

**THE EVOLUTION OF LEGISLATION FOR THE PROTECTION AND  
PRESERVATION OF HISTORICAL SHIPWRECKS IN SOUTH AFRICA**

BY: ALLAN HEYDORN  
P O BOX 1327 / FAX 41331  
RICHARDS BAY

TELEPHONE NUMBER: 0351 41324/5 (work)  
25305 (home)

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## **INTRODUCTION**

A conservative estimate indicates that some 1400 shipwrecks pre-dating 1914 are located along the South African coastline. This figure includes 46 pre-1700 wrecks, 90 from the period 1700 until 1800 and 103 from 1800 to 1830.<sup>1</sup>

Groups interested in historic shipwrecks are *inter alia* : archaeologists, historians, numismatists, the National Monuments Council, underwriters, amateur/recreational divers as well as professional salvage divers. Over the years many amateur divers have devoted their spare time to tracing and salvaging historic shipwrecks, while professional divers have earned a livelihood in this way. However such divers have in the past not always performed satisfactorily with regard to the methods they have employed, the keeping of records and the dissemination of information.

At the time of writing there is in South Africa no properly staffed and equipped maritime museum, no formal training course in maritime archaeology, no proper facilities for the reception, care, restoration, rehabilitation, repair or proper storage or display of artifacts. Nor, until recently, was there a qualified underwater archaeologist in the country.<sup>2</sup>

Prior to 1981, there was no statutory control for the protection or preservation of historic wrecks. Shipwrecks have unique features which give rise to peculiar legal problems such as ownership, jurisdiction, the application of salvage law and law enforcement, while international law frequently comes into play. This paper is divided into two sections, the first outlining aspects of common law relevant to historic wrecks, whilst the second focusses on the development of legislation for the protection of historic shipwrecks and is structured as follows :

### **PART A:**

- 1.1 **The Roman - and Roman-Dutch law principles of acquiring ownership of lost or abandoned property.**
- 1.2 **Claims to historic shipwrecks.**
  - 1.2.1 Claims by underwriters / subsequent owners to newly found historic wrecks.
  - 1.2.2 Claims by third parties to wrecks which have been abandoned by the underwriters, original owners or heirs of original owners.
- 2.1 **The need for statutory regulation of matters concerning historic shipwrecks : a case study of the *Meresteyn* 1702.**
  - 2.1.2 The outcome of an application to the Supreme Court.
  - 2.1.3 The salvage of the *Meresteyn*.

### **PART B:**

The evolution of legislation for the protection and preservation of historic shipwrecks : a chronological approach.

- 1.1 **The National Monuments Act, 1969 (Act No. 28 of 1969).**
  - 1.1.1 The National Monuments Council.
  - 1.1.2 Reference to shipwrecks : the 1981 amendments.
- 1.2 **The permit system to salvage historic wrecks**
  - 1.2.1 The arguments of the archaeologists against the existing permit system.
  - 1.2.2 The views of the National Monuments Council of the permit system.
  - 1.2.3 A comparison of the views of the archaeologists and the National Monuments Council.
- 1.3 **The South African Historical Wreck Society.**
- 1.4 **The 1986 amendments.**

- 2.1 **The 1989 draft bill on historic shipwrecks and artifacts [NASOP 02-566 (89/06)]**
- 2.1.1 Contributors to the draft bill.
- 2.1.2 **The critique of the South African Historical Wreck Society to the proposed bill.**
- 2.1.2.1 **False assumptions inscribed or implied in the draft bill:**
  - 2.1.2.1.1 Wreck sites will be preserved if they are not disturbed by divers.
  - 2.1.2.1.2 Conservation legislation and systems which work in other countries will work here.
- 2.1.2.2 **Vast discretionary powers to be vested in the National Monuments Council.**
- 2.1.2.3 **Anticipated difficulties in the enforcement of certain provisions of the draft bill:**
  - 2.1.2.3.1 Permits to search for historic wrecks.
  - 2.1.2.3.2 Wreck inspectors.
  - 2.1.2.3.3 Presumptions.
- 2.1.2.4 **Procedural innovations in the draft bill.**
  - 2.1.2.4.1 Disposal of historic wrecks and artifacts.
  - 2.1.2.4.2 Furnishing the NMC with information.
- 2.1.2.5 **Perceived inconsistency in the definition of an historic wreck.**
- 2.1.2.6 **The time criterion for historical wreck status.**
- 3 **Conclusion**

NOTE: This paper reflects the law and relevant developments as at 31 December 1990.

## **PART A:**

### **1.1**

## **The Roman - and Roman-Dutch law principles of acquiring ownership of lost or abandoned property**

In Roman law things are divided into different categories such as *res extra commercium* (things which cannot be owned) and *res intra commercium* (things which can be owned); *res singulorum* (things belonging to a single person) and *res nullius* (things belonging to no-one).<sup>3</sup>

*Res nullius* can be acquired by *occupatio* which can be defined as : "the lawful taking possession by a person, with the intention of becoming owner, of corporeal things which are capable of ownership but which are unowned in fact; for example, wild animals, birds, bees, fish, treasure trove, abandoned things and enemy property."<sup>4</sup>

Abandoned things (*res derelicta*) are a category of *res nullius*<sup>5</sup> but are only classified as such if the former owner had the intention of relinquishing ownership thereof.<sup>6</sup>

*Res derelicta* must be carefully distinguished from property which has been lost. A lost thing (*res deperdita*) remains the property of its owner, who despite the fact that he no longer has physical control thereof, still has the required *animus* (intention) of remaining owner.<sup>7</sup> A finder of lost property does not become the owner thereof until prescription has run in his favour.<sup>8</sup>

Whether or not a thing is abandoned is a question of fact.<sup>9</sup> There is however, a presumption against the abandonment of property which has any value. The intention to abandon such property is therefore not presumed.<sup>10</sup>

Abandoned shipwrecks fall into the category of *res derelicta*. The Merchant Shipping Act<sup>11</sup> defines 'wreck' as : "including flotsam, jetsam, lagan and derelict found in or on the shores of the sea or of any tidal waters of the shores of the sea or any tidal waters of the Republic, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress and belonged to any person who was on board that ship or aircraft at that time."

This definition does not distinguish between historic wrecks whose owners may no longer be identifiable, and contemporary wrecks whose owners (whether the original owners, their heirs or underwriters) still have an interest in their property.

Similarly, abandonment in this context probably means physical and not legal abandonment.

### **1.2**

## **Claims to historic shipwrecks:**

Legal disputes concerning the ownership of wrecks have frequently arisen in the past. Two typical scenarios will be considered : firstly, where salvors have discovered the location of an historic wreck and have begun retrieving the cargo and other artifacts therefrom; and secondly, where a wreck has been abandoned by its original owners, has become derelict and where rival salvors claim to have rights therein. Two reported cases concerning shipwreck will be considered. Although neither wreck was classified as historic at the time of judgment, the general common law principles of ownership are nevertheless clearly illustrated.

### 1.2.1 **Claims by underwriters / subsequent owners to newly found historic wrecks:**

The case of *Salvage Association of London vs. S.A. Salvage Syndicate Ltd*<sup>12</sup> is the leading case in this regard:

The *Thermopylae* was wrecked off Green Point, Table Bay on 12 September 1899 while on a voyage from Australia to England. Both ship and the cargo were abandoned by the owners to the underwriters who paid the owners for a total loss.

The Respondent syndicate had salvaged ingots of tin and copper from the wreck site. The Salvage Association of London had not been approached or consented to such retrieval. The respondent syndicate alleged that it had obtained authorization from the South African Government to search for and recover treasure-trove, particularly at the wreck site of the *Thermopylae*. It further believed that the wreck and cargo had been abandoned by "whoever had been the owners".<sup>13</sup>

The Salvage Association of London through its agents in Cape Town submitted an application on motion for an order of the court restraining the respondent syndicate from working at the site of the *Thermopylae*, and from disposing of anything they might have recovered therefrom.<sup>14</sup>

De Villiers, C.J. held that according to the authorities, there is a presumption that the property is not abandoned unless it is proved that the owners intended to do so. Thus, in the present case, the burden of proving that the owners have altogether abandoned their rights of ownership, is on the respondents. The fact that the owners have for some years taken no steps to recover their wrecked property, does not give rise to a presumption of abandonment.<sup>15</sup>

#### **Implications of the Thermopylae judgment:**

The case report does not reflect the exact date upon which the salvors commenced their operation. What is clear is that the *Thermopylae* foundered in September 1899 and that the salvors, at the time of the application in 1906, were still at work at the wreck site. No more than seven years could therefore have elapsed. In the circumstances, it seems reasonable to presume that ownership has not been abandoned. However, it seems questionable whether the same reasoning should today be applied to a seventeenth century wreck. It is estimated that there are in excess of 46 wrecks pre-dating the year 1700 in South African territorial waters.<sup>16</sup> Supposing nothing has been heard from the owners or underwriters of a seventeenth century wreck : could it still be argued that the mere fact that "some years" have elapsed during which the owners have made no effort to salvage the cargo, should not give rise to a presumption of abandonment or would such presumption be diminished by the lapse of time as suggested by Van Meurs.<sup>17</sup>

To eliminate the difficulties outlined in the foregoing passage, the legislature proposes by statute to modify the common law presumption against abandonment. Section 2 (1) of the "Bill on Historic Shipwrecks and Artifacts"<sup>18</sup> stipulates that historic wrecks and artifacts will be owned by the state, while S 2 (2) provides that all historic wrecks and artifacts are deemed to have been abandoned until the contrary is proved. Section (1) (iii) defines an historic wreck as one which is at least eighty years old or which has by the Minister of Education been declared to be such.

This innovation will force persons with obscure claims of ownership to come forward and prove the same. Provided such ownership is not proved, the state is free to allocate permits to salvors subject to such conditions as it deems appropriate.<sup>19</sup>

The proposed legislation will be examined in detail in part B of this paper.

### 1.2.2 **Claims by third parties to wrecks which have been abandoned by the underwriters, original owners or heirs of original owners.**

Such abandoned wrecks have become *res derelictae*. The question which often arises is what steps need to be taken by a salvor to establish ownership or some other right over a wreck.<sup>20</sup> As was set out *supra*, the method of acquiring ownership of a *res nullius* is through *occupatio*. But what is the position where a person is in the process of taking control but before he succeeds, another interrupts and takes possession of the thing? Such facts were considered in two judgments:

The first is that of *Underwater Construction & Salvage Co. Ltd. v Bell*.<sup>21</sup> The dispute revolved around the wreck of the *S S Hypatia* which foundered in fog off Whale Rock in Table Bay on 29 October 1929 while on a voyage from Beira to New York carrying a cargo of blister copper and chrome ore.<sup>22</sup>

It was common cause that the wreck of the *SS Hypatia* had been abandoned by her owner and had become *res derelictae*.

On 14 March 1967 the plaintiffs, using explosives loosened and separated the four propeller blades from the wreck. They took two blades ashore while the remaining two were left on the seabed. To mark the spot a piece of floating rope was attached to the shaft near the blades.

On 16 March, the defendants proceeded to the wreck, removed the marker and transported the two blades to Cape Town.

The plaintiff company sued the defendant for the return of the blades, claiming that it had already acquired ownership by the act of separation. The defendant asked that plaintiff's claim be dismissed and in reconvention claimed an order directing the plaintiff to return the two blades in plaintiff's possession to the defendant. According to the defendant, it had taken certain steps in the past (prior to the plaintiffs) to remove the propeller blades.

Banks J on a balance of probabilities found that although the defendants had previously worked on the wreck of the *S S Hypatia*, they had not done so with a view to taking possession of the propeller blades. The plaintiff company in contrast, as soon as it had forced the blades apart from the wreck, had taken possession of the same with the intention of becoming the owner thereof and had in fact thus acquired ownership.<sup>23</sup>

The second case dealing with claims to abandoned wreck is that of *Mills v Reck and others*.<sup>24</sup> The *Antipolis*, a Greek tanker was being towed to a breaker's yard in Taiwan when her tow-cable parted on 28 July 1977. She drifted ashore and ran aground at Oudekraal on the Cape Peninsula<sup>25</sup> where she was abandoned by her owners as a derelict ship.<sup>26</sup>

The applicant, Mills, and first respondent, Reck jointly agreed to remove valuable copper alloy pipes from the condenser of the *Antipolis*. In order to reach the pipes, the condenser casing needed to be cut open. In July 1987, the parties commenced working on the casing and continued doing so whenever the weather permitted access to the wreck.

However, there were occasions when the sea was diveable when the applicant's boat was not available.

Reck became frustrated, hired another boat and enlisted the second respondent (and others) to assist in the salvage operation. Mills found respondents at the wreck and persuaded them to leave on the grounds that he had a prior right.

Reck claimed to have cancelled the agreement with Mills due to the latter's breach of the terms thereof. Reck informed Mills that he (Reck) and second respondent would henceforth be working on the wreck together.

The condenser casing was at this stage still in tact although incisions had been made therein.

The second respondent alleged that when he had commenced work on the condenser casing, he had noticed fresh cuts at the one end thereof, but that he had started cutting from the other end, therefore not utilizing the original cuts. It was only after the agreement between himself (second respondent) and Reck (first respondent), that he made use of the original incisions.

Mills now applied for an interdict *inter alia* restraining Reck and second respondent from further interfering with the applicant's possession of the condenser or its contents. To succeed, however, Mills would need to show that he had a right worthy of legal protection.<sup>27</sup>

The Respondents argued that the applicant had no right of ownership in the wreck or any part thereof as neither he nor the first respondent had separated any part of the wreck. The intention of the parties had throughout been to remove nothing but the contents of the condenser. To take possession of the whole wreck was never intended by either party. Until the condenser was removed from the wreck, it could not be owned separately.<sup>28</sup>

The distinction between this case and that of *Underwater Construction & Salvage Co. (Pty) Ltd. v Bell*<sup>29</sup> as discussed *supra*, is that in the latter case the applicants had, according to Banks J, acquired ownership of the propeller blades by separating them from the wreck. *Occupatio* of the *res nullius* was thereby established.

In seeking a solution to the present dispute, the court turned to the old authorities. An analogy was sought in those texts dealing with the capture and taking control of wild animals which constitute another class of *res nullius*.

According to the *Digest*<sup>30</sup> there were two schools of thought. The first is of the opinion that a wild animal which has been wounded by a hunter, at once becomes the property of the hunter provided he remains in hot pursuit thereof.

Should he cease to pursue it, he loses any rights thereto and the animal again becomes the property of the first to take it. If another were to capture the animal while the original hunter was still following it, such person commits a theft vis-a-vis the original hunter.



The second school of thought argues that a wild animal only becomes the property of the hunter once he captures it, as there are many things which may prevent the hunter from actually taking possession of the wounded animal.

Roman-Dutch law seems to support the view that ownership is not acquired until the animal is captured but introduces a penalty for those who engage in unfair hunting practices. According to De Groot:<sup>31</sup>

"If one person starts game and another catches it, the latter acquires the ownership of the same, but may be fined for hunting unfairly."

The view of Voet accords with that of *De Groot*.<sup>32</sup> Voet adds that meddlesome forms of hunting should be sanctioned as such behaviour is often the cause of "quarrels and brawls."

Burger J comes to the following conclusion :

"In my view the passages quoted from Voet and *De Groot* are adequate authority for interdicting the gate-crasher from interfering with the original hunter in his pursuit or with the person working on the wreck to separate a part, provided that he is still so engaged. If the gate-crasher could be 'fined' for interfering, which hardly seems applicable today, there is every reason to interdict him.

I am aware that this would recognise a right (not a right of ownership) to a person engaged in salvage - it seems to me that the rules of fairness and justice so demand.

The court cannot countenance two people quarrelling or even fighting over the same object, and if it has to choose, then the first in time must be given preference, provided that he is still actively engaged upon the activity."<sup>33</sup>

The court proceeded to grant an interdict against Reck and the second respondent, barring them from proceeding with the salvage of the condenser. However, the order against Reck was not to apply if Reck worked in association with Mills in accordance with the original agreement.

Lewis<sup>34</sup> in her analysis of the judgment states the following:

"The very essence of *occupatio* as a method of acquisition of ownership is that the first person who *succeeds* in taking control of a thing that is unowned should acquire legal title to it. Until then the thing is available to all. The grant of protection to a person who has not even managed to acquire possession of the thing defeats the object of the rules of *occupatio*.

The counter-argument is, naturally, that the failure of the law to protect people in the process of acquisition will result in lawlessness - in what Voet termed 'quarrels and brawls'. Perhaps this is inevitable where one is dealing with a primitive legal institution, as *occupatio* undoubtedly is."<sup>35</sup>

In an appeal against the decision of Burger J in the Cape Provincial Division, the Court of Appeal was highly critical of the approach of the lower court. Joubert A.J. held that Burger J had erred in using the analogy of the pursuit of wild animals and that such extension of the common law was unwarranted.<sup>36</sup> The principles of the *Mandament van Spolie* ought rather to have been applied. In order to succeed in his application for an interdict barring Reck and other divers from removing the condenser, Mills would have to prove:

- 1) That he was physically in control/in possession of the Condenser;
- 2) that he had been wrongfully deprived of such possession against his wish.<sup>37</sup>

Mills alleged that he had attached a rope and floating buoy to the condenser. Joubert A.J. held that even if this were so, it would not constitute the required element of physical control. It follows that the second element of wrongful deprivation of possession could not have been violated.

The court concluded that Mills had failed to show that he was entitled to a *Mandament van Spolie* against Reck and his associates. Mills was thus not entitled to a temporary interdict against Reck and his associates as Mills had never acquired control of the condenser.<sup>38</sup>

### 1.2.3 **Comments on the appeal judgment:**

According to Joubert A.J. a rope attached to the underwater object with a floating buoy tied to the other end would not constitute the requisite physical control which is needed to satisfy the *mandament van spolie*.

The question which arises, is what conduct would be required to establish such physical control. Would, for example, a floating platform attached to the underwater object be sufficient or should the salvors by some means mark the object on the seabed.

Of course the legal dispute between Mills and Reck could have been avoided had a salvage agreement been drawn up between the parties. Instead, the operation was based on a loose, verbal partnership agreement.

An example of a salvage agreement is that which has been drawn up between Drs. B.E.J.S. Werz as the agent of the University of Cape Town and three salvors of the wreck believed to be the *Oosterland* 1697 in Table Bay. This joint maritime archaeological operation is presently being conducted. Matters regulated by the contract are *inter alia* the following : The contribution of skills, services and expertise of each party, the custody of finds and artifacts as well as insurance cover thereof, the apportionment of costs, media coverage and sponsorship, the documentation of the project, the salvors' and University's rights in the wreck and artifacts, arbitration in the event of a dispute between the parties and the compliance with relevant legislation.

### 2.1 **The need for statutory regulation of matters concerning historic shipwrecks:**

The lack of protection of both historic wrecks and the discoverers of such wrecks, prior to 1981, is best illustrated by means of a case study.<sup>39</sup>

The matter concerns the wreck of a Dutch vessel, the *Meresteyn*.<sup>40</sup> She was wrecked on the south-west corner of Jutten Island at the entrance to Saldanha Bay on 3 April 1702 while carrying a valuable cargo of coins and lead bars.<sup>41</sup>

On 30 March 1971 the salvage company registered as Marinesaive (Proprietary) Limited applied to the Provincial Division of the Cape of Good Hope recognising its rights of ownership in and to the wreck of the *Meresteyn*.

It appears that at the time of the application, salvors were able to acquire rights of ownership in abandoned shipwreck.

The events leading up to the application can be described as follows : The shares in the company *Marinesaive (Pty) Ltd.* were held by three shareholders - Archibald Dichmont, Trevor Hayward and Barry Williams. Dichmont (the applicant) was an attorney by profession who practiced in Cape Town, while Hayward and Barry were full-time salvage divers. Dichmont was the holder of a salvage licence issued by the Controller of Customs and Excise<sup>42</sup> to search for and exploit wrecks along the coast of the Republic.

The terms of the licence require the licence holder at the end of each year to set out his activities for the past year and to outline his plans for the forthcoming year.

On 28 January 1971 the applicant advised the Controller of Customs and Excise as follows:

"I (like any South African diver) still have hopes of finding the "*Meresteyn*" off Jutten Island which is the most valuable treasure ever to have been wrecked off the South African coast. I have arrangements with a resident in Saldanha Bay who phones me when the weather is suitable (it very rarely is off Jutten Island) and I trail my boat to Saldanha to work the area. I intend to continue my search this year."

The applicant had for the two preceding years searched for the wreck of the *Meresteyn* and had in the last year found signs thereof in the form of a cannon. He discussed his find with Hayward and Williams and urged them to continue the search as the applicant could only do so on those infrequent occasions when the conditions were favourable over weekends.

On 8 March 1971 Hayward and Williams informed applicant that they had discovered the wreck of the *Meresteyn*. Applicant immediately wrote to the Controller of Customs and Excise advising him of the discovery and laying claim to the wreck.

The applicant had in the past, after discovering other wrecks experienced considerable trouble with rival divers who would descend on the wreck and pilfer all they could lay their hands on.

In the hope of finding a method whereby applicant could protect his rights in the *Meresteyn*, he made an appointment with the Deputy Minister of Finance, Dr. Du Plessis. Various possibilities were discussed whereafter the applicant was referred to the Secretary for Customs and Excise. The applicant advised the Secretary of his concern and also informed him that he claimed sole rights in the wreck. The Secretary indicated that he accepted the claim.

On 19 March, Hayward and Williams were advised by a rival salvage group, the Dodds Brothers of their intention to follow the former to the site of the *Meresteyn* and to work there in competition with the discoverers of the wreck. The applicant henceforth wrote to the persons in question advising them of his rights of ownership in the wreck.

On 24 March, Hayward and Williams recovered a quantity of silver ducatoons and bronze cannon from the *Meresteyn* which were immediately reported to the customs officials.

In order to seize the wreck and to leave some proof of ownership, Hayward had on the same day marked the area by leaving a crowbar and 20 foot steel wire rope under the water in the area. The wire rope was stretched around redbait pods and shackled to the seabed. In addition Hayward scratched marks on an ingot of lead and marked several iron cannons. Having seized the wreck as aforesaid, applicant and his associates intended retaining their ownership in it and to recover treasure.

On 25 March the applicant again met with the Secretary for Customs and Excise who now stated that in fact his department did not have the authority to grant applicant sole rights in any particular wreck.

On 26 March another rival salvage diver informed Hayward that he had read the letter which applicant had directed to the Dodds Brothers. Like the Dodds Brothers, he too intended ignoring the applicant's warning and would follow the applicant's group to the site and work on it himself.

The applicant and his partners were now in a quandary : The coins and other artifacts of the wreck were scattered over a wide area and what had up to that point been recovered could have represented only a fraction of what may ultimately have been salvaged. If they resumed salvage work on the wreck site, other divers would descend upon the area, whereas, if they ceased visiting the site, other divers would commence searching for the wreck and could claim that the applicant had abandoned his rights thereto.

Having spent a considerable amount of time and money in locating the wreck, the applicant's group was desirous of having its rights protected.

The applicant thus in his application submitted that he had through Hayward seized the wreck of the *Meresteyn* and that such seizure was made with the intention of acquiring ownership.

#### 2.1.2 **The outcome of the application:**

Judge Beyers turned down the application stating that it was impossible to grant rights of ownership in a range of objects scattered over a wide area on the seabed.<sup>43</sup>

The implication appears to be that a right of ownership in an abandoned wreck which was in tact, would have been recognised.

The concepts of a 'wreck site' and 'historic wreck' as developed by statute will be considered under part B of this paper.

#### 2.1.3 **The salvage of the Meresteyn:**

Once the application had been turned down, the site was open to exploitation by all. It was not long before the Dodds Brothers arrived on the scene. They too began salvaging the *Meresteyn* as they were legally quite entitled to do.

All in all an estimated 15 000 coins comprising of *inter alia* a few gold ducats, silver ducatoons, silver riders and Dutch shillings dating back to the late 16th century were retrieved from the wreck site.<sup>44</sup>

Turner describes the negative aspects of the salvage of the *Meresteyn* as follows:

".... the greatest tragedy of the salvage operation at this and most other sites along the coast of South Africa was the intense competition between rival groups of salvors. The greatest emphasis was placed on the recovery of treasure, and little attempt was made to recover the other valuable artifacts which were uncovered. The bronze guns and lead ingots were removed, but many other objects such as pewter spoons and plates, clay pipes and candlesticks were largely ignored in the rush for silver. Furthermore the authorities showed little interest in obtaining a representative collection for display, for instance in Saldanha, and thereby lost a great opportunity.

One can but hope that the mistakes of the past will serve as lessons for the future. Over-hasty action benefits nobody, while due caution will ensure that finds of undoubted cultural value will be preserved for future generations to enjoy."

From the foregoing it is clear that there was an urgent need for statutory intervention; firstly to protect historic wrecks and wreck sites by introducing restrictions on the hitherto uncontrolled exploitation of these culturally significant resources, and secondly, to provide protection for those divers who have discovered wrecks and thereby eliminating the possibility of a "free-for-all", or in Voet's language, "quarrels and brawls", from developing.

**PART B:****The Evolution of Legislation for the Protection and Preservation of Historical Shipwrecks****1.1 The National Monuments Act, 1969<sup>45</sup>**

The objective of the National Monuments Act, 1969 is to protect and preserve a wide range of things which are deemed to be of aesthetic, cultural, scientific or historical significance. Falling within the ambit of the present act are *inter alia* : certain burial grounds and graves, memorials, gardens of remembrance, relics and antiques, meteorites and fossils, rock paintings or drawings, archaeological or palaeontological finds and historical shipwrecks. Prior to 1981 historical shipwrecks were not covered by the act under discussion.

**1.1.1 The National Monuments Council**

A statutory body, namely the National Monuments Council (NMC) is established in terms of S2. The NMC in consultation with the Minister of National Education is responsible for the preservation and protection of the cultural heritage of South Africa. The NMC is composed of a minimum of seven members who are appointed by the minister. Two additional members who are experts in specific fields may be co-opted by the NMC.<sup>46</sup>

**1.1.2 Reference to shipwrecks : the 1981 amendment**

The original Wargraves and National Monuments Act of 1969<sup>47</sup> made no specific reference to historical shipwrecks. In subsequent years it became evident that such protection was required. The act was amended in 1981 and 1986 to fill this void.<sup>48</sup>

The 1981 amendments *inter alia* provide that "no person shall destroy, damage, alter or export from the Republic any wreck or portion of wreck, or any object derived from wreck known or generally accepted to have been in South African territorial waters longer than 50 years except under the authority of and in accordance with a permit issued under this section."<sup>49</sup> The purpose of this measure was to attempt to restrict the hitherto uncontrolled exploitation of shipwrecks by both amateur and professional divers. The permit therefore lays down the terms and conditions subject to which the salvor may salvage a wreck. However, the NMC was criticized by divers on the one hand who feared that the state, through the NMC and the Department of Customs and Excise would have the power to take a disproportionate share of the salvaged material, and by certain archaeologists on the other who argued that the basic conditions attached to the permit were insufficient to protect wrecks satisfactorily.<sup>50</sup>

**1.2.1 Arguments against the existing permit system by the archaeologists:<sup>51</sup>**

- although the NMC had laid down certain basic archaeological principles in the conditions attached to a permit, the salvors had no archaeological training and were destroying historically significant information;

- shipwreck material was safe where it was and could await a time when the discipline of maritime archaeology was properly established in South Africa. Although minimal equipment and facilities were required for the location and survey of wrecks, considerable laboratories and a staff of skilled conservators were necessary before progressing towards excavation. Chemical processing of some finds could take up to five years. No institution or private company in South Africa has the necessary staff or facilities to undertake underwater excavation.
- as the element of financial reward is commonly present, the impression may be created that the NMC tacitly supports the sale of objects removed from shipwrecks;
- the number of divers interested in historical wrecks was increasing rapidly. Rival diving groups were competing for permits to locate and salvage the same wreck or wreck sites. Permits for several wrecks were often issued to the same diver. This system was undesirable as it encouraged hasty and superficial work;
- some amateur divers worked selectively on wrecks, searching in particular for coins, precious metals, cannons, porcelain and jewellery. This selectivity does not accord with archaeological practice. Archaeology is not concerned with "things" *per se*. Excavated cultural material provides clues to the past. It is not the bits and pieces of the past that are important to trained archaeologists, but the context in which they are found;
- shipwrecks are often incorrectly identified by salvors. Divers not uncommonly decide on the identity of a wreck from a cursory examination of objects on the seabed. A permit is then sought in which the ship is named. Artifacts are removed, and then declared without doubt to originate from the vessel so named. In fact, the identity of a ship can often only be established with relative certainty *after* a detailed examination of the wreck and proper research of the artifacts has been completed.
- there is insufficient public reporting of the work done on old wrecks. The practice of removing objects from a site, placing a few in a museum and submitting a list of finds or a grid diagram is unsatisfactory. Old wrecks are the property of the nation and deserve publication to proper academic standards. Divers are rarely capable or interested in doing so. Furthermore, divers are working old wreck sites at a pace which far exceeds the capacity of professional historians and archaeologists to publish on the material and data uncovered;
- in short, various old wrecks have been ruined irretrievably for proper historical research; there is no overall plan or strategy for shipwreck research in South Africa; the standards of maritime archaeology as observed overseas are lacking to a serious extent in this country; and, old shipwreck material which deserves to be considered as national cultural property, is in fact still inadequately protected in law and is being subjected increasingly to the prospect of exploitation for adventure and personal gain.

To remedy the situation, archaeologists have urged the NMC to take the following steps :

To consult urgently with interested parties with a view to formulating -

- a) a strategy for shipwreck research in South Africa;
- b) improved legislation to provide safeguards for the protection of wrecks from exploitation;
- c) a code of ethics for shipwreck research and exploitation in South Africa.

Either immediately halt the issue of further permits to work on wrecks over 100 years of age and insist on full public reporting to acceptable academic standards for all wrecks for which permits have already been issued<sup>52</sup> or impose a moratorium on salvage work to all historical wrecks and revoke all existing permits until proper legislation has been passed.<sup>53</sup>

### 1.2.2 **The views of the National Monuments Council in regard to the permit system**

The response of the NMC to the suggestions of the archaeologists concerning the 1981 amendment of the National Monuments Act, 1969 will now be considered :<sup>54</sup>

- The recommendation of the archaeologists that a moratorium should be imposed on the salvage of all wrecks older than 100 years until an institute for maritime archaeology with its own salvage facilities (as in Western Australia) is established, is idealistic. It would take many years for the government to create such an institute. The NMC is unable to prevent divers from removing objects from wreck sites;

To give permit holders increased legal protection, every wreck for which a permit was applied, was provisionally proclaimed to be a national monument by the NMC. However, this procedure failed to deter other divers from poaching on wrecks to which permit holders had rights. Besides the practical problem of policing historic wrecks, evidentiary difficulties have arisen. In one instance objects were removed from a site by unauthorized divers; the police, however, refused to take action as it was impossible to prove that the material had been taken from a specific wreck;

- the NMC therefore adopted a far more pragmatic policy whereby salvage on a limited scale would be permitted subject to certain conditions. It was originally decided that permits for wrecks predating 1830 would only be issued in exceptional circumstances, for example where the wreck site was composed of nothing but scattered remains. The applicant should furnish information regarding previous salvage experience, collaboration with museums, and so forth, as well as research conducted on the wreck in question. The conditions lay down certain basic archaeological principles and methods for the salvage procedure. A survey should be made of the wreck site and a grid system established. All finds are to be recorded in a logbook which must be made available for inspection by the NMC;
- all salvaged material must be deposited with the collaborating museum for study. The NMC has the power to claim up to 50% of the material which it then donates to the museum in question. Customs duties are paid on the balance leaving the salvor with no more than one third to defray expenses.



The reason why divers search for objects of commercial value such as coins, is because of the costly nature of salvage work.

To encourage salvors to remove objects with little or no value, the NMC may exchange such material for more valuable coins (from the NMC's share).

The NMC does not object in principle to salvors selling their portion of the salvaged material. A case in point is the *Johanna* (1682) where a treasure of silver coins was discovered. Apparently 50% was handed to the NMC which in turn delivered the same to the S.A. Cultural Museum. The remainder consisting mainly of worn coins, was sold by the divers to cover customs duties and salvage costs. The operation was conducted under the supervision of a trained archaeologist and researcher who was employed by the salvage unit at the time;

- to monitor whether the salvor complies with the conditions of the permit and to ensure that correct archaeological procedures are followed, the NMC has appointed honorary shipwreck curators;
- scuba diving in South Africa is becoming an increasingly popular sport. Besides the full-time professional salvors, there are countless amateur divers with metal detectors who spend their free time examining wrecks and searching for new wreck sites. It is senseless having legislation on the statute books controlling such activity if it is unenforceable in practice;
- it is a serious misconception to believe that shipwreck material is safe where it is. Many amateur and professional divers are removing such material without permits and fail to deliver the same to museums. Policing the wrecks is a task which is impossible for the NMC to fulfil;
- most salvors have no formal marine archaeological training. However, there are a few divers who are currently studying archaeology locally while others are doing so abroad. In some countries amateur divers do salvage work under the supervision of trained divers and archaeologists. This ought to be encouraged in South Africa;
- professional salvors frequently apply for permits to explore a number of wrecks, the reason being that different wreck sites are accessible under different weather conditions. Some wrecks can be worked for only a couple of weeks of each year. It is therefore important particularly for the professional salvor to have rights to such a range of sites as to keep his unit occupied throughout the year;
- before being granted a permit, an applicant is required by the NMC to do research into the history of the wreck. Permits are often granted prior to the actual location of the wreck. The identity can only be confirmed once the wreck is salvaged - even then often without absolute certainty. Along the South African coastline salvors seldom find whole wrecks, but generally only scattered objects on the seabed. In cases where the identity cannot be confirmed this should be reported to the NMC;
- it is conceded that many divers do not publish their work. However, thorough reporting on the most significant finds has either already been done, eg. the *Sacramento* (1647), the *Doddington* (1755) and the *Arniston* (1815) while a paper on the *Johanna* (1682) is at present being produced.

Referring to the final recommendation by the archaeologists, the NMC made the following points :

- a) a moratorium would not be effective for the reasons stated *supra*;
- b) full reporting on salvage operations is required from all permit holders. Until such time as there are more trained maritime archaeologists, reports cannot be expected to meet academic standards. Major salvage operations should be published;
- c) written consultation with authorities, divers, historians, archaeologists and others concerned should be undertaken with a view to formulating :
  - a strategy for research;
  - improved legislation; and
  - a code of ethics.
- d) the authorities should be approached by the Committee of Heads of Declared Institutions<sup>55</sup> with a request for :
  - revised amendments to shipwreck legislation;
  - the training of maritime archaeologists and the introduction of such posts at state and provincial museums in coastal areas;
  - the establishment of maritime museums and archaeological research centres along the coast.

### 1.2.3 **A comparison of the views of the Archaeologists and the National Monuments Council**

The approaches of the archaeologists and the NMC to the protection and preservation of historical wrecks appear to differ in the following respects :

- whereas the archaeologists would prefer a withdrawal of existing permits and call for an immediate halt to the granting of new permits, the NMC is of the view that such measures would be ignored by salvors and would be unenforceable and counterproductive in practice. The imposition of a moratorium until such time as a maritime institute has been established in South Africa, would for the same reasons not be recommended. The NMC argues that controlled salvage under the present permit system should continue;
- whereas the archaeologists insist on full public reporting (meeting academic standards) of salvage work which has been sanctioned by the issue of permits, the NMC contends that this could only be achieved once a sufficient number of trained maritime archaeologists are available to supervise the salvage work;
- whereas the archaeologists deplore the sale of salvaged goods, the NMC appears, in principle to have no objections to salvors disposing of their share in this manner.

The archaeologists and the NMC are agreed that : a composite strategy and code of ethics for shipwreck research and exploitation is required, that there is a need to train maritime archaeologists, that maritime museums and research centres should be established and most importantly that legislation apropos historical shipwrecks should be revised as a matter of urgency. This should be done in consultation with the authorities, divers, historians and archaeologists.

### 1.3 The South African Historical Wreck Society

Before turning to the 1986 amendments to the National Monuments Act, 1969, it is necessary to examine the professional historical wreck salvor and the role of the South African Historical Wreck Society (S.A.H.W.S.)

There are a number of well-organized diving units who conduct salvage operations both within and beyond South African territorial waters. The initiative, efforts and resources of professional salvors have led to the discovery of all the major historic wreck finds along the South African coastline. In contrast no university or other archaeological group has made any wreck finds of note. Salvage work is conducted in collaboration with the museum situated closest to the wreck site.

The S.A.H.W.S. was inaugurated on 19 July 1983. It was created to give a voice to amateur and professional divers and others with an interest in shipwrecks. It is a national organisation having members in the Western Cape, Eastern Cape and Durban. Its membership is composed of professional salvors, amateur/recreational divers as well as non divers simply having an interest in historical wrecks. Since its formation the Society has held regular meetings, hosted many speakers and media presentations on shipwrecks and related subjects, co-operated with the NMC and other bodies in projects like National Symposia on Maritime Archaeology and the wreck survey of Granger Bay, and generally busied itself with the task of promoting maritime archaeology and the conservation of the South African marine heritage.

On 15 May 1986, at a meeting with the NMC attended among others by archaeologists from the Universities of Cape Town and Stellenbosch, the S.A.H.W.S. made the following statement:<sup>56</sup>

"The S.A.H.W.S. is devoted to the entire sphere of maritime heritage conservation. One of our principal objectives is to assist in the conservation and protection of historic shipwrecks. Accordingly the Society is committed to promoting a sustaining participatory relationship among all sport divers, shipwreck salvors, marine archaeologists and wreck hobbyists interested in preserving the archaeological integrity of historic shipwreck sites. With this in mind, the Society has formulated the following guidelines which outline what it perceives as acceptable procedures for all shipwreck research being undertaken by non-professional archaeologists in salvage projects:

- **Professional guidance.** An attempt should be made to seek professional guidance from archaeologists and marine scientists concerning operating procedures for locating, mapping and recovering objects of antiquity. Professional advice should be sought from conservators about proper procedures for preserving artifacts.

- **Recording Information.** All search and salvage operations must be conducted in a manner which at all times respects wreck sites as finite and fragile time capsules from the past. Continuous systematic efforts must be undertaken to carefully record all information about each recovered artifact. A report of the salvage operation should be written within one year of the end of the project.<sup>57</sup>

**Promoting Marine Archaeology.** Marine archaeology is in its embryonic stage and therefore all efforts should be made to assist marine archaeologists and other interested researchers to participate in the study of the wreck and its contents. To encourage the training of maritime archaeologists and the provision of such posts at state and provincial museums in the coastal areas.

**Stabilization and Conservation.** All recovered objects must be properly stabilized and protected in a safe and secure place.<sup>58</sup> Descriptive inventories and a photographic record of all material together with site maps and relevant data should be made available to State officials, archaeologists, museums and historians interested in the site.

**Maritime Museum.** To encourage the establishment of maritime museums with restoration facilities and maritime archaeological research centres along the coast. To encourage persons to lend to local museums a representative cross-section of artifacts recovered prior to legislation."

1.4 In paragraph 1.1.2, the permit system as introduced by the 1981 amendment to the National Monuments Act, 1969 was considered.

The NMC was not satisfied with the 1981 legislation and urged the authorities to revise the Act. Academic archaeologists from the Universities of Cape Town (Associate Prof. A. Smith) and Stellenbosch (Prof. H. Deacon) supported the call by the NMC. The S.A.H.W.S. added its voice to that of the others. Under such pressure, a committee of legal experts from the relevant government departments was set up to review the law on salvage.

A surprising feature of the committee was that neither the NMC, the archaeologists nor the salvage divers were represented.<sup>59</sup>

The findings of the committee were set out in a draft bill which was discussed by a parliamentary committee. After making a few changes, the bill was published in the Government Gazette of 2 April 1986. Section 12 dealt with the general protection of monuments and certain other objects of mainly archaeological and palaeontological importance.

Under the 1981 amendment<sup>60</sup>, no person was to "destroy, damage, alter or export" from the Republic any wreck or portion thereof or objects found thereat if older than 50 years except under a permit. No reference was made to "salvage or removal from the original site". The NMC feared that divers would raise the defence that they were not destroying or damaging objects which were removed from the seabed, but rather rescuing (salvaging) them from destruction by the natural elements.<sup>61</sup> It was probably to close this lacuna that S12(2C) was enacted in terms of which no person was to "disturb or remove any wreck older than 50 years except by virtue of both a permit issued by the NMC and a salvor's licence issued by the Commissioner of Customs and Excise.<sup>62</sup>

The permit issued by the NMC entitles the salvor to salvage a specific historic wreck subject to such terms, conditions, restrictions and directions as laid down by the NMC. The permit can therefore be tailored to suit a specific project.

In contrast, the licence issued by the Department of Customs and Excise allows the holder to search for abandoned wreck generally.<sup>63</sup>

Indeed, no distinction is made between historic and contemporary wrecks as can be seen from an examination of the definition of a shipwreck in S112 of the Customs and Excise Act, 1964:<sup>64</sup>

- "Wreck - (1) For the purposes of this section "wreck" includes -
- (a) flotsam, jetsam and lagan;
  - (b) any portion of a ship lost, abandoned or stranded or of the cargo, stores or equipment thereof or any other article thereon ...."

The NMC permit is usually valid for a period of three years but may be extended. This is subject to the condition that satisfactory progress reports are submitted to the NMC by the salvors.

The licence issued under the Customs and Excise Act, 1964 is valid from 1 January until 31 December of every year.<sup>65</sup> Although such licence is issued free of charge, a security bond of R2 000,00 is required to be taken out by the salvor. An application for the renewal of such licence is to be accompanied by a report furnishing details of the activities of the past year as well as an outline of proposed salvage operations for the forthcoming year.

Other features of the 1986 amendments are :

- an applicant for a permit is to furnish written proof of affiliation with a museum approved by the NMC. This reflects the increased sharing of responsibilities between the NMC and museums which will receive the state's share;<sup>66</sup>
- the fact that a permit has been applied for is published in the Government Gazette. Persons who claim to have rights in the wreck are thereby afforded three weeks to come forward and to object.<sup>67</sup> Meanwhile, the application is forwarded to members of the Science Committee of the NMC and to the S.A. Association of Archaeologists for their comments.<sup>68</sup> The actual location of the wreck will not be published in the above notice; the purpose being to protect the wreck site.<sup>69</sup>
- a salvor to whom a permit has been granted acquires no rights to wreck other than those listed in the permit.<sup>70</sup> The NMC is empowered to lay down such conditions as it deems fit. It could conceivably authorize salvors to remove bars of lead but not cannon from a particular site. This subsection possibly also refers to multiple wreck sites where salvors are permitted to salve wreck X and no other;
- no permit will be issued by the NMC to salve wrecks in a security or nature conseration area without prior consultation with the controlling authorities.<sup>71</sup> Thus an application to salvage the *Dageraad* which went down to the west of Robben Island in 1694, allegedly carrying 17 sea chests of coins, was rejected by the Minister of Prison Services;
- material recovered from a wreck site is to be placed in the custody of a museum. Such museum in consultation with the NMC and permit holder will decide on the disposal thereof.<sup>72</sup> According to the earlier conditions laid down by the NMC, the NMC received the state's share and then generally transferred it to the museum nominated in the application.<sup>73</sup>

Now all material recovered is to be directly deposited with the appointed museum. No mention is made of the Department of Customs and Excise which has in the past insisted that precious metals be placed in its custody.<sup>74</sup>

## 2.1 The 1989 draft bill on historic shipwrecks and artifacts<sup>75</sup>

Despite the 1981 and 1986 amendments to the National Monuments Act, 1969, the NMC was still not entirely satisfied with the law governing historical wrecks. Academics too, having studied the Australian system called for a review of the legislation.<sup>76</sup> Similarly, the archaeological community expressed the opinion that the 1969 Act was attempting to cover too wide a range of historically and culturally significant material in one package.<sup>77</sup> It was generally felt that there was a need for a legislative enactment dealing specifically with historic shipwrecks.

The protection and preservation of shipwrecks requires a different approach to the war graves, buildings and other structures on land. Many foreign legal systems have drafted specific legislation for the protection and preservation of shipwrecks, for example : Australia (Historic Shipwrecks Act, 1976), Denmark (Wet op die Beskerming van Historiese Wrak, 1973), France (Decree of 1961-12-26), Norway (Act of 1951-06-29) and the United Kingdom (Protection of Wrecks Act, 1973). By passing similar legislation, South Africa would align itself with such countries.<sup>78</sup> To attain this objective the standing Committee on National Education produced a report which incorporates two draft bills namely the "Bill on the Conservation of the Material Cultural Heritage" and the "Bill on Historic Shipwrecks and Artifacts".<sup>79</sup> The proposed legislation therefore separates shipwrecks from other culturally and historically significant material.

The draft bill addresses the following issues : ownership of historic wrecks and artifacts, the powers of the N.M.C., register of historic shipwrecks, rights to search for historic shipwrecks, disturbance of historic wrecks, rewards for the discovery of historic shipwrecks, wreck inspectors, forfeiture and attachment, the onus of proof and rewards for information.

### 2.1.2 Contributors to the draft bill

In paragraph 1.4 mention was made of the fact that neither the NMC, the archaeologists nor the salvage divers were represented on the committee which was formed for the purpose of producing what was to become the 1986 amendment to the National Monuments Act, 1969.

In drafting the present draft bill on Historic Shipwrecks and Artifacts, the prehistoric land archaeologists were prominent actors while a range of other academics were called upon to assist; yet surprisingly, neither the NMC, the maritime archaeologists nor the South African Historical Wreck Society were approached, or even consulted. This is surprising indeed as Drs. Bruno Werz, the most highly qualified maritime archaeologist in South Africa, who has been involved in a number of salvage projects of historic wrecks in various parts of the world, governed by different systems of law, would certainly have been able to make a valuable contribution. With regard to the Historical Wreck Society, it is in full accord with the aim of this draft, viz. "Om voorsiening te maak vir die beskerming en bewaring van sekere wrakke, wraktereine en artefakte van historiese belang".<sup>80</sup> Indeed, a reading of the Societies' constitution will confirm that this has always been its position since it was created in 1983. The objects and activities of the Society were outlined under paragraph 1.3 *supra*. The Society has clearly established itself as a mouthpiece for many of those actively involved in wreck diving; in other words those who are directly and immediately affected by any legislation governing shipwrecks.

A series of meetings of the executive committee of the Society were convened during August 1989 to analyse the draft.

It is clear that the Society finds it alarming that a bill governing shipwrecks, when, how and by whom they may be salvaged, should be drafted by a group of people, not one of whom has dived on a wreck-site and without consultation with those who do so for a living or a hobby, nor with the society they have created to be their mouthpiece.

2.1.3 The critique of the Society to the proposed bill for the preservation/conservation of historical wrecks in South Africa will now be examined :

2.1.3.1 **False Assumptions Inscribed or Implied in the Draft Bill :**

2.1.3.1.1 **Wreck -sites will be preserved if they are not disturbed by divers**

Some academics seem to think that a wreck site is like an archaeological site on land; that one of the options open is simply to leave it covered up for future generations. This is not the case. Everything on a wreck-site in our rough seas is subject to a constant, inexorable deterioration as a result of gradual exposure to forces of erosion and corrosion. To give an illustration, consider the case of the bronze V.O.C. cannons removed near the Salt River mouth in Table Bay in February 1989. Normally those sites lie under metres of sand, protected from erosion and corrosion. Perhaps once every ten years the overburden of sand is shifted sufficiently to expose them to some danger. This year they were totally uncovered. Had they not been removed, they would have been exposed to a winter of gales and powerful seas, which would have resulted in deterioration which could quite conceivably reduce them to featureless bronze tubes.

This is not the only way in which wrecks and artifacts are lost. At Greenpoint the *Seafarer* (1966) sank right on the remains of the *Thermopylae* (1899), an historical wreck by definition of the draft bill. The S.A. Harbours Board built a harbour wall on top of the bones of the *Middelburg* (1781) in Saldanha Bay. The Foreshore and harbour extensions have piled tons of earth and concrete over scores of historical wrecks in Table Bay. Dredging in the harbour still produces remains of these occasionally.

In stark contrast with these few instances is the report's blandly complacent generalization :

"Roerende Kultuurgoed en skeepswrak hou gewoonlik nie verband met fisiese ontwikkeling en beplanning en met omgewingsake nie".<sup>61</sup>

The simple truth is that in South African waters time is not unlimited and leaving wrecks is not a means of preservation. Any diver can relate instances of wreck sites being so disturbed by wave action in the duration of one winter as to be virtually unrecognizable as the same sites that had existed there before.

2.1.3.1.2 **Conservation legislation and systems which work in other countries will work here**

The report studies and compares a number of systems. The draft bill most closely follows the Australian system, although it is much more draconian than the latter. The situation in South Africa is very different from that in Australia :

Australia has relatively few wreck-sites, South Africa has in excess of 1400 pre-1914 shipwrecks. Included in the 1400 wrecks are: 46 pre-dating 1700, 90 between 1700 and 1800, and 103 from 1800 to 1830 (as seen in 1 above).<sup>62</sup>



- Australia can spread the work of salvaging those sites over the next four or five decades, working on one or two projects at a time; at the rate of work it would take a millennium to work South Africa's sites adequately and in that time most of what should be protected would be destroyed;
- the Australian state is prepared to spend money and can afford to do so; in South Africa, under the current climate of economic restraint, public money will not be devoted to maritime archaeology in the foreseeable future;
- the Australian legislation was drafted in the late 1960's when there were relatively few sports divers. Since the 1960's there has been a proliferation of scuba divers in South Africa.
- because of the relatively few wrecks, Australia did not have a considerable number of professional salvors to lose their livelihood as a result of the new legislation : in South Africa there are quite a few professionals who have invested a lot of money and are accustomed to making a legitimate living out of diving, which raises awkward questions about compensation should that living be restricted;
- in Australia it is a relatively simple matter to police wreck sites and to inspect them regularly : in South Africa it cannot be done because of the numbers involved; in fact no law governing wreck-sites and no programme of policing and monitoring can be implemented without the support of both the amateur and professional divers.

The Australian system seems an excellent system because it is suited to the circumstances and conditions there. Even so, it has not been in force for sufficient time to be assessed objectively : it has yielded three salvage projects, two of which were, in any case, initiated before the enactment of the Australian Historic Shipwrecks Act of 1976.<sup>83</sup> From the foregoing it would appear that there are no grounds for South Africa's slavishly following the Australian system.

#### 2.1.3.2 Vast discretionary powers to be vested in the NMC

The provisions of the bill are alarmingly vague about who will be allowed permits to search for and salvage historical wrecks. They grant discretionary powers to the Monuments Council to determine who is fit to be awarded such permits.<sup>84</sup> Until the recent imposition of the moratorium on the granting of further permits, any salvor who located a wreck was reasonably assured of being awarded a permit to salvage it and would then be responsible for policing the site. The fear exists that this will not be the case in the future, and that discretionary powers granted by the draft bill to the Council will be used to deprive professional salvors of their livelihood. Similarly the proposed empowerment of the Council to fix monetary values for rewards for artifacts purchased,<sup>85</sup> poses a threat to this livelihood. The bill should set criteria for suitability of applicants for permits, otherwise divers are at the mercy of bureaucratic arbitrariness. Possible criteria would be :

- the amount of research done into the history of the wreck
- the costs incurred in doing such research
- the salvage equipment at the disposal of salvors



- the previous experience and number of salvage operations successfully completed
- the previous record of co-operation with museums
- the amount of time available to the salvors to complete the projects (eg. whether an amateur weekend diver or full-time professional salvor)
- the absence of a criminal record particularly with regard to crimes involving theft, fraud and general dishonesty.

S18(1) provides that the finder of a wreck is entitled to such compensation as the National Monuments Council with the approval of the Minister of National Education, subject to the approval of the Minister of Finance may determine. This is too vague. It creates the impression that the reward is proportional to and dependant on the resources available to the relevant government departments at that particular point in time.

In English law the Board of Trade determines the compensation to be paid to salvors. However, there is a link between the costs incurred by the salvors and the value of the salvaged goods. This was set out in a recent judgment of the Queen's Bench.<sup>86</sup> Judge Sheen noted " ... that the practice is that all wrecks received by the Receiver of Wrecks are treated in the same way. The salvors are rewarded for their efforts and usually receive 50% of the value of the wreck. When it is established to the satisfaction of the Receiver of Wrecks that the Salvor has incurred heavy expenses, that fact is taken into account and the amount paid to the salvor will be increased accordingly. If the expenses exceed the value of the wreck the Receiver is likely to pay to the Salvor the whole sum realized on the sale of the wreck."

The salvors are of the opinion that the English system is more equitable and realistic than that of Australia, where a reward "not exceeding the prescribed amount"<sup>87</sup> is payable to a finder, and ought to be thoroughly investigated.

The fact that S18(2) makes provision for arbitration proceedings, is not a satisfactory safeguard for the salvor. Past experience has shown that legal costs often exceed the potential benefit to be gained.

In South Africa and elsewhere it has always been the divers who have been responsible for the locating and salvaging of the vast majority of shipwrecks. There are very few cases in which statefunded institutions have done so. In the past divers have not always performed satisfactorily with regard to the methods they have employed, the keeping of records, the dissemination of information, and the generation of academic papers (as recommended by the archaeologists - see paragraph 3.1 supra) and the conservation of artifacts. It was for this reason that the Historical Wreck Society was constituted : to educate divers about the need to rectify these shortcomings (see paragraph 4.1 supra.) Since the introduction of the permit system for historical wrecks, however, divers have shown themselves capable of working under the supervision of the Council and Museums. Considerable success was achieved with wrecks like the *Johanna* (1682), the *Sabina* (1842), the *Nicobar* (1783), the *Birkenhead* (1852) and the *Colebrooke* (1778) and even before the introduction of the permit system with wrecks like the *Doddington* (1755), the *Sacramento* (1647) and the *Atalaya* (1647). It is divers, like David Allen<sup>88</sup> and Malcolm Turner,<sup>89</sup> who have written authoritative books on shipwrecks on the South African coast. Most of the artifacts now in the possession of the museums have been supplied to them by divers. All of this has been done at no cost to the state.

The S.A. Historical Wreck Society has always supported the principle that divers need to be advised and properly supervised in their work on wreck sites (see paragraph 4.1 *supra*.) It has been the Council, the museums and the universities who have not had the funds or personnel to do this. Indeed most of the artifacts which divers have furnished to the museums have not yet been displayed, precisely because the museums do not have the funds, the staff or the space to do so. Instead of taking on an even greater financial role in the salvaging of wrecks, as envisaged in the draft bill with the payment of rewards for locating wrecks<sup>90</sup>, the purchase of wrecks and artifacts from private owners<sup>91</sup>, the creation of an inspectorate<sup>92</sup>, cash incentives for informers<sup>93</sup> etc., the drafters should tackle the much smaller problem of acquiring the fiscal support from the state to appoint the staff and create the facilities needed merely to solve the existing problems. In the present economic and political climate, even the procuring of this funding will be extremely difficult.

It is falsely assumed that the salvage of historic wrecks is hugely profitable to divers.<sup>94</sup> This is simply not the case. The costs incurred are invariably enormous. In 1976 alone the state of Western Australia spent 92 000 Australian Dollars on what was at that stage a very limited salvage project on one wreck. It was envisaged at the time that the whole project would cost the state about 200 000 Australian Dollars.<sup>95</sup> Expensive equipment, boats and vehicles (subject to rapid wear, frequent servicing and heavy depreciation) are required for salvage work. The consumption of fuels, lubricants and other consumables is high. Diving equipment is expensive to acquire and maintain. In the best conditions divers seldom work for more than ten days a month on any site, because of sea and weather conditions; yet they must be available to take advantage of favourable conditions whenever they occur. These are problems which voluntary inspectors, as outlined in the draft bill<sup>96</sup> too, will encounter.

Having borne all these costs salvors get as little as 50% of what they find in terms of the existing permit system. They must pay a 15% customs royalty and a further 10% surcharge on the entire value of the declaration. If as is often the case with silver and gold coins, they market what they have recovered in the form of jewellery, they pay a further 35% *Ad Valorem* tax on its value. Finally, their net income is subject to company and/or personal tax. A simple computation of these figures will show that for every R100,00 in value recovered from a wreck, the salvor can expect R20,00 after deduction of costs and the payment of shares, levies and taxes to the various state organs who have a claim.

### 2.1.3.3 **Anticipated difficulties in the enforcement of certain provisions of the draft bill :**

#### 2.1.3.3.1 **Permits to search for historic wrecks**

S15(1) provides that no-one may search for historical wreck or artifacts without a permit, and subject to such conditions as the NMC may deem fit. The draft bill proposes to protect and preserve historical wrecks. However, no attempt is made to curtail the salvaging of wrecks younger than eighty years. An evidentiary problem is likely to arise as it would be impossible for the state to prove that a salvor who is, for example towing along a magnetometer or metal detector is in fact searching for an historic and not a more recent wreck.

It is suggested that the most effective way to issue permits would be to award them to finders of a wreck-site on a 'first-come-first-served' basis and not to searchers.

As was pointed out in paragraph 4.2, salvors are in any event (besides any permits) required to possess a yearly licence from the Department of Customs and Excise to search for abandoned historical wrecks.

#### 2.1.2.3.3.2 Wreck Inspectors :

Sections 19, 20 and 21 deal with the appointment, functions and powers of wreck inspectors: As was pointed out in the introduction, there are some 1400 historical wrecks in South African territorial waters. These are so widely dispersed, many of them in remote and inaccessible places, that policing them would be an immense task. To consider one example : a dispute arose recently among some divers who had, or were applying for temporary permits in the area of the Salt River mouth. The port captain was asked by the Monuments Council to see to the policing of these sites. The police found it impossible to distinguish one site from the other and ascertain who was authorized to be there. The port captain consequently imposed a total ban on diving operations in the area, despairing of his ability to perform the task. Despite this total ban it is alleged that divers have poached on these sites with impunity by swimming from the shore. If therefore, it has proved to be impossible for the port captain to police wreck sites which lie in visible distance of his office with all the means at his disposal, what hope would wreck inspectors have of enforcing the new legislation on approximately 1400 wreck sites scattered along a coastline of almost 4 000 kilometres?

The system which prevailed prior to February 1989 (i.e. before a moratorium was imposed on all wrecks predating 1850) is to be preferred. It was the duty of the diver to police his own site. Permit holders ought to share the responsibility of patrolling wreck sites with the wreck inspectors. If such co-operation were achieved, sites could be effectively protected against third parties. Obviously the wreck inspectors would also monitor the salvage operation being conducted by the permit holder to ensure that the conditions are being complied with.

#### 2.1.3.3.3 Presumptions

S24(3) provides that if a person is proved to have been in possession of an artifact within a distance of 10 km from a particular historical wreck or wreck site, such person is presumed to have removed it from such historical wreck or wreck site.

Difficulties are likely to arise particularly in relation to multiple wreck sites where sites may overlap. If one takes the *Perseverance* (1826) at Whale Rock Table Bay as an example, there are no fewer than 250 wrecks which the bill would define as historical within a 10 kilometre radius of this point. From which of these will the accused be presumed to have removed the artifact? The problem of positively identifying sites and artifacts allegedly removed from them is likely to be a daunting one - it is no simple matter to positively identify a wreck site, and many are known to which no positive identity has yet been attached.

Where there is a concentration of wrecks or wreck sites, the accused could be charged with taking the artifact from any of them. The burden would then shift to the accused to establish that he did not take the artifact from the site specified or if he did, that he did so lawfully (eg. under a permit issued under S16). However, in instances where the identity of a wreck or wreck site is unknown and particularly where it is not clear whether the same is historic or not, the burden of proving the contrary would be an onerous one indeed.

#### 2.1.3.4 Procedural innovations in the draft bill

##### 2.1.3.4.1 Disposal of historic wrecks and artifacts

Prior to the 1986 amendment of the National Monuments Act, 1969, any diver could legally acquire artifacts from any wreck, provided that such diver held a licence to search for abandoned wrecks from the Department of Customs and Excise. The draft bill too, frequently refers to the "owners of wrecks or artifacts other than the state".<sup>97</sup> It appears thereby to acknowledge that such private ownership is possible.

In terms of S9(2) the power to *dispose* of historic wrecks and artifacts will be subject to any salvage rights or other real rights which might exist in respect of such wreck or artifact. The word "dispose" according to S1.(ii) refers to the transfer of ownership or the conclusion of an agreement whereby ownership is transferred. S9(2) further stipulates that such disposal would be subject to such conditions as the Commissioner of Customs and Excise may determine. (see Annexure A) The implication appears to be that the Council has the power to dispose of historical wrecks or artifacts, but subject to any salvage rights, admiralty rights *in rem*, other real rights and the conditions set by the Commissioner of Customs and Excise.

In terms of S9(3), if the historic wreck is owned by someone other than the state, the Council and such owner may by mutual agreement decide on the disposal thereof.

In terms of S9(5)(a), if consensus is not reached, the Council must by written notice notify the owner that it (the Council) will after the expiration of six months, seize the wreck or artifact on behalf of the state.

In terms of S9(5)(b) the Council will indicate the sum it is prepared to pay for the wreck or artifact.

In terms of S9(5)(c) if consensus has not been reached ownership of the wreck or artifact will automatically after the expiration of six months pass to the state.

If the above translation and interpretation is correct, then there appears to be an anomaly. According to S9(2), the "disposal" of an historic wreck or artifact is subject to any real rights such as ownership, which may exist. It would thus appear that the Council would be unable to expropriate the same without the consent of the owner. However, according to S9(5)(c) ownership of the wreck or artifact will automatically after the expiration of six months pass to the state if consensus concerning the disposal thereof has not been reached.

It is suggested that the situation may be remedied by providing that in instances where no agreement concerning the disposal of the wreck or artifact is reached between the owner and the Council, the Council should have a right of pre-emption over such thing, i.e. if the owner were to decide to sell, the state through the Council would have the first option to purchase.

It is submitted that draconian procedures of expropriation as contemplated in S9 will have a negative effect in practice. It is improbable that the state will provide sufficient funding to compensate the owners adequately for the loss of their artifacts. To avoid such loss the owners are likely to conceal their possessions, to dispose of them by alternative means or destroy them, especially where the scrap value of metallic objects such as cannon exceeds the amount the Council is able to put forward.

A possible solution to the problem would be to compile a register of all artifacts from historical wrecks which are already in the possession of private persons and allow them to remain the legal owners. This would at least provide a record of culturally valuable artifacts which could in future be used for research purposes. Even so, this would be an enormous task to compile, and it could only be done if the owners were assured that their artifacts would not be expropriated.

If there were no record of existing artifacts in the hands of private persons, such persons would if found in possession thereof, simply raise the defence that such goods were removed from the seabed prior to 1986. If in terms of S2 it is presumed that artifacts are abandoned and therefore owned by the state, the possessor may still rebut the presumption by alleging that the goods were acquired prior to 1986. Whereas, if a person were to be found in possession of an artifact which does not appear in the register and which was not removed in terms of a permit issued under S16, such person would be unable to escape the punitive consequences of S22.

The fact that S9(6) allows an owner who is dissatisfied with the quantum of compensation put forward by the NMC to resort to arbitration, is not a satisfactory safeguard to protect the interests of the owner. Why should the diver who legally acquired ownership of an artifact in the past, bear the costs of arbitration simply because a law now empowers the state to expropriate such possession?

#### **2.1.3.4.2 Furnishing the NMC with information**

S7(1)(h) requires any person whom the NMC is satisfied possesses information relating to a specific wreck to furnish the NMC with such information.

This subsection is similar to S10(A)(3) of the present National Monuments Act, 1969.

Compelling a person to divulge information without some incentive, whether pecuniary and commensurate with the value of the wreck or in the form of a permit to salvage a wreck site, is unlikely to be effective in practice.

In 1979 when the Amendment Bill introducing S10(A)(3) was debated in Parliament, it already evoked a certain amount of scepticism. During the Second Reading Debate in the House of Assembly, Mr. P.A. Pyper remarked : "It is feared that this provision will actually be counter-productive. Co-operation will be achieved if some incentive is offered .... It is wishful thinking that people must just be expected to part with knowledge they have gained as a result of years of research and hard work."<sup>98</sup>

It is suggested that this argument still holds true today. This subsection should either be amended to include adequate compensation or be removed altogether.

### 2.1.3.5 **Perceived Inconsistency in the definition of an historic wreck :**

In terms of S1(iii)(a), "historic wreck" means any ship or aircraft or any portion of such ship or aircraft which -

- a) is at least 80 years of age *or* which has in terms of S8(1) been declared to be an historic wreck by the Minister;

The implication is that a wreck of 80 years is automatically classified as historical whereas a wreck younger than 80 years may, should the circumstances warrant it, be awarded historical status by the Minister.

In terms of S8(1), when the Minister considers it to be in the national interest that a wreck or wreck site should be protected, he may, on the recommendations of the Council, by notice in the Government Gazette declare the wreck or wreck site which has been recorded in the register to be a historic wreck or wreck site.

The implication is that a wreck only becomes historical once it has been entered in the register *and* declared by the minister to be such.

The anomaly is that S1(iii)(a) stipulates that a wreck of 80 years automatically becomes historical, whereas S8(1) requires an entry in the register plus a notice in the Government Gazette before the wreck receives historical status.

It is suggested that S8(1) should read : "When the Minister considers it to be in the national interest that a wreck *younger than 80 years*<sup>99</sup> or a wreck site should be protected, he may, on the recommendations of the Council by notice in the Government Gazette declare the wreck or wreck site to be a historical wreck or wreck site".

The purpose of an entry in the Shipwreck Register should simply be to provide a record of known shipwrecks to the public at large. The fact that a wreck has not been entered in the register should not bar it from being classified as historical and enjoying the protection that flows therefrom.

### 2.1.3.6 **The Time Criterion for Historical Wreck Status**

The amendment of 1986 to the National Monuments Act, 1969 set the age at 50 years. The Historical Wreck Society feels that this is too recent. Even eighty years, as defined in S1(iii)(a) of the draft bill is too young, bearing in mind that the same section empowers the minister to declare any wreck an historical wreck regardless of age. As a general cut-off point, a year (eg. 1850) is recommended rather than an age, as the latter creates the unsatisfactory scenario of this year's legally salvageable wreck becoming next years so-called historical wreck, because eighty years will have elapsed. The Historical Wreck Society believes that 1850 is a more reasonable cut-off point. Virtually nothing of archaeological, technical or historical value, which is not already known can be learned from wrecks after this time. Even the blueprints of many vessels built after this time are still in existence. Should there be any special reasons for considering a post-1850 wreck of cultural-historical significance, it can in any case be declared an historical wreck by the Minister in terms of the bill.

In terms of S4 of the draft bill, the object of the Council is to protect and preserve the historical and cultural heritage of ship-and aircraft wrecks and to encourage and promote such protection and preservation.

A provision declaring a wreck which has already been lawfully stripped, to become an historic wreck simply by reason of the fact that it foundered, for example 80 years ago, would serve no purpose.

Consider the giant Korean bulk carrier, the *Daeyang Family* which ran aground just south of Whale Rock off Robben Island on 30 March 1986. The entire cargo and superstructure have been removed while the engine room was at the time of writing being dismantled by salvors. In terms of S1(iii)(a) of the present draft, the hull of the *Daeyang Family* would in the year 2066 become a so-called historic wreck. Surely there is nothing of cultural or historical interest which future generations could glean from the *Daeyang Family*. Besides this, not much is likely to remain of a metal wreck after 80 years - particularly where it is located along a high-energy stretch of coast. The *Oriental Pioneer* which ran aground off Cape Aghulas on 22 July 1974 can be cited as an example. Nothing but a heap of rubble and mangled plates on the seabed mark the spot where the ship foundered. The same applies to the site of the *South African Seafarer* of 1966 off Moulle Point.

In an article entitled Shipwreck Legislation : Legality v Morality appearing in *The Freeman*, a New York publication, Gary Gentile argues that :<sup>100</sup>

"Not every barge or tramp freighter has historical or cultural value. Yet the plethora of anti-shipwreck bills continually in congressional hearings are implicitly all encompassing, and seek to put in the province of local authority every shipwreck in navigable waters, off coastal communities, and those outside the jurisdiction of the United States. This is a gigantic number of wrecks : over 4 000 off the New Jersey coast alone. What are we to do with them all? And why preserve a sunken liberty ship when some of them still ply the seas, or are being scuttled as artificial reefs?"

The Historical Wreck Society feels that setting the cut-off date at 1850 would halve the number of wrecks which have to be registered, policed, inspected, etc., greatly reduce the administrative and financial burden on the NMC and the state, and improve the prospects for both hobby and professional wreck divers to continue their activities without breaking the law or having to deal with unnecessary regulatory restrictions and red tape.

It is suggested that a provision should exist exempting wrecks of the type outlined above, from protection. Such a provision would be the converse of S1(iii)(a) which empowers the Minister to provide protection for a wreck younger than 80 years.

### Conclusion :

- 3.1 From the foregoing spectrum of views it is clear that the archaeologists, the NMC and the South African Historical Wreck Society have divergent views on many aspects of salvage diving. The most fundamental point of dispute appears to be whether salvage work should be permitted to continue or whether it should be halted until such time as academically trained maritime archaeologists, modern museums and laboratories are available :

The prehistoric land archaeologists argue that shipwreck material should be left *in situ* until the required expertise and facilities are available.<sup>101</sup>



The NMC adopting a more pragmatic approach is opposed to the imposition of a moratorium for two reasons : Firstly, there is no indication how long (if ever) it will be until the state approves the concept and allocates the revenue required for a maritime institute; Secondly, because of the number of wrecks and divers involved, it would be physically impossible for the NMC to prevent divers from proceeding with salvage operations. Salvage on a limited scale and subject to prescribed conditions should therefore be permitted.<sup>102</sup>

The South African Historical Wreck Society, arguing empirically contends that in South African waters time is not unlimited and leaving wrecks alone is not a means of preservation. There is a vast number of wrecks, the state and the academic institutions cannot undertake the task, professional salvors can and they have the means and technology to do so. Controlled salvage work ought therefore to be encouraged.

The maritime archaeologists believe that harsh legislation would antagonize salvage divers and would lead to the further destruction of shipwrecks. By undertaking joint salvage operations governed by well drafted contracts archaeologists and salvors could achieve results beneficial to all. The salvors' rights to material recovered from wreck sites could be secured in such a contract, whilst the scientific value of such material too would be guarded.<sup>103</sup>

Obviously any salvage operation should be conducted within a legislative framework. Such legislation should ideally provide for the protection of historic wrecks whilst allowing controlled salvage projects to be conducted. Similarly, the salvors' rights should be protected. The 1981 amendments to the National Monuments Act of 1969 introduced the permit system. A situation as was described in Part A where rival salvors descended upon the site of the *Meresteyn* could no longer develop as the permit holders would have sole salvage rights to the wreck.

3.2 Having studied and analysed the draft bill, certain perceived, shortcomings may be isolated and rectified as was attempted in the foregoing arguments. However, it is not only the draft bill *per se* in its present form which causes concern to the diving community but the extent to which future salvage operations depend upon the manner in which bureaucratic discretion is exercised. Thus S 12 empowers the minister to issue regulations concerning all matters which he considers necessary and useful to achieve the objects of the draft bill. Similarly a reading of S16(1)(a) indicates that the issue of a salvage permit depends on the decision of the NMC. Such arbitrariness could be eliminated by introducing criteria<sup>104</sup> with which an applicant for a salvage permit should comply. A further example where the drafters of the bill have opted for the maximum amount of bureaucratic discretion is in S18. Finders of wreck whether with or without a permit are entitled to such compensation as the NMC with the approval of the Minister of Education with the approval of the Minister of Finance shall determine. The situation could be rectified if provision were made for 'reasonable compensation' or if the quantum of compensation were proportionate to the value of the salvaged material, as was argued *supra*. Presumably the quantum of compensation could be negotiated between the Council and the applicant in terms of S16, although this section does not clearly circumscribe such right.

To ensure that as little culturally significant material as possible leaves the R.S.A., a provision could be introduced giving the NMC a right of pre-emption over that portion of the material to which it has no claim. The introduction of such a clause would correspond with a condition which the NMC has in any event in the past incorporated in salvage permits :



"The salvor receives 50% of the salvaged cultural goods according to the estimated value and the customs duty on this material will be paid out of the other 50%, which goes to the museum. The museum does not pay duty on its share. The museum has the first choice of the salvaged material *and also first option on purchasing further material at market value*".

- 3.3 The South African Historical Wreck Society, maritime archaeologists and the NMC expressed their outrage at not having been consulted in the process of formulating the draft bill. It has now been established that the draft will in the near future be published for general public comment. Hopefully some of the perceived flaws as outlined in this paper will have been ironed out. Any party having further suggestions or objections to the bill will be afforded the opportunity of submitting such criticism.

University of Cape Town

## FOOTNOTES

- 1 Stuttaford M.ed. 'Shipwrecks along the South African coast' (1982) Volume 6 *South African Shipping News and Fishing Industry Review* 18
- 2 Drs. B.E.J.S. Werz, a maritime archaeologist having studied at the Katholieke Universiteit Nijmegen, Netherlands, has since 1988 lectured in the Department of Archaeology, University of Cape Town and is presently Head of the Maritime Archaeology Research Group, Department of Archaeology, University of Cape Town.  
Drs. Werz has a vast amount of practical experience in the field of maritime archaeology having *inter alia* participated in the *Mary Rose project*.
- 3 Lee and Honore *Family, Things and Succession* 224
- 4 Gibson *Wille's Principles of South African Law* 224
- 5 Lee *The Elements of Roman Law* (1956) 147
- 6 Lee and Honore *op cit* 267
- 7 Lee *op cit* 174
- 8 Lee and Honore *op cit* 269
- 9 *Osaka Steamship Co. v S.A. Railways* 1938 AD 168 at 177 and 180
- 10 *Doyle v Leyds* N.O. (1895) O.R. 22
- 11 57 of 1951 as amended
- 12 1906 23 SC 169
- 13 *ibid* 170
- 14 *ibid* 169
- 15 *ibid* 171
- 16 *South African Shipping News and Fishing Industry Review op cit*
- 17 Van Meurs 'Legal aspects of marine archaeological research' (1985) 1 *Special Publication of the Institute of Marine Law*, University of Cape Town 39
- 18 NASOP 02-566 (89/06)
- 19 *ibid* S 16
- 20 Including any portion of a wreck, cargo, stores or personal property on board as defined in the Merchant Shipping Act No. 57 of 1951
- 21 1968 (4) SA 190 (C)
- 22 *Turner Shipwreck & Salvage in South Africa - 1505 to the Present* 161
- 23 *Underwater Construction* case 192 F G
- 24 1988 (3) SA 92 (C)
- 25 *Turner op cit* 163
- 26 Legal abandonment came about as follows : A German company, Wolf Plant Hire purchased the wreck which was to be cut up and sold as scrap metal. It paid the nominal sum of R2,00 (Two Rand) for the wreck but was required by the Department of Transport to put down R100 000,00 (One Hundred Thousand Rand) as security. The company was eventually dissolved resulting in the indirect abandonment of the *Antipolis*.
- 27 Lewis, 'How Reck lost the wreck' (1988) *Businessman's Law* 16
- 28 *Underwater Construction* case 94 H I
- 29 *op cit* fn 21
- 30 4 1.1.5.1
- 31 *Inleidinge tot de Hollandsche Rechtsgeleertheyd* 2.4. 31
- 32 *Commentarius ad Pandectas* 4 1.1.7
- 33 *Underwater Construction* case 97 H J
- 34 *Lewis op cit* 33
- 35 *ibid*
- 36 *Reck v Mills en 'n ander* 1990 (1) SA 751 at 759 A
- 37 as laid down in *Scoop Industries (Pty) Ltd v Langlaagte Estate and G M Company Ltd* 1948 (1) SA 91 (WLD) at 98 and 99
- 38 *Reck* case *supra* 759 E G
- 39 Interview with retired wreck diver A.E. Dichmont at Arniston
- 40 also spelled *Merestein* or *Mierestijn*
- 41 *Turner op cit* 144
- 42 in terms of S112 of Act No. 91 of 1964
- 43 unreported judgment
- 44 *Turner op cit* 114

PART B

- 45 Act No. 28 of 1969  
 46 S 3(1) of the National Monuments Act, No. 28 of 1969 as amended by S  
 2(a) of Act No. 13 of 1981  
 47 as amended by the 1986 Amendment Act (No. 11 of 1986) and henceforth  
 entitled the National Monuments Act, 1969  
 48 Subsection (2B) inserted by S 11(b) of Act No. 13 of 1981 and substituted  
 by S 8 (c) of Act No. 11 of 1986; Subsection (2C) inserted by S 8 (d) of Act  
 No. 11 of 1986  
 49 S 12 (2B) (d)  
 50 Rudner 'new legislation on old shipwrecks' (1987) 3 *under water* 47  
 51 Arguments extracted from correspondence with the NMC by Dr. B.R.  
 Stuckenberg o.b.o. the Committee of Heads of Declared Institutions dated  
 3 December 1984 and Professor Deacon, Department of Archaeology,  
 Stellenbosch dated 23 January 1985.  
 52 Dr. B.R. Stuckenberg.  
 53 Prof. H.J. Deacon.  
 54 Arguments extracted from correspondence from the NMC to Dr.  
 Stuckenberg.  
 55 This is a statutory body formed under S13 of the Cultural Institutions Act 29  
 of 1969 and is composed of approximately twenty representatives of  
 cultural institutions. Its function is to advise the minister on matters of  
 interest to cultural institutions.  
 56 Newsletter 88/01 of the S.A.H.W.S. dated 23 February 1983  
 57 Reports are in the custody of supervising museums  
 58 Stephen Valentine, a member of the SAHWS holds an honours degree in  
 analytical chemistry from the University of Cape Town. He has developed  
 unique processes of cleaning silver and is frequently consulted by the  
 Cultural History Museum. His methods have also aroused interest in the  
 United States of America  
 59 Rudner "New legislation on old shipwrecks" (1987) 3 *Underwater* 47  
 60 S12 (2B)  
 61 Correspondence between the NMC and Dr. B.R. Stuckenberg, Natal  
 Museum dated 4 January 1985  
 62 In terms of the Customs and Excise Act, No. 91 of 1964  
 63 S 112 (4) The Minister may by regulation prescribe the circumstances under  
 which and the conditions subject to which a licence may be issued by the  
 commissioner to any person entitling him to search or search for any  
 wreck, but no such licence shall give the holder thereof the exclusive right  
 of searching for or salvaging any particular wreck  
 64 Act No. 91 of 1964  
 65 Schedule 8 of Act 91 of 1964  
 66 Rudner *op cit* 47 ; S 12 (2C) (b)  
 67 S 12 (2C) (c) (i)  
 68 Rudner *op cit* 47  
 69 S 12 (2C) (c) (ii)  
 70 S 12 (2C) (d)  
 71 S 12 (2C) (e)  
 72 S 12 (2C) (f)  
 73 Rudner *op cit* 47  
 74 *ibid*  
 75 NASOP 02-566 (89/06)  
 76 Professor Deacon made a study of salvage legislation and maritime  
 museums in Australia and submitted representations to the NMC furnishing  
 full information of the latter system of law  
 77 NASOP *op cit* 199  
 78 *ibid* 216  
 79 Own translation - at time of writing no English version in existence  
 80 NASOP *op cit* 287  
 81 NASOP *op cit* 177

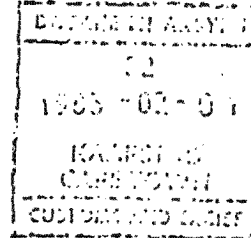
- 82 *South African Shipping News and Fishing Industry Review op cit*  
83 *The Batavia and Vergulde Draeck*  
84 *NASOP op cit* S 16  
85 *NASOP op cit* S 7 (2)  
86 *Pierce and another versus Bemis and another. The Lusitania* [1986] 1  
ALLER 1011  
87 S 18 of the Australian Historic Shipwrecks Act, 1976 (No. 190 of 1976)  
88 *Allen and Allen Clive's Lost Treasure*  
89 *Turner op cit*  
90 *NASOP op cit* S 18  
91 *ibid* S 9  
92 *ibid* S 19  
93 *ibid* S 25  
94 Letter by Associate Professor A.B. Smith, Department of Archaeology,  
University of Cape Town dated 11 January 1985 to Doctor C Loedolff,  
N.M.C. concerning the wreck of the *Birkenhead* (1852) : "Let us not pretend  
that this is anything but a salvage operation to find the reputed bullion on  
board the vessel. The divers will just be mining the wreck!"  
95 Schedule 1 to the Australian Historic Shipwrecks Act, 1976 (Act No. 190 of  
1976)  
96 *NASOP op cit* S 20  
97 S 2 (4) (a), S 7 (1) (i), S 7 (2), S 8 (2)  
98 (1979) 79 House of Assembly Debates, 1 March 1979 at Col. 1636  
99 or pre-dating a specified year - see *infra*  
100 Gentile 'Shipwreck legislation : legality vs. morality' (June 1989) 39 *The*  
*Freeman* 217  
101 paragraph 1.2.1 *supra*  
102 paragraph 1.2.2 *supra*  
103 Drs. B.E.J.S. Werz  
104 as suggested in paragraph 2.1.3.2

2/1 ... K.19.....

Enquiries: *M. H. Meyer*  
Tel. No: ~~27131 X 40~~ 211930 X 213

CONTROLLER OF CUSTOMS AND EXCISE  
PRIVATE BAG 9046  
CAPE TOWN  
8000

*M. H. Meyer*  
*M. H. Meyer*  
*M. H. Meyer*  
*M. H. Meyer*  
*M. H. Meyer*  
*M. H. Meyer*



Sir/Gentlemen

LICENCE TO SEARCH OR SEARCH FOR ABANDONED WRECK.

Licence No. *29*..... authorising you to search or search for abandoned wreck along the coast of the Republic of South Africa until 31 December 19 ..... is enclosed.

Should you desire to renew the licence timeous application should be made to this office before the date of expiry.

Such application should be accompanied by a report with regard to your salvage activities during rhe period January - December 19 ..... and your plans for 19 .....

Yours faithfully

*M. H. Meyer*

CONTROLLER OF CUSTOMS AND EXCISE

> Please note that The National Monuments Council, 927 Mutual Buildings, Darling Street, Cape Town, which administers the Act on National Monuments (Act No. 28 of 1969) should be approached for the necessary permit or authority where applicable.

LICENCE TO SEARCH OR SEARCH FOR ABANDONED WRECK

Permission to search or search for abandoned wreck along the coast of the Republic of South Africa and/or the coast of South West Africa and to take possession of articles recovered therefrom is hereby granted to \_\_\_\_\_ subject to the rights of others, including any person to whom a licence similar to this licence may have been granted or may hereafter be granted and to the following conditions:-

1. The licensee shall keep a register which shall be open to inspection at all reasonable times by an officer of Customs and Excise, or any other person authorised by the Commissioner for Customs and Excise (hereinafter referred to as the Commissioner) specifying all articles or things whatsoever, nothing excepted, recovered by the licensee, the date of recovery, the manner and the date of disposal of such articles or things, and to whom and for what sum or consideration disposed of.
2. The licensee shall within seven days of the date of recovery of any article or thing, furnish the nearest Controller of Customs and Excise with full particulars of such articles or things and shall remove the same to a place of security approved by the said Controller unless he authorises disposal in some other manner.
3. The licensee shall keep unopened any safe, chest or other receptacle which may be recovered until the nearest Controller of Customs and Excise has been advised of the recovery and he or his deputy is present at the opening thereof.
4. The licensee shall pay to the Government through the nearest Controller of Customs and Excise a royalty of 15% of the value of all articles or things recovered.
5. The licensee shall pay on demand to the nearest Controller of Customs and Excise (in addition to the 15% royalty mentioned in paragraph (4)) the duties leviable in terms of the Customs and Excise Act on any wreckage, articles or things as well as all expenses incurred by Customs and Excise in connection with whatever supervision of his operations the Controller may deem necessary for the protection of the revenue.
6. The duties and royalty shall, on any articles recovered, be assessed on either:-
  - (a) the value of the articles as ascertained by sworn appraisement; or
  - (b) if the article is sold by the licensee, on the sale price according to the decision of the Commissioner in the matter; or
  - (c) the rated duty if liable to the rated duty.
7. The licensee shall notify the nearest Controller of Customs and Excise in writing of all wreck discovered or located, within seven days of such discovery or location, and shall keep a register which shall specify the names and contents of the wreck

As far as known, and their position or locality. Such register shall be open at all times for inspection by the Commissioner or Officer deputed by him.

- 8. If any work or recovery is conducted on or from the sea-shore as defined in Act No. 21 of 1935, as amended, such work shall be subject to the provisions of that Act, and the regulations framed thereunder.
- 9. If any work of recovery is conducted on or from the sea-shore or three miles limit of South West Africa (as defined in Ordinance No. 37 of 1958) such work shall be subject to the provisions of that Ordinance and the regulations framed thereunder and the Nature Conservation Ordinance, 1967 (Ordinance No. 31 of 1967) and the regulations framed thereunder.

10. This licence is valid from the 1 January 1983, until the 31st December, 1983, but may be renewed on application at the discretion of the Commissioner. The licence is not transferable.

11. Should the licensee:-

- (1) fail to commence work within three months from date hereof;
- (2) cease operations or fail to carry on operations to the satisfaction of the Commissioner or
- (3) fail in any way to comply with the conditions hereof; the said licence may be cancelled.

Dated at PRETORIA this 19th day of January, 1983.

COMMISSIONER FOR CUSTOMS AND EXCISE

