FOREWORD:

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Mason v. The Ship Blaireau: Salvage, Slaves, and the Law of Nations

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Abstract

In March 1803, French ship *Le Blaireau* ran into Spanish ship of war *St. Julien* in the middle of the Atlantic Ocean, severely damaging the *Blaireau* such that her captain and crew abandoned ship and boarded the *St. Julien*, with the exception of seaman Thomas Toole. The next day, British ship *The Firm* found and temporarily repaired the *Blaireau,* and helped Toole bring her into port in Baltimore, which was *The Firm*'s destination. The case addressed the question of awarding salvage; specifically, to whom should there be salvage, and in what amounts? It also raised questions about jurisdiction and the rules for awarding salvage to slaves; and twenty-four years after the Supreme Court's decision, the *Blaireau* resurfaces in a fascinating memorial to the Senate. This paper explores those topics.

Disciplines

Law, Maritime History

Mason v. The Ship Blaireau: Salvage, Slaves, and The Law of Nations

In March of 1803, the French ship *Le Blaireau* ran into the Spanish ship of war *St. Julien* in the middle of the Atlantic Ocean, severely damaging the *Blaireau* such that her captain and crew abandoned ship and boarded the *St. Julien* back to Spain, with the exception of seaman Thomas Toole. The next day, British ship *The Firm* found and temporarily repaired the *Blaireau*, and six men from *The Firm* joined Toole in bringing her into port in Baltimore, which was the destination for *The Firm*. This case revolves around the lower courts' decisions in awarding salvage to those who saved the *Blaireau*; specifically, to whom should there be salvage, and in what amounts. But the case also raises interesting questions, some of them with broader implications, which are the focus of this paper: How did the United States Supreme Court hear a case between foreigners? Why did a slave not keep his salvage award? And why did someone file a memorial to the United States Senate about the *Blaireau* twenty-four years after the Supreme Court decides the case?

The Accident and the Rescue

The Irishman called himself Thomas Toole, and the ship was *Le Blaireau* – which is French for "badger." They first saw him running back and forth across the deck of the *Blaireau* on the morning of March 31, 1803, in the middle of the Atlantic Ocean.[1] His ship, which was not actually his ship, looked battered. She was battered – her bowsprit shorn off completely, her bows badly damaged, and an ever-worsening leak threatening to sink her.[2] She should have been

[1] Deposition of Charles Christie, Maryland Archives, File labeled "Thomas Toole v. Ship Blaireau + Cargo, 1803, Salvage," Available at http://www.editonline.us/cgi/viewTranscript.php?pdfFile=http://www.mdhistory.net/nara_rg21/nara_rg21_24m127/pdf/nara_rg21_24m127-0424.pdf&viewDir=horz

[2] Deposition of Charles Christie; *The Blaireau*, 6 U.S. 240, 241 (1804)("[The *St. Julien*] struck the bow of the Blaireau, carried away her bowsprit, and cutwater [forward edge of the stem] close to the seam of the stem [main beam forming the bow], started three planks of the bends [thickest outside planking], and all above them, and crushed to pieces the larboard [port side] cat-head [beam sticking out from the bow to hold anchors]. Before morning there were three and a half feet of water in the hold[.]"); *see also* Translation of the Statement of the

continuing a journey to Bordeaux, France. Instead, she was fighting for survival. After looking her over, the captain and crew of *The Firm* agreed to help Mr. Toole save the *Blaireau*, but her new destination would be Baltimore, in the young United States of America.

The *Blaireau* set sail from the island of Martinique, in the West Indies, on or about March 10th.[3] Bound for Bordeaux, France, her cargo included sugar, copper, and cocoa, making the approximate value of ship and cargo around $67,000.[4] The commercial firm Pelletreau, Bellamy, & Company owned both ship and cargo, and awaited her arrival.[5] But she never made it to France. Heading east-northeast at ten o'clock on the night of March 30th, "it being pretty dark," the ship accidentally ran into a Spanish man-of-war heading east-southeast. [6] The *St. Julien* was a 64-gun warship.[7] Although the *St. Julien*'s exact size is unknown, she

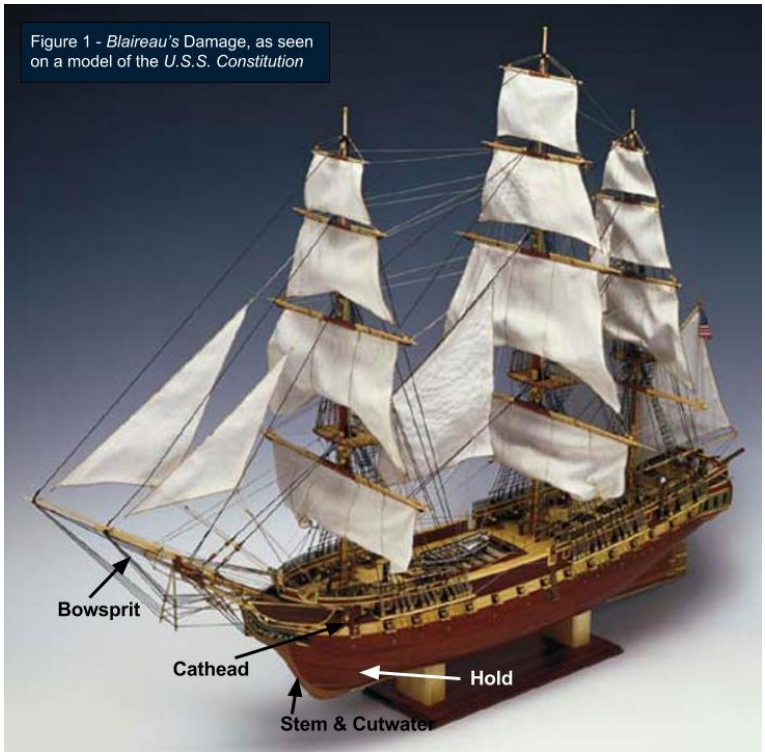

Figure 1 - *Blaireau's* Damage, as seen on a model of the *U.S.S. Constitution*

Crew of the Blaireau, p.2, Maryland Archives, File labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage," Available at: http://www.editonline.us/cgi/viewTranscript.php?pdfFile=http://www.mdhistory.net/nara_rg21/nara_rg21_24m127/pdf/nara_rg21_24m127-0262.pdf&viewDir=horz

[3] Deposition of Thomas Toole, Maryland Archives, File Labeled Maryland Archives, File labeled "Thomas Toole v. Ship Blaireau + Cargo, 1803, Salvage."

[4] David Hoffman. Memorial and argument in the case of the Ship Blaireau, praying a return of tonnage and duties erroneously paid in 1803: Addressed to the Senate of the United States. Baltimore: Printed by J.D. Toy, 1826. Shaw 33573; Bib. of Early American Law 14995; 3.

[5] *Id*. at 3.

[6] Deposition of Thomas Toole, *supra* at n.3; Translation of the Statement of the Crew of the *Blaireau*, *supra* at n.2.

[7] Hoffman, Memorial, *supra* at 3; *The Blaireau*, 6 U.S. 240, 240 (1804).

was much larger than the *Blaireau* that required only sixteen crewmen[8]; in fact, there is no mention of the warship receiving any significant damage. On the other hand, the *Blaireau*'s damage was bad enough that "[i]t was the opinion of several experienced sea-captains that the bringing in the Blaireau was a service of great risk and peril, and nearly desperate, and such as they would not have undertaken."[9] Although the ship in Figure 1, above, is not the *Blaireau*, it shows where the damage occurred. It was all at the bow, as the two ships' courses formed a "V" until they ran into each other.

According to Thomas Toole, he and the captain went below deck to assess the damage, and Toole believed the *Blaireau* could be saved.[10] Even if she could not survive long, Toole knew they were at a latitude where there was a good chance of meeting up with another vessel that could help them. But the captain disagreed and ordered the men onto the *St. Julien*.[11] The first small boat was leaving the *Blaireau*, but Toole's fellow crewmen refused to let him board.[12] After this resistance, combined with Toole's hesitance to board a Spanish ship in the first place (for which he offered no explanation), Toole refused to board the second boat. Instead, he stayed on the *Blaireau* alone while the rest of the crew sailed off in the Spanish warship.[13] The next day, crew members of the *Firm* spotted the *Blaireau* and took action.

The officers and crew of the *Blaireau* offered a slightly different version of the post-accident events. In a statement translated into English for the court, they gave their side of the story, as follows.[14] A crewmember saw the Spanish ship at the last minute, and at least two men

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[8] Deposition of Charles Christie, *supra* at n.1.
[9] *The Blaireau*, 6 U.S. 240, 242 (1804).
[10] Deposition of Thomas Toole, *supra* at n.3.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Translation of the Statement of Crew of the *Blaireau*, 2, Maryland Archives, File labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage," Available at:

agreed that she was sailing faster than the *Blaireau*, so they tried to avoid the crash by slowing down.[15] However, the *Blaireau* crew was wrong, and the maneuver did not prevent a devastating collision. After the ships crashed, the captain went into the hold and saw three feet of water.[16] The Spanish ship sent a boat to offer help, but could not give the *Blaireau* the help it wanted – namely, eight men to pump water from the hold through the night.[17] Without specifying, the *St. Julien*'s captain said his government mission did not allow any delay; and he only agreed to take the *Blaireau*'s crew and passengers on board with urging from his own crew.[18]

During Captain Anquetil's last moments on board the *Blaireau*, he realized the Englishman Thomas Toole was unaccounted-for and tried to find him.[19] When he could not find Toole, he assumed the man had gotten drunk and fallen overboard.[20] The crew of the *Blaireau* lost sight of the *Blaireau* around ten o'clock the next morning, at which point she had water over her deck.[21] Each version of the story benefits the one telling it, and there is no way to know who is lying; but Thomas Toole was alone on the *Blaireau* when men from the *Firm* boarded her mid-afternoon on March 31st.[22]

The two ships "laid to together for two or three days" while the *Firm* took some of the cargo and the men put a temporary fix on the leak. [23] Then six crew members from the *Firm* boarded the *Blaireau* to help bring her into Baltimore: Charles Christie, supercargo, co-charterer and co-owner of the cargo; William Stephenson (sometimes misspelled Stevenson), first mate;

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http://www.editonline.us/cgi/viewTranscript.php?pdfFile=http://www.mdhistory.net/nara_rg21/nara_rg21_24m127/pdf/nara_rg21_24m127-0262.pdf&viewDir=horz.

[15] Statement of the Crew of the Blaireau, 1, *supra* at n.14.

[16] *Id.*

[17] *Id.* at 2.

[18] *Id.*

[19] *Id.*

[20] *Id*.

[21] *Id*. at 3.

[22] Deposition of Charles Christie, *supra* at n.2.

[23] *The Blaireau*, 6 U.S. at 241 (1804).

John Brownall (sometimes misspelled Brown Hall) and John Wilson, seamen; John Moat, an apprentice; and Tom, the slave of a reverend living in London.[24] William Stephenson and William Mason, master of the *Firm*, were the only crew members who knew how to navigate into Baltimore.[25] They arrived safely on or about May 3rd, 1803.[26] Soon after arrival, several men, including Thomas Toole, filed libels in the admiralty court for salvage. In other words, they wanted the court to make sure they were paid for their efforts – whether directly from the owners, or by selling the *Blaireau* and her cargo.

When someone rescued a ship in distress and brought it into port, that person or crew was entitled to payment for their services, called salvage. The ship's owners could take their ship and cargo, and pay the salvage out of separate funds; or they could sell the ship and cargo and use the proceeds to pay salvage. Most Western nations followed some form of salvage policy to discourage those at sea from leaving others to die helpless on the water. In prize law, courts also awarded salvage when a crew recaptured a sister ship that had been taken as prize.[27] The case of *Mason v. Blaireau* revolves around these salvage awards.

Decisions from the District Court of Maryland and the Fourth Circuit Court of Appeals

On July 14, 1803, Judge Winchester issued a ruling in the District Court of Maryland. The salvors were entitled to three-fifths of the net proceeds from the sale of the ship and cargo. The owners of the *Firm* and her cargo received one-ninth of the salvage, divided between them in proportion to the value of the ship and the cargo. The *Firm*'s master William Mason did not get any salvage because he embezzled some of the *Blaireau*'s cargo for his own use, thereby

[24] *Id.*; *see also* Letter of John Ireland, *infra* at n.65.
[25] *The Blaireau*, 6 U.S. at 242.
[26] Deposition of Thomas Toole, *supra* at n.3
[27] Donald A. Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*, 156 (Naval Institute Press, 1999).

forfeiting his right to salvage.[28] Then Judge Winchester, admitting the actual amounts were within his discretion and he had no hard rule to follow, allotted the highest amount to the men on board the *Blaireau* – and among them, the amount varied based on each man's rank on the crew.[29] Among those on board the *Firm*, he similarly allotted the money according to rank, except of course William Mason. The remaining two-fifths of the net proceeds went to Baltimore's bank for the owners of the *Blaireau*.[30] Appendix A shows the amounts awarded by Judge Winchester, as well as in the Circuit Court and Supreme Court.

Nearly every interested party appealed the court's ruling, as seen in a list in Figure 2.[31] The Cranch reporter notes, "Upon the appeal, additional testimony was adduced…but it does not seem to affect the principles upon which the rates of salvage ought to be awarded."[32] On December 27, 1803, the Circuit court, Judge Chase, issued its opinion. Without offering any legal analysis or reasoning behind his decision, Chase affirmed Judge Winchester's decision with several exceptions.[33] Judge Chase adjusted the amounts awarded in salvage so the owners of the *Firm* got a greater award,

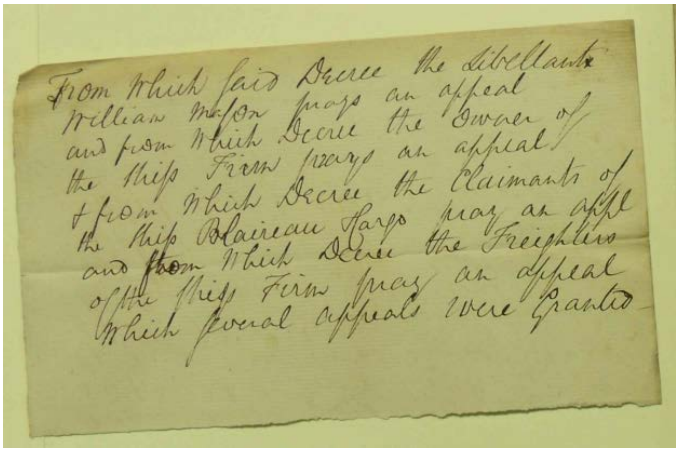
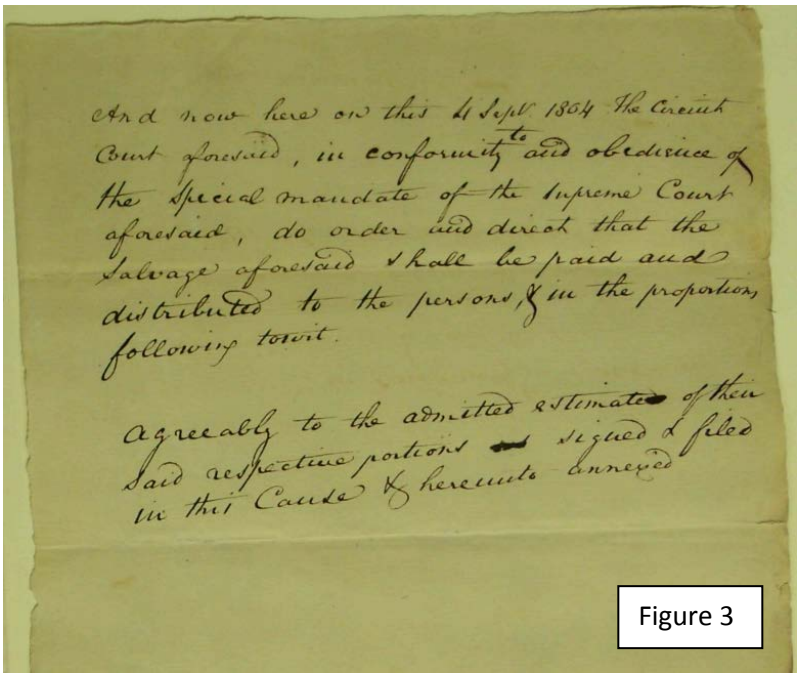

From which said Decree the Libellants William Mason prays an appeal and from which Decree the Owner of the Ship Firm prays an appeal & from which Decree the Claimants of the Ship Blaireau Cargo pray an appeal and from which Decree the Freighters of the Ship Firm pray an appeal which several appeals were Granted

Figure 2

[28] *The Blaireau*, 6. U.S. at 242 (1804).
[29] *Id.*
[30] *Id*. at 245.
[31] The following all filed appeals: William Mason, master of the *Firm*; John Jackson, owner of the *Firm*; the claimants of the *Blaireau*; and Charles Bedford Young and Charles Christie, charterers of the *Firm* and owner of its cargo. *The Blaireau*, 6 U.S. at 245 (1804).
[32] *The Blaireau*, 6 U.S. at 245.
[33] But see *The Blaireau*, 6 U.S. at 267 (Marshall, C.J., explaining why he affirmed some of the lower court decisions).

while William Stephenson got a smaller amount.[34] The Circuit court also held that the apprentices' salvage awards did not go to John Jackson as the boys' master, but to the boys themselves.[35] The salvage awarded to the slave Tom was held for his master, Reverend John Ireland.[36] However, Reverend Ireland had authorized representatives in Baltimore – Lewis Atterbury and Rev. Joseph Grove John Bend – to give Tom his freedom and one-fifth of his salvage award, and return the other four-fifths to Rev. Ireland.[37] The court allowed that solution. Finally, no appellant except William Mason had to pay costs on appeal.[38]


And now here on this 4 Sept. 1804 the Circuit Court aforesaid, in conformity to and obedience of the Special mandate of the Supreme Court aforesaid, do order and direct that the Salvage aforesaid shall be paid and distributed to the persons & in the proportion following towit.

Agreeably to the admitted estimates of their said respective portions signed & filed in this Cause & hereunto annexed

Figure 3

Another round of appeals, as writs of error, took the case to the Supreme Court. The parties' arguments are addressed below. On March 6, 1804 – almost a year after the *Blaireau* set sail from Martinique – the Court issued its short opinion, written by Chief Justice Marshall.[39] Figure 3 is a document that appears to be part of a Circuit Court order to distribute the salvage as ordered by the Supreme Court.[40] The document is dated September 4, 1804. The case was over, but not without

[34] *The Blaireau*, 6 U.S. at 246-47.
[35] *Id.* at 247.
[36] *Id.*
[37] *Id.* at 247.
[38] *Id.*
[39] *Id.* at 263.
[40] Decree of Fourth Circuit Court of Appeals, Maryland Archives, File labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage."

addressing several interesting aspects of maritime law and the law of nations in the early nineteenth century.

Writs of Error

The Judiciary Act of 1789 was hugely significant law regarding the federal judiciary, passed under the authority of Article III, Sections 1 and 2 of the Constitution.[41] Sections 21 through 23 of the Judiciary Act of 1789 lay out rules for appealing decisions, specifically civil actions and admiralty/maritime cases.[42] The Supreme Court laid out its interpretation of those sections in *Wiscart v. D'Auchy*[43] under an interesting set of circumstances: the man writing the opinion, Chief Justice Oliver Ellsworth, was the legislation's chief drafter.[44] More significantly, Ellsworth explained the difference between reaching the Supreme Court by appeal and reaching it by writ of error: "An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and re-trial: byt [sic] a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."[45] The Court also appeared to hold that it could only hear an admiralty or maritime case via writ of error.[46]

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[41] Section 1 states, in part: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Section 2 states, in part: "In all the other cases before mentioned [ed: including admiralty and maritime cases], the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

[42] Judiciary Act of 1789, 1 Stat. 73, Ch. 20 §§21-23, available at http://www.constitution.org/uslaw/judiciary_1789.htm.

[43] 3 U.S. 321 (1796).

[44] *Senator Ellsworth's Judiciary Act*, Senate Stories, United States Senate, https://www.senate.gov/artandhistory/history/minute/Senator_Ellsworths_Judiciary_Act.htm (last visited Jan. 1, 2014).

[45] *Wiscart*, 3 U.S. at 327.

[46] *Id*. at 329.

However, the Court in several other cases affirmed its ability to review salvage cases for fact as well as law.[47] It seems clear that in this case, Chief Justice Marshall addressed the lower court's factual determinations as well as its legal conclusions.

The Supreme Court: Arguments and the Court's Decision

The initial question before the Court was whether it had jurisdiction over "the case of a French ship saved by a British ship and brought into a port of the United States[.]"[48] Attorney Luther Martin, on behalf of the *Firm*'s owner, raised a question about jurisdiction, but noted that it was often inconvenient – if not impossible – to bring a ship into its own country or its salvor's country.[49] Add the reality that "any civilized nation" would follow the law of nations with the same general principles for salvage, and "[t]here seem[ed] to be no good reason" for the Court not to decide the case.[50] Further, all the parties waived any objections to jurisdiction.[51] The Supreme Court barely gave lip service to the question, resolving it in favor of jurisdiction in just two sentences, especially since no party objected.[52] It moved on to the merits of the case.

The first set of arguments came from those who claimed ownership of the *Blaireau*, who raised four objections: the total amount of salvage was too large, the amount denied two crewmembers should go to the claimants instead of the other salvors, Thomas Toole should not get any salvage, and the amount embezzled by an unknown crewmember should be deducted from the salvors' general sum.

a. The Total Amount of Salvage

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[47] *See, e.g.*, *The Connemara*, 108 U.S. 352, 360; *The Richmond*, 60 U.S. 150, 160-61 (1856).
[48] *The Blaireau*, 6 U.S. at 248, 264.
[49] *Id*. at 248.
[50] *The Blaireau*, 6 U.S. at 248.
[51] *Id*.
[52] *Id*. at 264.

The claimants of the *Blaireau* said three-fifths of the net proceeds was too high for several reasons: as a general principle, under the principle of reciprocity, and compared to cases of recapture in prize law.[53] As a general principle, there was a difference between a totally abandoned ship and a ship with someone still on board, and here the ship was not totally abandoned.[54] The claimants also noted the *Blaireau* was not far from the Azores, a string of islands approximately one thousand miles off the coast of Portugal; and she was still a very fast ship; and she sailed with the *Firm* for nineteen days, and so the claim that she was in very much danger did not hold water.[55]

Secondly, England followed the rule of reciprocity in prize and salvage cases, so the French law was important for deciding the amount.[56] The claimants denied there was any case in England or in France where the salvage was higher than two-fifths.[57] Nor did any recapture case allow more than one-sixth in salvage award.[58]

The salvors responded with arguments of their own. First, since salvage cases are decided at each judge's discretion given the circumstances of the specific case, there is no fixed rule against which to measure the three-fifths award.[59] The judge has discretion so he may decide the amount he thinks is just. Secondly, the comparison to reciprocity and recapture cases is misplaced. The *Blaireau* was not taken as a prize at all, and so the salvors argued that prize law was irrelevant in the Court's considerations.[60] Further, no case cited by the claimants was as

[53] *Id.* at 250.
[54] *Id*.
[55] *Id*. at 250-51.
[56] *The Blaireau*, 6 U.S. at 251.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 254.
[60] *Id*.

severe as the present case, which included "a navigation of 3000 miles with death constantly staring [the salvors] in the face; and a great part of the time almost constantly at the pumps."[61]

Finally, the salvors noted that the present award was three-fifths of the net value, whereas the cited cases gave a fraction of the gross value; and they presented the case of the Dutch East-Indiaman at Dunkirk, where the salvors got one-half the value, to refute claims that no English court awarded more than two-fifths in salvage.[62]

The Court agreed that salvage awards are at the court's discretion.[63] However, it sided more with the claimants of the *Blaireau* than the lower courts had. Justice Marshall noted France's statutory maximum of one-third the gross value, and England's rule of reciprocity.[64] Yet he did agree that the case was one "of great merit and a very liberal salvage" was appropriate.[65] Accordingly, the Court reduced the salvage from three-fifths to two-fifths the ship and cargo's net value.[66]

b. Whether Toole Gets Salvage

He was a hero, a stubborn man, a hard worker. Thomas Toole saved the *Blaireau*, and worked hard to help bring her into Baltimore. But Charles Christie and William Stephenson both testified in their depositions that Toole also had a temper, specifically while intoxicated.[67] According to the depositions, at different times Toole claimed to own the *Blaireau* and her cargo, tried to hit Stephenson, and tried to sink the ship by cutting her apart with an ax.[68] Yet his

[61] *The Blaireau*, 6 U.S. at 255; *see also* Deposition of Charles Christie, *supra* at n.3.
[62] *Id*.
[63] *Id*. at 267.
[64] *Id*. at 268.
[65] *The Blaireau*, 6 U.S. at 268.
[66] *Id*.
[67] Deposition of Christie, *supra* at n.3; Deposition of William Stephenson, Maryland Archives, File labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage."
[68] *Id*.

antics were limited to moments when he was drunk, and otherwise the men seemed to get along well with him.

The claimants argued that Toole was not entitled to salvage at all.[69] He was paid to support the ship, and if the Court awarded him for saving her from trouble, it was motivating him – and others like him – to create trouble in order to get a reward for salvage.[70] He saved the ship to save his own life, since he was forced to stay.[71] The claimants said he would still receive wages, and that was sufficient. The salvors, on the other hand, said that Toole was no longer a mariner of the *Blaireau* once his captain and crew abandoned him.[72] The Court agreed with the salvors and upheld Toole's award, under principles of sound policy. The Court soundly rejected an argument that would deny Toole salvage after being completely abandoned to die on a sinking ship.[73]

c. Whether the Owner and Freighters of the Firm Should Get More than One-Ninth Salvage

The debate between owners of the ship and the owners of the cargo rested on whether the aid to the *Blaireau* constituted a deviation. If so, the freighters were liable for any problems that subsequently arose, and should therefore receive a higher salvage award.[74] If not, the owners had the greater risk, and should receive a greater salvage. Ironically, both parties were arguing that they were more liable as a result of helping the *Blaireau* – where normally parties argue to avoid

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[69] *The Blaireau*, 6 U.S. at 249.
[70] *Id*. at 252-53.
[71] *Id*.
[72] *Id*. at 255.
[73] *The Blaireau*, 6 U.S. at 270.
[74] *Id*. at 256.

liability, in this case increased risk meant increased reward. The Court sided with the owners of the ship, to encourage owners to allow "their captains to save those found in distress at sea."[75]

d. Whether William Mason May Collect Salvage

Mason argued that the courts of admiralty had no jurisdiction over a crime or tort of embezzlement, and therefore his embezzlement should not be counted against his efforts to save the *Blaireau*.[76] He sought salvage under the theory of quantum meruit, independent of other actions.[77] Further, he said the *Firm* needed his permission to save the *Blaireau*, so he was critical in the salvage.[78] And finally, refusing salvage and punishing him for embezzlement with a fine was double punishment and unjust.[79]

The response, by an unnamed party, was first, that Mason's argument rested on the embezzlement taking place on land, but it almost certainly took place at sea.[80] Even so, the court could weigh "demerit" as well as "merit" in deciding salvage.[81] Secondly, salvors have to be trustworthy. They cannot save something and then destroy it without being liable to the owners, and being in the category of pirates instead of salvors.[82] The Court affirmed the Circuit Court's refusal to grant Mason salvage, again resting on public policy more than legal precedent. Marshall said the principle of salvage was to encourage good upright behavior, "highly meritorious" actions.[83] He refused to reward a man who followed upright behavior with theft.

A Brief History of the Law of Nations and Maritime Law

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[75] *Id*. at 269.
[76] *Id*. at 260.
[77] *Id*. at 258-59.
[78] *Id*. at 259.
[79] *Id*. at 260
[80] *The Blaireau*, 6 U.S. at 260.
[81] *Id*.
[82] *Id*. at 261.
[83] *Id*. at 266.

The Law of Nations, specifically regarding maritime law, goes back at least centuries.[84] One of the earliest compilations traced directly to British and Western European law was the Law of Oleron. The Law of Oleron, or Rules of Oleron, was written in the thirteenth century after Duchess Eleonor (Eleanor of Aquitaine) returned from the Second Crusade on the Holy Land.[85] Impressed by the admiralty law in Jerusalem, either she or her son had it written in Oleron, in the southwest region of France then known as Guienne, where she lived.[86] Eleonor's son was King Richard I of England, and he had the "Rolls of Oléron" translated into English and unofficially incorporated into English maritime law.[87] In 1266 the British officially promulgated the Law of Oleron.[88] Supporters of the Law of Wisbuy assert that it is an even older maritime law. Rooted in the city of Wisbuy on an ancient island in the Baltic Sea, many of the law's provisions are identical to the Law of Oleron, and some assert that Oleron predated Wisbuy.[89] The Supreme Court has referenced both in interpreting admiralty law.[90]

At the time the *Blaireau* was salvaged, the United States admiralty courts allowed salvage amounts to vary at the judge's discretion, based on the facts of the specific case.[91] England usually honored a rule of reciprocation: it generally honored the other nation's law or policy for the amount awarded, as a percentage of the ship and cargo's total value.[92] French awards varied on a case-by-case basis, but France had a statutory maximum salvage of one-third

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[84] Gordon L. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 Tul. L. Rev. 1065, 1068 (1982-83).
[85] *Id*. at 1070.
[86] *Id*.
[87] *Id.*
[88] Laws of Oleron, Bouvier's Law Dictionary, 1856, available at http://www.constitution.org/bouv/bouvier_l.htm.
[89] *Id*.
[90] See *Vaughan v. Atkinson, et al.*, 369 U.S. 527 (1962); *see also The Troop,* 118 F. 769 (D. Wash. 1902); *Harden v. Gordon*, 11 F.Cas. 480 (Cir. Ct. D. Maine 1823).
[91] *The Blaireau*, 6 U.S. at 242, 267.
[92] *Id*. at 268.

the ship and cargo's total value.[93] Both those nations' laws were relevant since the case primarily involved French and British citizens, with only two Americans.

Jurisdiction

One of *The Blaireau*'s most significant contributions to United States admiralty law was, ironically, the Court's holding that it had jurisdiction to hear a case between foreign parties. Chief Justice Marshall took a scant paragraph to matter-of-factly find jurisdiction, stating that "those [considerations] in favour of the jurisdiction, appear much to overbalance those against it, and…there ought to be [no doubts] where the parties assent to it."[94] In spite of his quick and shallow treatment of the question, the case became a benchmark for United States courts in admiralty to take jurisdiction of similar cases.

Although it seems unusual, Marshall simply adopted an international admiralty law tradition. In his argument to the Court, Luther Martin noted the British case of *The Two Friends*.[95] There, the crew of an American ship recaptured their ship from French prize-takers, and brought it into Britain – the crew of the American ship was all British.[96] This raised a question of jurisdiction. But Sir William Scott held that he had jurisdiction, not only in the present case where the crew was British, but also had the crew been American, because "salvage is a question of the *jus gentium*."[97] As an issue decided with "sound discretion," based on "general principles," Sir William Scott found "no reason why one country should be afraid to trust to the equity of the courts of another on such a question[.]"[98] In *The Blaireau*, Marshall

[93] *Id*. at 267-68.
[94] *The Blaireau*, 6 U.S. at 264.
[95] *Id*. at 248-49.
[96] 1 C.Rob. 271 (1799).
[97] *Id*. at 278.
[98] *Id*. at 279.

reciprocated Scott's gesture by taking jurisdiction, and his decision became engrained in American admiralty law.

The Court continued affirming its power to hear cases in admiralty between foreign parties, and in fact the rule stands today. The year after *The Blaireau*, the Court saw a case raising the exact same jurisdictional question.[99] Although it dismissed the writ of error without ruling because of a technicality, the Court ended the brief opinion by citing its decision in *The Blaireau*.[100]

In 1885, the Court affirmed *The Blaireau* with a more thorough analysis of the jurisdiction question, in a case called *The Belgenland*, which is worth exploring briefly.[101] In *The Belgenland*, Justice Bradley specified that a court must have jurisdiction of the ship for an in rem proceeding, and identified situations in which the District Court should not take jurisdiction.[102] For example, a trial court should use its discretion not to take a case if: the parties can easily take the case to their own country; they agreed to limit action to that country; or there is a treaty between the United States and the other nation giving jurisdiction to the consul.[103] In other cases – like crewmembers' suits for wages – the trial court may ask the country's consul for permission before proceeding, because of convenience or to keep international "comity."[104] However, the Supreme Court distinguished cases in admiralty that arise under the common law of nations, such as salvage; there, courts should exercise jurisdiction unless "special grounds

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[99] Bailiff v. Tipping, 6 U.S. 406 (1805); *see also Piquignot v. Pennsylvania Railroad Company*, 57 U.S. 104, 106 (1854)(citing *The Blaireau* for the settled decision that the U.S. will hear cases between aliens "if none of them object to [jurisdiction]); *The Jerusalem*, 13 F. Cas. 559, 562 (Cir. Ct. D. Mass. 1814)(Story, J., referencing *The Blaireau* with approval for the rule that any court can hear salvage cases because they are a question of *jus gentium*).
[100] *Id*.
[101] *The Belgenland*, 114 U.S. 355 (1885).
[102] *The Belgenland*, 114 U.S. at 362-63.
[103] *Id*. at 363, 364.
[104] *Id*.

should appear to induce the court to deny its aid" – and as long as there is "jurisdiction of the ship or party charged."[105]

The Court quoted British cases from 1839 and 1859 with the same holding.[106] In the latter case, the British court said, "[I]t has been the practice of this country, and…of the European states and of the United States of America, to allow a party…to proceed *in rem* against the ship wherever found[.]"[107] While the British court was ruling on a collision case, the same principles applied to salvage.[108] Justice Bradley went on to note the special expedience of taking a case between foreigners who are themselves from different nations:

> Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is preeminently one *communis juris*, and and [sic] can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to wich [sic] the litigants belong.[109]

The Supreme Court further clarified the law into the Twentieth Century.[110] Eventually, the question of jurisdiction between foreigners in admiralty merged with the doctrine of *forum non conveniens*.[111] The issue became less common and the courts seem more likely over time to decline jurisdiction in cases where they had discretion to do so; but undoubtedly *The Blaireau* laid important groundwork to have the conversation in the United States to begin with.

The Slave Boy Tom

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[105] *Id*. at 365.
[106] *Id*. at 366-67, (quoting *The Johann Friederich*, 1 Wm. Rob. 35; *The Griefswald*, Swab 430).
[107] *The Belgenland*, 114 U.S. at 367 (quoting *The Griefswald*).
[108] *Id*. at 368.
[109] *The Belgenland*, 114 U.S. at 369.
[110] 285 U.S. 413, 420 n.1 (1932)(The District Court has discretion over whether it takes jurisdiction of a case between foreigners, but it should deny jurisdiction where "justice would as well be done…in the home forum" (internal citations omitted).).
[111] *See American Dredging Co. v. Miller*, 510 U.S. 443, 449-50 (1994); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d. 943, 960 (4th Cir. 1999).

The case of Tom presents interesting questions, although they are mostly questions of verbiage. The District Court issued its ruling on July 14, 1803, ordering Tom's salvage award to be held by the court for his master.[112] On October 18, Reverend John Ireland wrote a letter from England authorizing Lewis Atterbury and Reverend Joseph Grove John Bend to act on his behalf as his attorneys in Baltimore.[113] Ireland instructed his attorneys to collect the full amount of Tom's award.[114] In a letter dated December 20, 1803, Atterbury and Bend restate their authority to take the full amount awarded to Tom on behalf of Ireland, as Tom's owner.[115] Yet they immediately go on to say Rev. Ireland agrees to free Tom and pay him one-fifth of the salvage award, and they will take the other four-fifths on Ireland's behalf.[116] The Circuit Court approved the agreement one week later, and the Supreme Court affirmed.

Both Ireland's attorneys and the court used language to the effect that Ireland, as Tom's owner, was the one entitled to Tom's money. Yet if that were the case, Ireland's agreement to both free Tom *and* give him two hundred dollars – in 1803 – seems extremely generous, and the generosity is completely unexplained. On the other hand, if the Circuit Court believed the money truly belonged to Tom, it makes much more sense that Tom would pay, and Rev. Ireland would accept, eight hundred dollars for Tom's freedom. Although the language leans toward the former interpretation, most contemporary legal decisions support the latter.

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[112] *Id*. at 242, 244.

[113] Rev. John Ireland, letter dated Oct.13, 1803, p.2, Maryland Archives, File Labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage," Available at: http://www.editonline.us/cgi/viewTranscript.php?pdfFile=http://www.mdhistory.net/nara_rg21/nara_rg21_24m127/pdf/nara_rg21_24m127-0258.pdf&viewDir=horz

[114] Letter of John Ireland, *supra* at n.93. Note Rev. Ireland said the award was an even one thousand dollars, although Judge Winchester actually gave Tom just over $1,100 (*The Blaireau*, 6 U.S. at 244).

[115] *Id*.

[116] *Id*.

As an initial matter, Great Britain did not allow slavery at all by 1803, yet Tom was the slave of a British resident.[117] The Circuit court describes Rev. Ireland as "late of this state, but now of the united kingdom [sic] of *Great Britain* and *Ireland*[,]"[118] so it is possible he owned Tom as an American and then brought Tom with him to England. The law regarding a slave's freedom once he reached England was somewhat less certain than the general ban on slavery. Yet even if Tom was legally Rev. Ireland's slave in England, under the law of salvage the money still should have belonged fully to Tom.[119] Without any more details about what drove the Court's decision, any guess is simply that – a guess. Perhaps the reasons are political. The Court was able to give Tom his freedom, give Rev. Ireland money, and avoid discussing whether a slave in the new United States could collect salvage money. Instead, Marshall simply affirmed a good solution and moved on to answer other questions. Very few cases cite *The Blaireau* for its ruling on the slave boy Tom, and none treat it as especially note-worthy on this subject.[120]

A Memorial to the United States Senate

In 1828, Peter Guestier (sometimes misspelled Gustier) filed a Memorial and Argument to the United States Senate seeking reimbursement for duties paid when the *Blaireau* entered Baltimore as a salvaged ship twenty-five years earlier.[121] Most legislation passed by the United

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[117] W. Blackstone, *Commentaries on the Laws of England*, Vol. 1 Ch. 14 (1765-1769) (although Blackstone notes that slaves may still be bound to serve their masters, as the relationship is similar to that of master and apprentice).

[118] *The Blaireau*, 6 U.S. at 247 (emphasis in original).

[119] *Small v. The Messenger*, 22 F.Cas. 366 (Dist. Ct. Penn. 1807). Although this was a lower-court decision after *The Blaireau*, it is representative of the law around the time of the decision.

[120] *See Browning v. Baker*, 4 F.Cas. 453, 458 (citing *The Blaireau* for the proposition that anyone, including a slave, may be awarded salvage); *but see Gourdin v. West*, 11 Rich. 288, 296 (Ct. App. Law S. Car. 1858)(Noting *The Blaireau* gave salvage to a slave, but held it for the master, in a decision granting salvage to a slave's hirer rather than his owner.); *The Sybil*, 9 F.Cas. 141, 147-48 (Cir. Ct., Dist. S. Car. 1816)(refusing to grant a runaway slave his share of salvage, and only citing *The Blaireau* for its salvage amount and granting salvage to Toole).

[121] David Hoffman. *Memorial and argument in the case of the Ship Blaireau, praying a return of tonnage and duties erroneously paid in 1803: Addressed to the Senate of the United States.* Baltimore: Printed by J.D. Toy, 1826. Shaw 33573; Bib. of Early American Law 14995 (http://www.law.umaryland.edu/marshall/hoffman/blaireau.html) accessed Nov. 19, 2013.

States Congress, signed by the President, and implemented as law is public law. It applies to everyone, or to certain large groups of people.[122] Private laws, however, are specific to one person; today individuals most commonly seek private laws for solutions to immigration-related problems.[123] A private law is a last-resort solution if other avenues do not yield the desired results.

A Maryland citizen acting on behalf of the ship's French former owners, Guestier hired famous Maryland attorney and founder of the University of Maryland Carey Law School David Hoffman to represent him to the Senate.[124] Mr. Guestier wanted the Senate to pass a private bill ordering the Treasury to pay $7,054.05 to the *Blaireau*'s former owners.[125] Some details in Guestier's memorial varied slightly from those in the Cranch Reporter, and more significantly, the depositions of Toole and the *Firm* crew – he said the *Blaireau* was damaged on March 13th, not the 30th.[126] He also called the Spanish ship the *San Julien* instead of the *St. Julien*.[127] Mistaken details notwithstanding, Guestier recounted the *Blaireau*'s misfortune, the *Firm*'s salvage, and the entry into Baltimore. He then emphasized that there was no duty because the *Blaireau* was in Baltimore involuntarily as a result of the salvage. According to Guestier, even the collectors and the comptroller agreed there should not have been any duty payment.[128] But the marshal, Reuben Etting, did collect duties.

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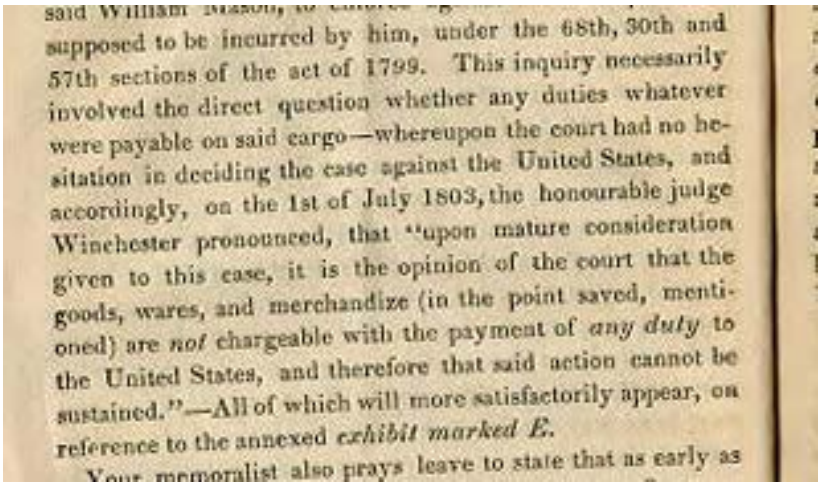
[122] Legislation, Laws, and Acts; Legislative Process, United States Senate, http://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last viewed 1/7/2014).
[123] *Id*.
[124] David Hoffman. Memorial and argument in the case of the Ship Blaireau, praying a return of tonnage and duties erroneously paid in 1803: Addressed to the Senate of the United States. Baltimore: Printed by J.D. Toy, 1826. Shaw 33573; Bib. of Early American Law 14995; 7.
[125] Hoffman, Memorial, *supra* n.97, at 5.
[126] Hoffman, Memorial, *supra* n.97 at 3.
[127] Hoffman, Memorial, *supra* n.97 at 3
[128] Hoffman, Memorial, *supra* n.97 at 5.

Etting sold the ship and cargo almost immediately after the District Court ruled on the salvage, rather than waiting for anyone to claim the *Blaireau,* for a gross sale of $62,816.43.[129] From that, Etting gave $12,112.58 in tonnage and duties.[130] Combined with the salvage award, only $22,424.60 remained for the owners of the *Blaireau* and her cargo. The duty payment apparently went quickly to the United States Treasury, even though the collector was reluctant to even accept it.[131] However, the owners did get $5,058.53 back, for goods immediately exported back out of the country, leaving the $7,000 figure.[132] The memorial references attached exhibits, which were not found in the course of research for this paper, to support its claims.[133]


said William Mason, to [illegible]
supposed to be incurred by him, under the 68th, 30th and 57th sections of the act of 1799. This inquiry necessarily involved the direct question whether any duties whatever were payable on said cargo—whereupon the court had no hesitation in deciding the case against the United States, and accordingly, on the 1st of July 1803, the honourable judge Winchester pronounced, that "upon mature consideration given to this case, it is the opinion of the court that the goods, wares, and merchandize (in the point saved, mentioned) are *not* chargeable with the payment of *any duty* to the United States, and therefore that said action cannot be sustained."—All of which will more satisfactorily appear, on reference to the annexed *exhibit marked E.*
Your memoralist also prays leave to state that as early as

The strongest support came from Judge Winchester himself. In a ruling dealing with the effects of William Mason's embezzling, Judge Winchester made the statement seen in a copy of the memorial itself: "[U]pon mature consideration given to this case, it is the opinion of the court that the goods, wares, and merchandize [*sic*] (in the point saved, mentioned) are *not* chargeable with the payment of *any duty* to the United States, and therefore that said action cannot be

[129] Hoffman, Memorial, *supra* n.97 at 4.
[130] *Id.*
[131] Hoffman, Memorial, *supra* n.97 at 5.
[132] Hoffman, Memorial, *supra* n.97 at 5; *see also* Statement of Proctors Z. Hollingsworth, T. Chase, T.G. Harper, J. Purviance, & S. Chase, Jr. on Behalf of Libellants, Maryland Archives, File labeled "{William Mason Charles Christie} et al v. Ship La Blaireau + Cargo, 1803, Salvage," Available at: http://www.editonline.us/cgi/viewTranscript.php?pdfFile=http://www.mdhistory.net/nara_rg21/nara_rg21_24m127/pdf/nara_rg21_24m127-0213.pdf&viewDir=horz
[133] Hoffman, Memorial, *supra* n.97 at 5-6.

sustained."[134] But by that time, the marshal had already withheld duty, and reversing the process was not as straightforward.[135]

Guestier took up the case to right the marshal's decision almost immediately in 1803, but he cited illness, international travel, and other difficulties as reasons for not seeing the process completely through.[136] There is no evidence regarding what took place around 1828 to make Guestier re-open the issue, but the memorial exudes confidence that his cause is just and right, and he has evidence to prove it.[137] Perhaps a piece of evidence was missing until then. Or perhaps a bad relationship spurred the French owners to revisit an issue a quarter-century old so they could make the United States pay $7,000. It could be the corporation was failing and wanted whatever sums might help it. Whatever the reason, David Hoffman filed the memorial in 1828.

The Judiciary Committee sent an answer. On January 29, 1829, the committee rejected every claim and ordered that Guestier was allowed to withdraw his petition.[138] And so, twenty-six years after a small but valuable merchant ship crushed its bow against a ship of war in pitch darkness in the middle of the Atlantic Ocean, the relationship between the *Blaireau* and the United States government quietly ended.

Conclusion

The case of *Mason v. The Blaireau* was an important opportunity for a young Supreme Court to interpret and clarify the United States position on international salvage law questions. In addition to jurisdiction over foreigners, slavery, and whether to accept the *jus gentium* in admiralty, the Court influenced future decisions on several other issues. They included: that

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[134] Hoffman, Memorial, *supra* n.97 at 4 (emphasis in original).
[135] *Id*.
[136] Hoffman, Memorial, *supra* n.97 at 6.
[137] *Id*.
[138] Report of the Senate Judiciary Committee, Jan. 29, 1829, available at: http://www.law.umaryland.edu/marshall/hoffman/blaireauresp.html.

embezzlement disqualifies a salvor from receiving salvage;[139] that salvors may receive salvage in the course of their duties under extreme circumstances;[140] that salvage, while under a judge's discretion, will only reach two-fifths of a ship and cargo's value when there is great danger involved;[141] that ship owners need to receive enough salvage that they are motivated to allow their crews to offer help on the high seas;[142] and that abandoning a ship ends a contract.[143]

In 1803, the story of the ship *Blaireau* merged with the story of the ship *Firm*. As a result, many facets of United States salvage law received analysis, clarification, and direction. Almost three decades later, the United States Senate flatly rejected attempts to reopen the case for unfinished financial claims. And nearly two hundred years after that, the case lead to an exploration of slavery, the law of nations, and the right of United States citizens to request private laws from their government. It was a small ship, but the *Blaireau* had a big impact.

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[139] *See The Mulhouse*, 17 F.Cas. 962, 965 (Dist Ct. S.D. Fla. 1859); *The Leander*, 9 F.Cas. 275 (Dist Ct. S.C. 1808);
[140] *See Hobart v. Drogan*, 35 U.S. 108 (1836) (awarding salvage to pilots who were no longer performing their official work as pilots); *The Sybil*, 9 F.Cas. 141, 146-47 (Cir. Ct. S.C. 1816).
[141] *The Connemara*, 108 U.S. 352, 359 (1883).
[142] *The Camanche*, 75 U.S. 448,472-73 & n.39 (1869)(Referencing *The Blaireau* in stating ship owners are allowed to take as salvors when their vessels are involved in salvage.)
[143] *The Eliza Lines*, 199 U.S. 119, 127 (1905).

APPENDIX A: Salvage Awards by Court

Table 1. Salvage Awards by the District Court, Winchester; Circuit Court, Chase; Supreme Court, Marshall			
SALVOR	**DISTRICT COURT: 3/5 NET PROCEEDS SHIP & CARGO**	**CIRCUIT COURT**	**SUPREME COURT: TOTAL REDUCED TO 2/5, OR $21, 400**
Owners of the *Firm* and cargo	4,018 dollars & 14.75 cents, divided between them as follows:	(Not explicitly stated - added from two rows below): $4,018.17 [324.24]	1/3 of the whole, divided in the ratios from the District Court – 18:4: $7,133.33
Owners of the *Firm*	Approximately $3,287.65	John Jackson, owner: $2,870.12 and 8 dimes	Approximately $5,836.36
Owners of the cargo	Approximately $730.50	C. B. Young & C. Christie, owners: $1,148.05	Approximately $1,296.97
Men on Board the *Blaireau*			**Same proportions as the Circuit Court used**
William Stevenson [sic], mate; and Charles Christie, supercargo, charterer, and owner of cargo	3,403 dollars & 63.25 cents each	William Stevenson: $2,269.08 and 9 dimes	Stevenson: Circuit Court amount confirmed. His award is reduced to that of "common mariner" because his actions around the embezzling were so suspicious. Christie: same as other seamen
John Brown Hall [sic], John Willson, and Thomas Toole	2,269 dollars & 98.75 cents each		
John Moat, apprentice on the *Blaireau*; and the owner(s) of Negro Tom	1,134 dollars & 54.75 cents each	Tom's salvage paid to Rev. John Ireland of Great Britain, or to his attorneys Rev. Joseph G.I. Bend & Lewis Atterbury – 4/5 to the attorneys, and 1/5 held by the clerk will go to Tom himself, along with his freedom	
Men on Board the *Firm*			
John Blackford, second mate; and John Falconer,	1,890 dollars & 90.75 cents each		

carpenter			
George Glass, cook; and John McMon, apprentice	1,756 dollars & 36.75 cents each		
Daniel Ross, Samuel Monk, Martin Burk, Mark Catlin, and Joachim Daysontas [sic], sailors	1,512 dollars & 73 cents each		
William Mason, master	No reward	No reward, but pays costs on appeal	No reward

APPENDIX B: Biography of Captain Reuben Etting

[Reuben Etting, 1794, by James Peale. Painting with watercolor on ivory. Property of the Pennsylvania Academy of the Fine Arts, accession number 1886.1.5, at http://www.pafa.org/museum/The-Collection-Greenfield-American-Art-Resource/Tour-the-Collection/Category/Collection-Detail/985/mkey--1618/nameid--524/).]

Introductory Page

Captain Reuben Etting, Marshal (1762-1848) b. York, PA d. Philadelphia, PA

1793-1798 Lieutenant in the military group Sans Culottes, later part of the Revolutionary Army

1798-1801 The first Captain of the Independent Blues (formerly the Sans Culottes)

1801-1804 US Marshal for Maryland, appointed by Thomas Jefferson

Biography

Reuben Etting was the son of Elijah and Shinah Etting, and part of one of Baltimore's first and most prominent Jewish families. The family was also important in Philadelphia. Reuben married Frances and had seven children, five boys and two girls.

Born in York Town, Pennsylvania, he probably moved to Baltimore around 1793, living on East Street (present-day Fayette Street) between Calvert and Gay Streets. He subsequently joined the military group the Sans Culottes as a lieutenant. In 1798, the Sans Culottes became the Independent Blues, part of the Revolutionary Army, and Etting was named Captain. The Independent Blues marched to Pennsylvania to help quash the Whiskey Boy Insurrection. It was a substantial corps, eventually part of the Fifth Regiment of Maryland Militia.

In 1801, Thomas Jefferson appointed Etting as United States Marshal for Maryland, at which point he lived at North Gay Street. One source says Etting helped defend Baltimore against the British in 1814.

Etting eventually moved to Philadelphia, where he died in 1848 just three days before his eighty-sixth birthday.

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Related Collections

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