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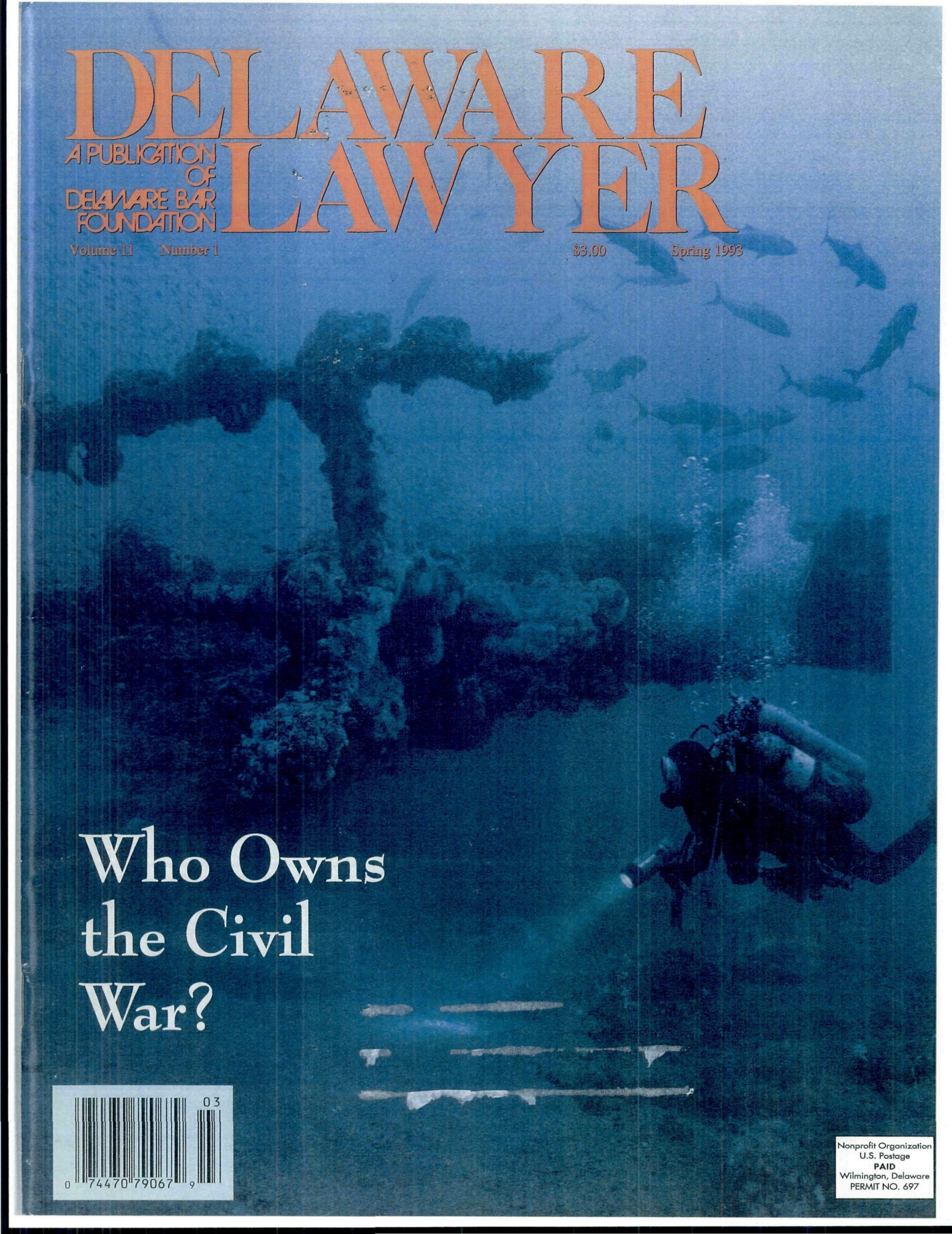

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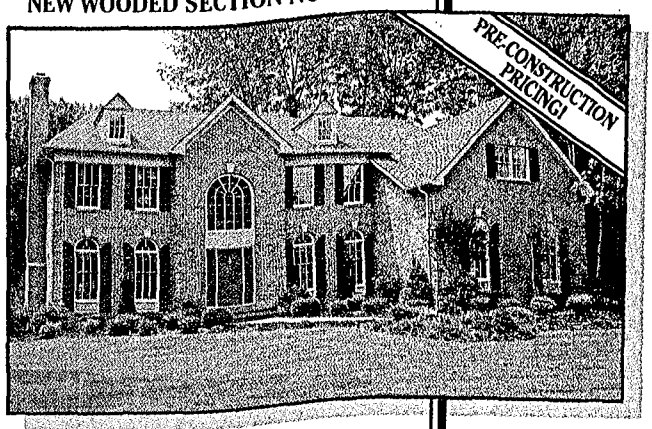

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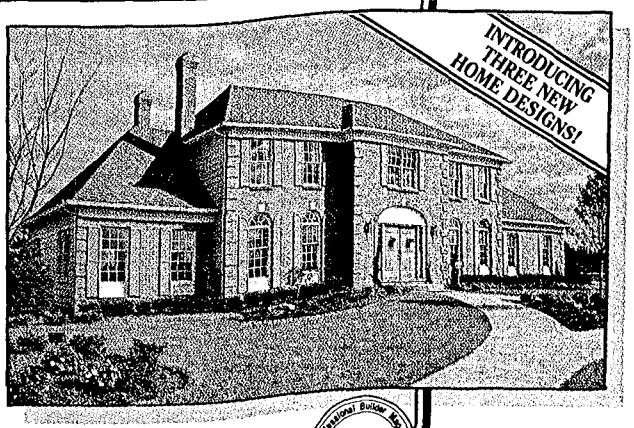

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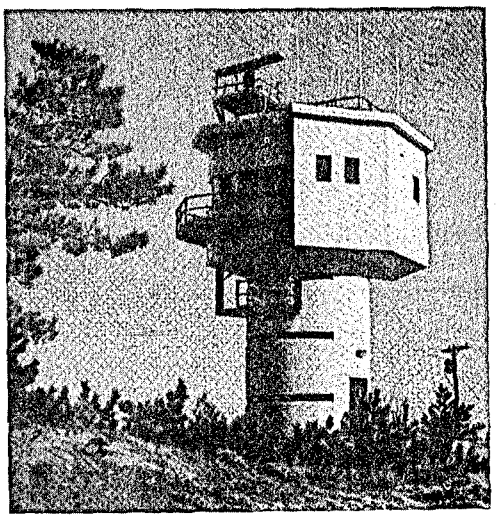
CONTENTS

8



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ON THE COVER: Steve Gatto, one of the first scuba divers to explore the shipwreck of the *U.S.S. Monitor*, hovers beneath its armour belt, just behind the coral encrusted propellor. Photo by 1990 U.S.S. Monitor Photographic Expedition Leader Gary Gentile

TOP RIGHT: Divers photographing the stern of the *Monitor*. Note the video camera mounted on a torpedo-like propulsion vehicle on the left.

BELOW RIGHT: Towering above Cape Henlopen and overlooking the entrance to the Bay, this high-tech ship tracking station is managed by the Pilots' Association and the Philadelphia Maritime Exchange.

The Editor's Page in the September 1992 issue misstated Board of Education memberships of Michael Modica and Raymond Tomasetti. Both serve on the Brandywine School District Board.

Top Photograph by Gary Gentile

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EDITOR'S PAGE

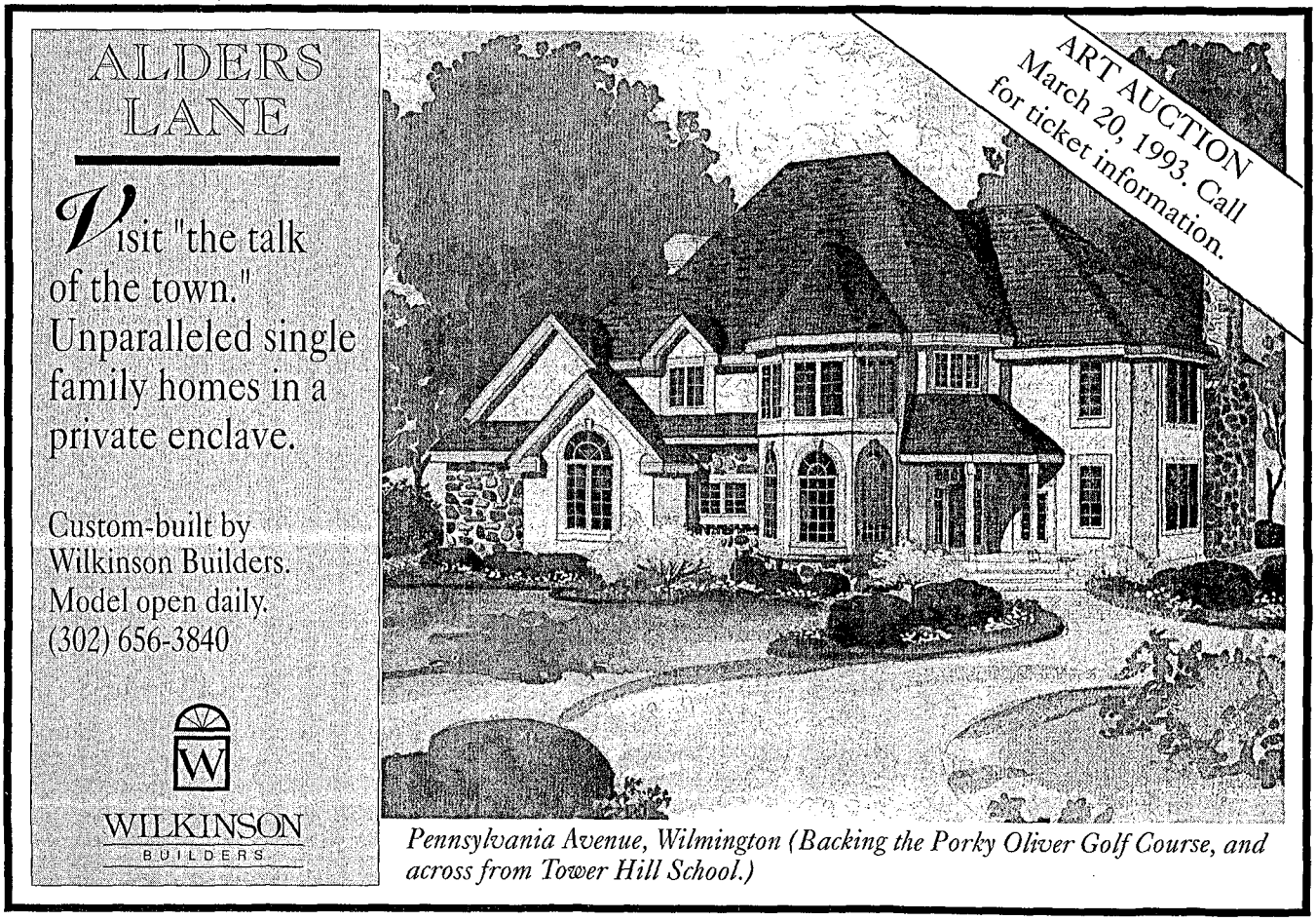
Landlubbing barristers, ahoy! Welcome to a salty, and I hope, refreshing maritime issue of DELAWARE LAWYER. In a state with such a geographic orientation to and cultural affinity for the sea, it is somehow surprising to find that one of the most ancient and honored legal arts, admiralty law, is so under-represented among the members of the Delaware Bar. Unfortunately, it is not unusual to find that in maritme cases filed in the United States District Court in Wilmington the local attorneys serve as nothing more than base tenders for admiralty lawyers from Philadelphia, Baltimore, and even New York. I should know, having worn — and still wearing — that humble mantle on too many occasions. And yet with the phenomenal growth of maritime commerce in and out of the Port of Wilmington (see John O'Donnell's article for this remarkable recession-proof success story), admiralty law is a branch of practice in which the Delaware Bar could experience growth as vibrant as that of our local port. The Bar Association's fledgling Admiralty Law Section hopes to make such a vision a reality.

Admiralty law is ancient — in fact, the common rules and regulations governing seafaring and maritime commerce were the genesis of international law. Professor Gerard Mangone of the University of Delaware's Graduate College of Marine Studies has graciously excerpted an article from his upcoming book which traces the fascinating evolution of admiralty law from biblical times to such prominence that the framers of the Constitution made it the exclusive province of the federal judiciary. Michael McCauley, Esq. brings matters up to date with an overview of the admiralty practice today.

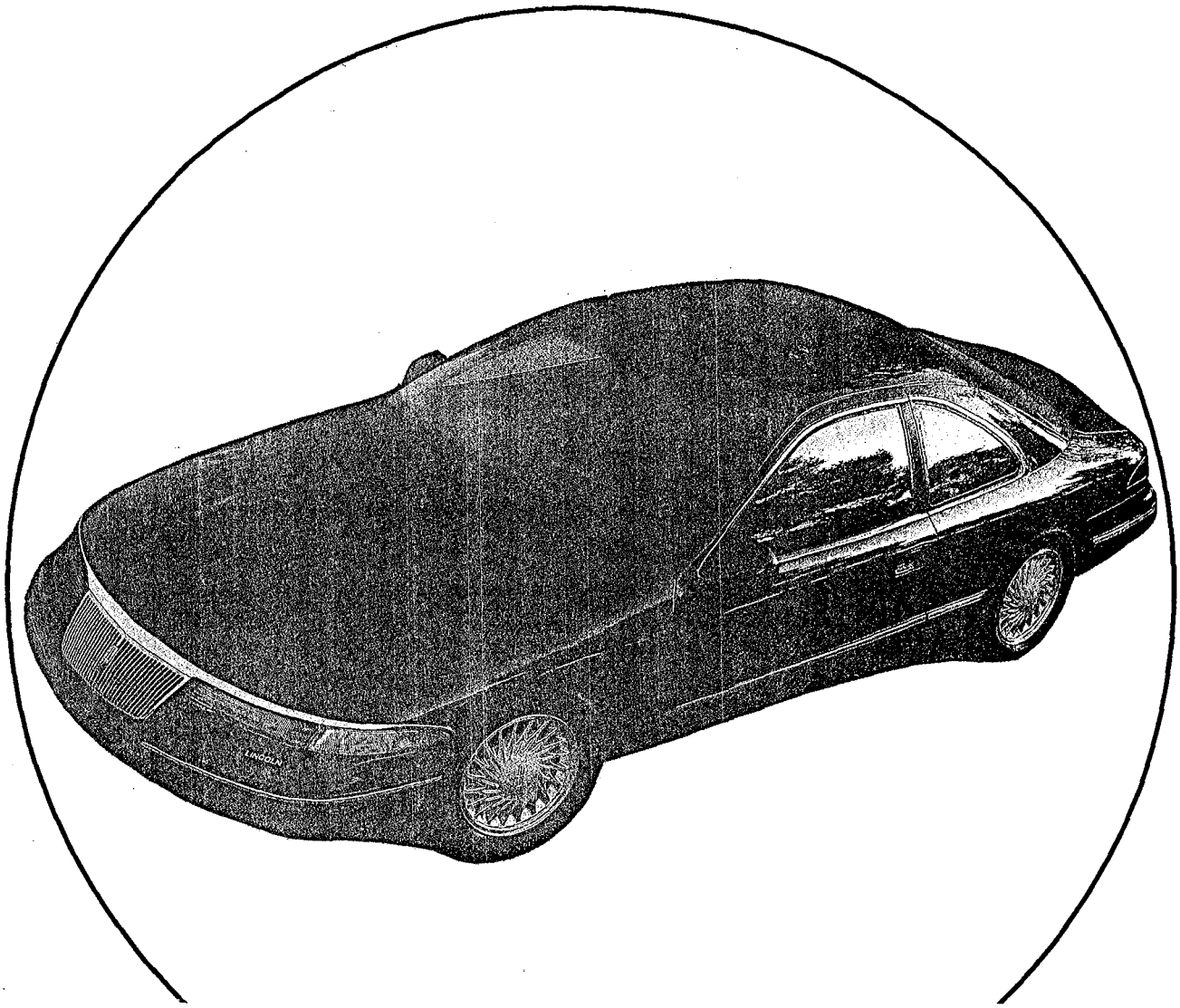
Mark L. Reardon, Esq. draws from his own familial heritage, taking the reader up the Delaware estuary at the helm of a gigantic freighter: the life and lore of the Delaware River and Bay Pilots is in his blood. And Cy Lieberman — whose "Boating" column in the News Journal has for decades promoted the safe enjoyment of our state's rich maritime resources — tells how a dedicated group of nautical enthusiasts have banded together to form the Delaware Maritime Center, which seeks to protect our fragile marine environment while commemorating our proud history of shipping and shipbuilding.

Venture with me beneath the sea to experience thrilling discoveries of the long-lost maritime heritage of the Civil War era. But don't get too excited about the find. Because when one puts away the wetsuit, inevitably, it's time to deal with the lawsuit.

Peter E. Hess



Pennsylvania Avenue, Wilmington (Backing the Porky Oliver Golf Course, and across from Tower Hill School.)



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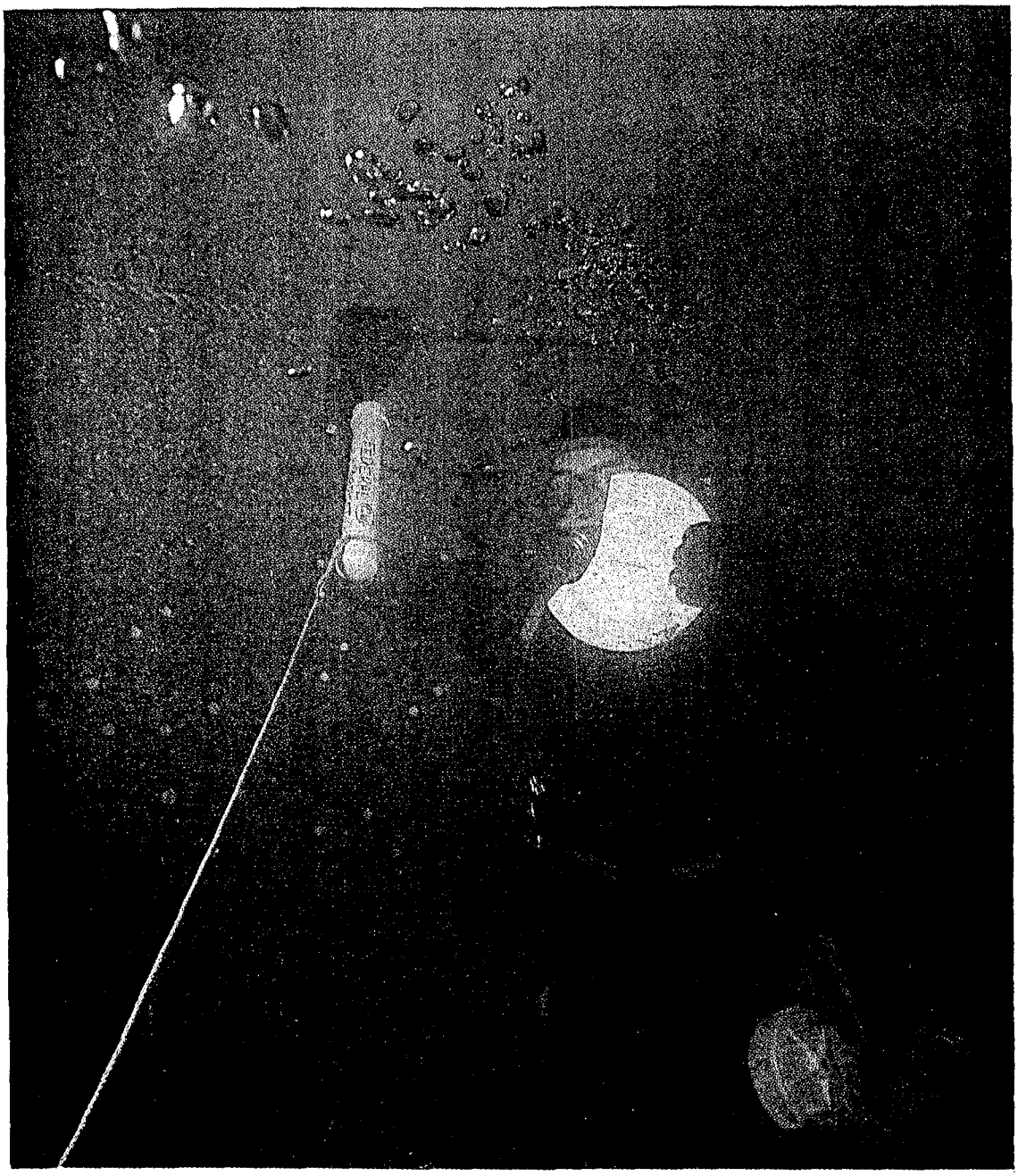
Battles Over Historic Shipwrecks, or



Photograph courtesy of Seavisions Inc.

Who Owns the Civil War?

Peter E. Hess

I. The Battle Against the Depths

The water is warm, incredibly azure, and I'm pulling myself down an anchor line that runs steadily deeper, seemingly forever. I'm constantly monitoring a panel of gauges: 150 feet - the big blue is everywhere I look except for a single nylon line angling downward and directly into the steady push of the Gulf Stream. I am just beginning to become aware of a familiar but not unpleasant cranial buzz signalling the onset of nitrogen narcosis. But the gentle tingling in my head suddenly disappears: my attention is captured by a school of great amberjacks swirling around the dive team between 160 and 180 feet.

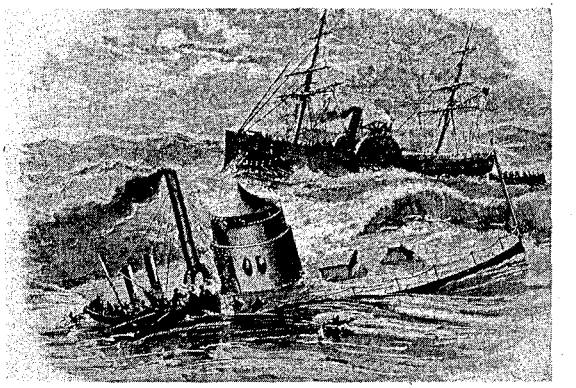
Now the jacks are above us - is that the bottom coming into view below? Ah, there she is, ahead and below, lying serenely in a sandy bowl. I suck harder on my regulator, gulping in excitement and even letting out a muffled cheer that no one but I can hear. I am ecstatic - yet it is not a trace of narcosis that contributes to the awe that engulfs me. The object of a hard-fought legal battle, an icon of American ingenuity and valor, the shipwreck of the *U.S.S. Monitor* beckons, only thirty feet below.

I release the lifeline to the surface and descend to the seafloor. Two hundred thirty feet down, and I am hovering next to the cylindrical gun turret of perhaps the most famous vessel in U.S. Naval history, the intrepid Civil War ironclad that saved the Union fleet from the fearsome Confederate behemoth, *Merrimack*. With reverence, I unfurl the storied Explorers Club flag. My client, comrade, and close personal friend, Gary Gentile, leader of the 1990 *U.S.S. Monitor* Photographic Expedition, captures the moment on film. It is a triumph to be cherished for a lifetime.

Diving the *Monitor* was an incredible thrill - a chance to visit an historic shipwreck that only a few explorers have experienced firsthand. The *Monitor* Expedition stands out as a crowning achievement in my sixteen years of memorable shipwreck diving. As Gary's attorney in what had been an often bitter, four year legal battle against the National Oceanic and Atmospheric Administration ("NOAA") for scuba diving access to its Monitor National Marine Sanctuary ("MNMS"), I was paid a fee that few lawyers have a chance to earn: the right to accompany some of the most skilled and experienced decompression divers in the world. Our objective: to use free-swimming scuba divers to photo-document the rapidly disintegrating shipwreck of an engineering marvel - a ship that changed not only the course of the American Civil War, but forever altered shipbuilding and naval tactics.

Left: Diver Alan Edmonds discovers that the *China Wreck* has been arrested by the Indian River Recovery Company.

Today the *Monitor* is a mere skeleton of its former glory. Precious artifacts from the first ironclad warship are exposed as the sand covering the shipwreck is scoured away by the relentless Gulf Stream; often they are carried away in the strong current without ever being documented or recovered for posterity. The *Monitor's* undercarriage is nearly flattened; once stout iron plates are pockmarked with gaping holes and elsewhere, corroded to wafer thinness. Only its distinctive turret, upon which the shipwreck is partially supported, identifies it as the intrepid *Monitor*.



The *U.S.S. Monitor*, her low deck awash, founders in North Carolina's "Graveyard of the Atlantic" while the *S.S. Rhode Island* renders assistance. December 31, 1862.

As an avid Civil War buff, I found it an unforgettable experience. And as a scuba diver, I was given a chance to learn from the divers who are redefining conventional notions of man's underwater limitations and bravely, yet carefully, expanding the frontiers that can be safely be explored by the untethered scuba diver. The construction and baptism under fire of the first ironclad symbolize American ingenuity and technological innovation in an era of dramatic change. Similarly, the *Monitor* Expedition's innovative diving methodology and the lengthy litigation that permitted the first civilian expedition to descend to this historic shipwreck represent radical change from an entrenched mindset that preceded them.

The Civil War era was perhaps the most important period of transition in United States history. The nation emerged as a powerful, ocean to ocean union of states subservient to a federal government. Slavery was abolished and the notion of universal civil rights was born. Our economy evolved from agrarian to industrial, the populace from rural to urban. And the vessels that carried our burgeoning commerce and defended our liberty were a part of the dramatic transformation of land and sea, perhaps best symbolized by the *Monitor*, the iron, steam-powered vessels that replaced the wooden sailing ship.

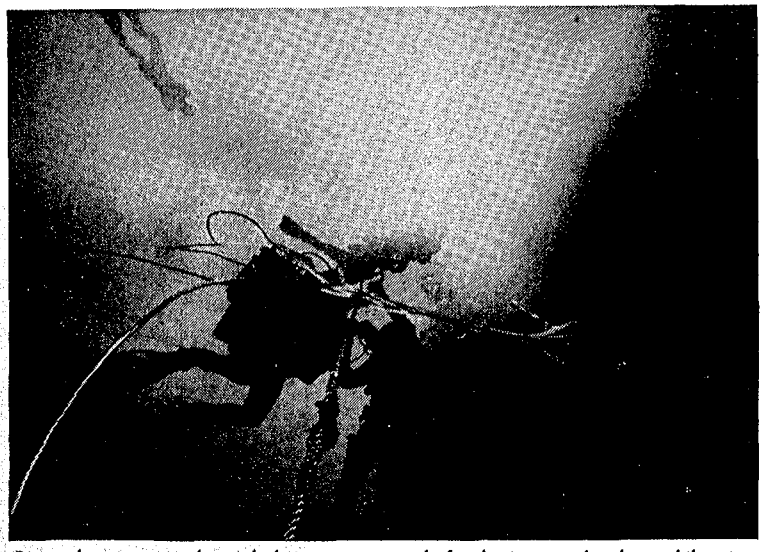
Today's technological revolution in remote electronic sensing and underwater exploration has led to the modern-day discovery of a long-lost legacy of vessels and cargoes from the Civil War era. Just as inevitably as technology leads to the location of these historic shipwrecks, the law raises questions about who owns them. A fascinating branch of admiralty law, the jurisprudence of title, salvage rights, and public access to historic shipwrecks is being created as the conflicting claims of sovereigns, finders, salvors, and recreational explorers are adjudicated today. For these diverse litigants, it seems, the Civil War is not over yet.

II. The Battle With the Underwriters

In September, 1857, California gold was brought to eager New York bankers on sleek, sidewheel steamers that transited the Pacific from San Francisco to Panama. Crossing the Isthmus by rail to the Atlantic, the gold was put aboard steamers again for the voyage north to the nation's financial capital. Officially, the Steamship ("S.S.") *Central America* was carrying more than three tons of the precious metal - these were the insured shipments consigned to New York City merchants or banks. How much more was being carried as the personal property of the more than 600 passengers fresh from

the gold fields crammed aboard her was not reported in the press of the day. What *was* reported - and in melodramatic detail - was the catastrophic sinking of the *Central America* when she steamed into the path of a raging, Hugo-strength hurricane in deep water somewhere off the coast of the southeastern United States.

The highly publicized loss of such an enormous shipment of gold bullion, coinage and dust set off the so-called Panic of 1857, the inevitable, painful (and, even today, somewhat familiar) cooling of an overheated economy - an economy that did not recover until the United States went to war against itself in a tragedy enormous enough to overwhelm the memory of a shipwreck that took more than 400 lives.



Photograph by Gary Gentile

Divers decompressing beneath their support vessel after having completed an exhilarating visit to the shipwreck of the *U.S.S. Monitor.*

Although in the 1970's several unsuccessful efforts were made to locate her sunken lode, the *S.S. Central America* did not again burst upon the American conscious until 1987, when an obscure trio of Ohio adventurers and their local financial backers, known as the Columbus-America Discovery Group, Inc. filed an admiralty action *in rem* against "an unidentified, wrecked and abandoned vessel, believed to be the *S.S. Central America.*" The shipwreck was found by towing sophisticated sidescan sonar - an electronic acoustical imaging device - above the seafloor 8,500 feet below, approximately 180 miles east of South Carolina, in international waters outside the jurisdiction of any state.

As evidence of their discovery of the shipwreck, the finders compiled somewhat inconclusive sonar images and underwater photographs of the target wreck. But with rival searchers closing in on their immediate vicinity, Columbus-America hurriedly lowered their custom-built remotely operated vehicle, or "ROV", to the abyssal seafloor in an attempt to recover a piece of the shipwreck. The artifact could then be symbolically attached by the U.S. Marshal in their federal admiralty jurisdiction of choice, the Eastern District of Virginia (Norfolk). In a stroke of good fortune, although the articulated pincer arm of the ROV "Nemo" did not work at depth, when the disappointed engineers winched Nemo to the surface, a chunk of coal-fuel for the *Central America's* boilers - was lodged in the ROV's landing skid. The coal was duly arrested and the admiralty judge enjoined all other claimants from interfering with Columbus-America's efforts to salvage the treasure-laden shipwreck.

As a lantern in the dark forest attracts thousands of insects, so the siren song of gold lures litigants to the courtroom. Among the intervening parties vying for title to the long-lost gold were Columbia University, a Miller Brewing Company heir, an eccentric Texas oil man, and even an order of Catholic monks. But perhaps the most formidable of those seeking ownership was a consortium of 37 insurance companies, their modern-day successors, or, in the case of five insurers out of business for more than a century, the State of New York, to whom, by statute, the property of a defunct insurance company escheats.

Columbus-America's claim to the shipwreck and its gold was based upon a simple premise: finders, keepers - admiralty's "law of finds", a legal theory applied to abandoned property that no longer has any owner. In their complaint, however, Columbus-America also pled an alternate theory, the law of salvage. When it is an historic shipwreck such as the *Central America* that is arrested in admiralty, under either theory of finds or salvage law, the courts have required the finder/salvor to fulfill an additional duty. Because the wreck site is, in effect, destroyed by the process of salvage, its archaeological integrity must be preserved by careful documentation of the shipwreck, the recovery process and by the proper conservation of the artifacts salved.

The law of salvage assumes that the lost property still has an extant owner - that is, it has *not* been abandoned. As an incentive to encourage mariners to voluntarily undertake the risky business of saving persons and property from marine peril, the admiralty court adjudicates a liberal salvage award based upon the value of the property rescued and the cost, difficulty and skill with which it was salvaged. But after the salvage award is paid, the owner is entitled to the remaining value of his property. Thus, the insurance consortium based their claim to a share of the *Central America's* riches upon the law of salvage. Conceding that Columbus-America was entitled to a salvage award, the insurers alleged that they had, by right of subrogation, collectively acquired - and had never abandoned - title to the shipwreck's insured shipments of gold.

But how does an underwriter prove ownership 132 years after an insured loss? Obviously, all witnesses to the disaster have long since died. Moreover, in the intervening century and a third, none of the insurance companies or their successors could produce business records of either the policies in effect or the claims payments made thereunder as a result of the *Central America's* sinking. Instead, as proof of having underwritten the loss of three tons of California gold, the consortium offered into evidence ancient newspaper accounts which detailed the insurance companies involved.

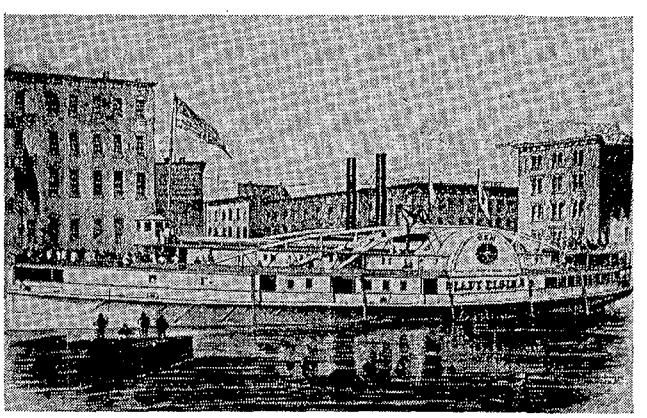
The critical ruling in the admiralty trial over title to the shipwrecked treasure concerned the law of evidence. While District Judge Richard Kellam found the newspaper articles admissible as evidence of the *Central America* catastrophe, they were inadmissible as proof of commercial transactions or ownership of the gold by right of subrogation. Without competent evidence as to title to the gold by the underwriters of its loss, the district court ruled that the shipwreck and its precious cargo had

been abandoned. Abandonment was further demonstrated by the loss and/or intentional destruction of any insurance records by companies that must have believed that they could never find - much less recover - a treasure lost at an unknown location in the abyssal depths of the Atlantic. By operation of the law of finds, therefore, the *Central America* and its gold was exclusively the property of its finders. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Vessel,* 742 F. Supp. 1327 (E.D. Va. 1990).

Ironically, the reversal of this decision would come only as a result of the contemporaneous modern-day legal battle over title to another Civil War era shipwreck, a contemporary tragedy on the scale of that of the *Central America.*

III. The Battle Against the State

The Presidential election of 1860 found the nation bitterly divided over the issues of slavery and states' rights. In Illinois these issues were framed in a series of famous debates between the Democratic candidate, Stephen Douglas and the Republican, Abraham Lincoln. In neighboring Wisconsin, the Republican governor Alexander Randall refused to enforce the Fugitive Salve Act. This set off a feud with the Irish Democratic state militia in Milwaukee, who believed their governor's orders to be treasonous. In retaliation, Randall stripped the militia of their arms. To raise the money with which to re-arm themselves, the Irish militia and their Democratic supporters chartered the luxurious sidewheeler, *Lady Elgin*, to steam south on Lake Michigan to attend a Chicago rally for Stephen Douglas.



The luxurious sidewheel steamer *Lady Elgin* at the quay in Chicago, the day before her fateful collison on Lake Michigan.

The rally was a great success and early in the morning of September 7, 1860, the *Lady Elgin* was headed north on the Lake in the midst of a violent squall. In the driving rain and poor visibility the steamer was suddenly rammed amidships by the south-bound lumber schooner *Augusta.* The *Augusta* disengaged and sailed away into the night without stopping to render assistance to the stricken sidewheeler.

Without interior bulkheads to staunch the water pouring into her, the *Lady Elgin* was doomed. The wooden vessel broke apart as she sank, scattering her wreckage - including the ship's equipment and lavish fittings, the armament and musical instruments of the militia and their military bands, and the personal belongings of hundreds of passengers - across a wide swath of Lake Michigan. Dozens of horrified survivors clung to the *Lady Elgin* floating hurricane deck as it drifted with the storm toward the distant shore, only to drown in the raging surf near Waukegan, Illinois.

In one of the Great Lakes' greatest disasters, more than 300 of the nearly 400 people on board the *Lady Elgin* perished that night. So many of the dead were prominent Irish politicians from Milwaukee that the catastrophic sinking resulted in a shift in the political power from the Irish to the Germans in that city, a cultural orientation that endures to the present day. Yet, like the loss of the *Central America* only three years before, the maritime tragedy was shortly to be subsumed by the imminent commencement of the Civil War.

In 1989, after years of archival research and months on Lake Michigan towing sidescan sonar, Chicago salvor Harry Zych discovered the debris field of the *Lady Elgin.* Pleading the alternate theories of the law of finds and salvage, Zych filed an admiralty arrest *in rem* of a collection of artifacts that he had recovered from the shipwreck site. But as the wreck lay in Illinois waters, Zych's claim of title was contested by the State of Illinois. Because the U.S. Constitution's Eleventh Amendment prohibits a federal court from holding jurisdiction over a non-consenting state, Illinois asserted its sovereign immunity, alleging that it could not be bound by any determination of title by the admiralty court.

Illinois further reasoned that if the *Lady Elgin* was abandoned and embedded in the lake floor, it was state property. This was due to the embeddedness exception to the law of finds: abandoned property buried or embedded in the soil belongs to the land owner and the "finders, keepers" doctrine does not apply. Moreover, the embeddedness exception had recently been codified by federal legislation, The Abandoned Shipwreck Act of 1987, ("ASA"), 43 U.S.C. 2101 *et seq.*

In light of the State of Illinois' opposition, Zych's attorney, Paul Keller, realized that the best chance to acquire title to the *Lady Elgin* was by operation of the law of salvage: that is, to prove that the shipwreck had never been abandoned, and thus, was subject to neither the embeddedness doctrine or the ASA.

Zych's research had shown the sidewheeler to have been insured by the Aetna Marine Insurance Co., which today is a part of the Philadelphia-based CIGNA Insurance Companies. A thorough search of the CIGNA archives revealed a series of letters from the corporate leaders to its field agents in Chicago which discussed the *Lady Elgin* disaster. Those letters showed that the marine insurer had in fact underwritten the vessel and her cargo and had paid all of the claims of loss made against the insurance policy. Moreover, Aetna, albeit in 1860, had specifically instructed its agents *not* to abandon the shipwreck.

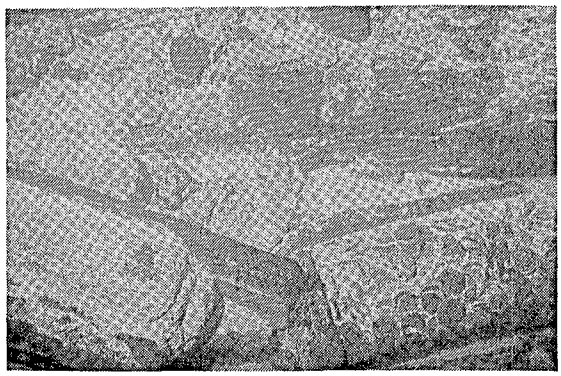
Armed with such authenticated documentation - the sort of proof of title unavailable to the insurance consortium in the *Central America* litigation - Zych formed the Lady Elgin Foundation, a not-for-profit corporation whose goal was to recover and preserve the artifacts from its namesake shipwreck and donate them to a museum in the Chicago area. Agreeing to split the artifacts salvaged on a percentage basis, the Foundation contracted for the salvage rights to the *Lady Elgin* from CIGNA, which, in turn, would cover the legal costs incurred by the Foundation in proving its title to the shipwreck.

Another attorney was needed to represent the Foundation's interests. Keller, like me, a recreational diver and amateur underwater archaeologist who also recognized the importance of the legal issues implicated in the *Lady Elgin* litigation, had expended considerable energy in providing *pro bono publico* representation to Zych. Given my experience in shipwreck diving and salvage litigation, my keen interests in exploring the historic shipwreck on the bottom of Lake

Michigan, and my proximity to CIGNA's headquarters, I agreed to represent the Foundation.

I obtained an affidavit from Zych to the effect that the widely-scattered debris field of the *Lady Elgin* could not have been discovered but for the advent of sophisticated sidescan sonar which could distinguish the shipwreck's artifacts from the natural rocky bottom of Lake Michigan. The affidavit combined with the insurer's archival documents supported the Foundation's assertion that the wreck had never been abandoned - and until very recently, could not have been discovered - by its subrogated owner, CIGNA. As the Foundation now held CIGNA's salvage rights, it was the lawful owner of the *Lady Elgin*, irrespective of any assertion of sovereign immunity from the federal court by the State of Illinois.

Photograph by Peter Hess



The stuff of dreams. Treasure of the 1622 Spanish galleon *Atocha* off the Florida Keys. A chest of silver ingots lies open on the right, next to a treasure chest of silver pieces of eight.

United States District Judge Ilana Rovner agreed and declared the *Lady Elgin* to be the exclusive property of the Foundation. *Zych v. The Lady Elgin,* 755 F.Supp. 213 (N.D. Ill. 1991). On appeal, the Seventh Circuit affirmed, but held that, by virtue of the Eleventh Amendment, the admiralty court's adjudication of title was not binding upon the State: such a determination of ownership between the Foundation and Illinois would have to take place in state court. *Zych v. The Lady Elgin,* 960 F.2d 665 (7th Cir. 1992). The ongoing legal battle over the historic shipwreck has now been joined in the Circuit Court of Cook County in Chicago; the Foundation has obtained a preliminary injunction, which suggests that it may prevail and be granted clear title to a spectacular collection of artifacts so evocative of the schisms tearing apart a nation on the eve of civil war. *People v. Zych, et al.* No. 92-3762, ___ N.E. 2d ___, (Ill. App. 1992).

The admiralty court's decision in the *Lady Elgin* litigation proved timely for the insurance consortium appealing the award of title to the *Central America* and its golden trove to its finders pursuant to the law of finds. On appeal, the Fourth Circuit found the law of finds inapplicable to a shipwreck that indisputably had been insured. Applying instead the law of salvage, the Court of Appeals held that its insurers were entitled to some percentage of the value of the gold whose loss they had underwritten a century and a third ago. Nevertheless, the Fourth Circuit ruled, Columbus-America was entitled to a salvage award, to be established on remand to the admiralty court; the award would constitute the lion's share of the priceless treasure and artifacts the salvors had recovered from the ocean's depths. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Vessel.* 974 F.2d 450 (4th Cir., 1992)

Two Civil War era tragedies, each with lasting historical repercussions. Two contemporary underwater discoveries, both resulting in protracted litigation over ownership and salvage rights. And the resolution of each case would be drawn, in part, from the legal repercussions of the other, as the once-forgotten maritime disasters would resonate again over the intervening century.

IV. The Constitutional Battle

In April 1868, a nondescript Great Lakes steamer, the *Seabird,* was on her first run of the season. Because of the frigid April air on Lake Michigan, a coal-fired stove was lit to heat her main cabin that night. In the morning, a porter attempting to dump the glowing embers overboard carelessly threw them into the wind, which carried them back onto some varnished tubs stored on the *Seabird's* deck. The freshly-painted wooden steamer was rapidly engulfed in flames; her frantic passengers and crew faced the terrible dilemma of instant death by fire, or a slightly more protracted, but no less certain death in the icy waters of the lake. Only two of the 200 on board survived. The *Seabird* was uninsured; her destruction and the terrible loss of life would slip into obscurity until 1989.

During his extensive sonar searches of the Illinois waters of Lake Michigan while seeking the *Lady Elgin*, Harry Zych also discovered the *Seabird's* remains. Ironically, this vessel, of dubious historic or archaeological significance, may nevertheless be the catalyst for legal precedent of even greater importance than that established in litigation over the disposition of the better-known shipwrecks of her era. When initiating legal action for title to the *Lady Elgin,* Zych filed a separate admiralty claim *in rem* upon the *Seabird,* the litigation over which, in spite of the apparent similarity to the *Lady Elgin* case, in fact presented distinct legal issues.

As an uninsured shipwreck with no extant owner, reliance by the plaintiff on the law of salvage was pointless: the *Seabird* had long since been abandoned. The State of Illinois, in contesting Zych's claim of title in the federal court, could in this instance rely upon the Abandoned Shipwreck Act ("ASA"), a law which had yet to be tested for constitutionality.

The ASA - a controversial statute that required nine years of Congressional debate before passage - grants title to the states to all abandoned or embedded shipwrecks within inland waters (i.e. lakes, rivers, and bays) or beneath the territorial seas, the seaward limit of a state's jurisdiction. The ASA's potential constitutional defect lay in its abolishing the application of the law of finds or salvage to any such shipwreck, effectively precluding a discoverer from filing an admiralty claim upon a shipwreck within state waters. Because the source of the federal courts' exclusive admiralty jurisdiction is the Constitution itself, legislation that unduly restricts the judiciary's central function of promoting the uniform application of law to traditional maritime activities is unconstitutional.

The *Seabird* litigation would attract a host of *amici curiae* on both sides of the central constitutional issue, myself and several of my salvage clients among them. As the case unfolded, a series of briefs was filed by the various litigants and interested parties raising several arguments defending or challenging the constitutionality of ASA. Those who had led the opposition to the enactment of ASA - salvors, treasure hunters, and recreational divers - felt that the ASA's abrogation of their traditional recourse to the admiralty court to determine title or salvage rights to shipwrecks they had discovered constituted unconstitutional tinkering by the legislative branch with

the function and authority of the federal judiciary. The ASA proponents - primarily governmental entities and professional archaeologists - on the other hand, had championed the legislation as merely confirming the states' title to historic resources and the only effective means of ensuring protection of shipwrecks from those whom they perceived to be looters and profiteers.

District Judge Rovner - who was also hearing the *Lady Elgin* case - initially disposed of the *Seabird* litigation by finding the shipwreck, whose location in state waters had been established, *likely* to be embedded in the lake bottom. The judge then reasoned that either the embeddedness exception to the law of finds or the ASA gave the state a legally cognizable claim of title, which thereby triggered Illinois' Eleventh Amendment immunity against suit in a federal court. As Illinois was the only other possible party with an interest in the ownership of the *Seabird* - and the court was precluded from holding jurisdiction over a non-consenting state - the admiralty court dismissed the case without prejudice - and without determining the constitutionality of ASA. *Zych v. The Seabird,* 746 F.Supp. 1334 (N.D. Ill. 1990).

The Seventh Circuit reversed and remanded, holding that the admiralty court could not merely assume the wreck to be embedded in the bottom. If, on remand, the *Seabird* was found to be embedded, then the district court would have to squarely address the constitutionality of the ASA, the enactment of which precluded the states from asserting ownership based upon the embeddedness exception to the law of finds: the ASA had, in effect, codified that doctrine. *Zych v. The Seabird,* 941 F.2d 525 (7th Cir. 1991).

On remand, Judge Rovner upheld the ASA, finding that it did not impermissibly restrict federal admiralty jurisdiction. The finder/salvor could still arrest a shipwreck *in rem;* the admiralty court's first function would be to determine abandonment. Because the statute only applied to abandoned shipwrecks, it did not affect claims such as those of the insurers of vessels like the *un*abandoned *Central America* (had it been located within state waters) or the *Lady Elgin,* which were still subject to the law of salvage.

The district court reasoned that the application of ASA to abandoned shipwrecks did not actually effect any change in the outcome of litigation between a state and a finder. Under either the embeddedness exception to the law of finds (combined with the state's immunity from suit in federal court), or pursuant to the newly-enacted legislation, the ultimate result was the same: the admiralty court would have to dismiss the action for want of jurisdiction. Thus, Judge Rovner determined, the ASA worked only at the margins of the federal courts' admiralty jurisdiction, an area within which Congress could clarify the reach of federal jurisdiction without running afoul of admiralty's central concern with promoting uniformity in essential matters of a maritime nature. *Zych v. The Seabird,* No. 89 C 6502, ___ F. Supp. ___. (Dec. 21, 1992).

The *Seabird* litigation is destined, at the very least, to return to the Seventh Circuit Court of Appeals, and perhaps, if the result is the invalidation of the ASA, the case is likely to rise to the United States Supreme Court. The ultimate irony for the archaeologically insignificant shipwreck would be that the *Seabird's* sinking may be better remembered by late twentieth century admiralty practitioners than it ever was in Abraham Lincoln's home state, a land already overburdened with sorrow when, on a cold April morning in 1868, two hundred persons met their fate in Lake Michigan's frigid embrace.

V. The Battle for the Bell

The War Between the States was fought on both land and sea, and perhaps to the surprise of many, across the world's oceans. Because of the vast superiority of the Union Navy, and its blockade of Southern ports, which strangled the commerce upon which its cotton-based economy relied, the Confederacy resorted to the clandestine construction of naval vessels in ostensibly neutral British ports. One such vessel, the Confederate States Ship, *Alabama,* was the most responsible for bringing an international flavor to the Civil War.

In 1862, a newly-constructed merchant vessel surreptitiously left Liverpool for the Azores Islands, where it rendezvoused with Alabama attorney and former U.S. Navy officer Raphael Semmes. Armed with artillery and gunpowder, the vessel was rechristened the C.S.S. *Alabama.* Its mission: to wreak havoc among the Northern merchant marine and whaling fleet. Under Semmes' masterful command, for the next two years the *Alabama* was feared the world over as her commerce raiding activities resulted in the capture or destruction of 62 Yankee vessels.

It was a record unsurpassed in naval warfare before or since. Like modern-day reflagged Kuwaiti oil tankers, U.S. merchantmen cowered under foreign flags. Fully half of the Union Navy was engaged, at various times, in trying to track down and destroy the *Alabama,* whose piratical mission took it from the North Atlantic to the Gulf of Mexico, the Caribbean Sea, the South Atlantic and Indian Oceans, the South Pacific and South China Sea, and eventually, in June, 1864, to temporary refuge in the harbor of Cherbourg, France. But before the *Alabama* could take on badly-needed fresh supplies and gunpowder, the U.S.S. *Kearsarge* appeared off the harbor and challenged the Confederate commerce raider to battle. On Sunday, June 19, with thousands of French spectators lining the shore, the famous duel between the American warships was fought in the English Channel, in international waters just beyond France's three mile territorial sea.

A diver explores the propellor of the liner *Proteus,* wrecked in North Carolina's "Graveyard of the Atlantic".

Photograph by Gary Gentile

The *Kearsarge* and the *Alabama* circled each other like prize fighters, each firing broadsides in hopes of sinking its rival. One of the *Alabama's* first shots struck and lodged in the rudder post of the *Kearsarge*, but the wet powder in the exploding shell failed to ignite. If it had, the Yankee warship would have surely been disabled and an easy target for Semmes. As the battle wore on, the heavier guns of the *Kearsarge* - itself draped in concealed chainmail that turned back the Confederate cannonballs - began to open gaping holes in the sides of the wooden *Alabama*.

What happened next is of some historical dispute. Realizing his vessel lost, Semmes raised the white flag and sent a boat to the *Kearsarge* to inquire as to terms of surrender. But for whatever reason, the cannonade began anew and the *Alabama* slipped beneath the English Channel before she was ever seized by the Union victor. Captain Semmes and several of his officers and crew were picked up by an English yacht that had been observing the battle; he was taken to England where he was feted like a hero, much to the chagrin of the U.S. Navy and Congress, who wished to try him on charges of piracy.

The controversy engendered by he *Alabama* did not end with the collapse of the Confederacy in 1865. An international legal body, the *Alabama* Claims Tribunal, found the British government liable to the United States in excess of $10 million for its role in assisting in the construction of, and later aiding and abetting the mission of the *Alabama*, whose depredations had proven so costly to U.S. maritime commerce. However, when certain foreign merchants and vessel owners - whose ships and cargoes had also been destroyed by the Confederate raider - applied to the United States for a share of the large reparations paid by England, they were rebuffed.

The reason: the fourth (and today, far more obscure) clause of the Fourteenth Amendment to the U.S. Constitution, which prohibits the United States from assuming any debt or obligation incurred in the aid of insurrection. Thus, it appeared, the United States was at that moment renouncing any claim of title to the shipwreck of the *Alabama*. Under accepted principles of international law, a nation could not - and, to this day, cannot - succeed to title to any asset of a defeated government without accepting the corresponding liabilities attributed to that property.

In 1937 a British hard hat diver from the Channel Islands was salvaging scrap metal from local shipwrecks when he recovered a brass bell inscribed "C.S.S. ALABAMA." He traded it for drinking rights at a local pub, but during the Second World War, the island, which had fallen into German hands, was bombed by the British and the pub was destroyed. After the war, the bell was dug from out of the rubble and passed through a number of British antiquities dealers. In 1979, a New Jersey dealer, Richard Steinmetz, learned of the bell's existence and traced its origin back to the Channel Islands, where several people recognized it from when the bell had rung in last call in their pub. Satisfied that the bell was genuine, he traded $12,000.00 worth of antique guns and collectibles in exchange for the Confederate artifact.

Returning to the United States, Steinmetz immediately offered to sell the bell to the U.S. Naval Academy Museum in Annapolis. The Navy had no interest in purchasing the relic, so Steinmetz kept it on display in his home for ten years. In 1990, he offered the bell to auction at a prestigious New York gallery. Agents of the Navy, seeing it advertised, went to the Attorney General, who - without so much as an offer of compensation to Steinmetz - filed an admiralty action seeking a declaration of federal title to the *Alabama* bell. The government's rationale: the Southern warship had been captured by the *Kearsarge* at the conclusion of their naval duel. Moreover, it was asserted, all Confederate property had passed to the United States by right of succession with its surrender at the end of the Civil War.

I learned of the injustice being visited upon Richard Steinmetz when I read a newspaper account of the unusual federal court hearing over the fate of the *Alabama* bell in Newark, New Jersey. The majority of the testimony concerned various accounts of a Civil War naval duel, the judge's opinion of the outcome of which would determine the ownership of the valuable Confederate relic. Although I spoke to Steinmetz' attorney directly, and mailed him several cases and law review articles to assist him defending his client's title to the *Alabama* bell, at that late hour, it was of little avail. In May, 1991 the District Court ruled that the ship's bell belonged to the United States: the *Alabama* had been "constructively captured" when the rapidly-sinking warship was cut off from any escape by the victorious *Kearsarge*; moreover, the court endorsed the government's theory as to the U.S. right of succession to all Confederate property. *United States v. Steinmetz*, 763 F. Supp. 1293 (D.M.J. 1991)

The decision sent a chill down the spine of wreck divers and Civil War collectors. If without even offering a modicum of compensation, the United States could blithely march in and confiscate one's artifacts, then many of our hard-earned collections were imperiled. As Steinmetz's attorney had no interest in appealing the ruling, I consulted with the bell's erstwhile owner and agreed to take his case on a contingent fee. Because of the complexity of the international law issues, as well as the larger public policy considerations implicated in the case, I enlisted the support of my colleague Paul Keller, whom I had assisted in the *Lady Elgin* and *Seabird* cases in Chicago.

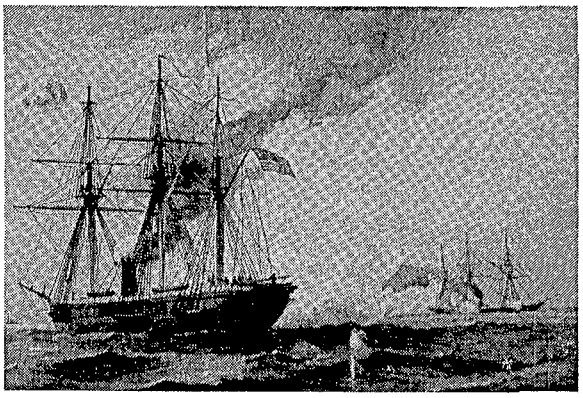
Paul agreed to immediately begin to research the fascinating, but arcane and unsettled area of the international law of succession. I would compile the appellate record, scour the country for potential *amici curiae*, and address the law of naval capture, an equally obscure area (even for an admiralty practitioner). In tandem, we worked very diligently through the summer in researching and briefing our respective issues, in the process building huge phone and FAX bills that could not be passed on to the client, who was undergoing heart surgery - the reason, it turned out, he had been forced to put the bell up for auction. Characteristic of the briefing schedules to which I am a party, the Appellant's Opening Brief, and Paul's supporting *Amicus* Brief, were due on the Tuesday, after a gorgeous Labor Day weekend.

While waiting for the United States' Answering Brief, out of the blue came a call from a distinguished-sounding southern law professor, David Bederman of Emory University in Atlanta. Although he had been overseas for the summer, upon his return he learned of the *Steinmetz* appeal, which, because of his expertise in international law, was of particular interest to him. Might I be interested in the free services of what he described as "law school nerds" to do legal research? I gladly accepted the offer, but cautioned him against forcing his students to work during the World Series, the Braves being in for the first time in over thirty years. "Law school nerds aren't interested in the World

Series," came the response.

When the "research" arrived, I was bowled over. It was, in fact, an authoritative, well written Response Brief that required very little modification before I filed it with the Third Circuit in Philadelphia. We were confident that the law was on our side and that our briefs, and those of our *amici*, were far superior to those of the government and its *amici* (the usual suspects who had supported the State of Illinois in its quest for title to the Lake Michigan shipwrecks.) Oral argument was scheduled for April, 1992.

Professor Bederman, whom I had never met in person, was so excited about the *Steinmetz* case that he flew to Philadelphia to attend the hearing. To prepare the morning before the argument, he had arranged for use of a conference room at his former classmate's Center City law firm. When I arrived at the appointed hour, a clerk was poring over the briefs on the table. He looked up and said, "Peter?" and I immediately recognized the voice. The wise old law professor that I had conjured up over the phone was younger than me!



The *U.S.S. Kearsarge* sinking the *C.S.S. Alabama* in their famous naval duel off the coast of Cherbourg, France. June 19, 1864.

Since his assistance had been invaluable, I offered to let David participate in the hearing. Paul Keller, an old hand before the Seventh Circuit in Chicago, elected to sit on the sidelines. David and I decided to spit our argument before the Court of Appeals on the succession and capture issues, respectively. The hearing went splendidly and all observers seemed to feel that we had argued far more effectively than had the U.S. attorney. For example, we had alleged that the United States had uniformly treated Confederate naval vessels as pirate ships. As a pirate's cargo was purloined booty, as opposed to the property of a sovereign government, under international law, the succession doctrine was not applicable. Hence, we argued, when its bell was recovered from a pirate ship in international waters, the lost and abandoned *Alabama* was subject to the "finders, keepers" rule of the law of finds, which gave good title to the bell to the diver who had discovered it, and from whom Steinmetz traced an unbroken chain of title.

Chief Judge Dolores Sloviter asked our adversary about a presidential proclamation that all Confederate vessels were to be considered pirates, which the U.S. attorney dismissed as rhetoric. "Do you mean to say that Abraham Lincoln was a liar?" "Yes, Your Honor," came the reply. We left the courtroom with a satisfied feeling.

Having already estimated the auction price of the only Confederate ship's bell in existence (and my percentage thereof) I was in for a rude awakening when the Third Circuit issued its decision. The opinion did concede, as we had argued, that there appeared to be no such doctrine of "constructive capture", as relied upon by the district court. Only a naval vessel that is actually seized, or captured, and brought into port becomes a prize of war; an enemy ship sunk or destroyed in battle cannot be considered a prize.

Unfortunately, however, the Court of Appeals based its ruling exclusively upon the United States' succession to Confederate property. Each of the four distinct arguments we had raised to counter the application of the right of succession to the *Alabama* bell had been turned aside. One in particular - related to the U.S. refusal to accept the liabilities incurred by the commerce raider, as evidenced in its refusal of compensation for the *Alabama's* foreign victims - we felt had been seriously misconstrued in order to justify its awarding title to the Confederate bell to the Navy.

Among the paltry crumbs that the Third Circuit tossed our way was its echoing of the district judge's recognition of the gross inequity of the situation. The appellate panel urged Steinmetz to seek redress through a sympathetic Congressional representative and a private bill for compensation. A motion for panel reconsideration, predictably, got us nowhere. *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992)

With the prospect of wholesale federal seizure of shipwreck and/or Civil War artifact collections dancing in our heads, we decided that the *Steinmetz* case was too dangerous a precedent. Borrowing a motto from an even earlier era's naval hero, John Paul Jones, we jointly pledged that "[We] had not yet begun to fight." (But we certainly were warmed up.) A Petition for Certiorari has been filed with the Supreme Court; if denied, an alternative legal strategy has been devised. At any rate, Steinmetz still has the private Congressional bill option.

Perhaps it is the fate of the Confederate commerce raider: just as the *Alabama* has engendered controversy since her construction, during her wide-ranging voyages and long after her sinking, that her bell - a now mute witness to the international carnage wrought during the Civil War - remains, to this day, in the midst of a hotly-contested battle.

VI. The Battle for Preservation

Mid-Atlantic wreck divers are intimately familiar with the so-called *China Wreck*. Forty five feet down and just outside Delaware or New Jersey waters seaward of the mouth of the Delaware Bay, the as-of-yet unidentified sailing vessel from the 1870's has yielded a non-precious, but no less treasured trove to literally thousands of scuba divers, including many making their first ocean dive. The *China Wreck* was carrying a cargo of English export ironstone china - everyday plates, cups, saucers, mugs, and bowls - when apparently, the sailing ship caught fire and sank. The wreck was known only as a reliable fishing spot until wire dragging vessels checking for underwater obstructions in the approaches to the Delaware Bay shipping channels snagged it in the early 1970's. When divers were sent down to investigate the snag, they reported a shipwreck with a pile of ironstone china as large as a house.

Within weeks of its discovery, the *China Wreck* had become one of the East Coast's most popular diving destinations. Because of the relative ease of recovery of its ironstone cargo, the relatively commonplace china soon adorned divers' homes throughout the region. On nearly every weekend since then, chartered dive boats visit the *China Wreck*, their proud complement of divers returning with souvenirs of the deep. Many a local captain has earned the greater part of his livelihood from voyages to the *China Wreck*.

Treasure fever gripped coastal Delaware in the mid-1980's with the discov-

ery and salvage of the reputedly vastly rich H.M.S. *DeBraak*, a British brig-of-war that sank in a sudden squall of Cape Henlopen in 1798. Local folklore had her piled high with looted Spanish gold and silver, but by 1985, her finders, Sub-Sal, Inc., had recovered a tremendous collection of Napoleonic era artifacts, but not much in the way of Spanish treasure. Following a dispute with his financial backers, Harvey Harrington, the former Sub-Sal president, formed a second corporation, Indian River Recovery Co. ("IRCC"), which promptly filed admiralty arrests upon six shipwrecks in and around the Delaware Bay, promising their investors that the wrecks collectively held hundreds of millions of dollars in gold and silver.

It soon became apparent that the main interest of IRCC's treasure aspirations was in one target in particular, the *China Wreck*, which local scuba divers soon discovered, had been arrested *in rem* and partially salvaged with commercial diving tools. Of even greater concern was that in its federal admiralty proceeding, IRCC was seeking to enjoin the public - which had been freely and openly diving and hand-salvaging the *China Wreck* for fifteen years - from even visiting the shipwreck in the future.

The alarmed diving and fishing community, along with the charter boat captains who rely upon their patronage, rapidly coalesced into the not-for-profit Ocean Watch, each member assigning his or her personal *China Wreck* salvage rights to the organization. With Dover attorney and veteran *China Wreck* diver Patrick Scanlon to represent them, Ocean Watch, asserting its own, pre-existing rights in the shipwreck, moved to intervene in the admiralty action. In spite of IRRC's opposition, District Judge Caleb Wright granted intervention. The decision stands today as Delaware precedent for a public interest group's standing to intervene in litigation of concern to the organization. *Indian River Recovery Co. v. The* China, 108 F.R.D. 383 (D.Del. 1985).

At the time, although I was keenly interested in the outcome of the litigation, I was a Deputy Attorney General - ethically and legally precluded from participation in any case in which I did not represent the State of Delaware. I did, however, obtain the approval of my supervisors to prepare, on my own time, an *amicus* brief on behalf of an organization to which I belonged, the Atlantic Alliance for Maritime Heritage Conservation. The Alliance, whose constituency was primarily wreck divers interested in preserving their right to dive and recover artifacts from historic shipwrecks, had been mainly concerned with the threat posed by greedy governments, not salvors. The Alliance nevertheless threw its support behind Ocean Watch. I spent many a diving weekend that summer slaving *pro bono* over an *amicus* brief (to be signed by another attorney), but the hard work paid dividends.

Following a one day hearing that established Ocean Watch's long and uninterrupted use of the *China Wreck*, as well as the *de minimis* commercial value of the English ironstone cargo IRRC sought to recover, Judge Wright issued his opinion holding that Ocean Watch's pre-existing right to dive and salvage the *China Wreck* by hand was superior to the late arrival of IRRC. IRRC was permanently enjoined from commercially salvaging the shipwreck; to this day the *China Wreck* continues to yield nineteenth century ironstone china to recreational divers willing to dig for it. *Indian River Recovery Co. v. The* China, 645 F.Supp. 141 (D.Del. 1986).

My reward came shortly after the *amicus* brief was filed, when Alliance Chairman R. Duncan Mathewson, the marine archaeologist for Treasure Salvors, Inc., invited me to dive the recently-discovered "Motherlode" of the 1622 shipwreck of the Spanish galleon *Atocha*, off the Florida Keys. While assisting in the underwater documentation and recovery of hundreds of silver ingots, tens of thousands of silver pieces of eight and associated artifacts, I experienced a mind-boggling treasure. This, then, was the stuff of dreams IRRC promised its investors - frustrated financiers, who would have to settle for a *China Wreck* bowl to cry into.

VII. The Battle Against Bureaucracy

In 1986, my work on the *China Wreck* case had brought me to the attention of Gary Gentile, a Philadelphia diver, author, and underwater photographer who, for the past several years, had to no avail been seeking permission of the National Oceanic and Atmospheric Administration ("NOAA") to dive and photograph the shipwreck of the U.S.S. *Monitor*, protected as a National Marine Sanctuary in 235 feet of water 16 miles off of Cape Hatteras, North Carolina. I knew Gary to be one of the world's most skilled and experienced decompression divers, having done more exploration of the "Diver's Mount Everest", the Italian luxury liner *Andrea Doria*, than any other person. The *Doria* lay in 250 feet of cold, turbid water 100 miles off of the tip of Long Island, New York: a far more challenging dive than the warm water *Monitor* posed. In spite of his impeccable credentials, Gary was getting nowhere with NOAA in his persistent effort to obtain a permit to photograph the shipwreck of the famous Civil War ironclad.

I had recently left the Delaware Department of Justice, and my firm, Jacobs & Crumplar, was generous enough to allow me to provide *pro bono* legal assistance to Gary in dealing with the federal agency. I expected the job, at most, to be of several months' duration. After all, the Marine Protection, Research and Sanctuaries Act, 16 U.S.C.1431 *et seq.* ("MPRSA") which authorized the creation of the Monitor National Marine Sanctuary ("MNMS") mandated that the sanctuaries be open to the widest possible public and private use consistent with the protection of the resource. Since underwater photography could in no way harm the *Monitor* - but in fact would fulfill the MPRSA's goal of enhancing public awareness of the precarious condition of the ironclad shipwreck - it seemed a simple proposition to obtain a NOAA permit.

But in the 15 years since the *Monitor* had been designated a Sanctuary, every expedition to explore the ironclad shipwreck had been led by NOAA itself and had been done at the government's expense. As the case progressed, it had become apparent to Gary and me that the agency was not acting out of their professed concern for divers' safety, but rather to protect what had become their own exclusive, taxpayer-financed research domain. If a self-funded group of scuba divers were able to successfully photo-document the *Monitor*, NOAA would have a difficult time in justifying its own multi-million dollar expeditions, the latest of which, in 1987, had proved to be a costly - and ineffective - boondoggle.

The stated goals of the MPRSA notwithstanding, Gary's permit application had, after lengthy delay, been formally denied by the agency. Pursuant to the Administrative Procedures Act, 5 U.S.C.701 *et seq.*, we filed an appeal in the United States District Court. The appeal, unfortunately, was hamstrung from the start. As NOAA had denied Gary an administrative hearing within the agency prior to his obtaining legal counsel and our recourse to a federal

court, the record on appeal contained little more than the rejected application and NOAA's rationale for permit denial: that it was unduly dangerous to scuba dive, breathing air, to depths of 235 feet.

When our motion to supplement what seemed a sanitized, pro-agency administrative record was denied, the federal appeal was doomed as we were precluded from introducing the evidence that would prove NOAA's safety rationale to be arbitrary and capricious. District Judge Louis Bechtle, although sympathetic to Gentile's desire to dive the *Monitor*, affirmed NOAA's permit denial. *Gentile v. NOAA*, No. 87-2192, __ F.Supp. __, (E.D.PA. 1988).

Gary, who, at this juncture, had been scrapping with NOAA far longer than I, was undeterred by the setback and quickly filed another application for a permit to dive and photograph the *Monitor*. The agency's tactics then became one of stonewalling: Gentile's permit applications and correspondence were met with silence. Almost a year and a half passed during which Gary had submitted eleven *Monitor* permit applications, averaging at least 50 pages each, which proposed various methods of exploring and photographing the shipwreck. Moreover, Gentile had some 51 unanswered letters of inquiry to the agency. It took the personal intercession of Gary's Congressman, Robert Borski (D-PA), with the NOAA Administrator: within one week, the agency finally issued the permit denial we had been waiting for. This time, I made sure that NOAA gave us the administrative hearing to which my client was entitled.

On October 19, 1989, almost five years since he had embarked upon his bureaucratic ordeal, Gary was finally afforded a hearing on his quest to dive the *Monitor*. Since the federal court defeat, we had contacted numerous experts in decompression diving who agreed to testify on Gary's behalf in order to rebut the agency's safety concerns. As each of them was also a scuba diving instructor, our witnesses patiently explained to Administrative Law Judge ("ALJ") Hugh Dolan the redundant safety equipment employed and the underwater experience and expertise by which they had collectively made hundreds of successful dives to the depths of the *Monitor*. The dramatic photographs and videotapes taken of deep water shipwrecks was irrefutable proof of the effectiveness of the diving procedures that Gentile had proposed in photo- docu-

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menting the disintegrating Civil War ironclad. The ALJ agreed, finding NOAA's safety concerns to have been exaggerated. Gary's desire to explore the *Monitor*, Dolan declared, was not something to be proscribed by bureaucratic fiat. He quoted the Idaho Law Review:

> A venturesome minority will always be eager to get out on their own, and no obstacles should be placed in their path: let them take risks, for Godsake, let them get lost, sunburnt, stranded, drowned, eaten by bears, buried alive under avalanches - that is the right and privilege of any free American. *In the Matter of Gary Gentile*, No. 951-193,U.S. Dept. of Commerce, Office of the Administrative Law Judge (Nov. 20, 1989).

But our true ace in the hole had come to us inadvertently when NOAA counsel prepared the administrative record for the hearing. Missing from every history of the MNMS provided us prior to the hearing was any mention of a 1979 expedition in which NOAA had actively assisted French underwater explorer Jacques Costeau in obtaining - within one month's time(!) - a permit for precisely the same decompression diving that Gentile had proposed. Costeau's goal had been to film the *Monitor* for a world-wide television special, which undoubtedly would have enhanced the prestige - and funding - of the MNMS. But the French expedition resulted in no useable film footage; the French divers were insufficiently experienced in, and improperly equipped for, North Atlantic wreck diving and hence unable to photo-document the shipwreck in the depths and currents at which the ironclad lay.

Yet in its dealings with Gentile, ALJ Dolan found, the agency had deliberately suppressed any reference to the unsuccessful Costeau expedition; the MNMS Manager had gone so far as to perjure himself in denying that it had even occurred. When I confronted him on the witness stand with NOAA's own report of the French expedition, the agency's credibility had been destroyed. In his decision, the ALJ contrasted the speed with which Costeau had been given a permit to dive the *Monitor* and the agency's inordinate delay in processing the Gentile applications, whose treatment he likened to the presidential phrase of being left twisting gently in the breeze. *In the Matter of Gary Gentile, Id.*

The ALJ having strongly advocated

permit issuance, after several more months of bureaucratic wrangling, the first permit to scuba dive to the *Monitor* was granted in time for Gary to lead the "People's Expedition" to the MNMS during the summer of 1990. The accident-free, self-financed expedition and the stunning film and video images that were captured of the rapidly deteriorating Civil War ironclad, surprisingly enough, did not end our battle with the bureaucracy for public access to the publicly-owned *Monitor*.

An identical Gentile application as was granted in 1990 was rejected the following year: now NOAA contended that the detailed photographic record of the dilapidated condition of the *Monitor* that we had compiled did not constitute scientific research, a prerequisite for MNMS permits. It would take two more administrative hearings and further Congressional intercession - this time by Congressmen Tom Carper (D-DE) and Norman Lent (R-NY) at NOAA's budget hearings before the House Merchant Marine and Fisheries Committee - before we would be granted another permit to dive and study the *Monitor*.

Since Gary was burnt out by his seven-year struggle with the agency and I was experienced in underwater archaeology and familiar with NOAA, in 1992 I became the MNMS permit applicant and my friend Jay Beasley - a former commercial diver now practicing law in Hagerstown, Maryland - the expedition attorney *de rigueur*. Working with corrosion engineers from the Gulf coast, we set the ambitious goal of using diver-held tools to measure the annual rate of corrosion of the ironclad. These data could then be used to devise a means of retarding the ongoing seawater-induced disintegration of the now-fragile shipwreck.

Because of the delay in permit issuance, we could not schedule the 1992 *Monitor* Expedition before the end of September hurricane season on the Outer Banks. Our worst expectations were met as Tropical Storm Danielle raged during most of the week-long trip. Strong currents and poor visibility on the few *Monitor* dives we were able to make precluded us from carrying out the corrosion studies we had planned. The 1992 Expedition nevertheless obtained underwater photography showing the extensive deterioration of the ironclad that had occurred in the two years since we had visited her last. Its skeg, which

see HESS, page 27

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MY OLD MAN AND THE SEA

(With apologies to Ernest Hemingway and my father)

MARK L. REARDON

With half a ring, the telephone on the nightstand jolts awake Pilot Lawrence M. Reardon. It is 2:10 a.m. A familiar voice reports that the *Oktay Kalkavan,* a Turkish-flagged bulk carrier, is arriving at Cape Henlopen at 0530, bound to Wilmington to take on a load of coal.

Anticipating the call, Reardon was sleeping lightly, a condition pilots call "channel fever". Before that moment, he did not know where, or precisely when he would be boarding his next ship. Now he knew. He knew it was his turn to guide an inbound ship into the mouth of the Delaware Bay, past Cape Henlopen, navigate past the breakwaters and shoals, and weave the narrow channel of the Delaware River. He knew his next easy breath would come only after gently docking the 788 foot vessel on the pier of Wilmington's Marine Terminal.

Three hours before the call, the pilot learned the next "turn" would be his. A "turn" for each of the 80 active members of the Pilots' Association for the Bay and River Delaware consists of piloting a ship outbound from its port of departure, and bringing another ship inbound, or vice versa, as is Reardon's task this time. The organized rotation of turns among Delaware pilots allows them to calculate roughly when their next assignments will come. The frequency of turns is dictated by the volume of ship traffic, the weather and tides, and the status of volatile stevedore labor contracts and crude oil prices. Pilots learn instinctively when to expect the next call.

With heavy ship traffic on the river since his last turn completed three days before, Reardon was calling every three hours to confirm his standing. The calls went into the pilots' dispatcher at the Pilots' Association headquarters on South 11th Street in Philadelphia. The dispatcher is responsible for assigning a pilot to ships sailing to and from the Delaware River ports, including Philadelphia, Camden, Marcus Hook, Wilmington, Delaware City, and to and from Baltimore through the C&D Canal. Assignments follow an established order of rotation. For the days between turns, a pilot will call the dispatcher twice a day, then three times a day, and as his turn draws closer, every several hours. Upon prodding from a pilot, a seasoned dispatcher will approximate when the pilot's next turn may begin by counting the ships expected to arrive and depart the Delaware Bay. Only when a pilot is designated as "one ashore" can he expect to be advised, with certainty, which ship he will be piloting, and where and when it will sail. The orderly assignment of turns is one of the principal bonds for members of the Pilots' Association.

Pilot Reardon's light travel bag is packed. He had checked the weather forecast and studied the tide tables before his half-night sleep. Flood tide begins at the Cape at 0440. Flag ripping wind. White caps. Cold and clear. A good December night for cruising the Delaware. Before boarding the *Oktay Kalkavan,* he would review again the weather conditions and forecast; he would study the list of other ships sailing the channel; he would digest weekly surveys published by the United States Coast Guard and the Army Corps of Engineers detailing the condition of navigational buoys and lights, and the gradual shifts in the depth and width of the channel.

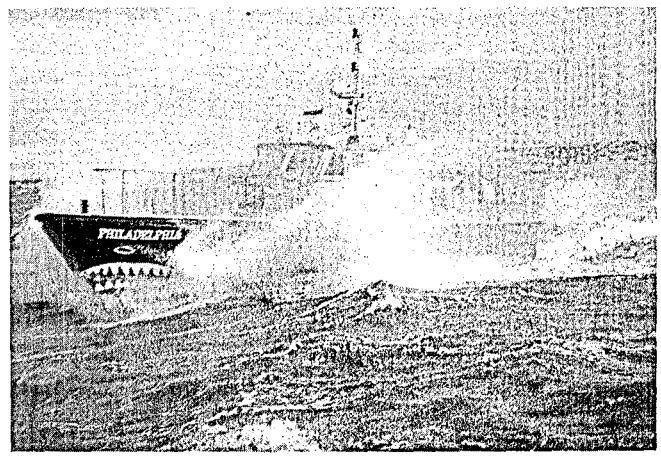
When the dispatcher called Pilot Reardon, the *Oktay Kalkavan was 46 miles from Cape Henlopen,* making 12 knots. To board the ship outside the mouth of the Bay, he leaves his home north of Wilmington at once. In the Twin Seneca III chartered for shuttling river pilots, Reardon is flown from New Castle County Airport to Eagle Crest Airfield, four miles inland from Lewes. The flight takes 28 minutes. *The Oktay Kalkavan is 31 miles from the Cape.* A driver waits for the pilot in a car next to the runway; the dispatcher had made the arrangements. The river pilot is driven to the pilot station located next to the Ferry Terminal in Lewes. There he prepares himself for the six-hour run to Wilmington. *The inbound vessel is 20 miles away.*

The pilot station is a 15 bedroom fra-

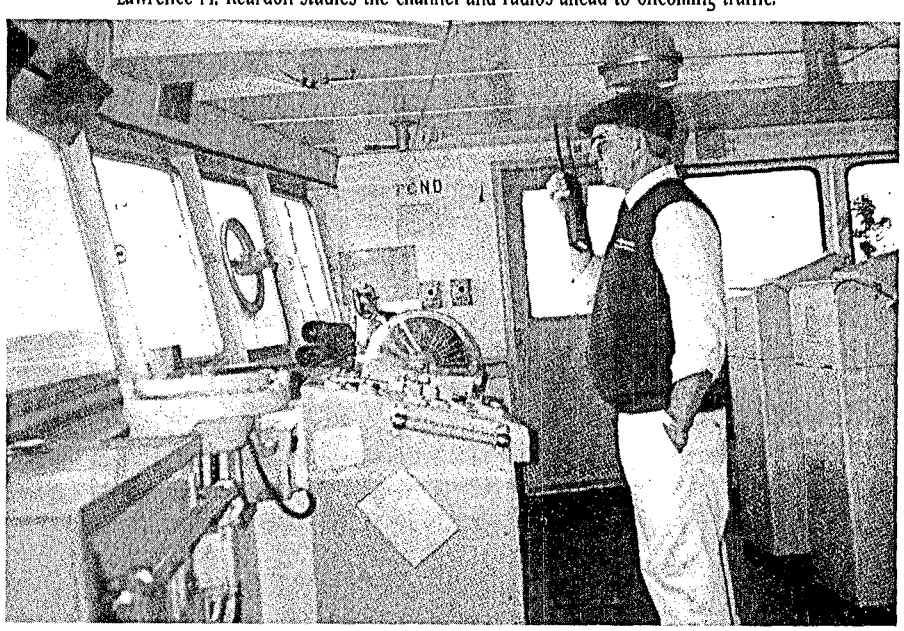
ternity house wrapped in cedar shingles and capped by a widow's walk. It has a rugged elegance: mahogany paneling and beams, brass chandeliers and sconces, rich leather furniture, nautical blue carpet, snug beds, hot showers, and a well-stocked galley. The station offers a pilot a home away from home for the layover between the legs of a turn. The modern pilot station was originally built in 1936 as a Coast Guard Station. The property was acquired by the pilots in 1976, and opened for use two years later after completion of the substantial renovations required to satisfy the pilots' practical needs and mannered taste.

Before 1978 operations in Lewes were managed from the pilot boat *Philadelphia,* a 165 foot cutter that served as the pilots' floating home and tracking station. Cruising in the mouth of the bay, the *Philadelphia* and its five predecessor pilot boats, had served virtually without interruption since the Pilots' Association was formed in 1896. For Delaware River pilots, the *Philadelphia* was home base, a sanctuary. A veteran pilot spent thousands of hours on board the pilot boat: first during the years he was honing his skill as an apprentice, then the hours spent waiting for his next ship as a working pilot.

The 52 foot *Philadelphia* is one of four pilot launches operated to shuttle pilots between the pilot station in Lewes, Delaware and ships sailing in the mouth of the Delaware Bay. Seen here the *Philadelphia* is pounding through heavy seas to deliver a pilot to an inbound tanker.



From the wheelhouse on board the Turkish bulk carrier *Oktay Kalkavan,* Delaware River Pilot Lawrence M. Reardon studies the channel and radios ahead to oncoming traffic.



The decision to retire the pilot boat did not come easily. As long as there had been river pilots on the Delaware, there had been a pilot boat. As devout observers of the history and tradition of their profession, the pilots were reluctant, at first, to move ashore. Over the past 14 years however, most every pilot has observed the superior comforts and economic efficiency of maintaining quarters on land. Senior pilots recall that on rough days on the pilot boat, it was difficult staying in bed, let alone getting any sleep.[1] Still, the beloved *Philadelphia* has a secure place in the pilots' history. Her years of service are memorialized with vestiges adorning the pilot station: the wheel, the anchor, the bells. An encased model of the Philadelphia is displayed in the pilot station library. An oil portrait is prominently displayed in the Philadelphia office.

Belying the stately colonial appearance of the pilot station is the presence of state of the art technology. Pilots for the Delaware River were recognized at the 1992 American Pilots' Association Biennial Convention for taking the lead in integrating technological advancements into local piloting. At the heart of the technology supporting the Delaware pilots is the Vessel Traffic Service ("VTS"), initially acquired when the *Philadelphia* was retired. Components of the VTS include voice and video recorders, radar for signal lengths, microwave and data compression phone links and meteorological and hydrological sensors. The system's capacities advance with improving technology.

The pilots operate the VTS together with the Philadelphia Maritime Exchange. Reliance on state of the art technology is necessary to increase efficiency and safety in navigation and for the protection of the environment. Recognized benefits of the VTS operating on the Delaware Bay and River include enhanced traffic management and early warnings to ships venturing near danger, such as congestion in the channel or approaches by ships with dangerous cargoes. Important also is the system's capability of providing assistance to vessels with radar failure, pilot incapacity, or navigational aid deficiencies. The VTS is capable of transmitting immediate warnings of inclement conditions, and coordinating port emergency responses. The VTS is also relied upon to produce statistical compilations on traffic flow, cargo tonnage, trouble spots, near misses, and problem vessels.

According to reports presented to the American Pilots' Association by Pilot Paul L. Ives, currently serving as president of the Delaware Pilots' Association, the VTS has improved efficiency in piloting on the Delaware by accurate tracking of vessel movements, coordination of tug and berthing operations, and making immediately available information

required by shipping agents and immigration officials.[2] Ives points out that Delaware pilots regularly rely on the VTS's potential for increasing safety in limited visibility conditions.

At the pilot station, Reardon studies the VTS data spitting from a laser jet printer. Tide. Wind. Visibility. Ship traffic. For a pilot readying to board, these details matter. Current data are spewing in from the Maritime Tower, the high-tech command post situated on the point of Cape Henlopen, two miles from the pilot station. Jointly staffed by personnel from the Pilots' Association and the Philadelphia Maritime Exchange, the Maritime Tower is the center of vessel-tracking operations. Communication and radar equipment are housed on the tower's observation deck, enclosed by windows overlooking the mouth of the bay. Added to the tower in the mid-1980's was the intricate Automated Radar Plotting Aid (ARPA), a system designed to prevent ships from straying off course. Monitored around the clock in six-hour shifts, ARPA will signal an alarm if a collision course is plotted.

The Oktay Kalkavan is 6 miles from the Capes.[3] The pilot walks from the station down the pier extending 150 yards into the Delaware Bay. *It is 0505. Sunrise in two hours. Clear sky. Eight miles visibility. Twenty-two knot wind. Fourteen degree wind chill.* Good conditions for piloting — no fog or ice.

At the end of the pier are four 52 foot twin diesel engine launches. The pilot launch *Delaware* is revving, its flood lights cutting a path along the pier for the pilot. Reardon hands his bag down to Mike Wyatt, one of 12 crew members who run launches for the pilots. As Reardon descends a ladder to the launch's deck, Wyatt's crew mate casts thick lines onto the pier. Reardon settles into a captain's chair for the 30 minutes it will take to ferry him to the inbound *Oktay Kalkavan.* The launch operator guns past the East End Light House on the inner breakwater. Cape Henlopen is off the starboard. The Harbor of Refuge Light House is off the port. The Bay is rough, the ocean wicked. Five foot swells. Frozen spray. Unfazed, the launch operator plows towards the oncoming vessel, detectable only on the radar screen.

Radio communications between the tower and the ship establish that the ship will slow to eight knots and the pilot will board the leeward side. As the ship bears in on the mouth of the bay, the pilot launch is steered to nestle alongside. When the launch's starboard rail glances off the ship's hull, a heavy rope ladder is heaved from the ship's deck, 42 feet above. White water rages between the launch and the ship. The rope ladder is taut. Cautious and sure footed, the pilot ascends using both hands. Always looking up. There is no room for error. Years ago Pilot Jim Maloney of Rehoboth lost a leg when it was crushed between the launch and the hull of a tanker he was boarding on the fly.

On the deck of the *Oktay Kalkavan,* the pilot is greeted by the third mate, a native born Turk who speaks English well enough. The third mate leads Reardon to the wheelhouse where he is introduced to the ship's captain. Also Turkish, the captain speaks fluent English. One of Reardon's colleagues, Pilot George G. MacIntire, assesses:

> "The most interesting part of being a pilot is...meeting seafarers of all nationalities. A pilot must be an unsung ambassador."[4]

Pilot Reardon and the ship captain confer on the ship's draft, its destination, and its handling characteristics. The pilot's conference with the captain is required protocol, and frequently serves to inform the pilot of any peculiarities of the ship.[5] The initial conference also serves to assure the captain that his ship, while in Delaware waters, is in the hands of a capable pilot.

Reardon learns the *Oktay Kalkavan* was built in 1972 and twice overhauled with state of the art engines and wheelhouse technology: radar, an echo depth sounding device, electronic steering gear, VHF radio, and a gyro compass. It is plain to Reardon this ship is loaded with the gadgets upon which pilots rely. Such is not always the case.

It is 0540, and Pilot Reardon assumes from the captain the responsibility for safely navigating to Wilmington. Though the ship captain maintains authority over the vessel and crew, for the six hours or so it will take to sail to Wilmington, the officers of the *Oktay Kalkavan* will answer attentively to a Delaware River pilot.

According to Reardon's colleague Pilot Andrew F. Knopp, ship captains are very willing to defer to the Delaware Pilots in the interest of safety for the ship, the crew, and the cargo. Contrasting their perspectives, Pilot Knopp notes "the difference between a ship captain and river pilot is that a captain worries when he sees land, and a pilot worries when he doesn't." Knopp adds, "For experienced pilots, navigating the confines of the Delaware is second nature."

The deference extended to local pilots on board visiting ships has been observed through history. Mississippi River Pilot Samuel L. Clemens, known also by his pen name, Mark Twain, wrote in *Life on the Mississippi:*

> "I loved the profession far better than any I have followed since, and took measureless pride in it. The reason is plain: a pilot, in those days was the only unfettered and entirely independent human being that lived in the earth....In truth, every man and woman and child has a Master, and worries and frets in servitude; but in the day I write of, the Mississippi pilot had none...The moment that the boat was underway in the river, she was under the sole and unquestioned control of the pilot. He could do with her exactly as he pleased, run her when and whither he chose, and tie her up to the bank whenever his judgment said that course was best. His movements were entirely free; he consulted no one, he received commands from nobody, he promptly resented even the merest suggestions. Indeed, the law of the United States forbade him to listen to commands or suggestions, rightly considering that the pilot necessarily knew better how to handle the boat than anybody could tell him."[6]

Twain wrote of the traditional view of the rank and dignity of piloting. Though modern pilots do enjoy privileges of the profession, and continue to command a high respect as top-ranking officers on board, the free-wheeling rapture of piloting has been hemmed.

Pilot Knopp, reflecting on his thirty-five years on the Delaware notes that "piloting has become more complex and there is more pressure than before." He points out that the increased size of the ships limits maneuverability in the channel, and ships are being required to sail on tight delivery schedules. Knopp adds that it is sometimes difficult to advise a captain, once underway, that poor conditions warrant anchoring. "I will not take a chance. If my professional opinion is that the fog is too dangerous, I'll anchor where I can," reports Knopp, keenly aware that, "a ship full of oil is always a potential disaster."

In terms of changes in piloting, other pilots cite expansive federal and state laws and regulations which, in recent years, must be considered when piloting on the Delaware. All pilots are routinely advised of pronouncements from the U. S. Coast Guard, the Army Corps of Engineers, the E. P. A., Immigration and Naturalization Service, Customs, the Delaware River and Bay Authority, and DNREC and its Pennsylvania and New Jersey counterparts. Particular restraints have been imposed on tankers, the predominant vessel navigating the Delaware.[7] For instance, in a recent issue of *Notice to Mariners*, published weekly by the Coast Guard, are reports of amendments to the Federal Water Pollution Control Act (33 CFR 1321 *et seq.*) as it relates to the responsibilities of the person in charge of a vessel that may discharge or spill a "quantity of oil that may be harmful".

As the *Oktay Kalkavan* reaches its harbor speed of 10 knots, Pilot Reardon gives rudder orders directly to the helmsman. Most ship officers, regardless of nationality, understand the required English. Reardon says, "steer a course to 330". The helmsman answers with "on course at 330". It is 0600 and the *Oktay Kalkavan* has cleared the Capes.

As daylight breaks, the ship's long shadow extends off the bow. The heavy seas that earlier tossed the 52 foot pilot launch are not felt high above in the ship's wheelhouse. At 45,832 gross tons, an average sized ship, the *Oktay Kalkavan* is riding smooth on the choppy bay.

River pilots know that ship handling is an art. Pilots learn to feel the ship: its mass, its power (or lack of it), its reactions to currents, turbulence, winds, pressures, and speeds, as well as rudder and engine responses to pilot orders.[8] The influences at work on a ship underway are so variable that no two of Reardon's thousands of runs on the Delaware during his 37 years as a pilot have been the same.

The *Oktay Kalkavan* sails full ahead towards the upper Bay. With binoculars Reardon surveys the channel. He accounts for oncoming ship traffic by use of the radar screen and by monitoring VHF channel 13, the working channel for navigation and bridge-to-bridge communications in the Delaware Bay. At each channel marker, the pilot slightly alters the ship's speed and course with a specific order to the quartermaster at the helm. At 0712, the Oktay Kalkavan has the Brandywine Light off the starboard. "Port 10° rudder, amid ship, steady 332°", instructs Reardon. The helmsman echoes when the ship is on course.

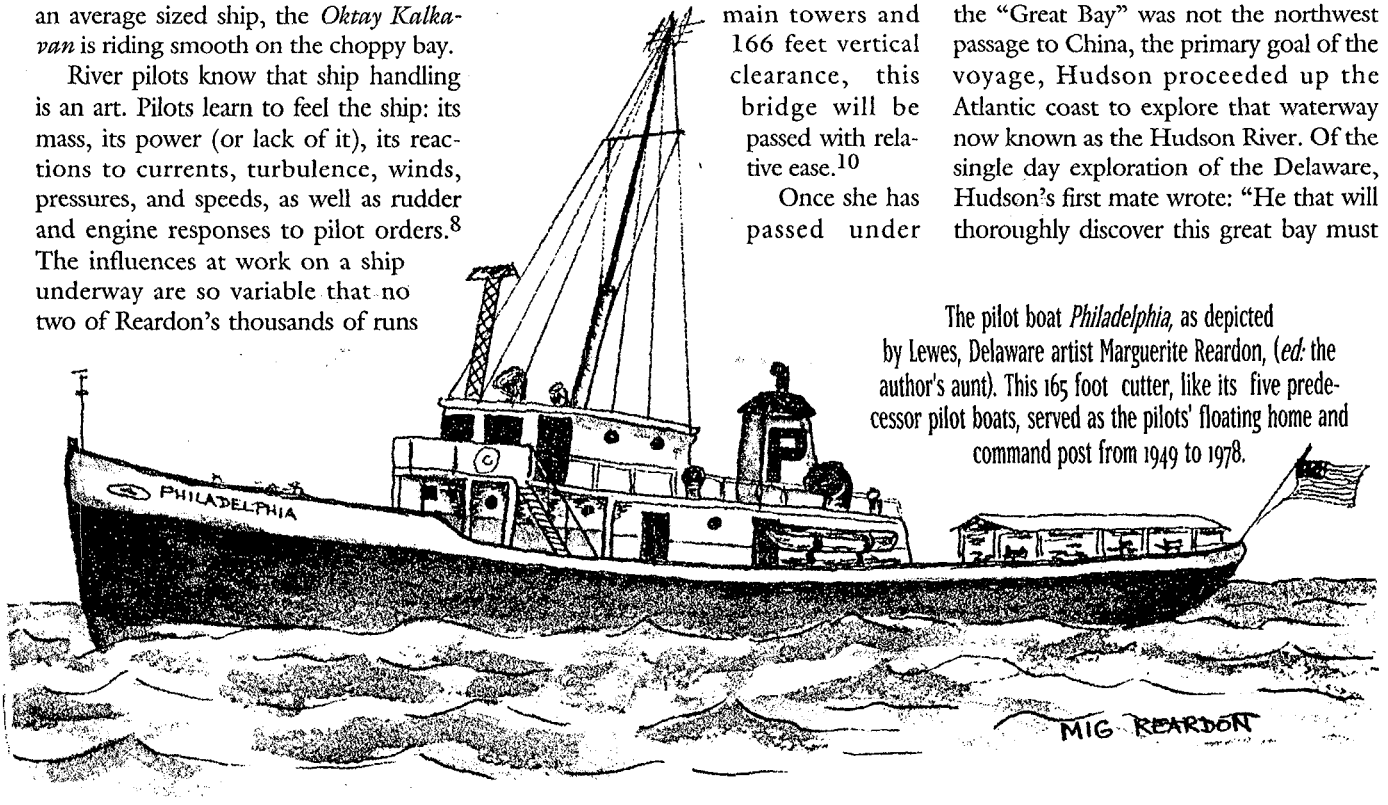
As the channel narrows further in the bay, the pilot's orders and the helmsman's acknowledgements become more frequent. Thirty-five miles from Cape Henlopen, the *Oktay Kalkavan* passes Ship John Lighthouse off her starboard side. At 0935, Bombay Hook Wildlife Refuge is off the port side. At 1030, the ship passes Buoy 8-L, the official demarcation between the Delaware Bay and the Delaware River. At 1052, the ship makes Reedy Island, which is sixteen miles from Wilmington. The pilot's steady orders continue.[9] At 1108, the ship glides past Pea Patch Island, ten miles south of the Marine Terminal. Prominent on the horizon is the Delaware Memorial Bridge. With 2,000 feet horizontal clearance between the main towers and 166 feet vertical clearance, this bridge will be passed with relative ease.[10]

Once she has passed under the Delaware Memorial Bridge, docking tugboats operating out of the Wilmington Marine Terminal hitch to either side of the *Oktay Kalkavan*. It is 1148 with two miles to Wilmington. A docking pilot gives radio instructions to the tugs. When docking, precise account is made for the current, the wind, the mass of the ship. Working in tandem, the two tugs nudge the *Oktay Kalkavan* from the channel into the narrow opening of the Christina River. Near docks tugs are the muscle and pilots are the nerve. At 1205, the ship is nestled next to the cranes on the pier at the Marine Terminal.

Reardon descends a gangplank from the ship. From an office at the Marine Terminal he telephones the dispatcher to learn that he is covering the next ship sailing from Baltimore through the C&D canal. The pilot is driven to Chesapeake City, Maryland to await the next leg of his turn. Maybe there will be time for a short nap.

A LOOK BACK

The first white men to explore the Delaware Bay turned away after one day because of difficulty in navigating the shoals. Chronicled on August 28, 1609 in the log book kept aboard Henry Hudson's Dutch ship, *Half Moon*, is clear reference to the peninsula later named Cape Henlopen, and details of the Great Bay and rivers in which "we found shoal", requiring Hudson's vessel to "stand backe again". Convinced that the "Great Bay" was not the northwest passage to China, the primary goal of the voyage, Hudson proceeded up the Atlantic coast to explore that waterway now known as the Hudson River. Of the single day exploration of the Delaware, Hudson's first mate wrote: "He that will thoroughly discover this great bay must



The pilot boat *Philadelphia*, as depicted by Lewes, Delaware artist Marguerite Reardon, (*ed:* the author's aunt). This 165 foot cutter, like its five predecessor pilot boats, served as the pilots' floating home and command post from 1949 to 1978.

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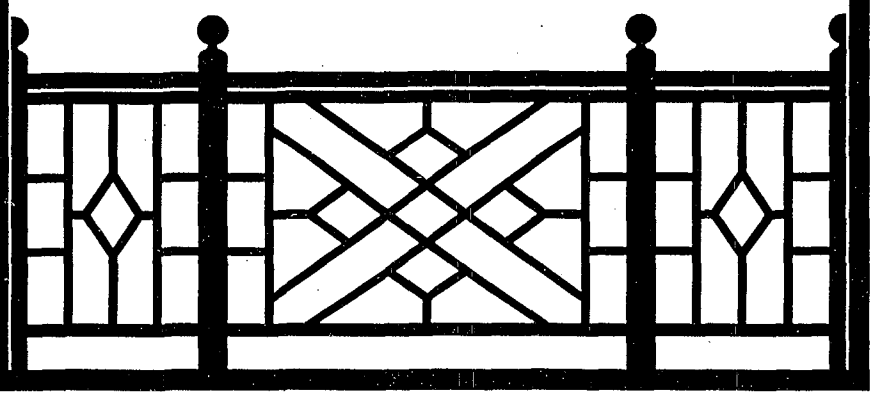

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have a small Pinnasse, that must draw but four or five foote of water".[11]

Hudson's visit in 1609 was soon followed by other Dutch arrivals. By 1614, Dutch sailors had explored and accurately charted as far up the Delaware as the Schuylkill River. A figurative map produced by Captain Cornelius Hendrickson in 1614 well delineates the Delaware Bay and the New Jersey Coast. These early explorers placed considerable reliance upon Indians who knew how to avoid the shoals inside the Delaware Bay. In *Pilots of the Bay and River Delaware* the Indian guides are referred as "the first pilots".[12]

Through the 17th and 18th centuries, as commerce and industry increased in the developing port towns along the bay and river, so too did the need for skillful piloting. Men from Lewes, Cape May and later Philadelphia became learned in navigation of the bay and river and offered their piloting services for hire.

Competition amongst the early pilots was fierce. Pilots raced their schooners and wooden skiffs to the incoming vessels since the first pilot to board, or "speak", earned the right to "take her up". Since pilotage fees then, as now, are determined by the size of the ship, the competition was intensified for larger vessels. Modern pilots recount infamous tales in which their forebears resorted to pistol fire and sabotage to get business.

In 1896, pilot John Penrose Virden convinced his fellow pilots to pool their interests for a common benefit. Virden recognized that cooperative efforts by all members of the Association would improve the piloting services previously available from competing individuals. Under Virden as the first president, the new association provided for the rotation of turns, joint ownership of pilot boats, coordination of fee collection, the taking of apprentices, and an equal division amongst pilots of revenues less common expenses. To a great extent these practices continue today. Also under Virden's leadership, it was established that the Delaware General Assembly would set pilotage fee schedules based on the size of the ship. 23 Del.C. 131.

From the beginning piloting has been a state-regulated profession. The first U.S. Congress decreed in 1789 that then existing state pilot laws were satisfactory and made federal regulation unnecessary. 1 Stat. 53, 54 (1789). Later Congresses have passed similar legislation. 46 U.S.C.A. 8501. (Delaware law

regulating river pilots is substantially premised on 23 Del.C. Ch.100).

The pilots' practice of associating for their common purposes and business is regulated by the Delaware Board of Pilot Commissioners, 23 Del.C. 101. The pilots' agreement to associate has been reviewed approvingly by the courts. In Virden v. Board of Pilot Commissioners, Ch.Ct. 67 A. 975, 977 (1896), the ad litem Chancellor Spruance held:

> "It would be difficult to exaggerate the importance of a well regulated and efficient pilotage service, and such a service is essentially important to the commerce of the Delaware, in view of the dangerous approach to the capes and the long and dangerous bay and river to be travelled before reaching the port in Philadelphia. To regulate this most useful service, and to promote its efficiency, the Pilotage Act was passed, and every aid within the limits of the law should be afforded to the Board of Pilot Commissioners in the discharge of their responsible duties....Any practice which tends to discourage the maintenance of a sufficient fleet of pilot boats must be detrimental to the service."

Consistent with the Pilot Commission's legislative authority, Commissioners determine the number of licensed pilots necessary to service the Delaware Bay and River, set standards of pilot competency, and formulate such rules and regulations as necessary to maintain efficient piloting operations. The Commissioners also create and administer the apprenticeship program. Apprentices, who agree to join the Pilots' Association at their own expense, must spend four years sailing the bay and river with licensed pilots before qualifying to take the pilots' licensing exam.

Historically, half the apprentices are chosen by the Navigation Commission of the Pennsylvania Bureau of Professional and Occupational Affairs. The other half are chosen by the Board of Pilots Commissioners for Delaware. Though there are no specific educational requirements, applicants with a degree from a merchant marine academy or a merchant marine officer's license are given the most serious consideration.[13]

While pilots openly acknowledge the special responsibilities and privileges of their profession, courts too observe a special niche for piloting. Writing for the U.S. Supreme Court, Justice Black opined:

> "Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such. In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbors entrance in a small boat to meet incoming ships, board them and direct their course from open waters to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and in some measure, the competitive attractiveness of particular ports.

* * *

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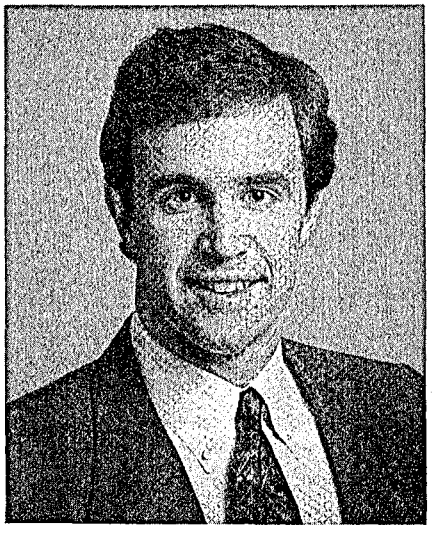
The history and practice of pilotage demonstrate that, although inextricably geared to a complex commercial economy, it is also a highly personalized calling. A pilot does not require a formalized technical education so much as a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and confirmation of the harbor or river which he serves."[14]

Today, along the river there are seven major refineries, numerous oil and chemical complexes, bulk handling facilities, and container and automobile terminals. The Delaware River ports collectively handle roughly one million barrels of oil per day.[15] It seems that William Penn's desire to colonize "where ships may ride best" has clearly materialized; the ports of the Delaware River remain among the ten busiest in the country.[16] John P. LaRue, executive director of the Philadelphia Regional Port Authority has noted that the reliable service rendered by generations of Delaware River Pilots has been essential to maintaining the vitality of the Delaware River ports.[17]

Constraints of space make it impossible to include the author's extensive footnotes, but the numbers to these footnotes appear. The full footnotes will be available upon request to the offices of this magazine.



Mark L. Reardon is a director in the Wilmington law firm, Elzufon, Austin & Drexler, P.A. He is a graduate of Boston College and Widener University School of Law, and since 1991 has served as counsel to the Delaware State House of Representatives. His father, Lawrence M. Reardon and his uncle, Francis D. Reardon are Delaware River Pilots. ◆

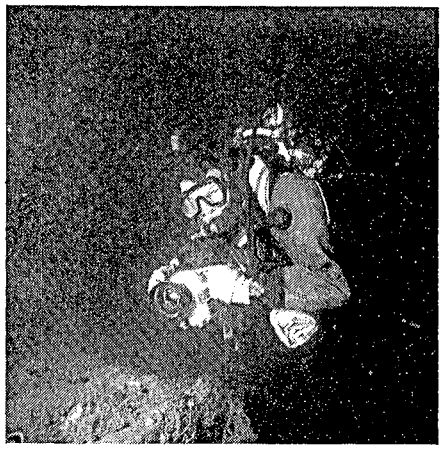
HESS

continued from page 19

stands prominently above the vessel's stern on this magazine's cover, has now collapsed and fallen over. A cache of bottles from the ship's galley that had been uncovered by Danielle's surging seas were captured on film and video; we can only hope that they will not have washed away by next summer, when our team hopes to return to the *Monitor*.

*** The modern-day discovery of the sunken legacy of the Civil War era has brought with it legal battles over title, salvage rights, and public access to shipwrecks both prominent and obscure. That these vexing legal controversies arise is perhaps inevitable, as are the technological advances that enable them to be found. Once a shipwreck is discovered, it is impossible to *un*discover it. Thus the legal issues must be addressed at the moment of discovery. And the battle the vessel fought - whether against an enemy in war or versus the elements that claimed it - reverberates across the centuries in the legal confrontations of today.

But the greatest and most decisive battle that these long-lost vessels face is one that cannot be won by any interest group, no matter how skilled their advocates. As perhaps best illustrated by the plight of one of the era's most illustrious vessels, the U.S.S. *Monitor*, as the war of words rages on the surface, beneath the relentless Atlantic, the intrepid Civil War ironclad, inexorably rusting away to oblivion, is losing her final battle.



Photograph by Peter Nawrocky

Peter Hess, who is editor of this issue, engages in a active admiralty practice. He is the chairman of the Admiralty Section of the Delaware State Bar Association. As you can see from his article, he is a brave and resourceful scuba diver and an articulate foe of bureaucratic chicanery. ◆

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GERARD J. MANGONE

Commerce by Water

"All Cases of Admiralty and Maritime Jurisdiction"

The statutes of Congress, some of which implement international conventions, and the plenitude of federal court decisions, have expanded, codified, or clarified the reach of modern admiralty law and its place in the American legal system.

What is maritime law? In its simplest terms it is the branch that applies to ships and shipping. But it is far more complicated in its creation and interpretation, because vessels at sea or sailing through coastal waters or docked at a terminal present a large variety of legal issues in their operation, administration, and maintenance. Questions about a payment for services to a ship; contracts for carrying cargo by ship; the rights of a crew aboard ship; collisions or salvage involving a ship; crimes aboard ship; and many other subjects may be subsumed under maritime law.

The United States Constitution of 1787, Article III, Section 2, extended the judicial power of the new federal government to all cases of admiralty and maritime jurisdiction. But what was the existent admiralty and maritime law in the view of the Founding Fathers? And how did its rules and practices in the 18th century suddenly enter the Constitution as one body of law for federal interpretation and procedure?

Ancient Maritime Law

The development of maritime law and the formulation of its rules stretch across many centuries, reaching as far back as the first commercial use of ships in history. Records of maritime transactions and regulations began in ancient Egyptian, Phoenician, and Greek ports where oar and sail in the Mediterranean brought exchanges of olive oil and wood, grain and minerals, fruits and cattle. From its inception maritime law involved navigation and trade between diverse communities and thus was driven to find principles and applications that would have a commonality across political boundaries.

In the fifth century before Christ the Athenian empire with an unrivaled navy dominated the commercial trade of the Mediterranean Sea. Its port of Piraeus, with three harbors, thrived with exports of olive oil, wine, silver, and handicrafts to pay for imports of cereals and other foodstuffs for the active Greek population. Athens created commercial maritime courts with jurisdiction over written contracts for its sea trade, affording a rapid adjudication of complaints between the parties regardless of their residence.

The most famous place for its commercial activity by sea, however, was the island of Rhodes, whose name has been forever attached to an early code of maritime law. Situated midway between the Greek Aegean Sea and the ports of Egypt, Cyprus, and Syria (Lebanon), Rhodes first acknowledged Persian then Athenian and Macedonian hegemony before full independence as a city state. But throughout its ancient history from the fifth to the second century before Christ, Rhodes was recognized as one of the best governed city states. The classic commentators called it "the metropolis of merchants". Maritime disputes were many and the rulings of the Rhodes magistrates became legendary. Although the island gradually declined and was incorporated into the Roman empire in the second century before Christ, it was widely remembered for its collection of maritime laws, which were probably extant at the time of Cicero but did not survive as a complete document.

With its great empire and vital sea trade Rome applied maritime law from the reigns of Augustus to that of Constantine in the fourth century after Christ. But it was not distinct from other civil law and never reduced to its own code. The Roman-Byzantine Code and Digest of Justinian, compiled between 529 and 565

A.D., collected, organized, and synthesized hundreds of years of earlier edicts and opinions, reflecting many local practices including maritime law around the Mediterranean Sea. However, only two specific references to the Rhodian laws can be found in Book XIV, Title 2 of the Digest, which is headed, "Concerning the Rhodian Law of Jettison".

Although the references are scant, the many ancient rules of Rhodes were well known and respected for centuries. Undoubtedly they infiltrated Roman law and very likely formed the bases for some of the maritime law expounded in the Code and Digest. A collection that is known as the Rhodian Sea Law, but is not, has been substantively dated between A.D. 600 and A.D. 900. The manuscripts of this Sea Law appear in many Byzantine documents, always either juxtaposed to or within other manuscripts, such as the Farmer's Law or the Soldier's Law.

Divided into parts by the legal scholar J. M. Pardessus in the first half of the 19th century, the so-called Rhodian Sea Law is a product of different periods and origins. The chapters in Part 2, for example, relate to the shares that the ship's company may take in the profits of a maritime venture, the regulations of space and water for passengers, the valuation of the ship for general average contributions, maritime loans, and so forth. Part 3 deals with such matters as theft aboard ship, the jettison of cargo, personal injuries from fights aboard a vessel and liabilities for injury, maritime loans and partnerships, and chartering of a ship by a merchant. Whatever the origins and development of this Roman Byzantine Sea Law, the great tradition of the Rhodian Sea Law remained, and for that reason the manuscript often ascribed its chapters on maritime law to the famous island of antiquity.

In the early centuries of the Christian era Rome dominated the world from Syria and Egypt to Britain, including all the Mediterranean and the Atlantic coasts of Spain-Portugal, France, and England. Maritime law was uniform. Although the empire divided in the 4th century A.D. with the new capital at Constantinople, and largely disintegrated in western Europe in the 5th century, Roman control over areas of Italy endured, particularly in eastern Sicily and in commercial centers like Naples, Amalfi, and Gaeta, until the 11th century. In these ports Roman maritime law continued to be expounded. Also in other commercial centers in Europe, either captured by Germanic tribes or asserting their own city state independence, Roman maritime law was the basis of adjudication because of its respected history and sophistication in the settlement of shipping disputes.

Medieval Maritime Law

As the political power of Rome declined in western Europe, local magistrates or consuls continued to apply Roman maritime law. Some adaptations to local conditions and contemporary developments occurred, and the collection of the judgments in the main centers of marine commerce became models or references for the application of maritime law.

In 1781 Congress approved a three judge Admiralty Court of Appeals. It was the first federal court of the United States of America.

The earliest extant code of medieval maritime law, attributed to the year 1063, can be found in the decisions of the Consuls of the Corporation of Navigators at Trani, a port on the Adriatic. Written in Italian, the code includes 32 items that the consults "propose, decide, and determine", touching such matters as contributions to the loss of cargo at sea, forbidding the jettison of slaves to lighten a ship, reasons for discharging a seaman from a ship, penalties for quitting service to a ship, and the master's right to hypothecate a ship to purchase supplies.

Second as an extant record of medieval maritime law are the Tabula Amalfitana, 21 articles in Latin and 45 articles in Italian, in a manuscript of 1274, probably based upon a code dating from 1010. Undoubtedly derived from rulings of consuls of the sea in Roman times, the code reflects the fact that Amalfi, on the west coast of Italy, was a substantial naval power, and had a lively commerce with Egypt and the Levant. Its magistrates were appointed by the Exarch of the Roman-Byzantine Empire probably up to the 10th century and thereafter by the municipality. Again the code deals with such matters as the engagement and wages of sailors, powers and duties of the master, contracts of affreightment, contributions to loss from the jettison of cargo, and so forth.

These early codes and several others of the period at Pisa, Ziani (Venice), and Ragusa all testify to the continuity and uniformity of maritime law in the Mediterranean region, inherited from Roman practices, albeit modified by local conditions. Indeed, maritime law applied by the city states was far more uniform, in that sense "international" in character, than the municipal laws derived from their constitutions, statutes, and customs.

Sometime around 1200 the guild in Pisa that monopolized maritime affairs elected some of its members as consuls of the sea, with power to settle disputes over freight, loans, wages, and other maritime matters involving merchants, shipbuilders, carpenters, and others associated with the guild. This is the earliest known maritime court of the medieval period with its own special authority. It was not unlike other courts of the Pisan Commercial guilds, but distinctive in its application to maritime affairs.

All major ports, of course, had to apply some maritime law to their activities, but a few were outstanding for their systematic compilations of the rules and judgments, their continuity, and their influence upon other communities that adopted their codes. Three of the most important collections of maritime rulings in the Middle Ages were (a) the Sea Laws of Wisby, applied by the merchant guilds associated in the Hanse in the Baltic towns of Luebeck, Hamburg, Schleswig, Riga, Wisby, and others from the 13th century onward; (b) the Consulate of the Sea of Barcelona, dating from the 12th century, whose rules were widely adopted not only in Aragon territories but also in other Mediterranean ports of France and Italy; and (c) the Rolls of Oléron.

The Rolls (Rules) of Oléron

In the 5th and 6th centuries, Jutes, Angles, and Saxons had crossed the North Sea, driven back the Celts, which included Brythons, and settled in England. But they were not thereafter a sea-faring people. References to wrecks can be found in 11th century laws under the Saxon King Edward the Confessor. In 1070, a re-editing of the laws of Edward by the Norman King William the Conqueror contains a chapter on the jettison of cargo.

Undoubtedly the port towns of England before the 12th century had their own commercial-maritime courts much

like the port towns on the Continent and applied their own local customs. But a mixture of English-Acquitaine dominions in 1152 facilitated the use of the Rolls of Oléron by English magistrates.

The island of Oléron, in the Bay of Biscay, about two miles off the Atlantic coast of France south of LaRochelle and north of the Gironde estuary, had been a commune under the Duke of Guyenne and obtained the freedom of a municipality to organize its own government and create local ordinances. It was well situated for the active coastal trade, touching Iberia, France, the Lowlands, and England. The earliest extant code of 24 original articles of the Rolls dates from 1266, but probably the rules were being applied about 150 years earlier.

Eleanor of Acquitaine (Guyenne) had inherited from her father, the Duke, his vast lands (greater than those of the King of France) including the Ile d'Oléron. This extraordinary woman married the King of France, bore him two sons, had her marriage annulled, retrieved her lands, then married the energetic 18-year old Henry Plantagenet, eight years her junior and heir to the English crown. As Henry II he became overlord of Acquitaine.

Eleanor was also the mother of Richard I (Coeur de Lion) to whom was attributed the correction, publication, and declaration of *La Ley Olyroun*. This is unlikely, but whether the attribution is correct, by the 13th century English maritime courts in London, Bristol, Rochester, and elsewhere were applying the law expounded in the Rolls of Oléron.

The Admiralty Court

The English word "admiral", may be a corruption of the Arabic "amir al-bahr" or commander of the sea. William de Leiburne was styled "admiral" in 1286, supplanting the use of the Latin "custos maris" or capitaneus maris". Under the Plantagenets there had been more than one English admiral, each commanding a fleet, but in 1360 Sir John de Beauchamp was appointed the King's Admiral of all fleets to hear pleas and to render justice in all matters pertaining to his office "according to the Maritime law." The King's Admiral and his court ranked first, but two other patents were also given to High Admirals in 1360 and 1361 with the same charge as well as providing the deputies who very likely were intended to hear pleas. The first known actual patent for an Admiralty judge was dated in 1482.

In its beginnings the English Admiralty was essentially a department of the Crown under the Admiral, who was charged not only with the oversight of the Royal Navy but with the collection of customs, the conservation of oyster beds, and the upkeep of rivers and harbors. The early Admiralty courts dealt almost entirely with piracy, spoil, reprisals, wrecks washed up to the shore, and shipboard discipline. But by the "Rules and Orders for the Admiralty", documents dating from 1360 to 1390, later incorporated into the Black Book of Admiralty, the admirals were already claiming jurisdiction over charter parties, contracts, or obligations made abroad or on the high seas.

With no navy, the Continental Congress issued letters of marque and reprisal to private vessels, thus empowering them to capture British ships and to claim them as prize.

Commercial maritime law of this period in England, which involved matters of contract, cargo shipments and loss, rights and duties of masters and seamen, loans, liens, salvage, and so forth, was applied by special commercial courts that had been established by treaty for foreigners, who handled the larger part of English trade, or by the local English town courts at the seaports.

The medieval itinerant deputies of the admirals holding court tended to expand their jurisdiction. As early as 1389 a Statute of Richard II warned the admirals and their deputies not to meddle with anything done within the realm, "but only of a thing done upon the sea". Two years later another statute of Richard II fixed the jurisdiction of the Admiralty courts, denying them any power over contracts, pleas, and other things originating within the counties by land or by water, including wrecks of the sea. Admiralty courts were granted cognizance over murders and mayhem aboard great ships in the mainstream of the great rivers, "only beneath the bridges of the same rivers nearest to the sea, and in none other places of the same rivers."

Conflicts between the deputies of the admirals, who were sent into towns for piracy and prize matters, and the local courts continued in the 14th century. The local courts of the Cinque Ports (Dover, Hastings, Romney, Hythe, and Sandwich — to which Rye and Michelsea were added) as well as courts in London, Bristol, Ipswich, Yarmouth, Colchester, Harwich, Chester, Dartmouth or Newcastle-on-Tyne all guarded their municipal charters of self-government jealously and tended to protect their own citizens, who were themselves skirting the law of prize, piracy, and spoil. On the other hand, the King had an interest in the judgments of his own appointed Admiral and revenues for the Crown, but he did not want to trespass too much on the charters of the towns or on the courts of common law, especially in criminal cases. Even in those cases where the original jurisdiction of the admiralty court was recognized, appeals were often taken to the Court of Chancery or the King's Council.

The Black Book of Admiralty

The English Exchequer of the Middle Ages copied official documents into books with black or red covers. So did the Admiral. Probably during the first reign* of Henry VI (1422-1461), an official collected the early and contemporary documents relating to the admiralty into a single edition, which was edited as *The Black Book of Admiralty* by Sir Travers Twiss in 1871.

The first two of seven relevant documents in this book were probably drafted about 1340. They deal with regulations of the Admiral and the fleet in such matters as duties, appointments, pay, sailing orders, collisions and so forth. The third document, dated between 1360 and 1369, which is entitled, "Rules or Orders About Matters Belonging to the Admiralty", purports to show a wide number of actions that would come under Admiralty jurisdiction.

The fourth document is a copy of the Rolls of Oléron, which as noted earlier, had become part of the maritime laws of England. To the original 24 articles of the Rolls, eighteen more articles had been added, some of English origin, some from other sources. The fifth document pertains to tariffs on wages, the

**Yes, the unfortunate Henry reigned more than once, but that is another story, bound up in the War of the Roses. Ed.*

law of prize, and statements of jurisdiction of the Admiral.

The sixth document is a treatise on practice and procedure, which follows the general principles of the civil law. The seventh reasserts those matters in which an Admiralty inquiry and action is warranted, matters similar to those in the third and fifth documents. Of note, however, is the omission of any reference in this document, dated in the first half of the 15th century, to contracts, charter parties, or mercantile affairs. The common law procedures of charges, inquest, and trial by jury seem to have been used in all criminal cases.

Despite this compilation of documents, which at first reading would indicate a broad jurisdiction and vigorous activity of the admiralty courts, the English Court of Admiralty reached its lowest point of authority about 1475. Various claims to jurisdiction found in the Black Book of Admiralty are open to questions about their veracity or effectiveness. In any case, complaints against admiralty jurisdiction were rampant in the 14th and 15th centuries, partly owing to the inefficiency and incompetence of the admiralty courts themselves. Moreover, not only did the local courts insist upon their privileges in maritime matters, gaining support from the Commons, but the Chancellor intervened or took original jurisdiction in many maritime cases, especially the ever-present charges of piracy.

English Admiralty: Tudors, Stuarts, and Commonwealth

While never denying the common law and the rights of Parliament, the Tudors, beginning with Henry VII in 1485, cleverly bent, twisted, or invented forms of government to achieve their ends. Their main instrument was the Royal Council, absolutely subject to the will of the sovereign, comprising some 12 to 16 men largely drawn from the grateful middle classes rather than the old aristocracy. A smaller group in the Council was "privy" to the Crown. The Council took an interest in everything in the realm, with inquiries, demands, appointments, revocations, and enforcement. Its members also sat on the several special prerogative courts created or augmented by the Crown, such as the Court of Star Chamber, Chancery, and Ecclesiastic as well as the Court of Admiralty.

Under Henry VIII and Elizabeth I, England built a staunch navy and merchant marine, encouraged overseas exploration for the wealth of colonies, and came into conflict with the fleets of Spain and the Netherlands. The increase in cases of piracy, prizes, reprisals, and merchant claims made admiralty courts a suitable instrument for the expedient royal disposition of maritime cases. In 1542 records of the court began to be kept and jurisdiction was extended to merchant shipping cases. With less cumbersome procedures than in common law cases and quick recourse to a well-known body of maritime rulings, the Admiralty Court specifically enlarged its jurisdiction in 1541 to include contracts made abroad, charter parties, and such matters as delay or non-delivery of cargo, negotiable bills of lading, insurance and general average claims, negligence in navigation, and failure to provide a seaworthy ship.

At the beginning of the 17th century, however, England endured a political struggle between the Crown and Parliament. The end of the popular Tudor dynasty, which wittingly or not had fostered Parliamentary growth and independence, was followed by the Stuarts, James I and Charles I. They unfortunately lacked the skills of combining royal rule and its prerogatives with an acknowledgment of Parliamentary powers, and they never gained the respect or love the people held for the Tudors. The new or enlarged courts that had been created by the Tudors and the Privy Council to enhance the royal power threatened the common law courts, their entrenched lawyers and judges, and the prerogatives of Parliament, whose role was most justified by the common law itself. In the larger political context, the issue was not destruction of either the Crown or Parliament but supremacy. With regard to the judiciary, it meant supremacy of the common law courts over the royal or civil courts.

The efforts of Sir Edward Coke, coupled with resentment of the autocratic Stuarts, greatly reduced the jurisdiction of the Admiralty Court. Nevertheless after 1632 the court still retained cognizance over contracts made and torts done on the sea or abroad; maritime liens for building, repairing, or supplying a vessel; and suits involving freight, wages, and charter parties for overseas voyages.

The independence of the Court of Admiralty was, however, doomed. Under the Commonwealth (1649-1660), the office of Lord High Admiral was abolished. When the Stuart dynasty was restored, the jurisdiction of the Court of Admiralty was narrowly restricted to piracies, offenses of masters and mariners, prizes, and reprisals on the high seas. Only contracts actually made and to be executed on the high seas were left to admiralty jurisdiction. All other matters, even charter parties and contracts when made on the land or even on the sea, when not in their own nature maritime, would be judged by courts of the common law.

Maritime Law in the United States

Englishmen colonized the eastern seaboard of America from the end of the Tudor dynasty, through the rule of the Stuarts, and into the rule of the Hanovers. The record of admiralty law in the English colonies strung along the Atlantic coast from Massachusetts to Georgia is hardly exact. Until 1679 the colonies, with an active sea commerce through Boston, Newport, New York, Baltimore, Charleston, and other ports had dealt with maritime cases in their local courts.

The body of maritime law, however, was undoubtedly well known to lawyers and judges. For example, in 1668 Massachusetts enacted a maritime code that had been largely, derived from (Wisby) Laws of the Hansa Towns, and in 1674 its Court of Assistants or Admiralty was given the power to hear and determine all cases of admiralty, without a jury unless it deemed otherwise.

England regarded its colonies under the mercantilist system as a source of wealth for the mother country, to be controlled and exploited in accordance with English domestic and foreign policy. English acts or orders in the 17th century to assure the payment of customs duties by American colonial traders to the Crown were constantly breached. Moreover, colonial governors, customs officers, and the common law courts overlooked or excused obvious trade violations, to the great chagrin of royal officers like Edward Randolph, who was the chief agent of the English government in all matters of trade.

The English Act of Traide, 1696

Following Randolph's detailed complaints against American colonial abuse of revenue acts and covert shipments to Scotland, the Act of Trade was passed by Parliament in 1696. The Act primarily sought to bring all the governors of the colonies, whether royal, proprietary, or corporate, under the Crown's control by requiring all appointments of governors to be approved by the King and making each of them swear to uphold the royal revenue regulations.

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Despite vigorous opposition from the colonies, the King was advised by the Attorney General of England that the royal prerogative enabled him to create vice-admiralty courts in the American colonies. On 29 April 1697 the Commission that executed the Office of the Lord High Admiral of England notified the governors of New York, Connecticut, and East Jersey that they had appointed a judge for the Vice-Admiralty of those colonies. However, political fortunes and influence in London fluctuated, leading to several changes of governors and new judicial appointments. Essentially, however, in the succeeding years up to the 1760s the admiralty districts in British America were occasionally reshaped, but judges were appointed for almost every colony.

The colonies resented the admiralty courts and constantly tried to interfere with or prohibit their jurisdiction. Rhode Island, for example, in the opening years of the 18th century attempted to set up its own admiralty court. Although the royal colonies also evaded the trade laws, being as prone to smuggling and illicit exports as their neighbors, the chartered and proprietary colonies were especially obstinate in resisting the jurisdiction of the admiralty courts, which was seen as a further encroachment on their government powers, often threatened by bills before the House of Commons to revoke their colonial charters entirely.

In 1702 the attorney general of England, pressed into an opinion on the powers of the vice-admiralty courts in America, fell back upon the 1696 Act that presumably gave the admiralty courts jurisdiction over all penalties and forfeitures for unlawful trading where the king or his customs were defrauded; jurisdiction over trading in prohibited imports and exports of the plantations; and jurisdiction over all other violations of the acts of trade. Thus the vice-admiralty courts in America had a far wider range of judicial exercise than in England, where like violations were being tried before the Exchequer.

The American admiralty courts had clear jurisdiction over contracts made at sea and torts occurring on the high seas, over seamen's wages, salvage, general average, and prizes taken on the high seas. They also maintained rights of admiralty, such as the right to drift whales. However the vice-admiralty courts, exemplary of the royal prerogative, were reviled by the colonists, who were simmering in a rebellious mood. Writs of prohibition by the common law courts, elected by the colonial legislatures, often trimmed the jurisdiction of the royal admiralty courts over cases of trade violations and even denied their judgments over prizes seized in ports.

The American Revolution, 1776

In 1768 the Crown established new vice-admiralty courts in Halifax, Boston, Philadelphia, and Charleston, with both original and appellate jurisdiction. But events quickly overtook their exercise of jurisdiction. In 1775 British troops and American farmer-militia fought at Lexington and Concord, catalyzing the revolution of the colonies against their sovereign. By 1775 several of the colonies had established their own provincial congresses in defiance of the governors, who had prorogued the regular assemblies. They entered into consultation with each other through committees of correspondence and in the first Continental Congress. As rebellion widened, a second Continental Congress convened in Philadelphia on 10 May 1775. Five days later the Congress gave George Washington command of all American forces.

The English word "admiral", may be a corruption of the Arabic "amir al-bahr" or commander of the sea.

In October 1775 Washington recommended to the Continental Congress that it establish admiralty courts to judge the capture of British ships. Massachusetts established its own maritime court in November 1775. Virginia declared itself independent in January 1776 and its assembly appointed a two-member maritime court. From May to October in 1776, seven more of the rebellious colonies appointed their own maritime courts, and by 1778 all 13 had established such courts.

Virginia epitomized the historical development of maritime law in October 1776 when it established a new three-judge admiralty court to be governed by the decisions of the Continental Congress, Acts of the Annual Assembly, English statutes enacted before the reign of James I, and the laws of Oléron and Rhodes as well as (Roman) Imperial laws. Clearly American jurists were very familiar with both "admiralty" law, as practiced under English rule, and the broader "maritime" law inherited from the ancient and medieval codes.

The Articles of Confederation, 1777

On 4 July 1776 in Philadelphia the delegates of the colonies adopted their Declaration of Independence from Great Britain. Recognizing the need for coordination, through yielding as little power as possible from the new states to a central government, the Continental Congress debated Articles of Confederation from June 1776 to November 1777, which, after approval by the states, became the first Constitution of the United States of America on 1 March 1781.

With no navy of its own, the Continental Congress issued letters of marque and reprisal to private vessels, thus empowering them to capture British ships and to claim them as prize before appropriate courts. Under the Articles of Confederation, however, Congress had no power to create courts in the 13 states, but it could "establish rules" for deciding cases of capture and prize on land or sea. It had the power to appoint courts for the trial of piracy or felonies committed on the high seas and to create courts for hearing appeals in all cases of captures. On 5 April 1781 Congress approved a three judge Admiralty Court of Appeals, which was required to follow the usages of nations in maritime law and to proceed without a jury. It was the first federal court of the United States of America.

Virginia and Maryland had started to capture British ships even before the Declaration of Independence, and thereafter hundreds of vessels were overwhelmed and seized by the states along the Atlantic coast during the Revolution. Appeals from prize cases were abundant, and the federal Admiralty Court of Appeals functioned until May 1787.

The Constitution of 1787

The need for a stronger federal union of the 13 states, requiring greater authority for the legislature, a decisive executive power, and a national judiciary was soon apparent. On 21 February 1787 Congress called for a convention of delegates from the states to meet in Philadelphia "on the second Monday of May next." A quorum of seven states were finally present on 15 May 1787 to begin their work, with two more states

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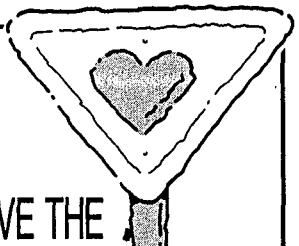

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joining the convention on May 28th, at first seemingly to amend the Articles of Confederation but soon obviously to institute a new form of government.

On May 29 Charles Pinckney of South Carolina submitted "a draught of a federal government to be agreed upon by the free and independent States of America", which was then sent to the Committee of the Whole House, but nothing more is recorded about the plan and no true record of it exists. In 1819 Pinckney sent a copy of his plan, according to his memory, to John Quincy Adams, indicating that he had proposed that the legislature create courts of law, equity, and admiralty, and that the judicial power should extend to all cases of "Admiralty and maritime jurisdiction." This phrase, with the notion of adding "maritime" to "admiralty", signifying wider powers than the traditional rights of the Admiral, endured through the substantive and editorial changes that were made to the document that finally emerged as the draft Constitution.

The Judicial Power: Admiralty and Maritime Cases

Virginia had proposed a national judiciary to consist of "one or more supreme tribunals and of inferior tribunals to be chosen by the national legislature". When on June 5th John Rutledge of South Carolina proposed the elimination of federal interior tribunals, leaving state courts to decide all matters with appeals to the supreme federal court, James Wilson of Pennsylvania, seconding the objections of James Madison of Virginia to the inefficacy of such a system, argued that the admiralty jurisdiction ought to be given wholly to the national government, especially since controversies with foreigners were most likely in that scene. In the Committee of the Whole House on June 13th, the Virginia resolutions on the federal judiciary were amended to give it jurisdiction over cases involving national revenues, impeachment of national officers, and "any questions which involve the national peace and harmony."

The Patterson or New Jersey resolutions, strongly attached to individual state sovereignty, proposed that the federal judiciary be composed only of a Supreme Tribunal appointed by a multiple Executive. Seven states voted against this article. Although the resolution to limit the federal judiciary to a supreme tribunal had been rejected, the New Jersey plan called for an expansion of jurisdiction of the supreme tribunal over impeachments, appeals in cases touching

ambassadors, all cases in which foreigners might be interested, the construction of treaties, and questions involving regulations of trade or the collection of the federal revenues, all of which ultimately influenced the judicial power eventually prescribed in the Constitution.

As the Convention proceeded toward strengthening the powers of the national government, the jurisdiction of the federal courts was widened. From the available record of the Committee of Detail between June 19th and July 23rd, gleaned from the papers of James Wilson, it appears, first, that "cases arising under the laws passed by the general legislature" were assigned to the federal judiciary. This was a very large increase of jurisdiction, as more and more powers had been delegated to the national legislature. Then, between July 24 and July 26, the impeachment of federal officers, cases concerning the collection of national revenues, disputes between citizens of different states or citizens of other countries, and "Cases of Admiralty Jurisdiction" seem to have been added to the federal judicial power.

On August 6th the Committee of Detail placed its report before the Committee of the Whole House. In Article XIV, according to Wilson's papers or Article XI, according to Madison's record, "The Jurisdiction of the Supreme Court ..." was extended to all cases arising under the laws passed by the national legislature, cases involving ambassadors, other public ministers and consuls, cases between the citizens of different states, between a state and a citizen of another state, between states, between a citizen of a foreign state and a state, the trial and impeachment of national officers, and "all Cases of Admiralty and maritime jurisdiction." On August 27th, when the judiciary article was taken up by the Committee of the Whole House, Madison and Governeur Morris moved to strike out "The Jurisdiction of the Supreme Court: and insert "the judicial power", which passed without objection. Although other questions arose about the powers of the federal judiciary, no discussion of "all Cases of Admiralty and maritime jurisdiction" occurred.

Thus, the founders of the 1787 Constitution accepted a large body of law that owed its origins to ancient and medieval practice, largely but not entirely incorporated into English administration and adjudication by the Admiralty. They entrusted that body of law to the new

see MANGONE, page 43

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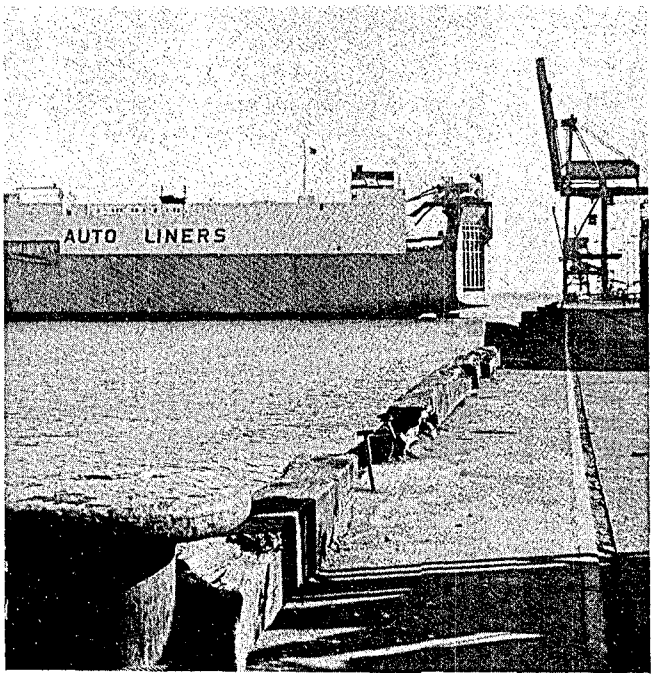
JOHN B. O'DONNELL

The Port of Wilmington: A Major Economic Force Evolving

A Strong Joint Effort By Labor, Government, and the Private Sector are Creating Jobs, Revenues, and a Bracing New Atmosphere of Growth on the Wilmington Waterfront

Photograph: Brochure Design, Inc.



A Norwegian auto carrier prepares to dock preliminary to loading U. S. made cars for export to the Middle East.

The Port of Wilmington, which is owned and operated by the city, goes back to 1917 when the General Assembly created the Board of Harbor Commissioners for the purpose of improving the waterfront and increasing Wilmington shipping facilities. Following construction, begun in 1921 and completed in 1923, the Port began with a modest 17,000 tons of cargo handled that year. In this 70th anniversary year of the Port of Wilmington it has become a major gateway for import and export of merchandise bound to and from the Eastern seaboard, the Northeast, and the Midwest. Historically Wilmington was an "outport" of Philadelphia, that is to say a smaller satellite port in proximity to a much larger one. Wilmington's evolution from an outport to an independent shipping and receiving point is a striking success story. In 1985 the Port handled 2,800,000 tons of waterborne cargo - a far cry from the modest beginnings in 1923 - but in the fiscal year ended June 30, 1992 this impressive figure had nearly doubled to 4,800,000 tons!

Why Wilmington?

The Port of Wilmington has enjoyed unusual labor stability. The Wilmington operation has been blessed with exceptional productivity by the longshoremen who are members of the International Longshoremen's Association - ILA hired by two local stevedoring companies, Wilmington Stevedores, Incorporated and Christina Stevedoring Services Company. Their fine contribution has been matched by terminal workers employed by the City of Wilmington. This has led to significant benefits in the form of savings to those who use the Port, including steamship lines, shippers, and other commercial entities. Enlightened and productive labor-management relations have given the Port a distinct competitive edge. It is interesting to note that, despite the extensive growth in the volume of business handled by the Port of Wilmington during the last six years, Philadelphia has seen a cargo decrease. During the same period the number of ships calling at the Port of Wilmington has grown from about 200 to 500 ships a year.

Credit for this growth must also be given to a continuing and aggressive marketing effort - indeed a worldwide effort, with particular success encountered in dealings with Latin America (e.g. Brazil, Chile, and Argentina), Central America, and New Zealand.

The Port has also been extremely fortunate in effective leadership and assistance by our Congressional Delegation. Senator Bill Roth succeeded in reversing a policy of attrition that would have eventually closed the Wilmington office

of the United States Customs. Such a closure would have had an extremely disadvantageous effect upon those who use the Port's facilities. Working closely with U.S. Customs Commissioner Carol Boyd Hallet, the Senator led the way to revitalizing and upgrading the Wilmington Customs Office. Former representative Tom Carper assisted materially in this important effort.

Senator Joe Biden has also been active in assisting the Port. For nearly half a century 300,000 tons of acid grade fluorspar have been stockpiled at the Port of Wilmington, covering five acres of much needed land. Thanks in large part to Senator Biden's efforts the Defense Department has at last decreed this material no longer a strategic requirement. It is expected that it will be disposed of and removed in the near term.

Imports and Exports

The Port's largest cargo category is perishables, for the Port is what is known as "a niche port", well qualified to handle perishable cargo (e.g. fresh fruit and frozen products such as orange juice concentrate from Brazil). In addition New Zealand, a major trading partner, ships in frozen beef and fresh fruits, including apples, kiwi fruit, and pears.

It will come as a surprise to many readers to learn that Wilmington is now the largest banana port in the world, handling over a million tons of fruit a year imported by Dole and Chiquita.

The Port conducts a major business in Chilean "winter fruit". In 1991 Wilmington accounted for five percent of the fifty one million cases of Chilean fruit shipped to North America. A new berth on the Christina River and a recently completed $7,000,000 warehouse will greatly enhance the fruit handling operation. It is expected that during 1993 these improvements will accommodate cargo shipped by a new Chilean customer, United Trading Company, one of Chile's largest fruit exporters and a former client of the Port of Philadelphia.

On the exporting side Wilmington has become the largest port for the shipment of American-made cars. During fiscal 1992 (the year ended June 30, 1992) the Port shipped more than 112,000 automobiles, while importing 46,000 cars. The vehicles shipped tended to be large expensive automobiles such as Chevrolet Caprices and Lincolns with an aggregate commercial value approaching $3,000,000,000. This year the Port is adding Toyota as a new customer for the shipment of cars built in Toyota's plant in Kentucky. These vehicles are destined for sale in Middle East nations such as Kuwait and Saudi Arabia.

The Port does a substantial business in shipping heavy equipment such as road grading machinery, dump trucks, cement mixers, buses, tractors, and construction equipment.

The Port not only handles import of deciduous fruit from Latin America; it is a significant handler of fruit *exported* to Central America, such as apples, pears, grapes, and other fruit not domestically available in the tropics. And the trade in bananas is not a one way street: the Port of Wilmington ships between eighty to one hundred thousand tons a year of kraft paper bound for Central America for the manufacture of banana boxes.

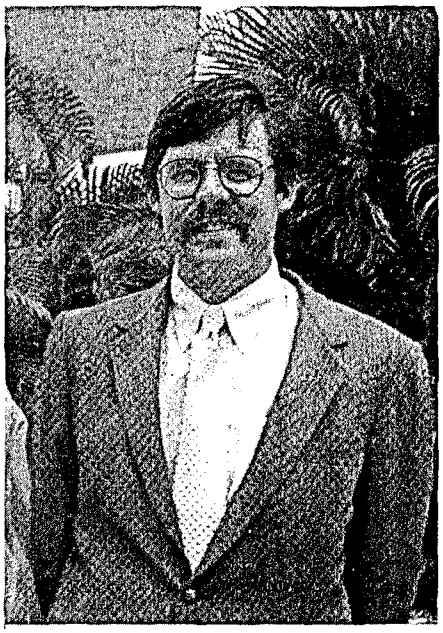
The Port and the Delaware Economy

In July 1989 Professor Mangone, whose introduction to admiralty law appears elsewhere in this issue, discussed the impact on the Delaware economy of the activities carried out at the Port of Wilmington. He estimated that the Port accounted for $249,000,000 in sales revenues, the creation of 1,827 jobs, and $61,300,000 in payrolls. Furthermore the city and the state gained $3,485,000 in tax revenues. These, of course, are 1989 figures and the volume of activity at the Port of Wilmington has increased substantially since that time, with a corresponding increase in the Port's economic significance to the state and local economies in employment and governmental revenues. Indeed it can be said that the Port is one of the major job creating engines in the City of Wilmington.

Present Needs for Future Growth

If this outstanding progress is to continue the Port will need more space for expansion in order to grow and to compete. Access by road must be enhanced to handle an ever increasing volume of truck traffic to and from the Port. While 1993 will see the addition of a new dry cargo warehouse with 150,000 square feet of storage space, this is probably only a beginning of what is required for Wilmington's role in an ever more active world economy. A new state of the art refrigerated warehouse and the lengthening of docking areas to approximately three-quarters of a mile will help, but the Port will need additional land in order to continue this expansion process. The City of Wilmington has over 100 acres of undeveloped landfill near the Port which could be developed for a future import/export auto storage and receiving terminal. In addition there is the possibility of land reclamation along the Delaware River for future expansion, subject to the jurisdiction of the U. S. Army Corps of Engineers, who are using the area as a disposal site for dredged material. It is expected that the Corps of Engineers' project will reclaim more than 250 acres of land over the next thirty five years, which could eventually become usable Port land. At this point, however, the future use of this land has not been determined. A promising site on the Christina River could expand berths, but this property, which is not owned by the City of Wilmington, awaits resolution of environmental and legal issues.

The success of the Port of Wilmington is the result of hard work, effective management, positive contributions by organized labor, and the aggressive pursuit of commercial opportunities and new business. It is expected that the same formula of wisdom, hard work, and talent will lead the Port to new successes and an even greater importance to the state and city it serves.



John O'Donnell, Director of Trade Development at the Port of Wilmington, is a Wilmington native. He graduated from Friends School and earned his Baccalaureate at Yale, where he majored in Chinese Language Studies. He is also fluent in Japanese. For five years he worked for an international trading company in Seattle, Washington before assuming his present position with the Port of Wilmington in 1985. ◆

MICHAEL B. McCAULEY

Admiralty: The Common Law Afloat?

By reason of a ruling by the U.S. Supreme Court earlier this century, the Delaware border and the corresponding jurisdiction of the federal court in Wilmington actually extends for a 12-mile radius drawn from New Castle to the high water mark along the shoreline of New Jersey.

Admiralty is unique. Its principles derive from ancient customs and practices. Because admiralty is distinct from the common law, there are certain fundamental differences that pose a threat to the unwary practitioner.

The spectrum of disputes affecting ships and maritime commerce are riddled with unusual rules and practices steeped in the tradition of the sea. While certain principles such as general average, salvage, and the arrest of vessels are saltier and better-known, they are but three facets of maritime law having no counterpart at the common law. Maritime contracts, torts, and other more conventional forms of disputes also adhere to principles quite different from those of common law. For example, oral agreements are binding under maritime law, and even today maritime transactions involving millions of dollars are commonly concluded by telephone calls.

The law governing ships and shipping is referred to as the law of admiralty, so-called because of its historical practice in the special admiralty courts of England. Maritime law has grown largely out of the practical considerations affecting seagoing commerce over the ages. Admiralty law was undoubtedly the first corpus of rules and practices among nations that grew into modern international law.

Maritime commerce spawned an intricate and uniform body of admiralty law that has served maritime commercial nations for centuries. Personification of the ship in an *in rem* proceeding, limitation of a shipowner's liability to the value of his investment, i.e., the ship, the inverse order (last in time is first in right) basic to maritime lien theory, a seaman's rights to maintenance and cure are admiralty conceptions ingeniously crafted to meet the commercial needs of maritime nations. For centuries these traditional and exceptional features of admiralty law were nurtured and protected by admiralty courts.

Born out of commerce among nations, in recent years time-honored principles of maritime law have found applications as diverse as collisions involving jet skis and dram shop claims arising from the service of alcoholic beverages onboard dinner cruise vessels. Maritime law has grown to meet a variety of technological advancements in the shipping industry as well as to respond to modern social changes, such as recreational boating and other water-related activities.

Even as our nation has been committed to states' rights under a federal form of government, maritime principles have endured intact as a separate body of law because our founders recognized the importance of uniform maritime rules among the several states in harmony with the laws of other maritime nations.

The importance attached to maritime affairs by the framers of the Constitution is reflected in the specific grant of admiralty subject matter jurisdiction to the federal courts in the Constitution of the United States, Article III, 2, which provides that "the judicial power shall extend ... to all cases of admiralty and maritime jurisdiction."

In the ensuing two hundred years, interpretation of this statutory language has been the focus of a significant number of reported admiralty decisions. Modern admiralty practice has been shaped primarily through analysis of the intended meaning of "admiralty and maritime" and the dichotomy between "exclusive" admiralty jurisdiction of the federal courts and the common law remedies preserved by the "savings to suitors" clause of the Judiciary Act of 1789.

Until well into this century the

reported decisions of the federal courts in maritime cases reflected a direct correlation between the concerns of commercial shipping and admiralty jurisdiction. From the age of sail to the age of steam and beyond, these cases provide a rich and colorful historical portrait of the nation's development as a commercial and economic power.

The principle of uniformity has been steadfastly applied in maritime cases in the United States. Thus courts throughout the nation apply the same general principles, and the outcome does not depend upon whether a vessel is trading in the Delaware River, the Great Lakes, or the Prince William Sound. Indeed, the District Court of Delaware has played no small part in the development of the maritime law in cases arising on the Delaware River.

The jurisdiction of the District of Delaware extends to the river's navigation channel for the length of the state and also encompasses the navigable portion of the Delaware Bay. Because Delaware's Big Stone Anchorage is a deep, natural harbor, it is a major area for the lightering of vessels. Deeply-laden supertankers arriving with crude oil from the Middle East, the North Sea, and even China discharge a portion of their cargoes into barges to decrease their draft to the 40-foot water depth available for navigation up the river. They then proceed upriver to one of the great refineries along the River, including Star Enterprises at Delaware City. The Delaware River is the largest oil importation center on the United States East Coast.

By reason of a ruling by the U.S. Supreme Court earlier this century, the Delaware border and the corresponding jurisdiction of the federal court in Wilmington actually extends for a 12-mile radius drawn from New Castle to the high water mark along the shoreline of New Jersey. Many an attorney arresting ships at anchorage off New Jersey by starting an action in the federal court of New Jersey has been greatly surprised by dismissal for lack of jurisdiction.

While maritime disputes may be litigated in state courts pursuant to the Constitution's Savings to Suitors' Clause, admiralty counsel traditionally bring claims in the federal courts because of their experience in maritime cases. The District Court of Delaware in particular enjoys a well-deserved reputation for its proficiency in resolving maritime disputes.

Whether a particular controversy gives rise to an "admiralty and maritime" claim depends on the nature of the injury, accident, or dispute. An "admiralty and maritime" claim may arise under the judge-made general maritime law, in which case different rules apply to determine whether jurisdiction exists, depending on whether the claim sounds in contract or in tort. In addition, a claim may arise by virtue of a federal statute, such as the Shipowner's Limitation of Liability Act, the seaman's Jones Act, or the Salvage Act. The statutes and the standards for determining jurisdiction over claims arising under the general maritime law require consideration of the circumstances of the particular case.

Admiralty law was undoubtedly the first corpus of rules and practices among nations that grew into modern international law.

Maritime tort jurisdiction depends generally on whether the claim at issue occurred on navigable waters. In a contract dispute, jurisdiction turns on whether the subject matter of the agreement is maritime. With regard to torts involving even pleasure craft, the U.S. Supreme Court recently reaffirmed the existence of jurisdiction by underscoring the importance of locality as the primary test for maritime jurisdiction. However, the occurrence must also bear some relationship to traditional maritime activity.

Admiralty tort jurisdiction encompasses nearly every species of personal injury, death, or property damage occurring on navigable waters. Thus claims by crew members, longshoremen, and passengers are within the admiralty jurisdiction. Likewise allisions* between vessels and docks and other fixed objects are within admiralty jurisdiction.

By reason of the Admiralty Extension Act torts occurring on navigable waters but having their effect ashore are likewise subject to admiralty jurisdiction. Conversely, a tort occurring on land but having its effect on navigational waters is also within maritime jurisdiction. Thus, in an interesting case from Louisiana, a hunter onshore shot a person in a skiff on a bayou. Because the alleged negligence of the hunter occurred on navigable waters, the court held maritime jurisdiction applicable. Similarly, in a case arising on the Savannah River, a ship ran into a bridge because a smokestack from a nearby factory had exhausted a great mass of black soot, which obstructed the visibility of the ship's navigators. In a claim by the shipowner against the factory, the court held that maritime jurisdiction applied because, even though the factory owner's alleged negligence occurred on land, its effect took hold on navigable waters.

Unlike tort claims, the admiralty court's jurisdiction over contract claims is not always susceptible to such logical analysis. For example, a contract to repair a ship is considered maritime but a contract to build one is not. Similarly, contracts to furnish necessaries to a vessel are within the admiralty jurisdiction but the extent to which supplies and services furnished to a vessel are "necessary" generally turns on the facts of the particular case. Admiralty lawyers still await the day when a court may hold that their services rendered to a vessel constitute a maritime contract with the corresponding right to arrest the vessel to secure payment of their fees!

The importance of bringing a case within admiralty jurisdiction is manifold. Most important, maritime claims give rise to maritime liens with the corresponding right to arrest the vessel or other maritime property as security for claims. The right of arrest is unique to admiralty and may only be exercised in federal court.

The *in rem* right is particularly important in international commerce where the seizure of foreign-owned vessels sometimes affords a claimant the only realistic opportunity to enforce a claim. In order to secure the release of his vessel after arrest, the shipowner must deposit a sum of money in an amount sufficient to satisfy the claim.

The maritime lien and the corresponding right to enforce it by the arrest of the vessel or cargo, *in rem,* affords a unique remedy without parallel in the American common law tradition. With certain limited exceptions, most tort or contract claims within the admiralty jurisdiction of the federal courts also give

** Nice word! Look it up and expand your maritime vocabulary. Ed.*

rise to maritime liens against a vessel. The types of claims creating maritime liens have been decided primarily case by case, although certain liens for goods or services supplied to a vessel are specifically provided by the Federal Maritime Lien Act, 46 U.S.C. 31301 *et seq.* Examples of other claims that also give rise to maritime liens include seamens' wage claims, salvage claims, tort claims arising from vessel collisions, personal injuries (except a seaman's Jones Act claim), cargo damage, general average, vessel mortgages, the furnishing of supplies, services and repairs to vessels, and claims for breach of charter parties and other maritime contracts.

Maritime liens may be enforced directly against the property to which the lien attaches to the arrest of the property *in rem.* If the property owner does not substitute security equal to the value to gain the property's release, the property may then be sold at a judicial sale and the proceeds used to satisfy all maritime liens in the order of their priority.

The arrest of a vessel or cargo *in rem* is available only to the holder of a maritime lien. Under American law, the property to which the lien attaches is said to be "personified." In other words, the property itself is considered to be the "offending thing" which can be made a party. For this reason, it is common for admiralty cases to contain the name of the vessel or the cargo in the caption, e.g. *Atlantic Mutual v. M/V POSEIDON*, or, *California and Eastern Steamship Co. v. 138,000 Feet of Lumber.*

While volumes have been written on maritime law, perhaps a sprint through the following cases, some of them local, will help illustrate that admiralty is not simply "the common law afloat." Not surprisingly, the river itself has long provided anxious moments for mariners and has added many cases to the federal docket.

The constricted, shoal-infested waters of the Delaware River have seen numerous disasters. Vessels arriving at Cape Henlopen must journey some 80 miles before reaching Wilmington and points north. Off New Castle lies the treacherous Bulkhead Bar Range, where vessels must make a hairpin turn of some 70° in the midst of swift and often unpredictable currents. In recent years no less than two catastrophes overtook vessels unable to safely navigate Bulkhead Bar.

On March 7, 1957, the *USNS MISSION SAN FRANCISCO*, proceeding northbound, collided with downbound *SS ELNA II* near Bulkhead Bar. "The collision was followed by two shattering explosions aboard the *MISSION* as the result of which the midship house collapsed and sank into her hull, she broke in two and sank very swiftly." There were a number of deaths and injuries among the *MISSION's* crew.

Invoking a procedure unique to admiralty, the owners of both vessels filed petitions for exoneration from or limitation of their liability in the District Court of Delaware. In an exhaustive review of the facts, the Honorable Caleb R. Layton, III commented on the practical difficulties of maneuvering large ships, particularly through this particular "sweeping bend in the Delaware River."

> "Now, a mile may seem like a considerable distance to a landsman accustomed to navigating in automobiles which, while relatively fast, answer immediately to a touch of their wheel, can decelerate fast simply by letting up on the accelerator, and very fast indeed by the application of brakes. But ships are ponderous, unwieldy things which answer their helms, not immediately, but in long seconds and whose only brakes are reversed engines which can stop them, not in a matter of feet, but perhaps in thousands of yards." *Petition of Oscar Tidemann & Co.* 179 F. Supp. 227 (D. Del. 1959)

Applying an intricate set of navigational rules known as the "Rules of the Road" Judge Layton determined that both vessels were at fault and held each liable and divided the damages equally between them. However, applying the principles of limitation of liability, the Court allowed the owners of the *ELNA II* to limit liability to the value of their interest in the vessel.

On the fog-shrouded afternoon of March 1, 1987, history repeated itself as the Cypriot-registered tanker *SEAPRIDE II* headed downriver into Bulkhead Bar Range. Sighting by radar another vessel south of the range, the SEAPRIDE II delayed the precarious turn and the ebb current swept her into collision with a high-voltage electrical tower located some 700 feet west of the channel. The collision toppled the tower and severed its high tension lines, which transmit power across the river from the Salem Nuclear Power Station. As a consequence the river was closed for several days and power was cut back throughout Delaware, Pennsylvania, and New Jersey.

The *SEAPRIDE II* was taken to Philadelphia where she was arrested by the marshal of the federal court in Philadelphia. In turn the shipowner commenced a limitation action. A consortium of power companies filed claims seeking $50 million in damages including some $25 million for replacement power costs. Invoking a quaint maritime rule articulated by Justice Oliver Wendell Holmes in 1927, the federal court held that some of the power companies could not recover their economic losses since they did not own the tower. In a separate trial, the court also held the vessel at fault for the collision and further denied the petition for limitation because the shipowners did not adequately train the master on the use of the computer-aided radar onboard the vessel. The Limitation of Liability Statute (46 U.S.C. 181 *et seq.*), an Act passed by Congress in 1851, allows shipowners to limit their liability to the value of their interest in the vessel but only if they are not "in privity" with the cause of the casualty.

Maritime injury claims are also governed by principles vastly different from the common law. In particular, seamen enjoy a special status under maritime law. Indeed, early American decisions held that seamen are "invincibly ignorant," and for that reason deserve special solicitude as the "wards of the admiralty court." (Some modern seamen may view the foregoing rationale as anachronistic!)

In the event of injury or illness onboard a vessel, a seaman is entitled to maintenance and cure, and may also sue for damages if the vessel was unseaworthy or the shipowner or its employees negligent in causing his injuries. The doctrine of maintenance and cure affords seamen the medical care and reimbursement for room and board during the period of recovery from an injury or illness. Maintenance stems from the rationale that seamen, entitled to free room and board on their vessels, should enjoy the same right ashore.

The remedy of maintenance and cure is broad, and is not lost even by "moral" misconduct by the seaman. The foregoing is demonstrated by the award of maintenance and cure to a seaman who broke his leg while climbing out the window of a house of ill repute. The circumstances leading to the seaman's plight is most eloquently described in the court's own words:

> "The plaintiff, a seaman, . went ashore about noon; in the exercise of a seaman's wonted privilege he resorted to a tavern where he

drank one glass of wine like to our familiar port; thereafter in the course of a walk about town he visited another liquid dispensary where he quaffed two glasses of a similar vintage; there he met a woman whose blandishments, prevailing over his better sense, lured him to her room for purposes not particularly platonic; while there 'consideration like an angel came and whipped the offending Adam out of him'; the woman scorned was unappeased by his contribution and vociferously remonstrated unless her unregarded charms were requited by an accretion of 'dinner' (phonetically put); the court erroneously interpreted the word as showing that the woman had a carnivorous frenzy which could only be soothed by the succulent sirloin provided at the plaintiff's expense; but it was explained to denote a pecuniary not a gastronomic dun; she then essayed to relieve his pockets of their monetary content ..." *Koistinen v. American Export Lines, Inc.* 83 N.Y.S. 2d 297 (N.Y.Co. 1948)

The shipowner's duty to provide proper medical care was also broadly construed in a case arising out of the District of Delaware. In *McLaughlin v. Sun Transport, Inc.*, a seaman suffered broken ribs and a collar bone when struck by a towing hawser while working on a tug off the coast of Puerto Rico. The tug put into Guayanilla and the seaman was taken by ambulance to a local hospital where he later died because of medical malpractice. Judge Stapleton ruled that the shipowner's duty to provide medical care was broad enough to make the owner vicariously responsible for the medical malpractice of the hospital, and for that reason imposed liability against the shipowner.

However, the admiralty court's solicitude for seamen is not infinite. Indeed, not all seamen are entitled to even bring their claims in American maritime courts. In 1989, in *Cruz v. Chesapeake Shipping*, several hundred Filipino seamen brought suit in the District of Delaware seeking payment of higher wages. These seaman had served onboard Kuwaiti tankers that had been reflagged as American vessels to qualify them for escort by the U.S. Navy through the hostile Persian Gulf during the war between Iraq and Iran. The Honorable James L. Latchum dismissed

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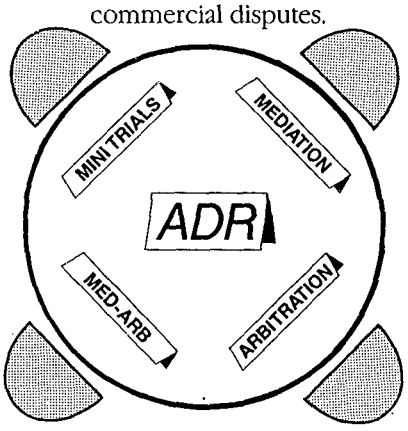

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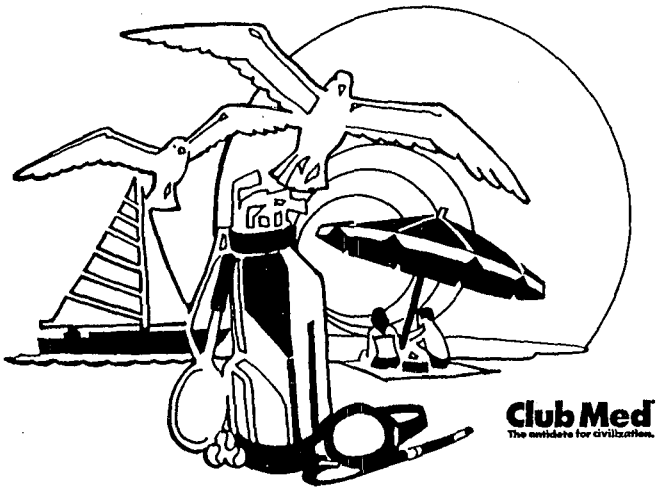

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their claims ruling that under applicable maritime choice of law principles they should seek recourse under the laws of the Philippines.

An area of increasing activity for the admiralty courts and counsel is water pollution from oil spills. Pollution liability had its very origin in maritime law. The spill of the *ARGO MERCHANT* off Cape Cod in 1969 spurred the United States Congress to pass the first comprehensive environmental statute in American history. The Federal Water Pollution Control Act has evolved through the present to the Oil Pollution Act of 1990, the most comprehensive water pollution legislation ever.

Indeed, presently pending in the District of Delaware is the litigation arising out of the latest maritime disaster in our region — the oil spill from the *PRESIDENTE RIVERA* near Claymont during the summer of 1989. Time-honored principles of admiralty law will undoubtedly be called upon to resolve that case, as well as other maritime disasters, which are sure to follow in the future.

Michael B. McCauley, a partner in the firm of Palmer Biezup & Henderson, is a member of the Bars of Delaware, Pennsylvania, New Jersey, New York, and Florida. A Coast Guard-licensed Master of oceangoing vessels, he is a graduate of the United States Merchant Marine Academy and the University of Miami School of Law. He is Secretary of the U.S. Maritime Law Association's Recreational Boating Committee and a member of the Association of Average Adjusters of the United States and of the United Kingdom. Mr. McCauley has written and lectured extensively on maritime law. ◆

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MANGONE

continued from page 35

federal judiciary with a Supreme Court. Congress also had the power to establish inferior federal courts and at its first session in 1789 it created 13 federal district courts, endowing them with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction". However, the historic struggle between the ordinary courts and admiralty courts was not forgotten; exclusive admiralty jurisdiction in the first judiciary act was hedged by the phrase "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

Many questions about admiralty law remain for American jurisprudence. The statutes of Congress, some of which implement international conventions, and the plenitude of federal court decisions, have expanded, codified, or clarified the reach of modern admiralty law and its place in the American legal system. Issues of definition and application persist and will continue to require appropriate action by Congress and wise judgments by the courts to ensure justice for all those attached to commerce by water.

Gerard J. Mangone, Ph.D. in International Law (Harvard University). Gerard J. Mangone has been a Profesor or Visiting Professor at 11 universities, a Dean, Vice-President, and Provost, a Consultant to the White House and the United Nations, and founder and Director of the Center for the Study of Marine Policy at the University of Delaware. He is the author of 12 books and the co-author of another 30 books. Professor Mangone is now the University Research Professor for International and Maritime Law at Delaware. ◆

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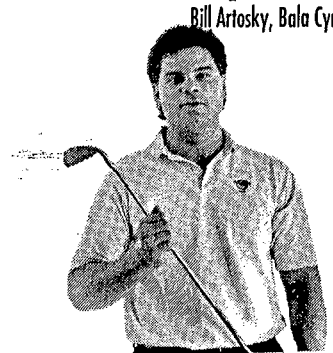

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CY LIBERMAN

The Delaware Maritime Center

In 1988 there were several organizations interested in the Brandywine, Christina, and Delaware Rivers, each merrily going its own way with little regard for the others or for the possible benefits of working together. Three people active on or about the waterways came up with the idea of forming a coalition of those organizations. The idea men were Don Callendar, Tom Colgan, and the author of this article. They called a meeting of existing organizations aboard the Cutter Mohawk, in the Christina at the foot of King Street, and found their idea warmly received.

Author Cy Liberman sails past a symbol of maritime history.

The result was the formation of the Wilmington Maritime Center, later renamed the Delaware Maritime Center. Taking part were representatives of the Cutter Mohawk, Inc., the Wilmington Rowing Club, the Kalmar Nyckel Foundation, the Wilmington Steamboat Society, Camp Dimension, the Schooner Ruth, the Delaware River and Bay Shoreline Committee, the Columbus 500 Committee, and several boat owners.

Four years later many of the same people are active in the Center. The Cutter Mohawk has been sold, but Charles Weymouth, who was president of the Mohawk group, is one of the leaders of the Center, and the "I Swam The Delaware" group of aquatic athletes is represented in the membership. That group does indeed swim across the Delaware, usually from the mouth of the Christina, and always with rescue boats and other safety precautions. These distance swimmers have a big interest in seeing the river cleaned up, both for water quality and the amount of flotsam and jetsam to be encountered.

Pressing for continued improvement of water quality in the rivers and preserving the riverbanks and wetlands is one of general objectives of the Maritime Center. Promoting the safe recreational and commercial use of the Christina and Brandywine Rivers and their waterfronts is a further objective.

The group also wants to cooperate with the City of Wilmington to develop the waterfronts with provision for water-related activities, open space, and public access. Two other general objectives are promoting public interest in Wilmington's maritime heritage while preserving and restoring that heritage, and promoting maritime education and the maintenance of maritime resources.

To reach the larger, long range objectives the Center adopted five specific goals, the first of which is to encourage the enactment and enforcement of regulations for safe use of the waterways. Another is to educate the public about the beauty and recreational opportunities of this splendid resource.

A closely related third goal is to provide information programs on the safe use of the waterways. The fourth is to work with other organizations in restoring water quality, maintaining the waterways, and removing hazards and obstacles. The final goal is to establish a permanent location for the Center, to include maritime exhibitions, an education program, locations for historic ves-

sels, a center for building and restoring small boats, and the encouragement of similar activity in the schools.

The goal of a permanent location with exhibits has been realized with the establishment of headquarters on the ground floor of Three Christina Centre, (at Second and Walnut Streets) where the owners of the handsome blue high rise office building have provided space at very low rent. The educational exhibit there features excellent models of 12 ships of the Wilson Line, which used to operate on the Delaware and other waterways. Seven of the 12 river vessels were built at Wilmington between 1885 and 1923, when the city was a major shipbuilding center. The builders were the Pusey & Jones Corporation and Harlan & Hollingsworth, both on the Christina.

The center also contains exhibits exemplifying the activities of the constituent organizations. Camp Dimension, for example, displays a small boat which can be easily constructed of plywood at very small expense. It really sails. Camp Dimension, with its own headquarters at East Seventh Street Park, teaches inner city youngsters how to build and operate boats, mainly rowing boats, and also cooperates with the schools in teaching boat building.

Although the Maritime Center's headquarters, with its adjacent parking, is excellent for meetings, experience has shown that it does not enjoy the volume of pedestrian traffic that would benefit from the educational exhibits. Members of the Center are looking for a location with more walking traffic.

The Center's most visible activity during the last two years has been its operation of the river tour boat, Miss Kathy. This is the 40-passenger launch that used to cart passengers from Delaware City to Pea Patch Island and back. When the state bought a larger vessel it gave Miss Kathy to the Maritime Center.

Miss Kathy is a wooden boat, always in need of maintenance. The Center has provided that maintenance and has improved the boat by installing a good marine toilet, with a holding tank, and by adding side curtains, which can be rolled down in the event of rain. Thousands of people have enjoyed one-hour trips on Miss Kathy during the warm months and she has become an important amenity of Wilmington's waterfront.

The weather last summer cut severely into Miss Kathy's patronage with too many rainy weekends, leaving the Mari-

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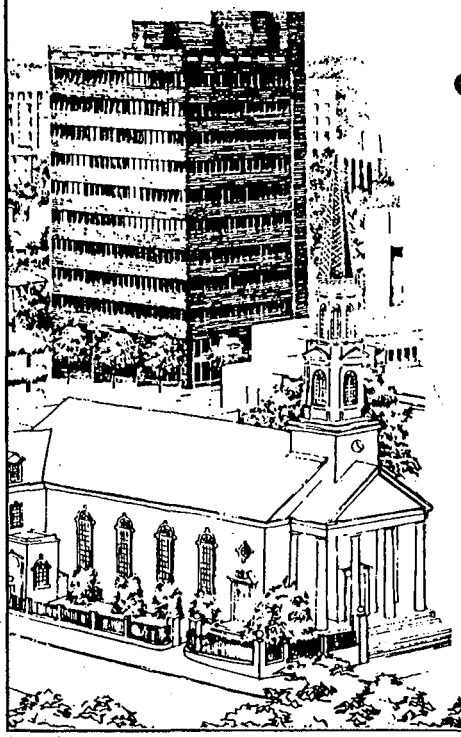

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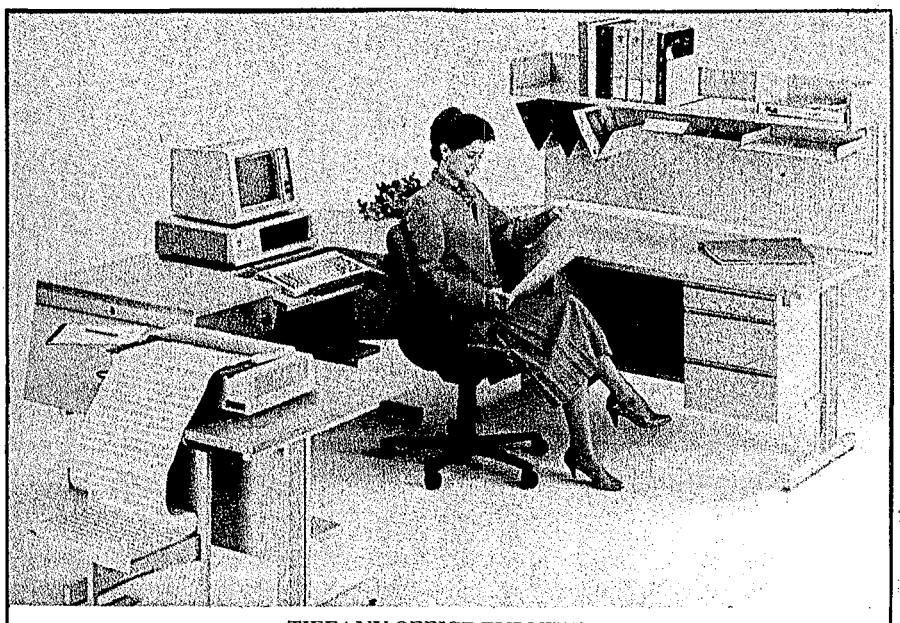

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time Center with insufficient income to pay the boat's operating bills. Fortunately the former Wilmington Waterways organization, which shared many of the Center's goals, came along with a substantial grant of funds left in its treasury when it ceased operating. That restored the Center's financial position. But like any non-profit agency, the Center is usually scratching for funds. Delawareans have a tradition of recognizing their native assets and of preserving them. This encourages a cautious optimism about the future of the Center and its growing contribution to local history and culture.

More Help For the Delaware Littoral

In the Fall of 1992 the Delaware State Senate established with Governor Castle's concurrence the Brandywine & Christina Rivers Task Force with the mission of protecting rivers, river banks, and adjoining lands. Author Cy Liberman, Rex Beaton, and Tom Colgan serve on that Task Force, providing a vital linkage between two important forces for environmental protection.

Ed.

Cy (more formally Cecil) Liberman now in his vigorous 80's joined the News-Journal papers as a reporter in 1941. He remained there for 34 years, becoming in the process of a distinguished journalistic career the first public editor of that paper. His wife and close literary collaborator, Pat, also served the paper as the Arden Stringer. (The Libermans have lived in Arden since 1938 in the same house and have contributed significantly to the Village of Arden, even to memorializing that fascinating community in "The Arden Book".) Cy, not only the doyen of newspaper journalists in Delaware, continues his long record of public service with his recent appointment to the Brandywine & Christina Rivers Task Force, where he serves with such distinguished Delawareans as former Governor Peterson and former University of Delaware President Dr. Trabant.

The editors join Cy in encouraging our readers to visit the Maritime Center and its fine exhibits at Three Christina Centre, Second and Walnut Streets, Wilmington.◆

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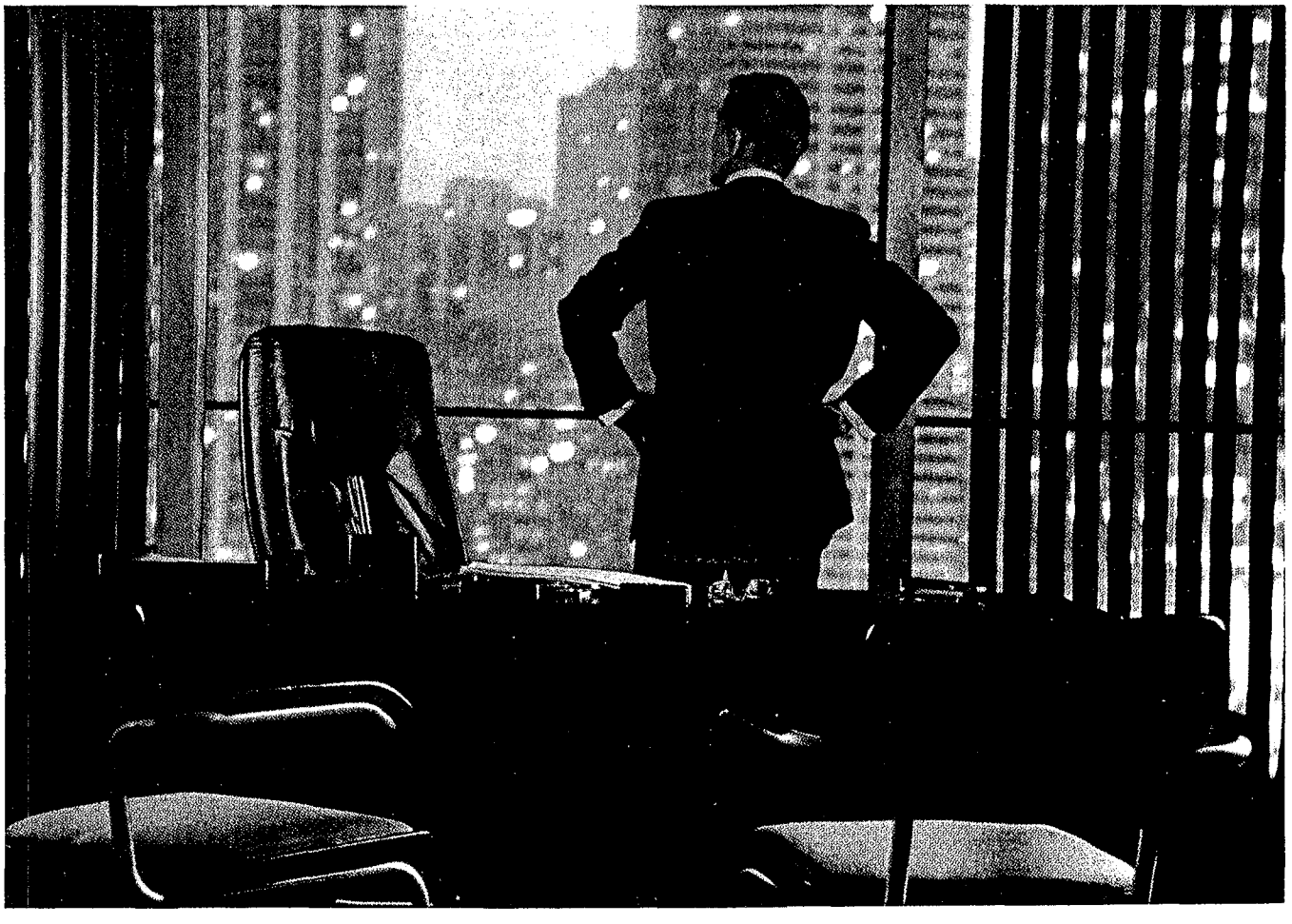

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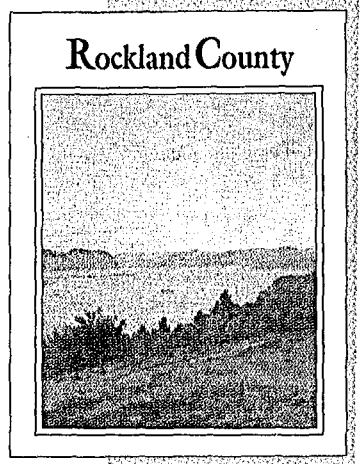

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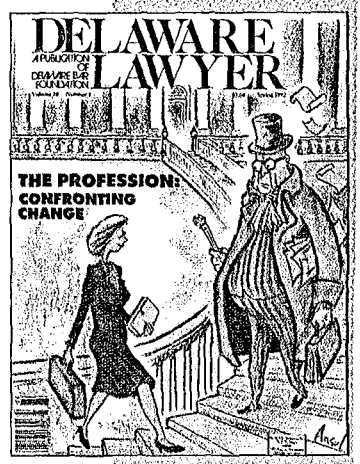

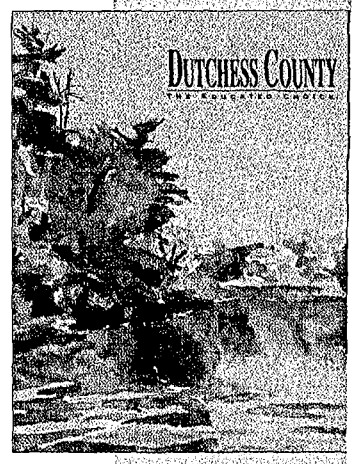

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