76/95

Case No 533/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

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| MARCARD STEIN & COMPANY . . . . | Appellant |
| versus | |
| PORT MARINE CONTRACTORS (PROPRIETARY) LIMITED . . . . . | First Respondent |
| DORBYL LIMITED . . . . . | Second Respondent |
| NATSHIP MARINE SUPPLIERS (DURBAN) (PROPRIETARY) LIMITED | Third Respondent |
| TEXACO LIMITED . . . . . | Fourth Respondent |
| ELLERMAN & BUCKNELL (PROPRIETARY) LIMITED . . . . . | Fifth Respondent |
| GULF & CONTINENTAL BUNKER FUELS COMPANY LIMITED . . . . . | Sixth Respondent |
| THE FUND CREATED BY THE SALE OF THE M V "VICKY" (formerly the m v "GULF TRADER"). . . . . | Seventh Respondent |

CORAM: CORBETT CJ, BOTHA, NESTADT, NIENABER *et* MARAIS JJA.

DATE OF HEARING: 22 May 1995

DATE OF JUDGMENT: 1 June 1995

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**J U D G M E N T**

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/ CORBETT CJ: . . . . .

CORBETT CJ:

This appeal raises the interesting and important question, where laws conflict, as to which system of law governs the transfer of the ownership of a ship. The question arises in this way.

On 20 May 1992 a corporation known as London Steamship Owners Mutual Insurance Association Ltd ("London Steamship") caused the m v "Gulf Trader" to be arrested, while she was berthed in the East London harbour, in pursuance of an action *in rem* instituted by London Steamship for payment of the sum of US$ 870 048,89 in respect of some (unspecified) maritime claim. (The name of the vessel was subsequently changed to the m v "Vicky", but I shall continue to refer to her as the "Gulf Trader".) On 23 May 1992 the "Gulf Trader" was again arrested *in rem* at the instance of Gulf & Continental Bunker Fuels Co Ltd ("Gulf & Continental") in an action for the recovery of US$ 35 625,00 for the supply of bunkers during April 1992. The "Gulf Trader" was released from the first

arrest in mid-July, but the second arrest remained in place until the vessel was sold by public auction in terms of an order of the Eastern Cape Division, exercising its admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 . The sale took place on 29 September 1992 and the vessel realised the sum of US$ 800 000,00. And on 22 October 1992 the same Court (which is also the Court *a quo*) made an order appointing a referee and making provision for his powers and functions in respect of the fund constituted by the proceeds of the sale.

The referee completed his report on 18 March 1993. It records that a number of creditors proved claims against the fund, including a German bank, Marcard Stein & Co ("Marcard Stein"). Marcard Stein submitted a claim and an alternative claim. The claim was based upon a cession to it of the aforementioned claim of London Steamship. The alternative claim was based upon a mortgage bond registered over the vessel in favour of Marcard Stein for US$ 16,5

million on 1 June 1992. Marcard Stein also objected to the claims of various other creditors on the ground that on 29 May 1992 the then owner of the "Gulf Trader", Verena Shipping Company ("Verena"), sold the vessel by bill of sale executed in London to Alvo Shipping Company Limited ("Alvo"). The objector further alleged that Alvo had taken delivery of the vessel and that registration of the sale had taken place in the registry of Bahamian ships, maintained in London, on 1 June 1992. On the basis of this sale Marcard Stein objected to the claims of all claimants who had not instituted an action *in rem* against the vessel prior to 29 May 1992 or who did not have a maritime lien over the vessel.

The referee confessed that he was unable to deal with the issues arising from this alleged sale and delivery of the vessel and suggested that a ruling by the Court be obtained thereon. This resulted in six of the creditors who had proved claims against the fund making application to the Court *a quo* for an order, *inter alia*, that the

sums claimed by them respectively be paid to them from the fund. Of the six applicants only one, viz Gulf & Continental (the sixth applicant below) had arrested the vessel *in rem* prior to the sale; and none of them enjoyed a maritime lien in respect of its claim. The fund was cited as respondent. Marcard Stein intervened and repeated its objection to the claims of the first five applicants and save for the claim of the sixth applicant (Gulf & Continental) prayed that the application be dismissed and that the first five applicants pay the costs thereof.

The matter came before Kroon J in the Court *a quo*. He held that the applicants had made out a case for the relief which they sought and made an order granting it. With the leave of the Judge *a quo*, Marcard Stein now appeals to this Court, seeking a reversal of the decision of the Court *a quo* and citing as respondents the six applicants below and the fund. No order is asked for as against the sixth applicant (now sixth respondent).

Before us it was common cause that the case hinged on two basic questions, viz:

(a) whether in law the execution of the bill of sale on 29 May 1992 by itself (i e without delivery) resulted in the ownership of (or property in) the "Gulf Trader" passing from Verena to Alvo; and

(b) assuming the answer to (a) to be in the negative and some form of delivery to be required, whether this in fact took place.

It was further common cause that if both questions were to be answered in the negative, then the objection to the claims of the first five respondents and the appeal should fail; whereas if either question were to be answered in the affirmative, the objection and the appeal should be upheld. I shall deal with these questions in turn.

PASSING OF OWNERSHIP (OR PROPERTY)

It is a fundamental principle of our common law that ownership in corporeal movable property cannot pass by virtue of a contract of sale alone: there must, in addition, be at least proper delivery of the contract goods to the purchaser (see Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others 1976 (4) SA 464 (A), at 489H - 490A). When, however, a South African court exercises its admiralty jurisdiction in terms of the Act in a case such as this, it is required to apply English admiralty law, including the relevant principles of English private international law (see Transol Bunker BV v M V Andrico Unity and Others; Grecian-Mar SRL v M V Andrico Unity and Others 1989 (4) SA 325 (A), at 334C - 336B). Upon this there was no dispute between the parties. They were also agreed that in terms of English domestic law a ship is regarded as a personal chattel and that the bill of sale, duly sealed, signed and delivered, would have caused the property in the vessel to

pass to the purchaser ; delivery was not necessary. It also appears that the law of the Commonwealth of the Bahamas, which generally applies English law, is to the same effect. The relevance of this arises from the fact that prior to the sale of the vessel on 29 May 1992, it was apparently registered in the Bahamas and flew the Bahamian flag. Moreover, the bill of sale indicates that the sale was registered by the registrar of Bahamian ships in London at "3:50 pm" on 1 June 1992. I might add, incidentally, that the mortgage of the ship in favour of Marcard Stein was registered in that registry at 3:55 pm on the same day, i e 5 minutes later.

It is today an established general principle of English private international law that the proper law governing the transfer of corporeal movable property is the *lex situs*, ie the law of the place where the property is to be found at the time of the transaction in question (see Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd [1966] 1 All ER 309 (CA), at 338 I - *per*

Diplock LJ; Winkworth v Christie, Manson & Woods Ltd and another [1980] 1 All ER 1121 (Ch D), at 1125j - 1126g; Dicey and Morris, The Conflict of Laws, 11 ed, at 942-6; Cheshire and North's Private International Law 12 ed, at 798-800; Halsbury's Laws of England, 4 ed, vol 8, paras 657, 632). The illustration of this general principle chosen by Diplock LJ in the Hardwick case, *supra*, is particularly apposite in this matter. He said (at pp 338 I - 339 A):

> "The proper law governing the transfer of corporeal movable property is the lex situs. A contract made in England and governed by English law for the sale of specific goods situated in Germany, although it would be effective to pass the property in the goods at the moment the contract was made if the goods were situate in England, would not have that effect if under German law (as I believe to be the case) delivery of the goods was required in order to transfer the property in them. This can only be because the property passes at the place where the goods themselves are."

In oral argument before us (as distinct from his heads of

argument) appellant's counsel, Mr Gordon, accepted that this was the established general principle of English private international law. And he conceded that if the *lex situs* (South African law) were to be applied in this case delivery, in one of its various forms, would have been a *sine qua non* to the passing of ownership in the "Gulf Trader" as between Verena and Alvo. He argued, however, that this general principle was subject to exceptions, one of them being the case of the transfer of ownership in a ship sold by one person to another. In such a case, he submitted, the transference of ownership would, in terms of English principles of private international law relating to choice of law, be governed by the so-called "law of the flag", i e the law of the place where the ship was registered, which in this case was Bahamian law.

There is a singular dearth of authority on this point in English law. Counsel were not able to refer us to any decided case dealing with the passing of ownership in a ship where the sale was

concluded in England at a time when the ship was located within a foreign jurisdiction. In fact the only case quoted which involved a ship was The Trustees Executors and Agency Co Ltd and others v Inland Revenue Commissioners [1973] 1 All ER 563 (Ch D). This case was concerned with the incidence of estate duty and more particularly with the question whether a yacht which the deceased had owned was at the date of his death "property . . . situate out of Great Britain". The yacht's port of registry was in the island of Jersey. During his lifetime the deceased had made annual cruises of about two months duration. Otherwise the yacht was ordinarily kept in a yard in Southampton and was there at the date of the death of the deceased. In dealing with the question at issue Pennycuick V-C stated the following (at 565 c-d):

> "There is no doubt that the yacht was physically situate in Great Britain at the death of the testator. Equally, in case that should be relevant, there is no doubt that it was not there for some merely temporary purpose. *I should*

> *mention at the outset that admittedly a ship does not, for the general purposes of the law, possess an artificial local situation, e g a situation dependent on its port of registry.* For the purposes of the general law, a ship situate locally in England is treated as indeed possessing that local situation. Contrast the position of choses in action, such as shares in a company, which have no actual local situation and to which, accordingly, an artificial local situation has to be attributed."
> (My emphasis.)

The learned Vice-Chancellor held on the facts before him that the yacht in question was property not situate out of Great Britain and was accordingly liable to estate duty.

The point is discussed in Dicey and Morris, *op cit*, at pages 907, 915, 942, 946-7. At page 942 the learned authors state the general rule as follows

> "RULE 119. - The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country

where the movable is at the time of the transfer (*lex situs*).

(1) A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England.

(2) Subject to the Exception hereinafter mentioned, a transfer of a tangible movable which is invalid or ineffective by the law of the country where the movable is at the time of the transfer is invalid or ineffective in England."

At pages 946-7 the exception referred to in Rule 119(2) is formulated and discussed:

"EXCEPTION. - If a tangible movable is in transit, and its *situs* is casual or not known, a transfer which is valid and effective by its proper law will (*semble*) be valid and effective in England.

COMMENT

The arguments in favour of Rule 119, that is, in favour of the *lex situs* as opposed to the proper law of the transfer, become least plausible when goods are in transit, *so that*

*their actual situs at any given moment is casual or temporary and not contemplated by or known to either party to the transfer.* In such a case it would be pedantic to insist that the transfer must comply with the requirements of the *lex situs* and can only receive such effect as the *lex situs* ascribes to it. Accordingly, it is thought that it would be sufficient if the transfer complies with the requirements of its proper law. It should be noted that this Exception has a somewhat limited scope. It is expressed in positive terms only, and does not assert that a transfer which is invalid or ineffective by its proper law will necessarily be treated as invalid or ineffective in England. Nor does it apply when the goods have come to rest at a definite stage in the transit, as when a ship is wrecked and the cargo is saved. *It is intended to apply only in cases where the goods are in transit and their situs is uncertain and unknown to the parties and the lex situs not within their contemplation. It does not apply to the means of transport, such as ships and aircraft. It may well be that the situs of a ship is deemed for some purposes at least to be at her port of registry and not at the place where she happens to be,* and a similar rule will no doubt be applied to aircraft."

(My emphasis.)

A footnote to the suggestion that the *situs* of a ship is deemed for

some purposes at least to be at her port of registry refers the reader to Rule 115(3), Exception 1 at p 915. Rule 115(3) itself (at p 907) states that, subject to exceptions "hereinafter mentioned", a chattel is situate in the country where it is at any given time. The first of these exceptions relates to ships and the exception and the comment thereon read as follows (at p 915-16):

> "EXCEPTION 1. - A merchant ship may at some times be deemed to be situate at her port of registry.
>
> COMMENT
>
> A ship is not like an ordinary personal chattel, and there are dicta indicating that a ship is situate in law at her port of registry and not where she is physically situate from time to time. This rule was adopted for a limited purpose by the legislature, and would seem to be both convenient and sound in principle when the vessel is upon the high seas. *Where, however, a vessel is within territorial or national waters the reasons for ascribing her a situs at her port of registry are not compelling, and the artificial situs is displaced by the actual situs.* Thus the English courts would not recognise the validity of a

> foreign government's interference with vessels wearing its flag present within English waters."
> (My emphasis.)

This passage from Dicey and Morris, as formulated (in virtually identical terms) in an earlier edition (the 8th), was quoted in full by Pennycuick V-C in The Trustees Executors and Agency Co Ltd and others v Inland Revenue Commissioners, *supra*, at 568 f-h, and the learned Vice-Chancellor commented (at 568 h):

> "For the reasons which I have given, I agree with the statement in the penultimate sentence of that comment, i e so far as a ship registered abroad and locally situate here is concerned, the artificial situs is displaced by the actual situs."

Halsbury, *op cit*, is generally to the same effect as Dicey and Morris (see paras 627, 631, 632, 638 and 657). See also Cheshire and North, *op cit*, pp 806-7.

It would seem that the main reasons for the choice by

English law of the *lex situs* to govern the transfer of ownership in movable property are, briefly, (i) that the rule refers the passing of ownership to the system of law pertaining to the jurisdiction which has effective power over the property in question; (ii) that the rule is normally simple to apply and makes for certainty in that it does not lead to multiple solutions since the property can only be in one place at a time; (iii) that it satisfies the expectations of the reasonable man, for a party to a transfer naturally concludes that the transaction will be subject to the law of the country in which the subject-matter is at present situated; (iv) that property passes at the place where the goods themselves are; and (v) that commercial convenience imperatively demands that proprietary rights to movables shall generally be determined by the *lex situs.* (See generally Dicey and Morris, *op cit,* pp 944-5; Cheshire and North, *op cit* pp 796, 797-800; In re Anziani. Herbert v Christopherson [1930] 1 Ch 407, at 420; the Hardwick case, *supra,* at 339 A; the Winkworth case, *supra,* at 1129 c-d, 1134

h - 1135 c.)

The reluctance of an English court to depart from, or allow exceptions to, the *lex situs* rule is illustrated by the Winkworth case, *supra*. The facts were that certain works of art were stolen from the plaintiff in England and subsequently taken to Italy where they were sold, without the knowledge of the plaintiff, by a third party to the second defendant. Thereafter the second defendant sent the goods to Christie's in England for sale by auction there. In the litigation which followed the Court was asked, on an agreed set of facts, to decide the preliminary issue as to whether English domestic law or Italian domestic law applied to determine whether the plaintiff or the second defendant had title to the goods. In terms of English domestic law the second defendant would probably not have acquired title to the stolen goods, whereas according to Italian domestic law he could, provided that certain requirements as to good faith, etc were satisfied. Despite the facts that at the time of the theft the goods

were in the ownership and lawful possession of a person domiciled in England, that that person (plaintiff) neither knew of nor consented to the removal of the goods from England, that the plaintiff did not know of or consent to the sale of the goods in Italy, and that the goods were back in England at the time of the proceedings before the English court, the Court adhered to and applied the rule of the the *lex situs*, i e the law of the place where the goods were at the time of the sale to second defendant.

In support of his argument that in this case an English court of admiralty would refer the question of the transfer of ownership in the "Gulf Trader" to the law of the flag, Mr Gordon cited Singh and Colinvaux, Shipowners, at pp 82-3 and Jackson, Enforcement of Maritime Claims, p 343. Singh and Colinvaux do, in truth, support the view that the law relating to the transfer of a ship and in general governing the property in a ship is the law of the flag, but cite no authority for this proposition. The work was published in

1967, i e prior to a number of the decisions referred to in this judgment, and it advances no convincing reasons for rejecting the authoritative views expressed by Dicey and Morris and Halsbury.

Jackson (at p 343) states the following:

> "It is likely that questions of ownership and mortgage of ships would be referred to the law of the flag, on the principle that a ship reflects the territory of the flag. In 1979 in *The Angel Bell* Donaldson, J, equated ships to land for the purpose of deciding on the law to govern a mortgage and applied the law of the flag. The reasoning applies with as much if not greater force to ownership. Even apart from the reasoning (which was that a ship was 'a floating piece of the nation whose flag it wears') it scarcely makes sense to refer questions of the validity and effect of proprietary transactions to the law of the place of a ship at the time of the transaction. It is commercially unrealistic to follow the general approach and link a transfer or creation of an interest to a *situs* when the transaction is between parties whose physical contact with the ship is probably minimal and the very purpose of the ship is that it continuously changes its *situs*. Further, the normal maritime framework for

ownership and mortgage is built on registration under the law of the flag and it would be contrary to the principle of uniformity to adopt a different reference point."

I am not sure that a decision concerning the proper law of a mortgage relating to a ship is relevant to the question as to the choice of law rule governing the transfer of ownership in a ship pursuant to a contract of sale. And I notice, in passing, that The Angel Bell is not referred to by Cheshire and North and is cited by Dicey and Morris only in connection with Mareva injunctions. The views of Professor Jackson merit careful consideration. On the whole, however, I prefer the views expressed in Dicey and Morris and Halsbury.

On behalf of the respondents Mr Wallis posited the case of the sale of a vessel registered in Liberia which, after the sale, is to be registered in the Bahamas. Assuming that the law of Liberia, unlike the law of the Bahamas, requires delivery for a valid transfer

of ownership, in terms of which law of the flag, he asked, would the question of ownership be decided, if the law of the flag is the governing system? When this hypothetical case was put to Mr Gordon he replied that the laws of both countries would have to be satisfied. I am not sure that such an hypothesis raises a real problem. It may be that the purchaser would first have to become owner of the vessel before he could effect a change in its registration (cf Halsbury, 4 ed, vol 43, para 166); but if the problem posed by Mr Wallis is a real one and the only answer is that supplied by Mr Gordon, then this is a further good reason for preferring the *lex situs*.

For these reasons I hold that a South African court, exercising its admiralty jurisdiction, should in general apply the principle of the *lex situs* in determining the passing of ownership in movable property when the case involves a foreign element and there is a potential conflict of laws. I might add that it would seem that a South African court exercising its ordinary jurisdiction would adopt

the same approach (see Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1980 (2) SA 175 (T), at 180 H; 1983 (1) SA 276 (A), at 294 D; 2 LAWSA (first reissue), par 456; Forsyth, Private International Law, 2 ed, pp 299-300). This general principle would apply also to the passing of ownership in a ship sold while located within the territory of a country, i e not on the high seas. In the present case the "Gulf Trader" was in East London harbour at the time of the sale (and had been there for at least some nine or ten days) and it must be inferred that the parties to the sale were at the time well aware of this fact. It is not necessary to decide what the position would be were a ship to be on the high seas at the relevant time. It follows that the question whether ownership in the "Gulf Trader" passed from Verena to Alvo must be determined by reference to the *lex situs* at the time of the transaction, viz South African law. As I have indicated our law requires delivery for the passing of ownership and consequently the execution of the bill of sale

did not by itself cause the property in the "Gulf Trader" to pass. Question (a) above must accordingly be answered in the negative. This was the conclusion reached by Kroon J.

DELIVERY

The second question is whether delivery of the "Gulf Trader" to Alvo is shown to have taken place. It was conceded by Mr Gordon that there was no evidence before the Court of actual delivery. He argued, however, mainly on the strength of certain documents which are part of the record, that there had been constructive delivery in the form known as *constitutum possessorium.* The requirements for this form of delivery were authoritatively stated by Jansen JA in the case of Mankowitz v Loewenthal 1982 (3) SA 758 (A) as follows (at 766 B-F):

"The absence of 'physical prehension' by the transferee

is, however, no obstacle to a delivery by way of *constitutum possessorium*. By agreeing to and intending thenceforth to hold the *res* on behalf of the transferee, the possessor ceases to possess and commences to hold as agent for the transferee, who, by intending to possess through the transferor, now becomes the possessor. The requisites for a *constitutum possessorium*, based on *Schorer* (*ad* De Groot's *Introduction*. 2. 48.28), are stated by SOLOMON JA in *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66 at 85 as follows:

> '(1) That the grantor be himself in possession of the things to be transfered: (2) that he cease to possess in his own name and begin to possess for another: (3) the consent of the grantee: and (4) some *causa* or *justus titulus*'.

For present purposes (2) and (3) are of crucial importance: there must be an agreement to the effect that the transferor henceforth holds on behalf of the transferee. This requires at least some external manifestation of the transferor's intention. A declaration by the transferor to

the following effect would make the matter clear: *quod meo nomine possideo, constituto me possidere alieno nomine,* or *constituo me possidere alieno nomine.* According to *Savigny* the intention

> 'must . . . necessarily be expressly declared, or necessarily follow from the other circumstances of the case'.

(On *Possession* s 29 - translation by *Kelleher.*) He states that a *constitutum* is not to be presumed and it is clear that he only infers the intention 'from the other circumstances of the case' where there is some other transaction entitling the transferor to remain a holder, eg where he 'gives a thing as a gift, and at the same time hires it'. (Cf Lauterbach *ad* D 41.2 s 18.) This is consonant with *Schorer* requiring a *causa* or *justus titulus* - *a causa detentionis* for the transferor. It is from the existence of this transaction that the transferor's intention to hold on behalf of the transferee is inferred."

(See also Bank Windhoek Bpk v Rajie en 'n Ander 1994 (1) SA 115 (A), at 144E - 145G.)

It is clear from this statement that it is essential for transfer by way of *constitutum possessorium* that there should be an agreement to the effect that the alleged transferor (in this case Verena) should henceforth hold the property in question on behalf of the transferee (Alvo).

There is no direct evidence on the papers of any such an agreement; but Mr Gordon asked us to infer it from the fact of the sale and from certain documents that were executed in connection therewith. The first of these documents was the minutes of the meeting of the directors of Verena held on 29 May 1992 at which, *inter alia*, it was resolved that the company execute a power of attorney authorising two directors of the company to act on behalf of the company -

> ". . . in such matter relating to attending documentary closing and giving physical delivery of the vessel in accordance with the agreement".

Thereafter the completed power of attorney appointed these two directors -

> "To do or cause to be done all acts, matters and things in connection with effecting physical delivery of the vessel to the buyer and to sign, execute and deliver a protocol of delivery in connection with effecting physical delivery of the vessel to the buyer and such other deeds, instruments, notices, certificates, demands, receipts, documents and papers as the attorney shall in the unfettered discretion think fit and where necessary to affix their personal seals thereto."

Correspondingly, Alvo resolved to give, and gave, a power of attorney to its sole director and another person authorising them -

> " . . . to accept title and delivery of the vessel on behalf of the company and to effect the registration of the vessel under the Bahamas flag in the ownership of the company and for such purposes to

> sign all and any applications, declarations, appointments, affidavits and other documents that may be necessary or desirable or called for."

These documents fail signally to establish any such agreement that would give rise to a delivery by way of *constitutum possessorium*. In fact the only kind of delivery which seems from them to have been contemplated by the parties was physical, ie actual, delivery.

The second question must, therefore, also be answered in the negative, a conclusion also reached by Kroon J. It follows that the objection to the claims of the first five respondents is not well founded and the appeal fails.

At the hearing of the appeal the appellant made application for the condonation of its late filing of certain documents forming part of the record. The application was not opposed. It was granted as prayed, subject to the appellant paying wasted costs.

The appeal is dismissed with costs.

M M CORBETT

BOTHA JA)
NESTADT JA)
NIENABER JA) CONCUR
MARAIS JA)