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Does Finders-Keepers Bring Piracy to New Depths?

For over 200 years, \$500 million in gold and silver cargo sat undisturbed on a seabed off the coast of Portugal. Then, in May of 2007, Florida-based Odyssey Marine Exploration announced the discovery of a vast treasure at an undisclosed location it called "the Black Swan." Within weeks, Spanish officials identified the Swan as the Spanish colonial-era galleon "Nuestra Señora de las Mercedes," declared her treasure to be the rightful property of the Spanish people, and demanded that Odyssey reveal its secret location. Now, two centuries after British cannon fire left the Mercedes "breaking like an egg, dumping her yolk into the deep," the Spanish warship has found herself at the center of another battle—exposing the fragile relationship between maritime law and cultural heritage protections.

The Spanish government argued that the ship and her contents were the "inalienable historical heritage and patrimony of Spain." Spanish newspapers labeled Odyssey Marine "modern-day pirates." In 2007, Spanish authorities even barricaded one of Odyssey's salvage vessels in port and confiscated its computer equipment and maps. Yet, Odyssey Marine may have held the stronger legal claim to the Mercedes and her treasure. In addressing this issue and granting the Mercedes her final repose, the court needed to determine whether the law of salvage or the law of finds applied to historical and culturally significant wrecks.

As explained by the Fourth Circuit, the law of salvage and the law of finds promote different actions and are designed for different purposes. R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521, 31 (4th Cir. 2006). The law of salvage is designed to present potential salvors with incentives to render voluntary aid to people and property distressed at sea. *See, id.* Under the doctrine, salvors are granted a maritime lien but the true owner is not divested of the property. *See, id.* Thus, under the law of salvage, Odyssey Marine would have been entitled to a significant reward as salvor-in-possession of the Mercedes, while the Spanish government would have retained ultimate legal title.

In contrast, the law of finds (the finders-keepers rule) grants the finder absolute legal title to a long-lost or abandoned shipwreck. *Id.* at 532. Courts have traditionally disfavored this doctrine, presuming that title remains with the true owner when property is lost at sea (unless the items are "recovered from ancient shipwrecks and no owner appears in court to claim them"). *Id.* Courts have been reluctant to freely apply the law of finds for fear that "individuals who come upon a distressed ship on the high seas would be encouraged to refrain from attempting to save it and to entertain the idea of taking the valuable cargo for himself as a finder." *Id.* at 533. The Fourth

Circuit even described a finders-keepers policy as "but a short step from active piracy and pillaging." *Id.*

Were the court to apply the law of finds and hold in favor of Odyssey, the company would take absolute title to the \$500 million in sunken treasure while the Spanish government would get the short end of the plank. Yet, even with absolute title, Spanish authorities could still frustrate Odyssey's claims to the treasure. Unless Odyssey's ships were to set sail back to America with the wreck and its entire \$500 million plunder in tow, the company would only be able to ask U.S. courts to exercise constructive *in rem* jurisdiction. A ruling under constructive *in rem* jurisdiction is essentially a decree, and only enforceable if recognized by other nations. As a result, foreign nations are unlikely to accept an unfavorable constructive *in rem* decision. Since the law governing cultural heritage and historical wrecks remains unsettled, it is highly unlikely that Spanish authorities would accept a constructive *in rem* ruling in favor of Odyssey.

Despite the Fourth Circuit's strong condemnation of such a policy, finders-keepers may be more applicable in the current case and may advance some redeeming policy implications. The traditional definition of "abandoned" vessels are those which have been left for a long time and whose owner has not attempted to reclaim it or begin salvage operations. While Spain may point to its oceanic exploration program as evidence of "attempts to reclaim," the Mercedes was lost for over 200 years and could reasonably be considered to be abandoned property. Additionally, Odyssey might advance the policy argument that private citizens are less likely to search for treasure if they are not entitled to legal ownership thereof. With decreased private exploration, there would be less likelihood of discovering historical or cultural items.

On the other hand, rampant exploration can cause serious harm to the oceanic environment and valuable artifacts. For example, in United States v. Fisher, a treasure-hunting company was found to have created over 600 holes, some as large as 30 feet across, in the Florida Keys National Marine Sanctuary. Although the explorations had uncovered over 200 artifacts, the Eleventh Circuit found the company liable for destroying seagrass and historic sanctuary reserves. Overzealous exploration can also lead to destruction of valuable art or antiquities through improper handling, as has recently become the case with the South China Sea's *dao bao zhe* or "loot treasure people," gangs of ex-fishermen who now search for valuable porcelain and sell them in Beijing's many antique markets.

Ultimately, while the techniques and technology required for major treasure salvage are uniquely modern, the laws on which such cases rely are antiquated, difficult to apply, and not guided by established custom or international decree. From the Florida Keys to the South China Sea, modern technology has allowed a new wave of treasure-hunters to explore the deep. While such explorations may embolden arts and antiquities markets across the globe, their legal status remains murky.

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