SALVAGE OF WRECKS AND WRECKAGE

LEGAL ISSUES ARISING FROM THE RUNDE FIND

BY

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FROM THE WRECK OF THE *AKERENDAM* IN 1725 TO THE DISCOVERY OF COINS AT RUNDE IN 1972

In the summer of 1972 large quantities of gold and silver coins were found off Runde, a small island off the coast of north-west Norway, in the district of Sunnmøre; these coins came from a Dutch East Indiaman, the *Akerendam*. The find and the subsequent dispute about the ownership of the coins caused a considerable stir. The dispute was settled amicably, but it provides a convenient starting point for a discussion of the question of the proprietary right to wrecks and wreckage and of such associated problems relating to salvage rights as are relevant.[1]

The *Akerendam*, a three-master of about 40 guns belonging to the Verenigde Oostindische Compagnie in Amsterdam, set out on her maiden voyage to the East Indies in January 1725 with about 200 men on board. The ship was loaded with supplies for the Dutch colonies and also carried gold and silver coins to a value of 230,000 guilders, packed in 19 chests. A route to the north of Scotland was chosen because of the danger of capture in the English Channel. A violent storm must have driven the vessel towards the Norwegian coast; it must have made its way into foul waters north of Runde and been battered to pieces in the breakers, being perhaps

[1] For more detailed information about the ship, the shipwreck, and the find, see Kloster in *Sjøfartshistorisk Årbok* (Yearbook of Maritime History) 1973, Bergen 1974, pp. 103–23, especially as regards the excavation in the summer of 1973, Rønning, *ibid.*, pp. 124–8, and in the *Nord. numismatisk Årsskrift* (Nordic Numismatic Annual) 1973–74, pp. 68–115, especially as regards the finds of coins. For a journalistic account, see Ellefsen, *Runde-skatten* (The Runde Treasure), Oslo 1974. See also Sandberg and Sætre, *Skattejakt langs norskekysten* (Treasure Hunt along the Norwegian Coast), Oslo 1973, especially pp. 11–33.

Hitherto the wrecks of 13–14 other Dutch East Indiamen have been found. Descriptions of a number of the finds have been published in *Int. J. Naut. Archaeol.*, see Green in vol. 4 (1975), pp. 43–63, on the *Batavia*, wrecked in 1629 off Western Australia, Stenuit in vol. 3 (1974), pp. 213–56, on the *Lastdrager*, wrecked in 1653 in the vicinity of the Shetlands, Green in vol. 2 (1973), pp. 267–89, on the *Vergulde Draeck*, wrecked in 1656 off Western Australia, Forster and Higgs in vol. 2 (1973), pp. 291–300, and Price and Muckelroy in vol. 3 (1974), pp. 257–68, on the *Kennemerland*, wrecked in 1664 in the vicinity of the Shetlands, Bax and Martin in vol. 3 (1974), pp. 81–90, on the *De Liefde*, wrecked in 1711 in the vicinity of the Shetlands, and Marsden in vol. 1 (1972), pp. 73–96, on the *Amsterdam*, wrecked in 1749 near Hastings in Sussex. See also Marsden, *The Wreck of the Amsterdam*, London 1974, especially ch. 11, and Larn in *Buried and Sunken Treasure*, ed. by Chorlton, London 1974, pp. 21–9, on the finding of the *Hollandia*, which was wrecked in the vicinity of the Scilly Isles in 1743.

finally shattered against the precipitous cliffs on the northern shore of the island. None of those on board survived the shipwreck, which according to local report took place on March 8, 1725. Several court sessions were held in connection with this affair.[2] The records of these sessions show that the Dutch representative in Bergen, the Consul N. S. Weinwick, strove energetically to get as much as possible salvaged from the wreck, and that as a consequence of this there was a certain amount of friction between him and the Norwegian authorities, represented by Eric Must, the district governor, and Nicolai Astrup, the bailiff. The records also contain detailed lists of what was salvaged: a quantity of cloth and other merchandise, a good deal of iron, lead, and copper, and a variety of ship's gear. The shipowners must have been especially concerned to secure the salvaging of the considerable consignment of bullion. According to the records, however, only five chests containing silver coins were recovered; such a poor result can probably be attributed to the inadequacy of the salvage methods then available.

The tragic shipwreck, the subsequent salvage operations, the court sessions, and the conflict between Weinwick and the authorities must have made a great impression on the inhabitants of Sunnmøre. Presumably it must also have been generally known that large quantities of gold and silver coins had been left lying on the seabed. But strangely enough the whole episode seems to have been forgotten quite soon afterwards. Disasters at sea and wrecks play an important part in the folklore of Sunnmøre, and here as elsewhere stories of finds of gold and silver from sunken ships feature prominently. Local tradition has, however, concentrated on a ship from Philip II's "invincible Armada", which is said to have run aground at Runde. Even the ship's name has been preserved; it was called *The Impregnable Castle* and was said to have had a great treasure on board.[3] This shipwreck, if it occurred, must have taken place in 1588, i.e. 137 years before the wreck of the *Akerendam*. That the legend of the

[2] "Extra Ret" (Special Court) of December 12, 1725, and "Extra Ting" (Special Assembly) of January 17–19, 1726. *Justisprotokoll* (Court Records), no. 15 (1725–29) for Sunnmøre District Court, folios 97 a – 98 b and 99 b – 106 a.

[3] See, *inter alia*, Scheen in *Norges Forsvar* (The Defence of Norway), 1961, pp. 252–60, Sandberg and Sætre, *loc. cit.*, pp. 73–7, Ellefsen, *loc. cit.*, pp. 147–61, and Rønning in *Nord. numismatisk Årsskrift* 1973–74, pp. 108–9.

In recent years the wrecks of several of the Armada's ships have been found: the *Girona* near the Giants' Causeway in Northern Ireland in 1967, *Santa Maria de la Rosa* in Blasket Sound in Southern Ireland in 1968, and *El Gran Grifon* in the vicinity of Fair Isle in 1970, see Martin in *Marine Archaeology*, ed. by D. J. Blackman, London 1973, pp. 439–59, and the same author in *Int. J. Naut. Archaeol.*, vol. 1 (1972), pp. 59–71, and also Stenuit, *Treasures of the Armada*, London 1972 (on the finding and excavation of the Girona, from which, *inter alia*, 402 gold coins and 756 silver coins were recovered, together with a considerable amount of very valuable jewellery).

Spanish treasure ship has borrowed some of the trappings of the shipwreck in 1725 is quite understandable. But it is rather astonishing that all the drama connected with the latter shipwreck and even the name of the *Akerendam* has been wiped clean off the slate of memory.

The wreck of the *Akerendam* has, however, been well known to those who have studied the history of wrecks and salvage and delved into the official archives.[4] In recent years a number of attempts have even been made to find the wreck. But it was by sheer chance that three amateur divers—a Norwegian and two Swedes—discovered the treasure from the *Akerendam*. This happened in July 1972, about 100 metres off shore, at a depth of 20 metres. In the first attempts about 5,400 gold coins and about 33,300 silver coins were brought up, amounting to about 20 kg of gold and over 400 kg of silver.

The third act in the drama, the dispute over who was entitled to the coins, was not so intensely thrilling as the shipwreck itself and the subsequent finding of the treasure, but it had its exciting moments. The dispute rapidly developed into a three-cornered contest between the Dutch Government, the three divers, and the Norwegian Government. The Dutch Government had taken over the assets and liabilities of the Dutch East India Company when the company was liquidated in 1798. It therefore represented the original owners of the *Akerendam* and its cargo and claimed that their title was still valid. The divers asserted that the treasure was *res nullius* when they found it, and that they had acquired the right of ownership by taking possession of it. The Norwegian Government, for its part, based its claim on the Protection of Antiquities Act of 1951.

The triangle, owner–salvor–littoral state, is far from being a feature peculiar to the Runde case; it is to be found in most conflicts of this type. In attempting a review of the many legal problems that arise, the best initial approach may be to discuss the legal position of each of the three main parties separately, and then ultimately to try to weave the various threads together and, if possible, to draw some conclusions.

Let us begin with the owners. Here the big question facing us is:

CAN THE TITLE TO SHIP AND CARGO BE LOST AS A RESULT OF A SHIPWRECK?

First, a little detour in the wake of Captain Carlsen and the *Flying Enterprise*. Carlsen became world famous in 1952, and there must be many who still remember him. The *Flying Enterprise* suffered very severe damage

[4] See, among others, Thorbjørnsen, *Av bjerginsvesenets historie* (The History of the Salvage Administration), vol. 1, Bergen 1941, pp. 75–7 and 83.

during a storm in the Atlantic around New Year, 1952. The passengers and crew were rescued from the ship in dramatic circumstances. But Carlsen remained on board the badly damaged ship for another 13 days. Only when the ship was listing at an angle of nearly 90°, and all hope of salvage was gone, did he jump overboard; 22 minutes later the ship went down.[5]

Captain Carlsen was hailed as a hero. Other masters of ships have waged the same sort of struggle against the elements without ever reaching the front page; quite a few of them in fact stayed on board too long and went down with their ships.[6]

What is it that impels masters of ships to take such chances? Quite probably their motives are largely irrational: masters want to live up to what they believe proud seafaring traditions require of them. The fact that there is somebody on board the disabled vessel who can make fast the towline when the salvage vessel arrives can also be of some consequence as regards the assessment of the salvage award. But I believe that in many cases another important motive prevails: among mariners the world over there is a widespread belief that the shipowner loses his property in a vessel that is abandoned on the high seas by all on board her. The ship then becomes a "dead ship"; anyone who later salvages it becomes the owner of it by taking possession of *res nullius*.

Innumerable stories passed from mouth to mouth lend support to these notions. We have, for example, an account of a ship that struck a mine in the first world war and was abandoned by all but two of the crew. Later some fishermen brought the ship to land, but by then the two crew members had disappeared without trace. In a later version—contributed to a newspaper by the master of a ship as recently as 1958—the story has taken on firmer outlines. It features a large Norwegian vessel, it is stated categorically that the two unfortunate seamen were thrown overboard by the salvors, and the event is even given a specific location in the southern reaches of the North Sea.[7] The reasoning behind the whole thing is simple: If the ship is not already "dead", it can be made so; thereupon it becomes a safe prize for the salvors.

Another illuminating tale is recounted by John Fowles in *Shipwreck*, London 1974. During a violent storm in December 1871 S/S *Delaware* ran aground near Bryher in the Scilly Isles. Ten men from Bryher, in the teeth of great danger and by dint of superhuman exertions, managed to row over to an

[5] For further details see Kofoed-Hansen, *Kaptajn Carlsen. Flying Enterprise*, Copenhagen 1952.

[6] Cf. Brækhus in *AfS*, 6, p. 510, note 28.

[7] Cf. Brækhus in *AfS*, 6, p. 506.

> uninhabited islet in order to rescue two seamen who had gone ashore there. They were received not with gratitude but with determined hostility: the two terrified mates, convinced that the real battle for survival was just beginning, had armed themselves with stones.

We have here an example of how ancient legal conceptions can persist hundreds of years after new rules have been introduced and placed on the statute book. Long, long ago—so long ago that the circumstances are partly shrouded in the mists of history—ships in distress, wrecks and wreckage thrown up on a foreign shore were deemed the rightful booty of the coastal population. Those who happened to survive a shipwreck met a grim fate—they were slain or enslaved.

From this barbarous beginning there were slowly developed rules for the protection of life and property at sea.[8] The "right to wrecks" or "foreshore rights" of the coastal population were gradually reduced. The King or the lord of the manor claimed such rights for himself; the right to wrecks became a royal prerogative.[9] Besides, the right was in substance restricted. Limits were imposed in various ways: in bilateral trading agreements provisions of exemption from foreshore rights in certain ports or waters were often included.[1] In the privileges granted to certain towns, for example the Hanseatic towns, merchants from the towns concerned were accorded corresponding protection;[2] gradually the general legislation also followed suit. The power of the Papacy and the Roman Catholic Church also played an important role in these endeavours to protect the life and property of shipwrecked persons[3]—even though the various princes of the church, in their capacity of holders of valuable prerogative rights to wrecks, presumably had conflicting interests.

In the first instance, efforts were made to protect the survivors of a shipwreck and their property. "If a man suffers a shipwreck, and there are people on board who come ashore alive, no one has the right to approach their goods", runs a provision to be found in the Jutland Code of 1241 (III. 63), for example. "Wreckage that comes ashore, and that no one

[8] A comprehensive account of the development is given by Niitemaa, *Das Strandrecht in Nordeuropa im Mittelalter* (*Annales Academiæ Scientarium Fennicæ*, Ser. B, vol. 94), Helsinki 1955.

[9] The prerogative right to wrecks could be transferred to private persons, and was often conferred on the higher clergy and nobility. As an example may be mentioned the prerogative right to wrecks on the Fro Isles in Southern Trøndelag, see Taranger in *TfR* 1920, pp. 88–104, and Skeie in *TfR* 1921, pp. 229–68.

[1] The oldest known case of this type from Northern Europe is according to Niitemaa, *loc. cit.*, p. 27 and pp. 37–8, an agreement concluded in A.D. 991 between the Anglo-Saxon King Ethelred and the Norwegian King Olav Tryggvason. The agreement protects only survivors of the shipwreck and the goods they themselves have salvaged.

[2] As regards the Hanseatic towns and foreshore rights in Norway, see, among others, Niitemaa, *loc. cit.*, pp. 33–4, 38, 78, 168, and 251–3 f.

[3] See, among others, Niitemaa, *loc. cit.*, pp. 91–137.

accompanies or follows after" becomes, on the other hand, the property of the King (III. 61). Corresponding provisions are to be found in the Gulating Code (chap. 145) and in Magnus Lagabøter's Rural Code of 1274 (VIII. 26). The distinction made between cases in which there were some survivors and those in which there were not may in fact have had a rational basis: the owners of the ship and cargo were usually to be found on board, and when they perished in the shipwreck, they no longer had any use for their property. There was no compelling reason to take into account possible heirs in distant countries; as a rule it would be difficult to locate them—perhaps impossible. And in any case the heirs had to be quite prepared to accept the loss of the ship and the cargo—maritime enterprise was at that time a very hazardous business. Certain humanitarian considerations had also probably exerted some influence. It was inhumane to deprive one who had survived the hazards of a shipwreck of the goods that the tempest had allowed him to keep; it was *afflictio afflictis adderetur,* heaping woe upon woe, to cite one of the Church's slogans against foreshore rights. Gradually, however, the rule that the survivors were protected against foreshore rights seems to have developed into a rather formal principle: if anyone on board survived the shipwreck, the ship and its cargo were entirely immune—no matter whether the owners were present or among the survivors or not. And the survivor did not even need to be human; the fact that an animal on board came ashore alive was in many cases sufficient to confer immunity from the right to wreckage.

> In the Statute of Westminster I, 3 Edw. I c. 4 (1275) it is provided thus: "Concerning Wreck of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape alive out of the Ship, that such Ship nor Barge, or any Thing within them, shall not be adjudged Wreck; but the Goods shall be saved and kept ... so that if any sue for those Goods, and can prove that they were his ... within a Year and a Day, they shall be restored to him ...»[4]

The right to wreckage was in many cases a substantial source of income for the King or for the person on whom he had bestowed the franchise, as well as for the coasal population, who certainly had their fair share of the spoils, legally or illegally. The rule that "dead wrecks" were *res nullius* was a very dubious one in this context. It did not pay to rescue the victims of a shipwreck; sometimes, too, the temptation must have been so great that the local population did not wait passively till exhaustion and cold had finished off the unfortunates who had struggled ashore. Here one is largely in the realm of conjecture. We may, for example, speculate a little

[4] Cited here according to the translation in *Statutes at Large*, ed. by T. E. Tomlins, I (1811), p. 79. See also Brækhus in *AfS*, 6, p. 505.

over the reason why the wreck of the *Akerendam* has left no lasting imprint on the folklore of Sunnmøre. Did something happen in connection with the shipwreck that was not to be talked about and that was best forgotten?

> In the court proceedings on January 17, 1726, the district governor asked whether any of the witnesses had seen any living person from the ship, or whether any of the dead persons who had been washed or taken ashore had clothes on. The reply was that "all the persons who have been found have all been naked and dashed to pieces, to which facts they could testify on oath . . .". It is rather astonishing that among what was salvaged there is no mention of any rings or other jewellery or personal possessions, and almost none of clothes.
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> The rule about "dead wrecks" was not only dangerous for the human beings on board the wrecked vessel. Fowles, *loc. cit.*, gives the following account from the Scilly Isles from around the 1850s: Two of the islanders went on board an abandoned ship, and they were seen to throw the ship's dog overboard and to watch while it drowned. When they were later reproved for this, they replied that otherwise the wreck would not have been "dead", "and in his defence one of the men astonishingly quoted the relevant phrase from the original Plantagenet law".

During the later Middle Ages the opinion began to prevail that the proprietary right to the ship and its cargo continued to subsist even though no one survived the shipwreck. The public authorities were to undertake the salvaging in such a case, and whatever was salvaged was to be stored in safe custody. If the owner came forward within "a year and a day", what had been salvaged was to be delivered to him on payment of salvage remuneration.[5] Frederik II's maritime code from 1561 (chap. 73), for example, is quite clear on this point.

Deeply rooted as were the conceptions of the coastal population's right to wreckage, it required more than papal bulls and legal enactments before things were altered in practice. In many places hundreds of years must have passed before the new attitudes finally prevailed. Frederick IV's ordinance relating to wrecks, issued in 1705 (i.e. 20 years before the wreck of the *Akerendam*), bears eloquent witness to this. In the preamble to the ordinance, it is stated that "seafaring folk" who have suffered shipwreck have not always "enjoyed the help and assistance that the law enjoins in such cases", but "have even been subjected to molestation, robbery, and

[5] Even with these limitations the foreshore rights could very well prove rather lucrative; one could, as Holberg says about the inhabitants of Anholt, "lead a Christian life and live off wrecks" (*Peder Paars*, Book 1, Second Poem). Nevertheless it is a matter of some astonishment that the public common prayer in Mecklenburg for "einen gesegneten Strand" was not abolished until 1777 (according to Hübner, *Grundzüge des deutschen Privatrechts*, 2nd ed. Leipzig 1913, p. 382).

theft against the law of God, and Nature, and the King, and furthermore sometimes even murder and manslaughter are committed". In sec. 2 there is repeated the threat, contained in the Code[6] 4-3-2, of the death penalty for anyone who "at night lights any fire, or sets up any signal on the cliffs or anywhere else on the shore to mislead sailors ...". Theft of wreckage to the value of over 50 measures of silver is to be punished by hanging (sec. 10); those who have violently assaulted and killed shipwrecked persons, shall have their limbs crushed and shall be exhibited alive at the stake, and "shall besides have all their goods, land, and property confiscated" (sec. 5), etc. In sec. 21 it was prescribed that the whole of this long and edifying ordinance should be read aloud "annually from the pulpits the next Sunday after Michaelmas and to all courts and assemblies on the Assembly Day immediately before Michaelmas".[7]

As we have seen, traces of the old and primitive legal conceptions still remain, not least in the inherent reluctance of seamen to abandon a ship in distress on the high seas. Yet today all civilized states regard it as axiomatic that the title to the ship and its cargo remains intact even if the crew have been compelled to abandon the vessel on the high seas, or have perished as a result of a shipwreck. Nor does it make any difference if the ship sinks—even if it goes down in such deep water that there seems to be no possibility of salvaging it in the foreseeable future.

The proprietary right to a wreck can have several practical consequences. What first comes to mind is the owner's right if the wreck is salvaged; in this instance we must, however, take into consideration the fact that the owner must then pay salvage remuneration, which may consume a great part of the value of the salvaged assets. An equally important offshoot of the right of ownership is therefore the right to decide whether and, if so, when and by whom the wreck is to be salvaged. In addition, there is the facility to dispose of the wreck where it lies. If the owner receives compensation for a total loss under his hull insurance policy, the hull insurer normally acquires the title to the wreck.[8] Professional salvors often buy up wrecks, not the least of their reasons for doing so being that they can then themselves make the necessary decisions concerning the salvaging. In order to complete the picture it must be mentioned that the proprietary right to a wreck can also have negative aspects. The wreck may block harbours and waterways, or may in some other way be a nuisance to traffic; the owner can then be enjoined to remove it, or to pay the expenses accruing if it is removed by public

[6] Christian V's Danish Code and Norwegian Code of 1682 and 1687, respectively.
[7] Thus in good time before the autumn storms set in (Michaelmas falls on September 29).
[8] See, for example, the Norwegian Marine Insurance Plan 1964, sec. 102.

authorities.[9] There may also be a question of responsibility for oil that leaks out of the wreck as the fuel tanks gradually rust away. In both cases large sums can be involved; the owner of the wreck is, however, in these instances afforded an opportunity to limit his liability.[1]

For better or for worse, then, the private ownership of sunken wrecks is thus a reality. But this does not mean that the owners' or their successors' title is perpetual. It is, for example, conceivable that the owner will expressly renounce his proprietary right. Let us suppose that a steamer that went down 50 years ago is found by amateur divers. The insurance company that has paid out compensation for the total loss of the ship may declare upon inquiry that it will not assert any right to the wreck. Such a renunciation of the right of ownership, a so-called *dereliction,*[2] can moreover be envisaged as a defensive move; the owner may be seeking to avoid a possible liability to remove the wreck.[3] This aspect of the questions I shall leave untouched.[4]

If a wreck is abandoned, it becomes ownerless (*res nullius*); according to Norwegian law anyone can then appropriate it (take possession of it) and thereby become its owner[5]—I ignore for the moment the effects of the Protection of Antiquities Act of 1951. It is therefore important to establish when a dereliction or abandonment shall be said to have taken place.

Traditionally a dereliction consists of two elements: an actual relinquishment of control over (possession of) the object in question, and a determination (intention) to relinquish the right of ownership (*animus derelinquendi*). The tradition goes back to Roman law;[6] it has been of decisive effect in the great civil codes based on Roman law,[7] and it reap-

[9] Cf. the Harbour Administration Act of June 24, 1933, no. 8, sec. 55.

[1] Cf. the Maritime Code of July 20, 1893, no. 1 (as amended by Act 1974 no. 69), chs. 10 and 12, especially secs. 234 and 270.

[2] In English and American maritime law the term "derelict" has been given a rather special meaning, viz. a disabled vessel left by its master and crew (abandoned) *sine spe recuperandi* and *sine animo revertendi,* cf. Kennedy's *Civil Salvage,* 4th ed. London 1958, pp. 387–90, and Norris, *The Law of Salvage,* Mount Kisko 1958, pp. 221 f. An abandonment of this kind will not have any consequences as regards the ownership of the vessel. In the present article the term "dereliction" is used as in civil-law systems, denoting abandonment or relinquishment of the proprietary right in the vessel.

[3] This is quite likely the basis of the "Notice of Abandonment" entered in *Svensk Sjöfarts Tidning* 1965, p. 334.

[4] See in this context 1913 N. Rt. 73, Gjelsvik, *Norsk tingsrett,* 3rd ed. Oslo 1936, p. 429, and Illum, *Dansk tingsret,* 2nd ed. Copenhagen 1966, p. 441.

[5] Cf. Scheel, *Norsk tingsret,* Kristiania 1912, p. 519, Gjelsvik, *loc. cit.,* p. 222, and Brækhus and Hærem, *Norsk tingsrett,* Oslo 1964, p. 622. See also Mr Justice Hiorthøy in 1970 N. Rt. 346 at p. 350. According to some foreign laws the state has in many cases the sole right to appropriate *res nullius;* see as regards Danish law, Fr. Vinding Kruse, *Ejendomsretten,* 3rd ed. Copenhagen 1951, p. 416, and—especially as regards wrecks—the British Merchant Shipping Act, 1894, sec. 523, and the German *Gesetz über Rechte an Schiffen,* 1940, sec. 7 (2).

[6] See, for example, Justinian's *Institutes,* 2-1-47.

[7] See, for example, German Civil Code, sec. 959, and Swiss Civil Code, art. 729.

pears in Scandinavian property-law doctrine.[8] The first element—the actual loss of control—seldom causes any problems. Far more difficult is the process of ascertaining whether the owner really possesses the necessary *animus derelinquendi*. No formal declaration of abandonment, addressed to the general public, to a representative of the public authorities, or to a potential appropriator of the object in question, can be required. Nor can one impose on the potential appropriator a duty to apply to the former owner of the object and to ask whether it has been abandoned; it may be that the owner is unknown, or that it is difficult to get hold of him for other reasons. It is therefore often held that in the absence of surer proof one may be entitled to infer from the surrounding circumstances the existence of an intention to abandon.[9] By surrounding circumstances are primarily meant the nature and situation of the object, how long it can be assumed to have been out of the owner's possession, and similar factors.

> As an example one can refer to a judgment of Romsdal district court in 1972 RG 188: The owner of a cement-mixing machine (a contractor) allowed it to stand for three years on another man's land, where it was moved about several times. The machine was old and out of order. Another contractor, who was interested in getting the area cleared up, removed the engine and dumped the rest of the machine on a rubbish heap. He subsequently delivered the engine to the owner, who had not meant to relinquish his property. The owner's claim for damages for the loss of the rest of the machine was, however, dismissed; he had shown such indifference that the other contractor was entitled to rely on the existence of an intention to abandon the property.
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> From Swedish case law 1931 NJA 521 can be cited. A firm of importers emptied 99 oak barrels containing rotten fruit on a rubbish heap in Malmö, and thereafter left the empty barrels to dry on the spot. O., who some days later appropriated 13 of the barrels, was convicted of theft in the lower courts, but was acquitted in the Supreme Court (by a majority of 5 to 2). It was stated "that according to customary law it was open to anyone to appropriate anything that was deposited on a rubbish heap with the intention of leaving it there". The Court further assumed that O. believed "that the barrels in question had been left on the heap without any intention on the former owner's part to assert any further right to them".

The emphasis has here been shifted from subjective to objective criteria. When the surrounding circumstances—for example, the fact that the objects were left on a rubbish heap—indicate that the objects have been

[8] See, for example, Gjelsvik, *loc. cit.*, pp. 428 f.

[9] Torp, *Dansk Tingsret*, Copenhagen 1892, p. 422, expresses it thus: "To establish dereliction no more can be required than that the owner relinquishes control over the object in such a way and under such circumstances that others may justifiably regard this as a relinquishment of the right of ownership. Whether this really accords with the owner's intention or not cannot be conclusive, since the intention being an internal matter does not allow of objective determination." See also Scheel, *loc. cit.*, p. 526, and Brækhus and Hærem, *loc. cit.*, p. 623.

abandoned, a third party may appropriate them even though the owner can prove that it was certainly not his intention to relinquish any right—he may, for example, have intended to fetch the objects later, but has not found the time to do so. The appropriation must also in this instance be regarded as taking possession of *res nullius,* not as an acquisition based on the doctrine on extinction of the owner's right by acquisition in good faith.

This somewhat objectivized abandonment rule can also be determinative in cases of wreckage. Let us suppose that the remains of an old wooden vessel have been lying on a beach for years and are steadily sinking deeper into the sand, while the owner does nothing to preserve the beams and planks that are still of some use. In such a case it will soon be concluded that they have been abandoned.

The situation is quite different when a ship or a cargo has sunk in deep water. It is conceivable that the wreck lies in such a position that for the time being salvaging is considered impossible or at any rate unprofitable. Perhaps, too, the exact position of the wreck is not known. In this instance one cannot say that the surrounding circumstances indicate that the owner has relinquished his right of ownership. He simply had no choice in the matter.

A case of this type was brought before the Norwegian Supreme Court in 1923, 1924 N.Rt. 170. A Swedish ship, lying in Puddefjord in Bergen, had got its anchor stuck fast in another anchor and chain which lay on the bottom at a depth of 80 fathoms. The Norwegian Salvage Company succeeded in freeing the Swedish ship's anchor and thereupon proceeded to salvage the other anchor. After a good deal of effort they succeeded; the costs amounted to over 27,000 kroner. The anchor, with 135 fathoms of chain, weighing 7 1/2 tons altogether, was sold for 50,000 kroner with the consent of the police. The police advertised the find in accordance with the lost-property regulations, but no one put in a claim. Nor was any information forthcoming in any other way as to which ship the anchor had belonged to, or when and how the anchor came to be left on the bottom of Puddefjord.

The Salvage Company asserted that the anchor and chain must be regarded as having been abandoned, and that the company therefore had a right to the whole of the proceeds of the sale, 50,000 kroner. The police and the county governor, on the other hand, would only sanction a salvage remuneration of 30,000 kroner. In the city court the Salvage Company had its claim upheld by a divided bench. Those responsible for the ship to which the anchor belonged must have known that the anchor had gone to the bottom of Puddefjord, but the ship had presumably left the harbour without any attempt to recover the anchor. It was probable that the captain

had meant to relinquish the proprietary right to the lost anchor. "Nor was it unnatural" that the whole value of the salvaged goods should be awarded to the salvor, in the opinion of the majority. The Supreme Court, on the other hand, reached a contrary conclusion—by a majority of 6 to 1. The majority attached importance to the traditional subjective requirements for an abandonment: the owner must have intended to relinquish his right of ownership; no such intention could be inferred from his behaviour in this case:

> It cannot be assumed that the owner has abandoned these objects, but rather that he has merely lost possession of them and has given up trying to recover them and raise them from the depths of the fjord. On the other hand, it does not appear that there has been revealed in this case any special circumstance which might possibly have given the owner reasonable grounds for deliberately, effectively, and finally relinquishing his proprietary right to objects of such considerable value as are here concerned, for the benefit of potential appropriators.

The decision has been criticized in legal writing,[1] and to most people today it may not appear to be altogether just. One can perhaps see a connection between the verdict and the intensive schooling in Roman law that the older generations of Norwegian lawyers had received—the requirement of a positive intention, *animus,* was to them a prime tenet of their creed. But a great deal has occurred in legal writing and legal practice since then. A prevalent feature has been the tendency to apply objective criteria. In contract law, for example, one no longer asks what the promisor really meant, but how his declaration must be interpreted objectively. In property law, one no longer regards the intention of one party as the sole decisive factor governing the transfer of the right of ownership, and in suits for damages the imputing of liability on the basis of presumed negligence has to a great extent been replaced by entirely objective rules governing liability. The application of objective criteria is especially marked in relation to the field of law that in Anglo-American law is called estoppel by laches.[2] In a number of different situations, rights or claims lapse if the person entitled does not take active steps within a certain time limit; cf., for example, the rules relating to complaints and notification of defects under the Norwegian Sale of Goods Act. Previously rules of this type were given a subjective colouring. The buyer had "tacitly" accepted the seller's delivery by failing to take action. Now it has long since been recognized that estoppel by laches must be objectively established, irrespective of what the buyer has intended or not intended. It has gradually

[1] Gjelsvik, *loc. cit.*, p. 428, note 5.

[2] The basic research on this point was done by Arnholm, *Passivitetsvirkninger,* Oslo 1932.

also become clear that this application of objective criteria to the principle of laches is being accepted to an increasing degree as an argument of legal policy. Greater demands for cooperation and loyalty in contractual relations are being made; this again often leads to a demand for active protection of the other party's interests. And nowadays the wasting of valuable resources is regarded with increasing disapproval. A mere non-use of legal rights can in certain cases lead to loss of those rights even if the person entitled cannot be blamed for his failure to assert them.

Have these modern ideas about laches any application as regards the proprietary right to wrecks and wreckage? In my opinion they certainly have. But in this context it is only laches of very long duration that ought to be considered relevant. All will agree that the owners of ships and cargoes ought to be allowed ample time for salvaging. When a number of years have passed after the shipwreck, all that is worth salvaging will as a rule have been salvaged. If a wreck or a cargo has not been salvaged, the reason usually is that salvaging is considered to be impossible or at any rate unprofitable—there are also cases where the wreck cannot be located. Even in this phase the right of ownership ought to be safeguarded for an ample period—it is, for example, conceivable that the price of scrap iron will rise so high that the salvaging of the wreck will become a profitable business. The last-mentioned consideration will weigh heavily, especially where wrecks purchased by professional salvors are concerned. As the years go by, the owner's interests will, however, further diminish; the wreck will be written off mentally, too. Then decades, perhaps centuries, later salvaging becomes feasible. The vanished wreck is found; the wreck or the cargo that it was previously impossible to salvage can now be raised thanks to new and far more efficient methods. Ought the original owner then to be entitled to impose a veto in a case where an energetic and skilful salvor wishes to attempt a salvage? Our salvage law consistently relies on the principle of encouraging initiative. The rules relating to the assessment and distribution of salvage remuneration, the right to salvage, and security for the salvage remuneration, etc., are all intended to encourage the salvors to exert themselves, so that valuable assets may be preserved or recovered for the common good. This principle ought also to preponderate in relation to the original title to wrecks and shipwrecked goods. Technically this can be achieved by introducing objective criteria into the abandonment rule: the original owner's proprietary right will be considered to have lapsed when it is deemed reasonable after a total evaluation of the time that has expired, the former owner's inactivity, and all the other circumstances, to breach the owner's salvage monopoly, and to award the salvors the full right to whatever is salvaged.

The old doctrine was that mere non-exercise of a property right could never lead to loss of that right, see, for example, Scheel, *loc. cit.* p. 47 note 5, p. 381. This view has long been abandoned, both in legal writing and in court practice. But the courts are still reluctant to accept claims that the right of ownership or of the use of real property has been lost by mere laches, see Brækhus and Hærem, *loc. cit.* p. 47 note 5, pp. 620 f., and Arnholm, *Tre utsnitt,* Oslo 1975, pp. 76 f. Only when in addition to the laches there has been a certain activity (use) by a person who wrongly, but in good faith, regards himself as the owner, can the original owner's right be lost (cf. the Limitations Act of December 9, 1966, no. 1).

One cannot, however, draw any precise parallels between the rules governing real property and the rules applicable to wrecks. Real property provides a solid foundation for stable legal relations; it is durable and is always there where one expects to find it. Ships and cargoes usually have a limited lifetime. And when a ship is wrecked and salvaging is not proceeded with, the assets have been left in a quite extraordinary situation. From a purely factual point of view, the legal right is extremely precarious; the massive protection accorded to the title to real property seems to be misplaced in this context.

I am aware that these views do not find favour with the professional salvors, who to a great extent buy up sunken ships, and who are therefore interested in maintaining their proprietary right and with it the sole right to salvage. They regard the whole thing as a conflict between professional salvors and amateur salvors, and assert that the latter often do more harm than good when they set about old wrecks. The amateur salvors use high explosives in order to detach some of the more valuable parts and they leave the rest of the wreck in such a weakened state that a subsequent complete salvage may be impossible. There is, of course, some truth in this objection. Monopoly is efficient, and freedom can be misuse. But I do not think that the objection holds good. Resourcefulness, initiative, and endurance are also of great importance, and it is precisely these qualities that are encouraged by allowing would-be salvors free access.

The proposed laches rule contains a strong discretionary element. A discussion of the various discretionary factors involved may, however, provide some guidance.

In the first place, there is the expiry of time after the shipwreck. As has been stated above, the original owner's title ought to be upheld for a fairly long period even when the owner has remained quite passive. No definite number of years can be set; in some cases the right should be lost on the ground of laches comparatively soon, in other cases a longer period of time must be required, all according to the relevant circumstances.

The most important factor in this connection is the owner's conduct after the shipwreck. If the owner does not try to salvage the ship and cargo or gives up the salvaging after a first unsuccessful attempt, even

though salvage seems to be possible, not much more is required to constitute a surrender of the right of ownership. This can also be the case when the wreck is in a difficult situation, or is so far from the owner's homeland that it will be practically impossible for him to exercise any effective control over it. The whole situation will in this instance indicate that the owner will never do anything to recover his lost assets. In such cases a loss of his rights because of his failure to take any action should occur relatively soon.

The matter takes on quite a different aspect when the owner is constantly engaged in salvage attempts, as will be the case when he is a professional salvor. The owner may have reasonable grounds for postponing the salvage; if there is a war going on, for example, it can make the work difficult. Cases can also be envisaged in which the owner has full control over the wreck and has postponed the raising of it because it would be unprofitable at the time. Under such circumstances no importance can be attached to failure to act.

The fact that the owner upon inquiry or just generally declares that he does not intend to give up his right of ownership is also one of the factors that ought to be taken into account. But it cannot be determinative.

These views were put to the test before the Norwegian Supreme Court in the case concerning the *U-76,* see 1970 N. Rt. 346 (1970 ND 107). The German submarine *U-76* was put out of action in January 1917 after an encounter with an enemy destroyer and was sunk by its own crew at a depth of 10–11 fathoms off Sørøya, an island off the coast of northern Norway, in the county of Finnmark. Certain attempts to salvage the vessel were made in September of that year and in 1923 without results. The wreck then lay untouched until after the end of the second world war. As is well known, all German property in Norway as at May 9, 1945, was then taken over by the Norwegian Government. Included in the German property were German wrecks along the Norwegian coast, wrecks of warships as well as of merchant ships. These wrecks—known and unknown—together with their cargoes were sold in 1957 en bloc to Høvding Shipbreakers. It was, of course, the wrecks from the last war that the parties primarily had in mind. But the agreement was so generally phrased that it also included wrecks from the first world war if these were still German property in 1945. Høvding, who were aware of *U-76*'s position, made efforts to salvage it in 1962 and 1965, but in both years had to discontinue the work because of adverse weather conditions.

In 1968, however, another firm, North Sea Divers & Co. Ltd., began to work on the wreck—meeting any protests from Høvding with the assertion that the wreck was ownerless. That kindled the dispute. North Sea Divers asserted that the Germans' "proprietary" right to the submarine had

lapsed as a consequence of a long-standing failure to take any action. The German state authorities had made no attempt at salvage, either in the years between the wars or in the period from 1940–45, when the Germans dominated Norway, and when the shortage of metals supplied an extra motive for salvage. The reason was obviously that the *U-76* was sunk in one of the stormiest places on the coast of Finnmark, so that salvaging would present very great problems.

North Sea Divers did not, however, succeed in their arguments. Both Bodø City Court and the majority of the Supreme Court found that the German state owned *U-76* in May 1945 and that consequently Høvding had acquired the title of the vessel in 1957; North Sea Divers' salvage efforts were therefore illegal and rendered the company damages. Great importance was attached to the fact that the German state had quite consistently asserted that it was still the owner of all German warships sunk in the first or the second world war. When a Norwegian salvage firm made an attempt to salvage *U-76* in 1923, the German legation in Oslo lodged an official protest.

In the Supreme Court, Mr Justice *Hiorthøy* dissented. He took the view that a potential appropriator is justified in reckoning that an intention to abandon the property is there if the surrounding circumstances clearly indicate this. The present case was concerned with the wreck of a warship that had entered neutral Norwegian territory in the course of belligerent action. If the vessel had remained afloat, it would have been interned in accordance with the laws of neutrality and would have accrued to the interning state unless the belligerent state had demanded its return after the end of the war. In a corresponding manner a former belligerent state must take steps within a reasonable time to dispose of the wrecks of its warships in neutral territory. In Hiorthøy's own words:

> A formal declaration cannot suffice, at any rate not when, as in this case, it is not followed up by positive measures for many years. It strikes me as objectionable and unreasonable that a foreign power by remaining inactive for many years should be entitled to preserve its property in war material lying on the territory of another state.

As is evident, the idea of inactivity plays an important part in this dissenting judgment, albeit in a rather special guise. But the majority also left the door ajar on this point. The spokesman for the majority, Mr Justice Eckhoff, stated *obiter:*

> It is possible that an owner's inactivity over a long period, taking into account the circumstances, can be a sufficient reason for considering that the proprietary right to a wrecked vessel has been relinquished. If so, this must depend

on a total evaluation of the circumstances after the shipwreck, and a balancing of the owner's interest, on the one hand, against a potential appropriator's interest, on the other. I agree with the city court that inactivity over a certain number of years cannot in itself be conclusive.

As the reader will understand, I am in sympathy with the dissenting judge's views. The fact that the Ministry concerned in Bonn clung to the German property in the sunken submarines is, in my opinion, a slender foundation on which to rest any conclusion. Can one imagine a civil servant ever voluntarily waiving any claim that his department has the least chance of succeeding with?

Nevertheless, a majority is a majority, and we must accept the fact that the Supreme Court does not consider inactivity over a period of 22–28 years to be fatal to the title of the former owner of a sunken ship. The question whether an even longer period of inactivity can lead to loss of rights was not decided. And it was precisely this question that arose when the Runde treasure was found, two years after the decision on *U-76*. In this instance no less than 247 years had elapsed between the shipwreck and the salvaging. After the expiry of so long a period it may often be difficult to discover who has the right to represent the original owner's interests. The original owner may be unknown, or without known successors; it is also conceivable that the ship may have been owned by a company that has long since been liquidated. As regards the *Akerendam,* problems of this nature did not arise; as earlier mentioned, it was clear that the Dutch Government was the universal successor to the ship's owner, the United East India Company. When the Dutch Government claimed on this basis to be the owner of the Runde treasure, while on the part of the finders and the Norwegian Government it was asserted that the original right of ownership had lapsed, all the requirements were present for a clear-cut dispute on matters of principle.

Before going any further into how the dispute was settled, however, let us examine more closely the legal position of the other two parties.

In foreign law the traditional view has been that the title of the owner of a wreck does never lapse through mere inactivity. But there are signs that a new approach is being adopted in several places.

In the USA, for example, Norris, *loc. cit.* p. 47 note 2, pp. 246 f. and 257, is strongly in favour of the traditional view, while Lohrey, 20 *JAG J* (1965), pp. 25–9, finds that there exists "a conflict of authority on the question"; he himself assumes "that where property has been abandoned, either affirmatively by owners or underwriters or where a long period of time has elapsed without any attempt at salvage by the owners, it should be considered as a find and title should vest in the successful salvor who reduces it to possession".

In West Germany, Ewald, 1957 *MDR* 134-7, has asserted that the necessary *Verzichtwille* can be inferred from *einer langen, durch äussere Umstände nicht veranlassten, also völlig freiwilligen Untätigkeit.* German warships from the first world war in extraterritorial waters he considered to be "ownerless" for this reason; for the wrecks from the second world war, on the other hand, too short a period had (then) elapsed. Ewald has been opposed by Reich, 1958 *MDR* 890-2, who seems to be the spokesman for the government in Bonn. Schaps-Abraham, *Das deutsche Seerecht,* vol. 1 (1959), p. 376, refers to both views and declares that the question is "zweifelhaft".

In English law the traditional views seem to prevail. According to Marsden (*The Wreck of the Amsterdam,* p. 20), the title of the Dutch Government was thus recognized to the East Indiaman *Amsterdam,* which was shipwrecked near Hastings in Sussex in 1749, and on which excavation operations were begun in 1969. The East Indiaman *Hollandia,* which was wrecked near the Scilly Isles in 1743 with 129,700 guilders on board, was found in 1971 and a quantity of silver coins were taken up; in this case the salvors had entered into an agreement with the Dutch Government beforehand, whereby the latter was to receive 25 per cent of whatever was salvaged, according to Larn, *op. cit.* p. 39 note 1, pp. 23 f. and 26.

In *Simon* v. *Taylor,* [1975] 2 Lloyd's Rep. 338, the Singapore High Court recognized the Federal German Republic as the owner of the *U-859,* which was torpedoed by a British submarine in 1944 and had been lying on the sea bed in international waters in the Strait of Malacca for nearby 28 years when the salvage operations began.

THE RIGHTS OF THE FINDERS OR SALVORS

In this context, too, I shall temporarily turn a blind eye to the provisions of the Protection of Antiquities Act, 1951, which superimposes a new legal structure on top of the considerably older rules relating to the remuneration of finders and salvors.

If the wreckage must be considered ownerless in accordance with the rules we have just discussed, the finders can appropriate it by taking possession of it; there cannot then, of course, be any question of additional reward. If the title of the former owners is upheld, however, the finders are normally entitled to a recompense for their efforts, cf. the Administration of Wrecks Act, secs. 7.3 and 10.[3]

If their efforts are limited to finding the wreckage and taking care of it, the finders must rest content with a *finder's reward,* together with a reimbursement of the expenses they have incurred. A case of this type

[3] Act relating to the Administration of Wrecks of July 20, 1893, no. 2, as last amended by Act no. 54, 1969.

presents itself when wreckage is washed ashore on a beach near a built-up area and is found and taken care of by the local population. Rules governing the amount of the finder's reward are to be found in the Lost Property Act of 1953:[4] it is to be determined by a free estimate, but "ought usually" not to be fixed at more than 10 per cent of the value of the goods in excess of 500 kroner. The ideology is that the finder should be rewarded for his honesty. The experience of centuries seems to show that the payment of such a gratuity is not only desirable but highly necessary if one is to counteract the misappropriation of shipwrecked goods. Especially when it is a case of money and similar valuables that can be quite easily disposed of, one ought for this reason to be generous when the finder's reward is assessed.

If the discovery or recovery of wreckage requires major efforts on the part of the finders, these efforts may be characterized as salvage and thus entitle the finders to *salvage remuneration,* cf. the Administration of Wrecks Act, sec. 10. The term salvage is primarily applied to the situation where someone rescues a ship and cargo that is in danger, for example, when a ship in distress is towed to safety, or a ship that has run aground is refloated before the storm breaks it up. Wrecks and wreckage at the bottom of the sea are not in danger—in this case the danger materialized long ago, and the wreckage now lies in relative security. The Act, however, also applies the rules on salvage to cases where the ship and the goods have been "lost", and thereby aims precisely at cases where the recovery of lost assets requires a special effort. The location and raising of wrecks that are lying at great depths or of gold or other valuable cargo from such wrecks are typical cases of this kind of salvage.[5]

> As an example one can mention the salvaging of the cargo of gold and silver from the P. & O. liner *Egypt,* which sank after a collision off Ushant in 1921. Three different salvage companies searched for the wreck one after the other, sweeping for months at a time the area where the ship was believed to have gone down. The last company to operate found the wreck in 1930 after two summers' systematic searching over an area of about 130 km². The ship lay at a depth of over 120 metres—and so at a greater depth than ordinary divers could attain. Nevertheless the salvors succeeded in blasting their way through three decks to the consignment of gold and silver, which they raised up in the course of another three years' labour. The value of the salvaged goods was said to be two million pounds sterling. There was a dispute about the right of one of the first two companies to receive salvage remuneration for alleged location of the wreck, *The Egypt* (1932) 44 Ll. L. Rep., p. 21. For this and other

[4] Lost Property Act of May 29, 1953, no. 3.

[5] Cf. the Maritime Code of 1893, sec. 224 I, and Brækhus, *Bergning* (Salvage), Oslo 1968, pp. 18 f.

celebrated cases of the salvage of gold and silver from sunken ships, see *inter alia* Scott, *Seventy Fathoms Deep,* London 1931, Taylor, *Gold from the Sea,* London 1943, Dugan, *Man Explores the Sea,* London 1960, ch. 4, van der Molen, *The Lutine Treasure,* London 1970, and "The recovery of the Chameau treasure" in *Canadian Illustrated,* vol. 1, no. 1 (1973), cf. *Blundon et al.* v. *Storm* (1971), 20 D.L.R. (3d) 413, Supreme Court of Canada.

In recent years the use of metal detectors and other electronic auxiliary devices has made it much easier to locate wrecks on the seabed, see *inter alia* Wilkes, *Nautical Archaeology,* Newton Abbot 1971, pp. 120–8, and Marsden, *The Wreck of the Amsterdam,* ch. 10.

Salvage remuneration fulfils to a certain extent the same purposes as the finder's reward. But salvage remuneration is something more than a gratuity paid to the honest finder. It is also an inducement to exercise skill and show enterprise and a recompense for the risk run by the salvors. By risk one does not mean only the purely physical dangers that the salvors encounter, but also the risk that their exertions will be in vain. Salvors operate on a "no cure–no pay" basis. A salvage expedition may have to search for weeks, at considerable cost, before it manages to locate the wreck in question; and yet more time and money are spent in the efforts to raise the wreck. And perhaps, when the salvors are at last on the verge of success and the wreck emerges momentarily above the surface, a hoisting cable breaks and the wreck disappears again into the depths. Salvage remuneration will therefore normally be greater than a finder's reward, often considerably greater.

In old laws salvage remuneration was in part fixed at definite fractions of the value of the salvaged assets. When ships or goods were salvaged from land, salvage remuneration in accordance with Christian V's Code was to be determined "according to what is appropriate and the value of the good" (4-4-2 i.f.). But a "skipper" who found "any wreck out at sea" was to get a third of its value "for his pains". If the wreck was found "in the open sea out of sight of all land, and there were none present to whom it belonged" the salvor got half the value (4-4-5). The latter rule has certainly contributed much to the notion that an abandoned ship is the booty of the salvors.

Under the law now in force salvage remuneration is always determined by a free estimate. The Act[6] nevertheless enumerates the factors that are to be taken into account; foremost among these are, *inter alia,* the know-how and skill that the salvors have displayed and the danger they have been exposed to. The value of what has been salvaged is, according to the wording of the Act, to take a secondary place. The purpose in so providing

[6] The Maritime Code, sec. 225, cf. Brækhus, *Bergning,* pp. 64–83.

has been to counteract the influence of the rules from the older legislation prescribing salvage renumeration as a fixed percentage of the value involved. In practice, however, the value of what has been salvaged continues to play a decisive role. Salvage remuneration is still discussed in terms of percentages of the values involved, inasmuch as the efforts of the salvors, the degree of danger, and the other relevant circumstances are expressed in percentage rates. As salvage remuneration must normally also cover the salvors' expenses, one is, however, obliged to keep an eye on the absolute figures. This generally means that the percentage rate must be increased when what has been salvaged is only of small value, while conversely the rate is reduced in the case of really considerable amounts.

If the treasure at Runde was still subject to a private right of ownership when it was found, the three divers would, in my opinion, clearly have been entitled to salvage remuneration. Merely to locate a treasure that has been lost and forgotten for 250 years deserves a reward, and the subsequent work of recovering the coins was also an enterprise of salvage-like nature. I shall not try to conjecture what percentage rate a court would have arrived at; I will simply mention a few considerations that ought to be taken into account in this connection.

The discovery of the coins was not the result of a systematic search; it was, one may say, almost a stroke of luck. So far as the locating of the find goes, the salvage remuneration would therefore bear a strong resemblance to a finder's reward. But a finder's reward of this type ought to be generously assessed. The chances of making such finds are very small—they are radically different from the typical finds of wreckage on the beach after a stormy night. In addition, as mentioned above, there is, in the case of finds of money and similar valuables, a special need to counteract the temptation to misappropriate the salvaged goods. I hasten to say that this view has no specific application to the three divers at Runde, who immediately reported their discovery to the police.[7] What I have in mind is the general preventive effect of liberal salvage remuneration.

The work and expenses of raising the treasure and of bringing it to safety should also be recompensed through the salvage remuneration, and on a far more liberal scale than under a regular contract of employment.

The determination of the value of the salvaged goods would have been a perplexing task for the judge—what is involved is not the mere value of the metal, but the full market value of the coins. Altogether the salvage remuneration would have amounted to a considerable sum. But it would be nowhere near the amount the divers would have reaped if they had been acknowledged as owners of the find.

[7] True, a minor irregularity did occur, see Ellefsen, *loc. cit.*, pp. 110–20.

THE STATE'S RIGHT TO WRECKS AND SHIPWRECKED GOODS

The state's prerogative right to wrecks still exists as a right to take over wreckage that has been found or salvaged but is unclaimed by the owners.[8] If the owners are not known, an advertisement must be published inviting them to make themselves known, cf. the Administration of Wrecks Act, sec. 8. If no one has come forward within six months after the find or salvage, the shipwrecked goods are to be sold, normally by public auction. The finders receive one-third of the proceeds of the sale, while the state retains two-thirds, cf. sec. 7 of the Lost Property Act. In cases of salvage "salvage remuneration is substituted for a finder's reward", cf. the Administration of Wrecks Act, sec. 10. In such cases the salvage remuneration ought to be fixed at at least one-third of the value of the salvaged goods.

The state's right to wrecks in accordance with the Administration of Wrecks Act and the Lost Property Act is today of little economic significance. Owners of ships and cargoes are swiftly advised of any shipwrecks that may occur, and they will assert their right to whatever can be salvaged. When it is a case of old wrecks and old wreckage that have been found or salvaged, there will, on the other hand, be a possibility that the title of the former owners has lapsed. Then the rules in the Administration of Wrecks Act and the Lost Property Act do not apply, and the finders or the salvors can appropriate the property by taking possession of it, as mentioned above. Or to put it more correctly: they could formerly have appropriated it. For the time has now come to deal with the latest link in the chain of legal development, namely the rules relating to wrecks contained in the Protection of Antiquities Act, which purports to effect a considerable extension of the state's right.

The Protection of Antiquities Act of June 29, 1951, in its original form applied only to finds from "antiquity or the Middle Ages". Wrecks from the period after the Reformation were not accorded any protection by law. This was, however, altered by an amending Act of 1963, which in a new section (12 a) provided rules relating to "vessels, ships' hulls, and objects pertaining thereto or parts of such objects which are more than one hundred years old". The rules were again amended in 1974, but for the

[8] The state's right is thus dependent on a notice to which no response is made, and the notice can only affect the actual find or salvaged shipwrecked goods. See in greater detail Skeie, in *TfR* 1921, pp. 229–68, especially paragraphs III, IV, and VIII. The state can clearly not be regarded as the owner of all the old wrecks lying on the seabed along the Norwegian coast by virtue of its prerogative right to wrecks.

present I shall ignore these amendments, which were an aftermath of the Runde case.

Of vessels more than 100 years old, etc., the state shall, in accordance with sec. 12 a, "become the owner when it seems clear, having regard to the circumstances, that there is no longer any reasonable hope of finding out who is the owner". According to the wording, the provision applies to cases in which objects that have been found or salvaged are still subject to private ownership but in which it is not possible to find the owner, i.e. the original owner or his successors. But the Act must also apply to cases in which it is obvious that no owner any longer exists; if, for example, it is established that the wreck belonged to an insurance company that was wound up 80 years ago. Sec. 12 a cannot therefore be said to embody any presumption that old wrecks are subject to private ownership, nor does it exclude the possibility that such a right of ownership can lapse through long-lasting inactivity on the owners' part. Questions of estoppel by laches thus continue to be of significance for wrecks that are more than 100 years old, but in this case it is the state, not the finders, who benefit from a possible lapse of title through laches.

The state's right is not, however, unconditional. In accordance with sec. 12 a (3), the rules in ch. 2 of the Protection of Antiquities Act relating to "movable antiquities" are to apply, *mutatis mutandis*. This means, *inter alia*, that the finder is bound to report the find at once to the authority concerned (sec. 8). The state must then redeem the find within six months from the day the report was received (sec. 12). And on redemption the state must pay a "recompense" to the finders. If it is gold or silver that is found, the recompense is to be fixed at the metallic value of the find by weight, with an additional sum of not less than 10 per cent. Besides this, the finders may claim reimbursement of their expenses (sec. 10).

The initiative for the statutory amendment in 1963 came from the Norwegian Maritime Museum and the Keeper of National Antiquities. The purpose was to protect the cultural, historical, and museum interests pertaining to old shipwrecks. The frogman technique had opened up entirely new possibilities for tracing old wrecks; the numerous amateur divers who flocked in, lured by the thought of hidden treasure in the depths, did not, however, always have a very full understanding of the problems of marine archaeology.

The intentions of the statutory amendment were thus of the best. But from a juridico-technical point of view the new rules were badly framed. The main weakness was that shipwrecks were largely included under the statutory rules relating to so-called "movable antiquities", rules which were drafted to cover finds on land of tools, jewellery, weapons, etc., from the

Middle Ages or prehistoric times. These rules are ill suited to finds of ships. As has been submitted by the Attorney General, Bjørn Haug,[9] it is difficult for the state to assume an obligation to redeem before it knows what the find consists of and what economic commitments a redemption will involve the state in. It would therefore have been an advantage if the period of redemption had begun to run only from the time when the nature of the find had been completely clarified. However, this would be contrary to the archaeologists' interest in receiving an immediate notification of the find and in controlling the excavation of it.[1]

Nor is the Protection of Antiquities Act clear as regards its relation to the Administration of Wrecks Act of 1893. Is "recompense" in terms of the former act to take the place of salvage remuneration entirely?[2] Or do the finders have an alternative right to claim salvage remuneration? In my view the latter solution is the correct one.

The rules of the Protection of Antiquities Act relating to wrecks have their parallels in the Danish Act 1963/203 relating to "historic shipwrecks", the Finnish Act 1963/295 relating to "antiquities", ch. 3 on "finds of ships", and the Swedish Act 1942/350 (as amended by the Act 1971/1163) relating to "antiquities", secs. 9a and 9b "concerning shipwrecks". The Danish Act has been commented on by Aagaard-Hansen in *Nordisk Tidskrift* 1966, pp. 217–44.

The Finnish Act (like the Norwegian) protects wrecks that are at least 100 years old, while the Danish and Swedish Acts require that 150 and 100 years, respectively, shall have elapsed from the time of the shipwreck as a condition for protection. The Danish Act is criticized on this point by Aagaard-Hansen, *loc. cit.*, pp. 218–22, who makes the comment that normally it is the ship's age and not the date when it was wrecked that determines its antiquarian value. All three enactments protect objects found in or near the wreck if they can be assumed to be derived from the wreck, including cargo. Under the Danish and the Swedish Acts the requirement is that the cargo must have been lost by shipwreck at least 150 and 100 years ago, respectively. By contrast, under the

[9] *Aftenposten* (a leading Oslo daily newspaper) June 9, 1973 (morning edition).

[1] Haug, *loc. cit.*, assumes that the state's obligation to redeem only applied to objects that had in fact been reported and specified. This would have been a reasonable solution as such. But the Act had a different construction. In accordance with sec. 8 the report was to be made "forthwith"; having regard to the purpose of the Act, this must mean "before excavation is commenced". And it was this "report" that provided the point from which the six months' time limit began to run in accordance with sec. 12.

[2] In accordance with sec. 9 of the Protection of Antiquities Act and sec. 1 (3) of the Lost Property Act "the recompense" is to be divided equally between the finder and the landowner; in accordance with the Administration of Wrecks Act the landowner as such has no claim to any share (but he can claim "moderate compensation" for services rendered, see secs. 1 and 5 of the Act, cf. sec. 11). The private right of ownership in the seabed extends only to the "marbakke" (the point off shore where the seabed suddenly declines), cf. Brækhus and Hærem, *loc. cit.*, pp. 68 f. Haug, *loc. cit.*, regards the state as the owner of the area beyond this point, but nevertheless finds it somewhat obscure whether the state can on this basis claim an owner's share in accordance with sec. 9 of the Protection of Antiquities Act. In my opinion the state's right to the seabed is not a proprietary right of the type envisaged by sec. 9.

> Finnish Act the decisive factor in this respect, too, is whether or not the shipwrecked *ship* is at least 100 years old; this means that cargo that is only a few years old could conceivably be regarded as "antiques".

As regards the Runde find, the Norwegian Government made an offer of redemption in accordance with the rules of the Protection of Antiquities Act. The recompense was to amount to the metallic value of the coins that had been recovered, with an addition of 50 per cent, i.e. about 700,000 kroner altogether.

The finders refused the offer, however, submitting that in their opinion the coins were part of the *Akerendam*'s cargo and thus did not fall within the scope of the rules of the Antiquities Act. The Act, as mentioned above, applied to "vessels, ships' hulls, and objects pertaining thereto . . .". From a purely semantic point of view, the expression "objects pertaining thereto" could probably be stretched to include the cargo, but legally speaking it is more natural to interpret the expression as synonymous with "appurtenances", a well-known term of maritime law that does not include cargo. The legislative history of the Act also clearly indicates that the latter interpretation is the correct one. The cargo was expressly included in the legislative draft put forward by the Keeper of Antiquities, but was later excluded on the proposal of the Ministry of Justice.[3] The only debatable point was whether the *Akerendam*'s treasure chests were cargo or whether they were to be classed as ship's appurtenances, because, for example, they constituted the master's funds for the voyage. Even in this regard the Government did not have much of a case. It is quite plain that the Dutch East India Company habitually sent large sums of money to Batavia for the purpose of financing the purchase of merchandise there; the consignments of money were distributed among the company's many ships in order to spread the risk to some extent.[4]

The Government, however, had one last card to play. Sec. 13 of the Protection of Antiquities Act provides for a prohibition of the export of antiquities: without the Ministry's consent it is prohibited, *inter alia,* to take out of the country objects of artistic or cultural and historical value that are more than 100 years old. A prohibition on export applied to the Runde coins would have hit the finders very hard; the Norwegian market could scarcely absorb so many coins at acceptable prices. In this regard, however, one must be permitted a little query as regards the extent of the state's

[3] See Bill to the Odelsting no. 23 (1962–63), pp. 1 f. The Odelsting is the larger of the two legislative chambers of the Norwegian Parliament.

[4] See, among others, Rønning in *Nord. numismatisk Årsskrift* (Nordic Numismatic Annual), 1973–74, pp. 99–101, Bax & Martin and Stenuit in *Int. J. Naut. Archaeol.* 3 (1974), pp. 88 f. and 236–9, and Marsden, *The Wreck of the Amsterdam,* pp. 40 f., 208 and 211.

interest in the Runde find. From the point of view of cultural history the most interesting aspect of this find, as I understand it, is that it offers an opportunity to study the size and composition of a bullion consignment of this type. The museums would, moreover, be interested in acquiring a reasonable number of the different types of coins. But it cannot serve any purpose to stock the museums with masses of coins that are all of one and the same type. For example, of the total of 6,601 gold coins recovered, no fewer than 6,528 were of the same type: a ducat issued in Utrecht stamped with the year 1724.[5] On the other hand, it is quite evident that the state could have gained a handsome income from the sale of these coins. But does the Protection of Antiquities Act protect a purely fiscal interest of this type?

CONCLUSION. COMPROMISE OVER THE RUNDE TREASURE. NEW LEGISLATION

I have now depicted the respective positions of the three parties in the dispute over the Runde treasure and set out the legal rules that they could invoke. The way now seemed open for a major law suit. The first question a court would have had to solve was the question whether the Dutch title was still valid. If the answer to this should be in the negative, the question of the proprietary right of the Norwegian Government in terms of the Protection of Antiquities Act had to be decided. And if either the Dutch or the Norwegian Government succeeded in its claim, the recompense for the three divers would have to be determined. In this event, which rules would be conclusive—the rules under the Protection of Antiquities Act or the salvage rules? The assessment of salvage remuneration would have presented a number of problems if it had had to be made. Maritime lawyers looked forward to the establishment of an important and interesting precedent.

Then came the anti-climax: the whole dispute ended in a compromise, in April 1973, without the adoption of any definite attitude to any of the questions of principle. The coins that the three divers had recovered in 1972 were divided up, 10 per cent of them going to the Dutch Government, 15 per cent to the Norwegian Government, and 75 per cent to the finders. The Norwegian Government and the finders were each to have 50 per cent of whatever the projected archaeological excavation of the find in the summer of 1973 might yield.[6]

[5] Cf. Rønning in *Sjøfartshistorisk Årbok* (Yearbook of Maritime History) 1973, pp. 126–8.

[6] This portion of the treasure was found to amount to 626 gold coins and 15,996 silver coins, see Rønning in *Sjøfartshistorisk Årbok* 1973, p. 128.

When one considers all the costs and vexations attendant upon and all the time required for a major law suit, it is easy to understand why the finders accepted a compromise. Nevertheless, they did not do badly out of it. The figure of 75 per cent shows that their claim to be recognized as owners of the treasure was a strong one; any salvage remuneration that they might have received would, in my opinion, have amounted to far less.

The Runde affair had an aftermath in the shape of new legislation, for sec. 12a of the Protection of Antiquities Act was amended—and we may very well say stiffened—by an amending Act in 1974.[7]

"Cargo and other material that has been carried on board" in the ships now also become state property if there is no prospect of finding the original owner, and the articles in question are more than 100 years old (it is thus not sufficient that the articles shall have been recovered from a ship that is more than 100 years old). This amendment will probably be accepted as reasonable by most people as regards cargo that can be assumed to have some cultural and historical value. But is there any reason why the state should become the owner of such things as cargoes of coal or bricks in ships that were wrecked, say, around 1870? Such cargoes may very well have an economic value, but the state's purely fiscal interests ought not to be protected in terms of any Act to preserve cultural values.[8] To limit the state's right in such respects will no doubt present certain problems from the point of view of legal drafting. But the difficulties are not insurmountable.

The finders' obligation to report the find "at once to the authority concerned" has been maintained. But the state no longer has any obligation to redeem the find. Nor does the state need to make any decision as regards protection; all wrecks and all cargo, etc., that are more than 100 years old, are automatically protected. Without "leave from the authority concerned", neither the owner nor the finder of shipwrecked goods may dig them up, examine them, raise them up, or initiate other measures for safeguarding them or preserving them. If this provision is followed literally, the finders will be completely barred. If an amateur diver finds on the seabed, in a forest of seaweed, some coins that are more than 100 years old, he has, strictly speaking, no right to touch them; according to the law he must first surface and report to the "authority concerned". (We can only hope that he will find the coins again when he has received "leave to move them"!) The fact that the protection provisions are also to be enforced against the owners of the ship or cargo can also lead to some rather

[7] Act. no. 41 of June 14, 1974.
[8] Cf. Aagaard-Hansen in *Nordisk Tidskrift* 1966, pp. 224 f.

grotesque results.[9] If a freighter that is 100 years old springs a leak and sinks on a voyage along the coasts, the owner will have to apply to the Ministry of the Environment for permission to salvage the vessel! The fact that the new protection provisions are also to apply to finds made before the Act came into force is of a piece with the rest of the Act.

The new protection rules are clearly most effective, and they will save the administrative authorities a great deal of trouble. But it should be possible to arrive at rules that are less absolute yet still afford in the same degree the necessary protection to cultural and historical values. One could, for example, impose an automatic protection subject to a time limit, but authorize an extension of the protection in cases in which the museum authorities declared a need for it.

Not much has been left of the finders' right to a recompense: "The Ministry may give the finder an appropriate reward if it finds there is reason for doing so." Finders of wrecks and wreckage are not, like finders of buried goods on land, guaranteed a minimum recompense equal to the metallic value of the find. Unlike finders of ordinary lost property on land, they do not even have a legal right to a finder's reward. The Ministry may go so far as to refuse to give an "appropriate finder's reward" "if it finds there is reason for doing so". This formula has no doubt been adopted deliberately; the intention behind it has almost certainly been to do away with any testing of a Ministerial decision in the courts.

The official reasons given for the new rules are very brief and they quite one-sidedly express the museums' point of view. The distaste for "hunting for a possible economic gain" is evident, and no mention at all is made of the positive aspects of the old and well-tried system of finder's rewards. The experience of centuries shows that the danger of misappropriation of wreckage is very great. The certainty that the honest finder will get a finder's reward or salvage remuneration on a satisfactory scale can to a considerable extent counteract this danger. Has this been forgotten? Or is there some belief that in this particular context human nature really has "advanced apace" along the path of virtue? The official reasons provide no justification for so clearly differentiating the rules relating to a finder's reward for a nautical find from the corresponding rules relating to finds of buried goods. Nor has the interrelation with the rules governing salvage

[9] As has been pointed out by the Ministry of Justice, in Bill to the Odelsting no. 40 (1973–74), p. 3, art. 105 of the Constitution imposes a limit here: the authorities cannot without payment of compensation interfere with the find in such a way that the owner is permanently deprived of control.

remuneration been clarified.[1] On the other hand, there are repeated assurances that relations between amateur divers and the museum authorities are excellent and will continue to be so!

I do not doubt that the museum executives, who are the moving spirit behind the new rules, are ardent for their cause and therefore inspired by the best of motives. We may also hope that they will enforce the new rules with sound judgment.

> In an interview in *Norges Handels- og Sjøfartstidende* of November 12, 1974, Svein Molaug, the director of the Norwegian Maritime Museum, emphasizes that the new rules must be applied with discretion: "When, for example, a find of wreckage uncovers dozens of clay pipes of which the museums can absorb only a limited number, I find it quite natural that some of the pipes should accrue to the finders". He adds, however, that the decision rests with the Ministry. Molaug's line was followed in the settlement in connection with the find of the Fredensborg, a Danish "slave ship" that was wrecked in the vicinity of Tromøya off the south-east coast of Norway in 1768. Of the 32 elephant and hippopotamus tusks that were recovered, the finders were allowed to keep half. One wonders, however, how things will go in the event of a new find of coins of the dimensions of the Runde find. Will the Ministry decide that there is "reason to" give the finders a significant recompense? "Hunting for a possible economic gain" may quite likely prove a temptation to the state, too.
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> The authorities' ability to apply discretion and common sense has also been shown up in a rather peculiar light in the so-called bottle affair. In 1973 some divers found the wreck of an old steamship (probably the *Olivia* of Danzig, wrecked in 1869) at a depth of about 50 metres off Mandal. The general cargo included, *inter alia,* a consignment of between 1,500 and 2,000 wine bottles. The divers offered the Norwegian museums 20 bottles without demanding recompense and sought permission to export the remainder to England, where there is a market for old bottles. After a delay of 1½ years the Ministry gave permission for the export of 100 bottles! What can be the motive for forbidding the export of the rest of the consignment, which as far as one can judge is the divers' own property (the amending Act of 1974 was not applicable in this case)? Does the state wish to take over the trade in old bottles?

The rules relating to wrecks and shipwrecked goods play a modest role on a wider stage. However, the new rules from 1974 invite criticism from the point of view of general legal policy. It is difficult to draft administrative statutes imposing restraints. The persons subjected to the restraints seek diligently for loopholes in the encircling wall erected by the authorities. Any such loopholes are in due course blocked up by a new turn

[1] The Danish Act relating to historical shipwrecks, 1963, sec. 3, has an express provision to the effect that salvage remuneration cannot be claimed. For a critique of this see Aagaard-Hansen, *loc. cit.*, pp. 231 f.

of the legislative machinery: the final result is a law totally restrictive in its application. Citizens may not move without first obtaining "leave" from the "authority concerned"; they have no rights other than those "the authorities" allow them as a matter of grace.[2] Such laws are easily drafted and quite effective from the state's point of view. But justice and legal safeguards are a long way down on the priority list.

[2] Cf. Frihagen, *Lærebok i forvaltningsrett* I, 1972, p. 86, regarding the "everything that is not permitted is prohibited" line in modern administrative law.