

BOOK REVIEW: THE CRUEL SEA

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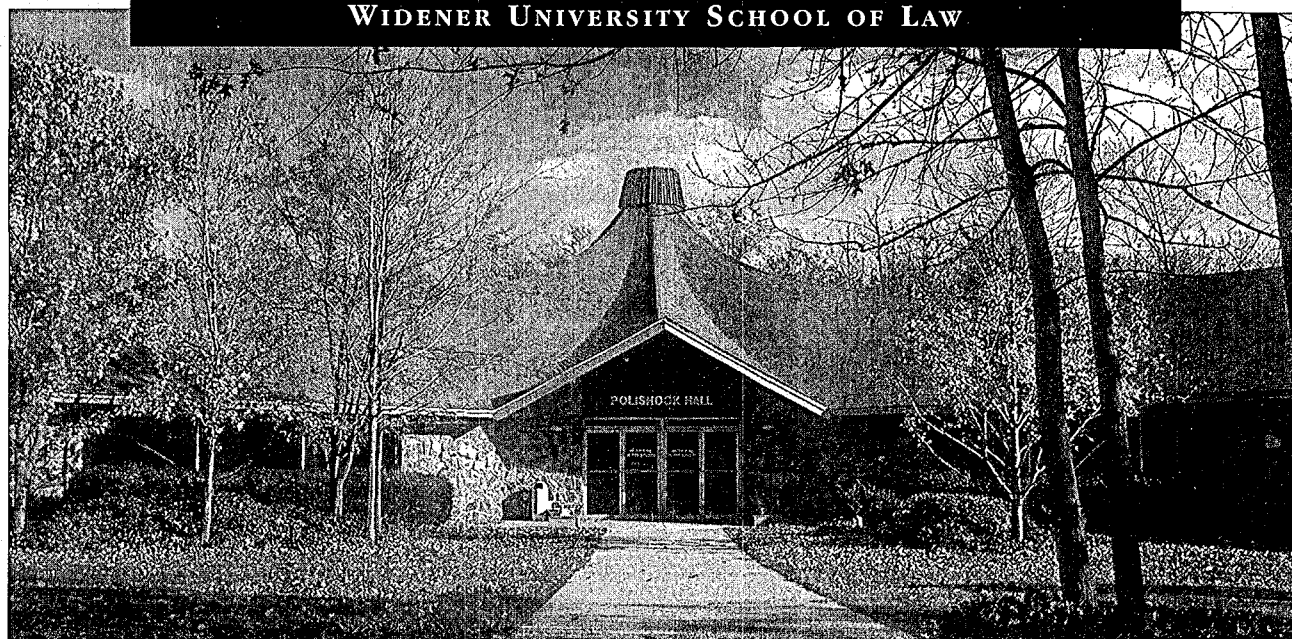
Spring 1999

TITANIC LEGAL BATTLES



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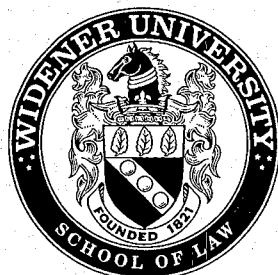
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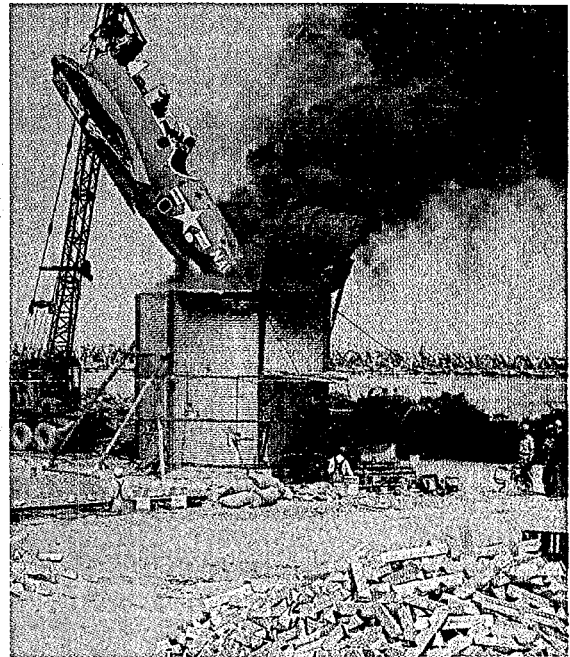
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Death of a Warrior, 1947: a Second World War Avenger aircraft being melted into scrap metal, while thousands of planes line up in the background await a similar ignominious fate.

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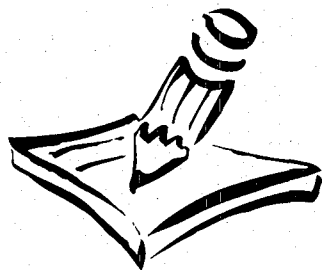
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THE CRUEL SEA

Vernon Proctor

Cover: At a depth of 12,500 feet, a Russian MIR submersible illuminates the foredeck of RMS TITANIC. Photograph by Ralph White

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Politically Correct at the Seaside

Elsewhere in this issue Edward Fornias argues eloquently for the public right to enjoy privately owned waterfront, and, to vindicate that right, access to sea and sand that would otherwise constitute trespass.

Mr. Fornias castigates Delaware courts for upholding the rights of beach owners to undisturbed dominion over the property on which they pay taxes. Unlike Delaware, New Jersey is on the side of the angels. Delaware is the villain of his piece.

His view enjoys the blessings of two potent, mischievous principles: populism and the vogue of the "politically correct". The former may be summarized as the practice of sanctimoniously helping yourself to other people's property. The latter, far more dangerous in a democratic society, consists in seizing the high ground of assumed moral superiority to justify the suppression of any contrary view (and to hell with that tiresome old First Amendment). Applied to the bathing beach controversy it takes the form of self-righteously insulting land owners who ask trespassers to leave. As one who has been on the receiving end of this pious chutzpah I am a scarred and seasoned veteran of the political correctness wars.

My family and I own a private beach on Cape Cod Bay. It is separated by a tidal creek from an ample public bathing beach to the west of our property. The relative isolation of our beach attracts trespassers from the public side of the creek. We try to keep our property clean, decorous, and environmentally sound. But the steady stream of interlopers apparently think it is my public obligation to furnish them with an al fresco boudoir for amatory displays, a comfort station for their dogs illegally running at large, and a tanning salon for surly nudists, who, when asked to leave (or at least leave something to anatomical imagination) proclaim, "The beaches belong to the people!", "You should be ashamed of yourself!", and similar endearments. These same advocates of the public interest uproot the attractive vegetation that grows on the margin of the beach, a depredation forbidden by law in order to protect the fragile wetland from further erosion. (Petty larceny, too!) When they depart they also leave behind an unholy mess of sandwich bags, cigarette butts, beer cans, etc. The land owner (unless he's just an old meanie like me) is expected to serve as a good-natured, unpaid garbage man.

Massachusetts, like Delaware, respects the rights of landowners, and the courts have declared that a taking of beaches without compensation would be plainly unconstitutional. (But isn't that exactly what I have suffered?)

The issue of public deprivation is a phony one. Cape Cod towns have excellent public beaches and many town landings affording access for shell fishing and duck hunting. But this generous availability does not deter those who covet the agreeable privacy of property belonging to others. Nor does it deter the politicians. From time to time one of them, devout in his political correctness, will demand universal access to sea bathing for a constituency, of whom, in my observation, many have yet to acquire the habit of bathing *indoors*. After an enjoyable spree of public-spirited nonsense, the politician calms down, while the courts continue to sustain the claims of private property.

And that, gentle reader, is why I am glad that I live under the beneficent laws of the State of Delaware and the Commonwealth of Massachusetts. They may be politically incorrect* but they protect a wholesome dividing line between mine and thine.

WEW

*I suspect that in the minds of the sensible the very notion political correctness has been reduced to a joke in poor taste by the salubrious operation of intelligence and derisive laughter.

This issue of *Delaware Lawyer* is devoted to the emerging and fascinating realm of Ocean and Coastal Law. Along the shore, our writers examine issues of particular concern to this and other coastal states. Edward J. Fornias addresses the vexatious issue of beach access and the inevitable clash between public rights and private property—a subject upon which our esteemed Chairman has a few wry observations (see adjoining column). James May and Wendy Myers describe the evolution of Delaware's landmark Coastal Zone Act and its newly-promulgated regulations. And Captain Michael Adams discusses oil pollution liability and then gives us a tour of his ship, *DELAWARE RESPONDER*, a state-of-the-art oil spill response vessel stationed on the Delaware Estuary.

From the ocean's abyssal depths to the halls of academe, our contributors are shaping maritime law. David Concannon details the ongoing legal battles over access and salvage rights to the shipwreck of RMS *TITANIC* while Dr. Gerard Mangone, a world-reknowned authority on the Law of the Sea, describes the upcoming joint degree program being offered by the University of Delaware's Graduate College of Marine Studies and Widener School of Law. The quest to find, recover and restore the aircraft that fought the Second World War and the governmental obstinance facing underwater explorers in search of Warbirds is the subject of "Air Wars"; while "Deep Shipwreck in High Court" describes the legal saga of the California Gold Rush ship, S.S. *BROTHER JONATHAN*.

Peter S. Hen

The Widener Connection to *DELAWARE LAWYER*

This issue is truly a product of Delaware's only institution dedicated to legal education, the Widener School of Law. Our writers include two Widener students, two Widener alumni, both a tenured and an adjunct Widener Law professor, and the moving force behind the Widener/U of D joint degree program. It is therefore appropriate to commemorate Widener and its namesake benefactors on our cover.

*On the cold, clear night of April 14-15, 1912, the fateful collision of RMS *TITANIC* with a North Atlantic iceberg resulted in the catastrophic loss of the greatest and most opulent ship ever built and 1,500 souls condemned to the ocean's frigid embrace. Death would honor no class distinction that night: with equal disdain, it would claim the impoverished immigrant and the immensely wealthy titan of industry. For among the victims of the world's most infamous maritime disaster were members of a Philadelphia dynasty—patriarch and scion, father and son: George Dunton Widener and Harry Elkins Widener.*

Contributors

Ralph White is a distinguished cinematographer and the founder of White-Pix Productions. He has participated in four expeditions to the *TITANIC*: as the cinematographer on the 1985 discovery expedition; the cinematographer on the 1987 salvage expedition; a submersible cameraman on the 1991 IMAX expedition; and as a second unit cameraman on the 1995 expedition to film the movie "*TITANIC*" (for which his photographic team won an Oscar for cinematography). He has made 23 submersible dives to the *TITANIC*. Shown here with the ship's bell, Ralph has most graciously provided *Delaware Lawyer* with the stunning underwater images of *TITANIC* on the cover and on pages 26 and 27.



Michael R. Adams will graduate from the Widener University School of Law this spring. Prior to assuming his position as captain of the Delaware Responder, he enjoyed a twenty year career in the Coast Guard serving aboard a variety of cutters and shore stations.



Gerard J. Mangone is a University Research Professor of International and Maritime Law in the Graduate College of Marine Studies at the University of Delaware. He is the author of 12 books and the editor of 25 books on marine political and legal issues.



David G. Concannon is a graduate of the Widener University School of Law in Wilmington, Delaware. He practices complex commercial litigation at Kohn, Swift & Graf, P.C. in Philadelphia. Mr. Concannon is counsel to The Explorers Club, on whose behalf he filed an amicus curiae brief in the Fourth Circuit advocating the public and scientific community's continued right of access to the R.M.S. *TITANIC*.



James R. May is a tenured member of the faculty at the Widener University School of Law, Wilmington, Delaware, where he has taught a variety of environmental law courses since 1991. In addition, Professor May is the director of the Widener University School of Law environmental and Natural Resources Law Clinic and he teaches graduate engineering courses at Widener University's School of Engineering in Chester, Pennsylvania. Professor May is also the co-founder/co-director of the Eastern Environmental Law Center. Professor May has written numerous articles in the fields of environmental law and toxics torts. He has extensive practice experience as a private and public interest lawyer, and is an invited member of the International Union for the Conservation of Nature (IUCN). He holds his Bachelor of Mechanical Engineering from the University of Kansas School of Engineering, his Juris Doctor from the University of Kansas School of Law, and his Masters of Environmental Law from Pace University School of Law.



Edward J. Fornias, III, is a third-year law student at Widener University School of Law in Wilmington and works as a law clerk for Marks, Feiner & Fridkin, P.C. He earned his Bachelor's Degree in Philosophy from La Salle University where he graduated with Honors in 1996.



Peter E. Hess, editor of this issue of *Delaware Lawyer*, practices law in Wilmington and is an Adjunct Professor at the Widener University School of Law. He has been an enthusiastic shipwreck diver for 22 years. He serves on the Board of Directors of the Explorers Club and the newly-created Professional Shipwreck Explorers Association. He authored an amicus brief before the United States Supreme Court in *California v. Deep Sea Research, Inc.* advocating a continued role for U.S. admiralty jurisdiction in disputes over the ownership and control of historic shipwrecks.



Wendy L. Meyers is a recent graduate of Widener University School of Law in Wilmington. She is currently employed as the Environmental Fellow for the Eastern Environmental Law Center in Wilmington, Delaware. She earned her Bachelor's Degree in Environmental Education/Biology with an emphasis in Marine Biology from Juniata College in Huntingdon, Pennsylvania.

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*See in this publication,
James May's article:
"It's not a Shore Thing:
Implementation of
Delaware's Coastal Act."*

Peter E. Hess

AIR WARS

I. The Atlantic Front A. Frankwitz' Hellcat

Ensign Vincent Frankwitz must have felt like he was on top of the world. At only 21 years of age, he was flying a F6F-5 Hellcat fighter, proven one of the most powerful and deadly aircraft ever built. With any luck, he would soon complete his pilot training and ship out of Rhode Island before the Second World War was over. Imagining the feel of a German Messerschmidt or a Japanese Zero in his gunsights, he snapped out of his heroic reverie when the rhythmic throb of the Hellcat's engine was replaced with an ominous sputter.

Hot globules of oil splattered his windscreen as the plane began to lose altitude. Frantically radioing his wingman, Frankwitz tried to remain cool and remember the procedures drilled into him. Off his right wing he could see the island of Martha's Vineyard; a dim smudge on the horizon was the continent. But coming up fast to meet the stalled Hellcat was nothing but the cold gray Atlantic.

Easing back on his throttle, the Hellcat leveled out, bellied into the water with a tremendous splash and instantaneously, Frankwitz had yanked back his canopy, unfastened his harness, and scrambled onto the left wing. He felt the icy water sloshing around his calves and instinctively shivered. Reassured momentarily by the sight of another Hellcat circling overhead, he was alarmed by the speed with which his own plane was filling with water and nosing toward the bottom.

Stepping off the sinking wing and into the choppy sea, the young Ensign panicked at the strength of the ocean current

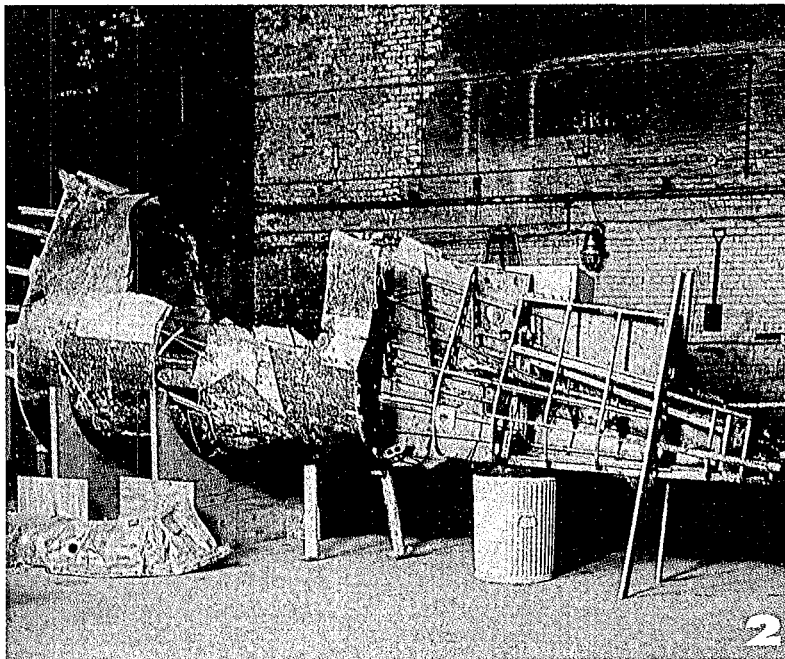
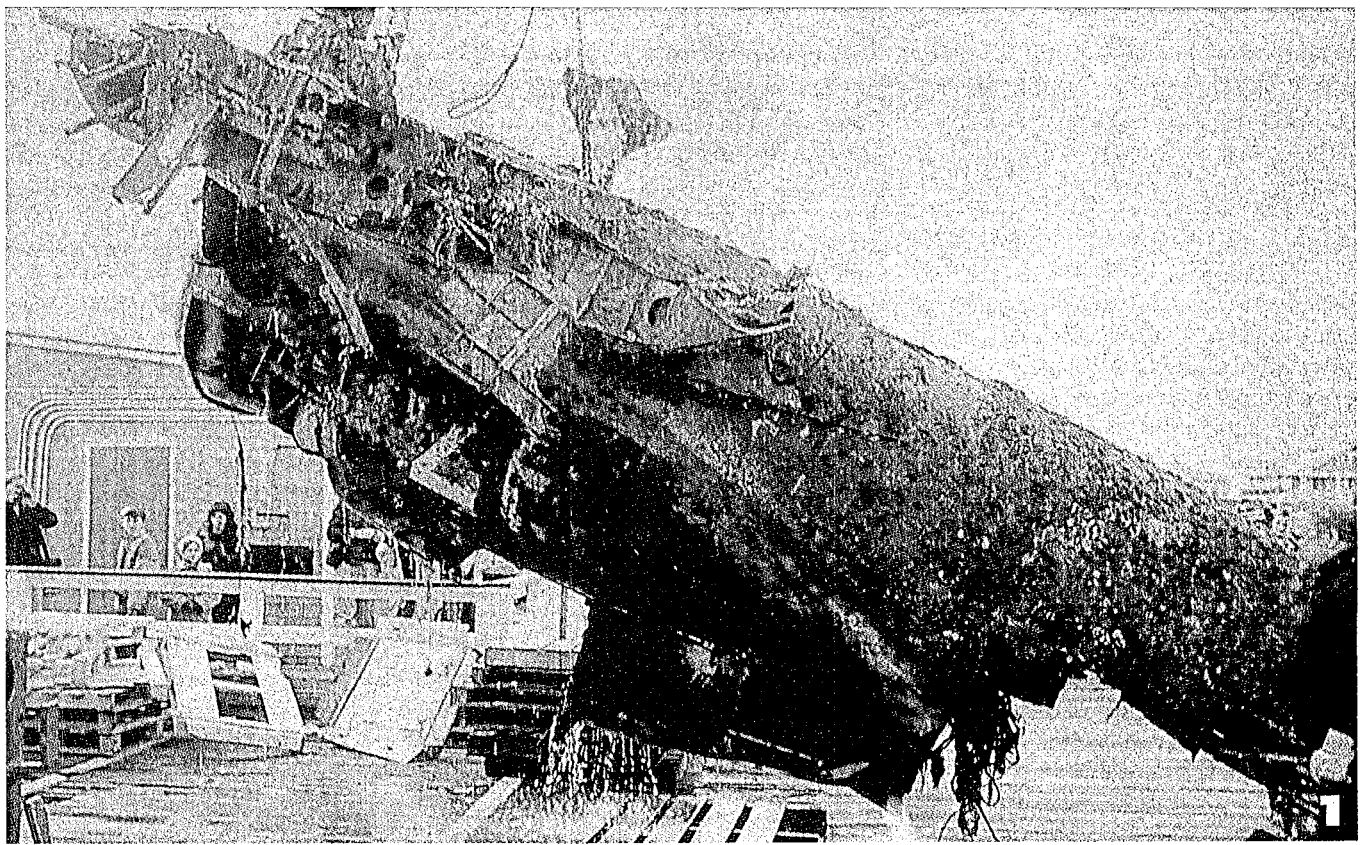
that swept him away from the crash site and the overwhelming numbness of the frigid North Atlantic. The cold rapidly penetrated his leather flight jacket as his body was assailed by a thousand icy needles. His mouth half open with uncontrolled shivering, Frankwitz struggled in vain to keep the cold water from splashing down his throat. He could only gurgle frantically as the circling wingman broke off and rapidly receded into the steely clouds.

Flailing helplessly at the merciless sea, the Ensign must have then realized that he was destined not for military honor, but to become a mere statistic: one of thousands of American boys who would die in training for the world's more glorified killing grounds. No white cross would ever mark his final resting place. On April 3, 1945, with the Nazis on the verge of surrender, Vincent Frankwitz would be consigned an anonymous grave in the trackless waters of the North Atlantic.

B. Campaign of Destruction

At the conclusion of the Second World War, tens of thousands of propeller-driven combat aircraft sat virtually useless. Rendered obsolete by the development of the jet engine, their armament and design made them unsuitable for civilian use. And the soldiers who had enlisted to make the world safe for democracy had not signed on to clean up afterwards.

Consequently, with the widespread demobilization of the U.S. armed forces, fighter aircraft became disposable and were simply discarded en masse. Entire flight decks of planes were pushed off aircraft carriers into the sea; hundreds were buried in massive trenches; thousands were broken into pieces small enough to be melted into scrap alloy; thousands



1) The Frankwitz Hellcat being loaded on a barge, December, 1993. 2) Frankwitz Hellcat fuselage under restoration, QAM, 1996. 3) Thousands of propeller-driven aircraft awaiting scrapping, 1946.

more were left to bleach in the desert sun in massive Arizona military salvage yards. In one of the war's greatest ironies, surviving German Luftwaffe personnel were hired to destroy the aircraft that they had been unable to defeat during the war.

The U.S. campaign of destruction of war material—particularly aircraft—was so pervasive that in many instances, no examples of the planes that had fought and won the war remained. As time

mellowed its memories and softened its wounds, nostalgia and recognition of World War II's significance led growing ranks of affluent "Warbird" collectors and history buffs to search out the few surviving examples of the aircraft that had fought it. With prices ranging from the hundreds of thousands to in excess of a million dollars for merely the wreckage of a rare plane, the value of locating and salvaging sunken Warbirds soon became apparent.

C. The Quonset Hellcat

With President Clinton's upcoming summer vacation on idyllic Martha's Vineyard, the United States Coast Guard was ordered to conduct a routine security sweep of its surrounding waters. While no terrorists were discovered, tangled in lost fishing nets in the treacherous shallows of Norton Shoals an old airplane was found half buried, nose down in the sand. Noting that its tail

reached to within 15 feet of the surface, the Coast Guard marked the hazard to navigation and moved on. Someone did remember to inform the fledgling Quonset Air Museum ("QAM"), a state-supported, volunteer-staffed collection of retired military aircraft housed in an old hanger on an abandoned US Naval Air Station whose most enduring claim to fame had been its namesake corrugated tin hut.

Within months, the enterprising QAM volunteers had secured the services of a couple of salvage divers, cranes and barges and set out for the churning waters of Norton Shoal. Although the Naval Historical Center in Washington, D.C. warned QAM that downed aircraft were considered war graves and Navy property in perpetuity, not unlike the little boy in the candy shop, QAM could hardly resist the temptation that a prized sunken Hellcat presented.

The Quonset volunteers could not believe their good fortune. Only a half dozen of the venerable Hellcats remained anywhere, yet here within their grasp was a restorable model like the hundreds of others that had been trained to kill out of Rhode Island airfields. To public acclaim, on a cold December day in 1993, the Hellcat was raised from the ocean. Much to the surprise of QAM and the citizens of Rhode Island, however, the Hellcat had not seen its last battle.

Shortly after its salvage—and the flushing of dozens of sea bass, ling cod and lobsters from its interior—the Hellcat was taken to QAM where its restoration commenced. Among the first visitors to the museum, however, were officers of the Naval Investigative Service. In no uncertain terms, QAM was informed that the Hellcat was Navy property and—at its own expense—the plane was to be immediately shipped to the National Museum of Naval Aviation ("NMNA") in Pensacola, Florida. To fail to do so would result in the arrest and imprisonment of QAM officers on charges of "theft of government property".

QAM President Damon Ise was in a quandary: while he desperately wanted to keep and preserve what historian Larry Webster had since identified as Vincent Frankwitz' Hellcat, his fellow volunteers were frightened and intimidated. The museum sat on a former Navy base and depended upon the Navy to loan retired aircraft for its nascent collection. To antagonize such a powerful benefactor could be suicidal to the upstart museum.

Entreaties to Congressional representatives were to no avail. Even influential Rhode Island Senator John Chaffee—himself a former Secretary of the Navy—could not convince the Navy to back down from its claim to the Hellcat. To his credit, however, the Senator did become a member of QAM and lend financial support to the battle for the Hellcat.

The surviving Frankwitz relatives were tracked down in upstate New York. Delighted and honored by the celebrity being afforded their uncle and/or brother's long-lost Hellcat, they enthusiastically supported Quonset's proposed restoration and display of the Warbird. But their pleas, like all others, fell on deaf Navy ears.

D. Battling the Navy

I had met Damon and his colleagues years before at the Boston Sea Rovers annual exposition, a sometimes raucous

**We had not
reckoned with
the Navy's
zeal in
asserting
perpetual
ownership
of all of its
lost planes.**

gathering of shipwreck divers and underwater explorers with a proud history dating back to the pioneering dives of Jacques Cousteau. Damon was aware of my efforts on behalf of wreck divers and the traditional salvage rights guaranteed under admiralty law and wanted to know what, if any, sort of legal remedies might be available. Intrigued by the challenge, I immediately enlisted the enthusiastic support of my colleague, Professor David Bederman of the Emory University School of Law in Atlanta.

While Damon stalled the Navy on the return of the Warbird, David and I devised a plan to "arrest" the Hellcat in the United States District Court in Providence, R.I. QAM would seek either a declaration that the aircraft had been abandoned by the Navy and hence, under admiralty's "law of finds", was the property of its finders; or alternatively, would request a liberal salvage award for having voluntarily and successfully rescued Navy

property from marine peril. With the assistance of Rhode Island attorney Lou Serio, our team and plan was set.

From a legal perspective, the case did not appear to vary significantly from many of the shipwreck salvage cases I had already handled: abandoned property becomes that of the finder under the venerable admiralty law principle of "finders, keepers". But we had not reckoned with the Navy's zeal in asserting perpetual ownership of all of its lost planes—and paradoxically, preventing the recovery and restoration of deteriorating Warbirds by private salvors. Moreover, the Navy was armed with a weapon that few other adversaries could wield: sovereign immunity.

Active duty Naval vessels have long been immune from admiralty arrest. Imagine the chaos that would ensue if a battleship, having run down a fishing boat, could be ordered to remain in port while the litigation was decided. Instead, while public vessels of the United States are liable for the injuries they cause, their freedom of navigation may not be compromised in the process of determining that liability. Accordingly, the Navy argued that Quonset's arrest of the salvaged Hellcat was illegal: the case should be dismissed with prejudice.

Yet our research had revealed numerous instances where the Navy had freely abandoned its sunken vessels. Significantly, most of these instances occurred when a Navy shipwreck had potential liability to another vessel. For instance, when two separate commercial vessels ran aground on the shallow wreck of the U.S.S. *TEXAS*—the target of aerial bombardment in the Chesapeake in the early 1920's—rather than paying for the ensuing damages, the Navy claimed to have abandoned the *TEXAS*. The case presented a perfect analogy to the Frankwitz Hellcat, which the Coast Guard had already deemed a hazard to navigation.

Although we felt that Quonset had a very strong case, one thing the young museum emphatically did not have was money. With barely enough funds to heat and light the cavernous hanger that doubled as their museum and restoration space, there was precious little money for the time-consuming work on the Hellcat restoration, much less to mount a legal battle against the U.S. Navy.

QAM volunteers commenced a letter-writing campaign in support of their legal cause. Prominent Warbird aficionados and collectors from across the country rallied to the defense of the Frankwitz Hell-

cat; contributions sufficient to fund the litigation on a restricted fee schedule was the price we would have to pay to bring such a potentially precedent-setting case. In fact, while not in and of itself lucrative, representing QAM and gaining the trust and confidence of the small but extraordinarily dedicated Warbird community would in fact lead to subsequent—and equally fascinating—lawsuits.

Ultimately, however, it was the facts as much as the law which would lead to settlement of Quonset's legal confrontation with the Navy. On cross motions for summary judgment on the issue of abandonment, the United States Magistrate Donald Lovegreen asked about the fate of the Frankwitz Hellcat were either party to prevail. QAM detailed the thousands of hours to that date spent disassembling, desalinating, and restoring each piece of the aircraft prior to its reassembly and the tens of thousands of additional hours still to come over the course of the multi-year project. As one of the only surviving planes that had flown out of the "Ocean State" during the War, Quonset wanted the Hellcat to become the museum's centerpiece and a memorial to not only Frankwitz, but to the thousands of other undecorated and unsung heroes lost in training behind friendly lines.

The Navy, on the other hand, was adamant about taking possession of the Hellcat. They openly admitted that they had neither the funds nor the inclination to restore the Warbird. As a matter of law and principle, the Navy intended to confiscate the aircraft and simply warehouse the unconserved wreckage until whenever—if at all—it would undertake preservation measures. Yet without immediate and appropriate treatment, the aircraft would be rapidly consumed by corrosion. The Magistrate was astonished that the Navy could take such a cavalier attitude toward the Hellcat while prohibiting a not-for-profit museum from restoring it for public display.

The court made it clear that were the issue pressed to judgment, it intended to find that as a Coast Guard-designated hazard to navigation, Hellcat would be deemed abandoned, the Navy was strongly urged to consider settlement. While Professor Bederman and I were eager to litigate a case which would create a legal precedent recognizing Naval abandonment of sunken Warbirds—and thereby open an untapped market in undersea salvage—we were duty bound to advocate the best interest of QAM. Quonset readily agreed to an arrangement whereby it would acknowledge Navy ownership of

the Frankwitz Hellcat in return for its perpetual loan to the Rhode Island museum. All in all, a fair deal for all parties, but a disappointment to the Warbird collectors who had hoped that the Quonset case would inure to their own benefit.

This would have to await another battle in the interminable Air Wars.

II. The Home Front

A. Gestapo Tactics

Dawn, October 24, 1995: Clad head to toe in black, an elite SWAT team, including the U.S. Marshal's Service, the FBI, the NIS and the Department of Justice burst through a door in Jupiter, Florida. Peter Theophanis, 36, is pinned to the wall, handcuffed, and dragged away. His wife, Peyton, hearing the commotion as she steps from the shower, stands in shock,

**An elite
SWAT team
burst through
the door. On
his wife's due
date, Theophanis
is pinned
to the wall,
handcuffed and
dragged away.**

dripping wet and wrapped in a towel. She is nine months pregnant and due to give birth that very day. She soon learns that her husband is being held without bail as a flight risk and a threat to the community.

A drug kingpin? International arms smuggler? Or perhaps merely a garden variety Mafioso? Peter Theophanis is none of these. Instead, he is charged with a sole count of "theft of government property". His alleged crime: the salvage of a Navy SBB "Dauntless" dive bomber that had been stripped of any useable parts and dumped into Lake Michigan in 1942.

B. Carrier Training

The most difficult skill for a pilot is master is that of taking off and landing from the deck of a moving ship. With the Japanese attack on Pearl Harbor, U.S. aircraft carriers in the Pacific were the only thing standing between the Imperial Japanese army and California.

None could be spared to train new pilots and yet thousands of fliers would be needed to win the war.

America's "Inland Seas"—the Great Lakes—truly became the home front: lake steamers had flight decks added to become makeshift carriers; pilots flying out of Glenview Naval Air Station, north of Chicago, would rendezvous with the newly-christened U.S.S. *SABLE* or U.S.S. *WOLVERINE* for eight landings and takeoffs to become C.Q., or "Carrier Qualified". Fifteen thousand pilots—including future President George Bush—would win their Navy wings over Lake Michigan.

Of course, with the hundreds of thousands of carrier landings and takeoffs on the Lake, accidents were inevitable. A Coast Guard cutter stationed nearby almost always rescued the unfortunate pilot, but the planes themselves were often less fortunate. Whenever possible, the aircraft would be hoisted from the deep and stripped of salvageable parts. Several hundred were never found; most of these still lie serenely on the lake floor, well preserved in frigid fresh water.

Among them was the SBD Dauntless dive bomber found by Peter Theophanis. The Dauntless had played a key role in the Second World War. At Midway, the decisive naval battle of the Pacific, while the Japanese fleet was occupied with destroying a wave of lumbering, low-flying Navy torpedo bombers, the Dauntless squadrons suddenly appeared screaming down from out of the clouds, unleashing high explosives onto Japanese aircraft carrier decks crammed with planes and ammunition. In an astonishing span of ten minutes, four enemy carriers were aflame and sinking—inflicting irreparable damage that would forever blunt the advance of Imperial Japan.

With the growing interest in recovering World War II history, in the early 1970's salvors began searching for Lake Michigan's lost Warbirds. The first plane, a rare TBM Torpedo Bomber, was raised by a Chicago sport diving club, which, amid much fanfare, landed their prize on the city's famous Navy Pier. Up to this point, the Navy had no reason to ponder disposition of its sunken planes. Nevertheless, to deter others from recovering these long-lost aircraft, the Navy seized the TBM and returned it to Glenview NAS—to the base's disposal yard, where, for more than two decades, it sat forlorn and rusting amid other discarded junk.

But with such a rich cache of well-preserved Warbirds in America's heart-

land, it was not long before professional salvors took interest in finding and raising these icons of aviation history. With some political clout, a well-connected Warbird collector could strike a "deal" with Pensacola's National Museum of Naval Aviation: find and salvage a plane that NMNA wanted for its own collection, and the private collector could recover a Lake Michigan Warbird to keep for himself. It wasn't long before the legality of this practice came under question, so NMNA changed its tack.

Peter Theophanis was first contacted by NMNA in 1992. Having recently discovered and raised an Avenger fighter airplane from the Atlantic off Florida, the museum asked that he put his skills to use on Lake Michigan. A contract was signed whereby Theophanis would search the lake electronically for Warbird targets. Upon finding one, a diver would videotape the wreckage; if after viewing the video, NMNA wanted the aircraft, Theophanis would be paid a flat \$40,000.00 fee for its recovery.

The summer of 1993 proved frustrating for Theophanis and his wife. According to contemporary crash reports, relentlessly towing sonar across the Lake Michigan waters where the carriers had operated should have revealed dozens of sunken aircraft. But the images of the bottom showed no planes for weeks on end. Finally, a single target—the heavily damaged SBD Dauntless dive bomber—was located and videotaped. Its condition was poor: the engine and propeller had apparently been removed forward of the cockpit; one wing was mangled and the other missing, and the entire empennage—the fuselage aft of the cockpit—had been cut away. These operations had obviously taken place on the surface, with the Dauntless remnant unceremoniously dumped overboard thereafter. But even underwater, the dive bomber wreckage was not safe: scuba divers had pried many of the cockpit gauges from their mountings.

In spite of the Dauntless' storied history, the NMNA's response to Peter's videotape of the sunken dive bomber was predictable: far too little of the aircraft remained for its interest. Theophanis, now desperate to salvage something out of his summer of searching the lake, asked if he could sell the wreckage to a collector to cannibalize for parts. NMNA Assistant Director Robert "Buddy" Macon's response was that he didn't care what Theophanis did with that "piece of shit".

Kevin Hooey, a wealthy Warbird collector from New York, had expressed an

interest in the Dauntless and agreed to hire a barge and crane to raise it. In July, Theophanis, Hooey and the two man crew of a barge recovered the plane and brought the dive bomber remnant back to shore. As they were confident of the Navy's assent, the wreckage was offloaded it onto well-lit U.S. Coast Guard parking lot in northern Indiana for preparation for transit back to New York. The helpful Coast Guardsmen kept a crowd of curious onlookers away from the workers.

C. Retaliatory Strike

A local newspaper's account of Theophanis Dauntless recovery operation aroused the ire of a competing Chicago salvage company who complained bitterly to NMNA that the dive bomber had been recovered without either a "deal" or any other Navy contract. Within weeks, Theophanis was the target of criminal

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prosecution and NIS officers began interviewing the people involved in the Dauntless recovery. Over the ensuing year, the NMNS' Buddy Macon would change his story to the investigator three times. He first told NIS agent Larry Fuentes that he had misplaced the Theophanis video of the salvaged Dauntless; a month later that he couldn't recall if a video had ever been sent; and finally, Macon denied that the sunken aircraft had ever been videotaped at all.

When the Grand Jury was later convened to decide whether to charge Theophanis with the felony theft of government property, Fuentes was specifically thrice asked by the jurors about the existence of any videotape of the Dauntless. In spite of his own notes stating that the tape had been lost by the NMNA, Fuentes perjured himself and steadfastly maintained that Theophanis had never fulfilled his

contractual obligation to provide footage of the sunken plane to the Museum.

I was contacted by Theophanis early on in the investigative process and assured him that no one had ever been charged criminally for the salvage of Navy aircraft. Since there were civil remedies available—such as a maritime repossession action—I believed it highly unlikely that he would be the first. The next I heard from him was over a year later when his wife's frantic call indicated that her husband had been dragged off to jail while she was on the verge of giving birth.

This is not all that I would learn. For well over a month prior to his October arrest, the Theophanis' had noted a peculiar buzzing and clicking sound on their telephone; the couple joked with their friends that they were being wiretapped. As Peyton's due date was a frequent topic of conversation, Peter's arrest on that very day was highly suspicious. This became even more questionable when pretrial discovery revealed that the Grand Jury indictment had been returned nearly three months prior to his arrest. Ordinarily, when one is charged with a nonviolent offense, the prosecutor often permits the defendant to appear on his or her own volition for booking. And only the most extraordinary circumstances is one indicted and not arrested until months later.

That Peter Theophanis was being made an example of became evident with his treatment following arrest. Rather than a quick booking, appearance and release on recognizance, the Assistant Attorney General in Florida had been instructed by his Indiana counterpart that Theophanis was a flight risk and threat to the community who should be held without bail until trial. Yet Peter had no prior convictions and had lived at the same address for over three years. Held incommunicado for more than 24 hours in a cell while anxious over his pregnant wife, Theophanis was ultimately released on a \$5,000.00 bond when the U.S. Magistrate learned of the true nature of the single charge against him.

While not a criminal specialist, Peter's plight was a cause near to my heart. Hiring as co-counsel local criminal defense attorney Jim Foster in the Rust Belt town of Hammond, the seat of the federal Northern District of Indiana, I was soon immersed in what seemed to be a vindictive effort to make an example to other salvors of the consequences of arousing the ire of the NMNA. The evidence was weak: as the SBD wreckage had been quickly sold for parts, no

"body" existed (similar to another burial at sea case with which Delawareans are all too familiar). The only photographs of the wreckage were blurry images taken by a newspaper reporter using a telephoto lens at night. And the man who financed the salvage operation and ended up with the Dauntless, Kevin Hoocy, had never been identified, interviewed or charged with any wrongdoing.

As a criminal case, the time between arrest and trial is far swifter than in civil litigation. Scrambling for expert witnesses, I called on Gary Larkins, a veteran Warbird salvor from California whose international exploits had left made many a bureaucrat jealous but had saved more than 60 endangered historic aircraft for private restoration or museum exhibition. Sympathetic to Theophanis' dilemma, Larkins quickly agreed to testify at no charge.

Jeff Ethell, historian, pilot and prolific writer, was incensed at Peter's arrest and also volunteered his services. He related how he and a team of volunteers had recovered another SBD Dauntless from Lake Michigan in the early 1970's, before even the creation of the NMNA. When an FBI agent was sent to investigate the theft of a "tactical fighter aircraft", the agent laughed aloud at the rusting hulk and exclaimed to Ethell, "[T]hat's nothing but a god damned antique!" and then chewed out the Navy officers who had sent him out on what he been led to believe was an anti-terrorist mission. Although since retired, the FBI agent was nevertheless forbidden from testifying in the Theophanis case.

Rick Ropkey ran the Indiana Military History Museum, which had rescued the first Warbird recovered from Lake Michigan, a TBM Torpedo Bomber, from forlorn destitution in the Glenview NAS disposal yard. The TBM was then transferred from the museum to a Warbird collector who has since spent tens of thousands of hours and dollars in restoring it. Ropkey, too, was eager to debunk a foolish Navy policy that endorsed the inexorable underwater destruction of historic aircraft over their recovery and preservation under private ownership.

As compelling a defense as we had assembled, ultimately the case was won more by the government's incompetence than anything else. The prosecutor, obviously a neophyte to maritime matters, was unable to decipher the Longitude and Latitude coordinates of the Dauntless' crash report and hence, was unable to even place the wreckage at the location from which it was recovered. When asked

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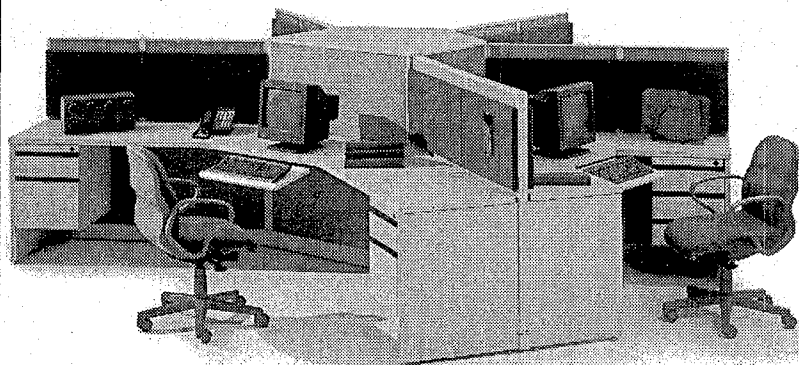
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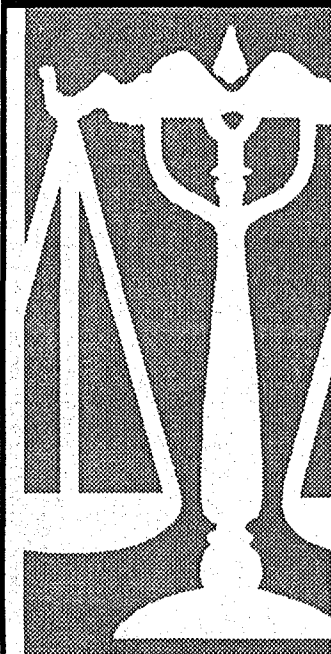
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by District Judge Rudy Lozano what the terms degrees, minutes and seconds meant—units of distance on the water—she guessed miles, feet and inches, missing the mark by the proverbial nautical mile and arousing the ire of the judge.

The prosecution's failure to identify Hooey—the Warbird collector who had paid for the salvage operation, trucked away the planewreck, and ultimately sold the Dauntless for parts at a handsome profit—proved equally problematic. For after NIS agent Fuentes repeated his perjury that no videotape of the sunken dive bomber had ever been made—and was duly impeached with his own written reports to the contrary—we produced Hooey as a rebuttal witness. Lo and behold, Hooey had the videotape; the underwater tour of the aircraft conclusively showed that the Dauntless had been disassembled on land and the remnant dumped into the water. This was a clear act of abandonment by the Navy: the aircraft could not possibly have been “stolen” from a non-owner.

Gary Larkins took the stand and contrasted the Navy's restrictive policies with those of the U.S. Air Force, which has formally abandoned all aircraft that crashed prior to 1961. Pointing out that both branches of the Armed Forces often used the same plane, although the Navy's were painted blue gray and those of the Air Force olive drab, Larkins noted that neither color could be distinguished in Lake Michigan's murky waters. Hoisted to the surface, if the Warbird was olive drab, one had hit the jackpot, but if it was blue-gray, he was going to jail!

Larkins was still testifying when Judge Lozano called a halt to the travesty of justice. Granting a defense motion for a directed verdict, the court ruled that the prosecution's evidence was so weak that no reasonable jury could find Theophanis guilty. Most of the defense witnesses had not even been called, nor had Peter yet taken the stand.

Nevertheless, it was a bittersweet victory for Peter and Peyton. Financially costly and emotionally draining, the experience harmed his reputation and did enormous damage to his underwater search and recovery business over the years he had endured the legal ordeal. A Federal Tort Claims Act claim for monetary damages against the United States has since been filed and is awaiting administrative decision, a prerequisite to filing suit. Until the Theophanis' are fully compensated for the damages they sustained as a result of Peter's unjust criminal prosecution, how-

ever, the repercussions of the Great Lakes' air wars will continue to be felt.

III. The Pacific Front A. Dreams of Glory

As a child, Robert Ferguson grew up near an Army Air Corps training base. Whenever he heard the distinctive roar of the P-51 Mustang fighters, he ran from his house and looked up to watch their aerial training maneuvers with awe. An uncle who flew the fighter took the young boy to visit his plane; Ferguson vowed that one day, he would fly a Mustang of his own. Decades later, after tremendous success in the business world, his dream was realized after he purchased a weather-beaten P-51 from a Central American air force that had finally replaced the hand-me-down planes they had received decades earlier from the United States.

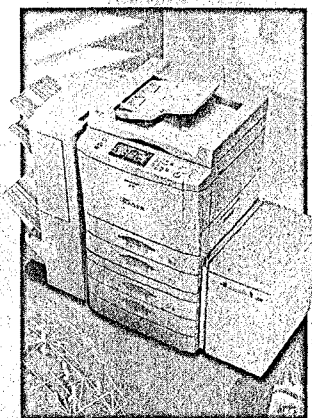
Hundreds of thousands of dollars later, Ferguson's Mustang was restored to its Second World War glory and had been proudly flown by its owner to numerous air shows. But he remained perplexed and angry that the United States Navy continued to prohibit its own citizens from recovering and restoring those crashed planes lying underwater. An ardent supporter of the legal battle over the Quonset Hellcat, Ferguson was disappointed that no legal precedent had emerged from the settlement, but vowed to carry on the fight.

Ferguson had previously befriended Robert Mester, a visionary underwater explorer and salvor from Washington State who shared his passion for history and Warbirds. Seattle's Lake Washington, in many respects a miniature Lake Michigan, was also a frigid repository of dozens of sunken aircraft from training accidents out of the adjacent Sand Point Naval Air Station. With Ferguson's backing, Mester formed Historic Aircraft Recovery, Inc. ("HAPI") and was determined to challenge the Navy's claim to the lake's Warbirds.

Having met me during the Quonset litigation, Ferguson was receptive to the proposal from Emory's Professor Bederman and I that another Warbird salvage case be filed and pursued until a precedent had been established. As HAPI had previously located many of the Lake Washington aircraft wrecks, a target for admiralty arrest was chosen: an F4F "Wildcat", the forerunner of the Hellcat and a frontline fighter in the opening years of the Second World War.

The Lake Washington Wildcat had been involved in simulated aerial combat

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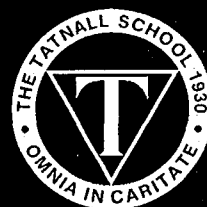


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in 1942 when it clipped wings with another plane. The pilot was able to put the Wildcat into the lake and escape the wreck, treading water until rescued, but his aircraft quickly went to the bottom. A Navy salvage team located the Wildcat in 170 feet of water but decided that the cost of recovery was too high for an obsolete fighter. At such depths, the Wildcat was obviously not a hazard to navigation so some other rationale to demonstrate abandonment by the Navy had to be found.

In 1942, our historical research revealed that the Navy did recover a state-of-the-art P-38 Lightning from even deeper waters in Puget Sound: the risk of allowing such technology to remain potentially accessible to Axis intelligence was unacceptable to the U.S. military. So we could demonstrate that the Navy had located the Wildcat and had the ability to salvage it, but declined to do so. Under similar circumstances, a New Jersey federal court had ruled that the shipwreck of the Italian luxury liner *ANDREA DORIA* had been abandoned by the insurance underwriters who had paid for its 1956 loss; we were confident that the U.S. District Court in Seattle, reasoning similarly, would rule that the Navy had abandoned the Wildcat.

B. The Battle Joined

Cognizant that we would be asserting abandonment by the United States—and not a private owner—we added another weapon to our legal arsenal. With the able assistance of local admiralty and environmental counsel Jeffrey Jernegan, Esq., we determined that the sunken fighter airplane had been carrying numerous hazardous materials, including aviation fuel, engine oil, hydraulic fluids, a large lead acid battery, and even radium paint used to illuminate the plane's gauges at night. HAPI's videotaped underwater tour of the Wildcat revealed that merely flexing one of its wings caused a telltale trickle of oil to float out of the plane to sheen on the lake's surface.

Watching the tape, directors at the Washington Department of Environmental Protection's Office of Water Pollution Control agreed that the Wildcat posed an unreasonable risk to Lake Washington that could be fully abated by the salvage and removal of the aircraft. Thus, our complaint requested not only the admiralty arrest of the Wildcat and the right to raise the rest of the plane: it also included allegations that the presence of hazardous materials within the aircraft violated both state and federal

pollution laws. Where an owner refuses to abate such a pollution source, we argued, the government or a private citizen could do so on their own.

Both the Navy and the U.S. Environmental Protection Agency sprang to the defense of their seemingly abandoned Wildcat fighter. Because, unlike the Quonset case, HAPI had decided to contest ownership before the actual recovery of the aircraft, we could only speculate as to the precise volume of the respective hazardous materials still on board the Wildcat. This made it very difficult to pass the threshold for a violation of either the federal Clean Water Act or its Washington State counterpart: proof that the release of the material would constitute an imminent danger to human health or the environment. While our state environmental experts seemed sure of their opinions while the case was being prepared, on cross examination in deposition, they backed off of their earlier affidavits in support of the Wildcat's removal from the lake.

With regard to abandonment of the airplane by the Navy, District Judge Thomas Zilly was clearly sympathetic to HAPI's salvage claim and agreed that under the circumstances, he would deem any owner to have abandoned the Wildcat. Any owner,

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that is, except the United States: reluctantly agreeing with the federal government, Zilly ruled that pursuant to the Constitution's Property Clause, the United States does not abandon its property unless it does so explicitly—and no such statement of intent had been made with regard to the Lake Washington Wildcat. While questioning the wisdom of the Navy's policy, the judge was nonetheless constrained by his reading of the Constitution. He did HAPI and fellow would-be Warbird salvors one large favor by ruling orally from the bench and issuing only a brief Order without any memorandum opinion.

Deeply disappointed, we left court crestfallen. HAPI's plans to recover Lake Washington's long-lost cache of historic aircraft would have to wait. Surprisingly, renewed hope that these icons of aviation history could be raised and restored would come from an unexpected quarter.

IV. Opening a New Front

In April, 1998, the United States Supreme Court's unanimous decision in favor of the finders and salvors of the California shipwreck *BROTHER JONATHAN* would change the legal landscape in the realm of historic ship - and

planewreck recovery. See, "Deep Shipwreck in High Court" (pages 16-19, *infra*.) Because a sovereign asserting ownership of underwater property subject to a salvage claim can no longer divest a feder-

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al court of admiralty jurisdiction, the Navy's "hands off" policy toward its sunken Warbirds is now clearly vulnerable. It did not take long for a salvor to challenge the Navy in another case.

In deep water off Miami, Florida lies the only known example of the TBD Devastator, the slow, vulnerable torpedo bomber that had been shot out of the skies en masse during the pivotal Battle of Midway. Several abortive efforts by the Devastator finders to cut a deal with the NMNS had been frustrated by Navy intransigence when news of the Supreme Court precedent broke.

With the torpedo bomber presently under admiralty arrest, the Southern District of Florida—home court for the fabulously successful treasure galleon finder Mel Fisher and company—will be the first to decide whether the Navy can continue to prevent those with the wherewithal and ingenuity to find, recover and restore Warbirds from saving these historic aircraft for posterity.

Vincent Frankwitz—and hundreds of other pilots like him—deserve a better fate than an anonymous grave in a trackless ocean. Only through the recovery and restoration of the aircraft that these brave aviators flew can proper recognition of their unsung contribution to victory be made—and the legacy of flight so instrumental in the preservation of our precious liberty be most fittingly and properly honored. ♦

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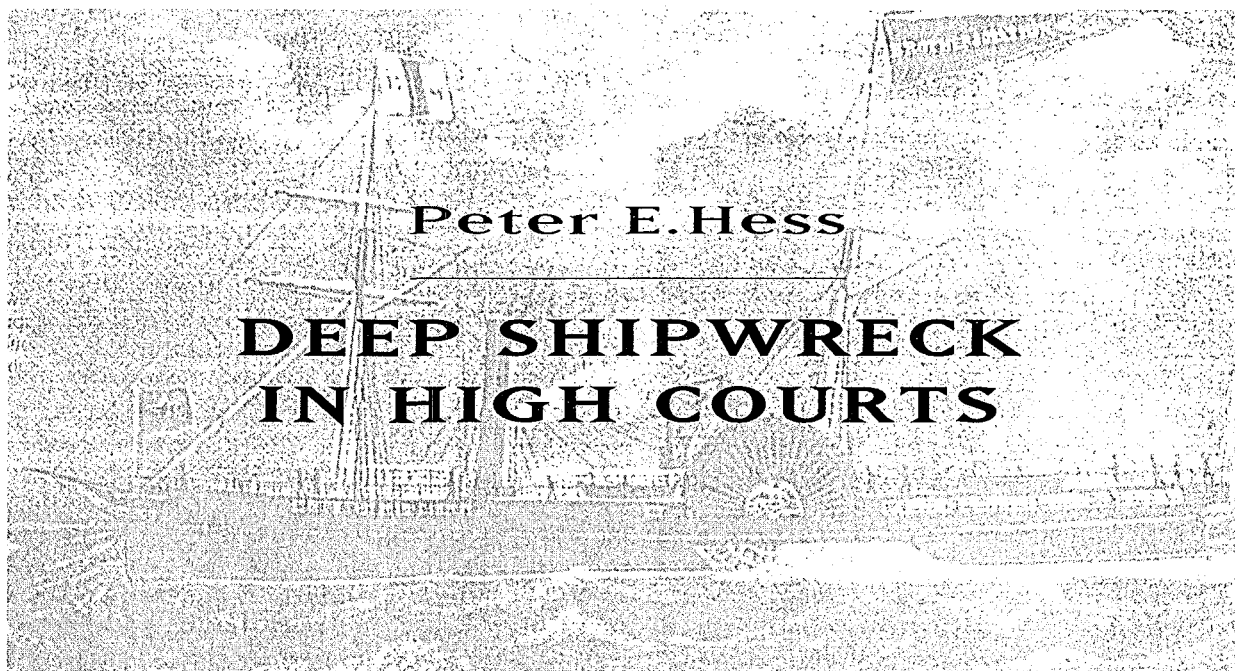


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DEEP SHIPWRECK IN HIGH COURTS

I. A Treasure Lost— and Found

Like a Phoenix arisen from a watery grave, a century and a third after her catastrophic sinking, the S.S. *BROTHER JONATHAN*—the most storied shipwreck on the U.S. Pacific coast—has sailed once again into national prominence. After striking an uncharted rocky shoal in 1865, the paddle steamer sank in 265 feet of seawater in California's territorial waters off Crescent City, not far from the Oregon border. The *BROTHER JONATHAN*'s tragic loss cost more than 300 lives and a fortune in gold coins and bullion from California's gold fields.

Highly sought after by modern-day divers and treasure hunters, after more than a decade of searching, the salvage company Deep Sea Research, Inc. ("DSR") found the shipwreck in 1993 in deep, cold, and turbid Pacific water more than four (4) nautical miles from her supposed place of sinking. Yet the historic find would yield more than merely a fabulous array of artifacts, archaeological data and a trove of more than 1,200 (and counting) gold coins: from the depths of the ocean, the litigation between her finders and the State of California over ownership and control of the *BROTHER JONATHAN* would rise all the way to the United States Supreme Court.

Perhaps of even greater value than the *BROTHER JONATHAN*'s dazzling treasure is the momentous decision by an unanimous Court: reaffirmation of the traditional right of a shipwreck finder and salvor to invoke the exclusive admi-

ralty jurisdiction of the federal courts. When faced with seemingly ubiquitous hostile and covetous governmental claims to that which has been found and recovered only through private initiative, perseverance and capital, any salvor will readily admit that having one's salvage case adjudicated by a neutral and disinterested federal court is truly worth its weight in gold.

While searching for the fabled shipwreck, DSR acquired the salvage rights to the *BROTHER JONATHAN* from the marine underwriters who had insured the sunken vessel and its cargo and paid the claims resulting from its sinking. Just as when one's automobile is wrecked in a collision, the insurance company pays the car—or ship—owner for the loss but retains the right to salvage the wreckage for usable parts or recoverable cargo. Thus, although the sunken vessel has been lost—even for well over a century—U.S. courts recognize that ownership rights remain intact. Nevertheless, one who voluntarily rescues the property of another from marine peril is entitled to a liberal compensation for undertaking the risk inherent in salvage operations. The salvage award has been an integral part of maritime law since the first sea codes were recorded by the Phoenician mariners of the ancient Mediterranean.

In order to protect its claim for exclusive salvage rights, DSR filed a federal admiralty "arrest" of the *BROTHER JONATHAN* and her artifacts, requesting that the United States District Court prohibit all others—including the State of California—from interfering with its recovery operations. But California asserted that the *BROTHER JONATHAN* had long since been abandoned by the underwriters that had insured the loss of the vessel and its cargo. With Congressional passage of the Abandoned Shipwreck Act in 1988 ("ASA"), 43

U.S.C. §2101 *et seq.*, if the *BROTHER JONATHAN* and its precious cargo were abandoned, it became the property of the State of California.

While the ASA purports to abolish federal admiralty jurisdiction over abandoned shipwrecks in state territorial waters, California's chief defense was the Eleventh Amendment to the U.S. Constitution, which bars an action against a state in federal court. As the owner of the submerged lands upon which the *BROTHER JONATHAN* rests, the state claimed constructive possession of the shipwreck; any admiralty action to determine its ownership was in effect a suit against California in violation of the Eleventh Amendment.

In litigation before both United States District Court and the Ninth Circuit Court of Appeals in San Francisco, California's claims were rejected. DSR successfully argued that the shipwreck had never been abandoned in the century and a third since its sinking: the technology to find and recover the *BROTHER JONATHAN* from 265 fsw has never existed until the very recent present. Without the ability to locate and recover his property, an owner could not be deemed to have given up his ownership rights. And if the *BROTHER JONATHAN* still belonged to the insurance companies that had paid for its loss, then it did not pass to California under the ASA: DSR's admiralty arrest of the shipwreck was not a suit against the state but rather akin to a maritime quiet title action. The lower federal courts agreed with DSR, awarding them the exclusive salvage rights to the shipwreck and enjoining everyone else—including California—from interfering. *Deep Sea Research, Inc. v. The BROTHER JONATHAN*, 883 F.Supp. 1343 (N.D. Cal. 1995); 102 F.3d 379 (9th Cir. 1997).

But salvage rights awarded DSR were not unconditional: as the *BROTHER JONATHAN* is indisputably of great historical significance, the court made it clear that the salvor is obliged to use appropriate archaeological methods for the recordation of the wreck site during its excavation as well as during the scientific con-

servation of all of the artifacts recovered. 883 F.2d at 1363. Archaeology is a destructive process: as a site is excavated, the contextual information can be lost if not properly recorded. And artifacts recovered from centuries of immersion are prone to rapid disintegration if not properly treated immediately upon being brought to the surface. Admiralty courts adjudicating the right to recover historic shipwrecks will not award salvage rights to such vessels to one who does not demonstrate the resources and commitment to proper archaeology.

Cognizant of their responsibility to posterity, DSR hired marine archaeologists and conservators and won the close cooperation of the Del Norte County (CA) Historical Society for assistance with the preservation of the salvaged artifacts, most of which will be placed on permanent display in local Crescent City museums.

II. Deeper Legal Questions

Dissatisfied with the courts' rejection of its ownership claim, California appealed to the nation's highest court. When the Supreme Court accepted the state's petition for *certiorari* in June, 1996, DSR had justifiable cause for alarm. During that term less than two percent (2%) of the petitions for review were granted; this alone implied that at least four Justices thought that the case had been wrongly decided. The issue that had attracted the Court's attention was the state's claim of Constitutional immunity from a federal salvage action over a shipwreck in state waters. Broad expansion of states' Eleventh Amend-

ment immunity had been a hallmark of the Rehnquist Court. And in the previous 1995-96 term, of the 26 cases on appeal from the Ninth Circuit, where DSR had prevailed, the Supreme Court reversed the lower appellate court 25 times! Having appeared in court six times and prevailing at each hearing, DSR was painfully aware that it could all be lost before the nation's highest court.

Ostensibly pitting only California versus DSR, the case attracted the participation of most coastal states and the nation's leading archaeological organizations in support of state ownership and control of the treasure-laden wreck. But DSR did not stand alone: in support of the finders and the traditional rights conferred under admiralty law were a broad array of marine insurance companies, historic shipwreck salvors, diving equipment manufacturers and training organizations also filed "friend of the court" briefs with the Supreme Court.

The Solicitor General of the United States—who represents the federal interest in cases before the Supreme Court—played something of a wild card in the *BROTHER JONATHAN* litigation. Claiming ownership of Army bullion being shipped on the ill-fated paddle steamer, the United States would not concede that it had been divested of title thereto simply because its property had been lost for over a century. Instead—as has been the federal tack in the litigation over the right to salvage sunken Navy aircraft—the Solicitor General sought to distinguish government property, which can never be involuntarily abandoned, from private property, which can. Agreeing with DSR and its *amici* that there was no Constitutional bar to federal admiralty jurisdiction over the threshold question as to whether or not the *BROTHER JONATHAN* and its cargo had been legally abandoned, the Solicitor General nevertheless argued that the facts compelled a finding of abandonment and hence, its non-federal cargo belonged to California alone.

At oral argument before the Supreme Court on December 1, 1997, the question of when a wreck has been legally abandoned attracted



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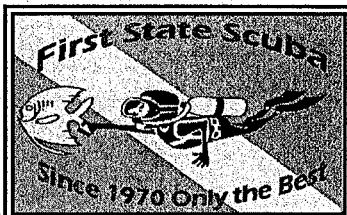


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considerable and lively queries from each of the Justices. To the amusement of the audience, Justice Antonin Scalia likened the loss of a shipwreck to his dropping a quarter into a sewer grate: just because one cannot retrieve it does not mean that he no longer owns it. Questioning California's attorney, Scalia challenged the state's contention that the *BROTHER JONATHAN* had been abandoned at some time when any effort to find and salvage her would have been fruitless. "So the law requires a vain act, to do what is undoable?" The lawyer somewhat sheepishly admitted that in essence, this was the state's position.

On April 22, 1998, an unanimous Supreme Court affirmed the courts below and the traditional right of a finder to bring an admiralty claim for salvage rights before the federal courts. The Justices declared that unless the shipwreck or property were in the *actual* possession of a state, federal or foreign government, that sovereign could not assert immunity as a defense to a salvage action: the mere fact that a state claims ownership of a shipwreck found in its waters does not divest federal courts of admiralty jurisdiction. *California v. Deep Sea Research, Inc.*, —U.S.—, 118 S.Ct. 1464 (1998).

Moreover, if a Navy aircraft or a Spanish treasure galleon were discovered underwater, either sovereign's claim will be adjudicated by the admiralty court as well. And if the sovereign is still the owner—that is, there has been no abandonment—then the finder and salvor is nevertheless entitled to the liberal compensation of a salvage award for having successfully rescued sovereign property from marine peril. Thus, in one fell swoop the Supreme Court invalidated the chief defense asserted against finders and salvors by governments seeking to lay claim to the property discovered through the hard work and perseverance of a private person or company.

Although the Court remanded the case to the district court for further determination of abandonment, California, losers in seven straight contested hearings, has had enough. By the time this article is published, a settlement between the state and DSR will likely have been approved. Ironically, its terms are nearly identical to those proposed by DSR upon its discovery of the *BROTHER JONATHAN* and prior to nearly five (5) years of adversarial litigation.

The implications of the *BROTHER JONATHAN* case for underwater

explorers are profound. In litigation over a shipwreck found at a depth only recently made accessible to the free-swimming scuba diver, the Court recognized that the advent of sophisticated search, recovery and diving technology will inevitably reveal greater numbers of long-lost vessels, cargoes and historic aircraft. Rejecting bureaucratic models like the ASA—in which government ownership is presumed and admiralty jurisdiction abolished—the Justices have come down firmly on the side of admiralty law as a venerable and effective means of resolving the contentious disputes over ownership and salvage rights thereto.

By making the finder a stakeholder in the disposition of the property—conditioning the right to an adjudication of title or a liberal salvage award upon the salvor's good faith and commitment to archaeological documentation of the recovery operations—admiralty law ensures the protection of historically significant property by the party most capable of providing it: he (or she) whose own blood, sweat and tears have resulted in the very discovery itself.²

In its epic journey from deep water to high court, the *BROTHER JONATHAN* has yielded treasure many more than the few intrepid and persevering members of DSR who found the sunken paddle steamer and her golden trove. For by ensuring the continued jurisdiction and impartial adjudication of admiralty law to those who brave the deep in search of the submerged history of a day and time long since past, the *BROTHER JONATHAN* has left a precious legacy for all underwater explorers. ♦

FOOTNOTES

1 Delawareans might recognize one of the principals of DSR, Harvey Harrington, famous in the First State for the 1984 discovery off Cape Henlopen of the 1798 British Brig of War, HMS *DeBraak*.

2 In spite of its venerable history and proven effectiveness in resolving disputes over historic shipwrecks, their ownership and salvage rights, admiralty law is under international attack as well. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") is proposing "The International Convention for the Protection of the Underwater Cultural Heritage" which proclaims all shipwrecks older than 25 years to be "underwater cultural heritage" and government property while abolishing admiralty law and any other statute, rule, regulation or contract creating any incentive whatsoever for the recovery of such shipwrecks. UNESCO hopes to conclude the negotiation and ratification of the Convention within the next three (3) years.



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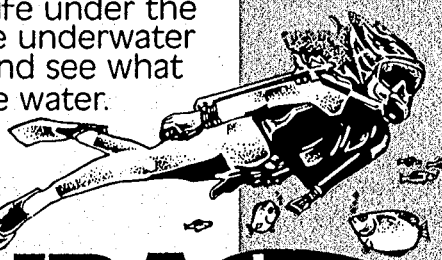
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IT IS STILL NOT A SHORE THING: ENVIRONMENTAL IMPROVEMENT AND INDUSTRIAL USES OF DELAWARE'S COASTAL ZONE*

From Swede's Landing in Wilmington, through the Bombay and Prime Hook National Wildlife Refuges, to the State's southern beaches, freshwater wetlands and inland bays, Delaware's coastal zone is the State's most distinguishing and important natural resource. Delaware's coastal zone serves as a flyway to the most significant migration of birds in the Northern Hemisphere. Maintaining the health of the coastal zone is imperative to the State's multi-million dollar tourism industry and for protecting property values statewide. Each year, tourists flock from world-round to view the myriad of migratory birds who engorge them-

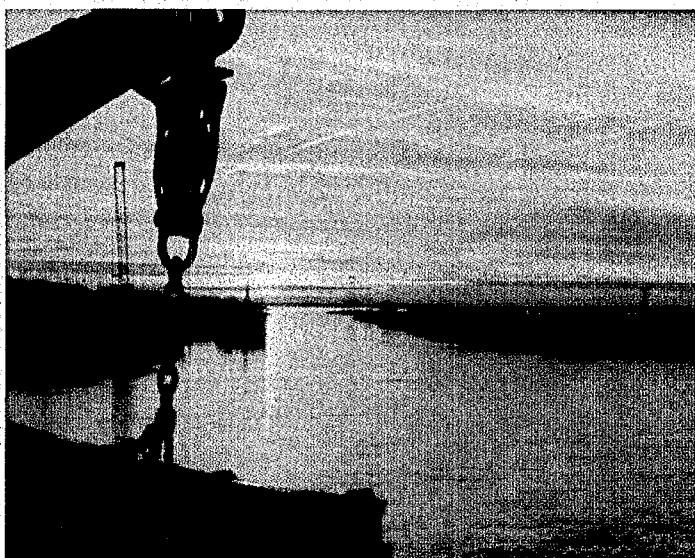
selves on a banquet of horseshoe crab eggs each spring before proceeding along on a grueling 5,000 mile trek to northern destinations. The zone's wetlands are registered with the Ramsar Convention, an international treaty that recognizes wetlands worldwide of international importance.

At the behest of then-governor Russell Peterson, in 1971, the Delaware Legislature enacted the first comprehensive coastal land use law in the world aimed at curbing industrial uses of a coastal area. Coastal Zone Act, 7 Del.C § 7001 et seq. (1971) (referred to hereafter as the "CZA" or "Act"). At its core, the CZA acknowledges that "the protection of the environment, natural beauty and recreational potential of the State is . . . of great concern," and aims to

protect the "natural environment of its bay and coastal areas," for recreation, tourism and environmental uses. 7 Del.C § 7001. As such, the CZA forbids some uses, allows others by permit only, and fails to regulate still more.¹

The CZA contemplates the development of implementing regulations. Such regulations, however, have been a long time coming. The CZA directs the Coastal Zone Industrial Control Board ("Board") to promulgate regulations upon consideration of those proposed by the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). After the Board's initial attempt to promulgate regulations in 1993 failed², DNREC submitted new draft regulations ("Regulations") to the Board on June 1, 1998.³ The Board's adoption of the Regulations, which await completion of a public participation process⁴, is imminent.⁵

The purpose of this article is to discuss two of the CZA's major aspects as implemented by the Regulations. Section I examines uses that are prohibited within the coastal zone, namely, new "heavy industry," "bulk product transfer facilities," and other new "nonconforming uses." Section II discusses the process used to determine whether to issue a permit for other uses, such as "manufacturing uses," and extensions or expansions to existing non-conforming uses. Section II then explains the method employed for ensuring that a permitted project will result in net environmental improvement in the coastal zone. Section III



Delaware's coastal zone must effectively balance industrial, recreational and environmental uses.

analyzes the Regulations' most important aspects.

I. PROHIBITED USES

The two primary uses the CZA prohibits are new "heavy industry" and "bulk product transfer facilities." 7 Del.C § 7003; Regulations, §D. The CZA "grandfathers"⁶ existing heavy industrial uses and bulk product transfer facilities, with the exception of "abandoned" facilities.⁷ The CZA prohibits, however, "Heavy industry use of any kind not in operation on June 28, 1971." 7 Del.C § 7003; Regulations, §D. "Heavy industry" constitutes uses "characteristically involving more than 20 acres," employing equipment⁸ with the "potential to pollute when equipment malfunctions or human error occurs." 7 Del.C § 7002(e); Regulations, §D. Prohibited new heavy industry uses also include extension or expansion of "non-conforming uses"⁹ beyond their footprints as found in Appendix B of the Regulations, 7 Del.C § 7004(a), Regulations, §D, and other similar heavy industrial uses.¹⁰

The CZA next prohibits "[b]ulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971." 7 Del.C § 7003; Regulations, §E. "Bulk Product" includes "loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel." Regulations, §C. "Bulk Product Transfer Facility" includes the transfer of bulk products from vessel to vessel. *Coastal Barge Corp. v. Coastal Zone Indus. Bd.*, 492 A.2d 1242, 1247 (Del. 1985).¹¹

A project applicant may,¹² and under some circumstances must¹³, seek a "status decision" to determine whether a project constitutes a prohibited use, requires a permit, or is exempted from the CZA.¹⁴ Before the Board made a decision on the appeal an agreement was reached between the parties which affirmed the ruling of the status decision, but modified the language of the decision. *Id.* The new language clearly stated that the Port of Wilmington docking facility exception only applied to facilities within the City of Wilmington. *Id.* "The effect of the revised status decision . . . is to place a clear geographic limit on the exemption under Section 7002(f) of the Coastal Zone Act of docking facilities of the Port of Wilmington. . . . Storage tanks widely separated from the Port and outside of the City of Wilmington would not come under the exemption provided by Section 7002(f)." *Id.*; 7 Del.C §

7002(f). See e.g., *Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 897 (Del. 1994).

II. USES ALLOWED BY PERMIT ONLY

Some industrial uses are allowed by permit only. These include new, expanded or extended "manufacturing"¹⁵ uses, or expansions or extensions of existing "nonconforming" uses, such as existing heavy industry, bulk product transfer facilities and other non-conforming uses within their existing footprints. 7 Del.C § 7004; Regulations, §F. The CZA also requires a permit for "the construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility," and any "public sewage treatment plant or public recycling plant." Regulations, §F.

Permit applications, which must be accompanied by an "Environmental Impact Statement" ("EIS"), are submitted for review to DNREC. Regulations, §§H.2 and H.3.¹⁶ Regulations, §H.2. The linchpin of the permit review process is to determine whether a project "may result in any negative impact" on the coastal zone, and to develop permit provisions to "offset" any such impact in light of various "environmental indicators." 7 Del.C § 7004(b); Regulations, §H.3. The ultimate objective of any approved permit application is "environmental improvement" in the coastal zone.¹⁷ To determine whether the project will result in such improvement, DNREC evaluates the following: (1) "Environmental impact," (2) "Economic effect," (3) "Aesthetic effect," (4) "Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsection," (5) "Effect on neighboring land uses," and (6) "County and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction," 7 Del.C § 7004(b); Regulations, §§F and H.3. DNREC's evaluation must consider the "direct and cumulative environmental impacts" of the proposal.

To obtain approval, the applicant must "offset" any "negative impact" on the coastal zone. The extent of any negative impact and the means by which to offset them are a function of various "environmental indicators."¹⁸ Regulations, §H.3. The definition and associated technical parameters of such indications have yet to be developed, although they should be

developed by March 19, 1999.¹⁹

If DNREC determines that the proposed project will have a negative impact on the coastal zone, the project applicant must propose an offset project that will result in environmental improvement. Regulations, §I.1. The offset proposal "must more than offset the negative environmental impacts associated with the proposed project or activity." Regulations, §I.1. The chosen offset project must be "clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with the permitting activities themselves." Regulations, §I.1.²⁰

[a] qualitative and quantitative description of how the offset project will more than offset the negative impacts from the proposed project. . . . How the offset project will be carried out and in what period of time. What the environmental benefits will be and when they will be achieved. How the offset will impact the attainment of the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone. What, if any, negative impacts are associated with the offset project. What scientific evidence there is concerning the efficacy of the offset project in producing its intended results. How the success or failure of the offset project will be measured in the short and long term. Regulations, §I.2.

In determining the ecological effectiveness of the offset proposal, the Secretary must look at "[h]ow the offset will impact the attainment of the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone. Regulations, §I.2. Past achievements of the applicant, as well as the location and timing of the proposed offset, may affect the extent of offset required, and the offset need not occur in the coastal zone.²¹ Permits are then approved contingent on the completion of the offset. Regulations, §I.2. Permitting decisions may be appealed to the Board. 7 Del.C § 7007; Regulation, §P.²²

III. ANALYSIS

There is no doubt that the Regulations mark the commencement of more discernible, predictable, and one hopes, sensible implementation of the CZA. The Regulations have better identified prohibited uses as well as the process for permit applications and review. The

Regulations, however, come up short for these aspects in several significant respects, each of which will have to be resolved in the future, as discussed briefly below.

First, the Regulations are conspicuous in what they do not address in one significant respect: the Regulations are not determinative of the issue of whether electric generating stations constitute "heavy industry." This issue has now frustrated implementation of the CZA for a quarter of a century. See e.g., *Kreshool v. Delmarva Power & Light Co.*, Del. Super., 310 A.2d 649 (1973). Regrettably, deciding the topic still too controversial to address, DNREC left it out of the discussions that led to the Regulations, thus relegating it as fodder for future prognostication.

Second, the Regulations did not provide the parameters for its most important invention, "environmental indicators." The indicators will be used to determine the extent of the environmental harm caused by a project, whether such harm will be offset, and whether such offset "clearly and demonstrably [is] more beneficial to the Coastal Zone than the harm done by the negative environmental impacts associated with the permitting activities themselves."

Given that such indicators will be used as the primary instrument for determining whether a permit should issue, it is uncertain at this time without clarification of the indicators whether the CZA's permitting program will eventually achieve the CZA's objectives.

Third, the Regulation's allowance that environmental degradation that occurs in the coastal zone may be "offset" by improvements outside of the zone — and theoretically even outside of the State — may mean that permitted uses may not be as carefully scrutinized as would otherwise be the case. Although it is a fair statement that environmental improvements that occur outside of the coastal zone may lead to environmental improvement within the zone, it is also fair to be skeptical about the degree to which such association can be made, monitored, and enforced.

Last, DNREC's nearly unfettered discretion to allow an applicant who has made past "voluntary" improvement to provide less of an offset is problematic for two reasons. First, it works in only one direction: While the Regulations allow DNREC to reduce the amount of offset required because of past good deeds, it does not allow the agency to increase off-

sets when an applicant has refused to make such improvements, or has otherwise been a bad actor. Second, the Regulations are silent on what constitutes "voluntary improvements." Conceivably, any environmental improvements that an applicant has made due to any Federal, State or Local requirement, for example, could be considered for the reduced offset.

About eighty percent of Delaware's tidal wetlands, all of its beaches and summer resorts, two federal wildlife refuges, almost all of its fish and shellfish spawning and nursery areas, many of its historic and archeological sites, and most of its industry is located in the coastal zone. Although the Regulations still leave some important issues for the future, they meet their aim to balance industrial uses with competing recreational, aesthetic and other uses in a more predictable and rational way. ♦

*This article is dedicated to the memory of Dr. Jerry Shields, author, environmentalist, friend and supporter of Delaware's coastal area.

FOOTNOTES

1. The CZA does not regulate numerous industrial uses, such as those not constituting the "initiation, expansion of heavy industry or manufacturing uses" Regulations, §E. These include: "The raising of agricultural commodities or livestock," "warehouses or other storage facilities, not including tank farms," "tank farms of less than five acres," "parking lots or structures, health care and day care facilities, maintenance facilities, commercial establishments not involved in manufacturing, office buildings, recreational facilities and facilities related to the management of wildlife," "facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy," "the repair and maintenance of existing electrical generating facilities providing ... [it] does not result in any negative environmental impacts," "docking facilities which are not used as bulk product transfer facilities," "maintenance and repair of existing existing equipment and structures;" and "any other activity which the Secretary determines ... is not an expansion or extension of a non-conforming use or heavy industry." Regulations, §E. The CZA does not regulate other quasi-industrial, commercial and residential development in the zone.

2. The secretary did not propose, and the Board did not promulgate, initial regulations until 1992 and 1993, respectively, *Chemical Indus. Council of DE v. State Coastal Indus. Control Bd.*, C.A.No. 1216-K Lexis 70 (Del.Ch. 1994) at 9-10, which the Court of Chancery then vacated, finding that the Board's use of "executive session" to the exclusion of the public had violated the Delaware Freedom of Information Act, 29 Del.C §§ 10004(c)(2) and 10001(f). *Id.* at 29.

3. To assist with writing the regulations, the Secretary empaneled a "Coastal Zone Regulatory Advisory Committee to the Delaware Department of Natural Resources and Environmental Control" (March 19, 1998) ("MOU") (on file with the authors).

4. The CZA requires all actions of the Board or DNREC be subject to public comment. 7 Del.C § 7007(c)-(d); Regulations, §§ M, N, O. Public notification must be published in two newspapers, one of daily statewide circulation and the second of

daily publication in the county of the proposed site. 7 Del.C § 7007(d); Regulations, §N. In addition, DNREC must maintain a direct mail program where any interested citizen can obtain a free copy of all notices. Regulations, §N. All hearings must be open to the public and "in accordance with the Delaware Administrative Procedures Act." 7 Del.C § 7007(c); regulations, §O; Delaware Administrative Procedures Act, 29 Del.C § 10004(a). The hearing must be held at a location that is "within a reasonable proximity to the proposed site." Regulations, §N.

5. The Board adopted the Regulations on November 23, 1998, immediately following a public hearing. The Board did so, however, without waiting until the end of the public comment period established for consideration of the Regulations. At the time of this writing, the Board is working to address this procedural misstep.

6. The CZA provides that "[a]ny nonconforming use in existence and in active use on June 28, 1971" is not prohibited by the CZA. 7 Del.C § 7004.

7. To determine whether a facility is abandoned or merely temporarily shut down, DNREC considers various factors, including the "status of environmental permits and/or business licenses, maintenance or machinery and structures, owner presence and involvement to some degree in reinstating the use and the duration of the cessation." Regulations, §L. A facility will not be deemed "abandoned" if the shutdown was involuntary and DNREC determines that the "owner had no intention to abandon the use." Regulations, §L. If the Secretary determines a facility abandoned, he must notify the owner of his intention to declare the facility abandoned. Regulations, §L. The owner has 60 days from the receipt of such notification, to "demonstrate that there is or was no intention to abandon the use and when operation of the use will resume." Regulations §L. DNREC must make a final decision concerning abandonment within 120 days from the date of original notification, taking into account all subsequent information. Regulations, §L. The owner may appeal any such determination. Regulations, §§ L and P; 7 Del.C § 7007.

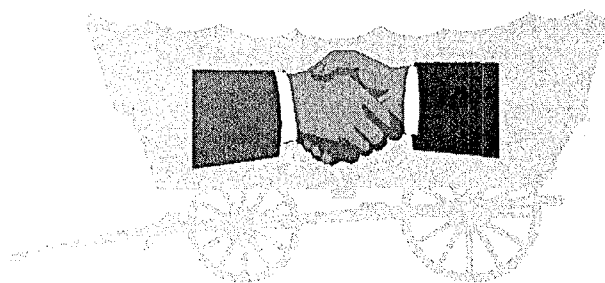
8. Such equipment includes that which "characteristically employ[s] some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, picking equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs." 7 Del.C § 7002(e); Regulations, §D.

9. "Nonconforming use" means a "use, whether of land or of a structure, which does not comply with the applicable use provisions in ... [the Act] where such use was lawfully in existence and in active use prior to June 28, 1971."

10. These include: (1) The "conversion of an existing unregulated, exempted, or permitted facility to a heavy industry use"; (3) "offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971"; and (4) "Any new tank farm greater than 5 acres in size not associated with a manufacturing use." Regulations, §D.

11. Coastal Barge involved the vessel to vessel transfer of coal in the Delaware Bay. *Id.* at 1242. DNREC initially found that the operation was not regulated by the CZA. On appeal, the Board reversed the ruling, finding that the CZA prohibited the activity as a "bulk product transfer facility." *Id.* Coastal barge then appealed to the Delaware Supreme Court, who affirmed the Board's ruling. *Id.* Petitioners Coastal Barge argued that the CZA

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(forthcoming) (1999) (on file with the authors). The original status decision found that a petroleum tank farm was not "manufacturing" and further, the project was an extension of the Port of Wilmington docking facilities and therefore, it was not a heavy industry and did not require a permit. *Id.* Save Our Shores, a private conservation organization, appealed the decision. *Id.*

Before the Board made a decision on the appeal an agreement was reached between the parties which affirmed the ruling of the status decision, but modified the language of the decision *Id.* The new language clearly stated that the Port of Wilmington docking facility exception only applied to facilities within the City of Wilmington. *Id.* "The effect of the revised status decision ... is to place a clear geographic limit on the exemption under Section 7002(f) of the Coastal Zone Act of docking facilities of the Port of Wilmington ... Storage tanks widely separated from the Port and outside of the City of Wilmington would not come under the exemption provided by Section 7002(f)." *Id.*; 7Del.C § 7002(f).

15. The CZA provides: "[M]anufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only." 7 Del.C § 7004. "Manufacturing" means "the mechanical or chemical transformation of organic or inorganic substances into new products, characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided the new product is not a structure or other fixed improvement."

16. The EIS must identify and assess the following: (1) "Probable air, land and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error"; (2) Impact on the "environmental indicators" of the Coastal Zone; (3) Likely destruction of wetlands and flora and fauna" (4) "Impact of site preparation on drainage of the area"; (5) "Impact of site preparation and facility operations on land erosion"; (6) Any need for the use of water; (7) "The likelihood of generation of glare, heat noise, vibration, radiation, electromagnetic interference and/or obnoxious odors"; (8) "The effect of the proposed activity on threatened or endangered species"; (9) "The raw materials, intermediate products, byproducts and final products and their characteristics from material safety data sheets (MSDSs) if available, including carcinogenicity, mutagenicity and/or the potential to contribute to the formation of smog." Regulations, § H.2.

17. The MOU provides: "[T]his means that

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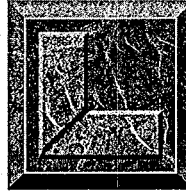
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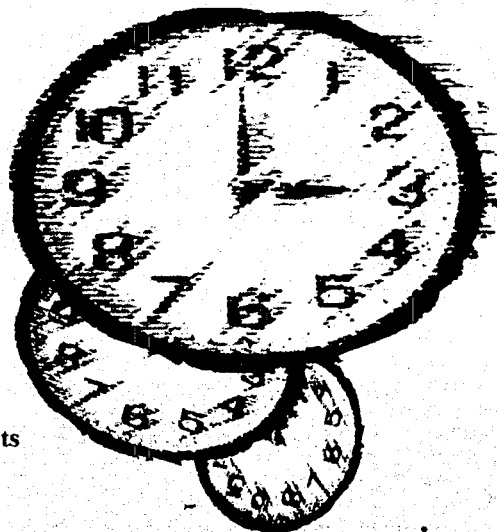
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each grandfathered heavy industrial facility, manufacturing facility, public sewage treatment plant, and public recycling facility should be allowed increased flexibility in permitting and operations only after DNREC had developed a carefully defined procedure for assessing applications to ensure that proposed activities meet the environmental improvement standard, as well as the six criteria cited in the Act." MOU at 2.

18. "Environmental Indicators" are "a numerical parameter which provides scientifically-based information on important environmental issues, conditions, trends, influencing factors and their significance regarding ecosystem health. Indicators inherently are measurable, quantifiable, meaningful and understandable. They are sensitive to meaningful differences and trends, collectible with reasonable Cost and effort over long time periods, and provide early warning of environmental change. They are selected and used to monitor progress towards environmental goals." Regulations, §C. Once developed, environmental indicators should provide a mechanism for evaluating whether the proposed project will meet the "environmental improvement" standard. MOU at 11. Environmental indicators also help the State to develop an accurate picture of the health of the coastal zone, to measure developing trends, and to provide it with a basis to explain permitting decisions to the public and applicants. MOU at 11.

19. MOU at 11. To determine what the environmental indicators are for the coastal zone, DNREC has formed an Environmental Indicators Technical Advisory Committee ("EITAC"). The charge of the EITAC is to develop environmental indicators that will analyze the environmental impact of proposed activities, analyze the effectiveness of proposed offset projects, determine whether a proposed activity will have a negative effect on coastal environment, and generally, help analyze the overall health of the coastal zone.

20. The proposal must contain, at a minimum: [a] qualitative and quantitative description of how the offset project will more than offset the negative impacts from the proposed project How the offset project will be carried out and in what period of time. What the environmental benefits will be and when they will be achieved. How the offset will impact the attainment of the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone. What, if any, negative impacts are associated with the offset project. What scientific evidence there is concerning the efficacy of the offset project in producing its intended results. How the success or failure of the offset project will be measured in the short and long term. Regulations, §I.2.

21. An applicant who has "undertaken past voluntary improvements may be required to provide less of an offset than applications without a similar record of past achievements." Regulations, §I.2. Additionally, the Secretary may look more favorably on projects that "are within the Coastal Zone, that occur in the same environmental medium as the source of degradation of the environment, that occur at the same site as the proposed activity requiring a permit and that occur simultaneously with the implementation of the proposed activity needing an offset." Regulations, §I.1.

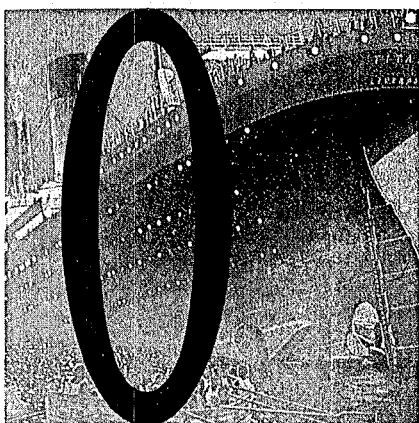
22. The Board may accept DNREC's permit decision, or modify the permit in any way. 7 Del.C § 7007. Any party who feels they are aggrieved by the decision of the Board may petition the Delaware Superior Court for review. 7 Del.C § 7008; Regulations, §P.3. The Court's review is essentially *de novo*, as it may accept the Board's decision or modify the permit as appropriate. 7 Del.C § 7008.

David G. Concannon

R.M.S. TITANIC THE LEGAL LEVIATHAN

Photographs by Ralph White

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n April 10, 1912, the R.M.S. *TITANIC* set sail from Southampton, England on a voyage that would end in tragedy. The story of the great ship's sinking is a staple of modern history. Now exploration and recovery of the *TITANIC* are making history of a different sort in American jurisprudence.

A legal battle over access to the *TITANIC* is currently raging in federal court in Virginia. On June 23, 1998, U.S. District Judge J. Calvitt Clarke, Jr. issued an injunction prohibiting a Russian research vessel, a British tour company, several American citizens and foreign nationals, and "all the world," from visiting the *TITANIC* for any purpose, including photography, exploration and scientific study. *RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 9F.Supp.2d 624(E.D.Va. 1998). The injunction has been appealed to the U.S. Court of Appeals for the Fourth Circuit, and a decision is expected early in 1999.

The appellate court's decision in *Deep Ocean Expeditions v. R.M.S. Titanic, Inc.*, No. 98-1934, is likely to resolve a number of significant legal issues that could directly affect the exploration and recovery of historic shipwrecks around the world, including whether U.S. courts can properly assert jurisdiction over shipwrecks located in international waters, and whether a federal judge may issue an injunction prohibiting U.S. citizens and foreign nationals from exploring an area of the high seas for an indefinite period of time. It is fitting that the *TITANIC*, which was the largest movable object on Earth when it sank, has become a legal leviathan that could have a dramatic impact on the laws of salvage, international comity, intellectual property, and due process.

I. The Sinking

Shortly before midnight on April 14, 1912, the *TITANIC* struck an iceberg approximately 400 miles southeast of Newfoundland, Canada, and sank in a little over two and a half

hours. Because the *TITANIC* carried only enough lifeboats to accommodate half the people on board, and the lifeboats were never filled to capacity, only 705 passengers and crew survived the sinking. More than 1500 people lost their lives.

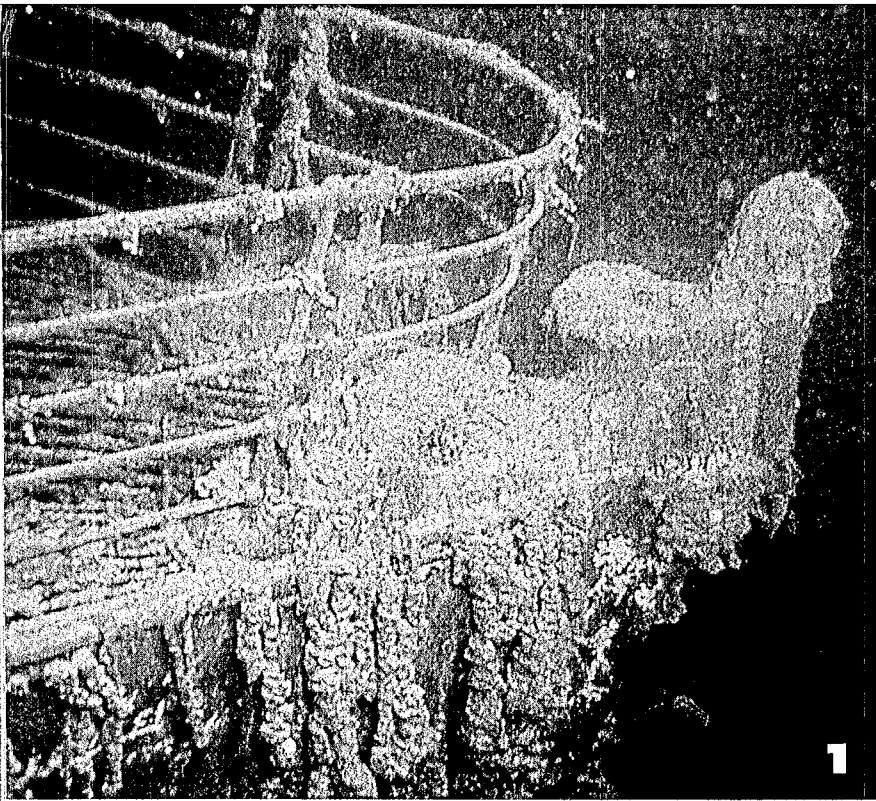
The *TITANIC* split in half before sinking. It came to rest in two sections separated by large debris field at a depth of 12,500 feet. The bow section, which filled with water before tearing away from the stern, was impervious to increasing water pressure during its descent and retained its shape. The stern section, which contained residual air pockets when it sank, imploded during its descent and came to rest as one large, twisted heap of steel and debris. The remains of the passengers and crew who lost their lives were eventually devoured by marine organisms. The only trace of human existence remaining today are shoes and other man-made items that litter the bottom.

II. The Discovery and Subsequent Expeditions

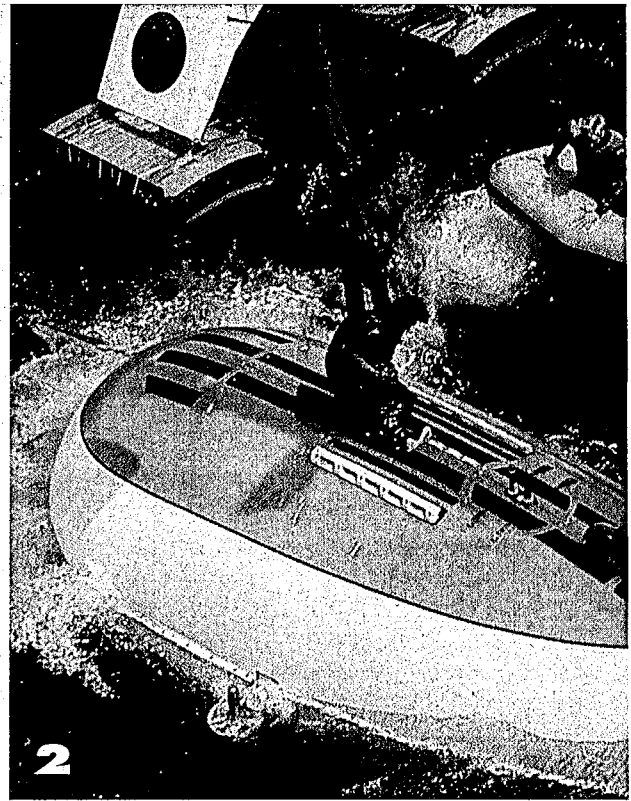
On September 1, 1985, an expedition led by Dr. Robert Ballard of the Woods Hole Oceanographic Institute discovered the *TITANIC* using sonar and photographic equipment towed behind the U.S. Navy research vessel Knorr. Three observers from The Institute of France for the Research and Exploration of the Sea ("IFREMER") were on board the Knorr when the *Titanic* was discovered. News of the discovery quickly spread around the world, and a Canadian newspaper published the wreck's geographic coordinates within days of its discovery.

Dr. Ballard returned to the *TITANIC* in 1986 to photograph the wreck using the submersible Alvin and the remotely operated vehicle Jason Junior. Few can forget photographs of the *TITANIC* taken on this expedition, particularly the image of a ghostly chandelier hanging forlornly from the ceiling inside the wreck. On Dr. Ballard's final dive to the *TITANIC* in 1986, he placed a bronze plaque on one of the capstans near the ship's bow. The plaque commemorates the efforts of those who discovered the *TITANIC* and requests that "any who may come hereafter leave undisturbed this ship and her contents as a memorial to deep water exploration."

The sentiment that the *TITANIC* should remain undisturbed was not universally shared. Less than one year later,

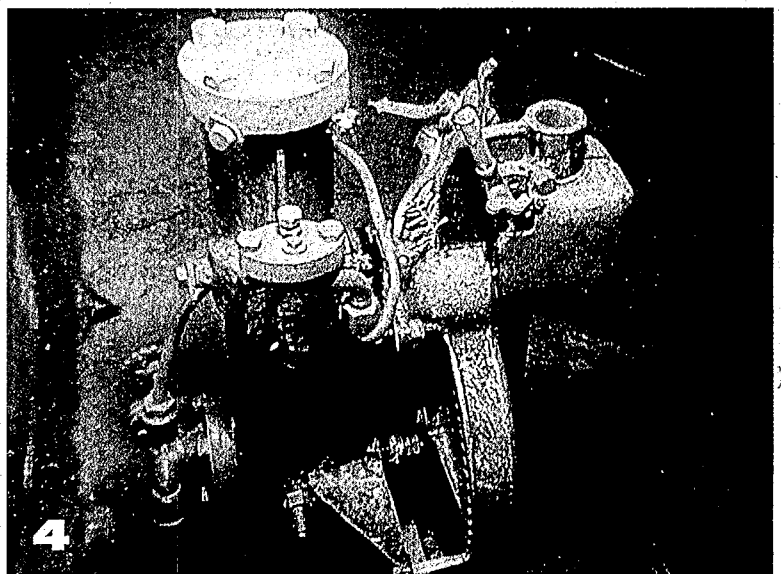


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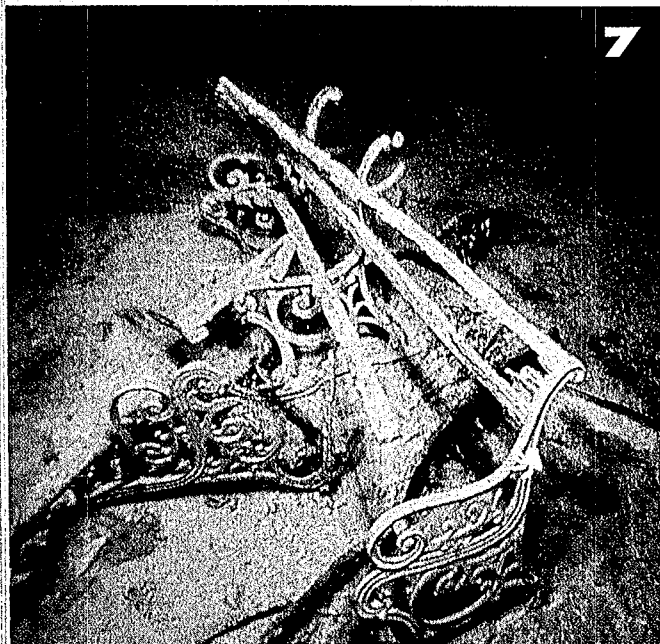


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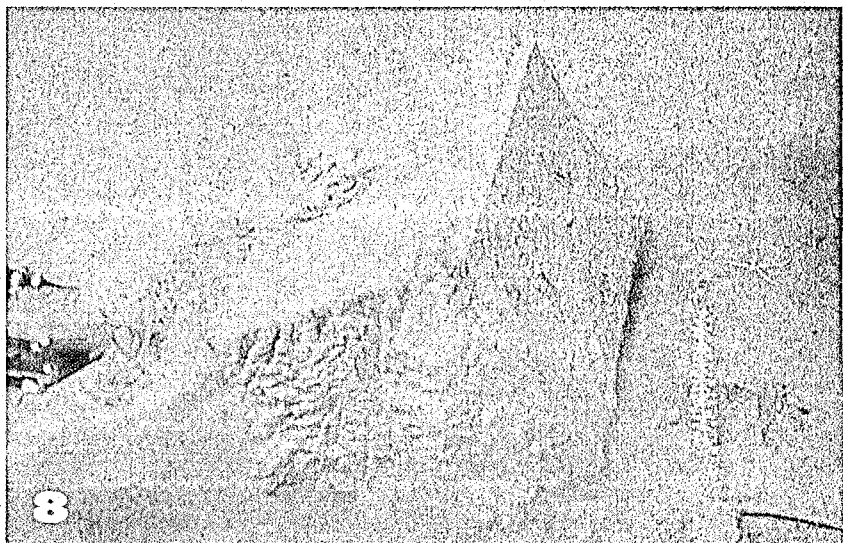
1) *TITANIC's* bow looming out of the dark. 2) Deploying the Russian MIR submersible for a dive to *TITANIC*, 12,500 feet below. 3) One of *TITANIC's* 18 ton bronze propellers. 4) *TITANIC's* helm. The wooden wheel has been completely consumed by marine organisms, leaving behind only its bronze stand. 5) One of *TITANIC's* massive boilers that powered the world's largest moving object. 6) A lifeboat davit remains deployed as if waving farewell to the lucky few survivors of the catastrophic sinking. 7) A shattered bench litters the abyssal seafloor. 8) Treasure? The submersible's manipulator arm reaches for a *TITANIC* safe. 9) A porthole lies serenely among the carnage of *TITANIC's* sheltered stern section. 10) Rustsicles trail from *TITANIC's* huge bollards from which the last lines securing her to the wharf had been cast off.



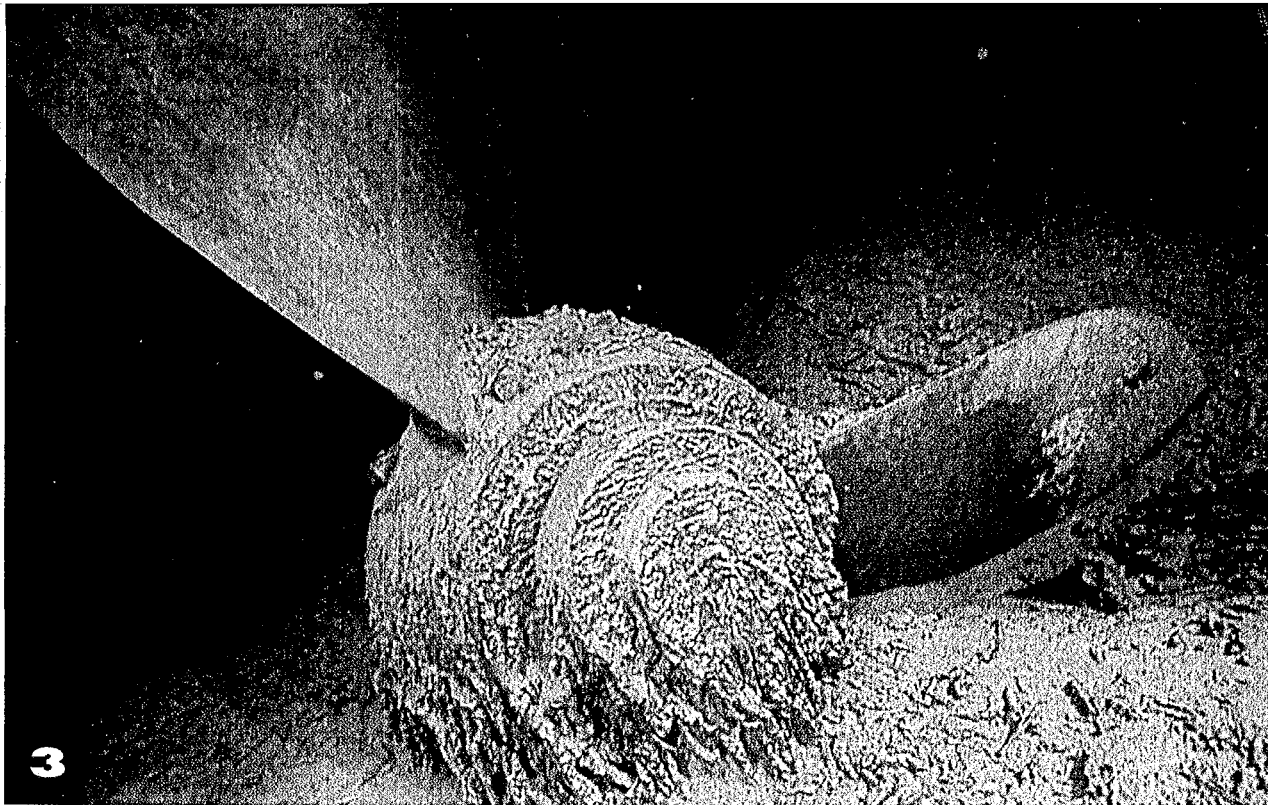
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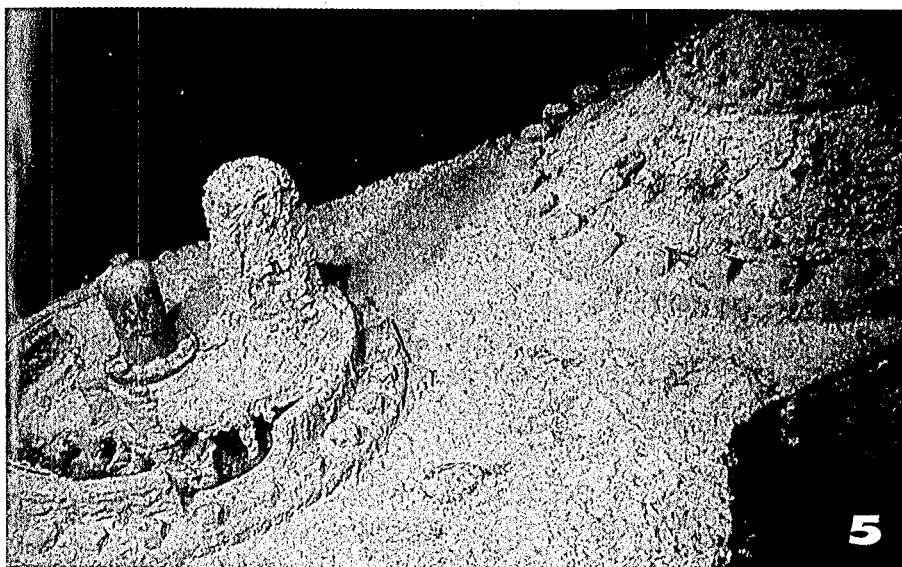
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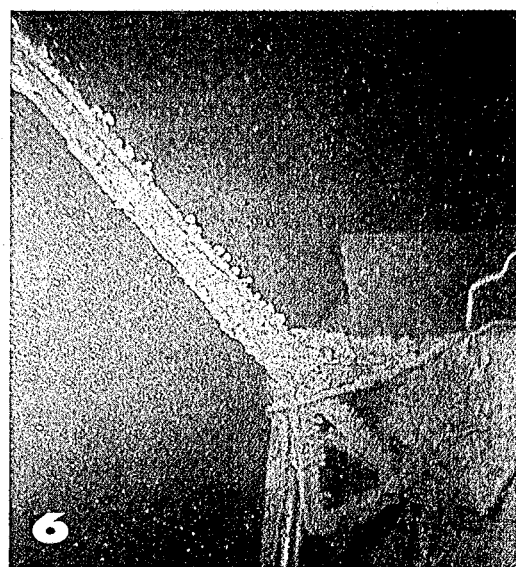
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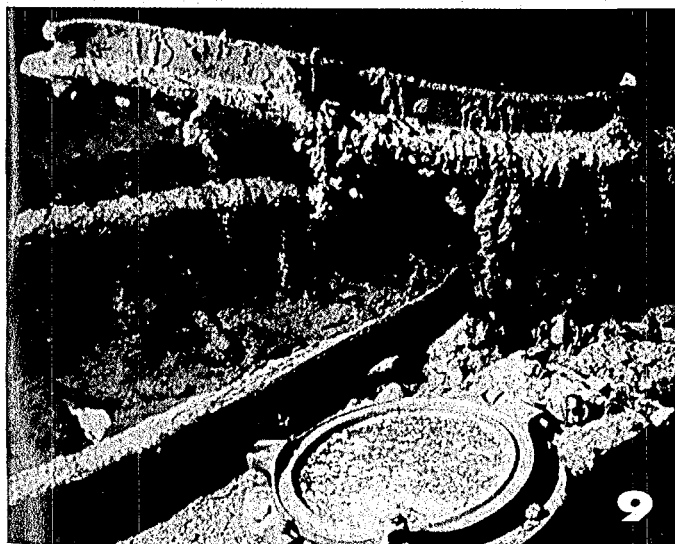
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IFREMER conducted a salvage operation with the help of an American company, Titanic Ventures. Using the submersible *Nautilie*, the expedition recovered 1800 artifacts, which were transported to France for restoration.

In June 1991, a joint Canadian-Russian-American expedition used the Russian research vessel *Akademik Mstislav Keldysh* and its advanced deep water submersibles, *Mir I* and *Mir II*, to study the *TITANIC*'s marine environment and film the IMAX documentary "Titanica." The expedition recovered steel samples from the debris field for metallurgical testing. These tests revealed the steel used to make *TITANIC* was more brittle than that used today, and a loss of the steel's ductility in the cold North Atlantic waters most likely contributed to the damage that led to the ship's sinking. The expedition also collected hundreds of samples of fish, rock, bacteria, specialized coral, and core samples from the deep ocean floor.

IFREMER conducted additional salvage expeditions in 1993 and 1994, this time with the participation of an American company, R.M.S. Titanic, Inc. ("RMST"). The salvors recovered thousands of artifacts from the debris field, which were again transported to France for restoration.

In 1995, James Cameron used the *Keldysh* and its *Mir* submersibles to conduct location filming for the movie "*TITANIC*." Cameron's underwater photographic team captured the *TITANIC* in its advanced state of decay, and later won an Oscar for cinematography.

1996, RMST and IFREMER returned to the *TITANIC* with a large contingent of support vessels, including a cruise ship filled with celebrities and passengers who paid fares as high as \$6,950 to watch the expedition's recovery efforts. The primary purpose of the 1996 expedition was to raise a large section of the hull dubbed "The Big Piece." After the salvors finished attaching lift bags to "The Big Piece" using nylon straps, it rose to within 200 feet of the surface. Unfortunately, the salvors misjudged a crucial stage of the recovery process they did not have divers or equipment capable of attaching stronger steel chains to "The Big Piece" at a depth of 200 feet. Consequently, the salvors and their audience watched helplessly as the lift bags eventually snapped their couplings and "The Big Piece" sank once again to the bottom.

Two competing expeditions to the *TITANIC* were planned for the month of August 1998. RMST planned to return to the wreck to recover "The Big Piece"

and additional artifacts, and to produce the first live television broadcast from the wreck itself. The P.P. Shirshov Institute of Oceanology, which owns the *Keldysh* and *Mir* submersibles, planned to return to the *TITANIC* to conduct additional scientific experiments. The scientific expedition was to be financed by a British tour company, Deep Ocean Expeditions ("DOE"), which proposed to charge an international group of passengers \$32,500 each to dive to the wreck and participate in the scientific research. Each dive on the expedition, which was promoted as "Operation Titanic," would be filmed, and passengers would receive videotapes of their dives to keep as mementos. The passengers also could

**The United
States District
Court asserted
jurisdiction over
the *TITANIC*,
issued a warrant
to "arrest" the
shipwreck and
ordered the U.S.
Marshal to take
possession of
any artifacts
recovered.**

take photographs of the *TITANIC* for their personal use. DOE and the Shirshov Institute pledged not to recover any artifacts or disturb the *TITANIC*, but they did not seek RMST's permission to visit the wreck. This perceived slight touched off the current legal battle over access to the *TITANIC*.

Both expeditions went forward in 1998. In August, RMST succeeded in raising "The Big Piece" and presenting the first live television broadcast from the *TITANIC* wreck. A few days after RMST left the wreck site, the *Keldysh* arrived with a team of scientists and a dozen passengers. On September 9, 1998, the first paying passengers dived to the *TITANIC*, in defiance of Judge

Clarke's June 23, 1998 injunction.

III. The Legal Battle

After Dr. Ballard discovered the *TITANIC*, he and others worked to promote an international agreement to protect the *TITANIC* from commercial salvage and to obtain passage of the R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. 450 rr, *et seq.* The Act expresses the sense of Congress that "limited exploration activities concerning the R.M.S. *TITANIC* should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. 450rr-5. The Act also proscribes the assertion of jurisdiction by the United States over the *TITANIC* wreck site, which is located in international waters. 16 U.S.C. 450rr-6.

Nonetheless, on August 12, 1992, a judge in the U.S. District Court for the Eastern District of Virginia, Norfolk Division, acting on a complaint filed by a would-be salvor, MAREX *TITANIC*, Inc. ("MAREX"), asserted jurisdiction over the *TITANIC*, issued a warrant to "arrest" the shipwreck, and ordered the U.S. Marshal to take possession of any artifacts recovered from the Titanic until the court made a determination of ownership. *MAREX Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993). MAREX, however, had never performed any salvage operations at the *TITANIC* site. As soon as Titanic Ventures learned of MAREX' action, it intervened to assert a superior salvage claim and to prohibit MAREX from engaging in salvage operations. *Id.* After a hearing to determine which party had exclusive salvage rights, the court sided with Titanic Ventures and entered an order vacating the August 12, 1992 order. *Id.* at 377. The court's order, however, was later reversed by the Fourth Circuit on technical grounds, which left the question of salvage rights unresolved.

On August 26, 1993, RMST, as the successor in interest to Titanic Ventures, filed a complaint asking the court to declare it to be the sole and exclusive owner of any items salvaged from the *TITANIC*. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va. 1996). Relying on the presence in the courtroom of a single wine decanter recovered from the *TITANIC*, the court asserted in rem jurisdiction over the wreck site. The court ordered the U.S. Marshal to arrest the *TITANIC* and the artifacts already recov-

ered pursuant to Supplemental Admiralty Rule C(2), and RMST was appointed substitute custodian of the wreck, wreck site and artifacts recovered, in lieu of the U.S. Marshal. *Id.*

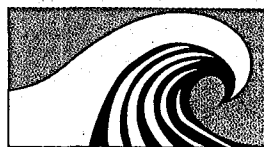
On June 7, 1994, the court entered an order awarding RMST salvor in possession status over the *TITANIC* and all artifacts recovered from the wreck. *Id.* Even though salvage activities were ongoing, the court declared that RMST "is the true, sole and exclusive owner of any items salvaged from the wreck in the past, and so long as [RMST] remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights. . ." *Id.* Finally, the court ordered that "default judgment is entered against all potential claimants who have not yet filed claims [to the *TITANIC* or its artifacts] and such claims are therefore barred and precluded so long as [RMST] remains salvor in possession." *Id.*

When RMST learned of director James Cameron's plan to film the *TITANIC* in 1995, it threatened to pursue litigation if filming ensued on the grounds that filming the wreck would violate RMST's rights as salvor in possession. Cameron thumbed his royal nose at RMST and filmed the *TITANIC* anyway, without seeking permission or a license. RMST never fulfilled its threat to pursue litigation. It later explained that it "determined not to seek injunctive relief" because Cameron only "intended to shoot 'secondary' photography for a feature-length non-documentary film over the course of eight (8) dives to the wreck site; . . . ; and that there was no intention to enter the *TITANIC* wreck." Periodic Report filed on September 20, 1996.

RMST did seek injunctive relief in 1996 when John Joslyn, an RMST shareholder, expressed an intention to visit the *TITANIC* to photograph it. *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va. 1996). On August 9, 1996, Judge Clarke issued an injunction prohibiting Joslyn from photographing the wreck. *Id.*

Additionally, on August 13, 1996, the court unilaterally entered an amended order expanding RMST's rights as salvor in possession to include the exclusive right to control access to the *TITANIC* "for any purpose," and to control photography of the wreck and wreck site. The court made this unprecedented expansion even though RMST never filed an amended complaint requesting this award, and no prior public notice was given that such an expansion was contem-

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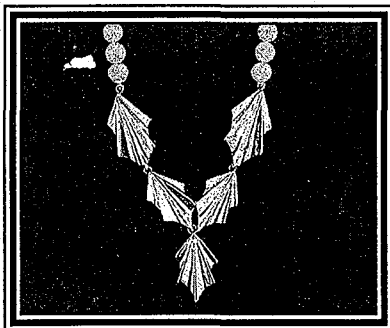
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plated. The court explained that it awarded these exclusive rights because RMST was unable to recoup its salvage expenses through the sale of artifacts and, therefore, it was entitled to the exclusive right to market images of the *TITANIC* as a means of making a profit. *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 9f. Supp.2d 624(E.D. Va. 1998)* The court was apparently unaware of RMST's charter agreement with IFREMER, which permitted the sale of *TITANIC* artifacts as a "collection" to "any entity that will make them available for exhibition to the public." Incredibly, the court also explained that its decision was based, in large part, on its finding that RMST located the *TITANIC*. *Id.* at 638. Judge

The court
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Clarke made this clearly erroneous finding despite his previous acknowledgment that Dr. Ballard discovered the *TITANIC* in another case concerning the right access to the R.M.S. *LUSITANIA*. *Bemis v. R.M.S. LUSITANIA*, 884 F. Supp. 1042, 1051 n.10 (E.D. Va. 1995), *aff'd*, 99 F.3d 1129 (4th Cir. 1996), *cert. denied*, 118 S. Ct. 1558 (1998).

Joslyn appealed the August 13, 1996 injunction to the Fourth Circuit, but the appeal was dismissed before a hearing on the merits pursuant to a stipulation filed by the parties. The court's injunction, however, would eventually form the basis of the current legal dispute between RMST and DOE.

When RMST learned of Operation Titanic, it was engaged in negotiations with NBC and the Discovery Channel to license the exclusive television broadcast

rights to its 1998 expedition for \$6 million. RMST wasted little time before filing a motion for a preliminary injunction in its *in rem* action against the *TITANIC*.

RMST's motion requested that any person or entity mentioned in Operation Titanic's promotional material — including DOE, the Shirshov Institute, the Keldysh, several U.S. citizens and foreign nationals — be prohibited from visiting or photographing the *TITANIC*. RMST sent its motion for a preliminary injunction to most of Operation Titanic's participants by regular mail and DHL Delivery. It did not, however, initiate legal proceedings against these individuals or entities by filing a complaint. They were never served with process, and many, if not all, of them lacked any contact with the forum or even the United States.

After RMST filed its motion, Christopher Haver, a passenger who had paid a deposit to participate in Operation Titanic, filed a separate action seeking a declaratory judgment that viewing the *TITANIC* would not injure RMST. Haver also sought discovery on the harm RMST could potentially suffer if Operation Titanic went forward. The court subsequently denied Haver the discovery he sought, stating there were no factual issues for the court to decide, and consolidated Haver's declaratory judgment action into RMST's *in rem* proceeding against the shipwreck.

On May 27, 1998, the court held a hearing in the consolidated actions. Not surprisingly, none of the individuals named in RMST's motion for a preliminary injunction appeared at the hearing. Haver's counsel appeared to argue the legal issues presented by his client's declaratory judgment action. Despite the court's prior statement that there were no factual issues for it to decide, the court immediately permitted RMST to call its President, George Tulloch, as a witness to testify about the irreparable injury RMST would suffer if Operation Titanic proceeded. The court would not permit Haver's counsel to cross-examine Tulloch on the discovery issue, or to establish that RMST had nothing to do with discovering the *TITANIC*. Instead, the court described its finding that RMST located the *TITANIC* as "the law of the case," stating: "You are a little bit too late, because I've decided to the contrary."

On June 23, 1998, Judge Clarke issued a "preliminary" injunction prohibiting all of the individuals and entities identified in RMST's motion from tak-

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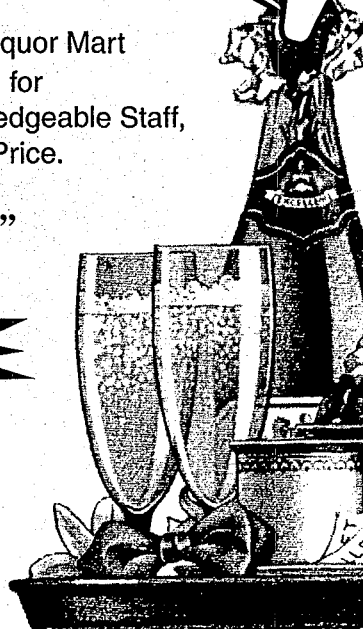
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ing personal photographs of the *TITANIC* or visiting the *TITANIC* for any reason. The injunction prohibited the expedition participants and "all the world" from entering a 120 square mile area of the high seas encompassing the *TITANIC* for an indefinite period of time. Judge Clarke reaffirmed that his decision to award RMST the exclusive right to control access to and photography of the *TITANIC* was based on his finding that RMST located the *TITANIC*, and that RMST was entitled to expanded salvage rights because it had agreed not to sell artifacts. *RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 9 F.Supp 2d 624 (E.D. Va. 1998). He did not acknowledge any of the prior scientific/photographic expeditions to the

The injunction
prohibited the
Deep Ocean Expedition
participants and
"all the world"
from entering a
120 square mile
area of the high
seas encompass-
ing the *TITANIC*.

TITANIC, nor did he consider the multiple documentaries and films that have featured the *TITANIC* or the competing interests of the scientific community. Instead, Judge Clarke criticized the non-parties for failing to appear at the May 27, 1998 hearing, and he belittled the harm they would suffer if they were enjoined from visiting the *TITANIC*, referring to it as "nostalgic," "minimal," "sentimental" and "speculative." *Id.* at 637-38. Indeed, Judge Clarke seemed annoyed that he was even forced to consider the non-parties rights at all, stating: "Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on irrational." *Id.* In one particularly memorable finding, Judge Clarke rationalized that Operation *Titanic's* participants would not suffer

any harm because they could each save \$32,500 by staying home to watch RMST's live broadcast from the *TITANIC* on television. *Id.* at 638.

Haver immediately filed a notice of appeal to the Fourth Circuit, which was later joined by DOE. Several prominent organizations filed amicus curiae briefs urging the reversal of the injunction, including The Explorers Club, which cosponsored Dr. Ballard's 1985 and 1986 expeditions to the *TITANIC* and supplied the plaque that Dr. Ballard placed on the ship's bow capstan; the Advisory Council on Underwater Archaeology; and Columbus-America Discovery Group, the successful salvor of the S.S. *CENTRAL AMERICA*. Nobody filed amicus curiae briefs on behalf of RMST.

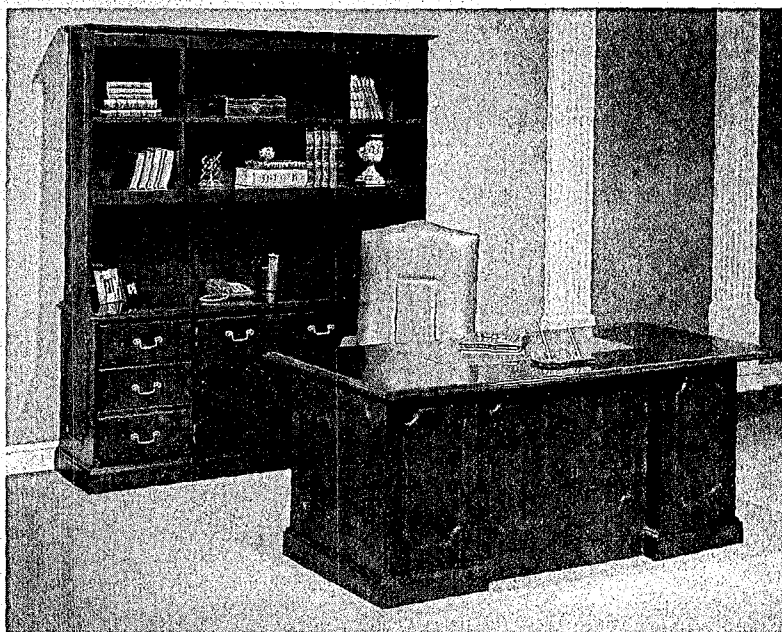
On September 10, 1998, the Associated Press reported that the first paying passengers had dived to *TITANIC* in defiance of Judge Clarke's injunction. A week later, RMST filed a notice requesting that Judge Clarke hold the expedition participants in criminal contempt of court for violating his injunction. This request is still pending.

On October 29, 1998, the Fourth Circuit heard oral arguments in the appeal in Richmond, Virginia. A decision is expected early in 1999.

IV. Possible Outcomes and Future Exploration

The outcome of the current legal battle over access to the *TITANIC* is uncertain. However, the appellate panel's questioning on certain issues at the oral arguments was revealing.

The panel seemed particularly hostile to RMST's argument that an injunction is valid against a non-party who received a copy of a motion for a preliminary injunction in the mail, as opposed to an actual party who is named in a complaint, served with process and enjoined after an opportunity to appear and be heard. Therefore, the injunction could be reversed because the court lacked personal jurisdiction over the participants in Operation Titanic. Similarly, the panel seemed unimpressed by RMST's argument that it deserves the exclusive right to control access to and photography of the *TITANIC* as a "bonus" for agreeing not to sell artifacts. Thus, a merger of intellectual property rights and traditional salvage rights may be unlikely under the facts of this case. On the other hand, RMST's right to recover artifacts was never directly challenged and it is unlikely



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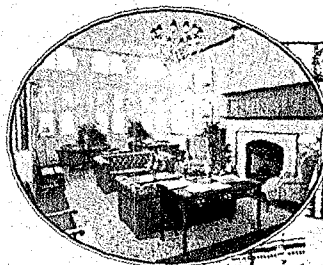
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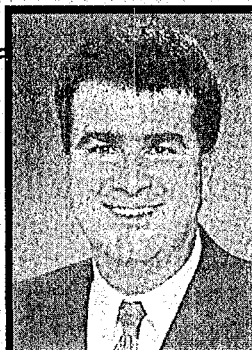
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to be disturbed. The panel also seemed reluctant to decide whether a U.S. court can properly assert jurisdiction over a shipwreck in international waters.

In light of the panel's questioning, it is the consensus of many of those present at the oral arguments that Judge Clarke's injunction is unlikely to be upheld in its entirety. The most reasonable outcome would be for the Fourth Circuit to uphold RMST's right to recover artifacts without direct interference from others while it is on site, but to permit photography and scientific study of the *TITANIC* during the frequent periods when RMST is not recovering artifacts.

Future expeditions to the *TITANIC* are likely to continue, although infrequently. Because the *TITANIC* sits at such an extreme depth, it is impossible to reach the wreck without using extraordinarily sophisticated and expensive underwater equipment. Currently, there are only four submersibles in the world that can reach the wreck: Nautilus, Mir I, Mir II and Shinkai 6500. Even RMST makes no assurance that it will ever return to the *TITANIC*. Instead, RMST's future expeditions are conditioned upon the availability of the Nautilus and its ability to license photography and secure corporate sponsors, which it is unwilling to guarantee. IFREMER, however, has retained the right to take competing salvors to the *TITANIC* so long as it provides RMST a right of first refusal. Finally, scientific expeditions are likely to continue, although it is uncertain whether tourists will be willing to pay \$32,500 a piece and face the possibility of criminal sanctions for a chance to visit *TITANIC*.

Since its discovery, images of the *TITANIC* have appeared in documentaries, books, magazines, and one of the most successful films of all time. More than 5000 artifacts have been recovered from the wreck site. These artifacts have been seen by millions at phenomenally successful exhibitions around the world. The ocean is large enough to accommodate continued multiple uses of the *TITANIC*, including scientific study, photography and the recovery of artifacts. The *TITANIC* set sail 86 years ago on a voyage that has proven to be everlasting. Just as its sinking led to changes in ship design and improvements in passenger safety, its discovery is certain to lead to previously unforeseen changes in several areas of the law. The *TITANIC* has truly become a legal leviathan. ♦

Edward J. Fornias

THE PUBLIC TRUST DOCTRINE IN DELAWARE — THE PROBLEM OF BEACH ACCESS

There is no better way to enjoy a hot summer day than to spend it at the seashore. As the ocean waves crash onto the sand, for miles in each direction there is nothing to see but people enjoying themselves on the beach. Children build sand castles and dig holes in the sand that they hope will lead to the other side of the planet. Young men and women lie motionless on their backs hoping to even out the tans on their faces and chests. Some find the beach a great place to sleep, while others cannot sit still and go from horseshoes to volleyball until the sun goes down.

Lost in the enjoyment these people are having is the fact that such activities were not always permitted on the beach and are still not permitted on every beach. People don't know that they weren't always able to play horseshoes, fly kites or even walk across the sand. At one time in this country, the beach was private property belonging to a private owner and the public had as many rights in the beach as you have today on your neighbor's land. Only since the law has evolved from its English origin and judges began recognizing public interests in beach lands, have the beaches become "public" as we know them today.

In the legal community, this notion of "public ownership" is known as the public trust doctrine. The doctrine has shaped much of the jurisprudence regarding coastal lands whether involving land use regulation or environmental protection. Whenever laws concerning the coastal zones are adjudicated, the issue of whether the legislation affects public trust rights is sure to be a determinative factor. In Delaware, the courts have not been as friendly to the public's rights as the courts of other states have been.

New Jersey is the leader in defining precisely what the public can and cannot do on beach lands. In New Jersey, many of the disputes involving the public trust doctrine center around the issue of the public's access to beaches. There the courts have used the public trust doctrine to invalidate discriminatory regulations and to broaden the public's use rights on coastal lands.

The focus of this article is to trace the development of the

public trust doctrine from its origin to its adoption by American courts. Particular emphasis will be given to the landmark New Jersey decision of *Matthews v. Bay Head Improvement Association*¹, and the reluctance of the Delaware courts to give as expansive a reading to the public trust doctrine as the New Jersey court did in *Matthews*.

History of the Public Trust Doctrine

The ancient Roman thinker Justinian once said: "thus, the following things are by natural law common to all - the air, running water, the sea, and consequently the seashore."² This is one of the earliest known expressions of the public trust doctrine. This belief was incorporated into the laws governing the Roman Empire. No Roman citizen could be denied access to the beaches or oceans because those things were not subject to man-made law. They could be controlled only by natural law inspired by divine providence. However, the common law did provide remedies for anyone whose right of access or use of the coastlines was impeded.

The use of natural law derived, in part, from Roman reliance on Greek law and culture as a model for their society, much like American law is derived from English common law. The Roman progenitor of the public trust doctrine stood for the proposition that no individual could hold title to coastal lands. Those lands were communal lands that were controlled by the government but subject to public use and benefit. It was the duty of the government to ensure that the public had access to those lands and that the public was permitted to use them in accordance with natural law. This theory of government holding coastal land in trust for the public, underlies the public trust doctrine as it is regarded in the American legal system.

The public trust doctrine also appeared in England. The English economy, like that of the Greeks and Romans, was dependent upon access to and use of the ocean and seas. When Magna Carta was ratified in 1215, it restricted the king's power to subjugate and control, and established his reign as subject to the will of the citizenry. Though it did not explicitly redefine public rights in coastal lands, change was

brought about by judicial interpretation of the document. It was written that the king had the property, but the people enjoyed the necessary use of that property. Though the king still owned some coastal lands, those lands could not be transferred free of the public's interest in them.

Though the English conceptualization of the doctrine relied upon the Roman predecessor, it was distinct with respect to the transferability of coastal lands. The Romans believed that coastal lands were *res nullius*, common property without an owner, and therefore, not subject to transfer. Under English law, no property could exist without an owner, and any land not owned by an individual became, the property of the Crown. But common to both versions of the public trust doctrine was its most important tenant, public rights in coastal lands.

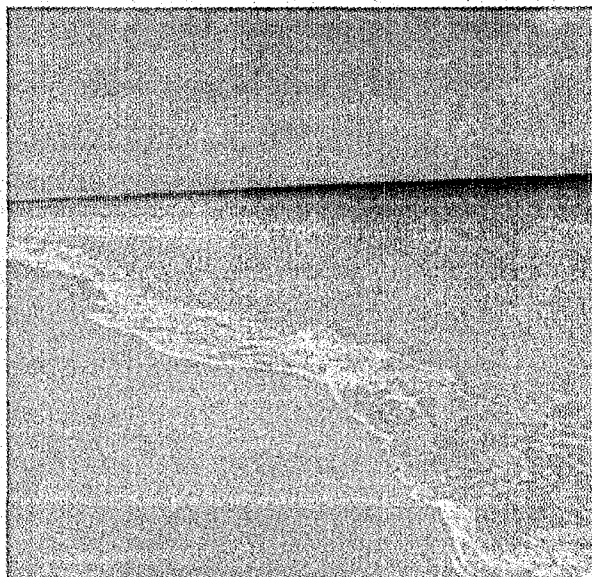
The American version of the public trust doctrine evolved from the English common law. British explorers in the New World claimed ownership of coastal lands upon discovery. As America was settled, they transferred their ownership rights to royal charter companies. While under English law American inhabitants public trust rights in coastal lands were managed by the Crown. After the Revolution, the Supreme Court of the United States determined that the American people were the owners of the land formerly controlled by the Crown and that when the states took control of these lands, they were taken subject to the public's rights.³ However, the public's rights at that time were limited to fishing, navigation and commerce.

The first mention of the public trust doctrine in American common law was in New Jersey. *Arnold v. Mundy*⁴ arose out of an action in trespass against an individual who entered the oyster beds to which the plaintiff claimed exclusive ownership. The New Jersey Supreme Court, in deciding that no individual could have an exclusive possessory right of coastal lands, said: "navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water . . . are common to all citizens, and each has a right to use them according to his pleasure, subject only to the laws which regulate that use."⁵

Though this articulation of

the public trust doctrine is different from the one that is recognized today, Arnold was a significant step in that direction.

In its present conceptualization, the public trust doctrine mandates that tidal lands, that is, lands seaward of the mean high or mean low tide line, are held in trust by the state for the benefit of the public. The state is not the owner of the coastal lands but merely acts as the caretaker of those lands. The public maintains certain rights in those lands which include but are not limited to include navigation, fishing, commerce and lateral access. Some jurisdictions, like New Jersey, have expanded public's rights to include lateral access over the dry sand beach because the right to enjoy the tidal lands is useless if the public cannot get to those lands. The argument then proceeds: if the public can cross the dry sand to get to the public trust lands, the public should have greater rights in the dry sand area because without greater rights in the dry sand, the use of the public trust lands is meaningless. That is, the public has the absolute right to recreate in the ocean. To enjoy this right, it necessarily follows that the public needs access across the dry sand to enjoy the public trust lands. But still, access is not enough. The public needs to be able to use the dry sand for recreational purposes. Without the recognition of a public right in recreation on the dry sand, people would only be able to cross the dry sand to get to the ocean and they would have to leave immediately after they finished enjoying the ocean. They could not place a towel on the dry sand or even stop to talk to a friend on the dry sand because this is an activity that is more than just lateral access.



New Jersey and Delaware Law

In New Jersey, litigation involving the public trust doctrine focuses on the issue of beach access. One reason to explain this is that New Jersey derives a substantial amount of its annual revenue from the tourism industry, of which a primary attraction is the New Jersey beaches.

The most significant case involving the public trust doctrine was *Matthews v. Bay Head Improvement Association*.⁶ In *Matthews*, the plaintiff brought suit against a non-profit organization that owned title to six parcels of land that were appurtenant to the beach. The Bay Head Improvement Association refused to permit the public to use the beach east of the land to which they held title at peak hours during the summer months. The issue in this case was whether the public trust doctrine, which provided for public use of tidal lands, required the public to have a right of access over the dry sand. The Supreme Court of New Jersey held that the public did have certain rights in privately-owned beaches:

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge upon, if not effectively eliminate, the rights of the public trust doctrine.⁷

The public's right will be satisfied as long as there is reasonable access to the public trust lands. Furthermore, the public's rights in upland sands is not limited to passage but includes recreational activities.

The law in New Jersey is clear: the public must be given rights in municipally-owned or privately-owned beaches for access to the trust lands beyond the mean high tide line. Public rights in these lands are not limited to access but include recreational activities. The *Matthews* court reasoned that denying the public recreational rights in the dry sand beaches would eliminate the opportunity for people to enjoy the public trust lands.

The state, either through state action or through a delegation of its police power to a municipality, can only regulate public trust lands as long as the public is affected uniformly.

When faced with similar issues, Delaware courts have reached different results. In *Groves v. Dept. of Natural Resources and Environmental Control*⁸, the Superior Court specifically refused to adopt the rule of *Matthews*. In that case, the court recognized that it has never been part of the public trust doctrine in Delaware to allow the rights of a private landowner to be subordinate to a public right of access to tidal lands. To take away the owner's right to exclude others would constitute a regulatory taking within the meaning of the United States and Delaware Constitutions and thus requiring the state to pay the private landowner just compensation for taking the land. Therefore, unless the state wants to pay the private landowner to open his beach to the public, the public may be lawfully excluded from private beaches.

The Delaware courts do not deny the public all of the public trust rights. The public may engage in any activity that it chooses, but those activities must be performed below the mean low tide line. The landowner owns the beach up to that point.

The law in Delaware is very different from the law of New Jersey. While New Jersey courts extend public access and recreational rights to the dry sand and foreshore, Delaware courts strictly construe the public trust doctrine to apply only to the lands below the mean low tide line. In doing so, the Delaware courts have chosen to protect the private land owner's right to exclude the public from his property to the detriment of the historical rights of the public. Such a rule can only serve to render the public trust doctrine a nullity in Delaware. The question that remains in Delaware is: What good are public trust lands if the public is not able to access the lands? ♦

FOOTNOTES

1. 471 A.2d 355, 95 N.J. 306 (1984)
2. THE INSTITUTES OF JUSTINIAN, (J.B. Mayle trans. 5th ed. 1913).
3. *Martin v. Waddell*, 41 U.S. 1 (1849).
4. 6 N.J.L. 1 (N.J. Sup. Ct. 1821).
5. *Id.* at 76-78
6. 471 A.2d 355 (N.J. 1984).
7. *Matthews* supra at 364.
8. 1994 WL 89804

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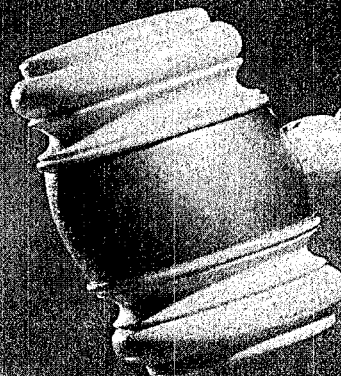
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Michael R. Adams

OIL AND (DELAWARE RIVER) WATER

The Delaware Bay and River is transited by ships carrying nearly two-thirds of the crude oil that comes into the east coast of the United States, and its shores are home to several oil refineries. Consequently it is a body of water subject to the threat of oil spills. Moreover, the Delaware Estuary has international ecological significance as it is a flyway and stopover for countless numbers and variety of waterfowl. Thus, prompt control and clean-up of an oil spill on Delaware Bay is important both to those who use it for a livelihood and for those who use it for recreation.

The threat of oil spills in the Delaware Valley as well as the rest of the nation, along with the need to clean them up promptly and efficiently, caused the United States government to enact the Oil Pollution Act (OPA) of 1990.

OPA was passed in the wake of a difficult year for oil transport in the United States. In June 1989, the tankship *PRESIDENTE RIVERA* grounded in the Delaware River spilling 300,000 gallons of oil and, within twenty-four hours, the tankship *WORLD PRODIGY* likewise grounded and spilled 300,000 gallons of oil in Rhode Island's Narragansett Bay. Three months earlier, the *EXXON VALDEZ* had struck Alaska's Bligh Reef spilling in excess of ten million gallons of crude oil, and thus generating massive litigation. The frequency and magnitude of these and other spills in 1989 led congress and the President to create the most comprehensive piece of oil spill legislation in United

States' history: OPA 90.

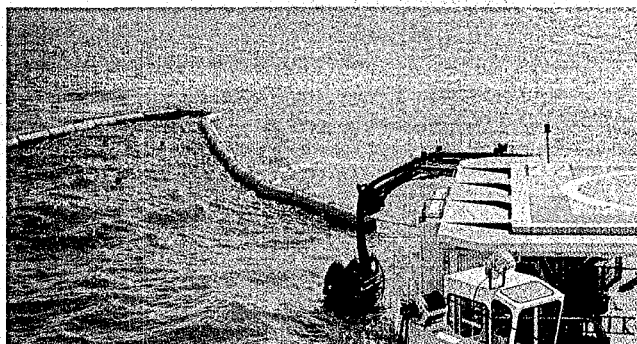
Prior to this act, several pieces of national pollution prevention legislation [such as the Federal Water Pollution Control Act (FWPCA)(1972), the Ports and Waterways Safety Act (PWSA)(1972), and the Port Tanker Safety Act (PTSA)-(1978)] as well as international agreements [such as the Safety Of Life At Sea Convention (SOLAS)(1974) and the International Convention for the Prevention of Pollution from Ships (MARPOL)(1973)] had been the subject of various legal challenges, more than one of which wound its way into the Supreme Court.¹

These cases often involved the constitutional question of an individual state's ability to regulate waterborne commerce, an area which had been traditionally viewed as a federal matter under either the Commerce Clause or by extension of the exclusive federal jurisdiction over admiralty cases.

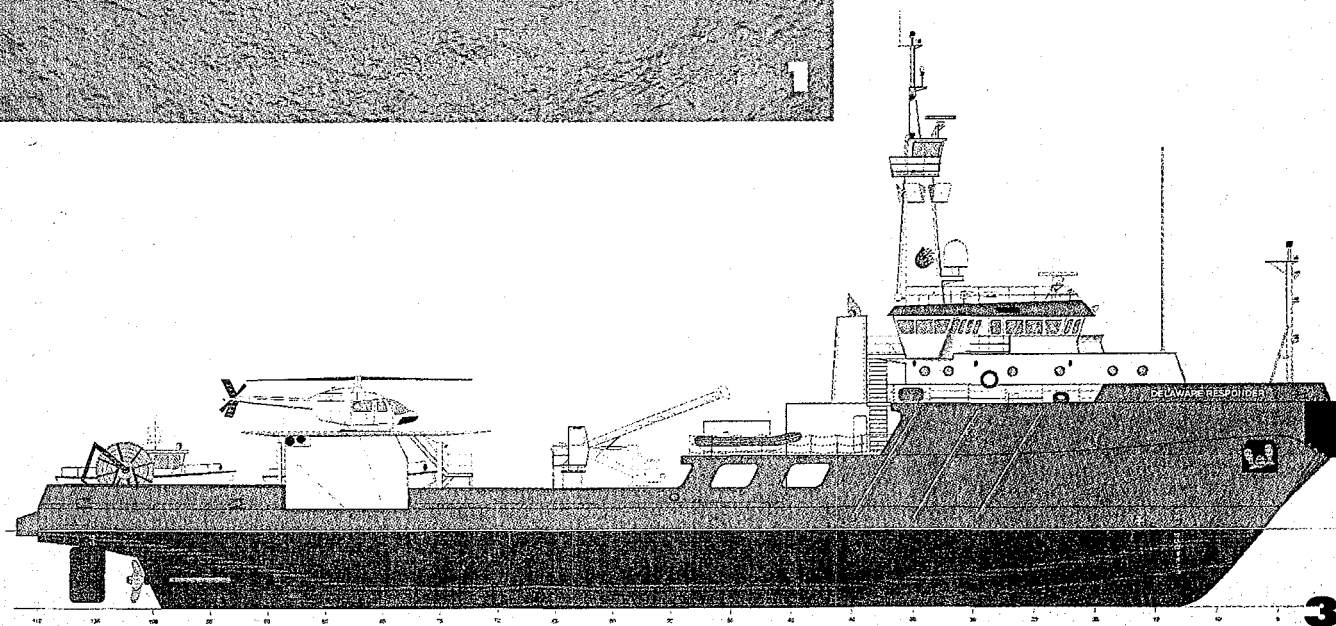
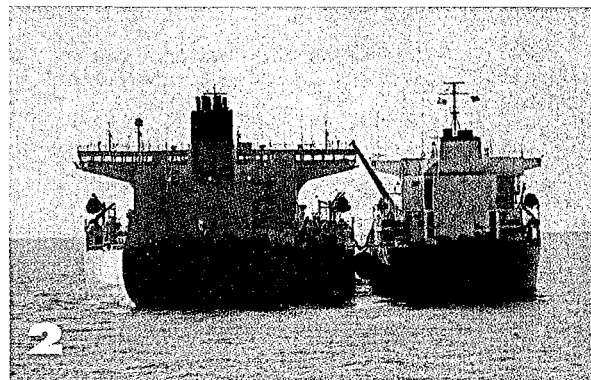
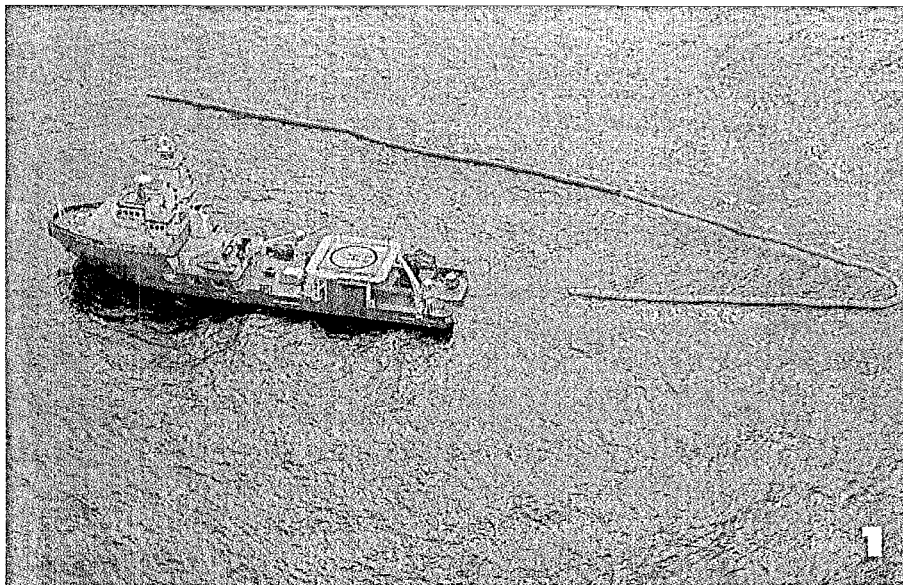
Delaware was among the first to exercise substantial state control over this "traditionally" federal matter (interstate waterborne commerce) when it passed its Coastal Zone Management Act in 1971, a year before enactment of the federal Coastal Zone Management Act. Similarly, and subsequent to the

PRESIDENTE RIVERA spill, Delaware passed an oil spill liability act which is analogous to, as well as complimentary to, the federal OPA.²

OPA, however, was not intended to supplant states' interests in oil pollution problems, but rather to establish nationwide operating and vessel construction criteria that would minimize the probability that spills would occur while simultaneously clarifying (and expanding) the duties and lia-



Delaware Responder deploying its oil skimmer capable of sucking up 5 gallons of oil-polluted water per second, 18,500 gallons per hour!



1) Delaware Responder deploys its oil boom around a spill. 2) Oil lightening in the Big Stone Anchorage: oil is transferred from a deep draft supertanker to a smaller tanker for transit up the Delaware Estuary. 3) Delaware Responder - as drawn by a naval architect.

bilities of anyone spilling oil.³

Among its numerous other requirements, OPA dictated that anyone operating a vessel or facility that handles or moves oil in bulk has to be able to respond to (i.e. clean-up) a "worst-case" spill from that vessel or facility. This means that all the oil companies and oil transport companies operating in the United States have to have plans, equipment and people prepared to respond to a possibly catastrophic spill on very short notice.

While most oil and transport companies own some equipment to deal with comparatively small spills, they generally choose not to buy or build their own equipment for a "worst case" occurrence. Instead, these companies contract with oil spill response organizations (OSROs) to meet their obligations. These OSROs exist because they answer OPA's mandate that oil producers and transporters be able to clean up

a major spill. The largest such OSRO is the Marine Spill Response Corporation (MSRC), a not-for-profit corporation created by a collection of oil and transport companies.

Because of the wide variety of locations and scope of operations conducted by the companies which created it, MSRC was developed to have equipment with catastrophic spills in place throughout the country. Consequently, MSRC contracted for the construction of sixteen nearly identical ships whose *raison d'être* was to be oil spill recovery and which would be homeported at a variety of locations around the nation.

Each ship is 208 feet in length, displaces around 1600 tons (depending on equipment, fuel load, recovered oil, etc.), has a recovered oil capacity of slightly more than 4,000 barrels (168,000 gallons), and is propelled by approximately 2500 horsepower. This makes them the largest oil spill recovery

vessels in the country, if not the world. The ships all share the surname "Responder" with a first name appropriate for the vessel's normal operating area; i.e. *Maine Responder*, *Caribbean Responder*, *California Responder*, etc. *Delaware Responder* is presently located in Salem, NJ, on a tributary of the Delaware River, where I have the pleasure of serving as the ship's captain.

The fundamental principles of cleaning up an oil spill are the same whether one is dealing with five gallons or five thousand gallons: stop the source of the spill, contain the oil, and pick it up. It is the last two fundamental processes, containing and picking up oil spilled on the water, which are the things *Delaware Responder* is designed and equipped to do. Those apparently simple processes can become complex, however, when oil is spilled on the water because the waterborne environment is in nearly constant three-dimensional motion.

Since oil floats on water it can be contained by putting a sort of floating fence around it. This "fence" is called boom and it comes in a variety of sizes depending on the environmental conditions in which it is deployed; i.e. depth of the water, wind, height of seas, etc. *Delaware Responder* normally has about 2600 linear feet of boom on board. Once the oil is "boomed off" it can be picked up through the use of skimmers which can be described as high-tech, high-capacity wet-dry vacs. *Delaware Responder's* primary skimmer rated by the U.S. Coast Guard to recover 10,560 barrels per day, which equals 18,492 gallons per hour or more than 5 gallons every second!

The whole process works thus: One end of the boom is attached to a small boat, which pulls it off the ship's main deck. The other end of the boom remains attached to the ship. The small boat, then parallels the ship's course leaving the boom in a "U" shape astern and alongside the ship. The "open" end of the U faces the source of the oil and/or into the wind and current so that oil moves into the boom. A skimmer is then floated into the boomed-off oil, the oil is picked up by the skimmer,

and piped into any or all of the ship's four recovered oil tanks. The recovered oil can then be pumped from the ship to a waiting barge, another ship, or a shore facility.

It is nearly inevitable that water as well as oil gets skimmed. In order to insure maximum efficiency (i.e. keeping mostly oil in the tanks rather than a mixture of a lot of water and a small percentage of oil), the ship is fitted with oil-water separators which return the skimmed water into the environment and put the oil back in the recovered oil tanks. With all the pumps and piping systems in the ship it is possible to be (1) skimming oil from the water's surface into one tank, (2) separating oil from water through another tank, and (3) pumping oil off the ship and into a barge from a third tank, all simultaneously. One hopes that none of these procedures ever becomes necessary.

The problem of oil pollution will not go away so long as society is dependent on fossil fuels. Simultaneously, legislatures will continue to regulate oil transportation and production activities. Nonetheless, the PWSA did not prevent the *PRESIDENTE RIVERA* spill nor did the PTSA prevent the *WORLD*

PRODIGY spill. Nor did OPA prevent recent spills in Rhode Island, Puerto Rico, New Jersey, Maine, and elsewhere. So long as regulations are unable to absolutely prevent spills, individuals, such as I, will have to be prepared to clean them up. ♦

FOOTNOTES

1. See, for instance, *Kelly v. Washington ex. rel Foss Co.*, 302 U.S. 1 (1937); *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978); *Askew v. American Waterway Operators*, 411 U.S. 325 (1973); *Chevron v. Hammond*, 762 F.2d 483 (9th Cir. 1984); *Intertanko v. Lowry*, 947 F.Supp. 1484 (W.D. Wash. 1996) (*rev'd in part, affm'd in part, Intertanko v. Locke* 1998 WL 318775 (9th Cir. [Wash.])).

2. 7 Del. C. 6201-6216.

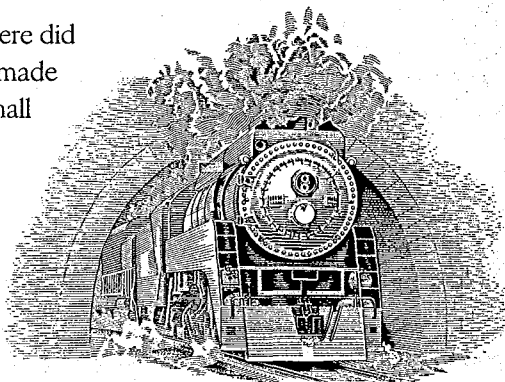
3. OPA has not positively cleared up these murky state/federal waters. *Intertanko v. Lowry* (footnote 1) is, in part, a challenge involving some of the provisions of OPA and Washington state law. See also: Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger William U.L.Rev. 363 (1977); Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case Western Reserve L. Rev. 1 (1997).

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Gerard J. Mangone

A MARRIAGE OF INSTITUTIONS: DELAWARE AND WIDENER TO CONFER A COMBINED DEGREE

The School of Law of Widener University and the Graduate College of Marine Studies of the University of Delaware are planning a joint degree program through which a student could earn both a Doctor Juris (JD) and a Master of Marine Policy (MMP) degree within four and one-half years.

Intended to provide future lawyers with a solid knowledge of marine policy and an opportunity to specialize in marine litigation or marine policy administration, the program will allow nine credits taken at the School of Law to reduce the 39 credits required for the Master of Marine Policy to 30. The graduate seminars at Delaware will cover coastal law and management, admiralty law and shipping, ocean law and policy, fisheries management, and marine environmental policy. At least one seminar will also cover the physical or biological aspects of the seas to provide a general scientific background for legal or policy studies.

Graduate students at the University of Delaware may also opt for the joint degree program. Their object would be to add a law degree from Widener University to their knowledge of marine policy, thus providing a clear direction to the practice of law or strengthening their careers in the management and direction of marine resources. Reciprocally the School of Law of Widener University would accept nine credit hours of the Master of Marine Policy Program within the count of 87 credits required for the J.D. degree.

The Graduate College of Marine Studies, established in 1970 at the University of Delaware, has become one of the leading institutions in the United States for the study of coastal and ocean science and policy. One Dean supervises

four programs, offering only magisterial and doctoral degrees. The programs include 32-core faculty with more than 50 joint, adjunct, and research scientist appointees. More than 100 graduate students pursue degrees in Marine Biology and Biochemistry, Oceanography, Physical Ocean Sciences and Engineering, and Marine Policy.

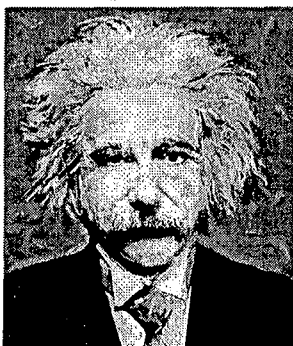
The College is located on two campuses: Newark, on the main campus of the University of Delaware; and Lewes, at the mouth of the Delaware Bay, where the College's vessel, *CAPE HENLOPEN*, is available for oceanographic research throughout the year. The number of faculty and students in the College are about equally divided between the two campuses, although all the faculty and students in Marine Policy work in Newark.

In fiscal year 1988 the College obtained over ten million dollars in grants and research contracts from the National Science Foundation, the Office of Naval Research, the Department of Energy, the Environmental Protection Agency, the National Oceanic and Atmospheric Agency, and other public or private agencies. In a single year no fewer than 65 refereed research papers or books, in addition to innumerable reports and proceedings, were published by the faculty.

In addition to its four academic programs, the College has created four research centers. The Center for the Study of Marine Policy, the first of its kind at a university in the United States, was created in 1973. Since then it has held many conferences on ocean and coastal policy, served local, state, national, and international agencies in marine policy studies, and published dozens of reports, articles, and books on legal, political, and economic issues relating to the seas.

Students in the joint JD and MMP programs, having finished their requirements at Widener University, would enter

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the Marine Policy program in the Graduate College of Marine Studies and would take courses in U.S. Marine Policy, International Marine Policy, Natural Resource Economics, Environmental Policy, and so forth. The resources of the Center for the Study of Marine Policy would also be available to them, with the opportunity to conduct research on coastal and ocean issues that might fit into their six-credit thesis requirement. Students who had matriculated in the Graduate College of Marine Studies and had completed their requirements under the joint JD-MMP program would enter the School of Law at Widener University and add a comprehensive legal education to their substantive knowledge of marine policy.

**Graduate
students may
also opt to
add a law
degree from
Widener
University
to their
knowledge
of marine
policy.**

Clearly the program is not intended for everyone. Full-time students must meet the admission requirements of both the School of Law and the Graduate College of Marine Studies and must be prepared to finish the curriculum of both institutions in four and one-half years. Part-time students would need six years. The waiver of nine credit hours will be helpful, but the student must be persevering and determined to amalgamate legal studies with marine policy for a choice career opportunity.

Both the School of Law at Widener University and the Graduate College of Marine Studies at the University of Delaware are looking forward with enthusiasm to this pioneer program that will ultimately afford well-prepared lawyers with expert knowledge of marine policy. ♦

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THE CRUEL SEA

Vernon R. Proctor

My pleasure reading is guided by three basic principles. First, because I flunked the Evelyn Wood speed reading course, the book must be relatively short. Second, it must be vitally interesting: usually history, but spy thrillers and other nonfiction will do in a pinch. Third, it must not be about lawyers. I usually spend 10 to 12 hours a day with them and that is quite enough, thank you.

Sebastian Junger's *The Perfect Storm* (W.W. Norton & Company, 1997, 227 pp., \$23.95) abundantly satisfied each of my simple requirements. I read the book early this year in about a day and a half – lightning speed for me. It seemed appropriate that I review the book for *Delaware Lawyer* admiralty issue, because the book is (as the subtitle indicates) “a true story of men against the sea.” Finally, there's not a single lawyer in the book –

at least, not one of any consequence – although, my febrile legal mind tried to do some “issue spotting” along the way. Particularly in worker's comp.

Junger's basic story line involves the *ANDREA GAIL*, a swordfish boat that set sail from Gloucester, Massachusetts, in the fall of 1991 for an ill-fated commercial fishing venture to the Grand Banks of Canada. On its way back

from a month-long trip, the *ANDREA GAIL* was lost with all hands in the midst of what has been called the “storm of the century.” Neither the boat nor the crew members' bodies were ever found, so the chronology of the boat's final hours – after the loss of radio contact – is necessarily based upon “educated speculation.” The story is nonetheless gripping and one that fundamentally appeals to me as a (usually) frustrated deep-sea fisherman.

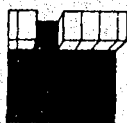
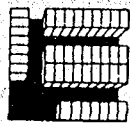
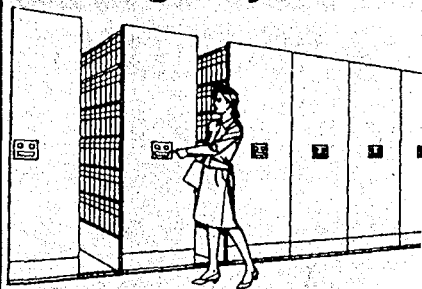
Junger's approach to his subject is interdisciplinary. He effectively intersperses the principal story line with meteorology; the history of Gloucester and of the New England fishing industry generally; seamanship; ichthyology; and the mechanics of swordfishing. The net result is a fast-paced and ultimately chilling “true-life adventure” about a doomed ship and its crew.

The swordfishing life is a difficult one: “hardscrabble” crewmen venture seaward for four to six weeks at a time, their sole objective being to return with a full hold of fish. “Shore leave” is short, free-spending and usually drunken. Family life suffers. Physical risk is high, particularly from the tasks of laying and retrieving miles of monofilament line containing hundreds of huge hooks baited with squid. Not an inspiring view of the human condition, and nothing at all like Gilligan's Island.

Junger is a master of character portrayal. We meet Captain Billy Tyne, the bold skipper of this fearful crew. We see



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vignettes of the personal lives of the crew members, particularly of one Billy Shatford, a hard-living and hard-loving fellow who typifies the reckless living and binge drinking of his contemporaries. We also encounter Alfred Pierre, a large and laconic Jamaican who evokes images of Queequeg from Moby Dick. Toward the close of the book, we learn of the risks incurred and the heroism displayed by the Coast Guard crews that search for missing vessels. The female characters are few in number but impressive in achievement: a courageous woman piloting a sailboat to Bermuda who survives the same storm, and the commander of the most successful ship in the Gloucester swordfishing fleet.

The ANDREA GAIL

was lost
with all
hands in the
midst of
what has
been called the
"storm of
the century."

Beyond question, the most important "character" in the book is the storm itself. Formed by the idiosyncratic confluence of three separate weather systems, including a Bermuda hurricane, the 1991 Atlantic storm was an epochal meteorological event. Wind speeds exceeded 120 miles per hour, and offshore wave heights reached at least 100 feet (barely short of the known record). Against such overwhelming forces, the *ANDREA GAIL* was no match. If you can read the climactic passage on the physiology of drowning without flinching, you are a stronger person than I am. I finished the book feeling both wonder at the power of nature and horror at the human cost of the storm.

The Perfect Storm may prove, in time, to be a seminal work of nonfiction. It is spellbinding, educational and genuinely awe-inspiring. All that, and no lawyers! ♦

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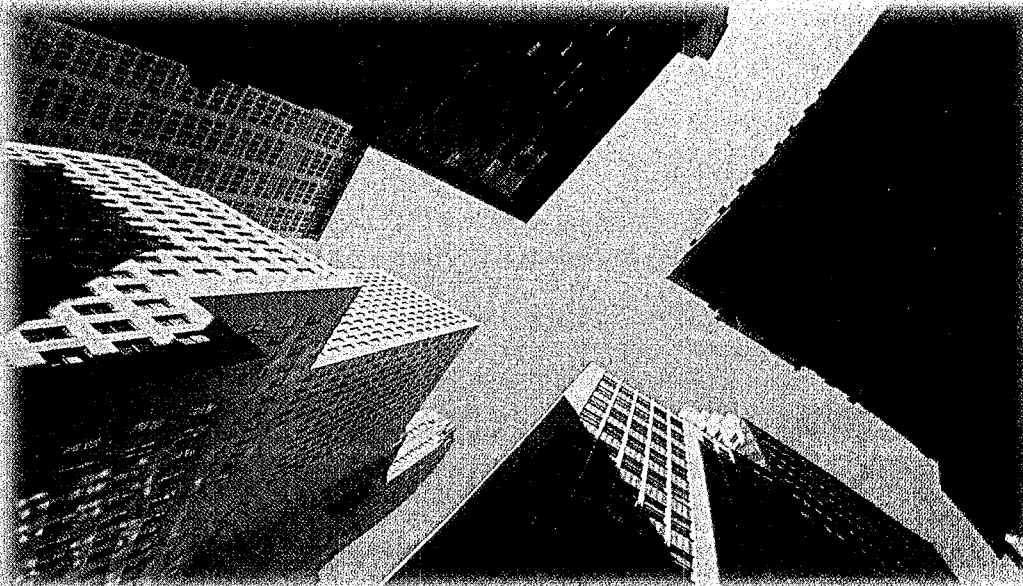
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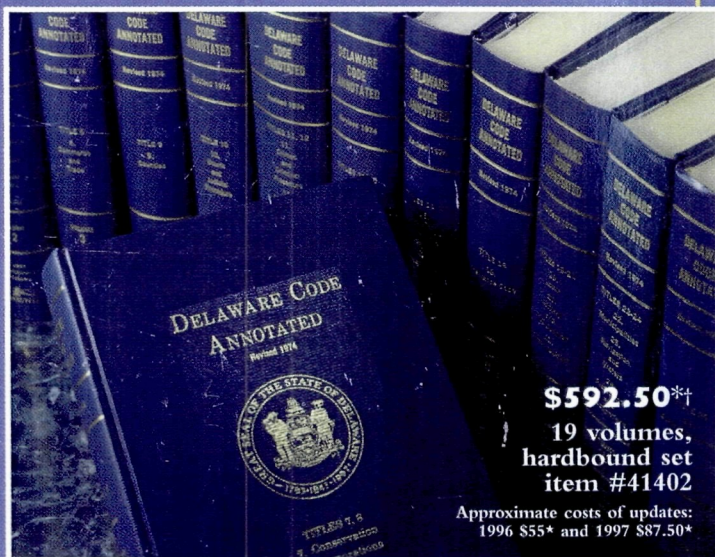
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