

**An analysis of the Law governing the acquisition of
shipwreck**

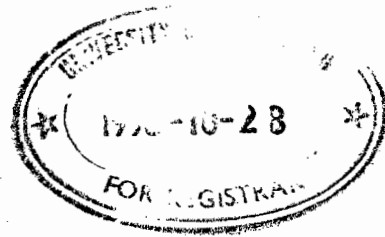
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“Research dissertation presented for the approval of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a Programme of courses.”

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1. INTRODUCTION	2
2. GENERAL BACKGROUND.....	3
2.1 OCCUPATIO v SALVAGE	4
2.2 THE ANTIPOLIS.....	6
2.2.1 The Antipolis Cape Provincial Division.....	6
2.2.2 The Decision Of The AD In The Antipolis	9
2.2.3 Mandament v Interdict.....	13
2.3 HISTORIC SHIPWRECK.....	14
3. HISTORICAL DEVELOPMENT OF OCCUPATIO.....	16
3.1 ROMAN LAW	16
3.2 MEDIEVAL LAW.....	18
3.3 THE DUTCH JURISTS	19
3.4 EARLY SOUTH AFRICAN LAW.....	22
3.4.1 <i>Van Breda v Jacobs</i> 1921 AD 330.....	22
3.4.2 <i>Underwater Construction And Salvage v Bell</i> 1968 (4) SA 190 (C).....	23
3.4.3 First Attempts At Protecting Historical Wreck	23
4. OCCUPATIO DEFINED.....	24
4.1 POSSESSION OF AN UNOWNED THING.....	25
4.1.1 Possession	25
4.1.1.1 <i>Corpus</i>	26
4.1.1.2 <i>Animus</i>	28
4.1.2 <i>Res Nullius</i>	29
4.1.3 Wild Animals	29
4.1.4 <i>Intra Commercium</i>	31
4.1.4.1 <i>Publicae</i> And The <i>Universitas</i>	32
5. COMPARISON FOR CLARITY - OTHER JURISDICTIONS.....	33
5.1 THE UNITED KINGDOM.....	33
5.1.1 <i>Applicability In South Africa?</i>	33
5.1.2 <i>The Tubantia</i>	36
5.2 WHALES AND WRECKS.....	39
5.2.1 <i>Aberdeen Arctic Company v Sutter</i>	40
5.2.2 Statutory Provisions For Historic Shipwreck In The UK.....	42
5.3 AUSTRALIA	43
5.3.1 Historic Shipwreck In Australia.....	45
5.4 THE UNITED STATES.....	46
5.4.1 The USA Abandoned Shipwreck Act Of 1987.....	50
5.4.1.1 The Genesis Of The Abandoned Shipwreck Act Of 1987.....	51
5.4.2 Aboriginal Fishery Rights.....	51
5.5 THE SWISS CIVIL CODE.....	52
6. CONCLUDING NOTES AND SUGGESTIONS.....	53
6.1 POSSIBLE MODIFICATIONS TO THE LAW OF HISTORIC SHIPWRECK.....	54
6.1.1 The Importance Of Removing The <i>Res Nullius</i> Aspect Of Historic Wreck	54
6.1.2 The Importance Of Modifying The Law Of Salvage From Historic Wreck	55
6.1.3 How Are Salvors To Be Encouraged?.....	55
6.1.4 Statutory Modifications.....	56
7. BIBLIOGRAPHY	57
7.1 ARTICLES.....	57
7.2 BOOKS	58
7.3 CASES.....	59
7.4 STATUTES	60

1. Introduction

The second half of the twentieth century has brought drastic changes in technology. These advances have changed the way marine resources are harvested or acquired. The development of SCUBA made diving to depths of 50m unrestrained by the need for surface support, feasible.¹ This opened up the possibility of exploring below the surface of the sea. It also brought with it the possibility of salvaging wrecks and remains which had been hidden since antiquity.² The year 1954 saw the first stern trawler the *Fairtry* converted from a decommissioned whaler. She was to set the standard for trawling efficiency and her design was soon replicated, replacing other types.³ Nylon fibres made lines and nets lighter and more durable.

Coupled with these changes in technology were those in the field of politics and the social sciences. The Empires finally fell. Their colonies are now virtually all independent and new expressions of community were given effect. Indigenous or "First people" are now given some form of credence and collective human rights⁴.

What do nylon nets and underwater welding torches have in common with island communities and aboriginal rights? Possibly little, save the fact that they could highlight relationships that give us cause to reassess our notions of acquisition of ownership.

Science has been working frantically at finding methods of acquiring resources in the marine environment. Has Law kept pace? Are the notions of acquisition and ownership developed in ancient Rome and applied with little change into the modern era able to deal with current techniques of acquisition and harvesting? What alternatives are there? Is there any need to change at all?

¹ Loftas The Last Resource 1973 p.188

² op cit.

³ Loftas p. 43

⁴ 1966 UN convention on the right to self determination

To examine these questions it is necessary to assess varied notions of original acquisition. It will be helpful to try to examine the notion of the original acquisition of ownership. The definition of occupation can be broken down into various elements. I will examine how these relate to various other alternatives and analogous situations.

Historic shipwrecks have been likened to time capsules. Artefacts provide historians with details of the development of technology and culture. I will argue that the current law governing these resources is inadequate in that it does not provide sufficient protection. An examination of the legislative changes will be helpful in this regard.

South Africa has seen some profound inroads into the once inviolate realm of private property. The possibility that a community's rights could be respected is also given credence.⁵ In this changing milieu it is perhaps a good opportunity to reconsider the acquisition of rights in shipwreck

2. General Background

What is needed is an appraisal of the concepts informing the jurisprudence of the acquisition of maritime property. The term possession is used rather glibly by the courts but it has many and varied manifestations. Harris⁶ points out that "we cannot study possession in the abstract, for the word has no legal meaning apart from the context of "... particular rules"⁷ A useful example of this would be the sale of a car. For an effective sale, a transfer should be effected. A seller who gives a buyer a set of keys to a car is said to have put the buyer in effective control. This is true even if the buyer has never even seen the car let alone been in any close physical proximity to the vehicle. The distinction in the types of possession needed for various purposes will be dealt with below under the heading of possession. Harris⁸ points out that the real question asked by the court when faced with an assertion of possession is to ask "Do the facts show that before or at the relevant time the plaintiff had entered into a

⁵ Gutto SBO Property and Land Reform Constitutional and Jurisprudential Perspectives 1995 p.17

⁶"The Concept of Possession in English Law" Oxford Essays in Jurisprudence p. 69

⁷ op cit. p. 70

⁸ op. cit.

sufficiently close relationship with the chattel that he ought to be given the benefit of the particular rule against the particular defendant?”⁹

This will be the foundation of this paper’s analysis of the acquisition of wreck and the analogous areas of *occupatio*. This paper will relationship with the *res* idea must feature quite prominently. In establishing possession the question could be “has the plaintiff properly asserted his relationship?” and for an assertion that a thing is derelict or *res nullius* the question must be “has the previous owner properly terminated his or her relationship with the property?” Sonnekus makes use of the relationship with the *res* when discussing things *in commercio* as “Sake wat binne die regsverkeer val kan verder onderskei word ooreenkomstig die verhouding waarin dit tot die potensiele regsobjekte staan”¹⁰. The relationship idea is echoed in Van der Vyver¹¹ who looks for a factual relationship that offers a protected claim against others.

A possible effect of establishing relationships is that the State has a curatorial relationship with all antiquities. This could be founded on a variety of bases, more fully discussed under their appropriate headings below. The actual judgements dealing with wreck have had elements of the relationship theme in them and much of the development in the law has been affected by these relationships.

2.1 *Occupatio v Salvage*

There is great potential for confusion to arise between salvage and occupation. This stems from the fact that they are different ways of acquiring rights in wreck. This has prompted Schoenbaum to write that “in starkly simple terms the conflict boils down to what rule fits the circumstances of the particular case.”¹² *Occupatio* is an original mode of acquisition. It is applied to a thing that is not owned and the first person to subject it to their control or “seize” it is the thing’s new owner.¹³ *Salvage* is a right particular to Maritime Law that allows a person who has rendered assistance to a ship

⁹ op cit.

¹⁰ “Besitsverkryging Oor ’n Skeepswrak As *Res Nullius*” TSAR 1989 4 720 p. 721

¹¹ THRHR 1970 231 p. 241

¹² Admiralty and Maritime Law 2nd ed. 1994 p. 336

¹³

(or cargo or freight) to be rewarded for their efforts and for any loss incurred to be compensated.¹⁴

Salvage is based on a set of factors which should all be present for a claim for an award to be effective¹⁵. The property salvaged must actually have been in danger. Services must have been rendered, which services must not have arisen out of an underlying obligation.¹⁶ In applying this to the facts in *The Antipolis*¹⁷ it is quite clear that there were services and that they were voluntary and contributed to the saving of the wreck¹⁸. The property salvaged should generally be maritime property.¹⁹ In the case of a shipwreck this is hardly problematic since it is specifically provided for by the Merchant Shipping Act.²⁰ The question is really whether the property was in danger. the type of danger has to be qualified. It need not be the danger faced by metal through the mechanical and chemical corrosion of the sea but rather that danger which a *res* faces by being out of commercial interaction. A *res*, to have value must be *in commercio* so restoring a ship (or part of it) to commerce is to save it from the greatest peril possible.²¹ This is not to say that the physical danger is to be underestimated since a vessel in the surf zone is exposed to enormous corrosive action.²² This action is, however, not immediate, and arguing immediate, physical danger might be rather tenuous.²³

A further possible problem is that salvage is payable to a person who has rendered salvage services to a derelict wreck. Salvage is ordinarily paid by the owner of the wreck. A derelict wreck is, however, ownerless by definition. A wide reading of the Admiralty Jurisdiction Regulation Act²⁴ together with recourse to some of the older

¹⁴ see generally Bamford *The Law of Shipping and Carriage in South Africa* Ch. 14 p. 75

¹⁵ *op cit.*

¹⁶ *op cit.* p. 77

¹⁷ 1988 (3) SA 92 (C), 1990 (1) SA (751)

¹⁸ Bamford *op cit.* p.77

¹⁹ The Wreck and salvage Bill incorporates the London Salvage Convention where the test is simply that it be in navigable waters.

²⁰ s 301 of Act of 1959

²¹ compare the judgement of the court in *The Central America* below

²² The sister ship of the *Romelia* was recently decimated in an unseasonably strong storm only a few kilometres away

²³ 105 of 1983

²⁴ see below under the Discussion of English Law

authorities mentioned below. If the wreck is modern and has an owner then the right that is acquired by the person bringing wreck to the surface or otherwise saving the property is usually a right of salvage

2.2 *The Antipolis*

2.2.1 *The Antipolis* Cape Provincial Division.

*The Antipolis*²⁵ is one of the South African Court's more recent pronouncements on *res nullius* and the acquisition of resources. It is interesting to note the difference in approach between the *a quo* and Appellate Division decisions. I will first consider the judgement of The Hon. Burger J in the Cape Provincial Division and then the way that it was received by the Appeal court.

The facts were briefly as follows:²⁶ Mills, the applicant agreed with Reck, the first respondent that they would recover condenser pipes from the wreck of *The Antipolis*. It was common cause that the wreck was in fact derelict. Mills had a licence to "salvage, to search and take possession of derelict ships or parts thereof"²⁷ Mills also had a boat equipped for this purpose.²⁸ Reck had the metal cutting apparatus suitable for the project. Both were professional divers. It must be noted that Reck had no salvage licence.²⁹ Mills and Reck began working on the wreck in an attempt to cut condenser pipes free from the wreck. The divers were prevented from working by the onset of bad weather until the 14 of August. On this day Mills was driving past the site of the wreck and noticed the second respondent working on the wreck. Reck and the second respondent had also entered an agreement to work on the wreck with the purpose of taking out the condenser pipes. When Mills found the second respondent working on the wreck he was in fact able to claim "a prior right and eventually persuaded the second respondent to leave."³⁰ But Reck and the second respondents

²⁵ *Mills v Reck* 1988 (3) SA 92 (C)

²⁶ *op cit.*

²⁷ *op. cit.*

²⁸ *op. cit.*

²⁹ *op. cit.*

³⁰ *op. cit.* P. 93

had managed to separate parts of the condenser from the wreck and Mills sued for their return.

Justice Burger sums the matter up succinctly in his reply to counsel for the Respondents. After considering the degree of control required over the *res*, the court points out that the notion that separation of part of the wreck from its whole to acquire ownership was not well founded. The Court replied to the fact that respondent counsel had

“strenuously contended that, until the propeller blade is actually separated the person who has been sawing at it daily for weeks without intermission, except to rest, has no rights whatsoever and at the final moment another person can sneak in and complete the separation of the blade and thus become its true owner...In my view the court would be failing in its duty if it did not protect the original salvor who has been working for days at separating...parts from the shipwreck but allows the gate crasher to collect the valuable prize in the final moments”³¹

After a discussion of the protection given to those in the process of acquiring rights in *res nullius* Burger J³² says “ I am aware that this would recognise a right (not a right of ownership) to a person engaged in salvage. It seems that the rules of fairness and justice so demand.” Perceptions of the judicial role have undergone considerable change. An open appeal to public policy is no longer looked down upon but rather welcomed. It is heartening to see that, while anchored in principles Burger J. Interprets these principles with a purposive approach in order that justice be done. It reflects a court concerned not with a cold, clinical dissection of our Law but rather one seeking to come to a workable solution to a vexed problem.

Burger J goes on to say that: “The Court cannot countenance two people quarrelling or even fighting over the same object.” This idea goes to the very heart of the court’s protection of possession and the robust nature of the *mandament van spolie* there is a recognition that possession even if apparently tenuous must be maintained. Burger J

³¹ op cit. 95 G-1

³² op cit. 97 I

makes reference in his judgement to “quarrels and brawls”³³ It is respectfully suggested that a possible source of this is the judgement of King J in *Greyling v Estate Pretorius*.³⁴ Here the court voices in strong terms the need to achieve order in the process of acquiring possession

‘If it became an established practice for the Court to fail to enforce a spoliation order because it was made to appear that in the ultimate result the rightful owner of the property in dispute would be injured in his enjoyment of that property, we should very soon find that the slender paradise our toil has gained for us of an ordered community had been lost and the dreadful “reign of chaos and old night” would be upon us. The modern Montagues and Capulets who resemble those famous and ancient families only in the single respect that they are equally prone to violence, would soon make our streets and thoroughfares hideous with their disputes, their fighting and their brawls - turbulence and civil commotion would soon replace the law of order and decency.’³⁵

This impassioned plea reflects Burger J.’s concern. There is a need to see justice done so that an harmonious coexistence is protected. It seems to be in sharp discord with the Appellate Division judgement which has a clinical application of what is to be understood as a robust remedy.

It is respectfully submitted that one of the strongest contentions put forward by Burger J. is the analogy between the acquisition of wreck and the acquisition of property by prescription.³⁶ The incisions of the welding torch are not unlike the days of possession which bring the possessor ever closer to ownership. A possessor in the process of acquiring possession must surely be protected from those who seek to interrupt his possession and thereby the process of acquisition.

Burger J. provides a useful example. “Where A possesses the property of B, and A is in the process of acquiring ownership by prescription; C then interferes with A and by his interference would disrupt the process. This analogy is an attempt by the court to

³³ p. 98 E

³⁴ 1947 (3) 584 (W)

³⁵ p. 59 (My underlining)

³⁶ op cit. p. 9

show how some relationships take time to cultivate. In the case of prescription it is as long as 30 years.³⁷ Prescription is a good example of how an existing relationship is allowed to erode while a stronger bond is formed by another. This prompts the court to ask who could be said to have the stronger relationship after the passage of time. This analogy corresponds closely to the decision of the English Probate court in *The Tubantia*³⁸ discussed below.

The real strength of the analogy must lie in the fact that it is a recognition that acquisition is a process. Some processes are quicker than others. The slower the process the greater the likelihood that interlopers will seek to disrupt it. The legal system that does not find an efficient way of dealing with the problem invites the civil commotion warned of in *Greyling v Estate Pretorius*.³⁹

2.2.2 The Decision Of The AD In *The Antipolis* ⁴⁰

This judgement is, with respect, disappointing. It seems that the judgement is founded very heavily on an interpretation of the pleadings as result of which the Appellate Division missed an opportunity to resolve an important *lacuna* in both Maritime and Property law.

The pleadings prayed for an order for the restoration of the condensers *ante omnia* pending the final determination of the ownership of the condensers in an action which was to be launched.⁴¹ The court chose to view this in the narrowest possible sense. Joubert JA in his judgement remarks that:

'Nader beskou, is dit duidelik dat bede 1A gebaseer is op die mandament van spolie as regsmiddel met die stelreel spoliatus ante omnia restituendus est as grondslag, nl. die persoon (spoliatus) wie se besit wederegtelik ontnem is, moet eers in sy vorige

³⁷ Vd Merwe Law of Things par 154

³⁸ [1924] P. 78

³⁹ 1947 (3) SA 584 (W)

⁴⁰ 1990.(1) 751.(A)

⁴¹ p. 755 in paragraph 1A of the pleadings.

toestannend herstel word deur die spoliator voordat daar op die meriete van die saak ingegaan word.”⁴²

The court then chooses to define the circumstances in which a mandament van spolie might be awarded very narrowly. The circumstances provided by the court are far more clinical and limited than those in which the court in *Greyling v Estate Pretorius*⁴³ were prepared to allow for relief. The requirements for a mandament as set out by Lucas AJ. in *Scoop Industries v Langlaagte Estate and G.M. Company Ltd. (In vol liq.)*⁴⁴ Here the court provided that two simple questions should be asked “Was the applicant in possession?” and “Was this possession disturbed?”

The court then seeks to rearrange the pleadings in an attempt to bring it within the realm of the mandament van spolie. Joubert JA. is not satisfied with the phrasing of the pleadings as they are set out. He suggests that the phrase “pending the final determination of an action to be instituted by the applicant against the first and second respondents for a declaratory order as to ownership and other relief.” is misplaced and should be dealt with elsewhere in the pleadings. It is respectfully suggested that the phrasing used was chosen carefully after a consideration of the strengths of Mills’ position. It is possible that Mills’ had phrased his pleadings in a way that would not resemble a prayer for a mandament van spolie. The mandament would not consider surrounding merits of the case. It would instead would pose two simple questions: Was there peaceful possession? And Was it disturbed? Due to the relative difficulty in proving possession, phrasing the relief sought as a mandament might have been avoided.

An appropriate question at this stage would be whether the approach of the courts furthers the principle which the law seeks to protect. A purposive approach would have asked “Has this decision furthered the problems which the law seeks to alleviate?” It has been pointed out that the mandament aims to stop self help.

⁴² op. cit. p. 755

⁴³ op cit.

⁴⁴ 1948 1 SA 91 (W)

It is respectfully submitted that their order was not to be temporary. The granting of a spoliation order would automatically become a final order. All the elements of *occupatio* had been completed save for possession so the first person to be in legally recognised possession could be considered to be the owner.

Another factor not considered by the court is the precise nature of the possession which should be exercised. This is canvassed more fully below in the discussion of possession.

Joubert JA in his discussion of *res nullius* mentions Grotius 2.1.52. and 2.32.3 for authority that a thing can be ownerless and acquired through *occupatio*. There is a paragraph dealing specifically with ships that have run aground as *The Antipolis* had. 2.4.36. provides that “stranded goods” which includes:

“...things which owing to high tide or shipwreck are found in the sea and fished out of it. ... were held to be the Count’s private property, including even the wreckage of ships which have run aground.”⁴⁵

The only stronger claim was that of the original owner. Grotius’ owner had one year and six weeks within which he could come to redeem his property against payment of Salvage charges. “After the above mentioned time has elapsed the count is entitled to the property...”⁴⁶

Joubert JA feels that the application of the salvage procedures described above has been abrogated by disuse since the more recent writers had not made mention of its provisions.⁴⁷ The matter had in fact come before South African Courts in *Johnston & Irvin v Mayston*.⁴⁸ The matter was raised but not fully resolved. The court was not faced with the issue directly. In *Salvage Association of London v S.A. Salvage Syndicate, Ltd.*⁴⁹ Chief Justice De Villiers held it to be trite Law that the Crown has a

⁴⁵ 2.4.36

⁴⁶ op cit.

⁴⁷ p. 75!@#\$%

⁴⁸ 1908 29 NLR 696 p. 699

⁴⁹ 1906 SC 169 , 172

prior claim to abandoned shipwreck over the finder. The matter was not developed further in that judgement since it was found that there had not been a proper abandonment since rights in the wreck had passed to the vessel's underwriters by subrogation.⁵⁰ There had also been extensive reliance on the Roman Dutch Salvage procedures by the Department of Customs and Excise. This extended application involved barring the true owner of salvaged property from recovering it a year and six weeks after it had been salvaged and left in the care of the Customs and excise authorities.⁵¹ More recently Bamford⁵² in possibly one of the more authoritative statements of the current law concerning shipping in South Africa was comfortable saying that the finder is entitled to possession of the goods except as against the State and the true owner.

The approach of Joubert JA. is not unusual and the phenomenon has been well documented by Visser.⁵³ What has been pointed to is a process whereby a principle of the Common Law with English Law roots or leanings would be removed by recourse to the old authorities. Joubert JA. it is respectfully submitted was under even greater pressure since he had to contend with a statute which would have introduced English Law directly.⁵⁴

The denial of rights of the State does not reconcile the fact that the Merchant Shipping Act makes specific mention of it. This provision was relied on by the Department for Customs and Excise in their claims for wreck in terms of the Merchant Shipping Act. S 301 provides that a reasonable claim for salvage is to be paid by the Secretary for Customs and Excise for saving wreck. Statutes generally are interpreted so as to disturb the common law as little as possible. The MSA is surely no exception.

That the courts have discounted the possibility of the Law of Salvage being applicable is not surprising. Were the matter to be seen as one of salvage, there is a very real

⁵⁰ op cit. p. 171

⁵¹ Harms L "A question of Abandonment" THRHR 1964 138

⁵² The Law of Shipping and Carriage in South Africa 1983 p 85

⁵³ "Daedalus in the Supreme Court" 1986 THRHR

⁵⁴ AJRA discussed below

possibility that it would fall outside the ambit of Roman Dutch Law and would more appropriately be dealt with by English Law.

2.2.3 Mandament v Interdict

It is respectfully contended that here again the court put too much emphasis on the textual interpretation of the pleadings without considering how the forms of relief relate to each other. The relief sought need not have been adjusted to a synthetic matching of a particular remedy. Allowing for the courts interpretation should the relief have been allowed?

The mandament is available where a person is deprived of the whole or part of his possession or where there has been deprivation of possession by a co-possessor. The interdict is available where possession is disturbed or threatened. Both of these are not concerned with the protection of rights but rather with the safeguarding an existing state of affairs. Badenhorst & Coetser⁵⁵ point out that the mandament is granted *ante omnia* and no enquiry into existing rights is to take place. The fact that an unlawful possessor could bring a mandament further supports this. This is not readily reconciled with the decision in *Mathee v Schietekat*.⁵⁶ Here the court found that the possessor in good faith has a right to the thing. The juristic conundrum of whether the factual state of possession gives rise to a right or a possessor has a right to the protection of an existing physical state need not concern us.

The Appellate division is dismissive of the possibility of founding a temporary interdict. Assuming that the reordering of the pleadings was warranted, the Court feels that a temporary interdict is not available.⁵⁷ The court does not make it clear why the elements for a temporary interdict have not been met. In *Eriksen Motors Ltd. v Protea Motors*⁵⁸ the Appellate Division spelled out the requirements for this relief.

⁵⁵ "Berging van Skeepswrakke Enkele Aspekte." TSAR 1989

⁵⁶ 1959 (1) SA 344 (C) cited by Badenhorst & Coetser op cit.

⁵⁷ *The Antipolis* 1990 (1) SA 751 (A) 759

⁵⁸ 1973 (3) SA 685 (A) 691 B-D

The court provides that there should be “a right which though *prima facie* established, is open to some doubt.” There should be a well grounded apprehension of irreparable injury as well as the absence of an ordinary remedy.⁵⁹ The right can be open to doubt. It is respectfully submitted that Joubert JA. need not have convinced himself of the nature of the right but rather should have had the same concerns of civil disorder that Burger J sought to address.

Selikowitz J⁶⁰ sums up the enquiry very well. “The right which applicant in fact asserts must be assessed in all the circumstances and in the light of the matrix of facts against which the applicant seeks to exercise the right.” The court could have analysed the whole *res gestae* from the time of the conclusion of the agreement between Mills and Reck until the time the parties were before the court and then determined whether or not there was a *prima facie* right.

2.3 Historic Shipwreck

The efforts of salvage divers are not focused solely on modern wrecks. Where the object of the salvors search on a modern wreck might be for scrap metal or navigational instruments to be sold on the second hand market, The target of the search of a salvor on an historical wreck is very different. The property that they seek to recover might be ordinary objects that acquire their value by virtue of the antiquity of the wreck and its contents. Herein lies the problem. Some of these objects are obviously of significant academic or archaeological interest.

Is it fair to say that historical wreck taken by *occupatio* automatically becomes the property of the finder? This is an area of the law which has seen extensive abrogation of the common law in order to protect the cultural heritage of South Africa. The idea that the salvor should receive none of the specie recovered but only a payment for his services is canvassed below under the discussion of *res nullius*.

⁵⁹ *op cit.*

⁶⁰ *Soundprop 1239 CC v Minister of Safety and Security [1996] 3 All SA 698, 701*

The protection of historic wrecks is provided for by the National Monuments Act.⁶¹ The Act allows for a wreck to be declared a national monument.⁶² The wreck should be 50 years or older or there should be a reasonable suspicion of the required age.

How does the declaration of a wreck as a national monument affect *ocupatio*? The most important element is that it would require any person attempting to work on or disturb the wreck to have a permit for this purpose.⁶³

Once any artefacts are recovered they are placed in the custody of a museum.⁶⁴ The museum, the salvor and the NMC decide on how they are to be distributed. Once an artefact is acquired by the salvor it could hardly be said that a full right of ownership is established since the salvor is heavily restricted in how he may deal with it. He may not “destroy, damage, alter or export from the Republic”⁶⁵ any of the wreck which he has acquired in the procedure outlined above. The Act in fact states that no right of ownership is conferred than that outlined in the permit. This alienation of the property may only take place with the consent of the NMC. This is a consent which would probably not readily be given.

Deacon⁶⁶ describes the conditions that attach to the permits. The salvor is to be personally liable for all salvage operations and those working under him. The salvor would be given exclusive rights to work on the wreck for 3 years. The salvor had to offer some proof of identity and age of the wreck.⁶⁷ Permits to work on wrecks dating from the seventeenth and eighteenth century were apparently not given out readily. Deacon⁶⁸ notes that “exceptional circumstances” would be required. These conditions were to become stricter following an episode in 1989 where the Port Captain of Cape Town placed a moratorium on all historical wreck being brought into Cape Town from Table Bay. This was following a period of unusually good diving conditions when

⁶¹ 28 of 1969

⁶² s 10A (1)

⁶³ s 12 (2C)(a)

⁶⁴ s 12 (2C)(f)

⁶⁵ s 12 (2B)(d)

⁶⁶ “Protection of Historic Shipwreck through the National Monuments Act p. 3

⁶⁷ op cit.

⁶⁸ op cit.

several wrecks were exposed in Table Bay. A series of what Deacon tactfully refers to as “disputes”⁶⁹ broke out and the moratorium was imposed. There was also a concern that Department of Manpower regulations were being flouted to fully exploit the favourable conditions. There was a lot of dissatisfaction with the moratorium and after consulting with salvors and others the NMC agreed to allow the lifting of the moratorium and the establishment of a system of inspectors chosen not from other divers but rather from a recognised museum or university.⁷⁰

3. Historical Development Of *Occupatio*

The history of shipwrecks must surely be as old as shipping itself. It would stand to reason that if there are ships being sailed that there are also ships and cargoes lost. Stranding or grounding might leave ships in the shallows easily accessible from the shore. Those vessels which sank in shallows would not be beyond reach since the notion of specialist divers is mentioned as far back as Ancient Babylon.⁷¹

3.1 Roman Law

The Roman law recognised *occupatio* and its basic formula was to survive down the ages relatively intact.

The Digest contains the broad statement that

‘If we know that the owner regards a thing as abandoned we can acquire it ... It no longer belongs to the abandonner but will another’s only when it comes into possession’⁷²

⁶⁹ op cit. p. 5

⁷⁰ op cit.

⁷¹ The Babylonian Talmud has a cryptic parable which makes reference to a diver retrieving a lost gem in Baba Bathra 74A

⁷² D 41 7 2 1

Things jettisoned from a ship are not to be automatically deemed to have been abandoned and could not be taken by *usucapion*.⁷³

“*Occupo*” implies the action of seizing possession or control⁷⁴ Watkins points out that Gaius does not deal with *occupatio* as a noun but rather as a verb.⁷⁵ Watkins shows that the development of the original acquisition of wild animals was developed to take into account the changing economic significance of wild animals.⁷⁶

At the outset, that image of wild animals which we might ascribe to ancient Rome should perhaps be cast aside. It is not the traditional notion of wild animals in vast woodlands hunted occasionally for sport or as a nutritional supplement of the lower classes. The *pastio villatica* was an enormous speciality food production centre where exotic animals were raised to be sold at the markets to be part of the many and varied courses at the Roman banquet.

The homesteads which specialised in this area had moved away from other forms of farming such as wine or olive oil production and focused instead on this specialised niche market⁷⁷ This prompted Watkins to comment that a villa might have “never seen hay in the in the loft, a vintage in the wine cellar nor corn in the granary” instead aviaries for the fattening of diverse types of birds were created as well as fish ponds for aquaculture not to mention cages and enclosures for the keeping of boars, hares, deer and even snails.

This “innovation in the realm of agricultural practice”⁷⁸ was to have its impact on the law of *occupatio*. An important innovation was the recognition that the establishment of a relationship with a *res* would affect the legal nature of that *res*. It is the ability of

⁷³ D 41 7 7

⁷⁴ Cassels Latin Dictionary

⁷⁵ Watkin “*Occupatio and the Pastio Villatica*” of Legal History 1991

⁷⁶ op. cit.

⁷⁷ Watkins cites Varro in *De Re Rustica* III 2.6

⁷⁸ op cit.

the Roman Jurists to mould their law effectively to deal with changes in technology and economics which could provide helpful guidance to us in South Africa

3.2 Medieval Law

The Rhodian Sea Law was a codification of maritime custom of the Mediterranean. It is pointed out that it is considered the “fountain of maritime jurisprudence”⁷⁹The Sea Law maintained the Roman Notion that ownership of property which is thrown overboard to save a ship in peril would not be lost. Instead of acquiring ownership of the property the finder of such property was entitled to an *ad valorem* award.⁸⁰

The full extent of the award was dependant on a variety of factors. Where the ship was for example lost on the high seas the value of the award to the salvor would be one fifth of the value of the property.⁸¹ Salvage of shipwrecked property inshore would also be compensated. Interestingly this was linked to the depth in which the wreck was to be found. If the wreck lay in 15 Fathoms the salvor was entitled to half the value of the goods. That recovered from eight fathoms earned one third of the value while that on the or within one cubit from it earned one tenth.⁸²

It is interesting to note the durability of the shipowners or merchants ownership in their property. The original owner would have an action for the return of his property subject to the salvage award. These awards were to reward the salvor for his efforts and ingenuity which ensured the safe return of the property. The rational for the awards and more particularly for awards to the crew for assisting the vessel or passengers in distress, which Melikan proposes is that “ [t]he difference between the mariner and the pirate in the period was often only a matter of resisting temptation”⁸³Melikan also points out that the Sea Law was a considerable

⁷⁹ Melikan “Shippers Salvors & Sovereigns Competing Interests in the Medieval law of shipwreck” Journal of Legal History 1991

⁸⁰ par. 38 of The Rhodian Sea Law

⁸¹ Melikan op cit.

⁸² par 47 of The Rhodian Sea Law

⁸³Melikan p. 105

improvement on the *Corpus Iuris Civilis*⁸⁴ She feels that the Roman Law had more an academic interest in shipwreck as an example of how ownership endures through the absence of possession. The Sea Law on the other hand grew up out of commercial practice and hence was far more practical. It dealt with actual awards and the need for the safe carriage of cargoes. Melikan suggests that this added security encouraged commercial activity. This seems probable since the shipper who knows his goods would be returned if lost (even if only against the payment of a salvage award) is guaranteed the safe carriage of the cargo.

3.3 The Dutch Jurists

In order properly to evaluate the classification of marine resources as *res nullius* it is necessary to enquire into the basis of the classification.. Grotius distinguishes between different areas, land and river as opposed to the sea. He goes on to say that this classification is both “..expedient and necessary”. Why should it be so?

“For everyone admits that if a great many persons hunt on the land or fish in the river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea.”⁸⁵

the acquisition of maritime property was discussed in the digest at 41.1.5.1 The position laid out is that ownership in a *res nullius* does not pass until final capture.

The passage actually deals with game. There has been substantial abrogation of the common law by statute in this area.⁸⁶

Grotius in *Mare Liberum* explores the notion of the acquisition of Marine resources at length. Grotius was prepared to acknowledge that there was a possibility that very extensive rights could be established without actual *occupatio*

⁸⁴ op. cit.

⁸⁵ The Freedom of the Seas p. 57

⁸⁶ see below for a discussion of the Game Theft Act 105 of 1991

Because of the relative obscurity of the text and the authority which Grotius enjoys in South African law the full text of the extract is given:

“Now the same principle which applies to navigation applies also to fishing namely that it remains free and open to all. Nevertheless there shall be no prejudice if any one shall by fencing off with stakes an inlet of the sea make a fish pond for himself, and so establish a private preserve ...”

Not all *res nullii* were to be treated equally, however, the passage from Grotius outlined below

“If anyone had prevented Lucullus or Apollinaris from fishing in private fish ponds which they had made by enclosing a small portion of the sea, according to Paulus they would have the right of bringing an injunction (*interdictum*), not merely an action for damages based on private ownership.”⁸⁷

“Indeed if I have staked off an enclosure in an inlet of the sea, just as in a branch of a river, and have fished there, especially if by doing so continuously for many years I shall have given proof of my intention to establish private ownership, I shall certainly prevent anyone else from enjoying the same rights. I gather from Marcianus that this case is identical to ownership of a lake and is true as long as *occupation* lasts.”⁸⁸

This passage points to a fascinating irony. Grotius was prepared to accept that some things although ostensibly not capable of private ownership could in fact be owned if a close personal relationship had been formed. This implies that the greatest possible control, of which the property is capable has been brought to bear on it. The irony becomes apparent on reading the judgement of Joubert who finds that the court *a quo* was out of keeping with Roman Dutch Law. It is respectfully submitted that possibly the father of Roman Dutch Law would have granted Mills the *interdictum* which he sought!

⁸⁷ De Mare liberum

⁸⁸ op cit

The fact that the thing should be *in commercium* and unowned must also be further considered. Could an answer to the problems be found in an assessment of what is to be considered unowned or *in commercium*. If a community prepares a sacred object for a ritual purpose would that thing become a *res nullius* if it is lost? It could be that the community as joint owners do not conceive of ownership ever being relinquished. These concerns are amplified under the discussion of *res nullius*

Voet has a disturbingly arbitrary distinction.⁸⁹ Hunting and fishing are permitted in a fenced wood or standing water but forbidden in a *vivarium* (a stocked fenced wood) or a fish pond. Here there is little notice served on the potential possessor. In surveying a body of still water he or she could not be expected to know the exact origins of the biota within. Surely the notice that was available was the local knowledge of which the intrepid angler would be presumed to be possessed. How much more so for *The Antipolis* where there had been a partnership agreement. The defendant had been aware of the plaintiffs attempts to secure control over the *res* he had the notice which would have satisfied the Grotian approach.

This approach must also be viewed in the light of the significance attached to the economic role of the *res*: Was the person actively involved in speciality food production or did they chance to have these things on their land. In the case of salvage the analogy is stronger the large commercial salvage undertakings closely resemble the Roman *pastio villatica*. They too are faced with a law which was not intended to deal with the change in economic significance from occasional windfall to a purposeful specialisation in a particular area of acquisition.

⁸⁹ 41.1.1.5

3.4 Early South African Law

3.4.1 Van Breda v Jacobs 1921 AD 330

Do free swimming fish belong to the first person to acquire control (i.e. to net and land it?) Not necessarily. Our courts have had cause to examine this problem in the past. The general rule will apply unless modified by custom. The case is the *locus classicus* for the proposition that custom could be a source of law. This case gives a demonstration of how communities develop their own system for dealing with rights in marine resources and the possibility that a relationship with the *res* would be recognised. Effectively the court permitted an abrogation of the common law rules of acquisitive ownership by the customary rules that were current at the time.

The plaintiff was a trek/ beach seine fisherman in False Bay. His crew had sighted a shoal of fish and set off in pursuit. Trek net fishing involves encircling a shoal of fish with a net and slowly pulling the shoal onto the beach. The defendant intercepted the shoal and was able to land it. The plaintiff sought the value of the catch totalling 32£ 4s. The amount was awarded to the plaintiff because of the custom of the area. The matter could have been resolved by applying Harris's test of who was in a closer relationship to the resource. The court in applying custom had actually applied commercial reality it would be unworkable if a person in the process of acquiring ownership was not afforded some form of protection from whoever tried to intercept them. This act bears many similarities to *The Hypatia* below. Once the process of acquisition is begun the law will offer protection.

Van Breda's case raises the further possibility that relationships might be geographically localised. Harris' test⁹⁰ would be reformulated as "Who would be considered to be in a closer relationship with the *res* in the area of the parties to the litigation?" Here the result would be the same since the relationship test is modified to give effect to localised relationships.

⁹⁰ op cit. p. 70

3.4.2 Underwater Construction And *Salvage v Bell* 1968 (4) SA 190 (C)

This is the forerunner to *The Antipolis* discussed above and it would be interesting to contrast the views taken by the court in the later case and applied to the facts of Bell.

The plaintiff and defendant divers were working on the wreck of *The Hypatia* off Robben Island in an attempt to salvage scrap from the derelict hulk. Both parties had ostensibly intended to blast the propellers loose from the vessel. The plaintiff was first to succeed in this and managed to load two of the four propellers onto the support vessel to be taken to Cape Town Docks. Two propellers were therefore left behind. The judgement proceeds to say that “They fixed a marker in the form of a floating rope to a shaft next to which the remaining two blades were lying”⁹¹ The defendant went two days later and removed the rope and took the two propellers. Banks J found for the plaintiffs saying that

“There was a seizure - a taking into possession as soon as they were forced apart from the wreck and this having been done with the intention of acquiring ownership, rendered plaintiff owner thereof.”

The idea that leaving it on the sea bed lost ownership was rejected by Banks J. What the plaintiff divers had done was subject the *res* to as much control as was possible at the time. Little more could be asked of them

3.4.3 First Attempts At Protecting Historical Wreck

The history of the need to protect historical wreck is clearly linked to the origins of the threats against its security. Deacon⁹² points out that the need for protection is closely linked to the development of “safe and affordable” diving equipment for what she

⁹¹ p. 191 B (my underlining)

⁹² Protection of Historical Shipwrecks through the National Monuments Act

terms the “man on the beach”.⁹³ The first protection was to be the amendment of the National Monuments Act.⁹⁴(NMA). This act was to provide for the repeal of earlier attempts at the protection of antiquities.⁹⁵ The NMA established the National monuments council (NMC). The Council was granted fairly wide powers for the protection of South Africa’s cultural heritage. The initial concern is described by Deacon.⁹⁶ Artefacts had been taken off several historical shipwrecks and sold at public auction in 1972. Valuable archaeological information was lost forever. As a response to this a permit system was introduced to allow for the regulation of the removal of artefacts or the disturbance of a wreck site.

4. *Occupatio* Defined

To assess the definition and apply it to Maritime property, Carey Miller’s definition is a good place to start.

Ownership is acquired by taking possession of a corporeal thing, not the subject of an existing right of ownership, with the intention of becoming owner.⁹⁷

The element of possession is clearly the first step. Its importance might, however have been exaggerated. This has prompted writers to warn that

‘dit is belangrik om daarop te let dat eiendoms reg in geeneen van hierdie gevalle uit blote besit ontstaan nie’⁹⁸

The thing must obviously be *intra commercium* and a *res nullius*. These are considered more fully below but these concepts are very helpful in assessing who can in fact acquire ownership.

⁹³ op cit. p. 2

⁹⁴ 28 of 1969

⁹⁵ Such as the Natural and Historical Monuments, Relics and Antiquities Act 4 of 1934

⁹⁶ op cit. p 3

⁹⁷ 1987

⁹⁸ CG Van der Merwe “Die Aard van Besit en die *animus* Element daarvan” THRHR 1978

Implicit in possession is an element of good faith. An analysis of the facts of both *The Antipolis* and *Van Breda* reflects a strong possibility that seizure took place in bad faith. The knowledge of the activities of Mills which Reck had gained during the subsistence of their partnership should be sufficient for Reck to realise that there had been established some prior relationship with the *res*.

4.1 Possession Of An Unowned Thing

4.1.1 Possession

The acquisition is premised on the fact that the thing is indeed unowned. Possession of an owned thing is clearly of little value as is an absence of any form of possession. Merely seeing the *res* or simply remarking on its presence should have little effect in law.⁹⁹

What is the precise content to be given to this possession. Possession consists of two elements the physical and the mental element (*corpus* and *animus*). The baby and the wreck diver have much in common where possession is concerned. The *infans* is used as an example of how the degree of control over the *res* should be highly subjective. Since a baby is only capable of a limited mental component so the diver is an example of limited control of the physical element. Harris¹⁰⁰ writes that

“The plaintiff’s degree of physical control should not be seen in isolation, but in relation to the greatest degree of physical control which it is possible for the particular plaintiff to exercise over a particular chattel. Thus the limited physical control of a child or an epileptic may be properly recognised, as is the limited control over a very large chattel or a wreck at the bottom of the sea.”

In making this analysis Harris specifically refers to *The Tubantia*¹⁰¹

⁹⁹ Silberberg and Schoeman “The Law of Property” p.115

¹⁰⁰ op cit. p. 74

¹⁰¹ op cit.

4.1.1.1 *Corpus*

The difference in *corpus* in *The Antipolis* and *The Hypatia* is perhaps the courts recognition of this factor in the latter case. What is the nature of the physical control to be exercised? Why did the court reject the attempts by Mills to mark out the site of his work? Joubert JA doubted that there was a buoy tied to the wreck but opines that even if one were tied on it would still not amount to the required physical control.¹⁰² Here it must respectfully be asked why the learned judge chooses to counter so established a principle as the marking of lagan.

It is respectfully submitted that the deficiencies of the courts reasoning will become apparent when The cases of *The Hypatia* and *The Antipolis* are contrasted. In the former the propellers were cut free but could not really be said to be under the plaintiffs direct control. What control was he exercising over them while they lay on the sea bed. Surely the real control is achieved once they are loaded onto the dive support vessel. The same is argued for *The Antipolis* what less control did the plaintiff exercise here. The question becomes :

“How do I exercise control over the condenser but by the tying of the buoy?” It is important to point out the exact location and setting of the wreck. She lies with her bow in the tidal zone and her stern very much in the surf zone. The swell in that area can become enormous.(At the time of writing a warning to navigators had been issued advising of 10m seas.) What more physical control can be achieved over a hulk or parts thereof than the humble float line. The float line is given recognition in other areas of law as a means of indicating possession. The Merchant Shipping Act still speaks of “lagan”.¹⁰³ The MSA still allows property rights in lagan to be maintained. All that lagan is, is simply objects with float lines attached. Bamford¹⁰⁴ describes lagan thus

¹⁰² op cit. p. 759 E

¹⁰³ s 2(1)

¹⁰⁴ op cit. p. 74

“*lagan (vel potius ligan)* is when the goods which are so cast into the sea, and afterwards the ship perished, and such goods cast are so heavy that they sink to the bottom and the mariners to the intent to have them again tie to them a cork, or a buoy or such other thing that will not sink so that they may have them again”

To argue that complete separation is required to establish possession does not take account of the complexities of the activity. The plaintiff clearly eschewed blasting the condenser clear because a condenser consists of an intricate mass of piping and a blast coupled with water in the piping would have been ill advised.

Sonnekus¹⁰⁵ feels that Mills had no intention of acquiring the whole wreck nor had he managed to separate any part of it. The degree of control should be that which would publicise one’s control to others. On the facts, however, the defendant was an ex partner and had full knowledge of the attempt at acquisition. Again assuming that there was no such knowledge how is one to achieve this publicity element and to whom should the notice be addressed? *The Antipolis* lies in roughly 12m of water and extends to the surface. How is publicity to be effected? Should the world at large have knowledge or only other salvage licence holders.

The degree of control of a ship has been considered by the courts. In *Cape Tex Engineering works v S.A.B. Lines*¹⁰⁶ the court found that where there had been better practical means of effecting control of a ship than simply placing two servants of Cape Tex on board. Corbett J. as he then was found that the existing control of the master and crew had not been disturbed to a sufficient degree.¹⁰⁷ In applying this to *The Antipolis* it is clear that the greatest degree of control is a highly subjective enquiry. There are different types of control necessary to assert possession of a ship fully fuelled and crewed and the stripped hulk of one lying in the surf zone.

¹⁰⁵ “Besits verkryging oor n Skeepswrak as *res nullius*” TSAR 1989 1 720

¹⁰⁶ 1968 (2) SA 528 (C)

¹⁰⁷ see generally 533 D

4.1.1.2 *Animus*

As a general proposition the mental state must be *animus domini*.¹⁰⁸ This is possessing with intention of becoming owner. This part of the definition will not be very problematic in cases of wreck salvage since it is implicit in commercial salvage work will be performed with the intention of becoming owner to sell the property at a profit. What is the case however if the salvor is aware of a potential owner even after a protracted period of time. This was the case in *The Central America*¹⁰⁹ where salvors had made contact with the underwriters, who had acquired ownership in the wreck by subrogation. Then the *animus* will surely not be *animus domini* but a weaker form. This would probably be the *animus ex re commodum acquirendi* this is the intention of holding to acquire some benefit for oneself.¹¹⁰ It is submitted that were the facts of the *Central America* to present themselves to a South African court the lack of the proper mental state would affect the salvor's rights in the wreck. The other possible *animus* element is that of being in control of the property and intending to remain in control. Silberberg and Schoeman¹¹¹ refer to this as the *animus possidendi*. This is also too weak to facilitate acquisition but also allows one to remain in control through servants and agents more effectively. The only possible practical application of this to a wreck salvage situation is the fact that a plaintiff salvage company would be acting through its agents and therefore might rely on this mental element.

The two latter mental state should entitle the holder to a mandament van Spolie but not to become owners by *occupatio*. The weaker mental relationship required could have been noted by the court before the manipulation of the pleadings commenced. What Mills might have been trying to plead was a mental state far stronger than one which entitled him to a mere temporary right of possession. What he could have been asserting was a mental state which is protected by an interdict against trespass. (Which it is respectfully submitted is not an English aberration in the law but a remedy Grotius himself would allow.)¹¹²

¹⁰⁸ CG Van der Merwe THRHR 1978

¹⁰⁹ see the discussion of the case below under the heading of US law

¹¹⁰ Silberberg & Schoeman p. 122 citing V Blerk JA in *Yeko v Qana* 1973 (4) SA 730 (A) p. 739

¹¹¹ op cit.

¹¹² see below under the discussion of The Roman Dutch Law

4.1.2 *Res Nullius*

The requirement that a thing be unowned is an essential part of *occupatio*. The question of when something is unowned is a vexed one since it is possibly against human nature to simply walk away from our property. The courts have been very reluctant to infer abandonment in most cases.¹¹³ The intention to abandon must be very clearly shown. In *The Antipolis* it was common cause that the vessel was derelict and had no owner. *Res nullius* is again well accounted for by the relationship principle. A relationship must be shown to have ended or not to have been present at all.

The relationship of an erstwhile owner (in the form of the insurer by subrogation) to a wreck is discussed under the discussion of *The Central America*¹¹⁴ below.

Sonnekus¹¹⁵ finds that the courts are prepared to presume abandonment where shipwreck is concerned. The measure of abandonment is related to the loss of control and the unlikelihood of regaining control. There could, however, be a far more pragmatic reason for abandonment which Sonnekus has not included. A vessel in distress might have accrued considerable expense which exceeds the value of the vessel. While still foundering she might have been exposed to salvage or wreck removal or even those arising out of collisions or pollution caused by the vessel. These claims could far outstrip the value of the vessel and an owner with little if any connection with the Republic would have little interest in the now sunken vessel.

4.1.3 Wild Animals

The law governing shipwreck was shaped with guidance from that governing wild animals.

¹¹³ see generally Van der Merwe par. 133 fn. 29

¹¹⁴ Columbus -America Discovery v Atlantic Mutual Insurance 974 F. 2d 450 (4th Cir. 1992)

¹¹⁵ op cit.

As a general proposition wild animals are considered *res nullius* and become the property of the person who captures them.¹¹⁶

Taming of an animal will render it owned property. Taming could be considered the ultimate example of establishing a relationship with the *res*. As to the need for publicity required to give notice it is pointed out that a tame animal is one which has a *consuetudo revertandi*, the habit of returning. This is to be preferred to the alternative of the *animus revertandi*, the intention of returning. The intention of a person is hard enough to gauge so how much more so an animal.

Animals which escape are also considered *res nullius*.¹¹⁷ This appears to stem from the difficulty in proving the tame nature of animals mingling with their wild counterparts. Again the need for some form of notice of the state of ownership is quite important.

The Game Theft Act¹¹⁸ provides substantial abrogation of the acquisition of game. This Act is particularly important in that changes in technology and economics have made the common law unworkable. The need to keep pace is reflected in the definition section

The Act provides in its definition section that game will include “all game kept or held for commercial or hunting purposes...”. The actual abrogation is provided for by section 2 titled “Ownership of game” The section provides that :

“Notwithstanding the provisions of any other law or common law

(a) a person who keeps or holds game or on behalf of whom game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2) or who keeps game in a pen or kraal or in or on a vehicle, shall not lose ownership of that if the game escapes from such enclosed land or such pen kraal or vehicle.”

The mischief at which the act seems to be aimed was that part of the common law that would allow an animal which had been captured and then escaped to revert to a *res*

¹¹⁶ Van der Merwe op. cit. par. 133

¹¹⁷ V d Merwe and Rabie “Eiendom van Wilde Diere” THRHR

¹¹⁸ 105 of 1991

nullius. It does, however, take the abrogation a lot further. A wild animal on private land would remain a *res nullius* until its capture. This situation was obviously completely unworkable. A game farmer could have spent hundreds of thousands of Rands on the restocking of an area of land with all types of game. Should the game escape he would have no claim to that game since it would, at common law, have reverted to a *res nullius*. The requirement is at its loosest that the game should be on enclosed land. At its strongest Act allows ownership to be acquired by fencing in an area of land and not by the usual method of capturing the animal.

How is this to apply to the marine environment? The most important recognition that this Act makes is the shortcomings of dealing with marine resources. The Legislature had the insight to appreciate that some aspects of the common law are not appropriate in dealing with the acquisition of unowned property. One of the more important factors mentioned above is that the courts in developing the law of wreck had relied heavily on the jurisprudence surrounding wild animals. Ironically, only a few months after the Appellate Division's judgement in *The Antipolis*¹¹⁹ the legislature was to change the law extensively. The change involved a move away from the original method but a more relaxed provision which could easily be described by Harriss' relationship with the *res test*

4.1.4 Intra Commercium

This aspect of wreck acquisition is a chance to consider our Roman Dutch traditions. From Roman times there was an awareness that some things are just beyond the range of private ownership. Some examples are obvious: the air is a good example simply from the point of view of practicality. Roman Dutch Law also recognised that class of things which was the property of the public and of particular communities.

¹¹⁹ op cit.

4.1.4.1 *Publicae*¹²⁰ And The *Universitas*.¹²¹

These are a class of things which are open to the public to enjoy. They would include parks, roads and other similar amenities.¹²² The question is: Do museums become *publicae*? Surely they do fall into this category since they are similarly held in trust by the state for the general public. If this is the case then an historic wreck could also be considered to be in this class. The historic wreck lying within easy reach of sport divers it could easily be argued, resembles more a national park than a modern derelict wreck. This is supported by the type of restrictions governing its salvage and alienation described above. If this is the case then the salvor of historic wreck never becomes a true owner and at best has some kind of curatorial possession. The State is free to claim back its artefacts where it finds them.

Many of our other notions as to what is amenable to private ownership would involve a cultural assessment. Interestingly enough there a certain amount of decorum shown to grave sites. This is a culturally informed notion which goes to the very heart of our relationship with property. It is interesting to note that the NMA also offers protection to a certain class of graves. These are notably war graves.¹²³ This is a strong recognition that some things are so imbued with a cultural relationship that private ownership is not possible, even distasteful. Wrecks are very close to war graves since many of these casualties involved loss of life. Would salvors be comfortable robbing graves?

The acquisition of historic wreck is a problem which requires a balancing of tensions. Some possible alternatives to the current position will be considered below.

¹²⁰ d 1 8 1 1

¹²¹ Inst. 2.1.Prim and D 1 8 6 1

¹²² see generally Silberberg an Schoeman p.24

¹²³ s 3A

5. Comparison For Clarity - Other Jurisdictions

The problem of the original acquisition of property and particularly of wreck is not a unique one. Other jurisdictions have sought to arrive at common sense and yet employ equitable solutions. In examining other approaches we shall see what they might offer us in South Africa. Some of these jurisdictions do have a preservationist approach to historic shipwreck. This is not a coincidence but rather a manifestation of concern which courts and legislatures are showing for the preservation of their historical heritage.

5.1 The United Kingdom

An important start in discussing the acquisition of wreck in other jurisdictions is the possibility that under section 6 of the Admiralty Jurisdiction Regulation Act.¹²⁴ this claim could have been considered a maritime claim and decided in terms of the English Law as it stood in 1983.

5.1.1 Applicability In South Africa?

It is possible that *The Antipolis* should have been decided in terms of English law and not South African Law. Booysen¹²⁵ argues that seeking to apply Roman Dutch principles is as appropriate as using the protection conferred on a holder in due course by the Law of Negotiable Instruments to a claim in a paternity suit. Booysen¹²⁶ feels that the court and the various commentators have simply taken for granted that the law governing the *occupatio* of wild animals was the correct law to apply. He feels that the matter should be dealt with as one of Maritime Law. He sets his enquiry out quite concisely.

¹²⁴ 105 of 1983

¹²⁵ 1990 THRHR 595 "Die toepassing van die Wisselwet om Vaderskap te Bepaal en van die Romeins Hollands Reg op Berging"

¹²⁶ op cit. p. 596

“Die vraag is of ſi persoon wat besig is met berging ongesteurd met sy berging mag voortgaan en of sy besit wat nodig vir die berging kan wees, beskerm sal wees.”¹²⁷

Booyesen seeks to answer the question with reference to the Admiralty Jurisdiction Regulation Act¹²⁸

The Admiralty Jurisdiction Regulation Act¹²⁹ provides the choice of law for maritime matters.¹³⁰ In order to invoke the act it must be ascertained if the claim that is being dealt with is in fact a *maritime claim*.¹³¹ The definition of a maritime claim is provided for by the Act.¹³² It could be argued that the claim in *The Antipolis*¹³³ was

“a claim for, or arising out of, or relating to- (a) the ownership of a ship.(b) the possession ... of a ship.”¹³⁴

This view is supported by Staniland¹³⁵ who argues that the distinction between “wreck” and “ship” is enormously arbitrary. He poses the anomaly that ships are all potential wrecks and many a wreck could be refloated and would revert to being a ship.¹³⁶

If this step of the enquiry is satisfied then it is appropriate to consider the second step. This is to see if the claim would have been cognisable by the Colonial Courts of Admiralty in South Africa in 1890. This is done with recourse to earlier statutes which bound the Courts of Admiralty across the commonwealth. The Admiralty act of 1840¹³⁷ provides in s IV :

¹²⁷ op cit.

¹²⁸ 105 of 1983

¹²⁹ op cit.

¹³⁰ s 6 (1)

¹³¹ s 2

¹³² s 1(1)

¹³³ op cit.

¹³⁴ s 1(1)(iv)

¹³⁵ SALJ 108 1990 594 “Admiralty Jurisdiction Over Wrecks”

¹³⁶ op cit. p. 597

¹³⁷ Act to improve the practice and extend the jurisdiction of the High Court of Admiralty

“That the said Court of Admiralty shall have Jurisdiction to decide all Question as to the Title to or Ownership of any Ship or Vessel, or the proceeds thereof. . arising in any Cause of Possession, [or] Salvage...”

If a wreck may be regarded as a “ship or vessel”, then this section should be wide enough to include a dispute as to wreck or ownership of wreck. This view is shared by Staniland¹³⁸ who points out that the wording of s 7(2) (a) is peremptory and the court was obliged to sit as a court of Admiralty.

The appropriate cause of action could be an action *in rem* against the salvaged property. An action *in rem* is available where the claimant has a maritime lien over the property or the owner of the property would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.¹³⁹ Personal liability could readily be ruled out since we are dealing with an ostensibly ownerless thing. (The curatorial nature of the States rights could be ignored for the sake of the argument.) A maritime lien ordinarily requires an underlying personal liability on the part of the owner of the maritime lien

This should serve to exclude salvage from derelict. But Thomas¹⁴⁰ opines that a maritime lien is available in the case of salvage of derelict.¹⁴¹ Thomas points out that

“The salvage maritime lien accrues independently of any voluntarily assumed obligation on the part of the owner of the imperilled *res* to pay a salvage award.”

Liens on derelict wreck are in fact specifically provided for as an example of the readiness with which salvage liens attach. Thomas¹⁴² writes that

“a maritime lien accrues when salvage service is rendered in the absence and without the knowledge of the *res* owner, as, for example when salvage services are rendered to a derelict.”

¹³⁸ op cit. p. 595

¹³⁹ AJRA op cit. at s 3(4)

¹⁴⁰ Maritime Liens

¹⁴¹ par 274

¹⁴² op cit.

Staniland¹⁴³ rejects this and finds that such *in rem* proceedings are unavailable. Staniland does not provide any authority for this saying rather that “it is generally thought that there must be personal liability”¹⁴⁴

A possible reason why the action *in rem* might not be available is that Thomas could assume the Crown’s right in wreck as a type of surrogate owner¹⁴⁵. This can easily be dismissed since the Crown’s *droit* extended only to wrecks within its dominion¹⁴⁶. If it could be shown that the derelict was brought in from outside the dominion then the salvor has the strongest possible right. It is quite conceivable that this would extend to 100% of the fund established by the sale of the salvaged derelict.

With this stage of the convolutions of s 6 complete, it is now left to determine the law of England as at 1983. Halsbury¹⁴⁷ leaves us in no doubt that the decision in *The Tubantia* was as good law in 1983 as it is in 1996.

5.1.2 *The Tubantia*¹⁴⁸

One of the strongest sources of authority on ownership or possession of wreck was to come from *The Tubantia*. A discussion of the facts will show how strongly analogous they were to those of *The Antipolis*.

The plaintiffs were salvors working on the wreck of the Dutch steamship *Tubantia*. Work began in 1922 with the salvors attempting to raise her. When it was ruled that this would not be feasible it was decided that the cargo was to be removed piecemeal through an incision in the hull. Salvage operations were abandoned due to the rigours of the weather in November 1922 but started again in April 1923. It was soon after

¹⁴³ *op cit.* p. 596

¹⁴⁴ *op cit.*

¹⁴⁵ in terms of the statutory codification the Crown’s *droit* in derelict provided by the British MSA in s 523 discussed below

¹⁴⁶ Jackson *Maritime Claims* at par. 49

¹⁴⁷ Halsbury’s “*Laws of England*” vol. 1(1) par. 332 (see also par.’s 301, 302 and 349), vol. 35 par 1220 (see also 1211, 1219 and 1221)

¹⁴⁸ [1924] P. 78,

this date that the defendant salvage company The British Semper Paratus Salvage Company sent its tug the *Semper Paratus* out to the site of the wreck. This ship caused considerable disturbance on the wreck. The crew tried to moor a motor launch on the plaintiff's buoys and sent down sounding lines which tangled in the plaintiff's lines.

The court expressed the problem very crisply.

‘What is really to be decide is whether in respect of the *Tubantia* and her cargo any rights of the plaintiff have been infringed by the defendants and if so what are the appropriate remedies.’¹⁴⁹

The right in question was that of the salvor in respect of salvaged property. This right was described as being “as well known to the law as any right of the salvor”.¹⁵⁰ The salvor's right to be in possession could be over a variety of things and included derelict wreck.

In establishing whether possession had in fact taken place the court went to great pains to show the relationship that had been created between the plaintiff salvors and the wreck. It was pointed out that the operations were in fact “discontinuous”.¹⁵¹ The Court found that the extent of the plaintiffs actions “... must be stated in some detail”¹⁵²

‘The plaintiffs by employing during two seasons, various vessels suitable for salvage work with competent crews ascertained and marked out the area occupied by *The Tubantia* and by means of buoys properly moored they were able to ... keep in position at and above the wreck, craft from which work could be carried on upon the hull and in the holds. They established and were using, various buoyed moorings by which they had direct access to the deck at various points. They cut a hole in the ship's side ... which gave them access to no. 4 hold.’¹⁵³

¹⁴⁹ op cit. p. 86.

¹⁵⁰ op cit. p. 87

¹⁵¹ op cit. p. 88

¹⁵² op cit.

¹⁵³ op cit.

The court found that by means of these and other apparati, they were able to work on the wreck and the cargo “when the weather and the state of the tide permitted”.¹⁵⁴

After analysing the state of work on the wreck the court posed a number of questions. chief among them must be “... what are the kinds of physical control and use of which the things are capable?”¹⁵⁵ The court found that had the original owners in 1916 have been in a similar position in relation to the wreck, they would have been in possession. The Court also had the foresight to seek guidance from assessors on the more technical matters involved. These were the Elder Brethren of Trinity House. It was their recommendation that possession of a wreck could be achieved by mooring a single buoy.¹⁵⁶ They also made clear to the court the difficulties attendant on performing salvage operations of this type. They advised the court that the plaintiffs had acted as one would expect a prudent owner to act.¹⁵⁷ The court expressed its indebtedness to the Elder Brethren and acknowledged the role that they had to play in the formation of the judgement.

What of the delays caused by bad weather, or the fact that there were only a few divers working at any one time? Should they not have had an impact on the possession of the wreck? The answer was a resounding no. The court found that do this would discourage salvage performed “by bold and costly work”¹⁵⁸

With possession having been established it was left to the court to see whether a trespass had in fact been committed. This too was answered in the positive. The manner in which the defendant had approached the wreck and sent sounding lines and grapnels down, had been such a source of danger that the plaintiff’s divers were prevented from working normally but had in the end to work in shifts with one watching for the threatening activities of the defendants servants. The description of how the plaintiff had approached the salvage work of the defendants could be applied

¹⁵⁴ op cit.

¹⁵⁵ op cit. p. 89

¹⁵⁶ op cit. p. 89

¹⁵⁷ op cit.

¹⁵⁸ op. cit. p. 90

to the defendant in *The Antipolis*. He had “deemed himself entitled to be thrust in upon the plaintiffs... to establish himself in concurrent *occupation*.”¹⁵⁹

The application of English Law is not as simple as it may seem. The Law is closely associated with the administrative bodies in place to deal with wreck. All wreck brought ashore must be reported to a Receiver of Wrecks.¹⁶⁰ The Receiver will then publicise the find. The owner will have a year to come forward and claim the wreck.¹⁶¹

The Owner may only have his property back if he pays a salvage award to the person who has brought it ashore.¹⁶² The question must then be posed what if no one comes forward? The answer is interesting, it is that ownerless or derelict wrecks are actually not ownerless at all under UK law. This paradox is created by a very ancient fiction which finds that wreck brought ashore in the UK are the property of the Crown.¹⁶³ The Crown will pay a salvage award to the salvors and the balance is paid to the Crown.¹⁶⁴ How is this to be reconciled with South African Law? South Africa has provision for the rights of the State to derelict. This will incorporate the Law of Salvage into claims arising out of derelict wreck. The complete body of Salvage Law is beyond the scope of this paper. Suffice it to say that it is robust and dynamic and may provide solutions to some of the complexities posed by *The Antipolis*.

A useful parallel is provided by a the judgement in *The Central America* in the USA as will be shown below.

5.2 Whales and Wrecks

Whales and wreck enjoy not dissimilar status in English Law. Both were held to belong to the Crown when they were brought ashore. A salvage award was payable to

¹⁵⁹ op cit. 91

¹⁶⁰ s 518 of the MSA of 1894

¹⁶¹ s 521(1) op cit.

¹⁶² op cit.

¹⁶³ Kennedy op cit. at par. 1393 p. 561 citing s 523 of the MSA of 1894

¹⁶⁴ MSA 1894 s 526

anyone who brought a “royal fish” ashore.¹⁶⁵ A royal fish included “grampuses, porpoises, dolphins, riggs and grasps”¹⁶⁶ Interestingly enough there was held to be a special relationship between the Sovereign and Whales. This once again demonstrates the close tie between economic importance and the development of the recognition of a relationship. It is difficult for us living in the age of the synthetic manufacture of many of our consumer requirements to imagine the enormous value of the whale. Whales represented a source of pure oils for fuel, lubrication and other purposes.

5.2.1 *Aberdeen Arctic Company v Sutter*¹⁶⁷

This is a particularly interesting case in examining the law of the acquisition of marine resources. The court was faced with a decision between the application of the aboriginal law of the local Inuit¹⁶⁸ or that common to those involved in Western whale fishing. An Inuit had been contracted to a whaler out of Aberdeen, the *Alibi*. The *Alibi* sighted a whale and sent out an Inuit in a boat to harpoon the whale. The whale was harpooned and a “drog” attached to the line. (A drog is a sealskin float). The defendants vessel intercepted the whale and was able to harpoon it and subsequently boat it. The owners of the *Alibi* sought an order of a right in property declaring the whale to be theirs. This was granted on appeal by the Scottish court of first division and the defendants appealed to the House of Lords.

The problem which faced the court was not merely one of applying customary law but also which customary law was to apply. The plaintiffs alleged that the proper law governing disputes of this nature was Inuit customary law since it was beyond the area of the Northern Whale Fishery and the indigenous method for the acquisition of marine resources was to apply. The court found that this was not the case and applied the Western model of acquisition. This was described as “The rule of fast and loose”. This implies that ownership was acquired at the stage where the whale had been harpooned and the harpoon line had been fastened to a boat. It was common practice

¹⁶⁵ Kennedy op cit. par. 278 p. 561

¹⁶⁶ *The Lord Warden and Admiral of the Cinque Ports v H.M. in his office of Admiralty etc. (In the Matter of a Whale) (1831) 2 Hagg. 438, 442*

¹⁶⁷ 6 L.T. 229

¹⁶⁸ The term “Esquimaux” is used in the Law Times and although “Eskimo” is perhaps better known “Inuit” is the term by which they now represent themselves.

that a whale which had been subdued and tied up to the ice would not be considered to belong to its captors. This rule is an interesting one. It would seem to be quite useful. If a whale has been harpooned and is tied to a boat, those aboard the boat will be left with little doubt as to whether it is or is not in the process of being subdued. The actual act of subduing a whale was referred to as a "Nantucket sled ride" because of the speed with which the light craft would be towed. Seeing a whale tied up fulfils a very useful publicity factor which might be absent where just a drog is used.

This case could have been subjected to the relationship with the *res* test. Who was at the time in a closer relationship with the *res*, the Inuit with drog attached or the whaler about to harpoon the whale? Again the modified Harris' test described above under the discussion of *Van Breda v Jacobs*¹⁶⁹ could be used to resolve the conflict. The question should be "Who would be considered to be in a closer relationship to the *res* by the those in the area?" The relationship which was actually recognised was that reflected in the adage "fast or loose". Was the *Alibi* exercising the greatest possible control over the *res*? Perhaps not, it is possible that the making fast of the whale was the real commencement of the relationship of which the whaler *Alibi* was herself capable?

The law governing whaling is not that remote from that of wreck and the case of *Langley v Miller*¹⁷⁰ is often cited in dealing with the acquisition of wreck. Particularly the judgement of Burger J in *The Antipolis*.¹⁷¹ The judgement of the court was that the party who had rendered assistance was entitled to a half share in the value of the whale. The dissenting judgement of Menzies J. found that the defendant had acquired ownership of the *res* by so mortally wounding the whale that it was no "longer able to keep the sea".¹⁷² It was Menzies J.'s attention to what the commercial realities of the industries are which is so impressive. The defendant had shown himself to be in the greatest possible state of physical control. The evidence produced was rather macabre and took the form of the captain of a whaler and a witness who had worked in the

¹⁶⁹ op cit.

¹⁷⁰ 1848 (3) Menz. 584

¹⁷¹ *The Antipolis* 1988 (3) SA 92 (C) at 97D

¹⁷² op cit. p. 584

industry and was able to describe the extent of the whale's injuries.¹⁷³ Based on their assessment of the degree of control usually encountered they were able to recommend to the court that the requisite degree of control had been established.¹⁷⁴

5.2.2 Statutory Provisions For Historic Shipwreck In The UK

Historic wrecks are still dealt with under the Merchant Shipping Act of 1894. The Act provides for a receiver of wreck to deal with any wreck brought into the UK. The provision was brought in not to deal with historic wrecks but to regulate the handling and bringing ashore of wreck and discourage the practice of wrecking. The 1894 Act addresses particularly the problems of "riotous and tumultuous" assemblies of people on the site of a wreck¹⁷⁵ and the of wrecks being "secreted" away.¹⁷⁶ Dromgoole¹⁷⁷ deals with the way in which the responsibility for dealing with historic wreck was moved away from the Department of Transport to the Department of the Environment (DOE). The DOE portfolio is also concerned with land based antiquities. The move was welcomed by those involved in the preservation of historic wreck but it still left much concern. The actual structure had changed little in that the receiver of wreck was still the proper authority for bringing wreck into the UK. This system had fallen into disuse. Dromgoole points to the negligible amount of wreck reported set against the high number of sport divers operating along the coastline of the UK.

There are provisions for the protection of historic wrecks which are in many ways similar to those in South Africa. The Protection of Wrecks Act of 1973 allows for the declaration of wreck sites "on account of the historical, archaeological, or artistic importance of the vessel or any objects contained or formerly contained within it." Acquisition of historic wreck can only take place in accordance with a licence now issued by the DOE. What is interesting is the amount of technical expertise that goes into the issuing of licences and the declaration of wreck sites. The DOE is advised by

¹⁷³ The captain of a whaler had said that he had never known a whale that had been so badly wounded to escape in good weather. p. 587

¹⁷⁴ *op cit.*

¹⁷⁵ s 515

¹⁷⁶ s 537

¹⁷⁷ "Transfer of Administrative Authority for Historic Wrecks" (1991) *IJECL* 68

“Advisory Committee on Historic Wreck Sites.” Dromgoole describes this as being a “non-governmental public body”¹⁷⁸ This would probably allow for those in the curatorial and salvage sides of wreck to be able to make a positive contribution to policy formation. The DOE is further advised by the “Archaeological Diving Unit”. This was established in 1986 to provide the authorities with what Dromgoole¹⁷⁹ describes as “full time archaeological expertise”. This points to a fairly well funded authority something which apparently the South African NMC is not.

Dromgoole¹⁸⁰ does not call for the scrapping of the Receiver system rather he proposes that instead of relying mainly on Customs and Excise officers, the museum or other curatorial authorities could be included in the Receiver system.

In South Africa there could be a lot more enforcement of the laws governing the acquisition of historic wreck. The appropriate authorities are no doubt under considerable pressure to enforce Sea Fisheries legislation and antiquities are secondary. There are only thirteen Cape Provincial Administration officers to patrol the coastline from The Strand to Gansbaai.¹⁸¹ To expect an efficient enforcement of NMC conditions or even the wholesale removal of artefacts with such limited resources is unrealistic.

5.3 Australia

In 1992 the Australian High Court produced an analysis of unowned property which resounded in politics, sociology and international relations. The impetus came in the unassuming guise of one Eddie Mabo. Mabo was a member of the Meriam people from the Murray Islands which lie off Australia's North East coast. The declaration sought by Mabo was that the Meriam people's right to the Murray Islands “as owners as possessors, as occupiers or as persons entitled to use and enjoy the said islands”¹⁸² be protected.

¹⁷⁸ *op cit.* p. 70

¹⁷⁹ *op cit.*

¹⁸⁰ *op cit.* p. 72

¹⁸¹ Saturday Argus 11 October

¹⁸² *Mabo v Queensland (1992) 107 ALR 1*

Justice Brennan in his consideration of the ownership of the Islands points out the problems attendant on applying long antiquated notions of property relations.¹⁸³ The Crown had based its claim to title on the fact that the territory had not yet been claimed. "The Crown's sovereignty over a territory was acquired under an enlarged notion of *terra nullius*".¹⁸⁴ To convey a full appreciation of the Crown's denigration of original Aboriginal title Brennan J. aptly quotes from a "Select Committee on Aborigines" of 1837. This proposes that Aborigines are so "Barbarous" and "so entirely destitute of the rudest forms of civil polity that their claims as sovereigns or proprietors of the soil, have been utterly disregarded".¹⁸⁵ A fundamental problem lies in the fact that the very basis of the Crown claim was couched in such a "...denigration of indigenous inhabitants, their social organisation and customs"¹⁸⁶

Brennan J. in his judgement points out that for a valid claim of *occupatio* of a territory it must above all be unowned. In support of this notion the court relied to a fair degree on the judgement of the International Court of Justice in the Advisory Opinion on the Western Sahara.¹⁸⁷ The I.C.J. was faced with the problem that its notions of property could not deal with those propounded by counsel for the indigenous people. The facts were closely analogous. In the Western Sahara Case the question centred on whether nomadic "tribesmen" could constitute occupation of an area. The I.C.J. found that it did and that any succession in title would be derivative and not original.¹⁸⁸

Interestingly enough it was the reasons given by the Crown as to why the land was unoccupied that turned out to be their biggest weakness. The Crown had contended that the land was not occupied by the early inhabitants because they had a largely nomadic existence. The Court points out that this is a sign of being in an intensely close relationship with the land. Aboriginal peoples lived in a precarious position. They depended on the land for their very survival. A nomadic people move off in search of food when they have exhausted available supplies. Who could be said to be

¹⁸³ p. 27

¹⁸⁴ op cit.

¹⁸⁵ op. cit.

¹⁸⁶ op. cit.

¹⁸⁷ [1975] ICJR p. 12

¹⁸⁸ op cit. p. 39

in a closer relationship with the *res* than those who depend on the *res* for their very survival?

The Mabo judgement represents a profound recognition of a relationship with a *res*. What the court could have done was to apply the Harris test in its purest form and ask whether the Meriam people were in a sufficiently close relationship at the relevant time.

5.3.1 Historic Shipwreck In Australia

Historic Shipwreck is governed by the Historic Shipwrecks Act of 1976. The Act empowers the minister to promulgate in the gazette that a shipwreck site is an historical site. The Act seems to resemble South African law quite closely as well. There are some exceptions. There are no minimum ages for a wreck to be historic. The declaration of a wreck site is at the discretion of the Minister.¹⁸⁹ The act extends Australia's jurisdiction over wrecks to those on the continental shelf.¹⁹⁰ The zone of protection could include areas around a wreck.

What is interesting is the way the *res nullius* aspect of historic wrecks has been modified where Dutch ships are concerned. In the schedule to the Act is the agreement between the Australian Government and that of Holland. The Dutch government purports to be successors in title to the VOC (Vereenigde Oostindische Compagnie) or Dutch East India Company. The Dutch Government confers title in ships, which belonged to the VOC and were wrecked off Australia, to the Australian Government. There were no doubt many such vessels blown off course *en route* to or from the Dutch East Indies. The question must then be what is the state of such an attitude to wreck in South African waters. Why has such an agreement not been entered into by South Africa? Is it still possible to assert ownership after more than 300 years? There is no reason why the wrecks should not be subject to such claims. An intention to abandon may only be apparent where there was an opportunity to abandon.

¹⁸⁹ s 5(1)

¹⁹⁰ s 6(1)

If the VOC had at no stage intended to abandon its vessels, and had continually asserted its rights then their ownership might persist.

5.4 The United States

The law governing ownership of (purportedly) abandoned shipwreck was covered in *The Central America*.¹⁹¹ It is a case of many and varied twists and turns and sheds much light on the topic. The Central America went down in 1857 *en route* from the Panama Isthmus to New York. She had the honour of being the main means of transporting gold from the Gold Fields of California to banks in New York. According to the court it was a time of economic downturn and there was a great interest in seeing as much money converted into gold and safely ensconced in a bank.¹⁹² The gold was estimated to have an astronomical value of \$1,6 million in 1857. There were no exact records of the place of her sinking. She was insured by a number of underwriters who settled the claims relating to the loss. On settlement, rights in the vessel and cargo passed to the underwriters by subrogation.¹⁹³ The matter was left at that until the Central America was discovered and a scramble for the great wealth in gold specie ensued.

The discoverers were the Columbus America Discovery Group a consortium of investors and treasure hunters. The initiative for the search for the Central America came from a certain Thompson, who had researched the prospects for such a mission as far back as the 1970's.¹⁹⁴ He was able to secure the financial backing of Grimm and John. There ensued a protracted search and eventually the site of the wreck was found.

¹⁹¹ *Columbus -America Discovery v Atlantic Mutual Insurance* 974 F. 2d 450 (4th Cir. 1992)

¹⁹² *op cit.* p. 457

¹⁹³ *see generally* p.456

¹⁹⁴ *op cit.* 457

The Discovery Group sought an injunction from the District Court declaring them to be the owner of the vessel and its cargo. This was contested by the underwriters who asserted their right of ownership through subrogation and who denied that they had at any stage abandoned their interest in the wreck. The District Court divided the trial into two enquiries: Firstly could the law of Finds be applied? (For this, abandonment was required.) Secondly if the Discovery group were not owners, did they have a claim for Salvage against the owners? The underwriters failed at step one. The court found that they had in fact abandoned their interest and awarded ownership of all the gold to the discovery Group. Against this the underwriters appealed.¹⁹⁵

It is not necessary for present purposes to go into the claim made by the intervenors to the trial. Suffice it to say that there had been an agreement entered for the assistance of expert oceanographers and a rival salvage group who claimed to be the initial finders of the wreck and that the claim put forward by the Central America Group was in fact fictitious. This was dismissed out of hand by the District Court and the court of Appeals.

The 4th circuit court of appeals considered the a quo findings and reversed them. In their judgement the court expressed their disapproval of the law of Finds as apposed to that of Salvage. The Law of Finds, it felt was not suited to activities of this type.

The court felt that the law of finds relies on an assertion of possession to assert title. This coupled with other elements has the effect of encouraging certain types of behaviour and has certain types of results. A particular remark is readily applicable to the circumstances in *The Antipolis*.

“The would be finder’s longing to acquire is exacerbated by the by the prospect of being found to have failed to establish title. If either intent or possession is found lacking, the would be finder receives nothing, neither effort alone nor acquisition unaccompanied by the required intent is rewarded.”¹⁹⁶

¹⁹⁵ op cit. p. 453

¹⁹⁶ op cit. p. 460

The court went on to say that Finds encourages work to take place in secret.

In sharp contrast to this was the law of Salvage. Its "aims assumptions and rules" were said to be "more consonant with the needs of maritime activity."¹⁹⁷ An important trump card for Salvage was the fact that it does not operate on an all or nothing basis. A salvor who had offered some services but not all was still entitled to a *quantum meruit*.

The court also put forward the idea that property lost at sea was taken away involuntarily and that abandonment would be difficult to prove.¹⁹⁸

As to the general requirements of abandonment in US Law, the court would be reluctant to interpret abandonment simply with reference to "lapse of time and nonuser".¹⁹⁹ A more concrete undertaking is required. A "...strong act" such as "the owners express declaration abandoning title" is sought.²⁰⁰ This could not be said to have occurred in the case of the Central America.

The court looked at the dealings between the Discovery Group and the Underwriters. The Discovery group made extensive use of the Underwriters library. They even went so far as to write to the underwriters to assess the possibility of acquiring their claim to the wreck.²⁰¹ At no stage did the underwriters consent to such a claim. They had attempted salvage soon after the loss but the necessary technology was not yet available. They reiterated their dealings with the vessel in a 1967 publication recounting the history of the Atlantic Mutual.

Once the matter had been remanded to the district court to be decided as a salvage award the lower courts made a salvage award of 90% in favour of Columbus America. The Underwriters appealed against this and it again fell to the appellate court to

¹⁹⁷ op cit. p. 461

¹⁹⁸ op cit.

¹⁹⁹ op cit. p. 461

²⁰⁰ op cit.

²⁰¹ op cit. p. 467

consider the Salvage award.²⁰² The court acknowledging the Underwriters ownership in the earlier decision analysed the factors that affect salvage awards and affirmed the lower courts ruling.²⁰³

The court applied the principles laid down in *The Blackwall*.²⁰⁴ The labour expended by the salvor was the first element. This the court showed to have been extensive. The vessel spent 487 days at sea working in 12 hour shifts and surveying an area the size of the state of Rhode Island. The court noted that the usual duration for searches of this kind would be a matter of days or weeks.

The salvor's promptitude and skill were also considered. The fact that the group had been able to assemble experts in the fields of "science, archaeology, history, maritime and marketing"²⁰⁵ obviously counted for much. This was also viewed against the fact that on hearing that a machine did not yet exist which was capable of performing the search required, the Group saw to it that such a device was designed and built. The value of the property employed by the salvor also featured quite prominently²⁰⁶ The court pointed out that capital investment in vessels exceeded \$6 million. The court was not aware of a similar salvage operation which had used equipment of that value. The degree of danger faced by the property was possibly overstated by the court. They felt that the property was in fact in extreme danger The court felt that until it was retrieved it was to be viewed as being in danger. The value of the property was obviously to play a vital role. "The haul" was to be "one of the largest in history" and obviously this entitled the salvors to a greater share.

The last factor that the court considered was an innovative approach to an old problem. The degree of preservation of historical and archaeological value of the wreck was considered as a factor. This is one solution to the vexed problem of reconciling salvage to historical preservation. The salvor is given an incentive to conduct historical analysis and leave as much of the wreck undisturbed as possible. It

²⁰² *Columbus America V Atlantic Mutual Insurance* 56 F. 3d 556 (4th cir. 1995)

²⁰³ op cit. p. 558

²⁰⁴ op cit. p. 571

²⁰⁵ op cit.

²⁰⁶ op cit. p. 572

also added in considering miscellaneous considerations that the policy of encouraging salvors should be supported.

5.4.1 The USA Abandoned Shipwreck Act Of 1987

Sweeping changes were made to the US law regulating historic shipwreck when The Abandoned Shipwreck Act was signed into force in 1988. The USA asserts title to all abandoned shipwrecks in its territorial waters.²⁰⁷ Owen²⁰⁸ points out that a “shipwreck” includes “a vessel its cargo and other contents.” The Act applies only to those wrecks “embedded”²⁰⁹ in the sea floor. The use of the word “embedded” is itself not coincidental. It is drawn from developments in the American Common Law of finds. The Meaning assigned to embedded is also drawn from jurisprudence on the matter. Owen²¹⁰ points to the case of *Chance v Certain Artefacts*.²¹¹ Here the (a quo) court referred to a vessel “firmly affixed such that the use of tools of excavation is required to gain access to the shipwreck and ...any part thereof”.

The notion of the “embedded” wreck should be explored by the National Monuments Council. It is not unrealistic to argue that historic wrecks already accede to the state by the law of accession and *inaedificatio*²¹². The Sea Shore Act²¹³ confers title to the sea, sea shore and sea bed on the State via the President. This could make the President owner of all artefacts and antiquities that have accede to his land. The extensive abrogation of the public nature of the sea, sea bed and shore was effected with the intention of defeating objections to beach Apartheid. Now it could be used for the protection of South Africa’s cultural heritage.

The most striking aspect of the American legislation is the degree to which it abrogates the common Law of Finds.²¹⁴ It states quite specifically that the Law of Salvage and

²⁰⁷ s 6(a)

²⁰⁸ *JML&C* vol.19 499 p. 500

²⁰⁹ s 6(a)(1)(2)

²¹⁰ *op cit* p. 505

²¹¹ *606 F Supp.* 801,

²¹² see generally Vd Merwe Law of Things par 142

²¹³ 21 of 1935 s2

²¹⁴ s 7(a)

Finds will not apply. The inclusion of the two is to overcome an attempt by salvage interests to weaken the effect of the act. Owen²¹⁵ points out that it had become common in salvage cases to plead the two rights to the property in the alternative.

The question of compensation for the salvor is left to the individual state to decide. Owen²¹⁶ enumerates some states which have such laws in place but others he says will be "writing on a blank slate"²¹⁷ To understand the Federal Government's delegation of jurisdiction for historic wreck to states which had previously had no interest in it, one must look to the origin of the Act.

5.4.1.1 The Genesis Of The Abandoned Shipwreck Act Of 1987

The evolution of the Act is helpful to understand the Act's devolution of authority to states which might not have an established jurisprudence. The late 1980's were a time of growing concern for state autonomy. Those lobbying for a particular law would do well to include a state autonomy provision to bring a substantial number of supporters into their camp. The Abandoned Shipwreck Act of 1987 is not the only Maritime Law provision to have such a history. The US Oil Pollution Act of 1990 has a similar origin. In determining an oil polluter's liability no cap was put on the amount that could be claimed by an individual state. This idea of an unfettered state hand appealed greatly to those arguing in favour of the greatest state autonomy possible.

5.4.2 Aboriginal Fishery Rights

There could be few stronger examples of a court's protection of a relationship between people and their marine resources than that given to the American Aboriginal fishery.

There has been increasing acceptance of aboriginal rights to fisheries. A strong recognition of the close relationship that American Aboriginal people enjoyed with the

²¹⁵ op cit. p. 510

²¹⁶ op cit. p. 512

²¹⁷ op cit.

resource has developed. Bentley²¹⁸ describes how the harvest was an essential source of social cohesion. The relationship is described as being so close that “fish were ...not much less important than the atmosphere they breathed”²¹⁹

There was a strong cultural role played by the salmon fishery. The harvest time was an opportunity to give expression to the individual’s place within a group. The whole community would be assigned tasks from the oldest to the youngest so that no one person could say that they were the harvester or that that the group was beholden to them for their survival. This is not the case with all indigenous harvesting and those areas where the capture is the sole domain of able bodied men.

What Bentley²²⁰ points to is the ability to acquire ownership of the fish through ownership of a fishing site. Sites were apportioned to various families. These sites were located on strategically placed headlands where migratory fish are presumably be bottlenecked. (South African equivalents could probably be found in Rooikrantz at Cape Point and Robbeberg in the Eastern Cape) Ownership of these sites “ensured ownership of the fish that returned”²²¹ This notion dovetails very comfortably with the decision in Van Breda. The enquiry in Harriss’ terms above would also be sound. Where quota applications were concerned the court was forced to give effect to treaties which had accorded rights to the Native Americans. It was these early treaties which had originally recognised the close relationship with the resource.

5.5 The Swiss Civil Code

It might seem strange that a discussion of the law of the acquisition of shipwreck should include a reference to the law of a landlocked country. The Swiss have, however, a useful provision relating to antiquities. The code provides for *occupatio* with the usual formula provided in paragraph 718

²¹⁸ American Indian Law Review vol. 17 1992

²¹⁹ *United States v Winans* 198 U.S. 371, 381 (1905) Cited by Bentley op cit.

²²⁰ op cit.

²²¹ op cit.

“Any person who takes possession of a chattel that has no owner with the intention of becoming owner of it acquires the ownership of it.”

This paragraph is by no means remarkable and is not worthy of much further comment. It is the modification of this formula where antiquities is concerned which is interesting. Paragraph 724 of the Code provides that

“Where natural curiosities or antiquities are found which have no owner and are of considerable scientific value, they become the property of the Canton in whose borders they are found.”

This would imply that all cultural property would accrue automatically to the State. No mention is made of compensation in this provision and, indeed none should be implied. The preceding provision of the code deals with treasure trove and the possibility of compensation for the finder. An equitable division is allowed for between the finder and the person in whose land the treasure was secreted. This is excluded expressly where the treasure falls within the parameters of the antiquities provision. Were a provision of this sort incorporated into South African Law I am sure it would be well received by the National Monuments Council.

6. Concluding Notes And Suggestions

In considering what is to be distilled from the above considerations of local and other jurisdictions, one of the strongest recommendations would be the application of the relationship test to assess if acquisition has taken place. Another consideration that the law governing the acquisition of derelict shipwreck is not that of South Africa but rather that of England

As shown above many jurisdictions have achieved some clarity in the law governing shipwreck through a close analysis by the courts. In the case of the US the court was able to bring the law of Salvage to bear. This would appear to be a far more

, appropriate body of law to cope with the problems which can reasonably be expected to arise.

A considerable dilemma in this area is the fact that the law on which the acquisition of shipwreck was founded was that regulating the acquisition of wild animals. This area of law was, however, seen extensive abrogated by parliament in recognition of the fact that it was inadequate in its application to modern commercial realities. From this it must flow that if the law of wild animals was unrealistic, if not altogether unhelpful, then how much more so would it be when extended to shipwreck by analogy.

It must be asked if, following other jurisdictions and following the direction offered in Roman Dutch Law,²²² whether the Law of Salvage would not be better suited to the acquisition of shipwreck.

6.1 Possible Modifications To The Law Of Historic Shipwreck

6.1.1 The Importance Of Removing The *Res Nullius* Aspect Of Historic Wreck.

This is premised on the idea that historical wreck is, as far as the salvor is concerned, the same as working for an ordinary commercial client in refloating a craft that sank recently or retrieving an anchor that has broken its chain. The state is according to Grotius the owner of "shipwreck ... found in the sea and fished out of it."²²³ All that is owed to the salvor is reasonable compensation. Salvage compensation is closely linked to the nature of the *res* which is salvaged. Where historic shipwreck is concerned the real salving of the vessel is the preservation of its archaeological value.

The compensation that historical wreck salvors could expect would not necessarily to be calculated against the value of the thing which is to be salvaged. Assuming that it is to be calculated on that basis it is not on a scale anything resembling 50%. A salvage award of less than ten percent is not unusual.

²²² Grotius p. 2.4.36

²²³ Grotius p. 2.4.36

6.1.2 The Importance Of Modifying The Law Of Salvage From Historic Wreck

Salvage and archaeology often do not mix. The two disciplines have evolved different priorities. For the archaeologist the wreck is a source of irreplaceable information. The position of relatively worthless debris could be as important as gold specie. Brice²²⁴ feels that a historic wreck falls into a class of property amenable to salvage because it is "immobilised". This does not take into account another requirement of salvage it is concerned with maritime property in distress. A potential salvage operation is often a far greater peril than allowing the wreck to remain undisturbed. What is required is a need to see a value in things beyond the price offered by a willing seller and a willing buyer. Archaeological and cultural values should be allowed to trump market values. Some property is so imbued with certain features that it is warranted special protection, that is why it is a National Monument.

6.1.3 How Are Salvors To Be Encouraged?

It is one thing to say that salvors should not be entitled to keep what they find and another to realise that the NMC's opportunities for the study of antiquities would be enormously reduced if salvors are not encouraged. Would not a preferable system be one whereby accurate archaeology could be sold and not just trinkets brought up and polished. A salvor which conducts the operation in the most careful scientific way might be able to "rent" it to other countries museums which will be saved the trouble of having to go through the process themselves. The "rental" should take place as soon as the wreck is discovered. The opportunity to work on it should be auctioned to an institution which would qualify under the National Monuments Act. All artefacts could go on a loan of a specified period to the institution and all intellectual property rights in the discovery should remain in the institution for that period. The NMC is empowered to do so by virtue of the sweeping powers conferred on it by their enabling

²²⁴ "Salvage and Underwater cultural Heritage" Marine Policy vol. 20 no. 4 p 337- 342

legislation. It is hard to think how the scheme outlined above would not fall within the parameters of s5(1)(e) of the act where the

‘Council shall ... have the power to purchase, or otherwise acquire hold, let, hire receive in trust or otherwise alienate, or hypothecate, burden with a servitude or otherwise confer any real right in any property movable or immovable’

The money could go to the salvors at market rates, the balance could go to the NMC into a particular fund reserved for shipwreck research and not into the general pool of the state coffers

6.1.4 Statutory Modifications

It was not the intention of this paper to offer concrete solutions or statutory formulae. It was simply an attempt to show some of the difficulties that beset our law and the way that other jurisdictions have chosen to deal with these issues. The Wreck and Salvage Bill has yet to be passed. It is an ideal vehicle for some of the suggestions made above to be given effect. The NMC could also benefit from some modification to its empowering legislation.

The Law of Salvage is so much more suited to the facts of *The Antipolis* and similar situations. It is dynamic and vital and is an area of law which has demonstrated a remarkably rapid response to the changing economic concerns which affect the industry from the change of sail to steam and the growing environmental threat of oil pollution. It would be a pity if it were not allowed to grow and develop to include the technical advances surrounding the salvage of wreck.

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