

# Wrecks and Wreckage in Swedish Waters

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## 1 Introduction

Diving for wrecks and wreckage has become a widespread hobby to amateurs and correspondingly a growing concern to those interested in the preservation of such objects. Swedish legislation has long protected vessels thought to be wrecked and foundered a hundred and more years ago,<sup>1</sup> but younger wrecks are not so protected and are said to be much exposed to looting. Diving at the Estonia wreck, which Sweden and other countries concerned with the sinking have sought to protect, has brought these questions to the fore.

The Law of the Sea Convention (UNCLOS) contains provisions on the right of nations to control wrecks in waters of varying international status. Mainly, national jurisdiction is limited to territorial waters<sup>2</sup> and a contiguous zone, if declared.<sup>3</sup> In other waters, national jurisdiction may be effective in relation to the State's own citizens and may be extended by agreements with other States.<sup>4</sup>

However, the USA considers itself to have jurisdiction over its own wrecks on international waters and aspires to wield such jurisdiction on foreign waters as well. Unless otherwise declared by Congress, the Federal Government claims to remain owner of all US and Confederacy naval and Government-owned vessels wrecked on international and even foreign waters<sup>5</sup> and would strenuously oppose any claim by a coastal nation to the exercise of any rights over such a wreck.<sup>6</sup>

Generally, rights in territorial waters are subject to national jurisdiction and determined by the coastal State itself. National solutions on the right to objects in water vary depending on the property, natural resources being generally

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<sup>1</sup> Act on Cultural Heritage etc (Kulturminneslagen, Cultural Heritage Act, 1988:950). Internationally, a rather similar UNESCO Convention on the Protection of the Underwater Cultural Heritage was adopted in 2001.

<sup>2</sup> Article 2 grants sovereignty of the coastal State to its territorial waters including the territorial sea, while on the Continental Shelf, art. 77 and Economic Zone, art. 56, the Coastal State's control is basically limited to natural resources, which excludes national pretensions to general control over wrecks in that area.

<sup>3</sup> For the contiguous zone, see articles 33 and 303 (2). The US has declared such a zone citing the protection of the cultural heritage as one reason, Presidential Proclamation 7219 Aug 2 1999, 64 Fed.Reg. 78,701 (Sept. 8 1999). Sweden has not declared a contiguous zone.

<sup>4</sup> Thus for the wreck of the Estonia, agreement to protect the wreck was reached with Denmark, Estonia, Finland and some other countries, which did not prevent Germans and others from legally diving upon the wreck.

<sup>5</sup> Robert S. Neyland, *Sovereign Immunity and the Management of US Naval Shipwrecks*, available on "www.history.navy.mil/branches/org12-7h". For international waters, this is rather dubiously supported by reference to UNCLOS articles 95 and 96 on immunity of Government ships. The Salvage Convention does not apply to warships .. entitled at the time of salvage operations to sovereign immunity under generally recognized principles of international law, see the Convention's article 4.

<sup>6</sup> The wreck of the infamous privateer *Alabama* sunk in French waters was finally raised by the US after agreement with the French Government, Dudley, *Submerged Cultural Resources in Peril*, 1995, cited from Neyland, *cit.* The US has since entered into agreements with France, Germany, Japan, USSR, UK and Northern Ireland for the recognition of such rights, Neyland, *cit.*

reserved for the State, with a power of ceding exploitation rights to the finder or other aspiring developer.<sup>7</sup>

Lost property has often been governed by other rules. In olden times it was open to any one to appropriate floating, sunken and land-driven property abandoned by its owner. Today it is generally recognised that the owner of an object retains his title after losing possession. But the principle is applied variously in different countries, and the rules are seldom clear. I shall content myself with viewing the question from the aspect of Swedish law, with some glimpses of other systems. I shall also limit myself to wrecks of vessels and sunken goods from vessels, although similar rules might be applicable for some other property.

My main concern is the ownership of wrecks and wreckage, but some bearings are needed initially to establish the scope of the question. We shall first consider what is intended by a wreck and then distinguish some legal figures used in connection with loss of control of maritime property, mainly vessels.

## 2 What is a Wreck?

According to the classic Swedish encyclopaedia,<sup>8</sup> a wreck is “a vessel that is or has become so damaged or leaking that there is none or little prospect of its salvation, as well as floating parts of a vessel or its rigging”. In Anglo-Saxon law a wreck is said to be “a unit not capable of navigation”, and not even a sunken vessel need necessarily be counted as a wreck if it can be salvaged to be navigated again.

In the Particular Average Statement reported in ND<sup>9</sup> 1990 p. 8 the Average Adjuster discusses whether the Swedish Ro/Ro vessel *Vinca Gorthon* was a wreck when she had sunk on 25 metres’ depth off the Dutch coast and probably been broken asunder. In general parlance she would certainly be regarded as a wreck, said the Adjuster, although he would not classify her as such as long as there existed a possibility of salvaging her.

A French Decree of December 1961 lists five categories of objects relevant to wreckage considerations. They are (1) floating objects or non-navigable vessels, (2) non-navigable abandoned aircraft, (3) appurtenances and remains of ships and aircraft, (4) cargo thrown or fallen into the sea (jetsam or flotsam), and (5) lost or abandoned objects. While this may be a laudable exercise of classification, it is not important for Swedish law purposes.

An obviously vital criterion of wreckage is that the object is destroyed as a vessel, not merely abandoned. The Swedish Maritime Code regards a vessel as a means of transport equipped to be steered and having a hull supported in the water by enclosed air. If either of these qualities is permanently lost in a casualty there is reason to regard the structure as a wreck in a maritime sense. The transition has consequences that will be considered later.

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<sup>7</sup> Thus for Sweden, according to Act (1966:314) on the Continental Shelf and Act (1992:1140) on Sweden’s Economic Zone.

<sup>8</sup> *Nordisk Familjebok*, Vol 32, Stockholm 1921 (the “Owl” edition).

<sup>9</sup> *Nordisk Domesamling i Sjøfartsanliggender*, Oslo, current.

### 3 Incidental Consequences

#### 3.1 *Right of Salvage*

The Maritime Code in chapter 16 contains rules of salvage based on an international Convention from 1989. Traditionally, the rules have always concerned vessels and their cargoes and appurtenances if the property has been in danger, but the new Convention widens the notion to comprise also other property in danger in waters. In addition, Nordic salvage rules have been widened to include sunken objects, thus mainly sunken wrecks, the risk to which is not the kind of danger intended to be covered by the Salvage Convention. Such a wider notion of salvage may occur in other systems, but to the author's knowledge it is then based on other sources than the Salvage Convention.<sup>10</sup> Briefly, the Swedish rules provide a right for the finder of such property to salvage it and thereby to earn a generous remuneration. If the object is a *vessel in distress*, it may in general be salvaged unless the master or owner<sup>11</sup> forbids this with good reason. If there is no master on board the distressed vessel, it may be salvaged without question. If the vessel is *not* in immediate danger, it may however be otherwise.

In the Swedish Supreme Court case NJA<sup>12</sup> 1978 p. 157 ND 1978, p. 103 (*Lohklint*) some persons had taken cordage and a lifeboat from a stranded vessel with the intention of salvaging the property. Upon being told to desist, they had done so. They were nevertheless sentenced for unlawful interference on the ground that there had been no marked risk situation. The Supreme Court said that an intending salvor must consider whether there is time to ask the owner "without risk of appreciable danger" to the vessel.

The decision may be compared with the first instance<sup>13</sup> decision of ND 1966 p. 346 (*lighter of M/V Gulfswede*). Röda Bolaget, a professional contracting salvor, had left a grounded lighter overnight, whereupon some fishermen pulled her off the morning after, against the salvor's prohibition. The fishermen were acquitted of liability for unlawful interference.

The Supreme Court judgement in the former case seems to indicate that if the vessel or wreck lies *safely*, the intending salvor must ask the owner if he can be reached and appears to have left the vessel only temporarily. The Supreme Court clarified that the salvor must balance the need to search for the owner against possible risks to the vessel.

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<sup>10</sup> Thus in the US such a right is well recognised by Admiralty law, but it is based on national admiralty law, *The Blackwall*, (1869) 77 US 1, cf. *Treasure Salvors Inc. v. ... The Atocha* (5 CA 1978) 569 F.2d 330, where the court expressly states the typical wreck risk to be a relevant marine peril. Based on old cases, *The Catherine* (1826), *The Jubilee* (1826), *The Cadiz/Boyne* (1876), the British Merchant Shipping Act section 234 now provides for salvage directed by the Secretary of State. In France a percentage of the salvaged value is payable for the raising of a wreck, Decree 26 December 1961 (D. 61-1547, D 1962-41), article 17.

<sup>11</sup> The right of the owner or operator to forbid salvage is considered by Brækhus in *Tidskrift for Retsvidenskap* (TfR, Oslo) 1975 p. 513.

<sup>12</sup> *Nytt Juridiskt Arkiv*, being the official reporter of Swedish Supreme Court decisions.

<sup>13</sup> Hising, Sävédals & Kungälv District Court.

If sunken, stranded or drifting property appears to be *abandoned*, it seems to follow from the Sea Finds Act (1938:163) that salvage is always permissible, but for property lying safely on a shore or aground, a contact with a known owner it may be necessary to establish that the property is really abandoned. Thus if a person finds a vessel belonging to a known shipping company in such a position, the finder will do well to consider whether the owners might have left the vessel not permanently but only temporarily. On the other hand, the finder does not need to make any special investigations or issue advertisements to find the owner. The law does provide for advertising, but only at a later stage, after the property has been brought to safety, and then with a view to protecting a title claim.<sup>14</sup>

That a floating vessel is “abandoned” in this sense suggests that it is left drifting but not necessarily that ownership is given up. For smaller vessels – mainly pleasure craft – the police consider them not abandoned if they are tied up or anchored, even though they may be assumed to be stolen.<sup>15</sup> The consequences of this practice will be considered later.

The finder of a wreck may need to protect his salvage right against others aspiring to raise it. Such a protection is not achieved by merely marking the find by buoys or in some similar manner, but it should be shown that preparations for raising the wreck are actually in progress.<sup>16</sup> Even so, there often arise conflicts concerning a finder’s right to exploit a valuable wreck.<sup>17</sup> In Sweden, there exists a procedure for a prospective salvor to secure his alleged salvage right by permit from the County Administration according to the Act (1984: 983) on Exclusive Right to Salvage. For wrecks, the Administration will normally check the “abandonment” with the National Maritime Museum, which keeps a comprehensive register of wrecks and missing vessels. The Act’s protection is somewhat toothless, as the Administrations have not been given authority to set a fine, but it should be possible to demand a court injunction according to chapter 15 section 3 of the Procedural Code.

Salvage matters are regulated in the Maritime Code and fall under the jurisdiction of the Maritime Courts.<sup>18</sup> Though exclusive salvage rights are granted by the County Administrations they are subject to maritime jurisdiction,

<sup>14</sup> A duty to declare the find is provided in the much more detailed provisions in the French Decree of 1961, whose article 2 obliges the finder to report the finding in a particular manner within 48 hours.

<sup>15</sup> The practice is expressly set out in the National Police Board’s General Advice on Marine Finds (The Board’s Statutes RPSFS 2003:3), under 2 paragraph 4.

<sup>16</sup> Brækhus, *Retten til å berge*, Arkiv for Sjøret (Oslo) Vol. 6 pages 495 ff, 527 f citing the English case *The Egypt*.

<sup>17</sup> The vessel Jönköping, sunk in the first world war with a cargo of cognac and champagne, was found off Finnish waters by a Swedish diver, whose right to the find was contested by a Finnish competitor. A settlement was reached and after challenge confirmed by the Gävle District Court (judgement 7 Nov. 2003 matter DT 897/9, now on appeal). As will be presented, the case raises matters of the Maritime Code and ought probably to have been remanded to the Stockholm Maritime Court, though the decision was not appealed on that ground.

<sup>18</sup> Maritime Code Chapter 21 section 1. In the Gävle District Court case of DT 897/9 (Jönköping), considered later, the validity and possible adjustment of an settlement between competing salvors was considered by the District Court, which appears improper.

for example if a wreck owner should dispute the salvor's right to interfere with his property.<sup>19</sup> Matters of finds, again, fall under the jurisdiction of the ordinary courts. However, if the question of ownership is incidental to a salvage dispute, such as disputed salvage right, the matter should fall wholly under maritime jurisdiction. Once a vessel has been retrieved, on the other hand, and the salvor disputes the right of the alleged owner, the case is for the ordinary courts.

### 3.2 *Condemnation*

The Maritime Code chapter 1 section 10 provides for a particular declaration of lost value when a vessel is not capable of or worth being restored. This is the so-called condemnation declaration according to MC chapter 18 section 22, based on what has been a regular maritime procedure in many countries. The condemnation may have legal effects in several respects, *inter alia* for insurance and General Average purposes, but the effect under the Maritime Code is only that the vessel may be sold by executive sale. If it remains unsold, the condemnation has no particular consequences, and the ownership is not affected.

Previously, however, condemnation used to be an insured event releasing payment as for constructive total loss.<sup>20</sup> Since under present Swedish hull insurance conditions condemnation is possible as soon as the vessel's value has decreased to 80% of the insurance value (with certain correctives), the condemnation as such no longer has any importance for establishing such an insured event.

### 3.3 *Legal Abandonment*

According to earlier rules, a shipowner could "abandon" his vessel to his maritime creditors and thereby relieve himself of any maritime debts. Such abandonment implied the renunciation of the vessel to the creditors against their limiting their claims to what might be realised by an executive sale of the vessel. The proceeding was however directed only to the creditors, and if – as would normally be the case – they would content themselves with payment of the ship's value, the debtor remained owner. Today abandonment can occur, particularly, in marine insurance, where an insurer having covered a total loss may desist from taking over the wreck (see *Vinca Gorthon*, below).

Such legal abandonment does not leave the wreck without an owner. The wreck is abandoned *to* some one – by the owner to his creditors or by the insurer to the assured shipowner. The term is used differently in the USA, where abandonment indicates an "act of leaving or deserting ... property by those in charge of it without hope on their part of recovering it and without the intention of returning to it."<sup>21</sup> To distinguish this from the popular sense of merely leaving

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<sup>19</sup> MC Chapter 16 section 10 paragraph 2.

<sup>20</sup> Examples, see Pineus, *Ship's Value*, Gothenburg 1975, pp. 47, 76.

<sup>21</sup> Norris, in Benedict on Admiralty, *The Law of Salvage*, 7<sup>th</sup> ed. 1991, § 134, at 9–10.

a vessel drifting or without custody, as used previously in this article, I shall indicate specifically when the abandonment concerns title or ownership.

### 3.4 *Deregistration*

The Maritime Code provides in chapter 2 section 6 that a registered ship must be removed from the register if it has disappeared or been abandoned at sea and not been heard of for three months. This does not necessarily mean that the vessel is a wreck. It may, for example, have been taken by pirates and been given a new identity, as has happened in some notable cases in recent times.

The section also provides for removal from the register of a vessel that has been “wrecked, broken up or otherwise destroyed”. “Wrecked” must mean irrevocably so; if the owner intends to raise her within the given term, he need not have her deregistered. Removal from the register does not as such involve any loss of ownership but only loss of the ship’s quality of a registered ship. This has important effects for the conveyance of the vessel to others. In principle the wreck is a chattel for which protection against seller’s creditors and competing buyers is achieved by taking possession of the object, which might of course be hard for a wreck. However, it is generally considered that actual transfer of possession is not needed for third party protection to property that is placed in a neutral location accessible to any one.<sup>22</sup>

### 3.5 *Dereliction*

In presentations of rules of ownership to wrecks it is often said that ownership is lost by a declaration of dereliction, that is, an express declaration by the owner that he abandons the vessel or wreck. This is expressly recognised in the US as a ground for title abandonment,<sup>23</sup> but it seems hard to apply in Swedish law. With us, ownership is seen as a relation between the owner and all others who might have a claim upon the property, and no form seems to have been devised for communicating with such an extensive public. On the other hand, an owner might conceivably relinquish property by declaration to certain named persons, with effect in relation to them.

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<sup>22</sup> Undén, *Svensk Sakrätt I*, 1961, p. 37, Beckman, *Rättspraxis om besittning*, Festskrift till Håkan Nial, Stockholm 1966, pp. 73, 7. Such assertion was left undisputed concerning the finding of the *Nedjan* wreck, below.

<sup>23</sup> Schoenbaum, *Admiralty and Maritime Law* (1994) § 14–7 at 800, *Columbus-America Discovery*, 974 F.2d at pp. 460–61, recognised in *Brady v. SS African Queen* (EDVa 1960) 179 F.Supp. 321.

## 4 Ownership

### 4.1 *A Bundle of Legal Effects*

A widespread opinion regards ownership of an object as a natural link between the object and the owner, which in the absence of a voluntary transfer must remain through any vicissitudes of life, or through inheritance upon the original owner's death.<sup>24</sup> Swedish law takes a pragmatic attitude to ownership, which it regards as a bundle of rights and partly duties whose relation and strength depend on the accumulation of constituent factors.

Some examples of incidents of ownership recognised in Swedish law indicate a composite notion. It involves or may involve

- right of disposal, legally and practically;
- right of possession, and restitution if unlawfully interfered with;
- representation for the vessel, in lawsuits and other claims;
- penal sanctions against one infringing the owner's rights;
- owner liability, tortious, criminal and sometimes fiscal.

### 4.2 *Owner Liability*

For wrecks, owner liability has been the most salient question, and discussions of ownership have mostly concerned owners wanting to rid themselves of wrecks in order to escape liability. Such liability will include a *residual vessel owner liability* and *liability as wreckowner*.

*Vessel owner liability* may be based on particular provisions, such as the strict liability for oil pollution. This concerns pollution from vessels but does not cease because the oil leaks out after the ship has become wrecked.<sup>25</sup> Swedish law places liabilities arising from many other types of event upon the "operator" (redare), who may be but is not necessarily the owner of the vessel. Such operator liability may arise in respect of sufficiently proximate consequences of the event that caused the ship's wreckage. Thus in *Vinca Gorthon* (above), the Average Adjuster found it clear that damage to an underwater pipeline was proximately caused by a sinking ship and therefore engendered liability to the

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<sup>24</sup> Thus says the British Receiver of Wreck, Ms Veronica Robbins, at "www.newsrelease-archive.net/coi/depts/GMC/coi3965e.ok" on the antique so-called Castor Marbles, found in British waters after wreckage in 1894 and returned to Turkey: "Every item recovered from the sea floor has at some time had an owner. If divers find wreck they must contact the Receiver or their local Coastguard station. We would advise all finders to let us know of their discoveries as quickly as possible to give the legitimate owner the opportunity of recovering their property." 000\*-

<sup>25</sup> As developed in my book *Båtjuridik* (Boating Law), Stockholm 1973, p. 193.



pipeline owner. This liability did not comprise the shipowner's strict liability to victims of consequent oil pollution, since the leaking oil came not from the vessel but from the pipeline.

*Wreck owner liability* is the owner's liability for damages caused by the wreck as such. This liability lies upon the person who was owner at the time that the damage was caused. In the *Vinca Gorthon* case (supra) the Adjuster speaks of liability that may arise after the hull insurer has taken over the wreck as a result of the wreck drifting on to an oil pipeline and damaging it. If at that moment the hull insurer has paid for a total loss of the vessel he has normally become the owner and is charged with wreck owner liability, although it is also open to him to abandon the wreck by declaration to the previous shipowner, who can then get the liability covered from his P&I Insurance.

Wreck liability also covers costs for the removal of wrecks that obstruct shipping or may cause environmental or other damage. In Sweden a Royal Ordinance (1951:321) authorises – perhaps even obliges – the Maritime Administration to remove wrecks obstructing shipping in public fairways, or fishing. However, the Maritime Administration has various means of passing this removal liability on to others, such as by order to the wreck owner according to the Water Pollution Act (1980:424)<sup>26</sup> if oil from the vessel threatens the environment.

Thus in ND 1997 p. 53 (*Opus*) a fishing vessel had sunk in 20 metres' water south of the island of Gotland with 15 cubic metres of gas oil slowly leaking, and with 400 litres of hydraulic oil and 400 litres of lubricating oil on board. The Administration ordered the owner to remove the wreck. The owner appealed to the Administrative Court of Jönköping, which decided that pumping out the oil and blowing up the remains of the vessel ought to be sufficient and remanded the case to the Administration for detailed directions.

If a vessel obstructs a public port, the port authority may remove it according to the Removal of Vessels in Public Ports Act (1986:371), and costs may be charged to the vessel owner according to sections 6–8 of the Act; by analogy, the provision is taken to be applicable also to wrecks.<sup>27</sup> Besides, harbour and canal regulations usually have corresponding provisions for the matter. Otherwise, and if the owner is unknown, a removal may be hard to finance.<sup>28</sup>

A wreck owner may be liable to fines according to the environmental rules of "littering", now in the Environmental Code.<sup>29</sup> The provision was previously limited to littering of the "environment", which was taken not to include sunken wrecks permanently under water<sup>30</sup> but was applied to a vessel of which burnt residues emerged out of the water.<sup>31</sup> The Environmental Code now widens the rule to a general prohibition of littering "outdoors at a place to which the public

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<sup>26</sup> The Act's Chapter 7 section 5.

<sup>27</sup> SOU (Sweden's Official Inquiries) 1975:81 p. 83 f.

<sup>28</sup> Attorney General's (Justitiekansler) inquiry and decision 12 Jan. 2004 no. 383-02-21.

<sup>29</sup> Environmental Code (1998 :808) Chapter 29 section 7.

<sup>30</sup> Malmö District Court DB 294/73, reported in my article in *Förvaltningsrättslig Tidskrift* (Journal of Administrative Law, Stockholm) 1983 pp 37, 46.

<sup>31</sup> NJA 1973 p. 547.

has access”,<sup>32</sup> and enforcement is possible by injunctive order of the respective administrative authority<sup>33</sup> or by forced performance at the owner’s expense.<sup>34</sup>

The IMO has prepared a Convention for the removal of hazardous wrecks, based on the principles of general reporting duty, removal mainly from international waters and owner’s responsibility for removal costs. The Convention has been scheduled for a Diplomatic Conference in 2005 and 2006.

### 4.3 Title

While ownership may be said to comprise all incidents of being an owner, title focuses on the rights inherent in ownership, ignoring the consequent liabilities that we have already been considering. Of the various incidents to title, particular focus is placed on a purchaser’s protection from third parties: seller’s creditors in bankruptcy or distraint, competing purchasers in a double sale, and good-faith purchasers. While the sale of a wreck is not the primary object of this exposition, it should be emphasised that while a buyer of a chattel normally gets protected only by taking possession of the object, protected title to an inaccessible wreck can probably be acquired by mere contract, if it is impossible for the purchaser to mark his possession of the wreck.<sup>35</sup>

It seems likely that the powers inherent in title would be more limited where the owner lacks actual possession compared to where he can claim such possession. Rules concerning protection of possession and interference with possession clearly cannot apply if the owner’s possession has been relinquished. The extension of the Swedish salvage rules to the raising of vessels must imply, however, that the owner can oppose to salvage if he has reasonable cause therefor,<sup>36</sup> for example, because an aspiring salvor may not be capable of salvaging the property without causing damage to it.<sup>37</sup> Whether this rule would also imply a right for the owner of opposing access to the wreck seems uncertain.<sup>38</sup>

<sup>32</sup> Environmental Code Chapter 15 section 30 with sanction according to Chapter 29 section 7.

<sup>33</sup> Environmental Code Chapter 26 sections 9 and 14 and, for the relevant authorities, section 3. Imposing – as opposed to prescribing – fines is always reserved to the courts of law.

<sup>34</sup> Environmental Code Chapter 26 section 17.

<sup>35</sup> Undén and Beckman, *loc.cit* under Deregistration, 3.4. above. The *Nedjan* wreck from 1954 was long undiscovered in the Gävle Bight until she was found by divers in 1996. After the finding, the vessel’s insurers donated the wreck to an endowment for marine history, but on the discovery that the insurers had already sold the wreck to a private person for more than a symbolic sum of money a dispute arose between the endowment and the buyer, in which the former tried to establish possession by marking with buoys and bringing up the vessel’s bell and other matters. The dispute was never brought to court, and the author is informed that the buyer now accepts diving and photography at the wreck against the endowment not disputing his ownership.

<sup>36</sup> MC Chapter 16 section 10 paragraph 2.

<sup>37</sup> The provision in MC Chapter 16:10(2) to this effect is not limited to vessels or property in distress. In Svea Appeal Court’s case ND 1997 p. 13 the motor yacht *Choisie* had been raised by a purportedly incompetent salvor who had damaged the yacht without managing to bring it to safety, but as the owner had given permission the court awarded salvage and refused such compensation to a later salvor who had effectively brought the vessel to safety.

<sup>38</sup> The question was much discussed in relation to US citizen Gregg Bemis’ dives at the wreck

#### 4.4 Title Holder

Who owns a wreck is determined, as previously stated, by the legal system applicable to the area where the wreck is found. This means that Swedish law is generally applicable only to Swedish territorial waters and not to the economic zone or continental shelf outside of the territorial waters.<sup>39</sup> However, correspondingly to other systems there are substantive provisions applicable to the situation where a vessel has salvaged property under way in whatever waters and brought the property into safety in Sweden.<sup>40</sup> Conversely, while claims such as those of the US to eternal ownership to naval vessels might be respected out of comity, it seems doubtful that this would be recognised in a situation raising conflict with a salvor.<sup>41</sup>

In the Supreme Court case of NJA 1965 p. 145, fishermen had found a meteorological observation mast drifting on international waters and salvaged it. The mast belonged to the East German Government, which contested a lien for salvage and claimed the mast without compensation. The Supreme Court granted the fishermen's claim of a lien for whatever salvage award would be agreed upon.

The Swedish rules on ownership of wrecks, like those of many countries, are far from clear, and it is necessary to search guidance from the few law provisions available as well as a sparse case-law and some views expressed by legal scholars. There seem to be no useful indications in any legislative preparatory works.

The previously mentioned *Sea Finds Act* applies to salvage of vessels and goods at sea and in navigable waters, which should be understood as waters reachable from the sea.<sup>42</sup> Wrecks found in other waters are dealt with in the Lost Property Act (1938:121). The *Sea Finds Act* deals with "abandoned vessels and shipwrecks", "ship" being defined in a wide sense as used before the present MC definition.<sup>43</sup> The Act also covers appurtenances to and goods from such vessels.

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of the M/V Estonia on international waters in August 2000. Sweden had forbidden access to the wreck and its surroundings, but Bemis, being independent of the Swedish prohibition, considered an investigation of the wreck important to determine the cause of the shipwreck. It has not been generally assumed that a recognised wreck owner could effectively oppose such prohibitions against investigations being made inside the wreck.

<sup>39</sup> Cf. UNCLOS articles 56 for the economic zone and 77 for the shelf.

<sup>40</sup> Thus the *Sea Finds Act* section 2, the *Cultural Heritage Act* section 4, paragraphs 3, and 4 and cf. MC 16:11.

<sup>41</sup> See the Supreme Court decision NJA 1965 p. 145 as reported below in the text.

<sup>42</sup> As I point out in my book *Båtjuridik, op. cit.*, pp. 117–121, "navigable" should be understood as reachable for the particular vessel by water from the sea. However, the Police Board in section 2 of its General Advice on Sea Finds (RPSFS 2003:3 previously cited) for no explained reason understands navigable as "navigable to commercial vessels" and otherwise applies the Lost Property Act (1938:121), which no longer provides for any advertisement of the find. This was followed by Hässleholm District Court in a judgement 17 March 2003, matter FT 1706-02 but was overruled by the Appeal Court, Skåne & Blekinge AC 20 Nov. 2003 matter FT 869-03, though on the surprising ground that the water in question, though not accessible from outside, was itself navigable. Leave to the Supreme Court was denied 27<sup>th</sup> Jan. 2004, matter T 5041-03.

<sup>43</sup> "Ships" are now, under MC 1:2, vessels of over 12 metres' length and over 4 metres'

Depending on the location, finds are described as “bottom finds, floatfinds and shorefinds”. For all three there exists a duty to report the find, whereupon a public summons shall be issued in the Swedish Maritime Administration’s “Notices to Mariners”<sup>44</sup> and if appropriate also in other manners for the owner to make himself known within a stated period. Neglect of the reporting duty is punishable.

If the owner gives notice within the stated deadline, he can reclaim the property against payment of salvage costs and other expenses. This shows, for our purposes, that title to the find *is not lost through the abandonment, as it used to be, but survives*. If no owner reports in time, the property devolves on the salvor, and the summons are thus “preclusive”.

In the Svea Appeal (VI) judgement DT 19/1986, the police had not issued any summons. Two brothers had salvaged a sailboat that had sunk outside their parents’ seaside property near Stockholm and had duly notified their find to the police, who had failed to issue the public summons. Apparently the police had not considered the Sea Finds Act to be applicable, as the boat had been tied to the shore with a broken painter and astern with a light anchor and therefore was not “abandoned” in the sense the police construe the law (above under 3.4.). After learning that some one had asked for the boat, the brothers wrote to this person but received no answer, whereupon they repaired the boat and brought it to the family’s summer place to use it as their own. The Appeal Court confirmed the police construction that the boat had not been abandoned in the sense of the Sea Finds Act and decided, in ND 1986 p. 26, that the brothers must be deliver it up at the place where they had found it.

The Appeal Court’s decision is irrational, as it legitimises the noxious police practice of not notifying sea finds in a situation where they are clearly lost to the owner. The Lost Property Act thereby applicable does not provide for any public notification.

According to its wording and intentions, the Sea Finds Act applies to *salvage* of objects, not just finding. To a mere *finder* of a wreck in general, with some reserve for ancient wrecks as considered below, only the right of salvage may be protected, according to the above-mentioned Act on Exclusive Right to Salvage. It may be questioned whether the Lost Property Act (1938:121) might be applicable to wrecks found but not salvaged, so that a finder’s reward might be available also to objects found “at sea and in connected navigable waters”. This seems questionable, however, since the Lost Property Act presupposes that the finder has taken some kind of action to take “custody” of the object.<sup>45</sup> The Finnish Lost Property Act is however said to be applicable to wrecks localised but not salvaged.<sup>46</sup>

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breadth, see further below.

<sup>44</sup> *Underrättelser för Sjöfarande* (UfR) are published weekly, and an English language version “Notices to Mariners” is issued monthly on pdf file, see the Administration’s home page “www.sjofartsverket.se”.

<sup>45</sup> Thus the preparatory works, *Hittogods mm.*, DsJu 1980:11 s. 33, and the Acts section 2. A drifting barrage balloon was considered taken sufficiently into custody when its anchorage cable had been tied to trees and rocks, see NJA 1952 p. 177.

<sup>46</sup> Wetterstein, *Vrak och gamla skatter*, JTF (Law Association in Finland Journal) no. 5/2000.

*The Cultural Heritage Act* (1988:950) succeeds a previous Ancient Heritage Act. It provides that ships that may be supposed to have been wrecked at least a hundred years ago are protected as permanent ancient remains together with the nearest surrounding seabed.<sup>47</sup> Like in the Sea Finds Act, “ships” are certainly intended to include not only ships in the sense of the present Maritime Code, being of over twelve metres length and four metres beam, but must cover also, for example, such Viking vessels of some ten metres’ length as were used on eastern raids into Russia.<sup>48</sup> If such a shipwreck is salvaged, unlawfully on Swedish waters<sup>49</sup> or with the State Antiquarian’s permission, it becomes the property of the State if it “has no owner”. The Act does not provide a public notice procedure, and summons according to the Sea Finds Act is not applicable according to special proviso in the Act’s section 9. It seems to have been assumed that older wrecks generally have no owner and that there is no need to search for heirs after a deceased shipowner through one or several generations. If any such person should still show up, he is taken to have the burden of proving his title.<sup>50</sup> In practice it is common to inquire with the National Maritime Museum, which keeps a register of known wrecks and missing vessels and their owners, if known. The rules and practice indicate that protection of title is not considered important for older vessels, whose owners may be expected to be dead. If this is the background, a search through several generations should not be important for younger wrecks either.

In Scandinavia the matter has been passed upon by the Norwegian Supreme Court in ND 1970 p. 107, concerning a German submarine sunken in Norwegian waters in 1917. The German legation protested against a salvage attempt in 1923, but the wreck was left undisturbed through the German occupation of Norway during 1940–45. Under legislation on enemy property the wreck thereafter passed to the Norwegian State and was sold by it to one Høvdning, who tried to salvage the wreck in 1962 and 1965. In 1968 a diving firm arranged a series of explosions by the vessel, which it pretended having acquired by occupation is an ownerless wreck. On suit by Høvdning, the Supreme Court declared that in the absence of an express dereliction declaration, the wreck

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<sup>47</sup> Cultural Heritage Act 2:1 and 2.

<sup>48</sup> The Viking ships crossing the North Sea to ravage the coasts of England and France were easily 20 metres or more, while those eastward-bound needed to be small and light, often under 10 metres in length, to be capable of being hauled between rivers. Test expeditions with replicas Krampmacken 8 metres, Norwegian Havörn 15.6 metres and Aifur 9 metres indicate that the larger ship was exceedingly hard to handle by traditional methods in and particularly between rivers. The Aifur, which the author has rowed, accommodated 8 oarsmen and the steersman.

<sup>49</sup> A wreck found outside the limits of national jurisdiction falls to the State without consideration of a possible owner, Cultural Heritage Act 2:4. According to the Government bill (prop. 1995:96:140 p. 190) this imposes upon the State the future custody of the wreck on behalf of all mankind, since under UNCLOS article 149 objects within the so-called Area must be guarded and disposed of for the benefit of mankind. If the wreck is found in an economic zone or on the continental shelf, the same should apply as “residual rights” not reserved to the coastal State by the zone/shelf reservation. In Finland secret salvors from the 1771 wreck of *Vrouw Maria* were entitled not only to bring up objects from the wreck but to continue salvage of the vessel, ND 2002 p. 117 Turku AC.

<sup>50</sup> Government Proposal (prop. 1967:19 p. 24) to the earlier Ancient Heritage Act.

could become ownerless only if the then owner had acted in a way indicating a will to give up his title. Neither the German State, nor the Norwegian State, nor Høvdning had acted in such a manner. A dissenting judge considered the vessel's original incursion into neutral Norwegian waters during war operations to justify a finding of dereliction.

This may be compared with the more mundane Swedish NJA 1947 p. 582, in which a broken bicycle with empty tires had been left outside a railway freight office. An employee who often passed by took hold of the bicycle, providing it with new tires, mudguards and other spares so that it could be used. The bicycle turned out to be stolen, and the finder was sentenced to two months' conditional prison for interference with another's property. The attitude may have changed, however, as indicated by NJA 1969 p. 340 concerning an abandoned car without wheels and other necessary parts.

Nordic *legal writers* have expressed varying views. The most exhaustive analysis is by Sjur Brækhus. According to him a vessel may become ownerless in three situations. In Brækhus & Hærem's book on Norwegian Property Law<sup>51</sup> the first situation is described as one where the property is *lost*, for example a ship sunk in waters so deep that it cannot be retrieved. The second ground for loss of property would be dereliction by *express declaration*. In an article in *Arkiv for Sjøret*<sup>52</sup> Brækhus adds the *passage of a long time* without any action by the owner to preserve his ownership, for which he finds support in a US decision *The Clythia*.<sup>53</sup> The period may be relatively short if the vessel was known to be lying accessibly in shallow water but longer if she was originally regarded as "unsalvageable".<sup>54</sup>

According to this analysis, a wreck may therefore become ownerless either

- by being irrevocably lost by the standards of existing technique, or
- by express declaration of dereliction, or
- by the passage of a long time without any manifestation of ownership.

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<sup>51</sup> Brækhus & Hærem, *Norsk Tingsret*, p. 622 f.

<sup>52</sup> AfS Vol. 6 p. 506.

<sup>53</sup> It seems incorrect that the passage of time as such would be decisive for such ownership abandonment as recognized in US practice. An article by Mark A. Wilder, (2000) *International Association of Defence Council Journal* Vol. 67 mentions examples where the inference of abandoned ownership may be assumed: In *SS America*, sunk in the Mississippi and soon covered by a silt island but sought to be salvaged after 28 years, the island having been washed away, the vessel was held abandoned, in *The Cynthia* (Wiggin's case) where the wreck lay visible for 66 years without any salvage attempt it was held abandoned, in *Andrea Doria* abandonment was assumed after only four years without salvage, in *Lady Elgin* (Zych's case) where the wreck had been undisturbed for 129 years due to lack of technology to locate her no abandonment was assumed, and in *SS Central America* a cargo of gold sunk in 3,000 feet of water was held not abandoned when recovery attempts were made by a salvage group 123 years thereafter.

<sup>54</sup> Brækhus in *TfR* 1975 p. 513.

This exposition seems strained in several respects. If a vessel has sunk in very deep water, it might later become accessible through new techniques.<sup>55</sup> Has then the lost title been resuscitated? If title may be lost by an express dereliction declaration, how can such a declaration reach every person that might raise a claim to the vessel? And if title is lost through prolonged passivity, according to what criteria should the length of the period be determined?

For other property than wrecks, Lindskog in a *Festschrift* article<sup>56</sup> has proposed a rather more comprehensible model. Transferred to vessels it would describe the owner's title as retained until taken over by an occupant. The owner may be seen to declare dereliction to the finder, and this becomes a kind of offer accepted by the occupation of the wreck. The method relieves us of having to imagine a notification to all and sundry. It also avoids the paradox of a resuscitated title when diving techniques improve, for to the extent the owner would have abandoned his title when the ship sank at unfathomable depth or in otherwise inaccessible water, this abandonment is viewed as a declaration to the aspiring salvor in today's situation. Long-term passivity also becomes a kind of declaration; if the prospective occupant must conceive that the owner of such an old and low-value wreck cannot reasonably be taken to insist on ownership in such a place, he may assume it to have been left to him as the finder. Thus there arises a kind of implied contract, where the occupier accepts the offer by going to the trouble of raising the wreck. In all such situations, the acquisition becomes "derivative" from the owner, not extinctive.

Title may however also be lost by dissolution of a company owning the wreck, often an insurance company, where its owners cannot be traced.<sup>57</sup> An occupation of such a wreck clearly establishes an extinctive acquisition.

As will be shown, the "preclusive" summons for the wreck owner cannot be issued until the wreck has been inspected and therefore, as a rule, raised. Thus the finder will have to undertake salvage operations at the risk of gaining only a salvage award though he may nourish the hope of becoming owner. If the vessel is raised and no owner responds to the summons, the salvor has gained his title. If a pretending owner turns up, the finder may challenge his right. Circumstances that might be decisive will be exemplified in a moment.

If the wreck is a US State vessel, it could not under US law fall to the finder, because flag-law legislation declares that the State does not abandon ownership. If the finder happens to know of this, he cannot assume a contract under which the US relinquishes its ownership. Most finders would not know of the matter, however, and there then arises the question of their acquisition.

Generally, the vessel would have some identification mark as a US State vessel, and the embassy would then be notified and would claim the vessel upon payment of salvage and other expenses. If there is no such indication, the find

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<sup>55</sup> Such is the case with the wreck of the R.M.S. Titanic, which, at a depth of 2 1/2 miles, is now accessible to underwater vehicles. Under special US legislation (USC §§ 450-6) she may not be moved, however.

<sup>56</sup> *Festschrift for Sveriges Advokatsamfund* (Stockholm 1991) pp 343–364.

<sup>57</sup> Compare the Swedish Companies Act (1975:1381) 13:16; if the dissolution has been preceded by bankruptcy, a possible distribution is preceded by post-distribution according to the Bankruptcy Act (1987:672) 11:19.

will be advertised, and the US might not report to claim the property. A court seized of the matter would then have to award the vessel to the finder according to principles mentioned previously.<sup>58</sup> If the wreck is expected to be over 100 years, it becomes the property of Sweden. A court of law must so decide, though the Swedish State might out of comity cede the vessel to the USA.<sup>59</sup>

If the vessel was found on international water and brought to Sweden by a Swedish finder, there arises a conflict of rules. The US rule states that as US Government property the wreck retains its immunity, which would have been violated by the finder bringing it to Sweden. As in the case of the observation mast above, a Swedish court might apply Swedish law to the discomfiture of the US claim. But under UNCLOS article 149 such objects found in the Area must be preserved for the benefit of mankind with particular regard to preferential rights of the State of origin, which imposes a duty for the national courts to observe.

In consequence of the Swedish rules of exclusive salvage right by permit from the County Administration, a wreck finder in Sweden has a reasonable chance of salvaging the find and can also give publicity to the event. He can count upon his salvage award without having to fight off competing salvors giving more or less spurious reasons for their claim to raise the property. On the other hand he has no certainty of gaining title, unless he has purchased the wreck from purported and likely owners or is convinced that no such owners with justified claims can be found. If finders were allowed to compel the issuing of a preclusive declaration while the find remains uninspected on the seabed, the authorities would be dependent upon their representations concerning the property when summoning the owner, and the owner's interest might suffer prejudice. It therefore seems proper that the Sea Finds Act's requirements of summons<sup>60</sup> only after inspection should be applied according to the letter.

## 5 Discussion

Sweden is a small country, and salvage operations for a named vessel of any size or notoriety are mostly publicised and broadcast through channels other than the legal summons procedure. When surviving relatives of ship or cargo owners get wind of such events, they quickly rise to safeguard possible spoils. Was not "Anaris" the name of Uncle Ove's ship that was sunk in the Gävle Bight during the Second World War? If the relatives challenge the raising or notify their interest within the summons deadline, there arises the question of their title.

According to the method recommended here it should be considered what message Uncle Ove left to the prospective salvor. Probably he deemed it hopeless to raise Anaris during the post-war period, after the cessation of the war

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<sup>58</sup> See the Supreme Court decision NJA 1965 p. 145 concerning the East German observation mast reported in the text below.

<sup>59</sup> In ND 2002 p. 117, 218, the Turku Appeal Court indicates that a foreign wreck from 1771 on Finnish water might not be relevant as part of the Finnish cultural heritage. This sounds doubtful under the Swedish Act.

<sup>60</sup> Sea Finds Act section 3.



obstacles. So old Ove went into his grave without anticipating any value in the wreck, which was consequently not listed in the death estate inventory – a fact that a prospective salvor can easily check before engaging in salvage operations.<sup>61</sup> I am inclined to see the total message from such a previous owner and his surviving death or bankruptcy estate as permissive of salvage of the wreck, the owner being dead or dissolved and no value having been attributed. For the heirs, the posterior attribution of such a value would be windfall that they never had any reason to count upon. But the question may be seen from various angles and merits discussion, for example the position of a survivor who becomes aware of the value of a previously forgotten wreck or the situation of a wreck that was actually attributed a value in the estate inventory.<sup>62</sup>

Mostly a wreck has little economic value and is rather seen as an encumbrance. The attraction lies in the cargo. Many cargoes may be more or less unaffected by a long sojourn in the water. French diver Costeau and his team brought up antique amphorae of Marsala wine that they did not find very palatable but that had still lain on the seabed for upwards two thousand years without penetration of seawater. The focus of this presentation has been on wrecks less than 100 years old. Their cargoes have often been insured, and the insurers have usually paid for total loss and assumed the title. For many of these finds the insurer is a company that has been dissolved under circumstances making it practically impossible to find owners for distribution of post-recovered assets. Once such a situation has been ascertained, the cargo should be free for occupation. If, on the other hand, the company still exists, it has usually not attempted or managed to search or salvage its drenched cargo. Does such a company merit the windfall of the cargo's value? Is the company's typical message to the finder: "We gave up all claims to this cargo, now it is your turn?" Or would the message be: "We stayed quiet as long as we lacked the means but only on the presumption that if possibilities arise, we will raise our claim (principle of 'underlying assumptions')". And would the message be altered when the company engages itself retroactively with the cargo and starts organising its salvage?

Whatever may be thought of parties' intentions, there resides at the basis a problem of legal policy. Valuable property is being wasted by lying idle, and a balance of the previous owner's and the aspiring salvor's interests ought to favour its utilisation. Two main incentives are recognised for the recovery of wreckage property: the prospect of earning salvage award and that of becoming owner. In Sweden, the former arises by law irrespective of agreement, unless

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<sup>61</sup> The noted case NJA 1940 p. 413 on the so-called Lohe silver treasure concerned a claim from the death estates of the late Adolf and Johanna Lohe to a revealed buried treasure. The claim was denied on account of insufficient proof that the property had really belonged to the Lohes. Apart from such evidentiary difficulties, it seems natural to construe the digging down of a treasure on one's own premises as a strong indication that the treasure shall devolve not only to the death estate but also to descendants, if it is later found. The hiding gives no evidence of a will to abandonment, but rather on the contrary, to preservation.

<sup>62</sup> If there is no heir, or of the owner was a foreign subject whose property would by national law fall to his State, the wreck becomes the property of the Swedish Inheritance Fund, which would surely not know what to do with it! See Inheritance Code Chapter 5 and Act (1937:81) on International Circumstances Concerning Death Estates.

salvage is reasonably prohibited<sup>63</sup> by an owner. The latter arises after achieved salvage if no owner responds to the call, and it can be regarded as prize money for one who has already undertaken the venture.

Salvage award has the direct purpose of encouraging retrieval of property and is deliberately measured, unless contracted with the wreckage owner, as an appraisal subsequent to salvage of the incentive appropriate in like cases. It can be split between competing salvors and thus fosters co-operation, and it encourages disclosure and open declaration of recoveries.<sup>64</sup> In comparison, the granting of ownership may seem to give an all or nothing bonus to grabbing treasure-seekers that happen to strike gold. Still, there is probably on the balance more strength and objective reason in their claims than in respect of such supported by neither expectations nor even awareness of the hidden treasures.

A third method is to deny either party the windfall upon which they have not counted. This is what the Swedish society has done and what the world community is contemplating in respect of wrecks more than a hundred years old, by classifying them as common heritage.<sup>65</sup> For younger wreckage the legislator has not assumed sufficient value to justify such a solution.<sup>66</sup> However, voices are now being raised that the looting of such wrecks is depleting our underwater inheritance and must be stopped.<sup>67</sup> This would doubtless be most effectively achieved by unclaimed wrecks in Swedish waters being generally declared to be State property, as in many other countries.<sup>68</sup>

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<sup>63</sup> Conceivably, a valid reason for an owner's prohibition according to MC 16:10 paragraph 2 may be justified doubt of the salvor's ability to achieve the task without unnecessary damage to the wreck. Prohibition by the master and operator, also mentioned in the section, has little relevance for wrecks.

<sup>64</sup> Southern District Court of New York in *Hener v. U.S.* (1981) 525 F.Supp. 359 concerning silver from barge Harold, sunken in 1903.

<sup>65</sup> The raising of such wrecks within the Swedish territory requires the approval of the relevant authorities, see further Cultural Heritage Act Chapter 1 sections 6 and 7, and if raised outside Swedish territory and brought to Sweden becomes the property of the Swedish State, same Chapter section 4. In the former case agreement on salvage remuneration will have to be made beforehand with the authorities, while in the latter salvage award is probably due according to MC chapter 16, cf Turku Appeal Court in ND 2002 p. 117.

<sup>66</sup> In Sweden before 1984, shorefinds became the property of the State, while floatfinds and bottomfinds fell to the salvor, but this was changed due to the insignificant values realised by the State from such finds, which were mostly small boats, see Ds Ju 1980:11 p. 132.

<sup>67</sup> Organisations such as the Baltic Foundation and the Baltic Sea Foundation are strongly resisting the ongoing deprivation of present treasures having become ever more accessible through modern technique and popular interest in diving. A Green Party Parliamentary motion (2003/04:Kr324) develops the problem at length, expatiating on a tendency of private divers alleging wrecks to be abandoned and stripping them, before the question is clarified, of any equipment of value.

<sup>68</sup> So stated in the above motion 2003/04:Kr324. In England, any unclaimed wreck found in any part of "Her Majesty's dominions" becomes the property of the Crown, unless the right to the wreck has been granted to any other person, Merchant Shipping Act, section 523. In France, the aforesaid Decree of 1961 as amended in 1982 provides for unclaimed wrecks to fall to the State.