


ABANDONMENT IN MARINE INSURANCE LAW:  
AN HISTORICAL-COMPARATIVE STUDY

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by CHRISTIAAN GEORG MARNEWICK SC, B Juris, LLB,  
Dip Mar Law, LLM.

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## PART IV: THEORY

### CHAPTER ELEVEN

'The very foundation ... of every rule which has been applied to insurance law is this, namely, that the contract of insurance ... is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.'

Castellain v Preston<sup>1</sup>

### THEORY: THE INDEMNITY PRINCIPLE

#### 1. INTRODUCTION

- 1.1. The marine insurance contract may be defined as a contract in terms of which the insurer undertakes, against payment of the premium, to indemnify the assured against loss caused by marine perils<sup>2</sup>. At

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<sup>1</sup> (1883) 11 QBD 380 (CA).

<sup>2</sup> Ivamy, *Marine Insurance*, 4th ed, (1985), (cited as *Marine Insurance*) 4. Roccus, *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708), not 1 defined insurance as follows:- '*Assecuratio est contractus que quis alienae rei periculum in se susceperit, obligando se sub certo pretio ad eam compensandam si illa perierit*'. ('Insurance is a contract in terms of which one accepts the danger to another's property against an undertaking to pay him a certain price as compensation if it should perish.') Article 246 of the Dutch *Wetboek van Koophandel* ('the WVK') defines insurance as '*eene overeenkomst bij welke de verzekeraar zich aan den verzekerde, tegen genot eener premie, verbindt om denzelven schadeloos te stellen wegens een verlies, schade of gemis van verwacht voordeel, welke dezelve door een onzeker voorval zoude kunnen lijden*'. Émerigon's definition of marine insurance in Chapter I of his *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty's edition of 1827), (or in the translation by Meredith under the title *A Treatise on Insurances*, (1850), 2) is to the same effect. See also the definition of marine insurance in section 1 of the Marine Insurance Act 1906 ('the MIA'): '1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine venture.'

the heart of marine insurance<sup>3</sup> and all other types of indemnity insurance is the principle of indemnity<sup>4</sup>. Virtually every other rule or principle of those types of insurance aimed at compensating for a loss in the patrimony of the assured is linked, directly or indirectly, to the indemnity principle. Abandonment was described earlier as a special method of claiming the full indemnity<sup>5</sup>. There is thus an obvious link between abandonment and the indemnity principle which renders a review of the indemnity principle itself

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The marine insurance contract is regarded as a commercial contract, in that it is generally concluded between persons engaged in commercial activities; Van Niekerk, *An Introduction to and some perspectives on the sources and development of Roman-Dutch Insurance Law*, (1988), ('Introduction'), 21. In the codes of the countries which have codified their law the legal principles on marine insurance are invariably contained in the commercial code, in a special section. The marine insurance contract is mainly distinguished from other forms of indemnity insurance by the type of risks covered by it, namely marine or maritime perils, and some concepts like abandonment which apply to marine insurance contracts but not to other forms of indemnity insurance.

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See generally: Ivamy, *Marine Insurance*, 4, 11 and 164; Hofmann, *Privatversicherungsrecht*, (1991), Chapter 3; Pröls-Martin, *Versicherungsvertragsgesetz*, (1992), 383 et seq; Bruck-Möller, *Kommentar zum Versicherungsvertragsgesetz*, (1980), 56 et seq; Lambert-Faivre, *Droit des Assurances*, 8th ed, (1992), 332 et seq; Dorhout Mees, *Nederlands handels- en faillissementsrecht*, 7th ed, (1987), (cited as *Handelsrecht*), 87; Joubert, (ed), *The Law of South Africa*, (1988), Vol 12, (*Insurance*), (cited as '*LAWSA*'), para 202; Rankin v Potter (1873) 6 AC 83 (HL), 118; Simpson v Thompson (1877) 3 App Cas 279 (HL), 284; Burnand v Rodocanachi (1882) 7 App Cas 333 (HL), 339; Castellain v Preston, *supra*. Since Benecke's treatise, *System des See-Assekuranz- und Bodmerei Wesens*, (1805-1821) the indemnity principle has been the backbone of German insurance law. Pothier, *Traité du Contrat d'Assurance*, (1768-1778), para 166 pointed out that allowing the assured to recover the full sum insured while retaining the remains of the ship or goods insured would be contrary to the spirit of the contract of insurance. See also De Groot's definition of insurance in *De Jure Belli ac Pacis*, (1625), ii, 12 as a contract '*praestandae indemnitas circa casus fortuitos*', (to provide an indemnity against accidents') and Park, *A System of the Law of Marine Insurances*, (1786), 164, (the edition used here being the 1789 edition published from the same plates in Philadelphia). Lambeth in *Templeman on Marine Insurance*, 5th ed, (1981), 1 expressed the opinion that it is a contract of indemnity in theory only in marine insurance because the insured value is in certain cases taken as the measure of indemnity. This subject is discussed in the text *infra*.

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Chapter 1 *supra*.

essential for a proper understanding of abandonment. The indemnity principle is so wide and has so many facets that it deserves a study of its own which cannot be performed here. In what follows the broad principles falling within the ambit of the indemnity principle are considered so far as a discussion of those principles is helpful in the analysis of the concept of abandonment.

- 1.2. It was argued earlier that the original reason for the birth and development of the marine insurance contract was the commercial necessity to make provision for the losses arising from ordinary transport risks<sup>6</sup>. From the earliest time the purpose of insurance was therefore not to make a profit out of the event insured against but to achieve a recoupment by the assured of the loss contemplated by the insurance<sup>7</sup>. This recoupment was not intended to and did not exceed the actual loss suffered by him. The insurer's obligation has thus been limited from the outset to the actual loss suffered by the assured<sup>8</sup>. The principle has been applied in the earliest decisions in English

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<sup>6</sup> Chapter 4 *supra*.

<sup>7</sup> Straccha, *Tractatus de Assecurationibus et Proxenetis*, (1569), 20.4, (from *Tractatus Illustrum in utraque tum Pontifici tum Caesarei juris facultate Iurisconsultorum, De Contractibus licitis*, (1631)). See also Marshall, *A Treatise on the Law of Insurance*, (1802), Book I, 80.

<sup>8</sup> *Bruce v Jones* (1863) 1 H & C 769.

law<sup>9</sup>, and formed the subject of Benecke's famous treatise<sup>10</sup>.

- 1.3. The indemnity principle, like marine insurance, was not created overnight. It was also not until Benecke's thesis that its principles were analysed and explained in full. Initially the principles or rules of indemnity appear to have developed as responses to particular malpractices and frauds employed by the assured. Thus, when the simulated sale contract was still in use, the assured could only sell the goods to be insured once as he could not deliver the same goods to two or more buyers, which he would have had to do if the risk materialised. There was thus no question of 'double-insurance' in the simulated sale. However, when the marine insurance contract proper came to be employed it did not take long before some unscrupulous merchants saw the opportunity of making a profit by taking out multiple insurance contracts on the same goods and against the same risk. This obviously undesirable practice was soon met by the rules against double-insurance. Similar

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<sup>9</sup> Like *Hamilton v Mendes* (1761) 2 Burr 1198, where Lord Mansfield said the following at 1214: '*The insurer ... ought never to pay less, upon a contract of indemnity, than the value of the loss, and the assured ought never to gain more.*'

<sup>10</sup> A *Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), the English version of his work, which was first published in German.



practices and rules to combat them include over-insurance, deviation and average. Slowly but surely, over the years, the principles of indemnity crystallised into a substantial body of rules and principles which, it will be demonstrated later, includes the principles of abandonment.

## 2. THE PRIMARY OR GENERAL RULE OF INDEMNITY

### 2.1. THE NATURE OF THE INDEMNITY PRINCIPLE

2.1.1. The indemnity principle is an implicit rather than an explicit principle<sup>11</sup>. It is seldom mentioned by name in the policy or applicable statute. Nevertheless, its spirit is ever present and all-pervasive<sup>12</sup>. The likely reason for the failure of insurers and legislators to mention it by name in their policies and statutes is that the indemnity principle is simply taken for granted<sup>13</sup>.

2.1.2. The indemnity principle consists of three separate yet inseparable elements namely the concepts of

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<sup>11</sup> Kremer, *Het Indemniteitsprincipe, een juridische (her)waardering*, (1988), 17 and 211.

<sup>12</sup> Its presence lurks even in the definition of indemnity insurance; see the definitions of marine insurance in fn 2 *supra*.

<sup>13</sup> Kremer, *op cit*, 17.

interest, value and loss<sup>14</sup>, which are in effect different aspects of the same idea<sup>15</sup>. According to Marshall '(t)here cannot be an indemnity without loss, nor loss without an interest.'<sup>16</sup> He went on to add that the extent or quantum of the loss is determined by the value of the interest<sup>17</sup>. Put another way, the amount recoverable by the assured is restricted to the extent of his pecuniary loss, which is determined by the value of his interest, which in turn depends on the nature of the interest in the thing at risk<sup>18</sup>. The indemnification to which the assured is entitled is therefore the product of the interaction between the elements of interest, value and loss<sup>19</sup>.

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14 Van Oven, *'De begrippen belang, waarde en schade in het verzekeringsrecht van heden en morgen'*, March 1977 *Bouwrecht* 225, point 2.

15 Kremer, *op cit*, 19.

16 *Op cit*, (1802) Book I, 80.

17 Marshall, *op cit*, Book IV, 685. The extent of the loss is not necessarily related to the value of the thing at risk, but is limited by the value of the assured's interest in the thing at risk.

18 Ivamy, *General Principles of Insurance Law*, 5th ed, (1986), (cited as *'Principles'*), 9.

19 When the subsidiary rules of indemnity are discussed in the text below, the extent to which these three concepts are tacitly recognized will become apparent. For example, the discussion of insurable interest clearly centres around the concept of interest. The concepts of value and loss are nevertheless equally apparent in the rules relating to insurable interest. Each of the other rules of indemnity has each of these three concepts present, sometimes explicitly, in other cases obliquely.

2.2. THE FUNCTIONS AND RATIO OF THE INDEMNITY PRINCIPLE

- 2.2.1. The indemnity principle is two-sided and has two aims; on the one hand it seeks to prevent the recovery of more than the actual amount of the loss; on the other hand it seeks to ensure that the assured is compensated to the full extent of the loss<sup>20</sup>.
- 2.2.2. There appear to be two main reasons for the principle that the assured should not recover more than his loss. The first is that it is the policy of the law to prevent the use of a gaming or wagering agreement in the guise of insurance<sup>21</sup>. The second reason is that the policy of the law is also to eliminate or reduce the temptation to the assured to bring about the event insured against if it could or would result in his being benefitted thereby<sup>22</sup>. The second principle namely that the assured should be allowed to recover the full amount of his loss has not been questioned

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20 Kremer, *op cit*, 19; Wery, *Hoofdzaken van het Verzekeringsrecht*, 4th ed, (1984), 15; Lambert-Faivre, *op cit*, 332-333.

21 Kremer, *op cit*, 18. This particular policy could be expressed in another way, namely that the law does not countenance the notion that the 'assured' should be enriched by the insurance. This is the way Lambert-Faivre sees public policy; *op cit*, 333. So does Dorhout Mees, *Schets van het Nederlands Handels- en Faillissementsrecht*, (1990), (cited as *Schets*), 213.

22 Kremer, *op cit*, 18; Lambert-Faivre, *op cit*, 333.

and is in accordance with the roots of insurance in the simulated sale. The first of these principles has however given rise to various difficulties in theory and practice, as will be demonstrated in the discussion below of the various secondary rules of indemnity.

2.3. THE ORIGINS OF THE INDEMNITY PRINCIPLE

2.3.1. It was concluded earlier that the maritime loan and simulated sale contracts gave insurance the indemnity principle and insurable interest, while the simulated sale contract also gave birth to the concept of an abandonment<sup>23</sup>. Insurable interest, abandonment and the indemnity principle, interlinked as they are, were integral parts of these simulated contracts, and were introduced to the contract of insurance via these devices.

2.3.2. While the indemnity principle was not mentioned by name in the works of the earliest authors on insurance matters, it was certainly recognized by them that the assured could not be allowed to recover more than a full indemnity. Santerna<sup>24</sup>

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<sup>23</sup> In Chapter 4 *supra*.

<sup>24</sup> Writing at a time when the contract was still using the terminology of the contract of sale.

asserted that the assured had to prove the casualty as well as the value of the ship or goods before he was allowed to recover 'according to the value'<sup>25</sup> of the goods insured<sup>26</sup>. This statement implied the presence of the indemnity principle as the amount which could be recovered was clearly linked to proof of the 'value' of the loss. Straccha was more explicit where he wrote: '*Assecuratus non quaerit lucrum, sed agit ne in damno sit.*'<sup>27</sup> This statement constitutes a more direct reference to the indemnity principle.

2.3.3. Almost a century later Casaregis, in his careful analysis of the nature of insurance, removed any uncertainty that may still have been present<sup>28</sup>. He declared that the insurer was bound to make good the value of the thing insured when it was totally destroyed or partly lost and partly

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25 '... ut tunc valeat.'

26 *De Assecurationibus et Sponsionibus Mercatorum*, (1552), 4.46, (available in *Tractatus Illiistrum in Utraque tum Pontifici tum Caesarei juris facultate Iurisconsultorum, De Contractibus licitis*, (1631)). Another collection in which Santerna's work was available to me is Straccha's *De Mercatura Decisiones, et Tractatus varii*, (1621).

27 ('Insurance does non produce a profit, but in truth strives to indemnify.') *Tractatus de Assecurationibus et Proxenetis*, (1569), 20.4. (This work was also taken up in the collection *Tractatus Illiistrum in Utraque tum Pontifici tum Caesarei juris facultate Iurisconsultorum, De Contractibus licitis*, (1631).)

28 *Discursus legales de commercio*, (1707).

saved<sup>29</sup>, and in a case of a partial loss owed only that sum which represented the proportion of the goods laden on board and lost, even if the insured sum exceeded the value of the goods<sup>30</sup>. The essence of the indemnity principle was thus stated centuries ago in these short passages.

2.3.4. The earliest compilations of insurance customs and usages as well as the earliest legislation on the subject also contained provisions which served to maintain the principle that the amount which could be recovered by the assured must not exceed the value of the thing insured. The *Guidon de la Mer* of the middle sixteenth century asserted that the assured could not reap benefit from the impoverishment of others, meaning the insurers<sup>31</sup>. Article 2 of the Amsterdam Ordonnance of 1598 expressly forbade the insurance of goods otherwise than by taking account of '*de oprechte ende gemeene waerde van dien*', and even then forbade

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Disc 1 num 101: '*Assecurati liquidare tenentur valorem assecuratae, vel quando tota perempta est, vel quando in parte salva est, et in parte perempta.*' ('The insurer is liable to make good the value of the insured thing, whether it is totally lost or whether it is partly saved and partly lost.') He could say this with regard to what appears to be a partial loss with confidence because the insurer acquired the salvage as a result of the abandonment which invariably followed the loss.

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Disc 7 num 8: '*... quia si est assecurationis debetur solum damnum ad ratam mercium oneratarum, et deperditarum ...*' ('... hence in the case of insurance only the loss to the extent of the merchandise laden on board and which perished is owing ...')

31

Chapter 2, article 13.

the insurance of the goods beyond nine tenths of their true value<sup>32</sup>, so jealously was the principle guarded. The *Ordonnance de la Marine* of 1681 maintained the prohibition against insurance beyond nine tenths of the value of the ship or goods insured<sup>33</sup>. It further prohibited the insurance of the goods beyond their true value, whether by way of over-insurance or by way of double-insurance, on pain of invalidity of the policy and confiscation of the merchandise<sup>34</sup>. It also forbade the insurance of freight, seamen's wages and the anticipated profits of the voyage<sup>35</sup>. The idea behind this approach was apparently that the French took a strict line<sup>36</sup>, regarding as valid objects of insurance only those which the assured ran the risk of losing during the voyage, and not profits which he might fail to

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De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (1631), ('*Inleidinge*') 3.24.4; Van der Keessel, *Theses Selectae Juris Hollandici et Zelandici*, (1800), ('*Theses Selectae*'), 717; Bynkershoek, *Quaestiones Juris Privati*, (1744), 1.iv.c.4 at 550 and c.13. at 626. The subsequent ordonnances passed in Amsterdam and Rotterdam in 1744 and 1721 respectively allowed insurance to the full value. See Van der Keessel, *Theses Selectae*, 717.

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Chapter I, Title IV, article 18. This provision later fell into disuse, and was not reproduced in the *Code de Commerce* of 1807, ('the *CdeC*'); Pardessus, *Collection de Lois Maritimes antérieures au XVIII<sup>e</sup> Siecle*, (1837), Vol IV, 372 fn 7.

34

Chapter I, Title IV, article 22. The provisions of this article were taken up in article 357 of the *CdeC*; Pardessus, *op cit*, Vol IV, 373 fn 1.

35

Chapter I, Title VI, article 15. See also Émerigon, *op cit*, (Meredith edition), 13-14.

36

Émerigon, *op cit*, (Meredith edition), 14.

realize<sup>37</sup>.

- 2.3.5. When and by whom the term 'indemnity principle' was first introduced, is not entirely clear. It has been suggested the term has its origins in English and French terminology<sup>38</sup>. It is submitted however, that the Latin origins of the word aside, Benecke's treatise probably not only gave birth to the terminology<sup>39</sup> but also made the concept of indemnification an indispensable part of the language of indemnity insurance<sup>40</sup>.

### 3. THE INDEMNITY PRINCIPLE IN OTHER COUNTRIES

#### 3.1. THE NETHERLANDS

- 3.1.1. The indemnity principle was recognized in Dutch legislation as long ago as the Amsterdam Ordonnance of 1598, a trend continued in later Dutch insurance ordonnances, for example, the

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37 In this respect a different approach has been followed in England and America from the earliest time, in that insurance of commissions, profits and freight was legally valid in those countries. See Meredith's comment in Emerigon, *op cit*, (Meredith's edition), 14 fn (a).

38 Kremer, *op cit*, 17.

39 Benecke's work was the first scientific analysis of indemnity as a separate and overriding concept applying to all insurance contracts.

40 The principle of indemnity is the aspect of indemnity insurance which most appropriately distinguishes it from life or non-indemnity insurance, which does not link the amount of the insurance to the amount actually lost by the assured.



Rotterdam Ordonnance of 1721, which forbade the conclusion of contracts amounting to wagers or contracts on imaginary profits<sup>41</sup> and further forbade the insurance of ships beyond seven-eighths of their value<sup>42</sup>.

3.1.2. In the draft *Burgerlijk Wetboek* of 1801 the draftsman (Walraven) included a number of provisions which would have had the effect of expressly maintaining or protecting the indemnity principle<sup>43</sup>. These principles were further developed in the draft *Wetboek* of 1808 and subsequent drafts until they were taken up in *Wetboek van Koophandel* of 1838, ('the WvK').

3.1.3. Although the indemnity principle is not mentioned explicitly in the WvK its presence is apparent in

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41 Article 28.

42 Article 31.

43 Kremer, *op cit*, 7. Walraven's draft article 3 provided that no insurance was to be valid unless the assured had a recognized and immediate interest in the thing insured. The draft article 5 provided that the insurance could never result in profit and only in '*schadeloosstelling*'. Article 9 reinforced the notion that there could be no valid insurance unless the assured had an interest in the thing insured. An insurance concluded contrary to that provision would be null and void from the beginning. Article 14 proposed that the same interest could not be insured against the same risk, during the same voyage or for the same period unless the first insurer became insolvent during the currency of the policy. Article 26 provided that, where more than one policy was taken out on the same interest, the second and further policies were void, unless they specifically and expressly mentioned the first policy. Lastly, the draft article 77 provided that any insurance made against the nature of the contract of insurance, as for example a contract of wager, a policy '*interest or no interest*' or without proof of interest, was to be void.

a number of its articles<sup>44</sup>. These articles<sup>45</sup> form part of the general section of the WvK dealing with indemnity insurance in general. The supremacy of the indemnity principle has also been recognized in various treatises in Dutch law since 1882<sup>46</sup>.

3.1.4. The matter is simplified considerably in the provisions of the *Nieuw Burgerlijk Wetboek*<sup>47</sup>. Article 7.12.2.1 defines indemnity insurance as

*'de verzekering strekkende tot vergoeding van vermogensschade die de verzekerde zou kunnen lijden, de vergoeding van kosten die hij zou kunnen maken daaronder begrepen.'*

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44 Nolst Trenité, *'Behoeven de beginselen van schadeverzekeringsrecht opgenomen in de artikelen 246-283 WvK wijziging?'*, an advice published before the Annual Meeting of the Nederlandse Juristen-Vereniging, 1939, has identified the principal articles of the WvK in which the indemnity principle is protected and maintained as the following: articles 250, 252, 253(1), 274, 275, 277, 278, 279 and 284. See also Kremer, *op cit*, 20.

45 The most important articles of the WvK in which the indemnity principle is now enshrined, are the following: article 246, which defines the insurance contract in such a way that it is clear that it is one of indemnity (*'... om denzelven schadeloos te stellen wegens een verlies ...'*); article 250, which prohibits insurance without an interest in the thing insured; article 252, which regulates the situation when there is double insurance; article 253(1), which prevents the recovery of more than a true indemnity in cases of over-insurance; article 277, which also prevents the recovery of more than a true indemnity in a case of double-insurance; and articles 273-275 and 288-289 which regulate the determination of the value of the thing insured and the quantification of the loss. Another important provision is found in article 254, which makes the provisions of the articles mentioned above compulsory.

46 Kremer, *op cit*, 23-27.

47 Kremer, *op cit*, 52-55.

Article 7.17.2.24-1 provides specifically that the assured is not entitled to any compensation which would have the effect of enriching him. By these two articles the relationship between interest, value and loss is fully maintained<sup>48</sup>.

3.2. GERMANY

3.2.1. The indemnity principle has been recognized in German law for a long time. Benecke's treatise analysing the indemnity principle was first published in German at the beginning of the nineteenth century<sup>49</sup>. The indemnity principle is referred to as the '*Bereicherungsverbot*' or the '*Entschädigungsprinzip*'<sup>50</sup>.

3.2.2. The principle is not mentioned expressly in the *Versicherungsvertragsgesetz* ('the VVG'), nor in the marine insurance section of the *Handelsgesetzbuch* ('the HGB'). It is mentioned specifically, however, in the *Allgemeine Versicherungsbedingungen* or general insurance provisions ('the AVB')<sup>51</sup> of the German

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48 Kremer, *op cit*, 53.

49 *System des See-Assekuranz- und Bodmerei-Wesens*, 5 vols, (1805-1821).

50 Kremer, *op cit*, 174.

51 *Des Allgemeine Versicherungsbedingungen*.

Association of Fire Insurers, where the principle is stated in article 13(2) that '*Die Versicherung solle nicht zu einer Bereicherung führen*'<sup>52</sup>.

3.2.3. Articles 1 and 55 of the VVG contain important provisions which import the indemnity principle into the VVG by implication<sup>53</sup>. Article 1 defines the contract of insurance in such a way that the indemnity principle is implied<sup>54</sup>. Article 55 on the other hand provides that the insurer is not obliged to pay the assured more than the amount of the loss even if the insured sum exceeds the value at the time of the occurrence<sup>55</sup>. According to article 49 of the VVG the indemnity has to be given in money<sup>56</sup> and the loss therefore has to be one which can be expressed and compensated in money.

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52 '*The insurance shall not result in any enrichment (of the assured)*'. See also Kremer, *op cit*, 174-175.

53 Kremer, *op cit*, 175.

54 '*Bei der Schadensversicherung ist der Versicherer verpflichtet, nach dem eintritt des Versicherungsfalls dem Versicherungsnehmer den dadurch verursachte Vermögensschaden nach Massgabe des Vertrags zu ersetzen.*' ('In indemnity insurance the insurer is obliged, after the occurrence of the insured event, to pay to the assured the amount of the patrimonial loss caused by that event to the extent (provided for) in the contract.')

55 '*Der Versicherer ist ... nicht verpflichtet ... mehr als den Betrag des Schadens zu ersetzen.*' ('The insurer is not obliged to pay more than the amount of the loss'.)

56 '*Der Versicherer hat den Schadensersatz in Geld zu leisten.*' ('The insurer is obliged to pay the loss in money'.)

3.3. FRANCE

3.3.1. From the outset French law applied the indemnity principle in insurance contracts. The *Guidon de la Mer* provided specifically that the assured was not to reap advantage from the loss of others<sup>57</sup>. Émerigon relied on Straccha and Targa for his statement that the very nature of the contract of insurance demands that it should not be a source of profit to the assured and concluded that any contract of insurance which deviated from that principle was void<sup>58</sup>.

3.3.2. The customary law embodied in the *Guidon de la Mer* forbade wagers dressed up as insurance contracts<sup>59</sup>, an approach echoed in the provisions of the *Ordonnance de la Marine* of 1681<sup>60</sup> and the *Code de Commerce* of 1807 ('the CdeC')<sup>61</sup>.

3.3.3. The most modern French insurance legislation is to be found in the *Code des Assurances* of 1976, ('the CdA') which is based on the law of the 13th July,

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57 Chapter 2 article 13.

58 *Op cit*, Chapter I, Section IV; (Meredith's translation, 13.)

59 Chapter 1, article 5.

60 Article 22.

61 Article 357.

1930 and covers non-marine insurance<sup>62</sup>. Article L 121-1 repeats article 28 of the law of 13 July, 1930 and provides specifically that the contract is one of indemnity, and that the indemnity due by the insurer to the assured may not exceed the value of the thing insured at the time of the casualty<sup>63</sup>. The principle is also recognized in the treaties on the subject<sup>64</sup>. Law 522 of 1967, which deals only with marine insurance, does not explicitly mention the indemnity principle. However, article 15 implicitly recognizes the indemnity principle by providing that the insurer is liable for physical damage caused to the insured objects by marine perils or *force majeure*<sup>65</sup>.

### 3.4. ENGLAND AND AMERICA

#### 3.4.1. In English law the indemnity principle is mainly

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62 Kremer, *op cit*, 189.

63 Article L 121-1.1: '*L'assurance ... est un contrat d'indemnité; l'indemnité due par l'assureur à l'assuré ne peut pas dépasser le montant de la valeur de la chose assurée au moment du sinistre.*' ('Insurance is a contract of indemnity; the indemnity due by the insurer to the assured may not exceed the full value of the thing insured as at the time of the casualty.') See also Lambert-Faivre, *op cit*, 332; Kremer, *op cit*, 189.

64 Kremer, *op cit*, 190; Picard and Besson, *Les Assurances Terrestres*, 5th ed, (by Besson), (1982), Vol I, 281 and 284.

65 Article 15: '*L'assureur répond des dommages matériels causés aux objets assurés par toute fortune de mer ou par un événement de force majeure.*' ('The insurer is liable for the material damage caused to the objects insured by marine perils or by an event of force majeure.')

preserved by the common law, although two Acts of Parliament namely the Life Assurance Act of 1774 and the Marine Insurance Act 1906 ('the MIA') contain provisions thereon. The fact that the 1774 Act was known as the Gambling Act gives a hint of the reason for that act, namely to prevent wagering under the guise of insurance<sup>66</sup>. That act, however, was not applicable to fire insurance.

3.4.2. The indemnity principle is implicit in sections 1 and 3 of the Life Assurance Act of 1774. Section 1 provides that no insurance may be made

*'wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made, shall have no interest, or by the way of gaming or wagering'*.

Section 3 further provides that the amount payable shall not be greater *'than the amount of the value of the interest of insured in such ... event or events'*.

In these short provisions the three aspects of indemnity namely interest, value and loss come to

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Kremer, *op cit*, 184.

provisions of this act were already in force when the American Colonies won their freedom from the Crown, and since then these principles of indemnity in English marine insurance law have been part of American law too<sup>67</sup>. Section 1 of the MIA defines insurance as an undertaking by which 'the insurer undertakes to indemnify the insured', which emphasises the nature of the contract as one of indemnity. This principle is also recognized explicitly in American marine insurance law<sup>68</sup>.

4. THE SECONDARY OR SPECIAL RULES OF INDEMNITY

4.1. The indemnity principle encounters, on the one hand, a number of problematic circumstances, and is served on the other hand, by a number of rules whose function it is to ensure that a proper indemnification occurs in all the diverse cases which may arise. In each of these cases a true indemnity is difficult to achieve, and it may well be said that the indemnity principle is an imperfect principle because it cannot, in all cases, achieve its aim<sup>69</sup>. While the principle may

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67 The same does not, of course, apply to the provisions of the MIA.

68 46A C.J.S. Insurance para 1460; *Pacific Fire Ins. Co v Pennsylvania Sugar Co.* 72 F 2nd 958.

69 Van Niekerk, *Subrogasie in die Versekeringsreg*, LLM thesis, Unisa, (1979).



be less than perfect, it seeks to achieve its aims through these subsidiary principles or rules, each of which plays its role in the particular circumstances for which it is designed. The rules concerned deal with such diverse situations as the absence of insurable interest, double-insurance, over-insurance, under-insurance, valued policies, replacement value insurance, sue and labour clauses, the quantification of the loss, and also the areas covered by subrogation and abandonment.

- 4.2. In the inter-play between the concepts of interest, value and loss, these special or secondary rules of the indemnity principle guard the indemnity principle at all its corners, always seeking to ensure that the assured recovers a full indemnity but no more than that. Nevertheless, there appears to be an area where public policy as exemplified by the judgments of the courts and the pressures of modern insurance practice have created circumstances where the assured is allowed to recover more than a strict indemnity.

5. INSURABLE INTEREST

- 5.1. The assured can, of course, suffer no loss unless he has some interest in the subject-matter of the

insurance which, as a result of the loss or damage, adversely affects him in his patrimony<sup>70</sup>. This interest is referred to as an insurable interest<sup>71</sup>. The extent of the indemnity can not exceed the value of the assured's insurable interest.

5.2. While the assured had an interest in the thing which was subject to the risk from the birth of indemnity insurance, as was pointed out earlier<sup>72</sup>, it was not until much later that Casaregis analysed the nature of the contract of insurance, compared it to other contracts such as wager and guarantee<sup>73</sup>, and concluded that the contract of insurance is to be distinguished from other contracts on the basis that in the former an interest in the thing at risk is always present, whereas such an interest is absent in wagers and

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70 Insurable interest is broadly defined in *Corpus Juris Secundum*, Vol 44, Insurance, (cited as 44 C.J.S. Insurance), para 175 as follows: 'A person usually has an insurable interest in the subject matter insured where he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against.'

71 See generally Ivamy, *Principles*, 19-29; LAWSA, para 102.

72 See Chapter 4 *supra*.

73 *Discursus Legales et Commercio*, (1707), *discursus* 1 num 24 and *discursus* 7 num 5; '*Sponsionis contractus est diversus ab assecuratione, nam ille valet etiam sine aliqua operatione, vel risico.*' ('The contract of guarantee differs from insurance because it is effective without any obligation or risk.')

guarantees<sup>74</sup>. Casaregis made it clear that without an interest in the object which is subject to the risk there could be no insurance contract<sup>75</sup>.

5.2.1. Insurable interest is a requirement of Dutch law too<sup>76</sup>. Dorhout Mees referred to the requirement of an insurable interest as '*het fundamenteel beginsel van alle schadeverzekering*'<sup>77</sup>. Wagers in the form of insurance were prohibited in Holland under the Amsterdam<sup>78</sup>, Rotterdam<sup>79</sup> and Middelburg<sup>80</sup> ordonnances on insurance, and it follows that a contract contrary to the prohibition was unenforceable. It is not made entirely clear whether Dutch law requires that interest to be present at the time of the

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74 See also Marshall, *op cit*, Book I, 80.

75 *Discursus IV num 4: 'Sicuti enim principale fundamentum assecurationis est risicum, seu interesse assecuratorum, sine quo non potest subsistere assecuratio.'* (Indeed, just as the risk is a principal foundation of insurance, so is the interest of the assured, without which (interest) there cannot be an insurance.)

76 Article 250 of Chapter III, Title 9, Book I of the *Wetboek van Koophandel* ('the *WvK*') provides as follows: '250 Indien hij, die voor zich zelve heeft laten verzekeren, of hij, voor wiens rekening door een ander is verzekerd, ten tijde der verzekering geen belang in het verzekerd voorwerp heeft, is de verzekeraar niet tot schadeloosstelling gehouden.'

77 *Schets*, 213.

78 Article 13 of the Amsterdam Ordonnance of 1744.

79 Article 28 of the Rotterdam Ordonnance of 1721.

80 Article 2 of the Middelburg Ordonnance of 1600.

conclusion of the contract as the article of the *WvK* simply says '*ten tijde der verzekering*'<sup>81</sup>. Since Dutch law is quite specific about the rule that the assured may not recover any compensation beyond what he has actually lost<sup>82</sup>, the rule must logically be that the assured cannot recover unless he had an interest at the time of the casualty as he could not suffer any loss without such an interest.

5.2.2. In German law<sup>83</sup> it is not specifically provided that the contract is invalid if the assured does not have an insurable interest in the object which is subject to the risk, but it appears that the approach is similar to that which prevails in South African law, namely that the contract is valid but no loss which has to be indemnified arises<sup>84</sup>. If, however, both parties knew that there was no insurable interest and that there was none likely to arise later, then the contract is not a valid insurance contract under German marine

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81 Article 250 of the *WvK*. See also article 7.17.2.1 of the *NBW*.

82 Dorhout Mees, *Handelsrecht*, 87.

83 See generally Chao-Kuo Chiang, '*Das Interesse im Seeversicherungsrecht*' in *Versicherungsrechtliche Studien*, Vol 3; Hofmann, *op cit*, 147 et seq; Pröls-Martin, *op cit*, 283 et seq; Bruck-Möller, *op cit*, 56 et seq.

84 *LAWSA*, para 102.

insurance law<sup>85</sup>. There is an apparent contradiction between articles 51 and 52 of the VVG in that the former mentions the value of the insured interest<sup>86</sup> whereas the latter refers to the value of the thing insured<sup>87</sup>. Article 68 of the VVG indirectly provides that future interests may also be insured, but is equally clear that if the contemplated interest does not come into existence then the assured is released from his obligation to pay the premium and the insurer becomes entitled to recover only his reasonable expenses<sup>88</sup>. In terms of article 52 of the VVG the value of an insured object is regarded as the insurable interest unless the circumstances indicate otherwise<sup>89</sup>. German marine insurance law appears to be to the same effect<sup>90</sup>.

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85 Article 785(2) of the HGB.

86 '... Wert des versicherten Interesses'. ('the value of the insured interest')

87 '... der Wert des Sache.' ('the value of the insured thing')

88 The requirement of insurable interest is thus postulated indirectly.

89 Kremer, *op cit*, 177.

90 Article 785 of the HGB provides as follows: '(1) Auf die Gültigkeit des Versicherungsvertrags hat es keinen Einfluss, dass zur Zeit des Abschlusses die Möglichkeit des Eintritts eines zu ersetzenden Schadens schon ausgeschlossen oder der zu ersetzende Schaden bereits eingetreten ist. (2) Waren jedoch beide Teile van dem Sachverhältnis unterrichtet, so ist der Vertrag als Versicherungsvertrag ungültig.' ('The validity of the contract is not affected if, at the time of conclusion of the contract, the event insured against can no longer occur, or has already occurred. If, however, both parties had knowledge of the true facts, the contract is not a valid contract of insurance.')

5.2.3. In French law article L 121-6 of the *CdA* of 1976 provides that every person who has an interest in the preservation of the thing may insure it. Every interest, whether direct or indirect, in relation to the '*non-réalisation*' of the risk may be the subject of insurance. It therefore appears that there is a very wide circle of persons with such an interest<sup>91</sup>. In French law wagers in the form of insurance contracts were prohibited from the earliest times, by the *Guidon de la Mer*<sup>92</sup>, the *Ordonnance de la Marine* of 1681<sup>93</sup> and by the *CdC*<sup>94</sup>. Such contracts were therefore not enforceable, as in Holland.

5.3. Insurable interest is defined in English law in respect of marine insurance<sup>95</sup>, but that definition is regarded as responsible for the difference between English law and American law, in that English law insists that there should be a '*legal or equitable relation*' between the

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91 Kremer, *op cit*, 190.

92 Article 5, Chapter 1.

93 Article 22.

94 See also Boulay-Paty, *Droit Commercial*, (1822), Vol III, 238.

95 Section 5 of the *MIA*.

assured and the adventure or property<sup>96</sup>. Unless such an interest existed and vested in the assured at the time of the loss, there can be no call for an indemnification<sup>97</sup>. The existence of an insurable interest is thus the first requirement determining the insurer's obligation to indemnify. Insurable interest is a requirement for the validity of the contract not only in English marine insurance law<sup>98</sup> but also in other legal systems based on it<sup>99</sup>. American law<sup>100</sup> takes a much wider approach to the concept of insurable interest than English law, principally because the old English statutes which came into effect after American independence in 1776 did not apply in

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96 MacGillivray & Parkington, *Insurance Law (relating to all risks other than marine)*, 8th ed, (1988), para 44.

97 'In property insurance an insurable interest generally must exist both at the time of the contract and at the time of the loss...'; 44 C.J.S. *Insurance*, para 175. This rule may express English and American law correctly, but not continental law. There the rule seems to require no more than that the interest must exist at the time of the loss.

98 Section 4 of the MIA provides as follows: '4(1) Every contract of marine insurance by way of gaming or wagering is void.  
'4(2) A contract of marine insurance is deemed to be a gaming or wagering contract-  
a where the assured has not an insurable interest as defined in this Act, and the contract is entered into with no expectation of acquiring such interest; or  
b where the policy is made "interest or no interest" or "without proof of further interest than the policy itself" or "without benefit of salvage to the insurer" or subject to any other like term:  
Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.'  
Instances of insurable interest are given in the sections of the MIA following upon this section.

99 See, in relation to American law, Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol II, Chapter III; Gilmore and Black, *The Law of Admiralty*, 2nd ed, (1975), 59; Schoenbaum, *Admiralty and Maritime Law*, (1987), 569. In Canada, Australia, New Zealand and even India the marine insurance legislation is based on the English MIA, and the law with regard to insurable interest is the same as English law.

100 See generally 44 C.J.S. *Insurance*, para 218 et seq.

America<sup>101</sup>. For example, the prohibition against ppi policies in section 4 of the MIA is unknown in American law<sup>102</sup>.

5.4. South African law leans toward the approach that insurable interest must exist at the time of the loss as without such interest at that time there could be no diminution in the patrimony of the assured which needs to be compensated<sup>103</sup>. There is a wealth of authority dating back to the Roman-Dutch law of the province of Holland requiring an insurable interest<sup>104</sup>.

5.5. Whether the requirement of an insurable interest is seen as an independent requirement without which the contract is invalid, as in English and American law<sup>105</sup>, or is seen as a demonstration of the operation of the indemnity principle, as in South African law<sup>106</sup>, does not matter in practice, as the assured can in either system only

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101 MacGillivray & Parkington, *op cit*, para 39.

102 MacGillivray & Parkington, *op cit*, para 39.

103 Reinecke, 'Versekering sonder Versekerbare Belang?' 1971 CILSA 193, 338.

104 These are discussed in De Jager, *The Roman-Dutch law of Marine Insurance applicable in South Africa*, LLM thesis, Cape Town, (1987-1988), Chapters 9 and 12.

105 Ivamy, *Principles*, 22; 44 *C.J.S. Insurance*, para 175.

106 LAWSA, para 102.



recover if he has such an interest at the time of the loss. Indeed, it has been suggested that there is no need for the concept of insurable interest and that it may safely be done away with as the finding on the question whether the assured has suffered an indemnifiable loss will inevitably determine whether he had an insurable interest in the first place<sup>107</sup>.

5.6. It is not within the scope of this work to analyse the precise ambit of the different forms that an insurable interest may take<sup>108</sup>, but the general statement may be made that the assured has an insurable interest in the object of the insurance if the loss or destruction of, or prejudice to, that object may result in a diminution of the patrimony of the assured or in his patrimony not being increased<sup>109</sup>. The link between the indemnity principle and this definition is immediately apparent. The following examples of

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107 See Reinecke, '*Versekering sonder Versekerbare Belang?*', 1971 *CILSA* 193; Van Niekerk, '*Insurable Interest 1, Legal Certainty 0*', (1995) 7 *SA Merc LJ* 262 and the authorities there cited.

108 For extensive examples of interests regarded as insurable under American law, which appears to be wider than English law in this regard, see 44 *C.J.S. Insurance*, paras 175-222; Phillips, *op cit*, Vol I, Chapter III. For an interesting demonstration of the problems which may arise in FOB and CIF sales, see the Australian case of *N.S.W. Leather Co. Pty Ltd v Vanguard Insurance Co. Ltd.* (1991) 25 *NSWLR* 699 and the discussion thereon by Davies, '*Australian maritime decisions 1992*', 1993 *LMCLQ* 253 at 261 *et seq.*

109 44 *C.J.S. Insurance*, paras 175, 219 and 245.

persons who are regarded as having an insurable interest in the subject-matter of a typical marine insurance policy may suffice: the owner or part owner<sup>110</sup> and in American law, a shareholder in the company or corporation which owns the thing insured<sup>111</sup>; a charterer of the ship; a trustee; a surety in respect of debts secured by the thing; a cessionary; the carrier in respect of the goods in his custody or care; a mortgagee; lienholders; a lender on bottomry or respondentia; and a buyer under an executory contract<sup>112</sup>.

6. DOUBLE-OR MULTIPLE-INSURANCE<sup>113</sup>

- 6.1. The *Guidon de la Mer* provided a simple if drastic solution to any attempt by an assured to gain from the insurance by taking out more than one policy. It recorded the customary rule that the first

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110 The part owner has an insurable interest only to a proportionate part of the value of the thing; Barels, *Advysen over den Koophandel en Zeevaart*, (1780-1781), *Advys* 27.

111 44 *C.J.S. Insurance*, para 246; *Seamen v Enterprise Fire & Marine Ins. Co.* 21 F 778.

112 See Bruck-Möller, *op cit*, 288 *et seq* for examples of insurable interest in German law and Ivamy, *Marine Insurance*, 4th ed, (1985), 16-29 for examples in English marine insurance law. In French law the discussion appears to centre around the concept of loss rather than whether an insurable interest exists. Lambert-Faivre, *op cit*, for example, does not even devote a chapter to a discussion of the nature of the interest required. Logically there cannot be a loss without an interest, and the determination of the question whether the assured suffered a loss also determines whether there was an insurable interest which was affected by the event insured against. The French approach therefore supports the notion that the concept of insurable interest be done away with.

113 The phrase double insurance is commonly used to include both multiple and double insurance, and will also be used in the text here.

policy alone attached. Subsequent policies did not<sup>114</sup>. The assured was thus prevented from making a double recovery and the indemnity principle prevailed.

- 6.2. Other legal systems found slightly different answers to the same problem, but all the solutions have the same result as the *Guidon* in mind, namely that the assured should not benefit from the insured event<sup>115</sup>.
- 6.3. Double- or multiple-insurance is said to exist when the assured is covered by two or more policies on the same subject, the same risk and the same interest<sup>116</sup>. It only amounts to double-insurance if the total amount insured exceeds the value of the assured's insurable interest<sup>117</sup>. All the insurances are generally valid in double-

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114 Articles 16 and 18, Chapter 2 and article 3, Chapter 3.

115 In English law, for example, double-insurance is valid, but makes 'but one insurance', which is good to the value of the goods at risk; Marshall, *A Treatise on the Law of Insurance*, (1802), Book I, 116.

116 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as 'Arnould'), para 406; 45 *C.J.S. Insurance*, para 951; *LAWSA*, para 238; Getz and Davis, *op cit*, 274; *American Surety Co of New York v Wrightson* (1910) 103 LT 663. Lambert-Faivre, *op cit*, 340-341. Park, *op cit*, 320 defined it as follows: 'A double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of having made two insurances upon the same goods or the same loss.'

117 *LAWSA*, para 238; but see Getz and Davis, *op cit*, 274.

insurance<sup>118</sup>, unless concluded fraudulently<sup>119</sup>. In a case of double-insurance the assured is at liberty to claim the full amount from any one of the insurers, or a portion from each of them, but once he has been compensated in full, he no longer has a claim against any of the others<sup>120</sup>. Even if, as may be under strict Roman-Dutch law, the insurer were only liable for his *pro rata* share of the loss, the assured would recover no more than each insurer's *pro rata* share from him<sup>121</sup>. The assured thus cannot recover more than a full indemnity<sup>122</sup> in either event. It has been said that the purpose of the rule is to '*prevent fraud, lest the desire of gain should occasion unfair and wilful losses.*'<sup>123</sup> The true reason seems to be, however, that the contract of insurance does not brook a recovery by the assured beyond the actual loss. Once he has been indemnified under the one

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118 That is not the case in the Netherlands; see the discussion of the position in that country in the text *infra*.

119 Arnould, para 406.

120 Park, *op cit*, 320; 46 C.J.S. *Insurance*, para 1207; LAWSA, paras 238 and 242; Getz and Davis, *op cit*, 274.

121 LAWSA, para 239 fn 8; Bynkershoek, *Quaestiones Juris Privati*, (1744), 4.2; Van der Keessel, *Praelectiones Juris Hodierni ad Hugonis Grotium Introductionem ad Jurisprudentiam Hollandicam*, (published in 1961-1967), ('*Praelectiones*'), 3.24.17; Van der Linden, *Regtsgeleerd, Practicaal, en Koopmans Handboek*, (1806), ('*Koopmans Handboek*'), 4.6.3.

122 Ivamy, *Principles*, para 487; *Morgan v Price* (1849) 4 Exch 615; LAWSA, para 242.

123 Park, *op cit*, 321.

policy, there can be no claim under any of the others because there is no longer a loss to be made good.

- 6.4. When an insurer has discharged his liability to the assured<sup>124</sup> he becomes entitled to call upon the other insurers to contribute their *pro rata* shares of the amount already paid by him in terms of his policy<sup>125</sup>. In English law this right to a contribution arises from equity<sup>126</sup>, not from contract, as there is no contract between the various insurers. The right to a contribution also exists only in indemnity insurance<sup>127</sup>. There are detailed rules relating to the apportionment of the loss between the insurers<sup>128</sup>, but these are not relevant here. It should be noted, however, that the insurer has to enforce his right to a contribution against the other insurers in his own name, and not in the name of the assured<sup>129</sup>. This demonstrates that the right to a contribution does

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124 *Williams v North China Insurance Co* (1876) 1 CPD 757 (CA).

125 Ivamy, *Principles*, 487-488; 46 *C.J.S. Insurance*, para 1208; LAWSA, para 343; Getz and Davis, *op cit*, 276; Lambert-Faivre, *op cit*, 346-347.

126 Park, *op cit*, 321; Ivamy, *Principles*, 488; *Godin v London Assurance Co* (1758) 1 Burr 489.

127 LAWSA, para 242.

128 Ivamy, *Principles*, 493 *et seq.*

129 LAWSA, para 242.

nor arise from some form of subrogation.

- 6.5. The conditions which must be present for the right to a contribution to arise are basically the same in English, American, South African, German and French law<sup>130</sup> and are the following: All the policies must cover the same interest or subject-matter<sup>131</sup>; all the policies must cover the same peril<sup>132</sup>; all the policies must be in favour of the same assured<sup>133</sup>; all the policies must be in force at the time of the loss<sup>134</sup>; and all the policies must be valid contracts of insurance<sup>135</sup>.
- 6.6. In South African law the right to a contribution existing between insurers would not exist if

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- 130 Dutch law appears to be the odd man out as a result of the provisions of articles 252 and 277(1) of the *WvK*, which make the second or subsequent policy void or ineffective except so far as the first policy does not result in a full indemnification of the assured; See Scheltema-Mijnssen, *Algemeen Deel van het Schadeverzekeringsrecht*, 4th ed, 167 et seq.
- 131 Ivamy, *Principles*, 488; Getz and Davis, *op cit*, 276; *Godin v London Assurance Co*, *supra*; Bruck-Möller, *op cit*, 462; Lambert-Faivre, *op cit*, 342.
- 132 Ivamy, *Principles*, 489; Getz and Davis, *op cit*, 277; *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877) 5 Ch D 569 (CA); Bruck-Möller, *op cit*, 462; Lambert-Faivre, *op cit*, 341-342.
- 133 Ivamy, *Principles*, 489-490; *Godin v London Assurance Co*, *supra*; Bruck-Möller, *op cit*, 462.
- 134 Ivamy, *Principles*, 491; Getz and Davis, *op cit*, 277; *Weddell v Road Transport and General Insurance Co Ltd* [1932] 2 KB 563; Bruck-Möller, *op cit*, 462; Lambert-Faivre, *op cit*, 342.
- 135 This states the obvious, but see in any event Ivamy, *Principles*, 492; Arnould, para 406; Getz and Davis, *op cit*, 277; *Woods v Co-operative Insurance Society* 1924 SC 692.

certain passages in the works of Bynkershoek, Van der Keessel and Van der Linden are construed to refer to double-insurance rather than co-insurance. The assured would then be limited in his claim against each insurer to a *pro rata* share only<sup>136</sup>. The matter is not entirely clear, but there is a strong indication that the Roman-Dutch rule was intended to refer only to the situation where more than one insurer bound himself under the same policy (co-insurance) as opposed to the case where more than one policy is taken out as in the standard case of double-insurance. As Van der Linden put it,

*'(e)ene Polis van Assurantie kan geteekend worden door verscheiden Assurateurs, zelfs op onderscheiden tijden: en zijn zij allen even zeer voor de vergoeding der schade aansprakelijk, in evenredigheid van de somme, waar voor elk hunner geteekend heeft.'*<sup>137</sup>

- 6.7. If the right to a contribution did not exist under South African law the insurer who paid the full amount of the loss before he learned of the existence of the other policy or policies would be

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LAWSA, para 239 fn 8.

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Koopmans Handboek, 4.6.3.

unable to recover from the other insurers on the grounds of enrichment because the assured is the one who is enriched by the overpayment, not the other insurers<sup>138</sup>.

6.8. The general position of English law regarding double-insurance has been stated above and compared with South African law, leading to the conclusion that the two systems lead to the same result. German<sup>139</sup> and French<sup>140</sup> law treat double-insurance similarly and regard a second policy as valid but limit the right to recover to the amount of the loss. In these two legal systems, as in English law, the insurers are also granted a right to a contribution *inter se*. A second policy taken in bad faith is invalid also in these systems. Current Dutch law differs from the other legal systems mentioned in that it provides that the second insurance contract is

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138 *Phillips v Hughes; Hughes v Maphumulo* 1979 1 SA 225 (N).

139 Articles 58-60 of the VVG. The assured who takes out double-insurance has to inform each insurer of the fact and of the identity of the other insurer, as well as the amount insured by such other insurance; article 58. The insurers are jointly and severally liable, but the assured cannot recover more than the amount of the loss; article 59(1). The insurers have a right of contribution *inter se*; article 59(2). Double-insurance effected with a fraudulent intention is void; article 59(3). Under certain circumstances the assured may effect a cancellation of the second or later policy and recover or save part of the premium; article 60. See also Hofmann, *op cit*, 177-180; Bruck-Möller, *op cit*, 459 *et seq*.

140 Article L 121-4 of the CdA, as amended by article 8 of the law of 13 July 1982. See generally Lambert-Faivre, *op cit*, 340 *et seq* for a discussion of double-insurance and the insurer's right of contribution in general indemnity insurance and Rodière and Pontavice, *Droit Maritime*, 10th ed, (1986), paras 551-553 for the position in marine insurance.



void<sup>141</sup>.

6.9. Notwithstanding this distinction between Dutch law and the other systems mentioned, the ultimate result remains the same so far as the indemnity principle is concerned: The assured is prevented from recovering more than a full indemnity by taking out a second policy and is restricted to the amount of his actual loss. Since the second policy is not valid in Dutch law there is no need for a right of contribution between the insurers in that system.

6.10. So far as marine insurance is concerned, the rules relating to double-insurance and the right to a contribution are regulated by the marine insurance legislation in force in England<sup>142</sup>, Germany<sup>143</sup> and France<sup>144</sup>. French and German law differ markedly from English marine insurance law in that

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141 Article 252 of the general insurance section of the *WvK*: '252 *Uitgezonderd die gevallen bij de wet bepaald, mag geene tweede verzekering gedaan worden, voor denzelfden tijd en voor hetzelfde gevaar, op voorwerpen, welke reeds voor dezelve volle waarde verzekerd zijn, en zulks op straffe van nietigheid der tweede verzekering.*'

142 Sections 32(1) and 80 of the *MIA*.

143 Article 787 of the marine insurance section of the *HGB*. See also articles 59 and 60 of the *VVG*.

144 Articles 12, 13 and 34 of Law 522 of 1967. Harrel-Courtès, *op cit*, 37 makes three points about article 34. In the first place the insurers are not liable *in solidum*. In the second place, each insurer is liable only in proportion to the amount insured by him. In the third place, that sum is then the limit of his liability.

each insurer is only liable for his *pro rata* share of the loss, whereas in the English law the assured may sue any one of the insurers, who then has to pay and recover a contribution from the other insurers. American law is the same as English law on this matter<sup>145</sup>.

6.11. The rules relating to the limitation of the assured's right of recovery to the actual loss suffered and the insurer's right to a rateable contribution from other insurers in the case of double-insurance have their basis in equity rather than contract<sup>146</sup>. This means that the contract cannot validly include a stipulation which would enable the assured to recover more than a full indemnity by whatever means. Nor can the assured and his insurers validly agree that there will be no right to a contribution among the insurers if there is double-insurance.

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See 46 *C.J.S. Insurance*, paras 1207-1208.

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*LAWSA*, para 242, where the view is expressed by the author that the limitation of the assured's recovery to the full indemnity and the insurer's right *inter se* to a rateable contribution are *naturalia* of the contract. This view appears to be erroneous, as it cannot explain the rights which the insurers have *inter se*. After all, they do not stand in any contractual relationship in relation to each other. The answer is probably that the primary rule (relating to the limitation of the recovery to the actual loss) has its origin in the indemnity principle while the secondary rule (relating to the insurers' right to a contribution *inter se*) has its basis in equity.

7. OVER- AND UNDER-INSURANCE

7.1. The assured is over-insured when the insured amount exceeds the value of the insured interest. In such a case the assured is prevented from recovering more than the actual amount of the loss. The insured amount thus serves no purpose beyond determining the maximum extent of the insurer's liability<sup>147</sup>. It is also used to calculate the amount of the premium<sup>148</sup>. The insured amount should not be confused with the agreed value under a valued policy<sup>149</sup>.

7.2. Where the assured is insured for less than the value of his insurable interest, he is said to be under-insured. In such a case, in marine insurance at any rate, he is regarded as co-insurer for the balance, and his recovery from the insurer is tempered by that proportion of the loss he has to bear himself<sup>150</sup>.

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147 Dorhout Mees, *Schets*, 214. It is customary in the Netherlands that the insurer also pays the cost of determining the amount of the loss; *Ibid.*

148 Dorhout Mees, *loc cit.*

149 It is discussed separately *infra*.

150 In the Netherlands, articles 253-2 of the *WvK*; See also Dorhout Mees, *Schets*, 215; In Germany, articles 792 of the *HGB* and 56 of the *VVG*; See also Hofmann, *op cit*, 174-175; Bruck-Möller, *op cit*, 318 *et seq*; In France, article 14 of Law 522 of 1967; See also Lambert-Faivre, *op cit*, 348 *et seq*; In England, section 81 of the *MIA*; See also Lambeth, *op cit*, 124; Ivamy, *Marine Insurance*, 437; For the position in America, see 45 *C.J.S. Insurance*, para 949.

7.3. There appears to be an area in marine insurance where the assured could well receive more than a full indemnity as a result of the rule that the value of the insured interest is determined as at the commencement of the voyage. This gives rise to an imperfection in the strict application of the indemnity principle in those cases where the insured interest may decrease in value during the voyage as a result of circumstances not insured against<sup>151</sup>. Otherwise statutory provisions in the Netherlands<sup>152</sup>, Germany<sup>153</sup>, France<sup>154</sup> and England<sup>155</sup> and the American common law<sup>156</sup>

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151 It appears that a blind eye has been turned to this transgression by insurance practice and the law for the practical reason that it is difficult to determine the ever-changing value of the insured interest as the voyage progresses.

152 Article 253 of the general insurance section of the *WvK* provides: '253-1 Verzekering, welke het beloop van de waarde of het wezenlijk belang the bowe gaat, is alleen geldig tot het beloop van hetzelfde.' Dorhout Mees, *Handelsrecht*, 92 is of the opinion that the insurance remains valid even if the insured sum exceeds the true value of the thing insured, but in such a case the recovery is determined by reference to the to the actual value. Article 612 of the marine insurance section provides: '612. Goederen mogen verzekerd worden voor de volle waarde, welke dezelve hebben ten tijde en ter plaatse der verzending, met alle onkosten tot aan boord, de premie van verzekering daaronder begrepen, zonder dat eene afzonderlijke begroting van ieder voorwerp kan gevorderd worden.' (The insured value may be increased, in terms of article 613, by the addition of the freight, import duties and other expenses which have to be paid.) See also Dorhout Mees, *Schets*, 215; Dorhout Mees, *Handelsrecht*, 92.

153 Article 52 of the *VVG*; Article 786 of the *HGB*. See also Hofmann, *op cit*, 172-173; Prölss-Martin, *op cit*, 298 *et seq*; Bruck-Möller, *op cit*, 188 *et seq*.

154 Article L 121-3 of the *CdA*. Lambert-Faivre, *op cit*, 338-339 points out that the article contemplates two distinct situations. In the first, where the over-insurance is taken in an attempt to defraud, the insurance as a whole is invalid and the assured is further penalised in damages and interest. In the second, where there is no fraud, the insurance is valid, but the amount which can be recovered is limited to the actual loss, and the premium is adjustable to the premium for the actual value. Article 10 of Law 522 of 1967 is to the same effect in respect of marine insurance.

155 Section 16 read with section 4 of the *MIA*.

prevent the recovery of an amount exceeding the value of the insured interest in the case of over-insurance, but special provisions regulate the case of valued policies where the rule may be breached.

8. VALUED POLICIES

8.1. The practice of inserting an agreed value in the policy has its roots in the difficulties experienced by the insurer and assured alike when the value had to be found after the ship or goods had been lost, damaged or destroyed. Over and above that, the ship or goods may appreciate or depreciate in value during the voyage. Their value may even differ from port to port with the result that the amount recoverable by the assured and payable by the insurer often depends on precisely where the loss occurs. By agreeing the value in advance the assured and the insurer are both protected against such increases and decreases in value<sup>157</sup>. However, as a result of the acceptance of this practice, some say with some justification that the contract of marine insurance is only theoretically a contract of indemnity because it

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156 45 C.J.S. *Insurance*, paras 944 and 950.

157 45 C.J.S. *Insurance*, para 950.

allows a claim for the agreed value in the case of a valued policy<sup>158</sup>. In *Irving v Manning*<sup>159</sup> the following was said:

*'A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify.'*

- 8.2. The principle seems to be that the prior agreement between the insurer and assured on the value of the insured thing binds them, subject to the agreement being voided by fraud<sup>160</sup> or for lack of insurable interest<sup>161</sup>, but that the contract remains a contract of indemnity with this proviso that the extent and amount of indemnity are capable of being agreed between the parties<sup>162</sup>. The argument that valued policies may offend the indemnity principle is also encountered in

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158 Lambeth, *op cit*, 1.

159 (1847) 1 HL Cas 287 at 307.

160 *Haigh v De la Cour* 3 Camp 318: 'The fraud entirely vitiates the contract.'

161 *Lewis v Ruckner* 2 Burr 1167.

162 Van Niekerk, *Subrogasie*, 17.

continental legal systems.

- 8.3. In the Netherlands the insurer is only bound by the valuation of the insured ship in a valued policy if that value does not exceed the true value by virtue of the provisions of articles 253(3)<sup>163</sup> and 619<sup>164</sup> of the *WvK*. Article 253(1) provides that the parties may agree that the agreed value be paid notwithstanding that the true value may be higher. In the converse situation where the agreed value exceeds the true value, the insurer is entitled to approach the court for a proper determination and, if appropriate, reduction of the value<sup>165</sup>. It therefore appears that Dutch law will prevent an agreed value from being recovered where it exceeds the proven true value and thus offends the indemnity principle. There are, however, two kinds of prior valuations in Dutch law. The first is the one commonly encountered in marine insurance and already referred to. The second is the case of

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163 '253-1 Het staat echter aan partijen vrij uitdrukkelijk te bedingen, dat, onaan gezien de meerdere waarde van het verzekerd voorwerp, de aan hetzelfde overkomene schade, tot het beloop der verzekerde som, zal worden vergoed.'

164 '619 De volle waarde op de kiel of het casco van een schip verzekerd zijnde, kan, hoezeer bevorens getaxeerd, door geregtelijke uitspraak, des noods na berigt van de shundigen, nader bepaald of verminderd worden.'

165 Dorhout Mees, *Schets*, 216 is of the opinion that the effect of a valued policy is merely that the onus of proof is shifted onto the insurer.

'voortaxatie' or prior valuation where the insured value is determined by experts before the risk attaches. In a recent decision the Hoge Raad has ruled in such a case of 'voortaxatie' that, in the absence of fraud, the effect of the agreed value was that the insurer was not allowed to avoid paying the agreed amount by relying on the indemnity principle, however much such reliance would otherwise be justified<sup>166</sup>. Some erosion of the indemnity principle thus appears to have occurred in Dutch law in this particular respect<sup>167</sup>.

- 8.4. While German law allows the amount of the loss to be determined in a valued policy by the agreement between the parties, article 57 of the VVG allows the insurer to prove that the amount agreed upon was in fact excessive<sup>168</sup>. In marine insurance the same principles apply<sup>169</sup>. The result is that the

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166 *M van Marle v Wereldhave NV* 1994 NJ 243.

167 This rule cannot, it is submitted, defeat the express wording of article 619 of the WvK referred to in fn 165 *supra* and the problem should therefore not enter marine insurance law.

168 Bruck-Möller, *op cit*, 380 *et seq.*

169 The provisions of the HGB regulate the position as follows: '793(1) Wird durch Vereinbarung der Parteien der Versicherungswert auf eine bestimmte Summe (Taxe) festgestellt (taxierte Police), so ist die Taxe unter den Parteien für den Versicherungswert massgebend. 793(2) Der Versicherer kann jedoch eine Herabsetzung der Taxe fordern, wenn sie wesentlich übersetzt ist...' ('If the parties agree the insured value in a fixed sum, that sum is binding on them as the insured value. The insurer may nevertheless claim a redetermination of the amount if it has been materially overstated ...')



insurer bears the onus of proving that the loss was not as high as the amount agreed upon, contrary to the usual position where the assured has to prove the quantum of the loss<sup>170</sup>.

- 8.5. In French law the amount of the loss is not defined in the *CdA*. While valued policies are known in France, the *CdA* is silent on the subject. It is mentioned, however, in article 29 of the 1930 law in relation to over-insurance. In principle the agreed value stands, unless the insurer proves that it exceeds the actual value. There is thus, as in Germany and the Netherlands, a shift in the onus of proof<sup>171</sup>. In France the rule that a fraudulent over-insurance is invalid also applies where the insured value is an agreed value<sup>172</sup>. The parties are bound by an agreed value unless there has been a fraud<sup>173</sup>, but there is authority for the proposition that the agreement as to the value means no more than that

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170 Kremer, *op cit*, 179.

171 Kremer, *op cit*, 192.

172 Article 10 of Law 522 of 1967 contains the following rider: '*Il en est ainsi de même si la valeur assurée est une valeur agréée.*' ('It is the same if the insured value is an agreed value.') See also Émerigon, *op cit*, Vol I, 264.

173 Article 11 of Law 522 of 1967: '*En l'absence de fraude le contrat est valable à concurrence de la valeur des choses assurées et, si elle a été agréée, pour toute la somme assurée.*' ('In the absence of fraud the contract is valid to the extent of the value of the insured things and, if it is for an agreed value, for the total sum insured.')

the onus of proof shifts from the assured to the insurer once a loss occurs. The limit of the indemnity therefore remains the proven value of the insured interest, whether that proof is found in the agreement of the parties or in contrary evidence adduced by the insurer<sup>174</sup>.

- 8.6. Under English law the measure of indemnity for a total loss is determined according to Section 68 of the *MIA*<sup>175</sup>. Under English law the amount recoverable by the assured is the value of his insured interest which may or may not be an agreed value, depending on whether the policy was an unvalued or valued policy. According to section 27(3) of the *MIA* the agreed value is conclusive in the absence of fraud. In English marine insurance, therefore, the contract of insurance may well be less than perfect as the agreed value may be more than the true value without the insurer being able to dispute it<sup>176</sup>. In this respect there is a sharp contrast between English and continental

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174 Lambert-Faivre, *op cit*, 334-335; Rodière & Pontavice, *op cit*, para 547.

175 'Subject to the provisions of this Act, and to any express provision in the policy, where there is a total loss of the subject matter insured -  
(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy;  
(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject matter insured.'

176 See Ivamy, *Marine Insurance*, 94-96 for a discussion and a selection of cases on the point.

law.

8.7. In American law the valuation of the subject-matter of the insurance as agreed upon in the policy is also considered to be conclusive in the absence of fraud, mistake or accident<sup>177</sup>, but the agreed value is not absolute for all purposes, and no estoppel is created which prevents the parties from resorting to any other value in appropriate circumstances<sup>178</sup>.

8.8. The Roman-Dutch law expounded by Bynkershoek<sup>179</sup>, Van der Keessel<sup>180</sup> and Van der Linden<sup>181</sup>, and consequently South African law, is to the effect that the agreed value stipulated in the policy binds the assured to the extent that he cannot recover more than that amount, while the insurer is not bound by the valuation and may prove the true value<sup>182</sup>. The agreement on the value therefore has no more effect than to relieve the

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45 *C.J.S. Insurance*, para 950; *St Paul Fire & Marine Insurance Co v Pure Oil Co* 63 F 2d 771.

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45 *C.J.S. Insurance*, para 950.

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*Quaestiones Juris Privati*, 4.3, 4.6, and 4.17.

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*Theses Selectae*, 738; *Praelectiones*, 3.24.6.

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*Koopmans Handboek*, 4.6.8.

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*LAWSA*, para 309.

assured of the burden of proving the value of the object affected by the peril insured against<sup>183</sup>.

9. REPLACEMENT VALUE OR 'NEW-FOR-OLD' INSURANCE

9.1. After the First World War a demand for replacement value insurance arose<sup>184</sup> which has led to an extensive and intensive discussion over the permissibility of such insurance in the light of the indemnity principle. Such insurance may be regarded as contrary to the indemnity principle as the assured may gain from the insurance.

9.2. In marine insurance a 'new for old' deduction has always been made in the case of partial loss or damage<sup>185</sup>. In the case of total losses, whether actual or constructive, (the latter embracing all abandonment cases), the indemnity has traditionally been determined on the basis of the market value of the insured ship or goods in their condition at the commencement of the insurance. Nevertheless, so far as replacement value insurance may have encroached into marine insurance, an indemnification which allows the

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183            *LAWSA*, para 309.

184            *Kremer, op cit*, 177.

185            *Kremer, op cit*, 105.

assured to recover more than the market value at the time of the loss is regarded as offensive to the indemnity principle and is therefore still prohibited in the laws of various countries.

- 9.3. In the Netherlands the approach of article 7.17.2.21-4 of the *NBW* seems to be that replacement value insurance is valid but it is enforced in such a way that there is no gain to the assured. The insurer has the choice to pay either the cost of repair plus any diminution in value which may remain notwithstanding repair, or the insured value. In neither case does the assured receive more than the full value of the thing insured<sup>186</sup>. Article 7.17.2.24 of the *NBW* expressly precludes any recovery which would result in the assured being '*in een duidelijk voordeliger positie*'<sup>187</sup>. Two problematic rulings were given in recent years by the Hoge Raad, but they are nevertheless reconcilable with the indemnity principle. The problem has apparently not reared its head in marine insurance.

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Dorhout Mees, *Handelsrecht*, 91; see also Kremer, *op cit*, 71-84 for a discussion of the *Maring* and *Kraaybeek* cases, where the principles of indemnification in Dutch law were considered by the Hoge Raad.

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See Kremer, *op cit*, 22-23.

9.3.1. In *Jacob Maring v La Confiance*<sup>188</sup> the assured had replacement value insurance on his farm which had been let to a tenant subject to the owner's obligation to restore the buildings thereon in case of their destruction<sup>189</sup>. The cost of rebuilding exceeded the inherent value or market value of the farm after a fire. The insurance company contended that the limit of its liability was the inherent value but the court held that the full reinstatement cost had to be paid. The crux of the matter was found to be the fact that the assured had the obligation to restore the buildings in terms of the *Pachtwet*. That being so, the assured clearly had an insurable interest which exceeded the mere value of the farm. By the same token his loss in case of fire would not have been limited to the value of the farm. In these circumstances the finding of the court cannot be faulted<sup>190</sup>, especially as the obligation to rebuild meant that the assured could not be in '*een duidelijk voordeliger positie*'.

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188 1972 NJ 339.

189 This obligation arose by operation of law, the *Pachtwet*. The case might have been decided differently had this obligation not rested on the assured.

190 The case elicited considerable academic interest. See Kremer, *op cit*, 79-84 for a discussion of the principal opinions on the judgment.

9.3.2. In *Land v Het Hollandsche Kruis*<sup>191</sup>, also known as the *Kraaybeek* case, an old age home insured for reinstatement cost without an obligation to reinstate burnt down. The assured claimed an indemnity based on the cost of reinstatement although reinstatement had not taken place. The insurer contended that such an indemnification would offend the indemnity principle. The court ruled that there was no threat to the indemnity principle because the assured would not necessarily be in '*een duidelijk voordeliger positie*' because the cost of reinstatement would either be reflected in the cost of finding alternative premises or in the lesser price received for the insured property if it were to be sold to a buyer who intended to restore. Kremer<sup>192</sup> interpreted the *Maring* and *Kraaybeek* rulings as restricting the indemnity to the value of the pre-existing property. Seen from this angle the decisions confirm the supremacy of the indemnity principle rather than to negate it<sup>193</sup>, but it is doubtful whether Kremer's interpretation of the rulings is correct. It appears rather that

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191 1978 NJ 577.

192 *Op cit*, 83.

193 Nevertheless, Kremer, *op cit*, 83 is at pains to point out that the *Kraaybeek* decision was based on the peculiar facts of that case and may not be applied to a dissimilar case.

the Dutch courts will allow some inroads to be made into the strict application of the indemnity principle in reinstatement value policies, with each case being decided on its own peculiar circumstances.

9.4. In German law the basic principle is stated in article 55 of the VVG, which is to the effect that the insurer is not obliged to pay more than the amount of the loss<sup>194</sup>. Article 52 of the VVG leaves no doubt that the loss is limited to the value of the thing insured<sup>195</sup>. While replacement value insurance is regarded as valid, a 'neu für alt' deduction is made to ensure that the assured does not gain by the insurance<sup>196</sup>.

9.5. French law follows a similar pattern. Replacement value was first introduced in 1928 in respect of the insurance of buildings and movables. Although there has been some debate about the question whether such insurance does not offend the indemnity principle, that debate was stifled by

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194 Kremer, *op cit*, 177-178.

195 '*Bezieht sich die Versicherung auf eine Sache, so gilt ... der Wert der Sache als Versicherungswert.*' ('So far as the insurance relates to an object .. the value of that object is regarded as the insured value.') See also Prölss-Martin, *op cit*, 305 *et seq.*

196 ('new for old'). No fixed percentage is prescribed by articles 86 and 88 of the VVG, unlike the position in the Netherlands. See Kremer, *op cit*, 177.



the standard clause in insurance policies that replacement value would only be recoverable in the event that the assured actually rebuilt. However, there may still be some enrichment accruing to the assured in such a case, and to meet this criticism a new for old deduction continues to be made, with a shift in the onus of proof<sup>197</sup>.

- 9.6. In English law the concept of replacement value insurance has been known since the First World War. Although it is acknowledged that it may lead to enrichment, it is nevertheless not regarded as impermissible. There is no case law on the question, however, and the question must be regarded as an open one<sup>198</sup> although the position perforce has to be the same as in marine insurance<sup>199</sup>. In marine insurance cases of constructive total loss no deduction 'new for old' is made<sup>200</sup>, but in cases of partial loss section 69(1) of the *MIA* provides that the 'customary deductions', which include the 'new for old'

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197 See Kremer, *op cit*, 191.

198 Kremer, *op cit*, 187-188.

199 See Ivamy, *Fire and Motor Insurance*, 4th ed, (1984), 171; *Ewer v National Employers' Mutual General Insurance Association Ltd* [1937] 2 All ER 193.

200 Lambeth, *op cit*, 235-236.

deduction<sup>201</sup>, have to be made.

10. SUE AND LABOUR

- 10.1. 'The duty of an assured to avert and minimize a loss and the concomitant liability of the insurer to recompense him for expenses incurred in compliance with this duty is an ancient principle of insurance law ...'<sup>202</sup>.

This principle is found in English law in the so-called sue and labour clause of English marine insurance policies. The principle is not limited to English law, however, although a similar result may be achieved in continental legal systems by the application of the Roman law action of the *negotiorum gestor*.

- 10.2. Whether the assured's rights and obligations in this regard are founded upon the contract or upon the provisions of a statute or the common law, it seems clear that they form an entirely separate set of rights and obligations between the

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201 Lambeth, *op cit*, 258.

202 LAWSA, para 310. See also Ivamy, *Marine Insurance*, Chapter 39; Lambeth, *op cit*, 153 *et seq*; 45 *C.J.S. Insurance*, para 953 and Van Niekerk, 'Suing, labouring and the insured's duty to avert or minimise loss', ('Suing, labouring') 1987 *MB* 144-160.

parties<sup>203</sup>. The assured is further entitled to recover only those expenses actually incurred by him in the course of the performance of his right or duty to avert or minimise the loss within the terms of the relevant contract or principles<sup>204</sup>. He therefore does not benefit financially and his situation is more akin to that of a *negotiorum gestor* who incurs expenses in the process of managing another person's affairs and then recovers only those expenses.

10.3. The assured is not merely entitled to labour and incur expenses in order to avoid or minimise loss, he is under a positive obligation to do so. In the Netherlands article 283 of the *WvK* and article 7.17.2.18 of the *NBW* expressly impose such a duty on the assured<sup>205</sup>. Section 78(4) of the *MIA* is to the same effect. As Van Niekerk demonstrated, South African law follows a similar position<sup>206</sup>. Thus, although it may appear at first blush that the practice to compensate the assured for expenses incurred in avoiding or minimising loss infringes the primary rule of the indemnity

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203 Ivamy, *Marine Insurance*, 447; Lambeth, *op cit*, 153-154.

204 Ivamy, *Marine Insurance*, 444; Lambeth, *op cit*, 156-157.

205 See Dorhout-Mees, *Schets*, 218.

206 'Suing, labouring', 1987 *MB* 144.

principle by allowing the assured to recover more than a full indemnity, the indemnity principle actually prevails as the assured does not recover anything other than that expended by him.

11. THE MEASURE OF INDEMNITY

11.1. The process of quantifying the loss suffered by the assured is another area where there are checks and balances to ensure that he receives a full indemnity but no more than that. Over and above the particular rules resorting under the indemnity principle and discussed thus far, the ordinary rules of what is called the measure of indemnity assist in the determination of the indemnity. The measure of indemnity varies according to the nature of the loss<sup>207</sup>. This study has no interest in the measure of indemnity in cases of partial and other losses. The interest of this study is solely in cases of total loss, whether the total loss should be an actual total loss or a constructive total loss, as it is called in English law, or the economic type of loss discussed earlier. The amount of the loss is, for example, unliquidated until agreed by the insurer

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Ivamy, *Marine Insurance*, 405.

or determined by the court or arbitrator<sup>208</sup>, and has to be proved by the assured<sup>209</sup>. This principle is in consonance with the oldest authority on the subject of insurance<sup>210</sup>, and has been enforced ever since.

11.2. In each of the countries under discussion there are also elaborate provisions relating to the measure of indemnity<sup>211</sup>, all designed to ensure that a full indemnity is arrived at without exceeding the actual loss. It is not within the scope of this study to analyse the *minutiae* of the principles which are applied. It will suffice to mention that they are considered in the standard textbooks on insurance<sup>212</sup>.

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208 Ivamy, *Principles*, 9.

209 Ivamy, *Principles*, 9; Van Niekerk, *Subrogasie in die Versekeringsreg*, ('*Subrogasie*'), LLM thesis, Unisa, (1979), 9.

210 Santerna, *op cit*, 4.46.

211 In the Netherlands, articles 696-721 of the *WvK*; In Germany, articles 872-881 of the *HGB*; In France, articles 28-30 of Law 522 of 1967; In England, sections 67-78 of the *MIA*; For the position in American law, see 45 *C.J.S. Insurance*, paras 944-965.

212 See for example in respect of Dutch law, Molengraaff, *op cit*, 679 et seq; Dorhout-Mees, *Schets*, 221 et seq; Dorhout-Mees, *Handelsrecht*, 89 et seq; in respect of German law, Prölss-Martin, *op cit*; Bruck-Möller, *op cit*; in respect of French law, Lambert-Faivre, *op cit*, 332-356; in respect of English and related legal systems, including American law, Ivamy, *Marine Insurance*, Chapters 31 to 39; Lambeth, *op cit*, Chapters 5-7; and in respect of South African law, *LAWSA*, paras 202-212.

12. OTHER CONTRACTS OF INDEMNITY

12.1. Other forms of indemnity are known to South African law. Of these three may be briefly mentioned as examples.

12.1.1. The first of these arises from the contract of suretyship. A contract of suretyship is a contract in terms of which one person, the surety, binds himself in favour of another, the creditor, for the due performance of the obligations of the third party, the principal debtor<sup>213</sup>. The liability of the surety is accessorial, with the result that he may not be liable for more than the principal debtor<sup>214</sup>. The liability of the surety is lightened by three *beneficia*<sup>215</sup>, of which the second and third are of relevance here. In terms of the *beneficium divisionis* the surety who is but one of a number of sureties who guaranteed the same debt may demand that the creditor should divide the debt between the sureties who are liable, with the result that he is only liable for

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213 De Wet & Van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5th ed, (1992), Vol I, 391; See also De Groot, *Inleidinge*, 3.3.12; Johannes Voet, *Commentarius ad Pandectas*, 46.1.1.

214 De Wet & Van Wyk, *op cit*, 394; De Groot, *Inleidinge*, 3.3.23.

215 De Wet & Van Wyk, *op cit*, 395-396.

his *pro rata* share<sup>216</sup>. The second benefit is the *beneficium cendarum actionum*, in terms of which the surety, who is held liable for the whole of the debt by the creditor, may demand from the latter that all the rights and securities which the creditor holds against the debtor and other sureties be ceded to him. This enables the surety who is held liable for the whole debt to recover his whole outlay from the principal debtor, to excuss such securities as the principal debtor may have held, and to claim directly from the other sureties as cessionary of the creditor rather than as a co-surety. Over and above these *beneficia* the surety who has paid the debt in whole or in part, has an automatic right of recovery of a *pro rata* share from each of the co-sureties<sup>217</sup>. The end result is that the surety, who in effect indemnifies the creditor in the event of non-payment of the principal debt by the principal debtor, is able to recoup his loss from the principal debtor and to claim a *pro rata* contribution from other sureties by operation of law. This puts the surety in a very similar position to that of multiple insurers in a case of

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De Wet & Van Wyk, *op cit*, 396; De Groot, *Inleidinge*, 3.3.28; Voet, *Commentarius*, 46.1.21.

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De Wet & Van Wyk, *op cit*, 399-400; De Groot, *Inleidinge*, 3.3.30; Voet, *Commentarius*, 46.1.31.

double- or multiple-insurance.

12.1.2. A second but similar situation arises in the law of negotiable instruments, with regard to the position of the aval. The aval is a suretyship undertaking given by a stranger to a bill or note whereby he guarantees payment of the instrument by one or more of the parties liable thereon<sup>218</sup>. Because an aval is tantamount to a guarantee or suretyship, the aval's<sup>219</sup> right of recovery against the persons whose obligations he guarantees are the same as under an ordinary suretyship, and for the same reason he enjoys a right of contribution against other avals or sureties for the same debt.

12.1.3. The third example is to be found in section 156 of the Insolvency Act 24 of 1936<sup>220</sup>. In this case the rules relating to subrogation and double-insurance would still apply as the insurer's position is not changed by the fact that he has to

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218 *Moti & Co v Cassim's Trustee* 1924 AD 720.

219 The word aval signifies both the undertaking and the person who undertakes it.

220 '156. Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.'



pay the indemnity to which the assured would be entitled to the party entitled to recover from the assured. The section does not appear to import more into the law than that the *concursum creditorum* is not allowed to share in the proceeds of the insurance at the expense of the party who has the primary claim against the assured<sup>221</sup>.

13. CONCLUSION

13.1. The elaborate principles discussed thus far in this chapter demonstrate to what extent the common or ordinary principles of indemnity insurance have been developed with the purpose of ensuring that the dual aims of the indemnity principle are satisfied in every possible case. In the process the paramountcy of the indemnity principle is reinforced and emphasised, but it is also clear that the indemnity principle is neither absolute

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There is an important difference between South African and English law with regard to the procedure to be adopted by the third party who wishes to recover from the insurer under the section. In English law the third party first has to establish his right to the indemnity against the assured by action, arbitration or agreement. Only after he has done so can he recover from the insurer. See section 1 of the Third Party (Rights against Insurers) Act, 1930; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 1 All ER 577 (CA); *Bradley v Eagle Star Insurance Co Ltd* [1989] 1 All ER 961 (HL). Under section 156 of the local act the third party has a direct action against the insurer, and does not have to institute an action or arbitration proceedings against the assured, nor does he have to establish his right to an indemnity by way an agreement. See *Woodley v Guardian Assurance Co Ltd* 1976 1 SA 758 (W); *Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd* 1989 2 SA 790 (W); *Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 1 SA 718 (W); *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 1 SA 410 (A); *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 (C).

nor perfect, especially in marine insurance. The question inevitably arises whether abandonment fulfils any function within the ambit of the indemnity principle.

- 13.2. The same question also arises with regard to subrogation, which appears to share common ground with abandonment. Abandonment and subrogation are similar in that the assured may, but for their operation, and by virtue of particular circumstances, recover more than the full value of the insured interest by either recovering from both the insurer and from a third party, or by retaining part of the insured thing whilst at the same time receiving its full value. Abandonment and subrogation also appear to be related concepts, with an entirely different pedigree to the other subsidiary rules of indemnity already discussed. Their relationship *inter se* and their functions will be considered next in an endeavour to determine whether they are indeed related concepts and whether they fit in within the broad field the indemnity principle.

## CHAPTER TWELVE

### THEORY: SUBROGATION, ABANDONMENT AND THE INDEMNITY PRINCIPLE

#### 1. INTRODUCTION

- 1.1. Abandonment has to be distinguished from other methods of conferring rights upon the insurer, such as subrogation, cession and assignment<sup>1</sup>. The latter two are methods of transferring personal rights and are not peculiar to marine insurance<sup>2</sup>. In an insurance relationship rights transfer through abandonment or subrogation. There are some obvious similarities between subrogation and abandonment.
- 1.2. A curious aspect of the law of indemnity insurance is that subrogation was not expressly mentioned as a separate concept or doctrine in early treatises, decisions and statutes. How a concept so essential to the preservation of the indemnity principle could have been obscured from view and scrutiny for so long after the birth of marine insurance is not entirely clear. Perhaps the parallels between

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<sup>1</sup> Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as 'Arnould'), para 1301.

<sup>2</sup> For that reason they will not be discussed here, save for mentioning that rights could be transferred by these means entirely independent of any insurance relationship being present.

abandonment and subrogation may give a clue. This chapter will therefore be devoted to the origins of subrogation, its function as a servant of the indemnity principle, its main principles, and the features which distinguish it from abandonment.

## 2. THE DEFINITION OF SUBROGATION<sup>3</sup>

2.1. Subrogation means substitution<sup>4</sup>. In law it denotes the process whereby one person so takes the position of another that he becomes entitled to enforce the rights of the latter in relation to a particular claim or cause of action<sup>5</sup>. While it is

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<sup>3</sup> The detailed principles of subrogation are set out in the standard textbooks on insurance and marine insurance, as well as theses examining the subject in greater detail. Helpful works in the different countries include the following: In South Africa, Joubert, (ed) *The Law of South Africa*, Vol 12, (cited as LAWSA); Getz and Davis, *The South African Law of Insurance*, 4th ed, (1993); Van Niekerk, *Subrogasie in die Versekeringsreg*, LL.M thesis, Unisa, (1979), (cited as Van Niekerk, *Subrogasie*); In the Netherlands, Dorhout Mees, *Nederlands handels-en faillissementsrecht*, 6th ed, (1987), (cited as 'Handelsrecht'); Van Barneveld, *Inleiding tot de Algemene Assurantiekennis*, 10th ed, (1978); Mulder, *Subrogatie*, doctoral thesis, Leiden, (1988); Scheltema-Mijnssen, *Algemeen Deel van het Schadeverzekeringsrecht*, 4th ed, (1991); In Germany, Ritter-Abraham, *Das Recht der Seeversicherung*, 2nd ed, (1967); Hofmann, *Privatversicherungsrecht*, (1991); Pröles-Martin, *Versicherungsvertragsgesetz*, (1992); Bruck-Möller, *Kommentar zum Versicherungsvertragsgesetz*, (1980); In France, Danjon, *Traité de Droit Maritime*, (1914); Ripert, *Précis de Droit Maritime*, 7th ed, (1956); De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-1960); Rodière and Pontavice, *Droit Maritime*, 10th ed, (1986); Lambert-Faivre, *Droit des assurances*, 8th ed, (1992); In England, Ivamy, *Principles of Insurance Law*, 5th ed, (1986); Ivamy, *Marine Insurance*, 4th ed, (1985); Arnould; Lambeth, *Templeman on Marine Insurance*, 5th ed, (1981); Halsbury, *Laws of England*, 4th ed, Vol 16, (Equity); MacGillivray and Parkington, *Insurance Law*, 8th ed, (1988); Khoury, *Subrogation in Marine Insurance*, thesis, University College of London, (1961); Derham, *Subrogation in Insurance Law*, (1985); Mitchell, 'The law of Subrogation', 1992 LMCLQ 483; In America, 46 C.J.S. *Insurance*; Schoenbaum, *Admiralty and Maritime Law*, (1987); Gilmore and Black, *The Law of Admiralty*, (1975).

<sup>4</sup> *The Compact Edition of the Oxford English Dictionary*, (1987), Vol 2, 3126, s.v. 'subrogate' and 'subrogation'; Mitchell, *op cit*, 483; LAWSA, para 222.

<sup>5</sup> Lambert-Faivre, *op cit*, 377; LAWSA, para 222; Getz and Davis, *op cit*, 243; Mitchell, *op cit*, 483.

particular claim or cause of action<sup>5</sup>. While it is in indemnity insurance that the concept is best known, it also occurs, although not necessarily in the same form, in other circumstances<sup>6</sup>.

2.2. Subrogation has been said to apply to all contracts of indemnity<sup>7</sup>. In this broader context subrogation may be said to be a '*restitutionary remedy for unjust enrichment*'<sup>8</sup>. In insurance, however, subrogation is perhaps better described as the right which the insurer has against the assured to recoup himself out of the rights and remedies which the assured may have against third parties in respect of the loss<sup>9</sup>. The word subrogation is used also to describe a wider set of rules namely the set of rules which determine,

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5 Lambert-Faivre, *op cit*, 377; LAWSA, para 222; Getz and Davis, *op cit*, 243; Mitchell, *op cit*, 483.

6 It suffices to mention that subrogation also occurs in the contract of suretyship, certain types of liability attaching to peculiar transactions involving negotiable instruments, cases of joint and several liability and the transfer of rights under section 156 of the Insolvency Act 24 of 1936.

7 In *Burnand v Rodocanachi*, (1882) 7 App Cas 333 (HL) Lord Blackburn said: '*The general rule (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.*'

8 Mitchell, *op cit*, 486.

9 LAWSA, para 222; Ivamy, *Principles*, 465; *Castellain v Preston* (1883) 11 QBD 380 (CA), 388; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 (A).

once the insurer has indemnified the assured, what the respective rights and obligations of the insurer and assured are *inter se*, on the one hand, and what the rights of the insurer are against the third party responsible for the loss, on the other.

2.3. The difference between subrogation in its narrow and wider senses can best be explained by reference to the three different scenarios which are possible. In the first the assured suffers an insured loss but recovers that loss from a third party. The insurer, without knowledge of that prior payment, then also pays for the loss. In the second, the assured suffers an insured loss, and the insurer fully indemnifies him. In the third, the assured suffers an insured loss and is paid by the insurer for that loss, but thereafter also recovers the same loss from a third party. Of these scenarios only the second is a true case of subrogation, or subrogation *stricto sensu*<sup>10</sup>. In the first and third scenarios the indemnity principle is protected by other rules which form part of subrogation in its wider sense, or, as it has been put, within subrogation *latu sensu*<sup>11</sup>.

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<sup>10</sup> Mitchell, *op cit*, 194-195; Van Niekerk, *Subrogasie*, xii-xv.

<sup>11</sup> Mitchell, *op cit*, 195.

2.4. In the course of his judgment in *Kaltenbach v MacKenzie*<sup>12</sup> Brett LJ made some controversial<sup>13</sup> statements about abandonment. He asserted that:

*'(a)bandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity.'*

2.5. These statements have to be seen in context. In the first place, since the case dealt with a marine insurance policy, the statements are *obiter dicta* so far as other contracts of indemnity are concerned. In the second place, it appears that Brett LJ did not properly distinguish between abandonment and subrogation<sup>14</sup> in a case where he must have had subrogation in mind rather than abandonment in its marine insurance sense. Brett LJ must have been aware of the distinction between

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12 (1879) 3 CPD 467 (CA).

13 Van Niekerk, *Subrogasie*, 329-330.

14 Van Niekerk, *Subrogasie*, 329-330.

subrogation and abandonment since he referred specifically to the 'abandonment' which occurs 'at the time of settlement' in contradistinction to the abandonment which required in the case of a constructive total loss. This is made clearer by his statement that '(a)bandonment is ... applicable ... whether it be for an actual total loss or for a constructive total loss.'<sup>15</sup> The confusion is therefore in the terminology, not the substance. The confusion is perhaps exacerbated by the fact that in English law real rights in the sense of the assured's proprietary rights in the thing insured may also be transferred by subrogation<sup>16</sup>.

2.6. The position was, it is submitted, correctly stated by Lord Atkin in *Glen Line Ltd v AG*<sup>17</sup> where he said:

'(W)here the owners of an insured ship have claimed or been paid for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred

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<sup>15</sup> This is clear from the position of English law that an abandonment is not required when nothing remains to be abandoned, which would be the case when the loss is an actual total loss; *Rankin v Potter* (1873) 6 AC 83 (HL).

<sup>16</sup> See the text *infra*.

<sup>17</sup> (1930) 36 Com Cas 1 (HL) at 13.



to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid ... But the right of the assured to recover damages from third parties is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle. And on the same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes.'

- 2.7. Notwithstanding the differences between them, abandonment and subrogation are so similar in their operation and purpose that the question inevitably arises whether they do not perhaps share common origins. This question has important repercussions for South African law as it was held in *Ackerman v Loubser*<sup>18</sup> that subrogation has been received by South African law from English law. The result is that the South African courts and authors have ever since looked to English law for guidance on the principles of subrogation without questioning the correctness of that assertion. However, if subrogation were to have been part of a wider doctrine of abandonment when the Roman-

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1918 OPD 31. See *LAWSA*, para 224 fn 6.

Dutch law was vested as the law of the Cape of Good Hope in the seventeenth century, then the conclusion must be that subrogation entered South African law through its Roman-Dutch law component and that the Roman-Dutch law may or must be looked at for guidance. There are important differences between English and continental law on the subject of subrogation and the question would gain further importance if the future of abandonment in the proposed Marine Insurance Act were to be considered.

### 3. THE ORIGINS OF SUBROGATION

- 3.1. Subrogation is part of the law of indemnity insurance of not only South Africa and England, but also of the Netherlands, Germany, France and America. Indeed, it is said to be part of the law of all countries where insurance is practised<sup>19</sup>. While the basic principles of subrogation appear to be the same or very similar in these countries, there is some disagreement about its precise origins<sup>20</sup>.

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19 Harrel-Courtès, *Le Nouveau Droit Français de l'Assurance Maritime et des Événements de Mer*, (1968), 37.

20 See Ivamy, *Principles*, 465 et seq; Van Niekerk, *Subrogasie*; and Khoury, *Subrogation in Marine Insurance*, thesis, University College London, (1961). Dover, *A Handbook to Marine Insurance*, 8th ed, (1975), 22 states that 'probably the earliest reference to the principle of subrogation' is to be found in the fourteenth century laws of the town of Bruges in

3.2. The concept of a subrogation was known to Roman-law, not in the context of insurance, but in the context of the payment of a debt by a third party, who was then granted the rights of the creditor against the debtor whose debt the third party had paid<sup>21</sup>. Subrogation is not mentioned by name in the sixteenth to eighteenth century ordonnances on marine insurance<sup>22</sup>, nor, with the exception of Pothier and Émerigon, in the treatises of the famous lawyers of that period<sup>23</sup>. The word appears to have surfaced in English cases only towards the last third of the nineteenth century<sup>24</sup>.

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what is now Belgium. I could not trace this reference, unless Dover had the case of *Marc Gentil v Arnulphi, Lommelien & Tany* which was discussed in Chapter 4 *supra* in mind. That case, however, dealt with abandonment. Van Niekerk, *Subrogasie*, 41 fn 20 states that the first decision in English law where the insurer's right was called the right to subrogation is *Stringer v English & Scottish Marine Insurance Co* (1869) LR 4 (QB) 676 and that the phrase was firmly in use after *Castellain v Preston*, *supra* was decided in 1883. The earliest express use of the term which I could find was in Pothier, *Traité du contrat d'assurance*, (1768-1778), paras 52 and 161 and Émerigon, *op cit*, Vol II, 230 *et seq.* In none of the treatises written before *Castellain v Preston*, *supra*, and to which I had access was there any scientific analysis of subrogation and its principles. Even Park, *op cit*, 8th ed, (1842), Phillips, *op cit*, (1854) and Arnould, *op cit*, (1857) did not treat it as a separate concept or rule. On the continent the earliest theses on subrogation I could trace are, in the Netherlands, Gualtherie van Weezel, *De wettelijke subrogatie bij verzekering*, doctoral thesis, Leiden, (1894); Van Asch van Wijk, *De subrogatie van den verzekeraar*, doctoral thesis, Utrecht, (1895); Ledeboer, *Het recht van den verzekeraar tegen derden*, doctoral thesis, Leiden, (1927); in Germany, Thut, *Der Regress des Versicherers*, (1924); and in France, Leproust, *Du recours de l'assureur contre les tiers*, (1914); Gautier, *Du recours de l'assureur contre le tiers responsable du dommage*, (1939); Vellieux, *De l'application à l'assureur de la subrogation légale de l'article 1251-3 du Code Civil*, thesis, Paris, (1948).

21 MacGillivray and Parkington, *op cit*, para 1151.

22 These ordonnances were discussed in Chapter 5 *supra*.

23 These include Santerna, Straccha, Casaregis, Roccus, De Groot, Bynkershoek, Van der Keessel, Van der Linden, Kuricke, Magens, Benecke, Valin, Émerigon, Park, Marshall, Kent and Phillips.

24 MacGillivray and Parkington, *op cit*, para 1171 fn 67.

3.3. By the end of the eighteenth century the English courts had come to recognize rights of subrogation in certain contracts of indemnity, including insurance<sup>25</sup>. The precise origins of the doctrine have remained a controversial matter in English law<sup>26</sup>. Some have argued that it is the product of equity<sup>27</sup>, others that it is a principle of law<sup>28</sup>, either imposed as a rule of the law itself, or as a measure introduced to the contract by a term implied by law. The House of Lords now appears to have settled this argument so far as English law is concerned in favour of the latter view<sup>29</sup>, but the question remains; when and where was subrogation introduced into insurance?

3.4. The only explanation of reasonable substance appears to be that the concept of subrogation was at first locked inside a wider doctrine of abandonment but later emerged as a separate doctrine with its own field of operation<sup>30</sup>.

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25 MacGillivray and Parkington, *op cit*, para 1163.

26 MacGillivray and Parkington, *op cit*, para 1163.

27 MacGillivray and Parkington, *op cit*, paras 1164-1167.

28 MacGillivray and Parkington, *op cit*, paras 1168-1169.

29 *Hobbs v Marlowe*, [1978] AC 16 (HL); MacGillivray and Parkington, *op cit*, para 1170.

30 MacGillivray and Parkington, *op cit*, para 1171.

Dorhout-Mees<sup>31</sup> expressed the opinion that the absence of reference to subrogation before the 1825 draft of the *Wetboek van Koophandel* of 1838 ('the *WvK*') could be ascribed to two factors. The first is that there were seldom circumstances in marine insurance where a claim could be made against an identifiable or reachable third party<sup>32</sup>. The second lies therein that in the exceptional case where a claim could be made against the third party responsible for the loss a ready remedy was found in abandonment<sup>33</sup>. A review of the historical landmarks in the development of insurance principles provides circumstantial evidence for this view, albeit by virtue of the absence of evidence rather than the concrete presence of evidence.

3.5. None of the early authors on commercial or insurance matters mentioned subrogation in their treatises<sup>34</sup>. Bosco does not appear to have considered the distinction between the case of a

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31 *Schadeverzekeringsrecht*, 4th ed, (1967), ('*Schade*'), 387.

32 This must surely have been the consequence of the vast distances over which ships traded, coupled with the lack of reliable means of communication, the lack of reliable legal institutions in the distant ports where the ship or goods arrived, and the lack of representation on the part of the insurers in such places.

33 Some authority for this view exists in opinion 247 in Van den Berg, *Nederlands Advysboek*, (1693-1698).

34 These are referred to in Chapter 4 *supra*.

loss of part of the goods insured under the simulated sale contract as opposed to a loss of all the goods. There is no reason to suppose that the condition (to which the sale was subject) was regarded as having been fulfilled in respect of all the goods if only a portion were lost or destroyed. In such a case (of partial loss) there was no need for the assured to relinquish ownership of the saved goods in order to give effect to the notional sale. However, in respect of the goods actually lost or destroyed the assured relinquished the goods to the insurer, who recovered as much as he could<sup>35</sup>. This recovery by the insurer had to take place, if the fiction of the sale was to be given its full effect, in the insurer's own name because his title to sue emanated from the fact that he had acquired the goods by purchase. The concept of subrogation could thus exist within the simulated sale in that the right to sue third parties for delivery of the goods or for the loss arising from their wrongful actions in relation to that portion of the goods followed the goods to the insurer.

- 3.6. The early ordonnances did not distinguish between partial and total losses and did not mention

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Bosco, *Consilia*, (1390-1425), *Consilium* 369.

subrogation at all<sup>36</sup>. According to mercantile custom as set out in the *Guidon de la Mer* the assured was required to '*quitter et delaisser ses droits, noms, raisons et actions de la propriété qu'il a en la merchandise*'<sup>37</sup>. What had to be left and relinquished to the insurer was therefore more than mere ownership of the merchandise insured, and included the assured's rights, ('*droits*'), title, ('*noms*'), causes of action, ('*raisons*') and claims of ownership, ('*actions de la propriété*'). Having regard to the wide application of the *Guidon* and the even wider sphere of its subsequent influence, it would not be unreasonable to assume that this statement reflected universal thinking of that time on the subject<sup>38</sup>. Since the same text contains the oldest definition of abandonment, one may also conclude that abandonment and subrogation were not seen as separate concepts when the *Guidon* was compiled in the middle of the sixteenth century.

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36 These were discussed in Chapter 5 *supra*.

37 The *Guidon de la Mer*, article 1.

38 An interesting Canadian case, *The Quebec Fire Assurance Company v Augustin St. Louis and John Molson* [1851] 7 Moore 286 (PC), came before the Privy Council in 1851. French law applied to the province of Quebec. Upon receiving the indemnity the assured executed a document to '*assign*' to the insurer its '*right, title, interest, property, claim and demand*', (language reminiscent of the *Guidon de la Mer*), against the wrongdoing steamboat which had caused the fire giving rise to the loss. The Privy Council ruled, on the authority of Émerigon and Pothier, that this amounted to a valid subrogation even though the document might not be valid as a cession for want of authority and that the insurer therefore had the right to pursue the recovery up to the amount of the indemnification against the wrongdoing third parties.

3.7. The concept of subrogation was not mentioned in the works of any of the institutional writers on Roman-Dutch law<sup>39</sup> but the Rotterdam Ordonnance of 1721 contained an interesting provision dealing with the vexed question of deviation. Article 52<sup>40</sup> of the ordinance provided that, when a deviation had occurred without the knowledge of the assured, the insurer remained liable nevertheless but the assured then had to cede his rights to recover the '*schade uit dezen hoofde veroorzaakt*' from the shipper to the insurer. This provision was referred to by both Van der Keessel<sup>41</sup> and Van der Linden<sup>42</sup> and it may therefore be argued convincingly that this is also South African law. It is notable that a cession was required so that there was not as yet an automatic or *ex lege* transfer of rights to the insurer. However, the roots of a subrogation are evident, it is submitted, in this provision<sup>43</sup>.

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39 The principal institutional writers whose works are referred to herein are De Groot, Bynkershoek, Van der Keessel and Van der Linden.

40 Article 54 of the Dordrecht Ordonnance of 1775 was to the same effect.

41 *Theses Selectae Juris Hollandici et Zelandici*, ('*Theses Selectae*') (1800), 750; *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, ('*Praelectiones*'), (published only in 1961-1967), 3.24.11.

42 *Regtsgeleerd, Practicaal en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 4.6.10.

43 It is improbable that the requirement of a cession of action existed only in relation to the assured's claims arising from deviation and did not exist in respect of all other claims the assured had against third parties.



The provision, if it reflected insurance practice of the time, would be in consonance with the notions of the *Guidon de la Mer*, namely that the assured also had to cede his personal rights to the insurer under the broad umbrella of the concept of abandonment.

3.8. Subrogation appears to have been introduced into Dutch legislation as a separate concept<sup>44</sup> as late as 1838 by way of article 284<sup>45</sup> of the *Wetboek van Koophandel* ('the *WvK*')<sup>46</sup>. The article applies to insurance generally and not just to marine insurance<sup>47</sup>. The article makes it clear, however, that it applies only to cases where the insurer has paid the loss in respect of a 'verzekerde voorwerp' and it is therefore limited to indemnity insurance. In the recent process of the modernisation of the *WvK* certain changes to the

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44 Mulder, *op cit*, Chapter 1. The first mention of subrogation occurred when it was inserted in the draft *Wetboek van Koophandel* in 1825. The clause was adopted into the final version of the *Wetboek* which became law in 1838 'zonder veel parlementaire bespreking', according to Van Barneveld, *Inleiding tot de Algemene Assurantiëwet*, 10th ed, (1978), 527.

45 '284 De verzekeraar, die de schade van een verzekerde voorwerp betaald heeft, treedt in alle de regten welke de verzekerde, ter zake van de schade, tegen derden mogt hebben; en de verzekerde is verantwoordelijk voor elke daad welke het regt van de verzekeraar tegen die derden mogt benadeelen.'

46 Mulder, *op cit*, 1.

47 It falls under the ninth title of Book I, Chapter III of the *Wetboek van Koophandel*, ('the *WvK*'), which covers 'assurantie of verzekering in het algemeen'.

law relating to subrogation were also made<sup>48</sup>. An express provision was added to article 284 that the rights of the assured against a third party responsible for the loss on a ground other than insurance pass to the insurer<sup>49</sup>. A much wider provision is due to be taken up in the *Nieuw Burgerlijk Wetboek* ('the NBW')<sup>50</sup>. The proposed article would prohibit the pursuit of the claims which are transferred to the insurer '*ten nadele van het recht op schadevergoeding van de verzekerde*', and proposes that no rights are to be acquired through subrogation against the assured, a co-insured, the wife of the assured, relatives in a direct line of consanguinity, the members of the assured's household, or his employees<sup>51</sup>. The proposal is in accordance with provisions already

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The new text is of temporary nature and is to be replaced by article 7.17.2.25 of the NBW when that article comes into force. No change has been made to the basic principle, but the new article will be to the effect that the *rei vindicatio* will become available to the insurer. See Scheltema-Mijnssen, *op cit*, 256.

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Mulder, *op cit*, xvi.

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'1. Indien de verzekerde terzake van door hem geleden schade anders dan uit verzekering vorderingen tot schadevergoeding op derden heeft, gaan die vorderingen bij wijze van subrogatie op de verzekeraar over voor zover deze, al dan niet verplicht, die schade vergoedt. De verzekerde moet zich onthouden van elke gedragen welke aan het recht van de verzekeraar tegen de derden afbreuk doet.'

'2. De verzekeraar kan de vordering waarin hij is gesubrogeerd, of die hij door overdracht heeft verkregen, niet ten nadele van het recht op schadevergoeding van de verzekerde uitoefenen.'

'3. De verzekeraar krijgt geen vordering op de verzekeringnemer, een mede-verzekerde, de niet van tafel en bed gescheiden echtgenoot van een verzekerde, noch op de bloedverwanten in de rechte lijn van een verzekerde en hun niet van tafel en bed gescheiden echtgenoten, noch op huisgenoten of werknemers an een verzekerde. Deze regel geldt niet vir zover zulk een persoon jegens de verzekerde aansprakelijk was wegens een omstandigheid welke, zo zij aan de verzekerde zelf was toe te rekenen, aan diens recht op de verzekeringsuitkering afbreuk zou hebben gedaan.'

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Article 7.17.2.25 of the proposed NBW; Mulder, *op cit*, xv-xvi.

applicable in Germany and France<sup>52</sup>.

- 3.9. In German law the principle of subrogation appears first to have been mentioned, although not by name, in article 804<sup>53</sup> of the *Handelsgesetzbuch* ('the HGB') which came into effect in 1900. Article 804 applies only to marine insurance. Subrogation is regulated for all other types of indemnity insurance by the general provisions of article 67<sup>54</sup> of the *Versicherungsvertragsgesetz* ('the VVG') of 30 May 1908, which also provides that the rights of the assured against third parties are transferred<sup>55</sup> to the insurer upon

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52 See the text *infra*.

53 '804(1) Hat der Versicherer seine Verpflichtung erfüllt, so tritt er, soweit er einen Schaden vergütet hat, dessen Erstattung der Versicherte von einem Dritten zu fordern befugt ist, in die Rechte des Versicherten gegen den Dritten ein, jedoch unbeschädigt der Vorschriften des A 775 Abs. 2 und des A 777 Abs. 2.' (The lastmentioned articles have since been repealed.)  
'804(2) Der Versicherte ist verpflichtet, dem Versicherer, wenn er es verlangt, auf dessen Kosten eine öffentlich beglaubigte Anerkennungsurkunde über den Eintritt in die Rechte gegen den Dritten zu erteilen.'  
'804(3) Der Versicherte ist verantwortlich für jede Handlung, durch die er jene Rechte beeinträchtigt.' ('804(1) If the insurer has fulfilled his obligations, he acquires, insofar as he has paid compensation for a loss for which the assured is entitled to claim compensation from a third party, the rights of the assured as against the third party, without prejudice however to the provisions of articles 775(2) and 777(2). (2) The assured is obliged to furnish the insurer, if he so requests, with an authenticated deed of acknowledgement concerning the acquisition of the rights against the third party, at the insurer's expense. (3) The assured is liable for any act by which he harms the said rights.')

54 Article 67 of the VVG contains the same principles as article 804 of the HGB, but also adopted the approach of the Netherlands, by providing (in article 67(2)) that there will be no subrogation when the third party primarily liable for the loss is a close relative of the assured, except if the damage was caused intentionally.

55 The German text uses the words 'geht über', which literally translates to 'passes', rather than 'is subrogated'; Pfennigstorf, *German Insurance Law*, (1975), 114.

payment of the loss.

3.10. In French law the word subrogation was first mentioned by Pothier<sup>56</sup>, as far as can be determined. There was no mention of subrogation in the *Ordonnance de la Marine* of 1681 upon which Pothier's commentary was mainly based, which tends to confirm that there was as yet no clear distinction between abandonment and subrogation before the end of the seventeenth century. The concept was also, strangely enough, not taken up in the *Code de Commerce* ('the *CdeC*') of 1807 in the chapter covering marine or other types of insurance<sup>57</sup>. Article 1251 of the *CdeC*, however, contained a general subrogation provision applicable to contracts and obligations. Although not applied to insurance at first<sup>58</sup>, this provision was later utilised to justify the application of the concept of subrogation also to

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*Op cit*, para 52 where he said the following: '*...il n'est pas douteux que les assureurs en doivent payer à l'assuré la valeur, sauf à eux à exercer les actions de l'assuré contre ceux qui sont tenus à la contribution,*' ('... there is no doubt that the insurers while having to pay the assured the claim, do so without prejudice to the exercise of the actions of the assured against those who are held liable to contribute,') and para 161: '*... (l)orsque les assureurs ont indemnisé l'assuré des pertes et dommages qui ont été causés pour le salut commun, dans les marchandises assurées, ils doivent être subrogés aux droits de l'assuré, dans la contribution qui doit se faire en ce cas.*' ('... when the insurers have paid the assured for the loss and damage which had been caused for the common benefit, in respect of the insured goods, they must be subrogated in the rights of the assured, in respect of the contribution which must be made in such a case.')

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Khoury, *op cit*, 9.

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Lambert-Faivre, *op cit*, 376.

insurance contracts<sup>59</sup>. In the nineteenth century French insurers simply inserted a subrogation clause in their policies, which allowed them to be subrogated in the rights and actions of their assured against all persons responsible for the loss<sup>60</sup>. In 1930 a statute reforming insurance law came into force, which gave statutory force to the existing custom and provided specifically for subrogation to apply in insurance contracts<sup>61</sup>. This statute was in turn replaced by the *Code des Assurances* ('the CdA') of 1976, which re-enacted most of the former's provisions without significant change. Article L 121-12 of the CdA<sup>62</sup> now regulates subrogation in insurance generally and article 33 of Law 522 of 1967<sup>63</sup> regulates the

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59 Khoury, *op cit*, 24-26.

60 Lambert-Faivre, *op cit*, 376.

61 Lambert-Faivre, *op cit*, 376; Khoury, *op cit*, 26-28.

62 'L 121-12. L'assureur qui a payé l'indemnité d'assurance est subrogé, jusqu'à concurrence de cette indemnité, dans les droits et actions de l'assuré contre les tiers qui, par leur fait, ont causé le dommage ayant donné lieu à la responsabilité de l'assureur. L'assureur peut être déchargé, en tout ou en partie, de sa responsabilité envers l'assuré, quand la subrogation ne peut plus, par fait de l'assuré, s'opérer en faveur de l'assureur.' ('L 121-12. The insurer who pays the indemnification (of the insurance) is subrogated, concurrently with the said indemnification, in the rights and actions of the assured against the third parties who, by their action, have caused the loss which gave rise to the liability of the insurer. The insurer may be discharged, in whole or in part, from his liability towards the assured, when subrogation can no longer operate in favour of the insurer as a result of the action of the assured.') The article also contains the familiar clause that there will be no subrogation in respect of the assured's claims against certain defined relatives, save where the damage has been caused intentionally.

63 '33. L'assureur qui a payé l'indemnité d'assurance acquiert, a concurrence de son paiement, tous les droits de l'assuré nés des dommages qui ont donné lieu à garantie.' ('The insurer who pays the indemnification (of the insurance) acquires, concurrently with his

subject in marine insurance.

3.11. In English law the concept of subrogation was recognized expressly in relation to marine insurance in *Randal v Cockran*<sup>64</sup> in 1748, where it was held that the insurers, after indemnifying the assured, stood in his place in relation to the goods, the salvage and restitution<sup>65</sup>. However, the first occasion when an English court discussed the distinction between abandonment and subrogation appears to have been in *Simpson v Thomson*<sup>66</sup> in 1877. Still, it was only after the decision in *Castellain v Preston*<sup>67</sup> in 1883 that the concept of subrogation achieved its own recognition in English law and practice.

3.12. It has been suggested that South African law has received the concept of subrogation from English law<sup>68</sup> and not from the Roman-Dutch law of the

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payment, all the rights of the assured arising from the damages which gave rise to the indemnification in the first place.')

64 (1748) 1 Ves Sen 99.

65 Khoury, *op cit*, 8. Park, *op cit*, 160 discussed *Randal v Cockran*, *supra*, but did not discuss the rules of subrogation in any detail, probably because the doctrine had not yet been accorded a place outside the ambit of abandonment at that time.

66 (1877) 3 App Cas 279 (HL).

67 *Supra*.

68 LAWSA, para 224.

seventeenth century, like the main body of South African law. This conclusion is a contentious one, as the concept of subrogation was probably present within the doctrine of abandonment from the birth of insurance itself, as previously suggested. If this conclusion is correct, subrogation must have entered South African law via the Roman-Dutch law of the seventeenth century which was vested here when the Dutch East India Company settled its refreshment station at the Cape of Good Hope in 1652. At that time abandonment was firmly part of Dutch marine insurance law, as the Amsterdam, Middelburg and Rotterdam Ordonnances of 1598, 1600 and 1604 respectively testify<sup>69</sup>. The reason why subrogation was not specifically dealt with by these ordonnances, nor by the commentators on their provisions, is probably that subrogation was not yet seen as distinct from abandonment in the Roman-Dutch law of that time<sup>70</sup>. Notwithstanding the absence of a direct reference to subrogation in Roman-Dutch law texts, there are some indications in the writings of the institutional writers on Roman-Dutch law, according to Van

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The abandonment provisions of these ordonnances are discussed in Chapter 5 *supra* and in Chapter 16 *infra*.

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This also appears to be the position in French law; see the discussion of French law in the text.

Niekerk<sup>71</sup>, that the assured was obliged in certain specific cases to transfer his right of action against the third party to the insurer. These texts<sup>72</sup> are insufficient, on their own, to allow a firm conclusion to be drawn that the doctrine of subrogation was applied in Roman-Dutch law in all cases where the insurer had indemnified the assured and then sought to pursue the claim of the assured against the third party responsible for the loss, but it is submitted that subrogation must have been part of the insurance law and practice of the time, not only in the Netherlands, but everywhere else where insurance was practised.

3.13. Subrogation was mentioned by name for the first time in 1918 in South African jurisprudence in *Ackerman v Loubser*<sup>73</sup>, although it was mentioned obliquely in earlier cases<sup>74</sup>. In *Ackerman v Loubser* it was concluded that the concept of subrogation was received into South African law from English law, a conclusion commonly accepted

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71 *Subrogasie*, 374-375.

72 De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (1631), ('*Inleidinge*'), 3.24.11 and 3.29.18; Van der Keessel, *Theses Selectae*, 717, 750 and 756; Lybrechts, *Burgerlijk, Rechtsgeleerd, Notariaal en Koopmans Handboek*, 3rd ed, (1761), 92; and Van der Linden, *Koopmans Handboek*, 4.6.10.

73 1918 OPD 31.

74 *LAWSA*, para 224 fn 6.



ever since. If this conclusion as to the origins of subrogation in South African law is correct, the principles of subrogation ought to be the same as in English law<sup>75</sup>.

#### 4. THE FUNCTIONS OF SUBROGATION

- 4.1. Subrogation serves the indemnity principle in the situation where the assured would have been able, but for the insurer's right to be subrogated, to recover both the insurance money and any amount due to him by the third party responsible for the loss<sup>76</sup>. The assured's right to claim the loss from the third party is therefore curtailed in such a way that the insurer receives the benefit of the recovery. At the same time the third party responsible for the loss is not released from liability to the assured, as that would allow a person not party to the insurance contract to benefit from it to the detriment of the insurer. It is doubtful whether insurance business could be conducted profitably or successfully were it not for these principles. Slightly divergent views are apparent on the exact purpose of subrogation.

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It is therefore not surprising to find that South African academics freely refer to English cases as authority for the principles of subrogation in South African law; see for example *LAWSA*, paras 222-237.

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Lambert-Faivre, *op cit*, 374.

4.2. In the Netherlands some authors and courts have expressed the opinion that the purpose of subrogation is to prevent a double recovery by the assured<sup>77</sup>, while others hold the view that its purpose is also to give the insurer some form of redress against the third party who caused the loss or is primarily liable for it<sup>78</sup>. More recent Dutch authority emphasises the fact that the third party would be unjustly enriched at the expense of the insurer if the latter were not given the right to pursue the assured's rights against the third party<sup>79</sup>. The final responsibility for the loss therefore remains with the third party primarily responsible for it<sup>80</sup>. The Hoge Raad has ruled that

*'... het bestaan van een sommenverzekering een aangelegenheid is die de schuldige aan het*

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Mulder, *op cit.*, 6; *De Naamlooze Vennootschap Stoomboot Maatschappij 'Carsjens' v L. Groenewegen*, (Rechtbank Utrecht), 14 Dec 1910, W 9149; (Rechtbank s'Gravenhage), 21 Jan 1915, 1915 NJ 448. It was held, at 449 of the Rechtbank s'Gravenhage's judgment, that article 284 of the *WvK* was an 'uitvloeisel van het beginsel dat verzekering alleen vergoeding van schade, maar niet winst ten doel het, (en) dat daardoor dubbele schadevergoeding worde voorkomen...'

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Mulder, *op cit.*, 6-7; Scheltema-Mijnssen, *op cit.*, 256; *De N.V. Verzekeringsbank De Nieuwe Eerste Nederlandsche v De N.V. Hollandsche Ijzeren Spoorweg Maatschappij*, (Hof Amsterdam), 28 Dec 1917, W 10223; (Hoge Raad), 31 Dec 1931, 1932 NJ 419.

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Mulder, *op cit.*, 8-9; *A Visser en A M L van Wesenbeck v Assurantie Maatschappij 'De Zeven Provinciën' NV*, (Hof Leeuwarden), 6 Feb 1957, 1957 NJ 644; (Hof s'Hertogenbosch), 14 March 1978; (Hoge Raad), 27 April 1979, 1981 NJ 139.

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Van Barneveld, *op cit.*, 529.

*ongeval niet aangaat ...*'<sup>81</sup>

The reasoning applied by the court is equally applicable to indemnity insurance<sup>82</sup>.

4.3. German<sup>83</sup> and French<sup>84</sup> law also recognize the function and purpose of subrogation as the prevention of a double recovery by the assured on the one hand, and the unjust enrichment of the third party at the expense of the insurer on the other. The view appears to be the same as in Dutch law, namely that the existence of the insurance is irrelevant as between the assured and insurer on the one hand and the third party responsible for the loss on the other<sup>85</sup>.

4.4. In English law the right to be subrogated is based on equity<sup>86</sup>, and is regarded as a natural consequence, corollary or sub-rule of the

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81 *Derx v IBC* 1970 NJ 172.

82 *Mulder, op cit*, 13.

83 *Bruck-Möller, op cit*, ad article 67, Anm 5; *Prölls-Martin, op cit*, ad article 67, note 1; *Mulder, op cit*, 12-14; *Bundesgerichtshof*, 17 March 1954, BGHZ Bd 13, 28.

84 *Mulder, op cit*, 15; *Lambert-Faivre, op cit*, 374-375; *Rodière and Pontavice, op cit*, 728.

85 *Bruck-Möller, op cit*, ad article 67, Anm 7.

86 *Khoury, loc cit*; Lord Hardwicke, in *Randal v Cockran, supra*, thought that the 'plaintiffs had the plainest equity'.

indemnity principle<sup>87</sup>. The reason for the doctrine according to English law is 'to prevent the assured from recovering more than a full indemnity'<sup>88</sup>. This approach is also followed in America<sup>89</sup>. The general rule of English law has been adopted in section 79<sup>90</sup> of the *Marine Insurance Act 1906* ('the MIA'). So far as the insurer's right to recoup himself by pursuing the assured's remedies against a third party is concerned, the approach of English law is that the burden of paying for the loss should ultimately be cast on the party primarily liable for it<sup>91</sup>.

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87 Khoury, *op cit*, 12-14; Ivamy, *Principles*, 465-466; Arnould, para 1299; Getz and Gordon, *op cit*, 243. McCardie J put it as follows in *Edwards and Co Ltd v Motor Union Insurance Co Ltd* (1922) 38 TLR 690, 692: 'The principle of subrogation is a latent and inherent ingredient of the contract of indemnity.' If this approach is correct subrogation must date back to the origins of marine insurance itself.

88 Brett LJ in *Castellain v Preston*, *supra*, 387. This case has been criticised for its imprecise use of terminology: see for example, *British Trader's Insurance Co. Ltd v Monson* (1964) 111 CLR 86 at 95 where the following was said: '*Castellain v Preston* of course was not a case of subrogation in respect of an outstanding right of action and one might almost wish that some other word had been used as the label of a right which exists when it is too late for subrogation in the ordinary sense.'

89 Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol II, para 1712.

90 '79(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.  
'79(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all the rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.'

91 Mitchell, *op cit*, 194 and the authorities there referred to in fn 9.

4.5. South African law is to the same effect. In *Ackerman v Loubser*<sup>92</sup> Ward J said:

*'The plaintiff's contract with the underwriters or insurers is res inter alios acta of which the defendant cannot avail himself. If it were so not the wrongdoer would take the benefit of a policy of insurance without paying the premium.'*<sup>93</sup>

## 5. THE COMMON RULES OF SUBROGATION

5.1. In English and South African law subrogation does not mean that the assured's rights to recover the loss from the third party are transferred to the insurer by a process like cession (assignment) or even by operation of some statutory provision of the law<sup>94</sup>. All it means is that, after indemnifying the assured to the full extent of the loss, the insurer becomes entitled, as against his insured, to pursue and recover the loss from third parties in the name of the assured<sup>95</sup>. In English

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92 1918 OPD 31, at 36.

93 The principle was confirmed in a number of subsequent decisions, including *Millward v Glaser* 1949 4 SA 931 (A) and *Teper v McGees Motors (Pty) Ltd* 1956 1 SA 738 (CPD).

94 LAWSA, para 222.

95 LAWSA, para 222; Mitchell, *op cit*, 488; Ivamy, *Principles*, 466; Ivamy, *Marine Insurance*, 458; Khoury, *op cit*, 11; *Castellain v Preston*, *supra*, 388; *Randal v Cockran*, *supra*.

and South African law the effect of the subrogation is therefore that the insurer becomes entitled to enforce the assured's rights of action against the third party responsible for the loss *in the name of the assured*. This means in effect that the insurer becomes *dominus litis* in respect of the recovery process instituted against the third party<sup>96</sup>. In continental legal systems (the Netherlands, Germany and France) the assured is vested with the right of recovery by statute, and makes the recovery in his own name. Important consequences flow from this difference between English law and continental law.

5.2. Notwithstanding the differences between English and continental law on the subject of subrogation, the common and general requirements for the insurer's right to be subrogated to the assured's position to arise appear to be the same and are as follows:

5.2.1. There must be a valid contract of insurance in

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The insurer's own identity, its very existence, is so completely ignored in the recovery action that the action is instituted with the assured as plaintiff, that there is no reference in the summons or particulars of claim to the fact of the insurance or the indemnification thereunder, and that the discovery process discloses the existence of documents in the assured's possession, not the insurer's. The principle goes so far that the assured as plaintiff would be liable for the costs of any unsuccessful legal action, although in practice the insurer (almost) invariably accepts liability for them and pays them to the third party sued by the insurer under its rights of subrogation.

terms of which the insurer is obliged to indemnify the assured before the right to subrogation can arise<sup>97</sup>. This is implicit in the relationships between the various parties.

5.2.2. The insurer must have indemnified the assured by admitting liability<sup>98</sup> and paying<sup>99</sup> the full amount of the loss payable under the policy<sup>100</sup>. The insurer's right to subrogation exists whether the loss is total or partial, provided the insurer paid the loss to the full extent provided by the policy<sup>101</sup>. The right to be subrogated therefore only matures upon indemnification<sup>102</sup>, although it

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97 Molengraaff, *Leidraad bij de beoefening van het Nederlandse Handelsrecht*, (1955), 689; Scheltema-Mijnssen, *op cit*, 257; Bruck-Möller, *op cit*, ad article 67 of the VVG; Prölss-Martin, *op cit*, ad article 67 of the VVG; Lambert-Faivre, *op cit*, 377-378; 46 C.J.S. *Insurance*, para 1209; LAWSA, para 227; *King v Victoria Insurance Co* 1896 AC 250 (PC). There is therefore no right to subrogation on payment under an invalid policy, or under a ppi (policy proof of interest) policy; Ivamy, *Marine Insurance*, 455; *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249; Ivamy, *Principles*, 468; Arnould, para 1298 fn 6. Under the provisions of article 7.17.2.25-1 of the NBW in the Netherlands the third party who is sued for the loss by the insurer exercising rights of subrogation may no longer dispute the insurer's right to claim on the basis that the insurer was not obliged to compensate the assured in the first place; Dorhout Mees, *Handelsrecht*, 96.

98 Ivamy, *Principles*, 469; *The Midland Insurance Co v Smith* (1881) 6 QBD 561.

99 Lambert-Faivre, *op cit*, 378; Ivamy, *Principles*, 469; Getz and Davis, *op cit*, 245; *Page v Scottish Insurance Corp Ltd*, *Foster v Page* [1929] 33 LLR 134.

100 Scheltema-Mijnssen, *op cit*, 256-257; Ritter-Abraham, *op cit*, 888; Ivamy, *Principles*, 469; LAWSA, para 228; *Mason v Sainsbury* (1782) 3 Doug KB 61; *Simpson v Thomson*, *supra*, 293.

101 Ivamy, *Principles*, 467; *Simpson v Thomson*, *supra*, 292.

102 Molengraaff, *op cit*, 688; Ritter-Abraham, *op cit*, 889; Bruck-Möller, *op cit*, ad article 67; Prölss-Martin, *op cit*, ad article 67; Lambert-Faivre, *op cit*, 377; 46 C.J.S. *Insurance*, para 1209; *Castellain v Preston*, *supra*, 389.

exists from the conclusion of the contract itself. In German<sup>103</sup> and French<sup>104</sup> law the transfer of rights occurs *ex lege* and no cession is required.

5.2.3. The loss must have been fully compensated so that, where the assured is underinsured, or has to bear part of the loss himself in terms of the policy, or suffers an additional but uninsured loss, the insurer has no right to be subrogated unless the policy provides otherwise. This is the position in English law<sup>105</sup>, and presumably in South African law. In Dutch, German and French law the insurer who pays only a portion of the loss is subrogated to the rights of the assured to the extent that he has paid<sup>106</sup>.

5.2.4. The assured must have a right to recover the loss or part of it from the third party<sup>107</sup>. Usually

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103 By virtue of the provisions of article 859(2) of the *HGB*; Ritter-Abraham, *op cit*, 890.

104 Lambert-Faivre, *op cit*, 383.

105 *LAWSA*, para 229; *National Fire Assurance Co v MacLaren* (1886) 12 OR 682; *Scottish Union and National Insurance Co v Davis* [1970] 1 LLR 1 (CA).

106 Molengraaff, *op cit*, 689; Scheltema-Mijnssen, *op cit*, 257, 263; Nolst Trénité, *Zeeverzekering*, 2nd ed, (1930), Vol II, 689 *et seq*; Ritter-Abraham, *op cit*, 892; Bruck-Möller, *op cit*, ad article 67; Prölss-Martin, *op cit*, ad article 67; Lambert-Faivre, *op cit*, 378.

107 Scheltema-Mijnssen, *op cit*, 259; Ritter-Abraham, *op cit*, 890; Bruck-Möller, *op cit*, ad article 67; Prölss-Martin, *op cit*, ad article 67; Lambert-Faivre, *op cit*, 379; *LAWSA*, para 230; Getz and Davis, *op cit*, 245-246; *Ackerman v Loubser* 1918 OPD 31; *Simpson v Thomson*, *supra*. In English law the insurer's right to be subrogated extends even to donations made to the assured by others with the intention to alleviate the loss; *LAWSA*, para 231; Arnould, para 1312; *Randal v Cockran*, *supra*;



this right arises from contract or delict<sup>108</sup>.

5.3. The insurer's right to subrogation matures when he has indemnified the assured and all the other requirements for subrogation have been fulfilled<sup>109</sup>. Two principal consequences then follow.

5.3.1. The first consequence of subrogation, although not its primary function or purpose, is that the insurer becomes entitled to enforce the assured's rights and claims against the third party responsible for the loss<sup>110</sup>. This means that the insurer may only enforce those rights against the third party to the extent that the assured himself could do so<sup>111</sup> and consequently any defences the third party may have against the assured may be raised against the insurer in the subrogation action. In the case of a valued policy, for example, the third party would be at liberty to

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*Burnand v Rodocanachi, supra; Castellain v Preston, supra, 404.*

108 *Molengraaff, op cit, 688.*

109 *Scheltema-Mijnssen, op cit, 257; Ritter-Abraham, op cit, 889; Lambert-Faivre, op cit, 378; LAWSA, para 232.*

110 *LAWSA, para 233.*

111 *Dorhout Mees, Handelsrecht, 97; Scheltema-Mijnssen, op cit, 259; Ritter-Abraham, op cit, 890; Lambert-Faivre, op cit, 379; Arnould, para 1309.*

demand that the extent of the loss suffered by the assured be proved as the agreement between the assured and insurer fixing the value of the subject-matter of the insurance does not bind him<sup>112</sup>. The extent to which the insurer is allowed to recover from the third party responsible for the loss is limited to the amount paid by the insurer to the assured<sup>113</sup>. The rights which may be enforced by the insurer are personal rights arising from the acts of the third party which caused the loss and does not include, for example, the right to sue on a *rei vindicatio* for delivery of the thing insured as such a claim is based on ownership<sup>114</sup>. The assured is obliged to allow the insurer to use his name in the proceedings<sup>115</sup>, and the insurer becomes *dominus litis* in the litigation<sup>116</sup>. This is the position in English law and South African law<sup>117</sup>. In

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112 Dorhout Mees, *Handelsrecht*, 97.

113 Scheltema-Mijnssen, *op cit*, 262; Lambert-Faivre, *op cit*, 378.

114 Dorhout Mees, *Handelsrecht*, 98. The problems which this principle have brought for the insurer have resulted in a special procedure for the transfer of movable property in Dutch law. By way of an agreement in terms of article 3.95 of the *NBW* transfer may now be effected to the insurer so that he can legitimately proceed with the *actio rei vindicatio* against the thief or other person in possession of the stolen thing. See in this regard Scheltema-Mijnssen, *op cit*, 264.

115 *LAWSA*, para 233.

116 *LAWSA*, para 233; Khoury, *op cit*, 19; *Edwards and Co Ltd v Motor Union Insurance Co Ltd*, *supra*, 692.

117 *Ackerman v Loubser*, *supra*, 36; *Teper v McGees Motors (Pty) Ltd*, *supra*, 744E.

continental law the insurer sues in his own name.

- 5.3.2. The second consequence of the subrogation is that the insurer recoups himself out of the proceeds of the claim to the extent that he has paid the loss under the policy<sup>118</sup>. The insurer is entitled to retain only so much of the proceeds of the claim against the third party as equals the amount paid by him. The balance must be paid to the assured<sup>119</sup>. By the same token, the assured has to account to the insurer for any proceeds of his claims against third parties which may come into his hands<sup>120</sup>. In English law a trust is then created in favour of the insurer<sup>121</sup>. If the assured receives payment from the third party before also being paid by the insurer for the same loss, the insurer may recover what he has paid without knowledge of the third party's payment to the extent that the aggregate exceeds the actual

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118 *LAWSA*, para 234.

119 *LAWSA*, para 234; Getz and Davis, *op cit*, 250; Ivamy, *Principles*, 478; Arnould, paras 1302-1303; *Yorkshire Insurance Co v Nisbet Shipping Co Ltd* [1962] 2 QB 330.

120 Molengraaff, *op cit*, 689; Bruck-Möller, *op cit*, ad article 67, Anm 6, 114 and 116; 46 *C.J.S. Insurance*, para 1209; *LAWSA*, para 234. There was some controversy in English law on the question whether the insurer has a personal rather than a proprietary right to the funds so received by the assured; see Mitchell, *op cit*.

121 *Morley v Moore* [1936] 2 KB 359 (CA). The question has now been determined authoritatively by the House of Lords in *Lord Napier and Ettrick v Hunter* [1993] 2 WLR 42 (HL) and [1993] 1 All ER 385. In *Ackerman v Loubser*, *supra*, at 36 Ward J suggested that this principle also applied in South African law, but that suggestion was made *obiter*.

loss<sup>122</sup>. This claim is an enrichment action in South African law<sup>123</sup>, and is a claim for money had and received, paid by mistake of fact in English law<sup>124</sup>. Such a claim is not strictly a claim under the insurer's right of subrogation. The application of the relevant principles have given rise to complicated problems in cases of excess clauses coupled with different tiers of insurance, as the case of *Lord Napier and Ettrick v Hunter*<sup>125</sup> testifies.

5.4. The rights and remedies in respect of which the insurer is subrogated in the position of the assured arise mainly from delict<sup>126</sup> (tort), contract<sup>127</sup> (or breach of contract), rights vested in the assured by virtue of some statutory provision<sup>128</sup>, and, in English law, the assured's

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122 In continental law the insurer is not allowed to recover from the third party when the third party has paid the assured without knowledge of the insurance; Molengraaff, *op cit*, 689; Dorhout Mees, *Handelsrecht*, 100-101.

123 The applicable action is the *condictio indebiti* which ought also to be part of Dutch, German and French law by virtue of the common Roman law component of those legal systems.

124 Mitchell, *op cit*, 195; *Lord Napier and Ettrick v Hunter*, *supra*.

125 *Supra*.

126 Ivamy, *Principles*, 470-471; 46 *C.J.S. Insurance*, para 1209.

127 Ivamy, *Principles*, 471-473; 46 *C.J.S. Insurance*, para 1209.

128 Ivamy, *Principles*, 473; 46 *C.J.S. Insurance*, para 1209.

rights in the subject-matter of the insurance<sup>129</sup>. The assured is obliged to give assistance to the insurer in enforcing his claims<sup>130</sup>, otherwise the insurer's rights may well be worthless. The assured is further obliged to refrain from acting in any manner which would prejudice the insurer in his pursuit of recoupment<sup>131</sup>.

- 5.5. There is one important difference between American law and English law with regard to subrogation. In American law the insurer who has been subrogated to the rights of the assured is entitled to institute action against the third party primarily liable for the loss in his own name<sup>132</sup>. In this regard American law follows continental rather than English law. This is not entirely surprising when account is taken of the high regard with which the *Guidon de la Mer* has been held in early American jurisprudence, and the *Guidon*, it is submitted, is the likely source of the insurance

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129 Ivamy, *Principles*, 473-474.

130 Ivamy, *Principles*, 476.

131 Molengraaff, *op cit*, 689; Dorhout Mees, *Handelsrecht*, 101-102; article 804(3) of the HGB; Lambert-Faivre, *op cit*, 380; Ivamy, *Principles*, 476-477; 46 *C.J.S. Insurance*, para 1209; Getz and Davis, *op cit*, 249. If the assured should, for example, release the third party responsible for the loss from liability, whether before or after indemnification by the insurer, the insurer will be released *pro tanto* from his own liability to indemnify the assured.

132 Schoenbaum, *op cit*, 589; Gilmore and Black, *op cit*, 91; *Aetna Insurance Co v S.S. Ortiguera* 583 F Supp 671; *Bohemia Inc v Home Insurance Co* 725 F 2d 506. See also Van Niekerk, *Subrogasie*, 106 fn 53.

practice on the continent which vested in the insurer the right proceed in his own name against the third party responsible for the loss.

- 5.6. Subrogation and its principles are, however, not applicable to non-indemnity insurance such as life or personal accident or disability insurance<sup>133</sup>. Subrogation rather takes its place as one of the handmaidens or servants protecting the indemnity principle against the threat of a double recovery by the assured<sup>134</sup>. Since the forms of non-indemnity insurance referred to are not aimed at an indemnification, subrogation has no role to play in them<sup>135</sup>. Abandonment, however, appears to fulfil a similar function, and a comparison between it and subrogation becomes inevitable.

## 6. THE RELATIONSHIP BETWEEN ABANDONMENT AND SUBROGATION

- 6.1. While both abandonment and subrogation are

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133 Dorhout Mees, *Handelsrecht*, 97; Ivamy, *Principles*, 465.

134 It is probably the most important concept fulfilling that function. It is certainly the one which is applied most often in practice.

135 There are some limited exceptions to this principle in some continental countries where some recourse is allowed to insurers in certain types of insurance of the person; see Lambert-Faivre, *op cit*, 389 *et seq.*

consequences of the indemnity principle<sup>136</sup>, there are a number of differences between them. The following main differences are apparent:

- 6.1.1. Abandonment only applies to contracts of marine insurance<sup>137</sup>, but subrogation applies to all contracts of indemnity<sup>138</sup>.
- 6.1.2. While abandonment applies only to total loss cases, whether such loss is an actual or constructive or presumed total loss, subrogation applies to all cases of indemnification where any loss, whether partial or not, is reimbursed<sup>139</sup>.
- 6.1.3. All proprietary rights incidental to ownership are transferred in the case of abandonment<sup>140</sup>, while all the rights and remedies of the assured in and in respect of the subject matter of the insurance pass to the insurer. There is one qualification to this distinction. In English marine insurance law

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136 Van Niekerk, *Subrogasie*, 332; *Castellain v Preston*, *supra*, 386-387: 'But grafted upon the doctrine of constructive total loss came the doctrine of abandonment ... in order that the assured may not recover more than a full indemnity.'

137 Whether this statement is indeed correct, and the reasons for this situation, are discussed in Chapter 13 *infra*.

138 . Arnould, para 1298; Van Niekerk, *Subrogasie*, 333.

139 Arnould, paras 1298 and 1300; Van Niekerk, *Subrogasie*, 333; *Simpson v Thomson*, *supra*, 292.

140 This subject is discussed in Chapter 14 *infra*.

subrogation also operates in cases of total loss in respect of proprietary rights<sup>141</sup>. Generally, however, abandonment transfers ownership of the thing insured, while through subrogation the insurer becomes vested with all the rights and claims which may exist independent of ownership<sup>142</sup>.

6.1.4. In abandonment the transfer occurs when the abandonment is made or accepted or judged to have been validly made<sup>143</sup>, while the insurer is only subrogated in the assured's rights and claims upon payment of the claim<sup>144</sup>.

6.1.5. Once an abandonment has taken place, the insurer has rights *in rem* and can sue in respect of the thing abandoned as owner. After being subrogated, the insurer has the rights and remedies of the assured, and sues (in English and South African

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141 Section 79(1) of the MIA provides that the insurer who pays for a total loss becomes entitled to take over the assured's interest in what remains of the subject-matter of the insurance. The wording is similar to that of the abandonment section, (section 63(1)), and the effect must therefore be the same. This provision only operates in respect of total loss; see section 79(2).

142 Arnould, para 1300; Van Niekerk, *Subrogasie*, 325-326; Dorhout-Mees, *Nederlands handels- en faillissementsrecht*, ('Handelsrecht'), (1987), 89-90.

143 Whether the transfer occurs even earlier, or retro-actively, is discussed in Chapter 14 *infra*. See also Chapters 6-10 *supra* for the position in individual countries.

144 Van Niekerk, *Subrogasie*, 329-330.



law) in the name of the assured<sup>145</sup>. If a cession of action occurred, however, the insurer has to sue in his own name<sup>146</sup>. The insurer's right to salvage is not an independent or additional right, but a consequence of his being subrogated in the rights and remedies of the assured or by his receiving transfer of the assured's real rights in the thing insured through abandonment. This enables the insurer to follow up what remains of the ship or goods insured and to claim possession of them from third parties and even from the assured.

- 6.1.6. In an abandonment case the insurer recovers, if he can, the remains of the insured things, without limitation in respect of the value he may recover in relation to what he has paid the assured<sup>147</sup>. In a subrogation case, however, the insurer's right of recovery against third parties is limited to the amount he has paid the assured<sup>148</sup>. If he recovers more he has to account to the assured for the excess.

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145 Van Niekerk, *Subrogasie*, 333-334.

146 The assured is divested of his right to claim from the third party and the insurer is the sole holder of the right; *LAWSA*, para 222; *Chi v Lodi* 1949 2 SA 507 (T).

147 *Glen Line Ltd v A G* (1930) 36 Com Cas 1 (HL) at 14; Derham, *op cit*, 17.

148 *Yorkshire Insurance Co Ltd v Nisbet Shipping Co. Ltd* [1962] 2 QB 330 (HL); Derham, *op cit*, 17.

7. CONCLUSION

7.1. It is apparent from the discussion thus far that subrogation fulfils an essential role in protecting and preserving the integrity of the indemnity principle. In the words of McCardie J:

*'The principle of subrogation is a latent and inherent ingredient of the contract of indemnity.'*<sup>149</sup>

This means of necessity that subrogation must have been part of indemnity insurance from the very beginning, as was abandonment. Subrogation also appears to be essential for insurance business in the broad sense, as insurers would certainly require far higher premiums simply to be able to survive financially if they did not have the right to recoup themselves out of the assured's rights against the third parties responsible for the loss in the first place. Generally there would in all likelihood be a relaxation of standards too as many persons would be prepared to gamble in the hope that foreseeable damage caused by their actions would be suffered by a person with insurance. This is clearly against public policy.

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*Edwards and Co Ltd v Motor Union Insurance Co Ltd, supra, 692.*

7.2. Notwithstanding their differences, abandonment and subrogation complement each other in their service of the indemnity principle. In an abandonment case, the insurer may pursue the remains of the abandoned ship or goods as owner, having become the owner thereof by way of the abandonment<sup>150</sup>. However, in those cases where the loss is such that it does not give rise to the right to abandon, the insurer becomes entitled to pursue the salvage under his rights of subrogation, which he may exercise after indemnifying the assured. In both cases the salvaged remains enure to the benefit of the insurer and the indemnity principle is honoured.

7.3. Subrogation thus appears to be related to abandonment and even to share the same origins. The theories which have been advanced to explain abandonment and the question to what extent abandonment must also be regarded as one of the servants of the indemnity principle will therefore be considered in the next chapter.

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The process of the transfer of ownership is discussed in Chapter 14 *infra*.

## CHAPTER THIRTEEN

### THEORY: INDEMNITY, ECONOMIC LOSS AND PROOF OF LOSS

#### 1. INTRODUCTION

- 1.1. De Smet's definition of abandonment<sup>1</sup> alerts one to the fact that abandonment has two main aspects. The first is that it is an exceptional method by means of which the assured is allowed to claim the full indemnity provided by the policy in certain special cases against an offer on his part to transfer his proprietary rights in the subject-matter of the insurance to the insurer. In this sense abandonment is linked to the question of proof of an indemnifiable loss which is total<sup>2</sup>. In its second aspect abandonment is a unique method of transfer of real rights<sup>3</sup>. The discussion in this chapter will be confined to abandonment as a special remedy operating in the sphere of the indemnity principle and its links in that sphere with the law of evidence. Abandonment as a method of transfer will be discussed in the next chapter.

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1 De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-1960), Vol I, para 527. As was pointed out in Chapter 1 *supra*, De Smet is not the only proponent of this definition, which appears to encompass all the main aspects of abandonment.

2 That the loss is regarded as total is evidenced by the fact that the full, or total, indemnity is claimable.

3 See Chapter 1 *supra* for a discussion of the authors who look upon abandonment as such.

1.2. The discussion of abandonment principles in the foreign countries considered in Chapters 6 to 10 has brought to light the essence of abandonment, namely that it operates only in relation to a special kind of loss, which can best be described as a loss which is total in the economic sense as opposed to a loss which is total in a real or actual sense. This distinction exists in the difference between the situation where the subject-matter of the insurance is completely destroyed and the situation where it continues to exist in some form or place or another but is beyond the assured's reach or control so that it has become economically worthless to him, for the foreseeable future at least. This aspect of abandonment shows certain obvious parallels with the concept of a '*pure economic loss*' in the law of contract and of delict. An investigation of these parallels may be helpful in determining whether abandonment is compatible with the rest of the body of the law.

1.3. Abandonment also has obvious links with the indemnity principle as it fulfils a similar but not identical role to the concept of subrogation. Further, it has been suggested that abandonment

operates in the sphere of the law of evidence as a presumption which creates an total loss where proof of an actual total loss is in fact absent or impossible<sup>4</sup>. An examination of the theories which have been put forward to explain the phenomenon of abandonment is necessary in order to find its true place and meaning in the law of marine insurance and in order to determine whether it still has a role to play.

- 1.4. There appear to be three main theories for the introduction, existence and function of abandonment<sup>5</sup>.
- 1.4.1. The first theory links abandonment directly to the indemnity principle and has it that abandonment is merely a manifestation of the indemnity principle at work.
- 1.4.2. The second theory links abandonment to the concept of an economic loss which is regarded as total.

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4 See Chapter 1 *supra*.

5 Sarlis, *Abandonment in Marine Insurance*, thesis, University of London, (1960), 2-8 mentions a fourth, namely that espoused by Rokas, *Abandonment in Marine Insurance Law*, (1951), 19 to the effect that abandonment was an essential part of the simulated sale and early insurance contracts of the fourteenth century, but this 'theory' does not explain the existence of abandonment, only its origins. (Rokas' work was not available to me.)

According to this theory abandonment was originally introduced in order to do away with proof of an actual loss or diminution in the patrimony of the assured in cases where the assured would have had difficulty or would have experienced delay in producing the kind of proof which was usually required. The reason for dispensing with such proof was to allow the assured to recover his venture capital as soon as possible for re-investment in a fresh venture, in the interests of trade<sup>6</sup>. This approach appears to adopt the theory that abandonment operates as a presumption which creates an indemnifiable loss when one would not otherwise exist.

- 1.4.3. The third theory postulates that abandonment originally developed out of the missing ship provisions of the Barcelona Ordonnance of 1435 and its successors and was designed to deal with the difficulty of proving a loss by a peril insured against in the case of the ship which disappeared without trace or news. In such a situation the assured would ordinarily have no realistic means

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This theory has found favour on both sides of the Atlantic: See for example, Pollock & Bruce, *A Compendium of the Law of Merchant Shipping*, 4th ed, (1881), 538; *Calmar S.S. Corp v Scott* 209 F 2d 852.

of proving an indemnifiable loss<sup>7</sup>. This theory also appears to embrace the notion that abandonment operates as a presumption.

2. THE INDEMNITY THEORY OF ABANDONMENT

2.1. Sir James Allan Park was of the opinion that abandonment was merely an illustration of the indemnity principle at work<sup>8</sup>:

*'(B)ecause insurance being a contract of indemnity, the assured can recover no more than the amount of the loss actually sustained; but if he were allowed to recover for a total loss, and might also retain the property saved, he would be a considerable gainer, which the law will not allow.'*

The twin purposes of the indemnity principle, namely to ensure that the assured receives a full indemnity but does not receive more than a full indemnity, are both satisfied by the concept of abandonment. On the one hand the assured is allowed to recover the sum insured when there is

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7 De Smet, *op cit*, Vol I, para 527.

8 *A System of the Law of Marine Insurances*, (1786), 162.



a loss, albeit a loss of a special kind. On the other hand he is required to transfer to the insurer his proprietary rights in the subject-matter of the insurance so that he cannot, in the Park's words, become '*a considerable gainer*'. Seen from a different angle, abandonment would appear to serve the same purposes as the indemnity principle, and Park's observation that abandonment is a manifestation of the indemnity principle at work would therefore be correct.

2.2. Benecke<sup>9</sup> disagreed with this view. In his opinion abandonment is inconsistent with a correct understanding of the contract of marine insurance as a contract of indemnity because, he argued, a concept which makes the insurer the '*proprietor of a thing for which he has only become a guarantee*' is contrary to the strict application of the indemnity principle<sup>10</sup>. He shared this view with

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9 A *Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), 336 et seq.

10 *Op cit*, 338. There appears to be an obvious flaw in this argument. The insurer is not a guarantor. There are many differences between the institutions of insurance and guarantee or suretyship. For one thing, there need be no contract between the guarantor or surety and the principal debtor for a suretyship to come into being. For another, neither the principal debtor nor the creditor needs to pay any premium for a suretyship to be valid. Lastly, the liability of the surety is accessorial, that is for the debt of another and upon that person failing to pay it, whereas the insurer is liable for his own debt, being the indemnity he has agreed to pay.

Émerigon<sup>11</sup> and Tecklenborg<sup>12</sup>, who were of the view that it is unnecessary for the purpose of providing the assured with a proper indemnity that the insurer should acquire the ship or goods insured. Benecke therefore bemoaned the fact that the '*odious remedy of abandonment*' had been allowed to become part of the law, but he accepted that it had already become '*so interwoven with the whole system of indemnification*' that it could no longer be abolished<sup>13</sup>. His final conclusion, however, was that abandonment constituted a special kind of indemnity which was applicable only in special cases and formed a distinct branch of the principle of abandonment<sup>14</sup>. Therefore, in spite of Benecke's criticism of abandonment, he appears to have accepted the principle that abandonment properly resorted under the broad umbrella of the indemnity principle. His views therefore appear at least to be compatible with Park's.

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- 11 *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition of 1827), Vol II, 207.
- 12 *System des See-Versicherungswesens nach der Natur des Sache*, (1862), 358.
- 13 *Op cit*, 338-339.
- 14 *Op cit*, 345. Helberg, *op cit*, 16 appears to share the view that abandonment constituted a separate category within the framework of the indemnity principle.

2.3. Martin<sup>15</sup> criticised abandonment on a different ground, namely that it offended against the indemnity principle in that the payment of the full amount of the insurance could lead to a disregard for the distinction between indemnity and non-indemnity insurance. To understand this argument fully, one has to keep in mind that the ship or goods are not necessarily destroyed completely in a physical sense in an abandonment case. If it were otherwise there would be nothing to abandon and no need for the requirement of an abandonment. However, Martin's criticism does not take proper cognizance of the fact that the event which gives rise to the right to abandon causes a loss which is in some way or to some extent of an economic nature. The effect of such an event on the patrimony of the assured is the same as if the ship or goods have irretrievably sunk in the deepest part of the ocean or have been completely consumed by fire. The assured's loss is thus as real in effect as would be the case of complete destruction of the thing insured and he would therefore not gain from the payment of the full

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*Die Haftung des Versicherers für Güter aus deutschen Schiffen in italienischen und portugiesischen Häfen*, (1918), 47 et seq.

amount of the insurance<sup>16</sup>, provided of course that he abandons his proprietary rights in the ship or goods to the insurer. Therefore, and notwithstanding Martin's criticism, abandonment is entirely in consonance with the ideals of the indemnity principle. The true burden of Martin's complaint appears to be that a loss in the nature of an economic loss is compensated rather than an actual or real loss<sup>17</sup>. Whether that criticism is valid may be determined by examining the economic loss theory.

2.4. There is substance in Park's explanation that abandonment is an illustration or manifestation of the indemnity principle, but that explanation does not appear to constitute a complete one.

2.4.1. In the first place, if Park's explanation were a complete theory of abandonment one would have expected to find abandonment in all forms of indemnity insurance, which one does not. This contention does not lose sight of the fact that abandonment and subrogation were not yet seen as

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<sup>16</sup> Helberg, *op cit*, 17.

<sup>17</sup> This contention is considered in the text *infra* where abandonment's relationship with the concept of an economic loss is considered.

separate concepts at the time Park enunciated his theory. Park's theory is thus more suited to explain abandonment and subrogation than to explain abandonment as a separate concept.

- 2.4.2. In the second place, virtually every substantive rule of insurance is linked in one way or another to the indemnity principle. Such rules include the principles relating to insurable interest, double- or multiple insurance, over-insurance, valued policies, replacement value insurance, sue and labour and the rules relating to the measure of indemnity<sup>18</sup>. Abandonment and subrogation are therefore not unique in this regard. Park's theory does not explain the narrower or unique function of abandonment as opposed to the functions of the other servant rules of the indemnity principle.

3. THE ECONOMIC LOSS THEORY: A PRESUMPTION OF TOTAL LOSS

- 3.1. In terms of this theory, referred to herein as the economic loss theory, abandonment is a device which is utilised in order to allow the assured to

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<sup>18</sup> The rule relating to these concepts and their links to the indemnity principle were discussed in Chapter 11 *supra*.

recover for an economic as opposed to an actual or real total loss. This theory is espoused by theorists and legal historians like Schook<sup>19</sup>, Mens Fiers Smeding<sup>20</sup>, Dorhout Mees<sup>21</sup>, Aschenheim<sup>22</sup>, Barkhausen<sup>23</sup>, Helberg<sup>24</sup> and Rodière and Pontavice<sup>25</sup>. Some of the proponents of this theory also espouse a particular theory about the origins and development of abandonment. According to them the concept of abandonment developed in stages as follows:

- 3.2. While the main purpose of marine insurance is to compensate the assured for loss or damage actually suffered, in the sense required by the *actio legis Aquiliae*, it was soon realized that some events do not necessarily cause physical damage to nor the final and irretrievable loss of the subject-matter of the insurance, yet they affect the assured's

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19 *Het Abandonnement*, doctoral thesis, Utrecht, ((1858), 13.

20 *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895), 28-29.

21 *Schadeverzekeringsrecht*, 4th ed, (1967), ('Schade'), 637-638.

22 *Der Abandon des Versicherten in der Seeversicherung*, (1893), 2-3.

23 *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895), 5.

24 *Der Abandon in der Seeversicherung auf Rechtsvergleichender Grundlage*, (1925), 14-15.

25 *Droit Maritime*, 10th ed, (1986), para 642.

interests just as severely as the case where there has been a complete physical destruction of the subject-matter of the insurance. The main characteristic of these events is that they so deprive the assured of his power to dispose of his property that he either does not know whether loss or damage has actually occurred, or does not know if or when it will finally occur<sup>26</sup>. Because of this uncertainty the assured is unable to claim on the insurance and is also unable to enjoy the benefits of his ownership or use of the subject-matter of the insurance<sup>27</sup>.

3.3. Further, as Phillips put it:

*'(I)n cases of capture and detention, insurance would afford a very inadequate indemnity to the assured without the right to abandon; and in many cases of sea-damage the indemnity would be long delayed and very difficult to adjust. The object of the insurance is, to enable the merchant to throw the adventure off his hands as soon as his enterprise is frustrated, and embark his capital*

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26 Helberg, *op cit*, 13. See also *Moore v Evans* [1918] AC 185.

27 In these cases the ship or goods insured continue to exist, or may continue to exist, but they are for practical and economic purposes incapable of being retrieved.

*in a new one.'*<sup>28</sup>

If the assured could not abandon but had to wait for an actual loss to eventuate, his venture capital would be tied up for a long time, which would stifle the enterprising spirit required for successful trade<sup>29</sup> and would work adversely on the interests of the insurer as the assured may be tempted to wait for an actual loss to occur or may even be tempted to assist an actual loss to occur when an early abandonment would give the insurer an opportunity to take steps to minimise his losses.

- 3.4. The combination of these two factors, namely the continuing uncertainty and the prejudice suffered as a result of the consequent delay in the settlement, led to the search for a method which would allow such capital to be released to the assured sooner. The system or fiction was therefore introduced which presumed loss in certain circumstances and allowed the assured to

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28 *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol II, para 1492.

29 Arnould, *A Treatise on the Law of Marine Insurance and Average*, 2nd ed, (1857), 1014 put it as follows: 'To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute total loss.'



claim the sum insured<sup>30</sup>. At first the payment by the insurer was provisional, and repayment had to be made upon any subsequent recovery of the ship or goods, but this was unsatisfactory as the uncertainty about his final position vis-a-vis the funds restricted the assured's ability to utilise the money<sup>31</sup>.

- 3.5. Instead of provisional payment the radical system of abandonment was then introduced. Under this system the loss remained a fictitious or presumptive loss<sup>32</sup> which was total and whose effect is that the assured is relieved of the onus of proving that he has suffered an actual diminution in his patrimony to the extent of the value of the thing insured, that is that the event has actually caused him a loss which is total<sup>33</sup>. This allowed the assured to claim without the risk of repayment and allowed him to re-invest his

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30 Helberg, *op cit*, 14-15; Bewer, '*Das Herrschaftsgebiet des Abandons*', (1891) 38 *Zeitschrift für das Gesamte Handelsrecht*, 373 and 425.

31 Helberg, *op cit*, 15; Bewer, *op cit*, 373.

32 A '*fingierten*' or '*präsumierten Totalverlust*', as it has been referred to in German treatises.

33 Schook, *op cit*, 13; Mens Fiers Smeding, *op cit*, 28-29; Dorhout Mees, *Schade*, 637-638; Barkhausen, *op cit*, 4.

capital in a fresh venture<sup>34</sup>. However, in order to make use of this radical system the assured had to offer up his proprietary rights in the subject-matter of the insurance to the insurer<sup>35</sup>. In this system the indemnity principle is thus served and protected by the requirement of an abandonment.

3.6. Benecke acknowledged that one of the principal reasons for the introduction of abandonment was to avoid the situation where the assured had to wait an indefinite period before he recovered his venture capital in those cases where a speedy settlement could not be achieved. However, he maintained that that obstacle could be overcome by obliging the insurer to make a payment on account<sup>36</sup>. Helberg convincingly disposed of this argument by pointing out that such a payment would by its nature still be provisional and that the undesirable uncertainty would continue with the result that the assured's ability to utilise the money in a fresh venture would still be

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34 Aschenheim, *op cit*, 2-3; Barkhausen, *op cit*, 5; Helberg, *op cit*, 15; Bewer, *op cit*, 373-374.

35 Dorhout Mees, *Schade*, 637-638; Bewer, *op cit*, 374.

36 *Op cit*, 344-345.

compromised<sup>37</sup>. Benecke also contended that the assured could be obliged to assist the insurer by co-operating in the endeavours to salvage the ship or goods so that there would be no real advantage to the insurer in an abandonment<sup>38</sup>. The problem with this approach, however, is that it ignores the advantage which abandonment provides the assured where the effect of a particular kind of casualty is that it destroys or diminishes his ability to utilise the ship or goods which constitute his investment to trade. If his investment were to be tied up for a long time without his being able to convert it to cash, he would be in the position where his investment has become practically useless or lost. There is therefore a clear advantage to the assured in the right to abandon and thereby to recover his investment sooner. If the insurer does not want to stand good for this kind of loss, he may exclude it from the cover granted.

3.7. Abandonment also came under attack from another

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37 *Op cit*, 15.

38 *Op cit*, 345. This was in fact the position under article 4, Title 11 of the Hamburg Ordonnance of 1731 and article 388 of the *Code de Commerce* of 1807 ('the *CdeC*') in France.

quarter. Tecklenborg<sup>39</sup> and others<sup>40</sup> were of the opinion that abandonment had served its purpose and was no longer necessary. This criticism was partly met by the events of World War I shortly after Tecklenborg's comments were published. During and after the war large numbers of claims based on abandonment principles were made on insurers<sup>41</sup>. More recently the conflicts in the Middle East between the Arab countries and Israel and between Iraq and Iran have similarly resulted in abandonment claims on insurers<sup>42</sup>. Tecklenborg's approach also negates or minimises the essential role of abandonment in cases of economic loss.

3.8. It is submitted that Tecklenborg and Benecke's arguments are not cogent enough to outweigh the advantages of abandonment to both the assured and insurer. But for the doctrine of abandonment the assured would not have been able to recover the full extent of his loss in cases of economic loss

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39 *Op cit*, 358.

40 See Helberg, *op cit*, 16-17.

41 Helberg, *op cit*, 16.

42 See Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' [1994] 25 *Journal of Maritime Law and Commerce* 95 at 117.

and there would have been a grave shortcoming in the law. However, Chalmers put the matter in perspective in 1903 when he wrote:

*'Constructive total loss lies midway between actual total loss on the one hand, and partial loss on the other. It is in effect a hybrid loss, and its dual character has complicated the decisions.'*<sup>43</sup>

This duality is found in the fact that abandonment treats as a total loss a loss which is in physical terms a partial loss at the most. It does so because in economic terms the loss is total.

- 3.9. The economic loss theory of abandonment does not appear to be in conflict with the indemnity theory. It relies on and supplements the indemnity principle by requiring an indemnification in the case of an economic loss against an abandonment. Maclou<sup>44</sup> explained that abandonment gives rise to two rights; the assured's right to the full amount of the insurance and the insurer's right to the

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43 Chalmers and Owen, *A Digest of the Law relating to Marine Insurance*, 2nd ed, (1903), 83-84.

44 *Le délaissement dans l'assurance maritime*, (1954).

remains of the subject-matter of the insurance<sup>45</sup>. This extraordinary right (to claim the full amount of the insurance) is granted in order to allow the assured to recover his investment and to re-invest it as soon as possible. This succinct explanation of abandonment at once recognizes its function within the ambit of the indemnity principle and demonstrates its economic purpose.

3.10. Economic loss can be contrasted with physical damage. In the case of physical damage there is, as the words suggest, physical damage to a thing, such as a dent or hole in the side of the ship, which requires to be repaired. The cost of repair is usually, but not always, the measure of the damages in such a case as the patrimony of the shipowner is reduced to the extent of such cost. In the case of economic loss, however, there may be no physical damage to the ship at all, but she may be so removed from the assured's control that she might as well have been physically destroyed. In some abandonment cases there is no physical damage to the ship or goods, as in cases of capture or perhaps even some instances of missing ships. In others there may be physical damage but

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See also Rodière and Pontavice, *op cit*, para 633.

not a complete destruction. The decisive feature is that the loss suffered by the assured is not limited to the cost of repairing the damage or the mere diminution in value of the insured thing.

3.11. The concept of economic loss has been described as '*patrimonial loss that is not the result of injury to property*'<sup>46</sup>, or '*a financial loss which is not causally consequent upon physical injury to the ... property.*'<sup>47</sup> In the case of marine insurance, particularly in respect of those events which give rise to the right to abandon, these statements have to be qualified to take account of the fact that abandonment relates to total loss. Therefore the notion of an economic loss in this sphere includes those cases where the loss is only partly of an economic nature. An example of such a case is where the cost of repair exceeds half or three quarters of the insured value, as is recognized by American and French law respectively.

3.12. The law pertaining to delicts and contracts recognizes that a person may suffer patrimonial

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46 Visser and Potgieter, *Law of Damages*, (1993), 54-55 and 353 *et seq.*

47 Feldthusen, *Economic Negligence: The Recovery of Pure Financial Loss*, doctoral thesis, University of Michigan, (1983), 1.

loss as a result of being deprived of the use of his property<sup>48</sup>. If the deprivation is temporary, the damage is assessed at the cost of hiring a substitute for the relevant period<sup>49</sup>. If, however, the deprivation is permanent, the loss is the value of the thing together with such damages as may have been suffered as a result of the loss of its use between the time of its removal from the claimant's use to the time of its replacement<sup>50</sup>. In the typical abandonment case the assured is to similar effect deprived of the use of his property, which deprivation continues in some form or another. Indeed, De Courcy described abandonment cases as cases of '*dépossession par fortune de la mer*'<sup>51</sup>, which graphically demonstrates the basic idea, namely that in abandonment cases the assured is dispossessed of his property but that the property continues to exist. Such a deprivation of possession causes a loss, but not the same type of loss which results from the destruction or actual loss of the thing insured.

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48 Visser and Potgieter, *op cit*, 334.

49 Visser and Potgieter, *op cit*, 335.

50 Visser and Potgieter, *op cit*, 335 fn 46.

51 *Questions de droit maritime*, (1877/1888), Vol II, 321.



3.13. Recent South African decisions have made it clear that the principles of the *actio legis Aquiliae* are applicable to and include the type of loss described as a pure financial or economic loss<sup>52</sup>. What these decisions emphasise is that liability in cases of economic loss, while falling within the principles of the *actio legis Aquiliae*, are tempered by public policy<sup>53</sup>. In this respect the relief granted by the institution of abandonment is of the same nature and public policy also plays a role. This is apparent from the history of abandonment principles, especially when one takes into account that the right to abandon has always been limited, whether by statute or by the English common law, to the cases falling within a specific class of loss which was regarded as worthy of being indemnified.

3.14. One may therefore conclude that abandonment is indeed, as Park explained, a manifestation of the

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52 *Herschel v Mrupe* 1954 3 SA 464 (A); *Suid-Afrikaanse Bantoetrust v Ross en Jacobz* 1977 3 SA 184 (T); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1973 3 SA 824 (A). See also Pauw, 'Aanspreeklikheid vir 'suiwer vermoënskade' in die Suid-Afrikaanse reg' 1975 *De Jure* 23.

53 *Administrateur, Natal v Trust Bank van Afrika Bpk*, *supra*; *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 2 SA 157 (W). It is not possible to formulate a general principle which will cover all type of cases where the law allows the recovery of an economic loss. Feldthusen, *op cit*, has identified six categories in the field of the law of delict alone. See also Sheller, 'Pride and Precedent: Economic loss-the search for a bright new line', 1995 *LMCLQ* 203.

indemnity principle, but that its essential nature is that it operates in the sphere of economic loss. In this function abandonment is unique and differs from the other servants of the indemnity principle, including subrogation.

4. THE PRESUMPTION THEORY OF ABANDONMENT

4.1. The proponents of the theory that abandonment operates by way of a presumption which turns into an indemnifiable loss what otherwise would not have given rise to a claim at all appear to accept the justice of allowing a claim in the typical abandonment circumstances because the assured has suffered an economic loss<sup>54</sup>. Their very theory supports the notion that abandonment operates in its special sphere as a remedy allowing an assured who has suffered an economic loss to recover the full indemnity from his insurer. However, they classify abandonment as being part of the so-called '*Beweissystem*'<sup>55</sup>, literally the '*system of proof*'. Whether abandonment can be reduced to a mere rule of evidence so easily is open to

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54           Bewer, *op cit*, 373; Aschenheim, *op cit*, 2; Barkhausen, *op cit*, 1; Helberg, *op cit*; 14-15.

55           Bewer, *op cit*, 373.

question as such a classification explains the manner in which it functions rather than its origins and purpose.

4.2. According to the presumption theory abandonment was introduced in the form of a presumption of loss which operated in given cases<sup>56</sup>. The nature of the presumption which is said to operate requires some thought. There are three types of presumptions. The distinction is of the utmost importance for South African marine insurance law. South African law of evidence is essentially English law<sup>57</sup>, which would mean that abandonment would be regulated by English law if it were the mere manifestation of a presumption. On the other hand, if abandonment were a concept or principle of substantive law, it would be regulated, subject to one qualification, by the ordinary '*Roman-Dutch law of the Republic*'<sup>58</sup>.

4.2.1. The first type of presumption is called an irrebuttable presumption of law, but it is in

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56 See para 3.5 *supra*.

57 Zeffertt, *The South African Law of Evidence*, 4th ed, (1988), Chapter 1.

58 Zeffertt, *op cit*, 530.

essence a rule of substantive law<sup>59</sup>.

4.2.2. The second type of presumption is a rebuttable presumption of law. In such a case the presumption creates only a provisional state of affairs which may be overturned by evidence to the contrary<sup>60</sup>.

4.2.3. The third type of presumption is a presumption of fact, which is really no more than '*an inference of common sense, based on what usually happens or is assumed to happen.*'<sup>61</sup>

4.3. If abandonment were indeed the manifestation of a presumption, it would have to be a presumption of the first kind as, once the circumstances permitting an abandonment are present, it is not open to the insurer in any of the legal systems discussed earlier to avoid liability on the grounds of the existence of any extraneous facts or circumstances which he might be able to prove. Émerigon made this clear, stating that

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59 Zeffertt, *op cit*, 530-531.

60 Zeffertt, *op cit*, 534-535.

61 Matthaeus, *De Criminibus*, Ad D 48.15.6(Tr) as quoted by Zeffertt, *op cit*, 531.

'... la perte entière est présumée ... et cette présomption, qui est *juris et de jure*, suffit ... pour donner ouverture à l'action de délaissement.'<sup>62</sup>

Abandonment is therefore more than just a presumption of loss which operates in given circumstances in the sphere of the law of evidence: It is a rule of substantive law.

- 4.4. It also appears that the presumption theory is in any event compatible with the economic loss theory, but is open to the criticism that it reduces a rule of substantive law to the mere formalism of a presumption in evidence. Such over-elaboration is unnecessary and of little use in casting light on the institution of abandonment.

## 5. THE MISSING SHIP THEORY OF ABANDONMENT

- 5.1. The theory that abandonment developed out of the missing ship provisions of early marine insurance ordinances has, it is submitted, already been dispatched by the historical evidence, especially

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*Op cit*, Vol II, 211. ('...the total loss is presumed ... and this presumption, which is *juris et de jure*, suffices to give room to the action of abandonment.') (Meredith's translation.)

the evidence contained in the earliest marine insurance ordonnances and the compilations of insurance customs which were discussed earlier<sup>63</sup>. The logical presence of abandonment or something akin to it in the simulated sale transaction also militates against this theory. Further, abandonment and the missing ship provisions existed side-by-side for a considerable period before the missing ship also became a case for abandonment<sup>64</sup>. The missing ship case should rather, it is submitted, be seen as a typical abandonment case arising in the event of an economic loss rather than an actual or real loss, where the uncertainty with regard to the fact or cause of the disappearance coupled with the delay in the settlement would otherwise have resulted in the insurance falling short of its target<sup>65</sup>.

5.2. The missing ship case confirms some important conclusions which have been reached thus far with regard to the reasons for the introduction and continued existence of abandonment as well as its function.

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63 See Chapters 4 and 5 *supra*.

64 This was also demonstrated in Chapter 5 *supra*.

65 Dorhout Mees, *Schade*, 638.

- 5.2.1. In the first place, it demonstrates abandonment's role as a servant of the indemnity principle, since it gives a clear demonstration of the double recovery which would be possible if the ship were to be found after the indemnification and would accrue to the assured if there were no requirement of an abandonment.
- 5.2.2. In the second place, it is a good example of an economic rather than an actual loss, since there is an absence of proof that the ship has in fact been lost in such a case. The ship may well continue to exist and to remain in the ownership of the assured.
- 5.2.3. Lastly, it is the prime example of the device which insurance law has adopted in order to rectify what was perceived to be a shortcoming in the law by relaxing the otherwise strict rules of the law relating to proof of loss, which made it almost impossible to prove a loss by an insured peril when the assured had no evidence at all of the cause of the ship's disappearance. That device was clothed in the form of a presumption, but it was a presumption of the kind which is actually a

rule of substantive law<sup>66</sup>.

6. THE APPLICATION OF THE ECONOMIC LOSS THEORY

6.1. The economic loss theory can be demonstrated to operate in all the different categories of cases where the laws of the countries discussed in Chapters 6 to 10 allow an abandonment. The circumstances which entitle an assured to abandon can be placed in four categories<sup>67</sup>. Each of the causes recognized in the countries under discussion falls into one of these categories and can be distinguished from those falling in the other categories by virtue of some difference in their essential nature.

6.1.1. The first category comprises those causes which involve the loss of the ship through its physical disintegration or breaking up, whether accompanied by its actual sinking or not, namely shipwreck and

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66 The missing ship was treated as a case of presumed loss in the ordonnances of the Dutch port towns, under the *Wetboek van Koophandel* of 1838 ('the *WvK*') (article 667) and is still treated as such a case in English law under section 58 of the Marine Insurance Act 1906 ('the *MIA*').

67 This classification is not necessarily followed by the legislatures of the countries under discussion.



stranding with breaking up<sup>68</sup>. The second category comprises damage to the ship or cargo and unseaworthiness of the ship which does not result shipwreck or stranding but makes the ship unfit for use as a ship or makes the ship or goods impossible or uneconomical to repair<sup>69</sup>. The third category comprises those causes which involve the removal or withdrawal of the ship or goods from the possession or control of the assured by some person or persons or a state or government through arrest, capture, detention or embargo<sup>70</sup>. The last category is that of the ship which disappears without trace or news, the so-called missing ship, and the cargo on her<sup>71</sup>.

6.1.2. These cases all have three essential features, which cannot be divorced completely from one another. The first is that the loss or part of the

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68 In the Netherlands, France, England and America causes falling in this category are recognized which could lead to a valid abandonment, but not in Germany, where shipwreck and stranding are regarded as instances of actual total loss, or 'Totalverlust'.

69 This category is recognized in the Netherlands, ('onbruikbaarheid door zeeschade' and 'vergaan of bederf door zeeramp'), France, (impossibility of repair, damage or deterioration beyond three quarters of the value and unseaworthiness through a maritime peril), and England and America, but again not in Germany.

70 This category is recognized in all five the countries under consideration, whether the cause is called arrest, detention, capture or embargo.

71 This category is also recognized in all five countries.

loss is in the nature of an economic or financial loss<sup>72</sup>. The second is that the insured thing is not completely destroyed nor lost for certain beyond all hope<sup>73</sup>. The third is that the loss is to all intents and purposes total. A review of the facts which fall in the four categories enumerated confirms this<sup>74</sup>.

6.2. CATEGORY ONE: SHIPWRECK AND STRANDING WITH BREAKING UP

6.2.1. Shipwreck and stranding with breaking up were specifically mentioned in the Netherlands<sup>75</sup> as causes which entitled the assured to abandon. In France they are regarded as species of total loss entitling the assured to abandon<sup>76</sup>. In Germany

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72 In each case the facts will determine whether the assured has suffered such a loss.

73 If it were, there would be nothing to abandon and the case would, by definition, not be an abandonment case.

74 What is also significant is that there does not appear to be any large practical difference between Anglo-American law and continental law in the precise circumstances which give rise to the right to abandon.

75 Article 663 of the WvK. The relevant provisions relating to abandonment have been repealed with effect from 1 January 1992, but for the sake of completeness and comparison the pre-existing provisions of Dutch law are referred to here. See Chapter 6 *supra* for a complete history of Dutch abandonment provisions from the nineteenth century.

76 They are no longer mentioned by name as causes entitling the assured to abandon, but have been retained as such causes under the 'perte totale' provision of Article 48 of Law 522 of 1967; Harrel-Courtès, *Le Nouveau Droit Français de l'Assurance Maritime et des Événements de Mer*, (1968), 49; Rodière et Pontavice, *Droit Maritime*, (1968), para 636.

shipwreck and stranding do not give rise to the right to abandon, but they may amount to a total loss, depending on whether the ship has irretrievably sunk<sup>77</sup>, or has been destroyed<sup>78</sup>. In England and America shipwreck and stranding may give rise to a constructive total loss or an actual total loss, depending on the facts<sup>79</sup>.

6.2.2. The words 'shipwreck'<sup>80</sup>, 'naufage'<sup>81</sup>, 'schipbreuk,' 'Schiffbruch' and 'skipbreuk'<sup>82</sup> have the same etymological components and the same meaning<sup>83</sup>. Notwithstanding some residual

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77 It is not enough for the ship to have sunk, she must be 'unrettbar gesunken', ('sunk irretrievably'); Ritter-Abraham, *Das Recht der Seevericherung*, 2nd ed, (1967), Vol II, 875.

78 The ship must be 'in seiner ursprünglichen Beschaffenheit zerstört', (destroyed in her nature), so that even though some debris may remain, she no longer exists as a ship; Ritter-Abraham, *op cit*, Vol II, 869.

79 Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), ('cited as Arnould'), para 1191; *Cambridge v Anderton* (1824) 1 B & Cr 691.

80 The common dictionary meaning of the word is 'the destruction of a ship at sea' and 'wreck' as a verb 'to break, spoil or destroy completely'; Collins Paperback English Dictionary, sv 'shipwreck'.

81 'Naufage' derives from the Latin words 'navis' (ship) and 'fractio' (a breaking).

82 Odendal et al, *Verklarende Handwoordeboek van die Afrikaanse Taal*, (1981), 984 defines 'skipbreuk' as '(d)ie vergaan, stranding van 'n skip' and the phrase 'skipbreuk ly' as 'met jou skip strand'. It is not without significance that the destruction of the ship is equated with its stranding, as this approach lends support for the classification of shipwreck and stranding with breaking up as a single category.

83 While the words for shipwreck in the different languages all tend to indicate the same thing, namely that the ship has become a wreck, or has been broken, there is some vagueness in that it remains uncertain when a ship is to be regarded as wrecked or broken. The literal meaning of these words, however, is to the effect that the ship has ceased to exist as a ship.

vagueness<sup>84</sup>, the legislatures who have codified their marine insurance laws have not attempted a definition<sup>85</sup>. Similar difficulties attach to the precise meaning of the word 'stranding'<sup>86</sup>, which happens to be spelled the same in English, Dutch and Afrikaans, and its French and German equivalents, 'échouement' and 'gestrandet'. The essence of these concepts is apparent from their treatment in different legal systems.

6.2.3. Shipwreck has been defined as an accident which breaks up the ship and leads to her sinking<sup>87</sup>. This definition is in accordance with the etymological roots of the word as well as with the common or usual sequence of events<sup>88</sup> where the ship is broken up to a greater or lesser extent and sinks. It has also been said that there can be

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84 Danjon, *Traité de Droit Maritime*, (1915-1916), para 1516.

85 Except for Russia, who defined shipwreck as a total loss which arises when a ship sinks, strands, is collided with or breaks up, or springs a leak which cannot be repaired; Abbink, *Het Zeerecht en de Zee-Assurantiewetten aller Volken*, (1847), Vol I, para 116 fn 110.

86 The word could be used as a noun or a verb meaning 'to leave or drive a ship ashore'; Collins Paperback English Dictionary sv 'stranding'.

87 'Le naufrage, c'est, écrit M. Ripert, au sens étymologique du mot, l'accident qui brise le navire et entraîne par conséquent sa submersion'; ('Shipwreck, wrote Mr Ripert, in the etymological sense of the word, means an accident which breaks the ship and sets in motion her sinking'.) De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-60), Vol I, para 542.

88 Boulay-Paty, *Droit Commercial*, (1822), 230.

no shipwreck without sinking and no sinking without the event also constituting shipwreck<sup>89</sup>. If this is correct the breaking up of the sunken ship is not necessary for the event to constitute shipwreck. However, the mere sinking of the ship is not sufficient as the ship may be able to be refloated. The complete submersion of the ship is not required as she may be irretrievably broken in shallow water, but in the latter case the event constitutes stranding with breaking up<sup>90</sup>. While the sinking usually follows sooner or later as the natural result of shipwreck, the sinking is therefore not the only important factor<sup>91</sup>. Stranding with breaking up can therefore be compared to shipwreck as its effect is the same<sup>92</sup>, but it differs from shipwreck in that, in the case of shipwreck the ship founders and leaves no remains on the surface while in the case of

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89 De Smet, *op cit*, Vol I, para 542.

90 That is precisely what occurred in the case of *Durand de la Bédouandière et comp v Sellier et Autres* ('Le Juste') 1858 (1) DJG 392 (Cour de Cassation) where the ship sank but was raised to the surface after three days. The policy restricted the right to abandon to shipwreck and the court held that the event did not constitute shipwreck but stranding with breaking up.

91 De Smet, *op cit*, Vol I, para 542. The Declaration of 15 June 1735 to the effect that shipwreck was equal to the sinking of the ship as a result of violent wave action, wind, storm or lightning, whether the ship is completely engulfed or some wreckage remains afloat, is therefore incorrect; De Smet, *loc cit*.

92 Boulay-Paty, *Droit Commercial*, 231-232.

stranding water gets into a stranded ship and fills it without the ship disappearing<sup>93</sup>.

6.2.4. English and American law, in keeping with their concept of a constructive total loss, emphasise the effect of the event insured against rather than its precise nature, as long as it falls within the insured perils. As a result of this approach, there is no strict definition of shipwreck or stranding, nor any particular distinction between them. If a ship is completely broken up by a peril insured against so that her hull is dismembered and her planks or plates scattered on the sea, she is regarded as a wreck and the assured is entitled to claim for an actual total loss<sup>94</sup>. The same applies where she retains the shape of her hull but has been reduced to a '*mere congeries of planks*'<sup>95</sup>, so that she would require reconstruction rather than repair to make

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93 Stranding in this context means she is grounded and fills with water; Kent, *Commentaries on American Law*, (12th ed), (1896), Vol III, 516 fn (b).

94 45 *C.J.S. Insurance* para 955; *Carr v Providence Washington Insurance Co* 109 NY 504.

95 45 *C.J.S. Insurance* para 955; *Burt v Brewers' & Maltsters' Insurance Co* 78 NY 400.

her capable of navigating the sea again<sup>96</sup>. Notwithstanding the approach of English and American law with regard to constructive total loss, there appear to be two recognized or identifiable kinds of shipwreck. In the first the ship actually sinks and is so broken that there is nothing to retrieve, or she is dashed to pieces or is burnt to a cinder. In such cases there is an actual total loss and the assured may claim the sum insured without any abandonment<sup>97</sup>. In the second she sinks or is stranded. If the event does not result in a shipwreck amounting to an actual total loss, the ship may still be left in a position where she may be salvaged, preserved to some extent yet unable to be refloated and repaired except by the expenditure of an amount which would exceed her value when repaired, or, in American law, an amount which would exceed half her repaired value<sup>98</sup>. In such a case a

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96      *Arnould*, para 1191; *Cambridge v Anderton* (1824) 2 B & Cr 691; *Continental Insurance Co v Clayton Hardtop Skiff* 239 F Supp 815. In the lastmentioned case the ship was known to have been fully destroyed or so fragmented that she was no longer a ship, although the wreckage remained undiscovered. The court held that the circumstances justified the conclusion that either an actual total loss or a constructive total loss had occurred. The court held further that the precise definition of the loss depended on the elapsed time since the loss, the circumstances of the loss and the type of ship involved.

97      *Carr v Providence Washington Insurance Co*, *supra*.

98      *Bradlie v Maryland Insurance Co* (1838) 12 Pet 378; *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*.

constructive total loss arises entitling the assured to abandon and claim the full sum insured<sup>99</sup>. The mere sinking or stranding of the ship is not enough. If the ship can be refloated and rendered fit to continue the voyage, and the cost of doing so does not exceed the repaired value, or half the repaired value in America, the assured is limited to an average loss<sup>100</sup>. When one works with the concept of a constructive total loss, the difference between shipwreck and stranding becomes unimportant, except in relation to the definition of the perils insured against, and it is in this context that a number of decisions have been reported on the peculiar circumstances of a variety of cases where an endeavour was made to determine each time whether the loss arose from a stranding. However, these cases depend so much on the facts of each case that no precise definition or universally applicable rule can be given<sup>101</sup>.

6.2.5. The comparative situation is thus as follows: In

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99 English law: Section 60(1) of the *MIA*; *Arnould*, para 1191. American law: *Appleman & Appleman, Insurance Law and Practice*, (Revised Vol 6), para 3705; *Peele v Merchants' Insurance Co* 3 Mason 27.

100 *Appleman & Appleman, op cit*, para 3708; 45 *C.J.S. Insurance* para 955; *Wood v Kennebec Insurance Co* (1810) 6 Mass 479.

101 *Kent, op cit*, Vol III, 516 fn (b) gives a number of such cases.



Germany, England and America shipwreck and stranding may give rise to an actual total loss, a '*Totalverlust*' as it is known in German law. In such a case no abandonment is necessary. The reason is obvious: There is nothing of value left to abandon. However, the shipwreck or stranding may not completely destroy the ship. In such a case the loss is a constructive total loss in England and America, and an abandonment has to be made if the assured wishes to recover for a total loss. In Germany the claim is for a partial loss only. In the Netherlands and France shipwreck and stranding with breaking up are regarded as abandonment losses notwithstanding the possibility that in certain cases there may be nothing left to abandon. This incongruity does not stand in the way of the theory that the abandonment is required because the loss is total by reason of its economic effect in contrast to an actual total loss of the insured thing<sup>102</sup>.

6.2.6. The fiction is therefore to presume a total loss,

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It occurs to me that the reason for this incongruity in French and Dutch law is that they do not, like English law, recognise that the real rights pertaining to the ship or goods in respect of which a full indemnity has been paid may be enforced by the insurer as part and parcel of his rights obtained by subrogation. If French and Dutch law had recognised a similar principle there would have been no need for the requirement of an abandonment in all cases of shipwreck and stranding, only in those where there remains, or may remain, something of value to abandon.

not merely that a loss has occurred. There is after all actual damage to the ship in the case of shipwreck and stranding, as the earlier discussion of the nature of these *causae* demonstrates. This damage causes a diminution in the patrimony of the assured which is equal to the difference between the before and after values of the insured ship and goods<sup>103</sup>. However, from an economic point of view the assured's patrimony is reduced further in that the cost of recovery and repair makes the exercise not worthwhile. To him the loss is therefore equivalent to the total loss of the ship or goods, as would have occurred had they sunk in the deepest part of the ocean or had been burnt to a cinder. It is this additional loss, which is economic in nature, which abandonment allows the assured to recover in the case of shipwreck and stranding.

6.3. CATEGORY TWO: INNAVIGABILITY

- 6.3.1. Innavigability or irreparable damage caused by an insured peril are regarded as a cause for abandonment in the Netherlands, France, England

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This diminution is directly related to the value of the ship or goods and is limited to the difference between their before and after values.

and America, but not in Germany. In the Netherlands the ship was regarded as innavigable or unfit if she had been damaged to the extent that she could not reach her destination except by the expenditure of an amount exceeding three quarters of her insured value<sup>104</sup>. Damage or perishing of the goods as a result of a marine peril was also a cause giving rise to the right to abandon the cargo so affected<sup>105</sup>. In the case of destruction or perishing of the ship or goods, the assured could not abandon unless the damage exceeded three-quarters of the insured value<sup>106</sup>. In France damage to the extent that the repair costs exceed three quarters of the agreed value<sup>107</sup> and impossibility of repair give rise to the right to abandon the ship and total loss, loss

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104 Schook, *op cit*, 29-37; Mens Fiers Smeding, *op cit*, 56-58; Dorhout Mees, *Schadeverzekeringsrecht*, 638. The Amsterdam Ordonnance of 1744 used the phrase 'innavigabel geworden is' (article 28) and the Rotterdam Ordonnance of 1721 the phrase 'vergaan of innavigabel geworden' (articles 60 and 62), while the CdeC used the phrase 'innavigabilité par fortune de mer' (article 369). These words and phrases convey the same meaning, namely that the ship or goods must become incapable of being used as a ship as a result of a maritime peril. See also Enschedé, *op cit*, 150-151. Unfitness appeared to Schook, *op cit*, 35 to be a case of an actual total loss, as the ship loses her character as a ship when she is no longer seaworthy. It is submitted that what Schook meant is that the assured's patrimony must definitely be diminished.

105 Schook, *op cit*, 37 regarded this cause as equivalent for the cargo what stranding and breaking up constituted for the ship.

106 Article 666: 'Het abandonnement in geval van vergaan of bederf kan niet gedaan worden, dan wanneer het verlies of de schade drie vierden van de verzekerde waarde bedraagt of te boven gaat.' In the draft of 1809 it was two-thirds; Enschedé, *op cit*, 152. The equivalent provision of the CdeC was article 369.

107 A deduction 'new for old' is made in the computation; Rodière and Pontavice, *op cit*, para 636.

or damage to three fourths of the value of the goods<sup>108</sup>, sale of the goods during the voyage due to material damage to the goods insured by a peril insured against, and innavigability of the ship, if the progress of the goods through such means of transport there may be has not commenced within three months<sup>109</sup>, all give rise to the right to abandon the goods. English law allows an abandonment in the case of the ship if the repair cost would exceed the value of the ship as repaired<sup>110</sup> and in the case of the goods where the cost of repair and the cost of forwarding them to their destination would exceed their value on arrival<sup>111</sup>. In American law an abandonment is allowed if the costs exceed half the value of the ship or goods<sup>112</sup>.

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- 108 See the '*Djurdjura*' (1975) 27 DMF 123 (Tribunal de Commerce de Paris 13/2/74). In the '*Ismene*' (1988) 18 DMF 170 (Cour d'Appel de Paris 29/5/87) the court ruled that the abandonment of the goods insured on the ground that the damage thereto exceeded three quarters of their value still had to be in accordance with the terms of the policy. Thus, where the policy restricts the right to abandon or imposes conditions the assured is bound by those terms.
- 109 In the '*Giota's*' (1985) 37 DMF 613 (Cour d'Appel de Paris 29/10/84) the assured abandoned the goods insured on the ground that the ship could not complete the voyage as a result of innavigability and that the goods could not be carried on without a delay of more than four months. The court found in favour of the assured in that the facts justified the assured's contentions.
- 110 Section 60(2)(ii) of the *MIA*.
- 111 Section 60(2)(iii) of the *MIA*.
- 112 See Chapter 19 *supra*.

6.3.2. What is important in this scenario is that it is recognized that the ship or goods continue to exist and may even be capable of being repaired in order to complete the contemplated voyage, but it is no longer a realistic economic decision to do so. This exposes the true nature of the right the assured has been granted to make an abandonment and to claim the full amount of the insurance in these cases where the ship or goods have been damaged: The loss is of an economic nature, at least to the extent that the value of the damaged ship or goods is exceeded by the full amount of the insurance, being the value of the ship or goods in undamaged condition.

6.4. CATEGORY THREE: CAPTURE, ARREST AND DETENTION

6.4.1. All five the countries under consideration recognize this category of loss as giving rise to the right to abandon. In this category the economic nature of the loss is the most obvious as the ship or goods continue to exist but they are no longer in the assured's possession or under his economic control. He cannot dispose over the ship

or goods even though he is still their owner<sup>113</sup>.

6.5. CATEGORY FOUR: DISAPPEARANCE WITHOUT NEWS OR 'THE MISSING SHIP'

6.5.1. The same applies to the case of the missing ship, or, to put it in the terms of the various ordonnances and statutes, the case of absence of news. All five the countries under consideration recognize this as a case for abandonment<sup>114</sup> and the indemnification of the assured for a total loss. Yet the ship or goods may continue to exist and if they do they remain the property of the assured. The loss is again exposed as an economic rather than an actual loss affecting the ship or goods.

6.6. SUMMARY

6.6.1. It is thus apparent that the cases where the law allows an abandonment and the indemnification of the assured as for a total loss are in reality cases of economic loss. Various legal systems have

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113 In some cases the assured is actually deprived of his ownership too, as by a valid confiscation order or an order for the sale of the ship or goods followed by a sale, but in such cases the loss is actual.

114 Although there is no express requirement for a abandonment in terms of the MIA.

found different phrases to explain or distinguish this kind of loss, but the essence is the same in each case: The loss is economic in nature and it is made recoverable by the fiction or presumption of total loss.

6.6.2. In the Netherlands abandonment losses were regarded, in insurance practice, as cases of '*wettelijk geheel verlies*'<sup>115</sup>, a concept which demonstrates that there is a fiction introduced by operation of law which makes the loss a total loss. German insurance practice also adopted the phraseology of English law, referring to abandonment cases as cases of '*constructiven Totalverlusts*' to the same effect as Dutch practice.

6.6.3. Even French law created a total loss in abandonment cases by way of a fiction, in the words of Émerigon, '*la perte entière est présumée*'<sup>116</sup>. It is only in England and America that such losses are described in legislation, in

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115 Molengraaff, *Leidraad bij de Beoefening van het Nederlandse Handelsrecht*, (1955), Vol III, 679. Mens Fiers Smeding, *op cit*, 33 pointed out that the concept of a '*wettelijk geheel verlies*' had been taken over from English law.

116 *Op cit*, Vol II, 211.

the case of England<sup>117</sup>, and in case law, in the case of America, for what they are, namely constructive total losses. It is nevertheless difficult to find an all-encompassing theory which will work for economic loss in all spheres of the law, including contract, delict and insurance<sup>118</sup>.

7. THE ORIGINS OF ABANDONMENT

7.1. There does not appear to be sufficient evidence that the evolution of the concept of abandonment occurred in the clear cut increments proposed by some of the supporters of the economic loss theory. This theory is defeated in any event by the overwhelming probability that some form of abandonment was already required in the simulated sale transaction which preceded the insurance contract<sup>119</sup>.

7.2. It appears instead that abandonment developed out of the simulated sale transaction<sup>120</sup> and was

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117 The same applies, of course, to Australia, Canada, New Zealand and India.

118 Sheller, 'Pride and Precedent: Economic loss- the search for a bright new line', 1995 *LMCLQ* 203.

119 See in this regard the discussion of the origins of insurance and of abandonment in Chapters 4 and 5 *supra*.

120 See Chapter 4 *supra*.



later retained in marine insurance because it was found to be commercially useful in the interests of both the assured and insurer yet also satisfied the requirements of the principle of indemnity.

8. THE RESTRICTION OF ABANDONMENT TO MARINE INSURANCE

8.1. Insurance against risks other than marine transport developed at a much later stage than marine insurance<sup>121</sup>. The great fire which devastated London in 1666 saw the first insurance companies who undertook fire insurance being formed. A similar event in Paris in 1750 caused a similar demand for fire insurance<sup>122</sup>. Other forms of indemnity insurance of land risks followed. It is a fact that abandonment only applies in marine insurance. There appear to be a number of reasons why the right to abandon has not been imported into other forms of indemnity insurance.

8.2. The first reason is related to the fact that fire insurance at first covered home-owners in respect of the improvements on their land. Such property

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121 Holdsworth, *A History of English Law*, (1977), Vol VIII, 294; Dorhout Mees, *Schade*, 24; Lambert-Faivre, *Droit des assurances*, 8th ed, (1992), 5.

122 Lambert-Faivre, *op cit*, 5.

consisted of two main components, namely the land and the improvements in the nature of houses and outbuildings thereon. The land itself would continue to exist after a fire may have devastated the improvements, and the insurance was therefore intended to cover the assured in respect of the improvements only. Thus, when the house and other improvements burnt down, the assured still had the land and could use the proceeds of the insurance to rebuild his home in the same place as he had no desire to establish or acquire a new home on other land. Under these circumstances there was no need on the part of either the assured or the insurer to insure anything other than the improvements on the land nor to transfer the whole property, land and improvements, to the insurer against payment of the sum insured. This contrasts sharply with the cases falling within the ambit of abandonment in marine insurance where the assured was usually deprived of any control over or use of the ship or goods. In short, in land risks there was not the kind of total loss associated with the economic loss for which abandonment provided an appropriate remedy.

8.3. Another distinction between marine insurance and

fire insurance which made it unnecessary to import abandonment into fire insurance is to be found in the sufficiency of subrogation as a remedy to pursue the insurer's right's against the third party responsible for the loss. Marine losses occurred away from the centres where the insurers found themselves and the pursuit of claims against third parties was little more than an idle dream in almost all cases<sup>123</sup>. Not so with regard to fire insurance, as the wrongdoer could usually be found and sued at the place where the fire occurred. Thus, while subrogation was an adequate remedy for land risks, it was inadequate for marine risks and abandonment remained as a suitable remedy in marine insurance only.

- 8.4. It may well be asked if an abandonment clause in a fire policy would be valid as it appears, *prima facie*, to offend the indemnity principle since it would allow the assured to recover payment for a substantial part of the subject-matter of the insurance (the land) which actually remains undamaged even in the event of a fire. It would, ironically when regard is had to the origins of the insurance contract, turn the contract into a

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Mens Fiers Smeding, *op cit*, 36-39.

contract of sale again, with the insurer buying the insured property when it is damaged. There cannot be a question of total loss, as the land component survives any fire. There is no evidence of the desirability for such a device.

8.5. Yet another reason why abandonment was not imported into other types of indemnity insurance relates to the quantification of the loss. In the context of marine insurance the quantification of the loss was in abandonment cases very often slow and problematic, and the fact that the loss was of an economic nature played a part. In the case of improvements on land these difficulties did not arise as the amount of the loss could be determined quite quickly and with a fair degree of accuracy<sup>124</sup>.

8.6. A reason which is advanced here with some reservation as it is not supported by any authority<sup>125</sup> is that the concept of subrogation was probably beginning to gain recognition as a remedy separate from abandonment at about the same the time when fire insurance became popular in

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124 Dorhout Mees, *Schade*, 643.

125 I could not find any.

England and Europe. For the reasons advanced in the preceding paragraphs, a less drastic remedy than abandonment was obviously required in fire insurance and subrogation appears to have been tailor made for the situation<sup>126</sup>.

8.7. When other forms of land insurance developed later, they developed on the model of fire insurance rather than marine insurance and, since abandonment did not form part of the former, the new forms of indemnity insurance did not include it either. Nor was there any more reason for such new forms of insurance to include abandonment than for fire insurance<sup>127</sup>.

## 9. ABANDONMENT DISTINGUISHED FROM OTHER CONCEPTS

9.1. Abandonment differs from cession (or assignment as it is called in Anglo-American law) in a number of

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126 The possibility also exists that the converse situation applied, namely that the requirements of fire insurance were such that a lesser remedy than abandonment was sought, and in the search for such a remedy it was found that the body of rules which have since developed into the concept of subrogation were already contained within the far wider concept of abandonment.

127. A possible exception to this general statement would be the case of stolen property where the insurer has paid for a total loss and the thief is identified. Perhaps there ought to be some recognition of a direct claim based on ownership, as would be the case if an abandonment were allowed, enabling the insurer to reclaim the stolen property with the *rei vindicatio*. See Schlemmer, *Verkryging van eiendomsreg deur 'n versekeraar in die geval van diefstal van 'n versekerde saak*, LLM thesis, RAU, (1991); Dorhout Mees, *Schade*, 396.

respects. Abandonment operates only in marine insurance. Cession applies in all the branches of commercial law, including marine insurance. In operation the two concepts differ mainly in that ownership of real property, that is a thing such as a ship or goods, cannot be transferred by way of cession in legal systems based on Roman law<sup>128</sup>. Abandonment is a necessary device in those legal systems to effect a transfer of ownership of the insured things to the insurer in the cases where the law allows an abandonment. Further, when the insurer seeks to recover the abandoned ship or goods he does so as owner, by way of the *rei vindicatio* if necessary, whereas the insurer or other person who seeks to recover them under a cession does not have the benefit of that action<sup>129</sup>.

9.2. Abandonment also differs markedly from *negotiorum gestio* and salvage. The *gestor* administers someone else's affairs or property for which he is allowed to recover certain out of pocket expenses. The salvor likewise saves someone else's property for

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128 See Chapter 14 *infra*.

129 Dorhout Mees, *Schade*, 396. This subject is discussed in more detail in the next chapter.

which he is granted an award determined by agreement or litigation. Both the *gestor* and the salvor have to account to the owner of the property administered or saved for their administration. The insurer who pursues the salvage of the abandoned ship or goods is in a different position as he pursues his own property without accountability for his conduct and without having to re-imburse or compensate any other person in respect of the salvage operations.

10. CONCLUSION

10.1. Abandonment therefore appears to be inextricably linked to the indemnity principle as Park postulated. Yet that does not appear to be the full explanation as abandonment operates in a special sphere, namely that area where the assured, by virtue of risks which are unique to marine insurance, is at risk in respect of a special kind of loss which is of an economic nature. Thus, while abandonment serves a special function in the relationship between the assured and the insurer, it also serves as one of the handmaidens of the indemnity principle on which all indemnity insurance is based.

10.2. Abandonment's function as a servant of the indemnity principle in the sphere of economic losses will ensure that it will always be part of marine insurance. In a neat summary of the situation Khurram stated:

*'Strandings, groundings, collisions, foundering, captures, and destructions in war are just as common today as they were during the times which gave rise to the jurisprudence in this area of the law. Recent cases arising from occurrences, such as, for example, the Iran-Iraq war, and cases involving ships trapped in the Suez Canal during the Arab-Israeli war, continue to invoke the classic cases of the past as authorities. The law of constructive total loss and abandonment will no doubt continue to challenge and inspire innovative legal minds as maritime events unfold and casualties continue to occur.'*<sup>130</sup>

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*Op cit*, 117. See also O'Keefe, 'Gold, Abandonment and Salvage', 1994 *LMCLQ* 7 for a discussion of a recent conflict relating to a cargo of gold abandoned more than 137 years ago.



## CHAPTER FOURTEEN

### ABANDONMENT: THE TRANSFER OF RIGHTS AND OBLIGATIONS

#### 1. INTRODUCTION

1.1. One of the consequences of an abandonment is that the insurer becomes entitled to the remains of the interests or effects which were insured and are abandoned. The insured effects which are required to be abandoned to the insurer may be real rights, *jura in rem*, or personal rights, *jura in personam*. This distinction is important for this study because different modes of transfer apply to real rights and personal rights. The question at the heart of the matter is whether the act of abandonment is sufficient to transfer the relevant real or personal rights to the insurer, assuming the insurer to be willing to receive them. The answer depends on the nature of the rights to be transferred, namely whether they are real or personal rights.

1.2. The different categories of maritime property subject to marine insurance are mainly ships, their cargo, the freight earned or to be earned by the carriage of cargo on a ship, and the profits

or commissions to be earned by or through the venture where these do not constitute part of the freight. The right to bottomry and respondentia moneys may be included in some jurisdictions<sup>1</sup>. The ship and cargo are things, or real property in respect of which the most basic right is ownership, being the ultimate power to dispose of and over a thing. Freight is a personal right of the carrier to claim the agreed remuneration from the shipper in terms of their contract, whether that claim arises from a charterparty or a bill of lading or any other form of contract of carriage. The anticipated profits or commissions could be either a personal right like freight, or could amount merely to a *spes* or hope. So far as the hope of making a profit may develop into the situation where the assured would be legally entitled to recover that profit from a third party, that anticipation would mature into a personal right. The right to bottomry and respondentia moneys appears to fall into the same category as anticipated profits and commissions.

- 1.3. Personal rights are transferred through the simple process of cession, as it is known in legal

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For example, Germany. See Chapter 7 *supra*.

systems based on Roman law, or assignment, as it is also known in English law and its related systems. There is no controversy about the way a cession or assignment operates, although there is some scope for confusion when it is recalled that there is a distinction between an agreement to cede and the cession itself. The former is the underlying agreement giving rise to the obligation to cede and its concomitant, the right to receive. The latter is the actual transaction transferring the rights in question, also known as the real transaction<sup>2</sup>. In the context of abandonment, the personal rights of the assured to the freight or bottomry and respondentia moneys and commissions would therefore pass, in those legal systems which allow such rights to be abandoned<sup>3</sup>, to the insurer by way of cession or something akin to cession. The proviso is that a cession is a bilateral act whereby the rights are transferred<sup>4</sup>, whereas the transfer of rights could occur, in some jurisdictions, without the insurer's co-operation. The transfer of personal

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<sup>2</sup> See generally De Wet & Van Wyk, *Die Suid-Afrikaanse Kontraktereg an Handelsreg*, 5th ed, (1992), 251 et seq.

<sup>3</sup> In German, English and American law, as well as in other systems based on English law.

<sup>4</sup> De Wet & Van Wyk, *op cit*, 251.

rights by the process of abandonment is uncontroversial and occurs in the same way as the cession of other personal rights<sup>5</sup>.

1.4. However, the notion that an abandonment may operate in marine insurance as a method of transfer of real property (things) without any recognized form of delivery to the insurer is a controversial one. Nevertheless, it will be demonstrated in this chapter that abandonment, properly understood, is not repugnant to the general principles of other branches of the law.

1.5. Abandonment in its non-marine insurance sense is a unilateral act whereby the holder or owner of a right or property completely divests himself of that right or property without transferring or intending to transfer it to any other person<sup>6</sup>. Such *res derelictae* becomes *res nullius* which in turn is capable of being acquired in ownership by

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5 It is relevant only in those countries where personal rights such as freight and profits may be abandoned, like Germany, England and America. See Chapters 7 and 9 *supra* in this regard. In Dutch law (prior to 1 January 1992) and in French law the question of cession does not arise because only the ship or goods insured could be abandoned. See Chapters 6 and 8 *supra*.

6 In this context abandonment is a '*prysgawe of afstand van reg*'; Schlemmer, *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, RAU, (1991), 72-73.

any third party by *occupatio*<sup>7</sup>. Usually such an abandonment occurs without any outward manifestation of the abandoning person's will, except inaction<sup>8</sup>, and there are no prescribed legal formalities to be complied with. This occurs, for example, where a person simply refrains from enforcing a claim or right without communicating with the other party, or physically abandons movable property. The abandonment of personal rights is called a waiver<sup>9</sup>, while ownership of property is said to be abandoned<sup>10</sup> or relinquished.

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7 Van der Linden, *Rechtsgeleerd, Practicaal, en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 1.7.2.

8 Some express or tacit expression of the intention of the person abandoning is required, as there can be no legal consequences to a mere intention.

9 Waiver has been described as the '*renunciation of a right*'; *Mutual Life Insurance Co of New York v Ingle* 1910 TS 540 at 550; The requirements for a waiver in South African law are set out in *Laws v Rutherford* 1924 AD 261 at 263: '*The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances.*' Difficulties arise in cases where there is no communication of the decision not to enforce a right or the right is not enforced for a lengthy period; In *Mutual Life Insurance Co of New York v Ingle*, *supra*, Innes CJ said: '*When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes. But the mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me ... to have no effect upon the legal position of the person making the resolve.*'

10 An abandonment of movable property amounts to a relinquishing of possession and control, with the result that it becomes *res nullius*. In the case of immovable property an abandonment may not be possible in systems where ownership is determined absolutely by entry in a register, like the South African system of land registration in the Deeds Office.

1.6. In marine insurance, however, an abandonment is an overt<sup>11</sup> act, is required by law to be communicated to the insured, and is accompanied by the intention that no-one but the insurer should be entitled to become the owner of the rights or property so abandoned. By definition the abandoned thing thus cannot become a *res nullius* which any third party may seize to become the owner, but this question has led to some disagreement in English law<sup>12</sup>. Further, the vesting of ownership in the insurer could have far-reaching consequences not only for the assured and insurer, but also for third parties and the State because ownership of some kinds of maritime property is accompanied by certain statutorily imposed obligations<sup>13</sup>. Marine insurance has therefore sought its own means to deal with the unique situation which arises when the assured exercise the right to abandon to the insurer. These means are not necessarily in consonance with the general provisions of the law or similar processes.

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11 It is an overt act by its very nature because the notice of abandonment is only effective if it is communicated to the insurer.

12 See Ivamy, *Marine Insurance*, 4th ed, (1985), 394.

13 For example, the obligations of the owner of a ship or the owner of an obnoxious cargo like crude oil arising from local legislation pertaining to the removal of wrecks or the prevention of pollution.

1.7. For example, the transfer of ownership of property and the cession of personal rights are generally regulated by that branch of the law known as the law of property or of things<sup>14</sup>. Generally the law requires some form of delivery for transfer of ownership of a movable like a car or a ship. In the case of a *res* the assured who has lost possession and control of the thing insured cannot transfer ownership of that thing to the insurer by delivery as he is unable to vest some form of control over that thing in the insurer. Marine insurance appears to have found a way to vest such ownership in the insurer without any delivery, namely the institution of abandonment. The focus of this chapter is how this situation developed and how it operates in different jurisdictions.

2. HISTORICAL REVIEW: 1350 TO 1800 AD

2.1. The seeds for abandonment's operation as a method of transferring or acquiring ownership were sown in the simulated sale transaction, and may even

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Ideally the legal principles regulating the transfer of ownership of property or personal rights should be the same for all types of contracts, but this may not be true for abandonment, as the discussion in this chapter shows. So far as the transfer of such ownership or rights may differ in abandonment in marine insurance from other contracts may be the result of some unique feature of abandonment, or it may be due to legislation. The answer will be sought in a comparison of the law in England (and other countries applying English law), the Netherlands, Germany and France, before South African law is examined.

have existed in earlier forms of insurance such as the Babylonian loan and the maritime loan. In the simulated sale the nature of the transaction required there to be a transfer of property to the buyer-insurer. Bosco<sup>15</sup>, however, made it clear that the transfer was linked to the recoverability of the goods. He stated that:

' (A) ssecurator solvit pretium et valorem pro quo assecuravit, et recuperat merces quae sunt periculo a se emptae, si recuperati possunt ...',<sup>16</sup>

The Roman law on which the simulated sale was based required a recognized form of delivery for ownership to be transferred<sup>17</sup> and such forms of

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15 *Consilia*, (written between 1390-1425), *Consilium* 191 at 612.

16 ('The insurer pays the price and value of that which he insured, and recovers the goods which were sold to him by the occurrence of the event (literally 'danger') insured against, if recovery is possible.') (my underlining)

17 The recognized forms of delivery in Roman law were: (a) *traditio de manu in manum*, that is to say, physical transfer from hand to hand; (b) *traditio brevi manu*, that is to say, the process whereby a person who already has possession but not as owner now continues to hold the thing as owner; (*Digest* 12.1.9.9) (c) *constitutum possessorum*, that is to say, the process where the owner possesses the thing, parts with ownership thereof, and continues to hold possession as lessee, for example; (*Digest* 6.1.77 and 41.2.18 pr) (d) *traditio longa manu*, that is to say, where the thing is placed in sight of the transferee and he is enabled to take physical possession; (*Digest* 46.3.79, 41.2.1.21 and 18.2) and (e) symbolical tradition, that is to say, by the handing over of the keys to a building where the things are stored, thereby enabling the transferee to take control of the things delivered. See in this regard: Lee, *The Elements of Roman Law*, (1944), 134-135; Van Warmelo, *An Introduction to the Principles of Roman Civil Law*, (1976) paras 255 to 257; Thomas, *The Institutes of Justinian*, (1975), 82-83.



delivery were impossible in the circumstances which prevailed. These forms of transfer all required two elements, namely the intention to transfer, *animus*, and the vesting of physical control, *detentio*, in the transferee. The problem was simply that the seller/assured was unable to pass physical control of the insured goods to the buyer/insurer as all the recognized forms of delivery under Roman law required. In the simulated sale the parties resorted to the device of a clause in their contract to the effect that the goods would be regarded as sold from the date of the contract if the risk materialised<sup>18</sup>, upon which event the seller-insurer relinquished the goods to the buyer-insurer<sup>19</sup>. This did not amount to a delivery of the goods to the buyer-insurer and it would appear that the buyer-insurer only became owner of the goods so relinquished if and when he physically recovered them, (*'si recuperati possunt'*). Two separate legal acts are apparent in this process. The assured relinquished his rights in the goods in favour of the insurer and the insurer became owner by recovering them.

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18 '... quasi tanquam resvenditae ex die contracte assecurationis toto viagio fuerint ipsorum emptorum ...'; Bosco, *Consilium* 391, 612. The retro-active transfer of ownership (to the date of the casualty) in English and American law appears to be a remnant of this provision.

19 Bosco, *Consilium* 369, 570.

2.2. This process involved two steps or legal acts which were recognized by Roman law. Under Roman law a person could divest himself of ownership by relinquishing it<sup>20</sup>. Equally, a person could acquire ownership of the abandoned thing by assuming control of it with the intention of holding it in ownership<sup>21</sup>. The same two elements were necessary for a transfer to occur in this fashion. There first had to be the expressed intention to relinquish on the part of the seller and an intention on the part of the buyer to acquire, constituting the *animus* element. Then the buyer had to acquire control, *detentio*, of the abandoned thing. However, the transfer of ownership to the buyer/insurer in this manner encountered the same problem as transfer by delivery: there could be no transfer of ownership until the buyer/insurer had somehow acquired physical control, that is *detentio*, of the things concerned.

2.3. There were two obvious shortcomings in this two-step process postulated thus far. In the first

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20 Domat, *Le lois civiles leur ordre naturel*, (1689), (translated by Cushing as *The Civil Law in its Natural Order*, (1850)), at 855 and 863 of the Cushing edition.

21 *Ibid.*

place, if the conduct of the assured were to amount to a complete abandonment of his rights in the things insured so that they became *res nullius*, a third party could easily become their owner through *occupatio*. That was never intended to be the result of the relinquishing of his rights by the assured, who intended the goods to go to the insurer, if they could be recovered. In the second place, the insurer was unable to pursue the things insured or their remains in the hands of third parties, even the very parties responsible for the loss, because the assured's conduct in relinquishing his rights alone did not vest any rights in the insurer. These problems were solved in a unique manner. Firstly, the abandonment was understood to be one restricted to the insurer, so that it operated only in his favour. Secondly, the abandoned things were taken to vest automatically, *ex lege*, and without any form of delivery or seizure (*occupatio*) in the insurer.

- 2.4. The early authors on insurance confirmed that the goods were relinquished with the intention that only the insurer was to be allowed to recover them

and become their owner. Straccha<sup>22</sup>, relying on Santerna<sup>23</sup>, wrote that the insurer was only held bound to that '*quod dominus mercium didisset pro recuperatione*'<sup>24</sup>. Casaregis<sup>25</sup> stated that payment by the insurer had the effect that the goods vested in him. He mentioned that '*... dicit quod liquidatio rei salva spectat ad assecuratorem ...*'<sup>26</sup>, but this statement, however, supposed that some of the goods were salvaged, ('*rei salva*'). The solution was introduced by statute.

- 2.5. The Savona Ordonnances of 1503 and 1522 contained a provision obliging the assured to '*intimate, notify and give notice of suit*'<sup>27</sup> when he wished to claim from the insurer, using the word '*denuntiare*', which may also be taken to mean 'to renounce'<sup>28</sup>. The notion of a relinquishing or abandonment of the goods insured is contained

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22 *Tractatus de Assecurationibus et Proxenetis*, (1569), 1.1.145.

23 *Tractatus de Assecurationibus et Sponsionibus Mercatorum*, (1552), 4.27-4.28.

24 ('... which the owner of the goods had given up for recovery.')

25 *Discursus Legales de Commercio*, (1740), 1.101.

26 ('It is said that upon payment (of the claim) the things saved vest in the insurers.')

27 '*intimare, notificare et denuntiare*'.

28 This second interpretation is preferred as the words used would otherwise be tautologous.

within this second meaning of '*denuntiare*'. There was no indication in this ordonnance that more than the mere notification and renunciation was required for it to be effective between the assured and insurer and against third parties.

2.6. However, article 29 of the 1558 Ordonnance of Philip II of Spain expressly provided that the assured could recover the sum insured in the case of the missing ship '*on ... making a resignation to the insurers and giving them the necessary cessions and procurations.*'<sup>29</sup> This provision, which is the oldest direct reference I have been able to find, contains both the idea of an abandonment ('*a resignation*') and a formal cession or power of attorney which would enable the insurer to pursue the goods insured in the hands of third parties, either in his own name, in the case of a cession, or in the name of the assured, in the case of a power of attorney. This provision probably provides an answer to both the problems raised earlier. In the first instance the abandonment was not one which operated in favour of all the world, but a limited abandonment '*to*

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The text of this article is found in translated form in Magens, *An Essay on Insurances*, (1755), Vol II, 37-38.

*the insurers'*. In the second instance, the insurer received a cession or procuration which entitled him to recover the things insured and relinquished to him, even from third parties.

2.7. The question whether more than the mere relinquishing of the things insured to the insurer was required was still unresolved at the time of the *Guidon de la Mer*<sup>30</sup>. Article 1 of Chapter 7 of the *Guidon* defined abandonment as a '*quitting and abandonment of the assured's rights, titles, claims and actions of ownership*'<sup>31</sup>. A transfer of ownership is not clearly apparent from this definition, which is in consonance with the idea that some additional step was still necessary for the insurer to become owner of the abandoned things. Article 12 of Chapter 7 of the *Guidon* provided further that, if the ship should arrive safely after an abandonment had been made, the insurer collected as his own the proceeds of the voyage, while the assured was not entitled to demand any part thereof<sup>32</sup>. This provision is also

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30 A mid sixteenth century compilation of the customs of the merchants of Rouen.

31 '*... c'est-à-dire, quitter et délaisser ses droits, noms, raisons, et actions de la propriété ...*'. The words '*actions de la propriété*' could perhaps more accurately be translated as 'proprietary rights'.

32 See Pardessus, *op cit*, Vol II, 404-405.

in consonance with the notion that a second step was essential for the insurer to acquire ownership of the abandoned things. Indeed, article 3 of Chapter 7 of the *Guidon* expressly mentioned that there was a controversy about the question whether the abandonment itself was sufficient to transfer ownership to the insurer or whether a further act in the nature of a power of attorney ('*procuration*') was required. According to Valin<sup>33</sup>, Émerigon<sup>34</sup> and Pardessus<sup>35</sup> no such additional act on the part of the assured was necessary<sup>36</sup>.

2.8. Two early statutory instruments clarified the matter considerably. The Genoa Ordonnance of 1588<sup>37</sup> (or 1610<sup>38</sup>) expressly provided for

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33 *Commentaire sur l'Ordonnance de le Marine du Mois d'Aout 1681*, (1760), (Becane edition 1829), 562, where the opinion was expressed that '*... donc le délaissement est signé, les effets assurés sont dévolus et acquis aux assureurs ... et par la nature du délaissement, qui vaut cession et transport, sans qu'il soit besoin d'une procuracion de la part de l'assuré ...*' ('... when the abandonment is signified, the insured effects devolve upon and are acquired by the insurers ... and by the nature of abandonment, which amounts to a cession and transfer, without it being necessary for a procuracion on the part of the assured ...')

34 *Op cit*, Vol II, 230-231.

35 *Op cit*, Vol II, 401.

36 However, these authors wrote on the subject after the *Ordonnance de la Marine* of 1681 which declared that to be the case and had been in force for a considerable time.

37 According to Pardessus, *Collection de lois Maritimes antérieures au XVII<sup>e</sup> siècle*, (1837), Vol IV, 256.

38 According to Magens, *op cit*, Vol II, 66.

ownership to pass to the insurer without the intervention of any further legal act by enacting that

*'(t)he assured may ... demand the full insurance, and abandon the effects insured to the insurers, whose property they shall be in such a case.'*<sup>39</sup>

Almost a century later article 60 of the *Ordonnance de la Marine* of 1681 of Louis XIV of France also expressly provided that,

*'après le délaissement signifié, les effets assurés appartiendront à l'assûreur ...'*<sup>40</sup>

Thus, in at least Genoa and in France, the legislature stepped in to provide that ownership of the abandoned things were vested in the insurer without delivery.

2.9. It is important to note, however, that this vesting of ownership in the insurer occurred by

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38 According to Magens, *op cit*, Vol II, 66.

39 Magens' translation.

40 ('After the notice of abandonment the insured effects belong to the insurer.')



operation of law on the strength of the particular provisions quoted above. What is equally important is that the event which triggered the vesting of ownership in the insurer was the notification of the abandonment to the insurer. Henceforth it would therefore no longer be necessary for the insurer to recover possession or physical control of the goods abandoned to him in order to become owner of them. He could therefore pursue them in the hands of third parties in his own name and relying on his own title. The process involved still required two separate legal acts, although they now coincided. The first was the notification of the abandonment to the insurer. The second was the vesting of ownership in the insurer by operation of law. It also appears that it was not considered at that time that there could be any burdens attaching to the owner as a result of the mere fact of ownership, and the insurer's cooperation or consent to this type of acquisition of ownership was therefore neither sought nor required.

2.10. Whether these provisions merely restated the existing law merchant which regulated marine insurance in Genoa and France respectively or

whether they were intended to bring an end to the existing controversy, is not clear. However, from the date of these enactments there could no longer be any doubt about the matter in the areas where these two ordonnances were applicable. Further, having regard to the fact that marine insurance was born in the northern Italian towns of which Genoa was one of the leaders, and further having regard to the international status and influence which the *Ordonnance de la Marine* of 1681 enjoyed, it is more than likely that the controversy must also have abated, if it ever existed, in the Netherlands, Germany and England. In respect of the province of Holland in the Netherlands there appears to be direct evidence for this conclusion.

- 2.11. In the Netherlands there was, prior to the codification of Dutch commercial law in the *Wetboek van Koophandel* of 1838 ('the *WvK*'), no express provision in any of the local ordonnances in force in the various towns nor in the Customs of the Antwerp Exchange which preceded them that the abandonment resulted in ownership of the things abandoned vesting in the insurer. However, in the province of Holland there was a legal opinion to that effect namely *Consultatie 52*,

given by Jacob de la Mine on 10 March 1677 in Amsterdam<sup>41</sup>. A significant feature of the opinion is that it relied on a decision of the *Rotae Genoa*<sup>42</sup>, the court of Genoa, as authority. The significance is found in the fact that, as was pointed out above, the Genoa Ordonnance of 1588 (or 1610) expressly provided that the goods abandoned became the property of the insurer upon the abandonment. Further authority in Holland is readily found in the opinions of Abraham van den Ende<sup>43</sup>. In his *Advysen 14 & 23*<sup>44</sup> he pointed out that the abandonment may be made '*... met volkoomen effect van rechte ...*'<sup>45</sup> and in *Advys 16*<sup>46</sup> he stated that '*... overmits door middel van dat Abandonnement en van dien afstand B. als Assurateur en (sic) ontwyffelbaer recht van eigendom heeft verkregen.*'<sup>47</sup> For this latter

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41 Van den Berg, *Nederlands Advysboek*, (1693-1698).

42 *Decisio 101*.

43 Contained in Barels, *Advysen over den Koophandel en Zeevaart*, (1780-1781).

44 Dated 6 May and 18 May 1715 respectively. *Advys 23* was an explanation of *Advys 24*.

45 Barels, *op cit*, 130.

46 Dated 10 April 1715.

47 Barels, *op cit*, 88. The passage quoted in the text indicates that abandonment was seen by Van den Ende, not as a means of transfer, but as a means by which ownership vested, *ex lege*, in the insurer. There is an important distinction. If abandonment were to be seen as a transfer

opinion Van den Ende relied not only on *Decisio 101* of the *Rotae Genoa* and Jacob de la Mine's *Consultatie 52*, but also on article 60 of the *Ordonnance de la Marine* of 1681. Therefore, so far as the province of Holland was concerned, the same legal acts, namely the notification of the abandonment and the vesting by operation of law, resulted in the insurer becoming the owner of the abandoned things.

2.12. In England there was no legislation on the subject and no evidence that the matter was ever controversial, but the courts in any event held from the earliest times that the effect of the abandonment was that it transferred the whole property and interest in the thing insured to the insurer, and did so from the date of the loss<sup>48</sup>. American law inherited the same rules<sup>49</sup>. The rule of the English common law that the abandonment transferred property retro-actively to the date of

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from the assured to the insurer, one would expect compliance with the requirement of delivery. For a vesting of ownership in the insurer upon the giving of notice of abandonment by operation of law such compliance would become irrelevant and there would be no clash between marine insurance law and other branches of the law.

48 *Camell v Sewell* 3 H & N 617; *S.C. in Cam. Scacc.* 5 H & N 728. See also Marshall, *A Treatise on the Law of Insurance*, 5th ed, (1865), Bk I, 487; Arnould, *The Law of Marine Insurance and Average*, 2nd ed, (1857), 1149.

49 Kent, *Commentaries on American Law*, 12th ed, ((1873), Vol III, 511-512; Phillips, *A Treatise on the Law of Marine Insurance*, 4th ed, (1854), Vol II, Para 1707; *Continental Insurance Co v Clayton Hardtop Skiff* 367 F 2d 230.

the loss harks back to the days of the simulated sale when the happening of the event insured against triggered the transfer. In English and American law, therefore, the abandonment truly operated as a transfer from the assured to the insurer. The difference between English law and continental law in this regard may be a consequence of the fact that continental law was based on Roman law, which without exception required a delivery of the thing transferred, while English law had no such general requirement for ownership to transfer<sup>50</sup>.

2.13. While no similar evidence relating to the period prior to the *Handelsgesetzbuch* of 1900 ('the HGB') has been found in relation to the position in Germany, it is submitted firstly that, by virtue of the fact that the practice of marine insurance was taken to Hamburg by Dutch insurers, the same situation in all probability prevailed there as prevailed in Holland. It is further submitted that the subsequent provision of article 872 the HGB<sup>51</sup> confirms that in German legal theory the abandoned

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50 See generally Buckland and McNair, *Roman Law and Common Law*, 2nd ed, (1965), 110 *et seq.*

51 This provision is discussed in the text *infra*.

things vested in ownership in the insurer by operation of law.

2.14. It is thus apparent that in the early, that is pre-1800 law of the Netherlands, France, England and America the abandonment had the effect of transferring real rights in the nature of ownership of the abandoned ship or cargo. German law may have been the same but followed the same pattern expressly from 1900.

3. ABANDONMENT AS A METHOD OF TRANSFER: 1800 AD TO THE PRESENT

3.1. It was pointed out earlier in Chapters 6 to 9 that the abandonment provisions of the European countries under consideration were taken up in the codification process which swept Europe after the Napoleonic conquests of the end of the eighteenth century. This occurred in France in the *Code de Commerce* of 1807 ('the *CdeC*'), in the Netherlands in the *Wetboek van Koophandel* in 1838 ('the *WvK*') and in Germany in the *Handelsgesetzbuch* of 1900 ('the *HGB*'). In England there was no general codification but the Marine Insurance Act 1906 ('the *MIA*') codified English marine insurance law.

In America no such codification took place. Whether the codification process of the nineteenth century imported any changes to the position which had developed will be determined next. In the process the abandonment and transfer of rights outside the sphere of marine insurance will be compared to abandonment and transfer in marine insurance in the individual countries.

- 3.2. When the current effect of abandonment in marine insurance is contrasted with the general provisions of the law in the countries under consideration it becomes apparent that abandonment in marine insurance differs from the abandonment which operates in the law of property. The distinction lies mainly therein that the law of property still requires the two distinct legal acts required by Roman law before the transferee becomes the owner of the abandoned thing, whereas marine insurance does not. Central to the distinction is the centuries old problem of control or *detentio*.

3.3. THE NETHERLANDS

- 3.3.1. Prior to the abolishment of abandonment in the

Netherlands with effect from 1 January 1992, the result of a proper abandonment in marine insurance was that ownership of the insured and abandoned ship or goods transferred to the insurer in terms of article 678 of the WvK<sup>52</sup>. The effect of the abandonment was therefore the '(g)eheelee, onvoorwaardelijke, onherroepelijke overgang van het verzekerde en geabandonneerde op de verzekeraar.'<sup>53</sup> This occurred *ex lege*, without any form of delivery mentioned in article 639 of the *Burgerlijk Wetboek* ('the BW') and without any form of acceptance by the insurer being necessary<sup>54</sup>. It also occurred without any entries

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52           Mens Fiers Smeding, *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895); Van Barneveld, *Inleiding tot de Algemene Assurantiëkennis*, (10th ed), (1978), 485; Dorhout Mees, *Schadeverzekeringsrecht*, ('Schade'), 4th ed, (1967), 641. In the Roman-Dutch law prior to the WvK the abandonment was also made 'aan de verzekeraar', and not to the world at large so that the ship or goods could become *res nullius*. The Customs of the Antwerp Exchange (1582) required an abandonment 'tot behoef van den verzekeraar', article 12 of the Rotterdam Ordonnance of 1604 'ten behoeve vande Verseeckeraers' and article 60 of the Rotterdam Ordonnance of 1721 'ten behoeve van de Asseuradeurs'. Article 28 of the Amsterdam Ordonnance of 1744 was to the same effect. There was thus no question of an abandonment to the world at large, only a notification to the other party to the contract of the assured's willingness to give up his rights in the insured ship or goods. The notice of abandonment therefore had legal consequences only between the assured and the insurer.

53           Mens Fiers Smeding, *op cit*, 107.

54           Mens Fiers Smeding, *op cit*, 108; Dorhout Mees, *Schade*, 641. Schook, *Het Abandonnement*, doctoral thesis, Utrecht, (1857), 69-70, questioned the conclusion that ownership transferred *ex lege* as a result of the abandonment prior to the advent of article 678 of the WvK. In the first place, he believed the contention was contrary to a passage in Roccus' work, *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708), not 9. In the second place, he was of the opinion that the absence of a *traditio* was strange. However, the relevant passage in Roccus' work does not deal with ownership after an abandonment, but with ownership during the period of the insurance. The absence of a recognized form of delivery, on the other hand, is explained by the unique development of marine insurance law.



having been made in the Shipping Register, which in ordinary circumstances would have been required for ownership to transfer<sup>55</sup>.

3.3.2. According to Molengraaff<sup>56</sup> abandonment was '*een rechtsfeit, waardoor eigendomsovergang plaats grijp ... mitsdien een wijze van eigendomsverkrijging, niet een rechtstitel van eigendomsoorgang.*'<sup>57</sup> Dutch marine insurance law therefore maintained the process whereby the notice of abandonment to the insurer resulted in an *ex lege* vesting of ownership in the insurer. Article 678 of the *WvK* also solved a vexed question, namely from what date ownership in the abandoned property was acquired. It provided that upon a proper abandonment '*behooren de verzekerde voorwerpen aan den verzekeraar, te rekenen van de dag van de beteekening van het abandonnement ...*' It is not without significance that the particular

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55 Articles 318, 748 and 750 of the *WvK*. See also Cleveringa, *Zeerecht*, 4th ed, (1961), 89 *et seq.*

56 *Leidraad bij de Beoefening van het Nederlandse Handelsrecht*, 9th ed, (1955), 683.

57 This statement may explain why it is futile to try and compare abandonment to the acquisition of ownership by way of delivery. In the case of abandonment Dutch law was to the effect that ownership vested *ex lege* in the insurer. Abandonment is thus a form of acquisition of ownership, not a method of transferring ownership. Seen in this light, the act of abandonment on the part of the assured divests himself of ownership and ownership then vests, by operation of law, in the insurer. Abandonment may then not be contrary to the other provisions of the law which require delivery for ownership to transfer.

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55 Articles 316-318 and 757 (until 1992) of the *WvK*. See also Cleveringa, *Zeerecht*, 4th ed, (1961), 89 *et seq.*

56 *Leidraad bij de Beoefening van het Nederlandse Handelsrecht*, 9th ed, (1955), 683.

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formula does not state that ownership 'transfers'. It would appear that the acquisition of ownership rather than a transfer was envisaged. The reason is not difficult to imagine. By giving notice of abandonment the assured expressed his offer to transfer his interest in the abandoned ship or cargo but the insurer could not, under strict Roman law and Roman-Dutch law principles, acquire ownership until he had actually obtained *detentio* of them. The law thus provided for him to 'acquire' ownership without having brought or received the ship or goods in his physical possession. This provision therefore confirms the conclusion arrived at earlier, namely that the two steps in the process of transfer now co-incided.

3.3.3. Outside marine insurance, the term '*afstand van reg'*' is used in different settings in Dutch law. The three main ways in which a right can move out of one's estate are firstly by way of delivery to another, secondly by removal from one's estate without delivery to another and thirdly by being lost through theft. The loss through theft or similar conduct is regarded as the opposite of acquisition of ownership<sup>58</sup>.

3.3.4. The term '*afstand van reg*' is used to denote an abandonment or waiver of a right, and is described as the legal act by which a right is removed from one's estate without transfer of that right to the estate of another<sup>59</sup>. In the case of ownership, the *Burgerlijk Wetboek* ('the *BW*') does not refer to abandonment of ownership, but only to the relinquishing of possession<sup>60</sup>. It is generally accepted, however, that the relinquishing of possession accompanies the relinquishing of ownership as long as the owner of the property makes his intention clear. Such movable property then becomes *res nullius* which can be acquired in ownership through *occupatio*<sup>61</sup>.

3.3.5. Such a relinquishing of possession and the subsequent acquisition of possession by a third party through *occupatio* does not result in the direct transfer of ownership. There are two

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59 Schlemmer, *op cit*, 73; Aaftink, *Afstand van Vermogensrechten*, (1974), 14.

60 Article 600 of the *Burgerlijk Wetboek*, ('the *BW*') and Book 3: Article 117 (3.5.11) of the *Nieuw Burgerlijk Wetboek*, ('the *NBW*'); Article 3:117 of the *NBW* provides as follows: '*Een bezitter van een goed verliest het bezit, wanneer hij het goed kennelijk prijsgeeft, of wanneer een ander het bezit van het goed verkrijgt.*' Haanappel & MacKaay, *Nieuw Nederlands Burgerlijk Wetboek: Het Vermogensrecht*, (1990), 61 translated this article as follows: '*A possessor of property loses possession when it is evident that he abandons the property or when another acquires possession of it.*' It should be made clear that the article deals only with loss of possession by a possessor, and not with loss of ownership by an owner.

61 Schlemmer, *op cit*, 73.

separate legal acts which do not have any relationship with each other. The one relinquishes ownership, the other acquires ownership without the co-operation of the first<sup>62</sup>. The acquisition of ownership through *occupatio* is a form of original acquisition of ownership and does not derive from the ownership of the previous owner<sup>63</sup>. Aaftink describes '*afstand van recht*' in this sense as

*'een rechtshandeling welke is gericht op het verlies van een recht door de rechthebbende, zonder tevens een overdracht van dit recht te zijn aan een ander.'*<sup>64</sup>

3.3.6. The *Nieuw Burgerlijk Wetboek* ('the *NBW*') also makes provision for the loss of ownership when an owner abandons it, but makes it clear that the giving up of possession has to be accompanied by the intention to divest himself of ownership<sup>65</sup>. The *NBW* further provides that the person who takes

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62 Schlemmer, *op cit*, 73; Aaftink, *op cit*, 15 *et seq.*

63 *Ibid.*

64 *Op cit*, 18.

65 Article 5:18: '*De eigendom van een roerende zaak wordt verloren, wanneer de eigenaar het bezit prijsgeeft met het oogmerk om zich van de eigendom te ontdoen.*'

possession of property which does not belong to anyone becomes owner thereof<sup>66</sup>. This acquisition occurs through *occupatio* which was the oldest and original form of acquisition of ownership<sup>67</sup>.

3.3.7. Originally Dutch law required factual control or *detentio* to be passed to the transferee for ownership of movables to be acquired by him<sup>68</sup>, as was the case in the Roman and Roman-Dutch law<sup>69</sup>. Article 667 of the *BW* in its original French text made it quite clear, providing that '*la tradition ... s'opère par la seule délivrance de l'objet ...*'<sup>70</sup> This provision did not apply to immovables, which were transferred by entries in the appropriate registers, nor to ships which exceeded a given tonnage, which were similarly transferred by entries in the ships register<sup>71</sup>.

3.3.8. After considerable discussion in the legal journals and a number of cases, this position was

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66 Article 5:4.

67 Schlemmer, *op cit*, 74.

68 Hofmann, *Het Nederlandsch Zakenrecht*, 3rd ed, (1944), 234.

69 Van der Linden, *Koopmans Handboek*, 1.7.3.

70 ('The transfer operates solely through delivery of the object.')

71 Hofmann, *op cit*, 234 fn 1; Articles 318, 748 and 750 of the *WvK*.

watered down somewhat so that stolen property could be transferred to the insurer without giving him physical *detentio*, but in such cases the insurer had to be placed in the position where he could 'legitimate' his claim against the possessor<sup>72</sup>. The *NBW* has confirmed this trend and allows ownership to transfer in certain cases where the transferor no longer has physical *detentio*<sup>73</sup>. In such cases the transfer occurs by deed, which allows the transferee to legitimate his claim to possession against third parties<sup>74</sup>. This process is available also in respect of ships, and theoretically an abandonment to the insurer could still achieve transfer of ownership in Dutch law by the procedure of article 3.95 of the *NBW*<sup>75</sup>. Thus, in Dutch law, the result achieved by abandonment in marine insurance for the past three or four centuries has now also been incorporated in the general law of property. Ownership is allowed to pass by means of a written

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72 See in this regard the discussion in Schlemmer, *op cit*, 28 *et seq* and the authorities there cited.

73 Schlemmer, *op cit*, 32 *et seq*; Clausing, *Korte inleiding tot het vermogensrecht onder het Nieuw BW*, 95 *et seq*; Hartkamp, *Compendium van het vermogensrecht volgens het nieuwe Burgerlijk Wetboek*, (1990), 88-90.

74 Mijnsen and Schut, *Bezit, levering en overdracht*, 3rd ed, 99-100.

75 Article 3.95 *NBW*: 'Buiten de in de artikelen 89-94 geregelde gevallen en behoudens het in de artikelen 96 en 98 bepaalde, worden goederen geleverd door een daartoe bestemde akte.'

deed, which is what the written notice of abandonment also achieved.

- 3.3.9. Ownership passed only in respect of the ship or goods<sup>76</sup> insured<sup>77</sup> and abandoned. There was some controversy about the question whether the freight earned before the abandonment accrued to the insurer. Schook<sup>78</sup>, Mens Fiers Smeding<sup>79</sup> and Molengraaff<sup>80</sup> held the view that it did not. After the abandonment the ship belonged to the insurer with all benefits arising from such ownership with the consequence that freight earned after the abandonment accrued to the insurer.
- 3.3.10. The abandonment transferred only the rights arising from ownership and did not include personal rights and claims against third parties<sup>81</sup>. The rights relating to the loss or

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76 Article 663 expressly provided that the '*verzekerde schepen en goederen*' could be abandoned. There was no provision for anything else to be abandoned in Dutch law.

77 Schook, *op cit*, 70-71; Mens Fiers Smeding, *op cit*, 108.

78 *Op cit*, 71-72.

79 *Op cit*, 112.

80 *Op cit*, 683.

81 Mens Fiers Smeding, *op cit*, 111 mentioned the interesting example of a salvage claim which accrued before the abandonment, to which the insurer obtains no right as such a claim arises from the effort made in saving the salvaged property and not from ownership of the ship engaged in the



damage indemnified transferred under article 284 of the *WvK* by means of subrogation<sup>82</sup>.

3.3.11. It was recognized in Dutch marine insurance practice that this type of transfer of ownership might not be desired by the insurer as it may be accompanied by obligations<sup>83</sup>. This was partly responsible for the practice of Dutch insurers to exclude the right to abandon from their policies, which occurred so consistently that the Dutch Parliament eventually abolished the institution of abandonment with effect from 1 January 1992.

#### 3.4. GERMANY

3.4.1. Aschenheim<sup>84</sup> regarded the transfer of ownership as the essence of abandonment. In respect of marine insurance article 868(1) of the *HGB* expressly provides that all the rights the assured has in respect of the insured effects transfer 'gehen auf') to the insurer. The transfer occurs at the moment notice of abandonment is given as

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salvage effort.

82 This only occurred upon indemnification; Schook, *op cit*, 70.

83 Van Barneveld, *op cit*, 485.

84 *Der Abandon des Versicherten in der Seeversicherung*, (1893), 7.

the article provides that the rights transfer by way of the notice of abandonment ('*durch die Abandon erklärung*')<sup>85</sup>. The effect of the provision is that it preserves the process whereby two legal acts occur, namely the giving of notice of abandonment and vesting of ownership, *ex lege*, in the insurer.

3.4.2. Article 959 of the *Bundesgesetzbuch* ('the BGB') deals with the abandonment of ownership of movable property outside marine insurance. In such a case the property does not devolve upon any other person by virtue of the abandonment<sup>86</sup>. The property becomes *res nullius* when the owner gives up possession with the intention to relinquish or renounce ownership. The intention of the owner is made apparent to the outside world by the expression of his intention to relinquish his ownership<sup>87</sup>. Ownership of the property which becomes *res nullius* may then be acquired by another person through *occupatio* coupled with the

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85 Aschenheim, *op cit*, 31; Helberg, *Der Abandon in der Seeverversicherung auf rechtsvergleichender Grundlage*, (1925), 94; Hagen, *Seeverversicherungsrecht*, (1938), 138.

86 Schlemmer, *op cit*, 77; Baur and Baur, *Lehrbuch des Sachenrechts*, (1989), 34.

87 Baur and Baur, *op cit*, 521.

appropriate intention<sup>88</sup>. However, it is apparent that two separate legal acts are involved, as in Dutch law, namely the act of divesting the relinquishing owner of his ownership and the act of the new owner in acquiring control over the thing or right.

3.4.3. Roman law was received into German law to a much greater degree than in the Roman-Dutch law and it is therefore not surprising that German law of property recognizes the same forms of delivery as Roman law and requires the transferee to acquire *detentio* of the thing to be transferred before ownership vests in him<sup>89</sup>.

3.4.4. The rights which are transferred are those which vested in the assured at the time of the abandonment, which rights are transferred together with such obligations as attach to the thing abandoned at that time<sup>90</sup>. Anything which validly formed the subject-matter of the insurance may be abandoned, including the ship, her cargo, the freight, as well as bottomry and average monies,

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88 Schlemmer, *op cit*, 77; Baur and Baur, *op cit*, 522.

89 Schwab, *Sachenrecht*, (1987), 135 *et seq.*

90 Ritter-Abraham, *Das Recht der Seeversicherung*, 2nd ed, (1967), 906-907.

but not the expected profit of the venture<sup>91</sup>. The controversy about the freight earned prior to the abandonment is solved by article 868(3) of the HGB, which provides that the insurer of the ship shall be entitled to the freight earned after the abandonment<sup>92</sup>. The freight earned before the abandonment must therefore vest in the assured.

3.4.5. The abandonment transfers all the rights the assured has in respect of the insured effects<sup>93</sup>. Although it is not expressly so stated, the rights the assured has against the third party responsible for the loss, whether in delict or in contract or otherwise, are not rights '*in respect of*', ('*in Ansehung des*'<sup>94</sup>), the insured effects but rights arising from the event which caused the loss. Such rights are personal rights which transfer under the principles of subrogation when the assured is indemnified<sup>95</sup>.

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91 Aschenheim, *op cit*, 33-43.

92 If the freight is separately insured the loss in respect of the freight earned after the abandonment falls on the insurer of the freight in terms of article 868(4) of the HGB.

93 Article 868(1).

94 Afrikaans: '*ten aansien van*'.

95 Article 804 of the HGB stipulates the requirements for subrogation in marine insurance and article 67 of the *Versicherungsvertragsgesetz* ('the VVG') in other forms of indemnity insurance.

3.4.6. While it is recognized in German law that the insurer may become owner of the insured property against his will as it may make him liable for certain obligations which arise from mere ownership of the abandoned effects, the lawmakers have left the provision unchanged.

3.5. FRANCE

3.5.1. The marine insurance provisions of the *Code de Commerce* of 1807 ('the *CdeC*') departed from the provisions of the *Ordonnance de la Marine* of 1681 by providing that, after the abandonment was signified and 'accepted or judged valid'<sup>96</sup>, the things abandoned vested in the insurer with effect from the date of the notice of abandonment<sup>97</sup>. The qualification does not necessarily mean the abandonment had become a bilateral act between the assured and insurer. It means that the legal vesting of the property in the insurer is suspended until the abandonment is accepted by the insurer, or failing such acceptance, judged valid by the court. The time of transfer had been the

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96 'et accepté ou jugé valable'.

97 Article 385.

subject of some disagreement as some were of the opinion that it occurred at the time when notice was given by the assured while others were of the view that the transfer only occurred when the notice was accepted or judged valid by the court<sup>98</sup>. Article 31 of Law 522 of 1967 laid this dispute to rest by stipulating expressly that the transfer operates as between the parties from the time the assured notifies the insurer of his election to abandon<sup>99</sup>. There was some dispute about the precise way an abandonment operated in French marine insurance law.

- 3.5.2. According to De Smet the effect of an abandonment under the *CdeC* was to transfer to the insurer the proprietary rights which the assured had in the thing insured<sup>100</sup>. De Smet's statement does not alert the reader to the fact that ownership vested in the insurer *ex lege*, but is not incompatible

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98 Rodière and Pontavice, *op cit*, para 640. De Smet, *Traité Théorique et Pratique des Assurances Maritime*, (1959-1960), Vol I, para 630 was of the opinion that the transfer was retro-active to the time of the notice, which implies that he could not have regarded the transfer as a bilateral act. Emerigon, *op cit*, Vol II, 230, commenting on article 60 of the 1681 Ordonnance, also expressed the opinion that the transfer operated with retro-active effect. Rodière and Pontavice, *op cit*, para 640 were hesitant to express any firm view on the matter.

99 The article provides that: '*Les effets de ce transfert remontent entre les parties au moment où l'assuré notifie à l'assureur sa volonté de délaisser.*' See also Rodière and Pontavice, *op cit*, para 640.

100 '*Le délaissement transmet à l'assureur les droits de l'assuré sur les objets assurés*'; *op cit*, para 629. The reason for the transfer is to prevent a double- or over-indemnification; De Smet, *loc cit*.

with that fact.

3.5.3. Danjon saw abandonment as a sort of cession by the assured to the insurer of all his rights in the things insured<sup>101</sup>. This scenario entails a direct and independent transfer from the assured to the insurer by way of cession. There is no warrant for such a fiction for two reasons. The first is that in French law ownership of things (real property) is transferred by delivery, not cession. The second is that the French courts have consistently held that the transfer of rights to the insurer occurs *ex lege* and without the necessity for any special cession or subrogation<sup>102</sup>.

3.5.4. Ripert did not see abandonment as a method of transfer, but as a method of acquisition of ownership<sup>103</sup>. It is submitted that Ripert's statement is more accurate than those of De Smet

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101 *Traité de Droit Maritime*, (1914), Vol V, para 1583; 'Il comporte une sorte de cession faite par l'assuré à l'assureur de tous les droits qu'il peut avoir sur les objets assurés ...'; ('It constitutes a sort of cession made by the assured to the insurer of all the rights he could have in the objects insured.')

102 *Basse v Assureurs Maritime ('La Nanine')* 1853 (2) DJG 4 (Cour Impériale); *Comp. la Gironde v Amanieu ('La Louise-Marie')* 1854 (2) DJG 15 (Cour Impériale).

103 Ripert, *Précis de Droit Maritime*, 7th ed, (1956), para 719 described abandonment as 'un mode d'acquisition de la propriété propre droit maritime.' This approach was also adopted in the 10th ed of Ripert's work by Rodière and Pontavice, *Droit Maritime*, 10th ed, (1986), para 639.

and Danjon as it makes it clear that there is no direct or independent transfer from the assured to the insurer, but that the abandonment by the assured is a unilateral act whilst the intervention of the law constitutes the second component which makes the abandonment '*un mode d'acquisition de la propriété propre au droit maritime*'<sup>104</sup>. Ripert's approach is also compatible with the underlying common law, based on Roman law, namely that delivery is necessary for the transfer of ownership.

3.5.5. Article 31 of Law 522 of 1967, which replaced the marine insurance provisions of the *CdeC*, adopted fresh wording to restate the principle. It provides that the abandonment '*transfers*' the rights of the assured in the things insured to the insurer<sup>105</sup>. While this wording may, at first blush, appear to conflict with the view expressed earlier, the article does not detract from the notion that the transfer occurs *ex lege*. It may therefore be concluded that French law recognizes the difficulty of passing ownership to the insurer

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104 '... a method of acquiring ownership in maritime law'.

105 '*Il transfère les droits de l'assuré sur les objets assurés à l'assureur* ...'



without a proper delivery by treating the abandonment by the assured and the vesting of ownership in the insurer as separate legal acts.

3.5.6. Some argued that the '*transfer*' does not take place unilaterally, through the '*will*' of the insured alone, but has to be accepted by the insurer or validated by the court<sup>106</sup>. The acquisition of ownership by the insurer is then a result of a contract ('*convention*') of abandonment<sup>107</sup>. This argument is fallacious, it is submitted, because it fails to take into account that the true effect of the provisions of the law is that the abandonment is a unilateral act and that the insurer in consequence of that act acquires ownership *ex lege*. The fiction of a contract of abandonment giving rise to the transfer is thus untenable.

3.5.7. Pursuant to the Roman law principles on which the French law of property is based, French law also recognizes abandonment outside of marine insurance

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106 De Smet, *op cit*, Vol I, para 630, relying on article 239 of the CdeC. It was recognized that the transfer is not necessarily to the advantage of the insurer. It could expose him to charges resulting from the obligations arising from ownership of the things saved; De Smet, *op cit*, Vol I, para 629.

107 De Smet, *op cit*, Vol I, para 630.

as a method of divesting one-self of ownership of the abandoned thing, which as *res nullius* may then be acquired in ownership by a third party who seizes the thing with the intention of owning it<sup>108</sup>.

3.5.8. Further, French law, like the Roman law, originally required the *detentio* of the thing transferred to vest in the transferee before ownership vested in him<sup>109</sup>. However, the *Code Civil* of 1807 has not followed this approach and ownership of movables now transfers by virtue of the agreement alone by virtue of article 1138<sup>110</sup>. For example, in terms of article 1583 ownership passes in the contract of sale as soon as agreement is reached as to the thing and the price, even though the thing has not been delivered or the price paid<sup>111</sup>. In French law, therefore, the notion that ownership should pass by abandonment in marine insurance without any form of delivery is not at odds with the general

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108 Domat, *op cit*, 855, 859 and 863; Malaurie and Aynès, *Cours de Droit Civil: Les Biens*, (1990), 146, 166 and 170. The source of this right of ownership is possession; Malaurie and Aynès, *op cit*, 166. This emphasises the *detentio* aspect.

109 Domat, *op cit*, 860.

110 Malaurie and Aynès, *op cit*, 145.

111 Bermann, de Vries and Galston, *French Law*, (1989), 4-108.

principles of the law of property or contract.

3.5.9. Ownership of the things insured and abandoned ('les droits ... sur les objets assurés') passes to the insurer together with all obligations attaching to the things abandoned themselves<sup>112</sup>. It goes without saying that only things which can validly be insured ('les objets assurés') may be the abandoned. In French law that means the ship<sup>113</sup> and the goods<sup>114</sup>, but not the freight, because, although the latter may also be insured, there is no longer any provision for the freight to be abandoned<sup>115</sup>. To be effective against third parties, the election to abandon must be contained in a written deed, which is regarded as publication to third parties<sup>116</sup>. In the case of the ship, the necessary entries have to be made in the mortgage register. In the case of cargo, the bill of lading has to be delivered to the insurer, as the bill of lading is a document of title.

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112 Danjon, *op cit*, Vol V, para 1583 bis.

113 The ship may be abandoned under article 48 of Law 522 of 1967.

114 The abandonment of the goods is provided for in article 55 of Law 522 of 1967.

115 Harrel-Courtès, *Le Nouveau Droit Français de L'Assurance Maritime et des Événements de Mer*, (1968), 3-4.

116 Rodière and Pontavice, *op cit*, para 640.

3.5.10. Only rights of ownership vest by way of abandonment in the insurer. The rights in relation to any claims the assured has against the third party responsible for the loss pass under the principles of subrogation<sup>117</sup>. Originally the insurer was also entitled to the freight earned during the insured voyage<sup>118</sup> as French law saw the freight as an adjunct to the ship<sup>119</sup>. From 12 August 1885 the freight could be insured separately and had to be abandoned to the insurer of the freight<sup>120</sup>. This situation changed yet again as a result of the provisions of Law 22 of 1967 which no longer mention a separate abandonment of the insured freight<sup>121</sup>.

3.5.11. Article 31 of Law 522 of 1967 introduced another welcome innovation, namely that the insurer may decline to accept the transfer of ownership of the subject-matter of the insurance, but without

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117 See article 33 of Law 522 of 1967 for subrogation in marine insurance and article L 121-12 of the *Code des Assurances* ('the CdA') for subrogation in other forms of indemnity insurance.

118 Article 386 of the *CdeC* before its repeal in 1885. See also *Lemaître et comp v Assurance Mutuelles ('La Ceres')* 1853 (2) DJG 61 (Cour Impérial).

119 Danjon, *op cit*, Vol V, para 1575.

120 Danjon, *op cit*, Vol V, para 1575; De Smet, *op cit*, Vol I, para 596.

121 Although the freight may still be insured separately; article 3 of Law 522 of 1967.

affecting his obligation to pay the sum insured. This put an end to a long-standing problem for insurers who did not want to be saddled with the remains of the thing insured<sup>122</sup>. Further, the insurer retains the right to stipulate in the policy that no transfer was to occur upon acceptance of the abandonment<sup>123</sup>.

3.6. ENGLAND AND AMERICA

3.6.1. Under the English common law the effect of an abandonment in marine insurance was to transfer *'the whole property and interest in the thing insured to the underwriter, as from the date of the loss.'*<sup>124</sup> American law, having inherited the English common law of the latter part of the eighteenth century, is to the effect that the abandonment *'of itself, and without any deed of cession, and prior to actual payment of the loss, transfers the right of property and interest in the things insured to the insurer to the extent of*

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122 From 1924 the insurers have stipulated in the policy that ownership would not pass to the insurer upon acceptance of the abandonment or upon it being judged to be valid; Rodière and Pontavice, *op cit*, para 641.

123 De Smet, *op cit*, Vol I, para 629.

124 Pollock and Bruce, *A Compendium of the Law of Merchant Shipping*, 4th ed, (1881), Vol I, 541; *Cammell v Sewell*, *supra*; *S.C.in Cam. Scacc*, *supra*.

the insurance.'<sup>125</sup> American law is therefore the same as the English common law before the latter was changed by the Marine Insurance Act 1906 ('the MIA').

- 3.6.2. Section 63(1) of the MIA changed the automatic transfer to one depending on the co-operation of the insurer for it to be effective. It provides:

*'Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.'*

- 3.6.3. The rights transfer retro-actively to the date of the loss<sup>126</sup>, not in terms of an express provision of the MIA, but in terms of the underlying common law, which is preserved by section 91(2) of the MIA<sup>127</sup>. The rule enunciated in *Stewart v Greenock*

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125 Pollock and Bruce, *op cit*, Vol I, 541; *Robinson v The United Insurance Company* 1 Johnson (US) Rep 592; *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*; Kent, *op cit*, Vol III, 511-512; Phillips, *op cit*, Vol II, para 1707.

126 Phillips, *op cit*, Vol II, para 1708.

127 91(2). *'The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.'*

*Marine Insurance Co*<sup>128</sup> therefore stands<sup>129</sup>.

3.6.4. The result is that abandonment has become, in English law, a bilateral act requiring the insurer's acceptance before the proprietary rights and interests incidental thereto pass to the insurer<sup>130</sup>. Therefore, whereas under the English common law the abandonment was a unilateral act which transferred the relevant rights to the insurer even against his will and without any form of delivery, under the *MIA* it is now a bilateral act requiring an acceptance by the insurer of those rights. Nevertheless, no form of delivery of the insured things or their remains is required.

3.6.5. When abandonment is seen in the light of the *MIA*, it appears to be similar to the abandonment of continental law where the abandonment *per se* does not vest ownership of the property in the insurer. However, while ownership then vests in the assured by operation of law in German law, in English it only vests in the insurer if he elects to 'take

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128 (1848) 2 HL Cas 159.

129 See also Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as '*Arnould*'), para 1283.

130 *AG v Glenn Line Ltd and the Liverpool and London War Risks Insurance Association Ltd* [1937] 37 LLR 55 (HL), 61.

over' the assured's rights<sup>131</sup>.

3.6.6. It is a matter of controversy in English law whether the act of abandonment effectively divests the assured of his ownership, whether against the insurer alone or against all the world<sup>132</sup>. Generally English law holds that a person cannot divest himself of ownership merely by saying he does not want it<sup>133</sup>. However, in some wreck removal cases the effect of some passages in the judgments was that the shipowner was released from obligations attaching to his ownership by the act of abandonment<sup>134</sup>. Whatever the position of English law outside of marine insurance, it is submitted that the act of abandonment in marine insurance must be distinguished from the abandonment of property which occurs in other contexts.

3.6.7. The assured who abandons to the insurer has no intention that any one other than the insurer

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131 In French law the vesting occurs unless the insurer elects otherwise.

132 Colinvaux, *op cit*, para 1290.

133 *Vandervell v I.R.C.* [1966] Ch 261; *Arnould*, para 1290 fn 66.

134 *The Douglas* (1882) 7 PD 151, 160; *The Utopia* 1893 AC 492, 498; *The Chrystal* 1894 AC 508, 519; see Colinvaux, *op cit*, para 190 fn 66.



should acquire title to the abandoned things. He may however, in particular circumstances, also give up his rights in and to the property concerned because he thinks they are beyond recovery, so that there may be an intention to abandonment against all the world if the insurer does not exercise his right to take over the property abandoned to him. In the first case the assured remains vested with a better title than any other person, and he may even withdraw the abandonment and claim for a average loss, in which event his title to the abandoned property remains as good as ever<sup>135</sup>. In the second case, however, the assured's intention differs markedly. He there intends to relinquish his rights so completely that, if the insurer does not exercise his right to take them over, the property becomes *res nullius*, which may then be claimed by any person who obtains possession.

3.6.8. This distinction has not been seen clearly in English law, resulting in the well-known conflicting dicta of Bailhache J, Greer LJ and Cohen LJ. Bailhache J thought there was a lot to be said for the view that a wreck abandoned to

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Arnould, para 1290 fn 66.

underwriters who did not accept the abandonment became a *res nullius*<sup>136</sup>. Greer LJ disagreed with this view, saying that

'(i)t does not follow that, because notice of abandonment is given to an insurer, therefore the vessel, which may have some value, is abandoned to all the world, so that it has no owner at all, and becomes what lawyers prefer to describe ... as *res nullius*.'<sup>137</sup>

Cohen LJ preferred Greer LJ's view in the light of the fact that Bailhache J' approach was irreconcilable with the assured's right to treat the loss as a partial loss and with the doctrine of ademption<sup>138</sup>. It is submitted that the approach of Greer LJ and Cohen LJ is correct and demonstrates that the abandonment in marine insurance differs from the abandonment in ordinary context in that the former operates only as between the assured and insurer.

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136 *Boston Corpn v France Fenwick & Co Ltd* [1923] 15 LLR 85 (KB), 91. Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' [1994] 25 *Journal of Maritime Law and Commerce* 95 at 114 supports this view whilst acknowledging that it gives rise to anomalies.

137 *Oceanic Steam Navigation Co Ltd v Evans* [1934] 50 LLR 1 (CA), 3.

138 *Blane Steamships Ltd v Minister of Transport* [1951] 2 LLR 155 (CA), 163.

- 3.6.9. The concepts of ownership and possession in English (and consequently American law) differ greatly from the principles of Roman law upon which the continental legal systems and South African law are based<sup>139</sup>. Whereas Roman law saw and maintained a clear distinction between ownership and possession, English law does not do so. Factual possession is distinguished from legal possession, which usually connotes that the possessor has the right to possess<sup>140</sup>. Legal possession may generally be given up without the intention of transferring the article concerned to another<sup>141</sup>. As in other legal systems, English law recognizes that ownership may be acquired by the occupation of an abandoned thing<sup>142</sup>.
- 3.6.10. Whereas ownership is seen as absolute in Roman law, operating against the world, in English law the emphasis is on possession so that the person in possession need only defend his possession against the party who claims to be entitled

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139 It is beyond the scope of this work to explain the differences.

140 Halsbury, *Laws of England*, 4th ed, (1981), Vol 35, (Personal Property), paras 1111 and 1112.

141 *Halsbury's Laws of England*, Vol 35, para 1125.

142 *Halsbury's Laws of England*, Vol 35, para 1136.

thereto<sup>143</sup>. 'No one is ever called upon to demonstrate an ownership against all men ... It is a relative ownership: "I own it more than you do"'<sup>144</sup>. Conversely, in a dispute between two persons about ownership, neither has to prove title in the sense understood by continental and South African lawyers, namely ownership. The question is; who has the better title?<sup>145</sup> This simple principle of English law makes it possible to explain that the notion that the mere abandonment transferred property under the English common law of marine insurance was not at variance with the common law relating to other branches of the law<sup>146</sup>.

3.6.11. When the abandonment is made and the insurer accepts it<sup>147</sup>, the insurer ordinarily has a better right than any person who might claim possession of the abandoned effects, but his title

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143 Buckland and McNair, *Roman Law and Common Law*, 2nd ed, (1965), 66-71.

144 Buckland & McNair, *op cit*, 67.

145 Buckland and McNair, *op cit*, 69.

146 Section 17(1) of the Sale of Goods Act 1979 determines that ownership ('property') in respect of specific or ascertained goods is passed in the contract of sale 'at such time as the parties to the contract intend it to pass', making it clear that delivery is unnecessary and that the buyer who receives ownership does not have to acquire *detentio* of the goods before he can become their owner.

147 Under the common law and in American law no acceptance was/is necessary.

or right can be no better than that of his predecessor, the assured. In principle it is therefore possible that a third party could have a better title than the assured and may defeat the insurer in the contest. This result is a consequence of the principle which also applies in continental law, namely that the insurer receives transfer of the insured effects subject to any defects in title and also to the rights of third parties<sup>148</sup>.

- 3.6.12. Under English law anything which could validly be insured under a marine insurance contract may be abandoned. This includes the ship, goods, freight and anticipated profits. The freight earned by the abandoned ship in completing the voyage (after the casualty giving rise to the abandonment) accrues to the insurer as being part and parcel of the proprietary rights incidental to ownership<sup>149</sup> if the insurer elects to take over the assured's proprietary rights. This is a logical consequence of the retro-active effect of the abandonment and its acceptance.

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148 See Arnould, para 1265.

149 *Case v Davidson* (1816) 5 M & S 79; *AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd*, *supra*, 61. This principle is alleged never to have been doubted in English law since *Case v Davidson*; see Colinvaux, *op cit*, para 1284.

- 3.6.13. The abandonment, if accepted, transfers only proprietary rights and rights incidental thereto. Personal rights and claims against third parties responsible for the loss pass upon indemnification of the assured according to the principles of subrogation, as provided by section 79 of the *MIA*<sup>150</sup>.
- 3.6.14. The amendment to the common law brought about by section 63(1) of the *MIA* tacitly acknowledges that there may be obligations accompanying the ownership received by the insurer, and allows the insurer to avoid them. Examples of such cases may be found in the legislation dealing with the owner's liability for the cost of removal of a wreck or navigational obstruction<sup>151</sup> or in respect of the cost of combatting oil pollution.
- 3.6.15. As in English law, whatever could be validly insured under a marine insurance contract may be abandoned in American law. The rights which transfer as a result of the abandonment are the property or ownership of the things abandoned

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150 *AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd, supra*, 61.

151 *Boston Corporation v France Fenwick & Co Ltd, supra*.

together with 'the rights identified with the insurable interest or depending upon the possession of it'<sup>152</sup>. The rights which transfer through abandonment are thus rights of ownership and rights arising from or being incidental to ownership. Claims and rights against the third party responsible for the loss pass upon indemnification under the principles of subrogation. The transfer is subject to the rights of third parties<sup>153</sup>. Obligations which accompany ownership also pass to the insurer. This may include the strict liability which accrues under the Clean Water Act<sup>154</sup> or the Comprehensive Environmental Response, Compensation and Liability Act<sup>155</sup> and also under a variety of State Acts<sup>156</sup>.

#### 4. THE TRANSFER OF OBLIGATIONS

##### 4.1. Ownership is accompanied by certain obligations,

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152 Phillips, *op cit*, Vol II, para 1707.

153 Phillips, *op cit*, Vol II, paras 1714-1721; 45 *C.J.S. Insurance*, para 965; *Delaware Mutual Safety Insurance Co v Gossler* 96 US 645.

154 . 33 USC section 1321; Schoenbaum, *Admiralty and Maritime Law*, (1987), 533-534.

155 42 USC sections 9601-9675; Schoenbaum, *op cit*, 534.

156 Schoenbaum, *op cit*, 540.

not only in general, but perhaps particularly so in the case of maritime property. The result is that there are instances where it may be inconvenient or financially risky for the insurer to receive or accept ownership of the insured things. As a consequence of this circumstance insurers have tended to exclude or limit the right to abandon in their policies and the legislatures of some countries have amended their law to leave the insurer with the choice whether he will accept transfer of ownership of the abandoned things or not.

- 4.2. Examples of obligations which accompany the ownership of the insured ship or goods include: the liability to pay a salvage reward to any person who saves the ship or goods; liability in respect of maritime and possessory liens; liability for the expenses of earning the pending freight; liability for the debts secured by mortgages over the ship or goods; statutory liability under the domestic legislation of various countries in respect of the removal of wrecks and the warding off and clearing up of pollution on their coasts; and the liability for customs and other duties payable in respect of the



ship or goods. The list does not appear to be a *numerus clausus* as further liability could attach under the domestic law of the country within whose boundaries the abandoned ship or goods may be found.

4.3. The fact that these obligations may attach to the ship or goods and may have to be met by the insurer who has become their owner as a result of the abandonment does not mean that the assured is relieved of all of them. In respect of civil debts or liabilities incurred by the assured before the abandonment, the insurer may recover from the assured those amounts he has been obliged to pay so far as they do not arise from the insured peril<sup>157</sup>. Whether the assured is completely freed from liability in the case of liabilities imposed by statute would depend on the precise provision. In *Osaka Steamship Co Ltd v South African Railways & Harbours*<sup>158</sup> the South African Appeal Court interpreted a local provision which imposed liability for the expenses of wreck removal on the owner as meaning the owner at the time of the casualty. The liability therefore remained with

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157            *Arnould*, para 1288.

158            1938 AD 146.

the assured. In the English case of *Barraclough v Brown*<sup>159</sup> the opposite result was achieved when the provision which imposed the liability imposed them on the owner at the time the expenses were incurred, being the insurer who had accepted the abandonment in that case.

5. CONCLUSION

- 5.1. Notwithstanding the differences between the legal systems referred to in the precise manner they allow ownership of the abandoned things to be transferred to the insurer, the effect of their individual provisions is that the assured who claims the full amount of the insurance against an abandonment does not benefit by having the money as well as the goods or their remains. Thus, by requiring an abandonment and by providing that ownership thereafter vests in the insurer notwithstanding that no formal delivery has taken place, the law preserves and protects the indemnity principle.
- 5.2. If abandonment did not have the effect of vesting ownership in the insurer, the insurer could suffer

severe prejudice, especially in the case where the assured simply gave up the chase and made no effort to save or salvage the insured property after abandoning them to the insurer. The assured's attitude in such a case may well be construed, at the place where the abandoned property is, as an abandonment operating against all the world with the result that the insurer has to compete with others for the salvage and has to suffer the interference of others in the salvage operations. In such a case there would also be unnecessary uncertainty as to the legal status of the abandoned property.

5.3. Abandonment in marine insurance differs from abandonment in other branches of the law in three main respects.

5.3.1. In the first place it gives rise to the right to claim the full amount of the insurance. This means that abandonment in marine insurance is bilateral in effect. It is founded upon the contractual relationship between the parties. In the absence of that contractual relationship the right to claim does not exist and cannot be created by the mere abandonment.

5.3.2. In the second place, abandonment in marine insurance is intended to operate only if favour of the insurer and does not vest any rights in any person other than the insurer. It is thus bilateral in the sense that it is intended to operate and operates only between the assured and insurer.

5.3.3. In the third place, abandonment in marine insurance has the effect or consequence that ownership of the abandoned things vest in the insurer automatically<sup>160</sup>, by operation of law, in some countries, but in other countries only if the insurer elects to accept such ownership<sup>161</sup>. In this sense abandonment in marine insurance is also bilateral in effect. Ownership of the abandoned property passes directly from the estate of the assured to that of the insurer. Abandonment in the ordinary non-marine insurance sense, however, is a unilateral act which divests the owner of his property without it vesting in any other person unless a further and separate legal act takes place. That further legal act is also unilateral

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160 As, for example, in Germany and America. The same process operated in the Netherlands until it abolished the right to abandon altogether.

161 As in France and England.

in that the person acquiring ownership does so by taking occupation of the abandoned thing without reference to the previous owner.

5.4. In the Roman law and the Civil law based on it abandonment in marine insurance might have been seen as a unique method of acquiring ownership of real property, that is of things, but with some erosion of the requirement of physical control or *detentio* over the particular thing. Even in those legal systems which have strictly maintained the principles of the Roman law, such as Dutch and German law, it is debatable whether abandonment was indeed all that unique. Its uniqueness does not appear to extend beyond the fact that ownership of the abandoned things were vested in the insurer *ex lege* rather than by delivery or *occupatio*.

5.5. It was demonstrated earlier that the transfer of ownership brought about by abandonment in marine insurance generally follows the same principles and process as the abandonment and acquisition of ownership of things in the law of property of individual countries. It is therefore submitted that abandonment as a method of vesting or

transferring rights of ownership in marine insurance should not be viewed as a foreign doctrine. Applying a label such as '*a unique method of transfer*' to abandonment is likely to invite suspicion rather than to assuage the existing doubts about its pedigree, operation and right to exist.

5.6. Before turning to an examination of the legal regime and sources of the law which regulate the principles of abandonment in South African law, the place and functions of abandonment may be restated briefly:

5.6.1. The cornerstone of marine insurance is the principle of indemnity, which requires that the assured should receive a full indemnity but no more than that;

5.6.2. Abandonment stands in the service of the indemnity principle by, on the one hand, allowing the assured to recover the full indemnity in the event of certain losses best described as economic loss, while on the other hand preventing the assured from recovering more than a full indemnity by requiring him to abandon his proprietary rights in

the insured property to the insurer;

5.6.3. The consequences of a proper abandonment are that the insured becomes entitled to claim the full amount of the insurance while the insurer becomes entitled to the abandoned property in the fullest sense, that is to say by acquiring ownership of them;

5.6.4. Abandonment is related to the concept of subrogation in that the latter regulates, in some countries, the transfer of personal rights from the assured to the insurer, and in other countries, the pursuance of the assured's rights against third parties in the interests of the insurer.

5.7. Whether these general principles of abandonment and the principles of abandonment which are common to the countries under consideration are applicable in South African law remains to be seen. In order to answer that question, the ancestry and content of South African marine insurance law have to be determined first and that will be done in the next chapter.

## PART V: SOUTH AFRICAN LAW

### CHAPTER FIFTEEN

#### THE RESIDUAL COMMON LAW: ENGLISH LAW OR ROMAN-DUTCH LAW?

##### 1. INTRODUCTION

- 1.1. Whether English law or Roman-Dutch law is the residual common law for South African marine insurance law has recently become a controversial question<sup>1</sup>. If English law applies, the law will have to be sought in English judicial decisions and perhaps in some statutes<sup>2</sup>, and abandonment will fall squarely within the principles of the concept of a constructive total loss. An important question which would arise if English law were applicable is whether the English common law as it was before the Marine Insurance Act 1906 ('the

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1 There is a distinction between the Roman-Dutch law which applied in the province of Holland in the seventeenth and eighteenth centuries on the one hand, and the Roman-Dutch law which applies in the Republic of South Africa on the other. The former is an important, probably the most important component of the latter, especially so far as insurance law is concerned, but the Roman-Dutch law inherited from Holland when Jan van Riebeeck founded the Cape of Good Hope has been modified considerably by local legislation and case law in the last three centuries. For the sake of clarity the Roman-Dutch law applying in South Africa at the present time will be referred to as South African law or as the Roman-Dutch law of the Republic, as the situation requires.

2 The Gambling Act 1774 and the Marine Insurance Act 1906 ('the MIA').



MIA') applies or whether the MIA applies<sup>3</sup>. If, on the other hand, Roman-Dutch law applies, the sources of the Roman-Dutch law of marine insurance will have to be identified and considered, and abandonment would be treated in the traditional continental manner. Other important questions would arise if Roman-Dutch law applies. What are the sources of Roman-Dutch marine insurance law? Are developments in the province of Holland after 1652 relevant?<sup>4</sup> If so, to what extent are subsequent developments relevant? Further, are these sources still adequate to meet the demands of the twentieth and even twenty first centuries? Not all of these questions can be answered in this chapter, which is devoted to the question whether English law or the '*Roman-Dutch law applicable in the Republic*' applies.

1.2. In 1973 Bamford SC wrote:

*'The sources of the South African law of marine insurance are (a) the Insurance Act 1943, (b) in the Cape Province, Orange Free State, South West*

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3 It was pointed out in Chapter 9 *supra* that the MIA made a number of changes to the English common law, including some important changes so far as abandonment is concerned.

4 Important developments after 1652 include the Rotterdam Ordonnance of 1721, the Amsterdam Ordonnance of 1744, the works of Bynkershoek, Van der Keessel and Van der Linden, as well as the *Wetboek van Koophandel* of 1838 ('the *WvK*').

*Africa and Rhodesia, English law, (c) South African judicial decisions, and (d) the writings of the Roman-Dutch jurists. The British Marine Insurance Act of 1906 does not apply, even in the Cape Province and Orange Free State. In Transvaal and Natal, English law is merely of persuasive authority.'*<sup>5</sup>

1.3. A scant ten years later the same author wrote:

*'The sources of the South African law of marine insurance are (a) the Insurance Act 1943, (b) South African judicial decisions, and (c) the writings of the Roman-Dutch jurists. The British Marine Insurance Act of 1906 does not apply. English law is merely of persuasive authority.'*<sup>6</sup>

1.4. Two important questions arise in this situation. The first is how it came that English law was applicable and then ceased to apply, in the Cape Province and the Orange Free State. Allied to this question is the possibility that English law may have been installed as the law regulating marine insurance in any event. The second question is whether English law exerted such an influence

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5 *The Law of Shipping and Carriage in South Africa*, 2nd ed, (1973), 237.

6 *The Law of Shipping and Carriage in South Africa*, 3rd ed, (1983), 337.

during the time it applied that it can be said that the principles of abandonment have been modified thereby. The first of these questions can only be answered by recounting the history of South African marine insurance law. The second can only be answered when the content of South African law is considered, which task is undertaken in Chapter 18 *infra*. Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') has a considerable effect on the position and will be used as the point of departure.

2. SECTION 6 OF THE ADMIRALTY JURISDICTION REGULATION ACT 105 OF 1983: ENGLISH LAW OR ROMAN-DUTCH LAW?

2.1. Section 6(1), read with certain other sections of the Act, makes it clear that either English law or the Roman-Dutch law applicable in the Republic regulates marine insurance. At a primary level, therefore, section 6(1) of the Act determines the sources of South African marine insurance law. The section is the product of the peculiar history of South African admiralty law which developed out of the grafting of English law and institutions onto the fabric of the Roman-Dutch law and courts in place at the Cape of Good Hope during the nineteenth century.

2.2. Section 6 of the Act provides as follows:

'6. Law to be applied and rules of evidence.-

(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890<sup>7</sup>, of the United Kingdom, had jurisdiction immediately before the commencement of this Act<sup>8</sup>, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement<sup>9</sup>, in so far as

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7 For a brief summary of the history of the admiralty court in South Africa see: Marnewick, *A Critical Analysis of the Law to be Applied in respect of a Maritime Claim for Marine Insurance, with reference to Non-Disclosure and Abandonment, and the need for codification*, LLM thesis, University of Natal, (1991), 87 et seq.

8 Bamford, *op cit*, (1973), 140 succinctly listed the matters over which the Colonial Courts of Admiralty had jurisdiction as follows: 'Booty of war; Building of ships; Damage by a ship; Master's wages; Master's disbursements; Mortgagee's claims; Necessaries; Ownership of ships; Repair of ships; Salvage; Seamen's wages; Towage.' Marine insurance is conspicuous by its absence from this list. Staniland (pers. comm.) is of the view that Bamford's list is oversimplified. Nevertheless, for the purposes of this study it is important to note only that marine insurance is absent from Bamford's list.

9 Where English law has to be applied, it has to be the law as it was at the date of commencement of the Act, namely 1 November 1983. This would mean that the MIA has become the law of marine insurance of all four the provinces of the Republic (and, for that matter, the 'independent states' which still formed part of South Africa on 1 November 1983).

that law can be applied;

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic<sup>10</sup>.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection<sup>11</sup>.

(3) ...<sup>12</sup>

(4) ...<sup>13</sup>

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.'

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10 The Roman-Dutch law to be applied is that which is 'applicable in the Republic', which is not necessarily still the same as the original Roman-Dutch law which arrived here in 1652. This law is plainly the ordinary common law of the Republic. Unlike the situation where English law has to be applied, when the common law applies, the law is not fixed as it was at the date of commencement of the Act, with the result that the common law is not stagnant and there remains room for development.

11 The effect of this provision is to preserve South African statute law so far as it affects matters within the admiralty jurisdiction of the court, even if a particular matter should otherwise be determined by English law.

12 Subsection (3) makes hearsay evidence admissible.

13 Subsection (4) leaves the weight to be attached to such hearsay evidence in the discretion of the court.

2.3. The Act defines a maritime claim as including a 'claim for, arising out of or relating to ... marine insurance or any policy of marine insurance'<sup>14</sup>. The wording is necessarily wide as many different claims may arise under a marine insurance policy. Section 6(1) of the Act thus determines whether English or the Roman-Dutch law of the Republic governs marine insurance contracts.

2.4. A number of other factors are relevant to determine the precise sources of South African marine insurance law. These include some aspects of the history of marine insurance in Europe, aspects of the history of European settlement at the Cape of Good Hope and the subsequent history of the provinces which make up the Republic of South Africa<sup>15</sup>. Important dates and events for the determination of the regime which prevails as the residual common law can be summarised as follows:

2.4.1. By the end of the sixteenth century marine insurance was firmly established in practice in

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14 Section 1(1)(iv)(u).

15 Other factors are the sources of marine insurance law in England and Holland and local developments in judicial interpretation of the law and in legislation. These are discussed later in the text.

both the Netherlands and England<sup>16</sup>.

2.4.2. In the years 1598, 1600 and 1604 respectively the insurance ordonnances of the towns of Amsterdam, Middelburg and Rotterdam, all in the province of Holland, were passed into law<sup>17</sup>. They were preceded by the two important ordonnances of 1563 and 1570 respectively of Philip II of Spain<sup>18</sup>. In 1631 De Groot's *Inleidinge* was published<sup>19</sup>.

2.4.3. In 1652 Jan van Riebeeck established a refreshment station for the Dutch-East India Company at the Cape of Good Hope and the Roman-Dutch law of the province of Holland became the law applicable at the settlement<sup>20</sup>. From then until 1806 the Cape was administered and governed according to the Roman-Dutch law of its Dutch masters.

2.4.4. In 1681 the important and influential *Ordonnance*

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16 See the discussion of the history of marine insurance in Chapter 4 *supra*.

17 These ordonnances were discussed in Chapter 5 *supra*.

18 These were discussed in Chapter 5 *supra* and are the subject of more detailed analysis in Chapter 16 *infra*.

19 *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (1631).

20 De Wet, *Die Ou Skrywers in Perspektief*, (1988), 18 *et seq*; Hosten *et al*, *Introduction to South African Law and Legal Theory*, (1977), 186-194; Hahlo and Kahn, *The South African Legal System and its Background*, (1973), 571-575 and 580; *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A).

*de la Marine* of Louis XIV was passed in France<sup>21</sup>.

- 2.4.5. In 1721 and 1744 respectively the new insurance ordonnances of Rotterdam and Amsterdam became law in Holland<sup>22</sup>.
- 2.4.6. In 1795 England conquered the Cape of Good Hope. A Vice-Admiralty Court was created, which applied English admiralty law. England gave up the occupation in 1802, but finally took over the Cape in 1806. Notwithstanding that it had the power to impose English law on the Cape, England did not do so and the Roman-Dutch law already applicable at the Cape was preserved as the applicable law in terms of the principles enunciated by Lord Mansfield in *Campbell v Hall*<sup>23</sup>. The English form of government and English institutions of government, including courts, were imposed. A short time later, 1820, large numbers of English settlers came from various parts of the British Isles and settled in the Eastern Cape.

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21 The ordonnance was discussed in Chapter 5 *supra*. Its influence was far-reaching, and it has been described as the most comprehensive codification and fount of all modern marine insurance law. See Dover, *A Handbook to Marine Insurance*, 8th ed, (1975), 23.

22 See Chapter 5 *supra*. If Roman-Dutch law were to be the residual common law of South Africa in respect of marine insurance, the question arises whether these two ordonnances form part of that common law.

23 (1774) 1 Cowp 204. See also Hosten et al, *op cit*, 196 et seq.



- 2.4.7. In 1838 the *Wetboek van Koophandel* ('the *WvK*') became law in the Netherlands. It contained a separate chapter dealing with marine insurance and replaced the provisions of the prior ordonnances on the subject<sup>24</sup>.
- 2.4.8. Between 1836 and 1840 Dutch-speaking colonists from the Cape settled in Natal, the Orange Free State and the Transvaal, and vested the Roman-Dutch law of the Cape in those places too. While Natal was soon conquered by the British and was governed by the Governor of the Cape from 1845, the Roman-Dutch law applicable at the Cape was expressly acknowledged to apply in Natal<sup>25</sup>. A Vice-Admiralty court was apparently also created for Natal<sup>26</sup>.
- 2.4.9. The Vice-Admiralty Courts Act of 1863 was enacted to regulate the jurisdiction of the Vice-Admiralty Courts. These courts were entirely separate from the municipal courts and applied English admiralty

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24 The *WvK* and its history were discussed in Chapter 6 *supra*.

25 De Wet, *op cit*, 32-43; Hosten *et al*, *op cit*, 202-203.

26 Natal was mentioned in the schedule to the Vice-Admiralty Courts Act of 1863 as one of the colonies to which that act was to apply. See: Forsyth, 'The Conflict between modern Roman-Dutch law and the law of Admiralty as administered by South African Courts', (1982) 99 *SALJ* 255, 260; Booysen, 'Admiraliteitshowe in die Suid-Afrikaanse Reg', (1973) 36 *THRHR* 241, 246; *The Myvonwy* (1883) 4 *NLR* 43.

law<sup>27</sup>.

- 2.4.10. In 1879 the General Law Amendment Act of 1879 made the law '*administered by the High Court of Justice in England*' applicable to all cases '*having reference to questions of marine insurance*'<sup>28</sup> in the Cape. A similar provision was enacted by the General Law Amendment Ordinance 5 of 1902 in respect of the Orange Free State after England had conquered the two independent republics, the Orange Free State and Transvaal, in 1902<sup>29</sup>. England maintained its long-standing practice, however, of not replacing the Roman-Dutch law applying in the conquered territories with her own law, and the Roman-Dutch law as the general common law was retained. The result was that Roman-Dutch law has continued to apply as the common law of all the provinces of the Republic of South Africa except where it was replaced by legislation<sup>30</sup>.

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27 Booyesen, *op cit*, 260.

28 For a detailed discussion of the provisions of this act, its history and consequences, see: Van Niekerk, *The Decline, Revival and Future of Roman-Dutch Law of Insurance in South Africa*, Monogram 3, Unisa, (1986), (referred to as '*Decline*').

29 Van Niekerk, *Decline*, 21. English law also became applicable to South West Africa (now Namibia) and Rhodesia (now Zimbabwe).

30 Numerous examples can be given of South African statutes which have changed the common law considerably. Many of these acts were modelled on English acts, for example, the various Companies Acts (1926 and 1973), the various Criminal Procedure Acts (1917, 1955 and 1977) and the Merchant Shipping Act 57 of 1951.

- 2.4.11. In 1890 the Colonial Courts of Admiralty Act abolished the Vice-Admiralty courts and replaced them with Colonial Courts of Admiralty, which were no longer separate from the municipal courts. The jurisdiction previously vesting in the Vice-Admiralty courts was vested in the courts of unlimited jurisdiction in the colonies which previously had Vice-Admiralty courts. These include Natal and the Cape Colony. Although the staff and judicial officers of the Supreme Court and the Admiralty Court were the same, two different courts in fact existed, applying different laws<sup>31</sup>, namely Roman-Dutch law and English law respectively<sup>32</sup>.
- 2.4.12. In 1906 the *MIA* was passed in England. It changed the English common law in material respects, in particular so far as abandonment is concerned<sup>33</sup>.
- 2.4.13. In 1977 the act of 1879 and the ordonnance of 1902 which made English law applicable to marine insurance in the Cape and the Orange Free State respectively were repealed by the Pre-Union

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31 Booyesen, *op cit*, 249.

32 The jurisdictional conflict between these two courts had to be addressed somehow, and section 7(2) of the Act was the result.

33 See Chapter 9 *supra*.

Statute Revision Act 43 of 1977<sup>34</sup>.

- 2.4.14. The Admiralty Jurisdiction Regulation Act of 1983 thereafter consolidated the admiralty jurisdiction of the courts, and enacted the basis for the determination of the primary question in every admiralty action, namely what law applies<sup>35</sup>.
- 2.5. Until recently there was no dispute that the Roman-Dutch law was the residual common law regulating marine insurance<sup>36</sup>. Only Staniland questioned the orthodox view. At first he was of the view that Roman-Dutch law was applicable on the basis that the pre-1983 South African Court of Admiralty did not exercise jurisdiction over contracts of marine insurance<sup>37</sup>. After *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries*<sup>38</sup> he re-stated his original

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34 Van Niekerk, *Decline*, 52-57 discusses the consequences of the repeal of the earlier act and ordonnance.

35 Section 6 read with section 7(2).

36 See for example: Dillon & Van Niekerk, *South African Maritime Law and Marine Insurance: Selected Topics*, (1983), 27; Bamford, *op cit*, (1983), 337; *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 4 SA 269 (D), 272I-273A; Staniland, 'Developments in South African Admiralty Jurisdiction and Maritime Law', 1984 *Acta Juridica* 271, 275; Staniland, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' 1985 *LMCLQ* 462, 466; Rycroft, 'The "Morning Star": an Omen for the Law of Marine Insurance?', (1984) 8 *SAILJ* 73; Marnewick, *op cit*, 95-96; *Admiralty Jurisdiction and Practice in South Africa*, (1987), 4; De Jager, *The Roots and Future of the South African Law of Marine Insurance*, (1993), 7.

37 'Developments in South African Admiralty Jurisdiction and Maritime Law', 1984 *Acta Juridica* 271.

38 1987 1 SA 842 (A).

*Shooter's Fisheries*<sup>38</sup> he re-stated his original view on the authority of that decision of the Appellate Division<sup>39</sup>. But then he questioned the applicability of Roman-Dutch law. On the one hand, he answered that

*'it may be argued that immediately prior to 1890 the Admiralty Court in the Probate, Divorce and Admiralty Division did not exercise jurisdiction over contracts of marine insurance so that Roman-Dutch law applies under s 6(1) of the 1983 Act'*.<sup>40</sup>

On the other hand, he said that

*'it may equally be argued that the High Court of Admiralty did exercise jurisdiction over contracts of marine insurance, that such jurisdiction was lost because of the prohibitions which were issued against the Admiralty Court, that such*

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38 1987 1 SA 842 (A).

39 *'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa'* 1985 LMCLQ 462.

40 *'What is the Law to be applied to a Contract of Marine Insurance in Terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?'* (1994) SA Merc LJ 16 at 25. An obvious typographical error in the quotation has been corrected. Since Staniland said that it may be argued that the Admiralty Court *'did not exercise jurisdiction over contracts of marine insurance'* it follows that the remainder of the sentence should have read *'so that Roman-Dutch law applies under s 6(1) of the 1983 Act'*. This error is also clear from the context of the paragraph as a whole where Staniland's intention was to juxtapose the application of Roman-Dutch law on the one hand with English law on the other.

*prohibitions may or may not have been lawful, and that the High Court of Justice (of which the Admiralty Court formed part) acquired jurisdiction over contracts of marine insurance prior to 1890'*

so that English law is applicable<sup>41</sup>. He has recently - and finally, it seems - decided against the application of English law in an article which is yet to be published. It may therefore be concluded that by all accounts the Roman-Dutch law of the Republic is the law to be applied by virtue of section 6(1) of the Act.

### 3. CONCLUSION

- 3.1. Having concluded that the Roman-Dutch law is the residual common law in insurance matters in the Republic, it remains to determine precisely what the sources of that law are and to what extent those sources are helpful in determining the principles of abandonment in South African law. That task will be undertaken in the chapters dealing with the content of the inherited Roman-Dutch law and the local development of those inherited principles. Before that is done, some broad considerations need to be spelled out in

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*Ibid.*

advance.

3.2. Firstly, while South African law is referred to as 'the Roman-Dutch law applicable in the Republic' in section 6(1) of the Act, it is more than just Roman-Dutch law. The words 'applicable in the Republic' make it quite clear that the Roman-Dutch law contemplated by the section is no longer the seventeenth and eighteenth century Roman-Dutch law of the province of Holland in the Netherlands, but the inherited Roman-Dutch law as that law has developed in South Africa over the last three hundred and forty years. Indeed, referring to South African law as Roman-Dutch law may be doing it a disservice as the suggestion inherent in the name Roman-Dutch law is that it is archaic, extraordinary and obsolete when South African law is in fact a modern system compatible with other modern legal systems<sup>42</sup>.

3.3. Secondly, South African law is a unique amalgam of the seventeenth and eighteenth century Roman-Dutch law of province of Holland and English law<sup>43</sup>. The

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<sup>42</sup> To what extent this holds true for marine insurance and in particular the principles of abandonment will become clearer in the following chapters.

<sup>43</sup> On the history of South African law, see Wessels, *History of the Roman-Dutch Law*, (1908); Hahlo and Kahn, *The South African Legal System and its Background*, (1968); Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg*, (1979); Hosten et al, *Introduction to South African Law and Legal*

influence of English law is visible in virtually every branch of the law, and English law is referred to as a helpful source of guidance so frequently that it no longer raises an eyebrow, especially in commercial cases. All but a small group of 'purists' on the bench and in the classroom accept the fact that English law is an important component of South African law<sup>44</sup>. The influence of English law on the principles of abandonment in South African law will therefore have to be considered<sup>45</sup>.

- 3.4. Further, reliance was placed in earlier chapters on treatises of famous commentators like Bosco, Santerna, Straccha, Casaregis, Valin, Pothier, Émerigon, Baldasseroni, Park, Marshall and Phillips. It needs to be determined to what extent, if any, these authorities may be relied upon as sources of South African law on the subject of abandonment, over and above the traditional sources.

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*Theory*, (1977).

44 Among these must be counted Professor J C de Wet, whose work, *Die Ou Skrywers in Perspektief*, (1988), studiously avoids mentioning the contribution of English law to South African law.

45 The need for such an exercise is exacerbated by the fact that English law was made applicable to marine insurance in the Cape of Good Hope in 1879 and in the Orange Free State (now called the Free State) in 1902, and applied in those two provinces until 1977.



3.5. Many important questions arise. What, for example, were the seventeenth and eighteenth century Roman-Dutch principles of abandonment? How have those principles developed in South Africa since 1652? What role has English law played? These questions cannot be answered without reference to the sources of the Roman-Dutch law of marine insurance of the seventeenth and eighteenth centuries, nor without a review of the law in action, that is in the form of decisions of the courts and in the form of legislation, in the provinces which make up the Republic of South Africa<sup>46</sup>.

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The sources of the Roman-Dutch law of marine insurance of the province of Holland include the ordonnances of the towns and the mercantile *jus commune* which had developed in Europe.

## CHAPTER SIXTEEN

### ROMAN-DUTCH LAW: CUSTOMARY LAW AND LEGISLATION

#### 1. INTRODUCTION

- 1.1. The conclusion in the previous chapter that the residual common law regulating marine insurance matters in South Africa is the Roman-Dutch component of South African law makes it necessary to identify the sources of South African marine insurance law and then to determine the content of South African law by reference to such sources. The relevant Roman-Dutch law is that which applied in the province of Holland during the seventeenth and eighteenth centuries. That law may be found in custom, legislation, treatises and opinions. In this chapter the relevant customs and legislation will be identified and analysed in an endeavour to determine the basic rules and principles of abandonment in the early Roman-Dutch law.
- 1.2. Professor J P Van Niekerk has already identified the principal sources of South African insurance law, with particular emphasis on Roman-Dutch authorities<sup>1</sup>. He described his work as an attempt

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*An introduction to and some perspectives on the sources and development of Roman-Dutch insurance law with appendices containing the more important Roman-Dutch insurance legislation, monograph 5, Unisa, (1988), ('Introduction').*

*'to put the principal sources of Roman-Dutch insurance law, namely legislation, treatises, decisions and opinions, and custom, in some perspective and to provide a general historical background against which they may be consulted and evaluated.'*<sup>2</sup>

By reason of Van Niekerk's pioneering work it is unnecessary for the purposes of this study to do an independent investigation into the sources of South African marine insurance law so far as those sources emanate from Roman-Dutch law. Nevertheless, Van Niekerk's work does not analyze nor evaluate the materials identified by him. That task will obviously have to be performed by the individual researcher who makes use of his bibliography. Van Niekerk's work is also not designed to identify the modern sources and materials which may be useful in the comparative process. Under the circumstances the materials identified by him will be used *'to provide a general historical background'* as suggested by him. As a starting point, there will have to be a recounting of the applicable customs and

legislative provisions, after which the essential rules of abandonment which applied in the classic Roman-Dutch law may be distilled from the relevant sources.

2. THE EUROPEAN *JUS COMMUNE* OF MARINE INSURANCE

- 2.1. It was pointed out in earlier<sup>3</sup> that a European *jus commune* which included marine insurance principles had developed and was applied across the face of Western Europe during the fifteenth and sixteenth centuries. Whilst it is true that these mercantile customs and usages were reinforced by statutory enactments in many places, those statutes were seldom intended to replace the existing customs and usages completely except in so far as individual statutes or sections thereof were aimed at particular malpractices<sup>4</sup>. The statutes themselves were not regarded as exhaustive and a residual common law based on the underlying mercantile customs and usages remained as a source of the law<sup>5</sup>.

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3 Chapter 4 *supra*.

4 Van Niekerk, *Introduction*, 36.

5 Even the Marine Insurance Act 1906 ('the *MIA*') has not resulted in a complete codification of English mercantile custom relating to marine insurance and the English courts have fallen back on the underlying customary law not only in interpreting the *MIA* but also in dealing with

2.2. During the fifteenth century the insurance law as practised at Bruges in what is now Belgium was still exclusively unwritten customary law although legislation on insurance matters which had already been passed in Italy and Spain might have had some influence on the established principles of customary insurance law as applied by merchants and the courts at Bruges<sup>6</sup>. The treatises of two of the earliest authors on the subject of insurance, Santerna<sup>7</sup> and Straccha<sup>8</sup>, appeared in 1552 and 1569 respectively<sup>9</sup>. Other notable treatises which concentrated on mercantile custom rather than statutory law were published in the seventeenth and early eighteenth centuries by Scaccia<sup>10</sup>, Ansaldis<sup>11</sup>, Casaregis<sup>12</sup> and Roccus<sup>13</sup>, but by

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subjects not covered by it. Section 91(2) of the MIA specifically preserved the 'rules of the common law including the law merchant' to the extent that they are not inconsistent with the MIA.

6 Van Niekerk, *Introduction*, 13.

7 *Tractatus de Assecurationibus et Sponsionibus Mercatorum*, (1552).

8 *Tractatus de Assecurationibus et Proxenetis*, (1569).

9 Johannes Voet, *Commentarius ad Pandectas*, (1698-1704), 22.2.3. identified Santerna and Straccha as sources of the Roman-Dutch law of marine insurance of his time. This is an example of the ease with which authorities from across national boundaries were accepted in respect of marine insurance.

10 *Tractatus de Commerciis et Cambio*, (1619).

11 *De Commercio et Mercatura Discursus Legales*, (1689).

12 *Discursus Legales et Commercio*, (1707).

13 *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708).

that time legislation had taken its place next to mercantile custom as a source of marine insurance law.

2.3. However, it is in two compilations of the mercantile customs and usages relating to marine insurance that the bulk of marine insurance law of the sixteenth century is to be found. These were the *Guidon de la Mer* and the 1582 version of the *Coutumes d'Anvers*, the Customs and Usages of the Antwerp Insurance Exchange. While both were written documents, neither was a statutory enactment. Nevertheless, both the *Guidon de la Mer* and the Customs and Usages of the Antwerp Exchange exercised great influence on insurance practice and subsequent legislation<sup>14</sup>.

#### 2.4. THE GUIDON DE LA MER

2.4.1. The *Guidon de la Mer* emanated from Rouen in northern France<sup>15</sup>. It was probably compiled by a committee of merchants setting out to record the

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That influence was also felt in jurisdictions far beyond northern France and Antwerp so that the customary law contained in these two documents acquired a life independent of their written components.

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While the written document later surfaced in the seventeenth century, the *Guidon* dates back to between 1556 and 1584. Van Niekerk, *Introduction*, 60 fn 146; Pardessus, *Collection de Lois Maritimes antérieures au XVII<sup>e</sup> siècle*, (1837), Vol II, 337.

applicable principles of their customary law in writing. It is most unlikely that these customs were of local application only. Indeed, having regard to the close proximity of the other northern European trading centres<sup>16</sup> and the subsequent acceptance elsewhere<sup>17</sup> of the *Guidon* as a source of the common law of merchants, it can safely be accepted that the *Guidon* faithfully recorded the customary law of marine insurance applying in northern Europe at that time, namely the second half of the sixteenth century.

2.4.2. The *Guidon* dealt with marine insurance in fine detail. The chapter<sup>18</sup> on abandonment alone contained twelve sections, the first of which not only defined abandonment<sup>19</sup> but also enumerated the cases in which it was available to an assured<sup>20</sup>. The *Guidon* contained several

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16 Like Bruges, Antwerp, Amsterdam and even London and Hamburg.

17 In England and America, for instance.

18 Chapter VII. See Pardessus, *op cit*, Vol II, 400 *et seq.*

19 '... quitter et delaisser ses droits, noms, raisons et actions de la propriété qu'il a en la merchandise chargée, dont il est assuré ...' ('... to quit and abandon the rights, titles, claims and actions of ownership which he has in the cargo laden on board and insured.')

20 '... naufrage du toute ou de partie, ou bien avarie qui excède ou endommage la moitié de la merchandise, quand il y a prise ou d'ennemis, arrest de prince, ou tel autre destourbier en la navigation, ou telle εμπειρεν en la merchandise, qu'il n'y ait moyen l'avoir fait naviger à son dernier reste, ou qu'elle ne valust le fret ou peu de chose davantage.' ('... shipwreck of the whole or part, or damage which

substantive abandonment provisions. The *Guidon* made it clear from the outset that the assured had the right to abandon, not an obligation to do so<sup>21</sup>. The *Guidon* also contained a missing ship provision. If a year and a day elapsed from the date of departure with no news being received of the ship, the ship was taken to have been lost at sea, and the custom was that the assured could abandon<sup>22</sup>. In respect of certain long voyages the period was increased by six months<sup>23</sup>.

2.4.3. The *Guidon* specifically provided that, if the missing ship should re-appear, the insurer would be entitled to every part saved, including the profits of the voyage, and the assured was expressly excluded from claiming any portion<sup>24</sup>. This provision arguably meant that the abandonment transferred ownership of the abandoned merchandize

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exceeds half the value of the merchandize, when there is a capture by enemies, an arrest by a prince, or such other disturbance of the voyage or such deterioration of (damage to) the goods (cargo) that it is not possible to forward them to their destination or not worth the freight or of little advantage.'

21 Article 1.

22 It is significant that the missing ship was treated as a case of a presumed loss, as that is the way the missing ship was dealt with in Roman-Dutch law and is still dealt with in English law.

23 Article 12; see Pardessus, *op cit*, Vol I, 404.

24 Article 12; see Pardessus, *op cit*, Vol II, 404.



to the insurer<sup>25</sup>. However, the *Guidon* went on to record that there was a difference of opinion about the question whether the abandonment alone was sufficient to enable the insurer to pursue the ship or goods as his own<sup>26</sup>.

2.4.4. The formal requirements for an abandonment were set out in the *Guidon* in some detail. (a) In the first place, the assured was required to make his decision without delay once he had received reliable news of the casualty. He also had to furnish the insurer with information about the cargo and the bills of lading, and had to give proof of the arrest or loss. This notice had to be given through the registrar of insurance<sup>27</sup>. (b) The notice of abandonment had to be served by a royal sergeant, the registrar of insurance or a notary, and had to be served at the domicile of

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25 According to Pardessus, *op cit*, Vol IV, 378 fn 3 this provision of the *Guidon* was the forerunner of article 60 of the *Ordonnance de la Marine* of 1681, which provided that the goods 'belonged' to the insurer after the notification of the abandonment.

26 Article 2. Pardessus, *op cit*, Vol I, 401 fn 2 ascribes this difference of opinion to a lack of understanding of the theory of abandonment. He pointed out that one had to look at the common law for an explanation of the advantages of the transfer which occurs by way of the abandonment. The theory was that the contract of insurance did not result in the sale of the goods insured to the insurer. However, one could not transfer ownership of the goods except by an act of transfer; so the insurer had to have a mandate ('*procuracion*') from the assured to be able to dispose of the thing insured after the abandonment. Eventually, Pardessus pointed out, custom simplified this process with the result that the declaration of abandonment was now taken to vest ownership of the abandoned things in the insurer.

27 Article II.

the insurers<sup>28</sup>. It is clear that the *Guidon* envisaged that the assured had to give two different kinds of notices to the insurer. The first was a notification of the casualty while the second was the abandonment itself<sup>29</sup>.

## 2.5. THE CUSTOMS AND USAGES OF THE ANTWERP EXCHANGE

2.5.1. The other collection of customs and usages which existed in northern Europe in the second half of the sixteenth century was that of the Antwerp Insurance Exchange. Although it is certain that these customs and usages were being observed already in 1563<sup>30</sup>, they have been preserved in writing only in a 1582 compilation. This collection was not as detailed as the *Guidon de la Mer* and appears to have dealt only with specific matters in order to record peculiar rules of the Antwerp Exchange.

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28 Article 3.

29 The distinction has been maintained in virtually all subsequent marine insurance legislation.

30 It is known that these customs and usages of the Antwerp Exchange must have been firmly entrenched in Antwerp before 1563 already because in that year Philip II of Spain promulgated an ordonnance which dealt with insurance (in Chapter VII) and provided (in article 2) that all insurances on goods and merchant ships had to be done in accordance with the customs of the Antwerp Exchange.

2.5.2. Article 14 of the 1582 compilation provided that the assured was entitled to abandon the ship or goods insured to the insurer in the event that the insured ship had become innavigable, or that the ship or goods had been captured or taken by enemies, and in similar cases<sup>31</sup>. In such a case the insurer was obliged to pay the sum insured within three months from the notice of abandonment<sup>32</sup>. Article 7 provided that, if the insured ship or goods were missing for a period of a year and a day without news, (if the ship was engaged on a voyage in the waters of Europe or Barbary (Turkey) or on a voyage of similar distance), the ship and goods would be presumed to be lost. For longer voyages the period was two years. The assured would then be entitled to claim the sum insured by giving notice to the insurers<sup>33</sup>. The customs of the Antwerp Exchange did not elaborate on the formalities for the abandonment, nor what the proprietary consequences

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31 *'in dese ende ghelycke ghevalen'*, which suggests that abandonment was allowed in cases which had the same effect, notwithstanding that the precise cause was not defined, so long as the cause fell within the risks insured against.

32 *'na d'intimatie'*. What precisely was meant by *'intimatie'* is not certain, but it would appear that more than mere notification was required, probably a formal notice of demand coupled with an offer by the assured to relinquish his rights in and to the insured ship or goods.

33 *'daer af doen intimatie'*.

of a proper abandonment were. It is more likely than not that these aspects did not require regulation and were therefore were left to the underlying mercantile custom.

2.5.3. The status and importance of the customs and usages of the Antwerp Exchange are evident from their subsequent incorporation in legislation on insurance<sup>34</sup>. The 1563 Ordonnance of Philip II of Spain referred to them. His 1570 Ordonnance expressly required the insurance to be in accordance with the customs and usages of the Antwerp Exchange<sup>35</sup>.

2.6. It is thus apparent that there was a strong body of customary law applicable not only in the Netherlands but in northern Europe in the second half of the sixteenth century. In the Netherlands this customary law formed the basis of the statutory law which was introduced by the Spain at that time.

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34 *'The unwritten Antwerp customary law still formed the more important part and underlying basis of the insurance law' at the time of the 1563 Ordonnance of Philip II; Van Niekerk, Introduction, 43.*

35 *The 1570 Ordonnance 'contained a detailed treatment of insurance law in 36 sections as well as a model policy form in which reference was made to the underlying' usages and customs of the Antwerp Exchange; Van Niekerk, Introduction, 47. See also Pardessus, op cit, Vol IV, 117.*

3. THE SPANISH ORDONNANCES

3.1. The common law or law merchant of marine insurance was built upon by a number of statutory enactments spanning the period from 1850 to the eventual codification of the marine insurance law of the Netherlands in the *Wetboek van Koophandel* ('the *WvK*') of 1838. Initially the statutes dealing with marine insurance were not intended to, nor did they, regulate marine insurance comprehensively. They also did not replace the underlying customary law<sup>36</sup>. The Spanish legislation<sup>37</sup> was drafted by Spanish lawyers operating under the influence of the Barcelona ordonnances and other Spanish ordonnances<sup>38</sup>. These draftsmen must have been familiar with the concept of abandonment and the problem of the ship which disappeared without news, as these subjects were dealt with in some detail in the ordonnances which had previously been passed in the Spanish towns. They must also be aware of the customary law already in place, especially that of the Antwerp Exchange. It is

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36 Van Niekerk, *Introduction*, 36.

37 All statutes will be referred to as '*ordonnances*', notwithstanding the logic of Van Niekerk's scheme of referring to the Spanish statutes as '*placcaaten*' and the Dutch municipal statutes as '*keuren*'.

38 These were reviewed in relation to the history and development of abandonment in Chapter 5 *supra*.

clear from the manner with which they dealt with the subject of abandonment that they were content to leave it to be determined by customary law.

### 3.2. THE 1563 ORDONNANCE OF PHILIP II

3.2.1. On the 31st October 1563 Philip II of Spain promulgated an ordonnance which applied to all the Spanish possessions in the Low Countries<sup>39</sup>. This ordonnance was still not a complete regulation of marine insurance law, but was aimed at specific malpractices<sup>40</sup>. Whilst the ordonnance contained no direct abandonment provisions, it made the customs of the Antwerp Exchange and the model policy conditions contained in the ordonnance itself compulsory<sup>41</sup>. The ordonnance also contained a missing ship provision to the effect that any assured who wished to rely on the particular custom of the Antwerp Exchange relating to the missing ship<sup>42</sup>, had to prove that the ship

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39 It was not the first Spanish Ordonnance to apply to the Low Countries. Earlier ordonnances dated back to 1458, 1537, 1549 and 1551 respectively. See Van Niekerk, *Introduction*, 36-41.

40 Van Niekerk, *Introduction*, 42-43.

41 Title VII, article 2.

42 Which was to the effect that the insurer was obliged to pay the sum insured if no news was received of the ship and goods for a period of a year and a day from the date of the policy.

and goods still existed at the time of the conclusion of the contract<sup>43</sup>.

3.2.2. The provisions of the 1563 ordonnance are important for a number of reasons. Firstly, it would appear from the absence of detailed provisions on the subject of insurance in the ordonnance that the bulk of the law was still to be found in custom whilst the ordonnance itself was designed only to deal with the few matters in respect of which the legislator wished to make specific provision. Secondly, it is thus apparent that the Antwerp Exchange already had a well known set of customs in place in 1563. Therefore, whilst the ordonnance of 1563 did not contain any specific abandonment provisions, one would have to revert to the underlying customary law to ascertain what principles applied at the time.

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Article 5. This provision was necessary to deal with the malpractice of insuring ships or goods on a 'lost or not lost' basis when by reason of an event preceding the conclusion of the contract the assured no longer had an interest in the ship or goods when the contract was concluded. This clearly offended the indemnity principle and reduced the insurance to a mere wager. Bynkershoek referred to article 5 of the ordonnance in *Quaestiones Juris Privati*, (1744), 4.7.

3.3. THE 1570 ORDONNANCE OF PHILIP II

3.3.1. In 1569 the Duke of Alva placed a complete prohibition on the conclusion of insurance contracts<sup>44</sup>. This placed insurance business at Antwerp at risk, and eventually the Duke relented and repealed the prohibition in an ordonnance which was not acceptable to the Antwerp merchants. On the 20th January, 1571 the Duke published the reworded ordonnance which is known as the Ordonnance of Philip II of Spain of 1570<sup>45</sup>. The 1570 ordonnance applied to all the provinces of the Netherlands which were then possessions of Spain.

3.3.2. The 1570 ordonnance dealt with insurance in thirty six sections, but was still not a comprehensive ordonnance on the topic. Article 34 of the ordonnance made a prescribed form of policy compulsory. This policy provided that the insurance was subject to the provisions of the ordonnance itself and to the usages and customs of the Antwerp Exchange which were not contrary to

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<sup>44</sup> Van Niekerk, *Introduction*, 44.

<sup>45</sup> Although published on 20 January 1571 it was known as the 1570 ordonnance because the new year was then taken to commence at Easter; Van Niekerk, *Introduction*, 37 fn 84.



the ordonnance itself. Thus, as was the case with the ordonnance of 1563, the underlying customs and usage of the Antwerp Exchange were recognized and made applicable.

3.3.3. Article 15 of the ordonnance provided that if a foreign king, prince or potentate confiscated the ship or if the ship became innavigable and incapable of completing its voyage, then the assured was obliged to wait for six months before he could pursue payment under the policy. During that period the assured was also obliged to transfer the goods onto another ship to carry them to their destination. If the assured did not tranship the goods, the insurer would be entitled to do so. In all these cases the insurer had to bear the cost of the transshipment as well as any damages resulting from the arrest<sup>46</sup>.

3.3.4. Article 16 provided that the assured was not obliged to wait for the effluxion of the period of six months if the goods insured were perishables such as wine, fruit, grain and other specified

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It will become apparent in the discussion of subsequent legislation that this provision was also taken up in the ordonnances of the Dutch towns.

goods. In such a case the assured could pursue his action forthwith as he deemed advisable<sup>47</sup>.

- 3.3.5. Article 23 of the ordonnance provided that when the ship had been arrested, taken or laid under embargo by kings, princes or potentates, and there remained hope to recover the same, the assured had to wait six months from the date of the taking or embargo before he could recover payment<sup>48</sup> if the port of destination was in Europe or Barbary, (Turkey) but if the ship was destined for the Indies or to a port outside the limits of Europe or Barbary, the term was extended to one year. In the meantime the insurers had to provide security by way of bail or pledge for payment of the insured sum. If the goods were lost or damaged for certain, or without hope of recovery, the insurers had three months in which to pay the insured sum, calculated from the date of a properly executed notification of the loss or damages<sup>49</sup>.

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47 This principle was maintained in subsequent legislation.

48 A distinction was thus drawn by implication between arrests by a power who could be persuaded to release the ship and a power who was unlikely to entertain such an idea, basically between friendly and enemy states.

49 This principle was maintained in subsequent legislation.

3.3.6. Article 23 of the 1570 ordonnance referred to an '*inthimatie, notificatie oft certificatie vande schade oft verlies, hen behoorlicken gedaen sal wesen*'. It appears that formal notification of some sort was required before the assured could recover the loss. Not only is it clear that the underlying requirements for the notice to be given by the assured before he could claim under the policy were contained in the customs of the Antwerp Exchange and even the underlying customary law, but the words used, namely '*inthimatie, notificatie oft certificatie*' in general meaning echo the words '*intimare, notificare et denuntiare*' of the Savona Ordonnance of 1503<sup>50</sup>.

3.3.7. These articles of the 1570 ordonnance do not refer to abandonment directly, nor to the case of the missing ship. One must therefore assume that the underlying customary law still regulated abandonment, as it did many other insurance matters. The provisions of articles 15, 16 and 23 do, however, give some indication of some general

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The Savona Ordonnance of 1503 was discussed in Chapter 5 *supra*.

principles which applied to abandonment cases at that time<sup>51</sup>.

- 3.4. There used to be some dispute as to whether these two Spanish ordonnances continued to be applicable in the Roman-Dutch law of the province of Holland<sup>52</sup>. Bynkershoek<sup>53</sup> laid this dispute to rest, however, answering the question in the affirmative<sup>54</sup>. The 1563 and 1570 ordonnances of Philip II of Spain must therefore be considered as the basic statutory instruments from which the South African principles of marine insurance and of abandonment are to be established.

#### 4. THE FIRST ROUND OF DUTCH ORDONNANCES

- 4.1. When Spain lost its grip on the northern provinces of the Netherlands, the towns involved in trading regained their independence in mercantile matters and commenced to regulate commercial activities within their jurisdictions in accordance with

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51 Articles 15, 16 and 23 of the 1570 ordonnance were referred to by Van der Keessel, *Praelectiones* 3.24.12 at 1466-1467 and Van Zurck, *Codex Batavus*, 2nd ed, (1727), paragraphs 17 and 20.

52 See Van Niekerk, *Introduction*, 54 and the authorities there referred to.

53 *Quaestiones Juris Privati* 4.1.

54 See Van Niekerk, *Introduction*, 54-55.

their ancient legislative privileges<sup>55</sup>. There was immediately a movement away from the strict regulatory approach of the Spanish lawmakers to a more liberal one. Mercantile customs and usages were left undisturbed, and in many cases they were given additional force by being taken up in the local ordonnances. However, until the advent of the *WvK* in 1838, the local insurance ordonnances of the Dutch towns were still aimed, generally, at particular malpractices<sup>56</sup>.

- 4.2. When the towns started legislating for themselves, small differences became apparent, but the main principles remained the same nevertheless. The legislative process of the towns built upon the existing Spanish legislation and customary law which applied throughout Holland to become the common law of the whole province<sup>57</sup>. Thus the Roman-Dutch law of marine insurance was created out of these three main components, the underlying mercantile customs and usages, the Spanish legislation and the local ordonnances of the Dutch towns.

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55 Van Niekerk, *Introduction*, 52.

56 Van Niekerk, *Introduction*, 52.

57 Van Niekerk, *Introduction*, 56-57.

4.3. THE AMSTERDAM ORDONNANCE OF 1598

4.3.1. On 31 January 1598 the town fathers of the port of Amsterdam broke away from the Spanish mould and promulgated their own ordonnance '*gemaectt op't stuck vande Asseurantie*'. The ordonnance contained two model policies, a cargo policy and a hull policy. The customs of the Antwerp Exchange were no longer referred to in the ordonnance nor in the draft policies, probably because Amsterdam had by then taken over the insurance business which had previously been conducted at Antwerp and in the process also the customs and usages of the Antwerp Exchange.

4.3.2. Article 8 of the ordonnance provided for the abandonment of the ship or goods. If any foreign king, prince, potentate or ruler captured, detained or arrested the insured ship or goods, whether there was hope of recovering them or not, the assured was entitled to abandon the ship or goods to the insurer. Likewise, he was entitled to abandon the ship or goods in so far as the ship became unfit and incapable of completing the voyage. However, in such cases the abandonment could not be made before a period of six months

had elapsed from the date when notice had been given by the assured through his broker or some other public person to the insurers at the place where the majority of them were domiciled. If the capture, detention or arrest occurred outside the waters of Europe or Barbary, the period was extended to one year. The assured was entitled to require security from the insurer. Article 9 provided that the periods of six months or one year would not apply if the goods insured were perishable.

4.3.3. Article 25 provided that the assured could abandon the ship or goods forthwith if the ship became innavigable or if the ship or goods were captured or taken by enemies or were otherwise damaged or lost for certain without hope of recovery. In such a case the insurers had to pay the sum insured within three months after '*de inthimatie van dien*'.

4.3.4. Article 5 of the 1598 ordonnance specifically enacted the principle of the custom of the Antwerp Exchange which was mentioned in Article 5 of the 1563 Ordonnance of Phillip II. It provided that the ship in respect of which no news was received

for a period of a year and a day (in European and Turkish waters or thereabouts) would be presumed to be lost. In respect of more distant sailings the period was to be two years. Article 5 further provided that the assured was entitled to claim payment of the sum insured three months after giving notice to the insurer ('doen inthimatie')<sup>58</sup>.

- 4.3.5. Article 28 of the ordonnance required the assured to give notice to the majority of the insurers at the place where the contract was concluded of any intelligence he received of any casualty, arrest or loss affecting the insured ship or goods. This information had to be provided through brokers or other public persons who had to keep a note of the notice. It is clear that the ordonnance provided for two kinds of notices. The first was a notice of all intelligence pertaining to the insured ship or goods which related to the possibility of a claim. The second kind of notice was the actual notice of a claim arising from an event insured against. In the latter case the notice naturally had to be in the form of an abandonment as the

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Pardessus, *op cit*, Vol IV, 124 translated 'inthimatie' as 'la dénonciation', which conveys the impression of an offer by the assured to relinquish his interest in and to the insured ship or goods.



assured could only claim the full sum insured against an abandonment of his rights in the subject matter of the insurance.

- 4.3.6. The Amsterdam Ordonnance of 1598 therefore provided for three separate cases. In the first place the assured could abandon immediately in the case of perishables and in the case of certain losses where the loss was final and certain. In the second category of cases where there was some possibility of recovery, the assured had to wait six months or two years, depending on the destination, before he was entitled to abandon. In the third instance, the missing ship was deemed to be lost and the assured allowed to recover the sum insured after six months or two years, again depending on the destination.

4.4. THE MIDDELBURG ORDONNANCE OF 1600

- 4.4.1. The provisions of the Amsterdam Ordonnance of 1598 were copied by Middelburg in 1600 with effect from 30 September 1600. The articles were numbered differently but the substance was the same<sup>59</sup>.

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Articles 5, 8, 9, 25 and 28 of the Amsterdam Ordonnance of 1598 became articles 12, 15, 16, 26 and 21 respectively of the Middelburg Ordonnance of 1600.

Flessingen copied the Middelburg Ordonnance in 1661<sup>60</sup>.

4.5. THE ROTTERDAM ORDONNANCE OF 1604

4.5.1. On 12 March 1604 Rotterdam promulgated its own insurance ordinance. It dealt with the subject of abandonment logically, concisely and comprehensively.

4.5.2. Article 12 gave the assured the right to abandon the ship or goods forthwith in the case of innavigability of the ship, or if the ship or goods were taken by enemies or pirates, were laid under arrest or were otherwise damaged or lost beyond hope of recovery. However, if the ship or goods were laid under arrest or detained by any kings, princes or rulers of Europe, Barbary or the Canary Islands, or at any nearer place, where there was hope of recovery, the assured had to wait six months before he could abandon after giving notice through a public person to the majority of insurers. And if the event occurred outside Europe, Barbary or the Canary Islands, the assured had to wait for a year before he could

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Pardessus, *op cit*, Vol IV, 182.

claim the sum insured. Nevertheless, if the goods were perishable, the assured did not have to wait for the effluxion of the prescribed period but could claim the sum insured immediately.

4.5.3. Article 14 provided for the case of the missing ship which could be abandoned if no news were received of her for a year and a day after sailing, if the destiny was in European, Turkish or Canary Island waters and two years if the sailing was to a more distant place. Whereas neither the Amsterdam of 1598 nor the Middelburg Ordonnance of 1600 provided expressly for the abandonment of the missing ship or the goods on her, the Rotterdam Ordonnance made it clear in its article 14 that the missing ship or the cargo on her had to be abandoned to the insurer when the sum insured was claimed.

4.5.4. If the ship became innavigable or was arrested prior to completion of the voyage, and the goods on board were not arrested or lost together with the ship, the assured was obliged to tranship the cargo onto another ship and the risk continued whilst the goods were being carried on such ship. The insurers also became liable for the cost of

transhipment and any damage to the goods, including additional freight.

- 4.5.5. Article 15 provided that the abandonment had to be made in writing and through a public person. The sum insured could only be claimed three months after such abandonment.

## 5. THE BASIC RULES OF ABANDONMENT

- 5.1. At this stage in the development of the Roman-Dutch law of marine insurance, that is after the first round of ordonnances was promulgated in the most important port towns of Holland, some important aspects or principles of abandonment are already identifiable. However, it is important for a proper understanding of the content of the right to abandon in Roman-Dutch law, and consequently South African law, to keep two facts clearly in mind.

- 5.1.1. The first is that the customs and usages of the Antwerp Exchange allowed the assured to abandon in the specific cases mentioned as well as '*ghelycke ghevallen*'. This means that the causes giving rise to the right to abandon in terms of the underlying

customary law were not regarded as a *numerus clausus*. Understanding this fact allows one to understand that the specific cases referred to in the customs of the Antwerp Exchange and also in the subsequent local ordonnances of the towns were not intended to be a complete and exclusive list of such causes. They served rather as examples in respect of which particular provisions were thought necessary by the legislature<sup>61</sup>.

- 5.1.2. The second important fact is that the local legislatures of the towns did not intend to deal with all the substantive aspects of abandonment. Some of these the legislatures were content to leave to the underlying customary law and to the parties to the contract. The proprietary consequences of an abandonment is one of the cases where the local ordonnances did not make any provisions at all. This does not mean that abandonment in the Netherlands did not have the same proprietary consequences as elsewhere. It

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A proper understanding of this fact allows one also to recognize the close links between South African law and English law on this particular subject. English law also does not require the loss giving rise to the abandonment to have been caused by one of a narrowly defined set of events. In this respect the Roman-Dutch law of the time, that is the seventeenth century, appears to be more closely related to English law than to French or German law. This was probably the result of the influence which the Antwerp Insurance Exchange had on practice at both Amsterdam and London. For an historical review of the relationship between Antwerp and London in early insurance practice see Holdsworth, *A History of English Law*, (1977), Vol VIII, 283 et seq.

merely means that one has to go into the underlying customary law to ascertain what those consequences were.

- 5.2. The basic principles or rules of abandonment may now be extracted from the recorded customary law as contained in the *Guidon de la Mer*, the 1582 version of the customs and usages of the Antwerp Exchange, the Spanish ordonnances of 1563 and 1570, and the first round of local ordonnances of Amsterdam, Middelburg and Rotterdam<sup>62</sup>. These rules constitute the general principles of abandonment which were applicable in the province of Holland in the middle of the seventeenth century and would thus constitute the basic principles of abandonment inherited by South African law from the province of Holland. These rules are arranged in what follows in the same pattern as that adopted in respect of the discussion of Dutch, German, French and English and American law in Chapters 6 to 10.

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In the process of distilling the abandonment principles from these sources the *Guidon de la Mer* will be relied upon as the residual source or backup only if the Customs of the Antwerp Exchange, the Spanish ordonnances and Dutch ordonnances are silent on a particular point, as the *Guidon* may perhaps be regarded by some as a foreign source.

5.3. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON

- 5.3.1. RULE 1: *The assured was entitled but not obliged to abandon when the circumstances permitted an abandonment.*

This rule follows the principle enunciated expressly in article 1 of Chapter VII of the *Guidon de la Mer*, where it was put as follows: '*Le delais n'est de necessité, mais depend de la volonté du marchand chargeur ...*'<sup>63</sup>. According to article 14 of the customs of the Antwerp Exchange '*vermach de gheassureerde het gheassureert schip oft goed t'abandoneren ...*', which indicates equally that abandonment was a right vesting in the assured and not an obligation.

- 5.3.2. RULE 2: *If the assured elected to abandon, he was allowed to recover the full amount of the insurance provided he first made a proper abandonment of the ship or goods, as the case may be, to the insurer*<sup>64</sup>.

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<sup>63</sup> ('The abandonment is not compulsory but depends on the wish of the cargo owner ...')

<sup>64</sup> Antwerp customs, articles 14 and 15; 1570 Ordonnance, article 23; Amsterdam, articles 5, 8 and 25; Middelburg, articles 12, 15 and 26; Rotterdam, article 15.

Two aspects of the rule require to be mentioned. Firstly, it is apparent from the customs of the Antwerp Exchange and all the relevant ordonnances that only the ship or cargo insured could be abandoned. Secondly, the purpose of the rule was to prevent a double- or over-recovery on the part of the assured. The rule therefore protected the indemnity principle.

5.3.3. RULE 3(a): *In the case of capture of the ship or goods insured by the enemy or by pirates, in the case of innavigability<sup>65</sup> ('onseylbaarheid'), and in any other case where the ship or goods were lost for certain without hope of recovery, the assured was entitled to make an immediate abandonment<sup>66</sup>.*

Unlike a detention by a foreign ruler who was not an enemy, an enemy or pirates would not be likely to give up the captured ship or goods. In international law the enemy may even acquired ownership of the ship or goods by the capture<sup>67</sup>.

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<sup>65</sup> Innavigability in the context of marine insurance means that the ship is absolutely irreparable or cannot be repaired where she is for want of money or material. The latter is known as relative innavigability.

<sup>66</sup> Antwerp customs, article 14; Amsterdam, article 25; Middelburg, article 26; Rotterdam, article 15.

<sup>67</sup> See in this regard Roccus, *op cit*, 66 (at 93 of Feitama's translation).



The loss was therefore regarded as certain and final as soon as the capture had occurred. In the case of innavigability a similar situation arose by virtue of the fact that the ship was incapable of being made seaworthy again, and the loss was therefore again certain and final. There was thus no purpose in delaying the exercise of the right to abandon in these and any other case where the loss was certain and final.

5.3.4. RULE 3(b): *If the goods insured were of such a nature that they would be likely to perish with the mere effluxion of time, detention by a foreign ruler (not an enemy) and unfitness of the ship to continue on the contemplated voyage gave rise to an immediate right to abandon in respect of such goods<sup>68</sup>.*

There was no purpose in delaying the exercise of the right to abandon in such cases because the delay brought about by the detention or the repairs would result in a certain and final loss in any event<sup>69</sup>.

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1570 Ordonnance, article 16; Amsterdam, article 9; Middelburg, article 16; Rotterdam, article 12.

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Unfitness apparently differed from innavigability in that the ship was delayed but could still be repaired. Delay was, of course, fatal to perishables. This aspect is discussed in the next chapter.

5.3.5. RULE 4(a): *In the case of detention by foreign rulers who were not enemies and in the case of supervening unfitness or inability of the ship to complete the contemplated voyage, the assured was entitled to abandon the insured ship or goods, as the case may be, after the expiry of a prescribed period, which ran from the date of the notification referred to in Rule 6<sup>70</sup>.*

The reason for the delay of the right to abandon until the prescribed period had elapsed is immediately apparent. So far as the detained ship or goods were concerned, there was always a possibility that the foreign ruler would relent and release the ship or goods. So far as the unfit or damaged ship was concerned, she could be perhaps be repaired to complete the voyage, albeit after some delay. When the prescribed period had elapsed without recovery or such repairs as to make the ship seaworthy again, the loss became definite and certain and the assured obtained the right to abandon. As in the case of the missing ship, the purpose of the prescribed period was

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The requirement of notice was dealt with separately; 1570 Ordonnance, article 23; Amsterdam, article 8; Middelburg, article 15; Rotterdam, articles 12 and 13.

thus to obtain a measure of certainty of the fact of an indemnifiable loss.

- 5.3.6. RULE 4(b): *During the relevant waiting period the assured was entitled to tranship the goods at the expense and risk of the insurer. The insurer was entitled to tranship himself, if the assured did not do so, in which event the insurer was liable only for the costs of transshipment and the actual damage suffered in respect of the cargo as a result of the arrest or unfitness*<sup>71</sup>.

The assured's right to tranship together with the insurers' right to do so if he did not ensure that appropriate action was taken to minimise the loss.

- 5.3.7. RULE 4(c): *During the relevant period the assured was entitled to demand security for payment of the insured amount from the insurer*<sup>72</sup>.

Since insurers in those days were often individual merchants and not necessarily financially strong, the assured was allowed to safeguard his own

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Amsterdam, article 8; Middelburg, article 15; Rotterdam, article 13.

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Amsterdam, article 8; Middelburg, article 15; Rotterdam, article 12.

position during the period of delay between making his claim and the date for payment by obtaining security.

- 5.3.8. RULE 5: *The ship of which no news was received for a specified period was presumed to be lost after the expiry of the prescribed period and the assured was thereupon allowed to claim the full amount of the insurance in respect of the ship (and the goods carried on her<sup>73</sup>) upon making an abandonment<sup>74</sup>.*

The purpose of the prescribed period was to obtain certainty, by way of presumption, of the fact of an indemnifiable loss. The requirement of an abandonment in such a case was to protect the indemnity principle.

5.4. THE SUBSIDIARY RULES OF ABANDONMENT

- 5.4.1. RULE 6: *The assured was obliged to notify the majority of the insurers who were domiciled at the*

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The ordonnances did not specifically state what was to happen in respect of the insured goods on board the missing ship. Scheltinga later pointed out that the presumption also operated in respect of such goods. See the discussion of Scheltinga's contribution in the text in the next chapter.

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Antwerp customs, article 7; Amsterdam, article 5; Middelburg, article 12; Rotterdam, article 14.

place where the contract was concluded of any casualty, arrest or loss affecting the insured ship or goods. The notification had to be made through a broker or public person who had to keep a record of the notification given. Where the abandonment could not be made forthwith, time did not begin to run until this notification had been served<sup>75</sup>.

The purpose of this rule was to enable the insurers to assess their position and to take such steps as were available to safeguard their own interests. The notice was regarded as serious enough to warrant formal service through a public official and the maintenance of a public record of the information given to the insurers regarding the casualty.

- 5.4.2. RULE 7: *The abandonment had to be made in writing and had to be served formally through a public official whose duties included the service of such formal documents and processes*<sup>76</sup>.

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Amsterdam, article 28 read with article 8; Middelburg, article 21 read with article 15; Rotterdam, article 16. The officer entrusted with this task differed from town to town, but was a public official.

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Amsterdam, article 8; Middelburg, article 15; Rotterdam, article 15. Who this official was differed from town to town.

When the importance of the consequences of the abandonment is considered, there was clearly a need for formality and certainty in the abandonment process. (The time for payment began to run with the service of the notice of abandonment and the abandonment also had the effect that certain rights vested in the insurer.) This rule thus served the purpose of making the abandonment part of the public and recorded procedure.

5.5. THE CONSEQUENCES OF THE ABANDONMENT

5.5.1. RULE 8: *The insurer was obliged to pay the sum insured after the expiry of a prescribed period<sup>77</sup>.*

This was probably not merely a formal recording of the insurer's obligation to pay. The delay for the obligation to pay to mature may well have been designed to give the insurer an opportunity to obtain the release of sufficient funds from his other ventures to enable him to pay the sum insured.

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Amsterdam, article 5; Middelburg, article 12; Rotterdam, article 15.

5.5.2. RULE 9: *The effect of the abandonment was that the assured relinquished his rights in relation to the ship or goods insured in favour of the insurer, who acquired ownership by operation of law.*<sup>78</sup>

It was pointed out in Chapter 14 *supra* that the process of transferring ownership to the insurer required two separate legal acts. The first was the abandonment in favour of the insurer by means of which the assured offered to relinquish ownership, not against the world at large, but *vis-a-vis* the insurer. The second was the vesting of ownership in the insurer, which occurred *ex lege* and did not require any act on the part of the insurer to bring or take the ship or goods abandoned to him under his physical control.

This rule is therefore based on the principles of the underlying common law as it is clear that there was no specific reference in the customs of the Antwerp Exchange or in the local ordonnances to that the abandonment had the effect that the

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Article 14 of the customs of the Antwerp Exchange provided that the assured '*vermach ... de gheassureert schip oft goed t'abandonneren tot behoef van den versekerer ...*' While this provision did not, under the Roman law which applied to commercial transactions, have the effect of vesting ownership of the abandoned ship or goods automatically in the insurer, that result was achieved by a provision of the *jus commune* of insurance and was eventually specifically enacted in article 678 of the *Wetboek van Koophandel* of 1838, ('the *WVK*').

insurer became the owner of the abandoned ship or goods as a result of the mere fact of the abandonment<sup>79</sup>. However, the finding of unowned goods, or of goods the property in which had been abandoned by the owner constituted a recognized manner of acquiring ownership<sup>80</sup>. It therefore appears that the insurer could become the owner of the abandoned ship or goods in accordance with the common law by *occupatio*<sup>81</sup>. This existence of the principles of this rule is also justified by article 2 of the *Guidon de la Mer*<sup>82</sup>.

5.6. At this stage of the Roman-Dutch law of marine insurance of the province of Holland was transplanted to the Cape of Good Hope. De Groot and Groenewegen had by the relevant date, 6 April 1652, published their comments on the insurance

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79 The Roman-Dutch common law required an *occupatio* for the acquisition of ownership. See in this regard De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, ('*Inleidinge*'), (1631), 2.4.1-38, especially 36-37; Van der Linden, *Rechtsgeleerd, Practicaal, en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 1.2.1.

80 Van der Linden, *Koopmans Handboek*, 1.2.4.

81 As was pointed out in Chapter 14 *supra*, this was not a satisfactory arrangement as the insurer would be unable to pursue the ship or goods in the hands of third parties without the co-operation of the assured and it appears that a principle developed in the European *jus commune* of insurance that ownership vested in the insurer automatically upon service of the notice of abandonment.

82 See para 2.4.3 of the text *supra*.



law applicable in Holland during their time<sup>83</sup>. The Roman-Dutch law was not static, however, and new ordonnances continued to be promulgated and more authors commented on the subject. Eventually the law was codified in the *WvK* of 1838. It was pointed out in the preceding chapter that not all the developments which took place in Holland after 1652 applied automatically at the Cape of Good Hope. However, so far as the provisions of later ordonnances were incorporated in the works of the institutional writers on Roman-Dutch law, such provisions became part of the Roman-Dutch law of the Cape, with the exception of provisions of purely local application<sup>84</sup>. This makes it necessary to review the insurance legislation passed in Holland after 1652 and also to consider the works of the institutional writers. The first of these tasks belongs in this chapter but the second is the subject of the next. The review of the second round of ordonnances which follows therefore does not take account of the extent to which their principles were adopted by the institutional writers.

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The first half of the seventeenth century. The works of these authors are dealt with in the next chapter.

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See *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 4 SA 269 (D) at 286; *R v Harrison and Dryburgh* 1922 AD 320 at 333 and 336.

6. THE SECOND ROUND OF DUTCH ORDONNANCES

6.1. THE ROTTERDAM ORDONNANCE OF 1721

6.1.1. On 27 January 1721 Rotterdam promulgated a new ordonnance on insurance, average and maritime matters which maintained the logic, structure and technical excellence of the earlier Rotterdam ordonnance<sup>85</sup>.

6.1.2. Section 60 required the assured to abandon the ship or goods insured to the insurer before he could claim the sum insured if the insured ship or goods were lost, taken, damaged or arrested<sup>86</sup>. If the ship had perished or had become innavigable or if the insured goods had perished or been damaged or had been taken or were otherwise lost for certain, without hope of recovery, the abandonment could be made immediately ('aanstonds') in terms of section 62<sup>87</sup>. In terms of section 63 the assured was also entitled to abandon immediately

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85 The Rotterdam Ordonnance of 1721 was also adopted by the town of Dordrecht in 1775, without substantial amendment; Van Niekerk, *Introduction*, 60.

86 This provision confirmed Rule 2 enunciated above.

87 This provision confirmed Rule 3(a).

if the goods were perishable and were detained by a governmental power<sup>88</sup>.

6.1.3. Otherwise, in terms of section 64, if there was still hope that the arrested ship or goods could be recovered, the assured had to wait with his abandonment for a prescribed period after he had given notice through a public person of the incident to the insurers. If the incident occurred within European waters as far as Barbary on the one side and the Canary Islands on the other, the period was six months and if the incident occurred in more distant waters, one year<sup>89</sup>. In terms of article 65 the insurer was obliged to provide sufficient security for the claim of the assured pending the expiration of the prescribed period<sup>90</sup>.

6.1.4. The missing ship was provided for separately in section 67, which provided that if no news was received of the insured ship or goods for a period of a year and six weeks from the departure of the

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The phrase used was '*van hooger hand zullen zijn gearresteert*'. This provision confirmed Rule 3(b).

89

This provision confirmed Rule 4(a).

90

This provision confirmed Rule 4(c).

ship, the ship and goods were presumed to be lost and the assured was to be entitled to abandon the ship or goods to the insurers. If the destination was beyond the waters of Europe, from Barbary to the Canary Islands, the prescribed period was two years<sup>91</sup>.

6.1.5. In terms of section 61 the abandonment had to be made through the '*bode van het Zee-Regt*' by way of a written notice, failing which the abandonment would be invalid<sup>92</sup>. Article 68 provided that payment could not be claimed from the insurer before one month had elapsed from the notice of abandonment<sup>93</sup>. The standard policy conditions of the Rotterdam Chamber of Insurance<sup>94</sup> obliged the insurers to pay the sum insured within a month of proper notice of the loss or damage<sup>95</sup>.

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91 This provision confirmed Rule 5.

92 This provision confirmed Rule 7.

93 '*de Insinuatie van het Abandonnement*'. This provision confirmed Rule 8.

94 See Van Niekerk, *Introduction*, 240-245 for the text of the standard policies.

95 This contractual stipulation confirmed Rule 8.

6.2. THE AMSTERDAM ORDONNANCE OF 1744

6.2.1. Amsterdam followed with its own ordonnance on the 10th March, 1744. It dealt with abandonment equally succinctly as follows:

6.2.2. Article 26 contained a number of provisions including the following: In the case of an arrest, capture or taking of the ship by a foreign king, prince, potentate or ruler, where recovery was uncertain, and also in the case where the ship became incapable of completing the planned voyage, the assured had to wait six months or twelve months depending on the destination before he could abandon her to the insurers<sup>96</sup>. The relevant period ran from the time the assured gave notice of the condition of the ship or goods to the insurers<sup>97</sup>. This notification had to be given by way of an exploit served by the '*Bode van de Assurantie Kamer*' at the place where the majority of the insurers were<sup>98</sup>. The assured was entitled to claim security or pledges from the insurers

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96 This part of article 26 confirmed Rule 4.

97 This provision confirmed Rule 4(a).

98 This provision confirmed Rule 6.

pending payment in the latter case<sup>99</sup>. The assured was further entitled to tranship the goods at the expense of the insurers who also had to pay any additional freight and the damages arising from the event<sup>100</sup>.

6.2.3. If the ship became innavigable or if the insured ship or goods were taken or captured by enemies or were otherwise certainly lost or damaged without hope of recovery, the assured could abandon such ship or goods straight away<sup>101</sup> and the insurers became obliged to pay the sum insured three months after service of the notice of abandonment<sup>102</sup>. If the goods were perishable, the assured also did not have to wait for the expiry of the relevant period but could make the abandonment forthwith<sup>103</sup>.

6.2.4. The missing ship was provided for on the same basis as before, namely that if no news was

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99 This provision confirmed Rule 4(c).

100 Article 26, which confirmed Rule 4(b).

101 Article 28, which thus confirmed Rule 3(a).

102 This part of article 28 confirms Rule 8.

103 Article 27, which thus confirmed Rule 3(b).

received of the ship or goods insured for a year and a day from the date of sailing, she would be taken to be lost and the insured became entitled to give notice to the insurers and to claim payment of the insured amount three months later. If the ship's destination was beyond the waters of Europe, Barbary, the Canary Islands, the Mediterranean, the Levant and the Archipel, the period was two years<sup>104</sup>.

6.3. The concept of subrogation is not mentioned in any of the abovementioned ordonnances at all. It is, however, such an essential component of indemnity insurance that one must assume that subrogation was regulated satisfactorily by the underlying customs so that the legislature at no stage felt obliged to intervene. Neither did these ordonnances mention that one of the consequences of a proper abandonment was that the abandoned ship or goods were to vest in ownership in the insurer.

6.4. In summary, it appears that the new ordonnances of Rotterdam and Amsterdam (as well as Flessingen and

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Article 29, which confirmed Rule 5. It is interesting to note that the Amsterdam Ordonnance still did not mention abandonment expressly in relation to the missing ship.

Dordrecht) confirmed the provisions which already applied under the earlier ordonnances.

7. CONCLUSION

7.1. It remains to determine to what extent the rules so far extracted from these customs and statutory provisions were incorporated in the works of the recognized Roman-Dutch authors and to what extent, if any, those principles have been modified by them. By recounting the historical events in the development of the concept of abandonment, as has been done in this chapter, it has been possible to distil the basic rules and principles of abandonment from the first customs and legislation which applied to the subject in the province of Holland. It is clear that abandonment was a feature of the marine insurance customs, practice and legislation which were applied in the port towns of Holland from the earliest time, after the practice of insurance had spread to those parts of northern Europe. It is also clear that the principles which were applied were the same or



very similar to those applying in France<sup>105</sup>, and to a lesser extent, in England<sup>106</sup>.

7.2. However, the Roman-Dutch law was not merely a collection of old customs and ordonnances. It was a living and developing body of law which was subjected to intense scrutiny by some of the great Roman-Dutch jurists of the seventeenth and eighteenth centuries. In order to determine how the relevant customs and the provisions of the ordonnances were interpreted and applied, one has to turn to the treatises and opinions of these jurists. One may then determine to what extent more light can be shed on abandonment as a component of the Roman-Dutch law which came to South Africa in 1652. These tasks are undertaken in the next chapter.

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See Chapter 5 *supra* for a discussion of the abandonment provisions of the French *Ordonnance de la Marine* of 1681, for example, and compare those to the rules stated in this chapter.

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See Chapter 5 *supra*.

## CHAPTER SEVENTEEN

### ROMAN-DUTCH LAW: TREATISES AND OPINIONS

#### 1. INTRODUCTION

1.1. The principles of abandonment as laid down in the Spanish and local Dutch ordonnances were the subject of discussion in the treatises and opinions of the Roman-Dutch lawyers of the seventeenth and eighteenth centuries. The rules of abandonment extracted from the ordonnances were confirmed and in some cases elaborated upon by these authors. Since the treatises and opinions of these authors are important sources of the law inherited from the province of Holland, their comments will naturally have to be considered in any endeavour to establish the principles of abandonment which became part of South African law.

1.2. The relevant Roman-Dutch authors can be divided into two main categories, namely those who commented on the first round or phase of insurance ordonnances and those who commented after the second round or phase of insurance ordonnances had been promulgated. De Groot and Groenewegen fall into the first category. An important opinion was

written early in this phase by Jacob de la Mine<sup>1</sup> and some important opinions were later furnished by Van den Ende<sup>2</sup> shortly before the Rotterdam Ordonnance of 1721 was promulgated. Bynkershoek completed his work after the Rotterdam Ordonnance of 1721 but before the Amsterdam Ordonnance of 1744 was passed. Van der Keessel and Van der Linden are the most important writers on the Roman-Dutch law of the second phase. However, having regard to the fact that the later ordonnances mostly confirmed the provisions of the earlier ones so far as abandonment is concerned<sup>3</sup>, it does not appear to matter much whether an author commented on the former rather than the latter. It remains important, nevertheless, to determine to what extent the principles laid down in the Spanish and local ordonnances were confirmed or altered by these authors.

- 1.3. None of the authors referred to discussed the customary law underlying the applicable ordonnances. Nor did they, with the exception of Van den Ende and Van der Linden, refer to the law

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<sup>1</sup> Consultatie 52 dated 10 March 1676 in Van den Berg, *Nederlands Advysboek*, (1693-1698).

<sup>2</sup> The first opinion (*Advys 14, infra*) was a joint opinion by Abraham van den Ende and two of his colleagues.

<sup>3</sup> As was demonstrated in Chapter 16 *supra*.

applying in the neighbouring countries. On the effect of the abandonment on the question of ownership of the abandoned ship or goods none of the abovementioned authors made any contribution at all. That was left to a practising advocate, Abraham van den Ende, who did so by way of opinions later taken up by Barels in his collection of opinions on mercantile and shipping matters<sup>4</sup>.

2. HUGO DE GROOT

2.1. De Groot wrote his main work<sup>5</sup> in 1631. It was written in form and substance as a commentary on the complete range of the laws applicable in the Province of Holland, without any substantial reference to authority<sup>6</sup>. Abandonment was dealt with by De Groot in four paragraphs in his chapter on insurance<sup>7</sup>. De Groot did not disclose any principles which are not already apparent from the provisions of the underlying Spanish and local ordonnances. However, the value of De Groot's contribution lies therein that he stated the law

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<sup>4</sup> *Advysen over den Koophandel en Zeevaart*, (1780-1781).

<sup>5</sup> *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, ('*Inleidinge*').

<sup>6</sup> These were later inserted by Groenewegen.

<sup>7</sup> *Inleidinge* 3.24.10,12,13 and 14.

as that applicable in the whole province of Holland rather than merely the law of an individual town. The rules of abandonment identified in the previous chapter could therefore, so far as they are confirmed by De Groot's *Inleidinge*, be regarded as the seventeenth century law of the province of Holland and consequently of South Africa.

2.2. Inleidinge 3.24.10 De Groot confirmed that the ship and cargo of which no news was received for a year and some days<sup>8</sup> while on a voyage in European and Turkish waters and for two years in respect of more distant sailings was presumed to be lost<sup>9</sup>.

2.3. Inleidinge 3.24.12 De Groot then confirmed the principle that, if the ship was detained in a foreign port by restraint of princes and rulers, or became otherwise incapable to prosecute the voyage, the assured had to wait six months or one year, depending on the destination, after having given notice of the event to the insurer before he

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<sup>8</sup> This is clearly a mistake because the local ordonnances all specified a year and a day.

<sup>9</sup> This paragraph merely echoes the existing provisions of the ordonnances in force at the time and confirms Rule 5. See the Amsterdam Ordonnance of 1598, article 5; the Middelburg Ordonnance of 1600, article 12; the Rotterdam Ordonnance of 1604, article 14; and article 7 of the customs of the Antwerp Exchange.

could abandon<sup>10</sup>. The assured was entitled to tranship the cargo in such a case and if he failed to do so the insurer could. In the latter event the insurer was liable for the cost of transshipment, the additional freight and the damage suffered in respect of the cargo itself as a result of the detention or restraint<sup>11</sup>. In the interim the assured was entitled to demand security for payment of the amount of the insurance<sup>12</sup>. The six month or one year period did not apply in the case of perishables<sup>13</sup>.

2.4. Inleidinge 3.24.13 If the ship became innavigable or if the ship or cargo was taken by enemies or pirates, the assured was allowed to abandon them forthwith<sup>14</sup> and the insurers then became obliged to pay the sum insured within three months<sup>15</sup>.

2.5. Inleidinge 3.24.14 The assured had to communicate all intelligence of restraint or loss to the

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10 This statement confirmed Rule 4(a).

11 This statement confirmed Rule 4(b). In this regard De Groot pointed out that the standard clause in policies at that time cast upon the insurer also the risks of transshipment, in which event the assured's claim for the sum insured would not be abated by the insurer's efforts.

12 This statement confirmed Rule 4(c).

13 This statement confirmed Rule 3(b).

14 The statement confirmed Rule 3(a).

15 This statement confirmed Rule 8.

insurer<sup>16</sup>.

3. SIMON GROENEWEGEN VAN DER MADE

3.1. Groenewegen published an edition of De Groot's *Inleidinge* in 1644 to which he had added footnotes containing his own comments and references to authority<sup>17</sup>. He referred to a wide range of authorities for De Groot's statements on insurance generally, including Santerna<sup>18</sup>, the Spanish Ordonnances of 1563 and 1570, the customs of the Antwerp Exchange, the Amsterdam Ordonnance of 1598, the Middelburg Ordonnance of 1600, the Rotterdam Ordonnance of 1604, as well as the opinions of Dutch lawyers<sup>19</sup>. In the footnotes on the abandonment paragraphs in *Inleidinge* Groenewegen mentioned no authorities outside the customs of the Antwerp Exchange and the local ordonnances of Amsterdam, Middelburg and Rotterdam. The value of Groenewegen's contribution lies in his confirmation, by omission rather than by express statement, that the principles set out

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16 This statement reflected the provisions of the existing ordonnances and confirmed Rule 6.

17 See De Wet, *Ons Ou Skrywers in Perspektief*, (1988), 135.

18 *Tractatus de Assecurationibus et Sponcionibus Mercatorum*, (1552).

19 See *Inleidinge* 24.1.1, 2 and 3, the footnotes thereto and 3.24.6, especially footnote 16.

in De Groot's *Inleidinge* constituted the law of the whole of the province of Holland and not merely of the towns in respect of which the individual ordonnances had been made.

4. JACOB DE LA MINE

- 4.1. In *Consultatie* 52<sup>20</sup> of 10 February 1676 De la Mine expressed the opinion that the effect of a capture by an enemy was that an original title (of ownership) was acquired by the enemy<sup>21</sup> and that the assured could not re-acquire ownership in a subsequent re-capture once the insurer had been condemned to pay the sum insured<sup>22</sup>. While De la Mine did not say so expressly, the reason for the latter statement was that the ship had been abandoned to the insurer when the assured claimed the sum insured, with the consequence that the insurer had thereby been vested with the assured's rights in and to the ship<sup>23</sup>.

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20 Van den Berg, *op cit*, 112.

21 'een primitive tijtvl van eigendom werd bekomen ...'

22 '... dat het Schip eens genomen en daar door den eigendom verlooren zijnde geworden Debora van Foreest daar mede haar regt ende Actie soodanig heeft verlooren gehad dat sij de selve niet weder heeft kunnen bekomen, gelijk als Rota Genuens seer wel ten regarde van de Assuradeurs heeft gedecideert wanneer deselve Assuradeurs zijn gecondemneert geworden te betalen omdat het Schip was genomen geweest ...'

23 It is stated in the opinion that the ship had been 'geabandonneert' and the conclusion is therefore inevitable that the assured did so and claimed the full amount of the insurance. The opinion therefore confirms the validity of Rule 9.



4.2. De la Mine relied in respect of the effect of the capture on the authority of De Groot<sup>24</sup>, and in respect of the inability of the assured to re-acquire ownership after the abandonment and payment by the insurer on *Decisio 101* of the *Rotae Genoa*. Dutch practice thus recognized that the abandoned ship accrued to the insurer after an abandonment. A significant feature of the opinion is that De la Mine relied unashamedly on authority emanating from outside Holland, which suggests that the insurance principles of the Roman-Dutch law were based on the European *jus commune* of insurance.

5. ABRAHAM VAN DEN ENDE

5.1. Three important opinions dealing with the general principles of abandonment and its operation as a means of transferring ownership of the abandoned ship or goods were taken up in Barels' collection of opinions<sup>25</sup>. The first was dated 6 May 1706 and signed by Verryyn, Van den Ende and Schrik<sup>26</sup>. It was later amplified by a second opinion dated 18

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24 *De Jure Belli ac Pacis*, (1625), 6.3 in fine.

25 *Op cit.*

26 *Advys 14*; Barels, *op cit*, 67.

May 1915 and signed by Van den Ende alone<sup>27</sup>. The third was dated 10 April 1715 and was signed by Van den Ende<sup>28</sup>.

5.2. ADVYSEN 14 and 23

5.2.1. The ship and its cargo of wine were insured at Middelburg on standard Middelburg conditions for a voyage from Bourdeaux to Middelburg. A capture by the English was a special risk justifying a higher than usual premium. The ship was detained at Guernsey after her departure by a Guernsian (English) ship<sup>29</sup>. The assured thereupon gave notice to the insurers through a notary that the detention was likely to cause a loss and damage through deterioration and leakage of the wine, and further that the assured intended to sell the ship and wine by auction. The assured intimated also that he would claim the difference between the insured value of the ship and wine and the price realized at auction minus the expenses incurred in the sale from the insurers. Three months later the ship arrived safely at Middelburg, but the assured

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27 *Advys 23; Barels, op cit, 128.*

28 *Advys 16; Barels, op cit, 85.*

29 While the opinion does not state this fact, the Dutch and the English were at war at the time.

sold her and the wine at auction after giving the insurers notice that he intended to do so and invited them to be present at the sale. The ship and wine realized only fifty percent of their insured value.

5.2.2. Although the facts recited does not make it clear, there must have been an abandonment to the insurers at the time the assured gave the notarial notification to the insurers<sup>30</sup>. The issue was whether the assured was entitled to recover the loss from the insurers. Van den Ende's opinion was in favour of the assured. One of the reasons he advanced was that the assured was entitled to institute action forthwith upon the detention at Guernsey, without having to wait to ascertain what the final outcome of the event was going to be<sup>31</sup>. He further pointed out that once the ship and the wine had been abandoned to the insurers it '*... zouden zyn en blyven in effecte geabandonneerd ...*' and that the subsequent recovery of the ship

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30 A notarial notification has the hallmarks of an '*intheimatie door een publyk perzoon*', that is to say an abandonment.

31 '*... de Geassureerde aenstonds op en met het neemen, opbrenging en aenhouden ... bevoegd is geweest zyne actie te institueeren en te vervolgen, zonder na den uitval der zaeke te wagten, en zulks ook zonder onderscheid zelfs of 'er hoope ware geweest om het goed weder te krygen of niet.*' See Barels, *op cit*, 70. As authority for this proposition the authors of the opinion referred to the respective ordonnances and a rule of the Chamber of Middelburg. So far as the ship and the wine were concerned, the ordonnances allowed an immediate abandonment in the case of capture by an enemy. In respect of the wine the ordonnances allowed an immediate abandonment also on the ground that wine is a perishable item. Rule 3(a) and Rule 3(b) were thus confirmed by the opinion.

and wine therefore made no difference to the assured's right to claim<sup>32</sup>.

5.2.3. This opinion establishes a further rule namely:

*The assured's right to abandon and the consequences of an abandonment properly made are not affected by any subsequent recovery of the abandoned ship or goods.*

5.2.4. The opinion was clarified in certain respects by *Advys 23*. It was pointed out there that the abandonment may be made '*... met volkoomen effect van rechte zo als daer te vooren by het 43 artikel was gepermitteerd en vasgesteld.*'<sup>33</sup>

5.2.5. The effect of the opinion was not just that the assured had the right to make an immediate abandonment on the facts of the case, but also that one of the consequences of a proper abandonment was that ownership of the abandoned goods vested in the insurer<sup>34</sup>. Apart from this

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<sup>32</sup> At 71.

<sup>33</sup> At 130. The article 43 referred to is that of the *French Ordonnance de la Marine* of 1681.

<sup>34</sup> Schlemmer, *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, RAU, (1991), 51 expressed doubt as to whether this opinion goes as far as to suggest that the abandonment referred to in marine insurance has the effect of transferring ownership.

opinion and *Advys 16* there is no direct authority in Roman-Dutch law directly to that effect.

5.2.6. It is significant that Van den Ende, who wrote the clarifying *Advys 23*, relied on article 43 of the *Ordonnance de la Marine* of 1681 and *Decisio 101* of the *Rotae Genoa*<sup>35</sup> as authority for this view. This confirms the conclusion arrived at earlier that the Roman-Dutch insurance principles were based on the European *jus commune* of insurance.

5.3. ADVYS 16

5.3.1. The facts of the case were not stated in the published opinion. The issues are capable of being identified in a broad sense only by the opinions which were expressed.

5.3.2. It appears that the ship had been detained and prevented from completing the voyage<sup>36</sup> by the government at Stockholm. The assured then incurred expenses in an endeavour to have the ship and cargo released. According to Van den Ende the assured was entitled to recover not only the sum

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The commercial court of the merchants of Genoa.

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'... in het vervolgen hunner voijagen aengehouden en belet derzelve voijagen te vervolgen ...'; Barels, *op cit*, 86.

insured<sup>37</sup> but also those expenses<sup>38</sup>, but he was obliged to abandon the insured ship, with all rights and everything attaching to it, the goods insured together as well as their proceeds to the insurers<sup>39</sup>.

5.3.3. The abandonment, in respect of ship and cargo was proportional to the extent of the insurance if the insurance was partial<sup>40</sup>. This statement qualified the principle that the abandonment vested ownership in the insurer by providing that the transfer operated only to the extent that the ship or goods were covered by the insurance<sup>41</sup>.

5.3.4. Van den Ende then went on to point out that mercantile custom was uniformly to the effect that the assured was entitled to abandon the insured ship or goods for the benefit of the insurers if the ship or goods were detained during the voyage and prevented from completing it. However, before

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37 'zyne volle getekende of geassureerde somme'; Barels, *op cit*, 85.

38 However, the expenses were recoverable under the principles of *negotiorum gestio*; Barels, *op cit*, 86-87.

39 'het zuivere provenue'.

40 'proportionelĳk na maete van de gedaene of gepermitteerde Assurantie'; Barels, *op cit*, 86.

41 One can therefore formulate a qualification to two of the principles already enunciated. The first is that the assured had to abandon the whole of the insured interest. The second is that the abandonment operated only to the extent of the insurance.

the insurers became obliged to pay the insured amount the assured had to give proper notice and make an abandonment<sup>42</sup>. The notice referred to must have been the notification the assured was required to give the insurers of all events affecting the insured ship or goods. The abandonment was a separate event.

5.3.5. Van den Ende then repeated the opinion expressed in *Advys 14* to the effect that the recovery of the ship or goods after the abandonment had no effect on the abandonment<sup>43</sup> and that the insurer acquired an indisputable right of ownership through the abandonment<sup>44</sup>.

5.4. The importance of these opinions and particularly Van den Ende's contributions cannot be underestimated. In the first place, these opinions were written by practising lawyers who dealt with the law as it was applied in practice. In this

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42 He relied on article 8 of the Amsterdam Ordonnance of 1598, article 15 of the Middelburg Ordonnance of 1600, articles 12 and 13 of the Rotterdam Ordonnance of 1604, articles 42-44 of the Ordonnance de la Marine of 1681, De Groot's *Inleidinge*, 'en andere meer'.

43 '... dat de vrygevinge van schip en goed gansch geene veranderinge kan maken in het Abandonnement en den afstand'; Barels, op cit, 88.

44 '... overmits door middel van dat Abandonnement en van dien afstand B. als Assurateur en (sic) ontwyffelbaer regt van eigendom heeft verkregen'; Barels, op cit, 88. As authority for the statement Van den Ende referred to article 60 of the Ordonnance de la Marine of 1681, *Decisio 101* of the *Rotae Genoa* and *Consultatie 52* of the *Nederlands Advysboek*.

light their reliance on mercantile custom and on foreign authorities demonstrates that the rules of insurance law of the time were not peculiar to any particular country or town. They were generally the same everywhere and therefore authorities were applied across national and town boundaries<sup>45</sup>.

5.5. Van den Ende also gave positive proof of the existence of Rule 9, namely that the effect of the abandonment in Roman-Dutch law was that ownership of the abandoned ship or goods was acquired by the insurer. Until the three *advysen* referred to there was no direct evidence of the existence of this principle in the Roman-Dutch customary law, nor in any of the Dutch insurance *ordonnances* passed from 1563 to 1744, nor in De Groot and Groenewegen's works.

However, that this rule had been part of the Roman-Dutch law of marine insurance was ultimately acknowledged by its incorporation in the codification of Dutch marine insurance law in the *Wetboek van Koophandel* of 1838 ('the *WvK*')<sup>46</sup>.

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The reliance on the *Ordonnance de la Marine* and the decisions of the *Rotae Genoa* give an idea of the extent to which this was done. See also the reference to Straccha in *Advys 13* at 66.

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Article 678 of the *Wetboek van Koophandel* of 1838, ('the *WvK*'). See also the discussion of the subject of transfer in Chapter 6 *supra*, para 4.



6. GERLACH SCHELTINGA

6.1. Notes taken by Scheltinga's students in 1755 and 1756 during his lectures on De Groot's *Inleidinge* were recently published in South Africa<sup>47</sup>. Scheltinga offered the following comments:

6.1.1. The reference in *Inleidinge* 3.24.10 to Europe or Turkey was not to be taken literally, but meant sailings in that general area<sup>48</sup>. The presumption of loss in respect of the missing ship, Scheltinga pointed out, operated in relation to the ship as well as the goods carried on her at the time although the ordonnances only mentioned the ship<sup>49</sup>. This clarification is important because there might otherwise have been a lacuna in our understanding of the law.

6.1.2. With regard to *Inleidinge* 3.24.13 Scheltinga pointed out that it was uncertain exactly what was meant by innavigable because the assured was also

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47 *Scheltinga se 'Dictata' oor Hugo de Groot se Inleidinge tot de Hollandsche Rechtsgeleerdheid*, published by De Vos and Visagie, (1986).

48 The Middelburg Ordonnance of 1600 added the words '*of daaromtrent*', and the Rotterdam Ordonnance even added '*of die eylanden van Canarien en andere daaromtrent*'. He also referred to article 29 of the Amsterdam Ordonnance of 1744 in this regard. He further mentioned that the news had to be received at the place of sailing and not elsewhere, again relying on the same article.

49 He thus confirmed and amplified Rule 5.

allowed to abandon if the ship became unfit to complete the voyage. He left this question unresolved<sup>50</sup>.

7. WILLEM SCHORER

7.1. Schorer's 1767 contribution<sup>51</sup> on the relevant sections of De Groot's *Inleidinge* consisted of two items<sup>52</sup>. He pointed out in relation to a footnote added by Groenewegen to *Inleidinge* 3.24.10 that Groenewegen had mistakenly referred to article 15 of the Amsterdam Ordonnance instead of article 5<sup>53</sup>. He also pointed out with reference to *Inleidinge* 3.24.12 that the assured could claim security from the insurer not only in the case mentioned by De Groot, but also in the event of one of the insurers being suspected of being insolvent<sup>54</sup>.

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50 See in this regard the discussion of Van der Keessel's contribution *infra*.

51 *Inleiding tot de Hollandsche Rechtsgeleerdheid beschreven By Hugo de Groot, bevestigd met Plakaten, ens, door Mr Simon van Groenewegen van der Made, nu met Latynsche aantekeningen uitgebreidt door Mr Willem Schorer, (1767).*

52 By the time of Schorer's comments the 1721 and 1744 ordonnances had been passed in Rotterdam and Amsterdam respectively, but Schorer did not refer to them.

53 Schorer's note on *Inleidinge* 3.24.10.

54 As authority for this last statement he relied on Heineccius; *Elementa Juris Germanici tum veteris, tum hodierni*, (1736 - 37), Vol II, Title 15, para 440. However, this principle seems to derive from insolvency law rather than from insurance law, and would be equally applicable to other debts.

8. JOHANNES VOET

- 8.1. Voet dealt with neither the principles of insurance nor with those of abandonment in his work, but mentioned some sources on the subject which makes it clear that sources from the European *jus commune* of marine insurance as well as the *Ordonnance de la Marine* of 1681 were regarded as sources of the law of Holland<sup>55</sup>. Voet's contribution lies therein that he confirmed the validity of the method adopted by Van den Ende, namely to apply the principles enunciated by the *Ordonnance de la Marine* of 1681 and the ancient writers Santerna and Straccha.

9. CORNELIS VAN BYNKERSHOEK

- 9.1. Bynkershoek's *Quaestiones Juris Privati*<sup>56</sup> has been described as the most important of all the contributions made by the Dutch writers on the Roman-Dutch law of insurance<sup>57</sup>. The main sources relied upon by him were the Spanish and local

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55 *Commentarius ad Pandectas*, (1698-1704), 22.2.3. This work was 'n in *besonderhede uitgewerkte kommentaar*', according to De Wet, *op cit*, 154. Apart from the Spanish and local ordonnances Voet mentioned the *Ordonnance de la Marine* of 1681 and Santerna and Straccha.

56 (1744).

57 Van Niekerk, 'Enkele bibliografiese gegewens oor Cornelis van Bynkershoek en die Romeins-Hollandse versekeringsreg', (1988) 51 *THRHR* 26, 28.

ordonnances and the collections of opinions and decisions which existed at that time. Abandonment is dealt with in only one of the chapters of *Quaestiones Juris Privati*, but the legal principles were not discussed there as the case referred to by him turned on the facts<sup>58</sup>. The ship had been driven onto the beach by strong winds. The master sold her equipment and furniture<sup>59</sup> at the place where she had been shipwrecked<sup>60</sup> and abandoned the ship itself<sup>61</sup>. The insurer argued that she could have been freed, but the court found that there was sufficient evidence to the contrary<sup>62</sup>.

10. DIONYSIUS VAN DER KEESSEL<sup>63</sup>

10.1. Van der Keessel's *Theses Selectae*<sup>64</sup> was published in 1800, shortly before the Cape of Good Hope was

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58 *Quaestiones Juris Privati*, (1744), 4.14.

59 'instrumentibus'.

60 'in loco naufragii'.

61 'navem ipsam derelinquit'. The abandonment referred to in this passage does not refer to the abandonment of the ship by the assured to the insurer but the physical abandonment of the ship by the master and crew, who gave the ship up as beyond saving.

62 This case was subsequently referred to in *De Pass v Commercial Marine Insurance Co* (1857) 3 Searle 46. See Chapter 18 *infra*.

63 Van der Keessel was a student of Scheltinga's; *De Wet*, *op cit*, 172.

64 *Theses Selectae Juris Hollandici et Zelandici*, (1800).

to become a British possession and the law in the Netherlands was to be codified. It took the form of a commentary on De Groot's *Inleidinge*, with reference to the law which was current at the end of the nineteenth century. Van der Keessel's lectures to students also survived, but were only published recently. His *Praelectiones*<sup>65</sup> was also in the form of a commentary on De Groot's *Inleidinge*, but he also referred to his own *Theses Selectae*. The method adopted by Van der Keessel made it inevitable that his works confirmed the rules of abandonment identified earlier and confirmed by De Groot. Nevertheless, by the time of Van der Keessel's writing and lectures the Rotterdam Ordonnance of 1721 and the Amsterdam Ordonnance of 1744 as amended had also been in force for a considerable period. Apart from his useful elucidation of many of the details of the old ordonnances, Van der Keessel's contribution allows one to determine to what extent the law expounded by De Groot had changed.

- 10.2. With regard to *Inleidinge* 3.24.10 and the case of the missing ship, Van der Keessel offered a number

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*Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam*, (published in Amsterdam and Cape Town 1961-1967).

of comments<sup>66</sup>:

- 10.2.1. He argued in the first place that the period of a year and a day actually meant a year and six weeks, by virtue of the provisions of article 67 of the Rotterdam Ordonnance of 1721 and article 69 of the Dordrecht Ordonnance of 1775.
- 10.2.2. Van der Keessel added that no news must have been received at the port from where the ship sailed as well as at the port of destination.
- 10.2.3. He confirmed that in such an event there was a presumption that the ship was lost with the cargo and that the assured was entitled, after proper notification to the insurer, to relinquish the ship and goods to the insurer and to claim the sum insured after three months<sup>67</sup>.
- 10.2.4. Van der Keessel thereupon pointed out that the Amsterdam Ordonnance of 1744 had extended the area to include the Levant and the Archipel 'of *daaromtrend*' and that by way of an amendment

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*Praelectiones* 1461.

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The effect of the presumption is thus twofold: Firstly, it is presumed that the ship has been lost. Secondly, it is presumed that the cause of the loss was an insured peril. While this is nowhere expressly stated, this conclusion is the inevitable result of the fact that the insurer became liable to pay the sum insured when a proper abandonment followed the expiry of the relevant waiting period.

imported in 1756 Greenland and the Strait of Davis were included.

10.2.5. He pointed out that the amendment further provided that the assured could require the insurer to secure the sum insured by paying it to him or by paying it into court, but in such a case the assured was obliged to pay a  $\frac{1}{4}\%$  interest. If the ship should subsequently turn up unscathed in some or other port, the amount paid in by the insurer had to be repaid to him, together with 4% interest from the date of his initial payment to the date of repayment. If the ship should arrive safely after the prescribed period, the running of interest would be halted on the expiry of the relevant term, to which had to be added an additional three months, being the time the insurer in any event has within which to pay.

10.3. Van der Keessel mentioned the provision that the assured was entitled to tranship the goods at the risk of the insurer in the case of detention by a foreign people or unfitness of the ship for the voyage as a result of some serious injury<sup>68</sup>. He added that if the injury to the ship was of a less serious nature the assured ought to allow a short

time for the repair of the vessel<sup>69</sup>.

10.4. He also confirmed that the ship which had been insured and had been rendered totally unfit for navigation by some serious injury could at once be relinquished to the insurer<sup>70</sup>, but if the injury was not quite as serious, and the ship was capable of being repaired at a small cost, the assured was obliged to perform the repairs in accordance with the standard conditions of the policy of insurance<sup>71</sup>. However, if the ship was detained under an arrest, a period of six months or a year had to elapse before it could be relinquished to the insurer, who in the meantime was obliged give pledges or security for the loss<sup>72</sup>.

10.5. With reference to *Inleidinge* 3.24.13 Van der Keessel pointed out that the assured was entitled to abandon immediately where the insured ship

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He relied for these statements on article 8 of the Amsterdam Ordonnance of 1598, article 26 of the Amsterdam Ordonnance of 1744, article 15 of the Middelburg Ordonnance of 1600, article 13 of the Rotterdam Ordonnance of 1604, articles 53 and 54 of the Rotterdam Ordonnance of 1721 and article 55 of the Dordrecht Ordonnance of 1775.

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*Theses Selectae* 755; He relied on article 12 of the Rotterdam Ordonnance of 1604, article 62 of the Rotterdam Ordonnance of 1721 and article 64 of the Dordrecht Ordonnance of 1775.

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*Theses Selectae* 755. In this regard Van der Keessel relied on page 92 of the *Handvesten van Amsterdam, Tweede Vervolg*.

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*Theses Selectae* 755. This principle was established by article 26 of the Amsterdam Ordonnance of 1744, articles 65 and 66 of the Rotterdam Ordonnance of 1721 and articles 67 and 68 of the Dordrecht Ordonnance of 1775.



became totally unfit prior to completion of the voyage or if the ship or goods were captured by the enemy or pirates, and all hope to recover them consequently evaporated<sup>73</sup>.

10.6. In his *Praelectiones*<sup>74</sup> Van der Keessel explained *Inleidinge* 3.24.12 and 13 in more detail.

10.6.1. He pointed out that De Groot's paragraph 12 dealt with the case where the insured ship had landed in such danger that there was still a degree of hope that it could be saved. In such a case the insured was not entitled to abandon the ship or insured goods immediately, but was obliged to wait the prescribed period and had to give the insured notice of the incident<sup>75</sup>.

10.6.2. Further, the detention referred to was a detention by kings, princes and other lawful rulers and not those who were enemies of the state, because in the case of the former one would retain some hope that the ship may be recovered. He added that the

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73 *Theses Selectae* 755.

74 1465-1468.

75 He relied for this statement on articles 15 and 16, read with article 23 of the 1570 Ordonnance, the provisions of the first round of Dutch Ordonnances, as well as articles 26 and 27 of the Amsterdam Ordonnance of 1744, articles 53, 54, 64 to 66 of the Rotterdam Ordonnance of 1721 and articles 55, 56 and 66 to 68 of the Dordrecht Ordonnance of 1775.

position was the same for the ship which was detained prior to completion of the voyage and the one which was laid under detention after arrival at the port of destination, provided that the insurers were still at risk<sup>76</sup>.

10.6.3. Van der Keessel then explained the difference between unfitness to complete the voyage and innavigability in some detail. In the former case, he pointed out, the ship could not be abandoned forthwith because there was some hope that it could be repaired. In short, the damage to it was relatively minor. On the other hand, the ship was regarded as innavigable or '*onzeijlbaar*' or '*onnut ende onbekwaam om de gedestineerde reyse te doen*' or '*buiten staat om de gedestineerde reise te doen*', or '*innavigabel*'<sup>77</sup> when the defect of the ship was so serious that it was totally unable to sail at all, or at least unfit for the completion of the voyage for which it was destined<sup>78</sup>.

10.6.4. He then proceeded to explain that notice of the casualty had to be given to the insurer through a

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76 Van der Keessel relied in this regard on a distinction between the provisions of articles 12 and 13 of the Rotterdam Ordonnance of 1604 and article 14 thereof, and similarly between articles 53 and 64 of the Rotterdam Ordonnance of 1721.

77 Using the language of the various ordonnances.

78 At 1466-1467.

public person, the messenger of the Chamber of Insurance or a notary or similar public person, failing which the assured was obliged to compensate the insurer for the damage arising from his failure<sup>79</sup>. At Amsterdam this notice had to be given through the secretary or marshall of the Chamber of Insurance<sup>80</sup>. Van der Keessel explained<sup>81</sup> that this notification was required because the insurers had an interest in the news of loss or damage by virtue of the risk they bore. The notification had to be given to the majority of the insurers domiciled at the place where the contract was concluded, and had to be made through a public person who had to record the notice of what had occurred. Amsterdam had specific provisions with regard to this procedure, requiring the assured to advise the insurer of all tidings the assured has received with regard to any casualty, capture or arrest, and the assured had to provide copies of the letters bearing such tidings to him<sup>82</sup>. He added that this notice had

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79 *Theses Selectae* 758. This provision was provided by article 54 of the Rotterdam Ordonnance of 1721.

80 Article 36 of the Amsterdam Ordonnance of 1744 as amended by article 36 of the amending ordonnance of 1756.

81 *Praelectiones* 1472.

82 The 1756 amendments to the Amsterdam Ordonnance of 1744 provided that the notification and abandonment could no longer be served by notaries or brokers, but only through the secretary or messenger of the Chamber of Insurance, failing which the notice or abandonment would be invalid

to be given before the assured could abandon and claim compensation under the policy<sup>83</sup>.

- 10.7. Van der Keessel pointed out that the insurer had to pay the sum insured in three months in most places, but at Rotterdam and Dordrecht within a month<sup>84</sup>. The amount payable was that which was contracted for at the conclusion of the contract<sup>85</sup>. The amount to be paid was the total estimated value of the ship at the commencement of the insurance, in respect of which rule there existed an exception at Amsterdam<sup>86</sup> in terms of which the insured value of the ship was abated for depreciation as a result of a long and successful voyage<sup>87</sup>.

11. JOHANNES VAN DER LINDEN

- 11.1. The wide range of sources Van der Linden referred

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and a fine of 25 Guilders would be payable.

83 *Praelectiones*, 1468.

84 *Theses Selectae* 757.

85 *Praelectiones* 1471.

86 Article 33 of the Amsterdam Ordonnance of 1744.

87 The Amsterdam provision appears to be more easily reconcilable with the strict application of the indemnity principle than the rule that the value at the commencement of the voyage prevailed.

to in his *Koopmans Handboek*<sup>88</sup> include the 1563 and 1570 Ordonnances of Philip II of Spain, the 1744 Amsterdam Ordonnance (with its amendments), the 1721 Rotterdam Ordonnance, the 1775 Dordrecht Ordonnance, the 1600 Middelburg Ordonnance (with its 1719 amendments), the works of Pothier<sup>89</sup>, Émerigon<sup>90</sup>, Weskett<sup>91</sup>, Park<sup>92</sup>, Baldasseroni<sup>93</sup> 'en andern meer'<sup>94</sup>. He dealt with the main principles of abandonment as follows:

- 11.1.1. Van der Linden made it clear that the insurer's obligation to pay the sum insured was dependent upon the assured making an abandonment<sup>95</sup>.

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88 *Regtsgeleerd, Practicaal, en Koopmans Handboek*, (1806), ('*Koopmans Handboek*'), 4.6.1.

89 *Traité du Contrat d'Assurance*, (1768-1778).

90 *Traité des Assurances et des Contrats a la Grosse*, (1783).

91 *Complete Digest of the Theorie and Practice of Insurance*, (1781).

92 *System of the Law of Marine Insurances*, (1800 edition).

93 *Delle Assicurazioni Marittime Trattato*, (1786). The fact that Van der Linden regarded Baldasseroni as a source of the law on the subject tends to suggest that there will be no material differences between the Roman-Dutch law as explained by Van der Linden and Italian law. Baldasseroni's own work appears to be a comparative study. In the section dealing with abandonment (Vol II Part 6) he referred extensively to ordonnances, writers and cases emanating from England, France, Holland and Germany. Like many others of his time, including Park and Van der Linden, Baldasseroni appears to have regarded marine insurance principles as transcending national borders and legal systems.

94 De Wet, *op cit*, 88 said that Van der Linden had been influenced by Pothier and added that '(o)ns ou skrywers het nie gekroom om van die werke van die Franse praktykskrywers gebruik te maak nie.'

95 *Koopmans Handboek* 4.6.9.1.

- 11.1.2. If the ship perished completely ('geheel en al vergaan'), or was damaged to such an extent that the assured could claim the full amount of the insurance, then the assured was obliged, before he could claim payment, to abandon the ship or goods and to relinquish them in favour of the insurer<sup>96</sup>. If the loss was certain and final, there was an immediate right to abandon<sup>97</sup>.
- 11.1.3. However, if there was still hope to recover the ship or goods the assured was obliged to wait for a period of six months or a year, (depending on the destination), after notice of the casualty had been given to the insurers before he could abandon and claim payment. In the meantime he was entitled to require security from the insurer<sup>98</sup>. In the case of detention in a foreign country or innavigability of the ship, the assured was allowed to tranship the cargo at the insurer's expense. If, however, the damage was small, he could not do so but had to take the necessary time

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96 *Koopmans Handboek* 4.6.8.2; Van der Linden relied here on Pothier, *op cit*, 3.1.1.3 and article 60 of the Rotterdam Ordonnance of 1721.

97 *Koopmans Handboek* 4.6.8.2. For this statement Van der Linden relied on De Groot, *Inleidinge* 3.24.13, article 62 of the Rotterdam Ordonnance of 1721 and the equivalent article in the Dordrecht Ordonnance of 1775.

98 *Koopmans Handboek* 4.6.8.2. As authority Van der Linden relied on De Groot, *Inleidinge* 3.24.12, article 26 of the Amsterdam Ordonnance of 1744, articles 64 to 66 of the Rotterdam Ordonnance of 1721, articles 67 and 68 of the Dordrecht Ordonnance of 1775, as well as Van der Keessel, *Theses Selectae*, 755.

to repair the ship<sup>99</sup>.

- 11.1.4. If no news were received of the ship or goods they were considered totally lost and the assured became entitled to abandon them after a year and six weeks if the destination was not beyond Europe or Turkey, and after two years in more distant sailings<sup>100</sup>.
- 11.1.5. The method by which the abandonment was made was through written notice served by the 'Bode van Zeezaaken' on the insurer<sup>101</sup>.
- 11.1.6. The assured was obliged to advise the insurer forthwith, 'dadelijk en zonder verwijl', of all tidings with regard to the ship and goods and on breach was liable to pay such damages as the insurer suffered<sup>102</sup>.

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*Koopmans Handboek* 4.6.8.2. Van der Linden again relied on the new ordonnances, (article 26 of the Amsterdam Ordonnance of 1744, articles 53 and 54 of the Rotterdam Ordonnance of 1721 and article 55 of the Dordrecht Ordonnance of 1775), for this statement, but added article 15 of the Middelburg Ordonnance of 1600 as a reference.

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*Koopmans Handboek* 4.6.9.1. The period of a year and six weeks was peculiar to Rotterdam and Van der Linden relied on article 67 of the Rotterdam Ordonnance of 1721 for this statement.

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For this proposition Van der Linden relied on article 60 of the Rotterdam Ordonnance of 1721.

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*Koopmans Handboek* 4.6.8.1. As authority for this statement Van der Linden relied on De Groot, *Inleidinge* 3.24.14 and article 36 of the Amsterdam Ordonnance of 1744, as amended in 1756.

11.1.7. The assured who made an abandonment had to declare to the insurer all other insurances he had taken on the ship or goods and also any loans he had taken on bottomry. This requirement must have been part of the European *jus commune* which still applied in Holland as the sources Van der Linden relied on were not strictly Roman-Dutch<sup>103</sup>.

12. THE PRINCIPLES OF ABANDONMENT IN THE ROMAN-DUTCH LAW OF THE SEVENTEENTH AND EIGHTEENTH CENTURIES

12.1. The basic principles of abandonment which were identified in the previous chapter with reference to mercantile custom, the Spanish ordonnances of 1563 and 1570 and the Dutch ordonnances may now be re-examined in order to ascertain to what extent they have been confirmed or qualified by the institutional writers discussed in this chapter. This exercise ought to produce the principles of abandonment in the Roman-Dutch law of the seventeenth and eighteenth centuries which became the law of South Africa. At the same time it will be indicated whether the same principles applied in Germany, France and England at that time and to what extent the relevant principles were taken up

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*Koopmans Handboek* 4.6.8.3. This provision is not contained in any of the Dutch ordonnances but in this regard Van der Linden relied on Pothier, *op cit*, 3.1.1.4.



in the *WvK* in 1838. This process ought to allow one to determine to what extent the Roman-Dutch principles of abandonment were the same as those of neighbouring maritime countries.

12.2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON

12.2.1. RULE 1: *The assured was entitled but not obliged to abandon when the circumstances permitted an abandonment.*

De Groot, Van der Keessel and Van der Linden did not expressly state that abandonment was a right of the assured rather than an obligation but treated it as a right. This approach was in consonance with the *Guidon de la Mer*<sup>104</sup>, the customs of the Antwerp Exchange<sup>105</sup>, the *Ordonnance de la Marine* of 1681<sup>106</sup>, the

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104 Article 1 of Chapter VII where it was put as follows: '*Le delais n'est de nécessité, mais depend de la volonté du marchand chargeur ...*'. ('The abandonment is not compulsory but depends on the wish of the cargo owner ...')

105 Article 14, which indicates equally that abandonment was a right, not a duty: '*de gheassureerde (vermach) het gheassureert schip oft goed t'abandoneren ...*'. See also article 17 of the Genoa Ordonnance of 1610, (Magens, *An Essay on Insurances*, (1755), Vol II, 66), where it was put in clear terms that the assured had an election between an average claim and an abandonment claim: '*The assured may ... according to his own choice, either demand the full assurance, and abandon ... or else he may make up an account of the damage ...*' (My underlining.)

106 Article 46: '*Abandonment may be made ...*'; See also Émerigon, *op cit*, 668, (Meredith edition); Pothier, *op cit*, para 128.

Königsberg Ordonnance of 1730<sup>107</sup>, and English common law<sup>108</sup> and was taken up in the *WvK*<sup>109</sup>.

12.2.2. RULE 2(a): *If the assured elected to abandon, he was allowed to recover the full amount of the insurance provided he first made a proper abandonment of the insured ship or goods, as the case may be, to the insurer.*<sup>110</sup>

In most instances this rule is merely implied, for example by De Groot<sup>111</sup>, but Van der Linden<sup>112</sup> and Van den Ende<sup>113</sup> expressly referred to it as a requirement for a claim for the full amount of the insurance. The requirement of an abandonment is so obvious in all the relevant statutory

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107 Article 22 of the ordonnance used the phrase '*... is authorised to give up the said Ship or Goods, and to abandon it...*', (Magens' translation.) See Magens, *An Essay on Insurances*, 1755, Vol II, 192.

108 Malynes, *Consuetudo, vel, Lex Mercatoria*, (1685), Chapter XXV, 115; *Goss v Withers* 2 Burr 683; Marshall, *A Treatise on the Law of Insurances*, 5th ed, (1865), Bk I, 478.

109 Article 663 expressed it permissively, namely that the assured ship or goods '*kunnen geabandonneerd worden ...*'

110 Articles 14 and 15 of the Antwerp customs; article 23 of the 1570 Ordonnance of Philip II; articles 5,8 and 23 of the Amsterdam Ordonnance of 1598; articles 5, 8 and 26 of the Middelburg Ordonnance of 1600; article 15 of the Rotterdam Ordonnance of 1604; article 60 of the Rotterdam Ordonnance of 1721.

111 *Inleidinge* 3.24.12 and 13.

112 *Koopmans Handboek* 4.6.8.2.

113 *Advys 16* in Barel's, *op cit*, 86-87.

provisions<sup>114</sup> and in the English common law<sup>115</sup> that it is seldom expressly referred to. The effect of articles 679 and 690 of the *WvK* was that the assured had to make an abandonment before the insurer became obliged to pay the full amount of the insurance. That only the insured ship or cargo could be abandoned is also confirmed by the subsequent provisions article 663(1) of the *WvK*<sup>116</sup>.

- 12.2.3. This rule has to be qualified as a result of the effect of the abandonment as set out in Rule 9. The abandonment divests the assured of his ownership of the ship or goods and vests it in the insurer. Such a divestment can clearly not be made effectively by any person other than the assured or his authorised agent. By the same token, the insurer must at least know that ownership is being vested in him when it occurs, and the abandonment therefore has to be to the insurer or his authorised agent. The following subrule must therefore be added:

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<sup>114</sup> See for example article 46 of the *Ordonnance de la Marine* of 1681 and articles 22, 25 and 27 of the *Königsberg Ordonnance* of 1730.

<sup>115</sup> *Magens, op cit*, Vol II, 174; *Marshall, op cit*, (1865), Bk I, 443.

<sup>116</sup> See Chapter 6 para 2.4. *supra*.

12.2.4. RULE 2(b): *The abandonment had to be made by the assured or his duly authorised agent to the insurer or his duly authorised agent.*

There is also authority for this principle in the English common law<sup>117</sup> and Dutch case law<sup>118</sup>.

12.2.5. RULE 3(a): *In the case of capture of the ship or goods insured by the enemy or by pirates, in the case of innavigability ('onseylbaarheid'), and in any other case where the ship or goods were lost for certain without hope of recovery, the assured was entitled to make an immediate abandonment.*<sup>119</sup>

This rule was confirmed by De Groot<sup>120</sup>, Groenewegen<sup>121</sup>, Van den Ende<sup>122</sup>, Van der Keessel<sup>123</sup>, who explained it in detail<sup>124</sup>, and

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117 Marshall, *op cit*, (1865), Bk I, 486; Rankin v Potter (1873) 6 AC 83 (HL).

118 De *Allgemeine Versicherungs Aktien Gesellschaft 'Hansa' v De Vennootschap van Koophandel, onder de firma P Onnes en Zoon* 1924 NJ 824 (Hoge Raad).

119 Antwerp customs, article 14; article 25 of the Amsterdam Ordonnance of 1598; article 36 of the Middelburg Ordonnance of 1600; article 15 of the Rotterdam Ordonnance of 1604; article 63 of the Rotterdam Ordonnance of 1721; article 28 of the Amsterdam Ordonnance of 1744.

120 *Inleidinge* 3.24.13.

121 By his footnotes to *Inleidinge* 3.24.13.

122 *Advys* 14 in Barels, *op cit*, 70.

123 *Theses Selectae* 755.

Van der Linden<sup>125</sup>. The principle of an immediate abandonment was also present in the *Ordonnance de la Marine*<sup>126</sup>, the Königsberg *Ordonnance* of 1730<sup>127</sup> and the English common law<sup>128</sup>, and was further taken up in article 663 read with article 668 of the *WvK*.

12.3. RULE 3(b): *If the goods insured were of such a nature that they would be likely to perish with the mere effluxion of time, detention by a foreign ruler (not an enemy) and unfitness of the ship to continue on the contemplated voyage gave rise to an immediate right to abandon.*<sup>129</sup>

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124 *Praelectiones*, 1466 et seq.

125 *Koopmans Handboek* 4.6.8.2.

126 Article 43.

127 Article 22 was reminiscent of the Dutch *ordonnances* where it provided that: 'The Ship or Goods insured being entirely lost, without any Hopes of recovering them, or the Ship proving unfit for farther service, and proper Notice having been given of this to the Insurer, the Person insured is authorised to give up the said Ship or Goods, and to abandon it ...' One can only speculate to what extent Magens compilation of the Dutch *ordonnances* together with the Königsberg *Ordonnance* influenced the development of the English approach, which allows an abandonment without strict reference to the exact nature of the event. It would appear at any rate that English, Roman-Dutch and German law (as expounded by the Königsberg *Ordonnance*) were all to the effect that the effect of the event was all important, rather than the precise cause, and in that respect differed from French law. The French approach was to prevail, however, in the subsequent codification process on the continent so that Dutch and German law parted from English law and became similar to French law in this respect. This development occurred, however, after the Roman-Dutch law had been transplanted to the Cape of Good Hope.

128 Magens, *op cit*, Vol II, 174.

129 Article 16 of the 1570 *Ordonnance* of Philip II of Spain; article 9 of the Amsterdam *Ordonnance* of 1598; article 16 of the Middelburg *Ordonnance* of 1600; article 12 of the Rotterdam *Ordonnance* of 1604; article 63 of the Rotterdam *Ordonnance* of 1721; article 27 of the Amsterdam *Ordonnance* of 1744.

The rule was confirmed by De Groot<sup>130</sup>, Groenewegen<sup>131</sup>, but Van der Keessel and Van der Linden were silent on the subject, probably because they regarded it as obvious that the goods were 'lost for certain and without hope of recovery' in such a case and therefore fell within the general rule. Similar principles applied under the Königsberg Ordonnance of 1730<sup>132</sup> and in English common law<sup>133</sup>.

- 12.3.1. RULE 4(a): *In the case of detention by foreign rulers who were not enemies and in the case of supervening unfitness or inability of the ship to complete the contemplated voyage, the assured was entitled to abandon the insured ship or goods, as the case may be, after the expiry of a prescribed period, which ran from the date of the notification referred to in Rule 6.*<sup>134</sup>

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130 *Inleidinge* 3.24.13.

131 By his footnotes to *Inleidinge* 3.24.12.

132 Article 26.

133 Under the early common law the period within which the assured could abandon was shortened in respect of perishables; see Magens, *op cit*, Vol II, 176.

134 The requirement of notice was dealt with separately; article 23 of the 1570 Ordonnance of Philip II of Spain; article 8 of the Amsterdam Ordonnance of 1598; article 15 of the Middelburg Ordonnance of 1600; articles 12 and 13 of the Rotterdam Ordonnance of 1604; article 64 of the Rotterdam Ordonnance of 1721; article 26 of the Amsterdam Ordonnance of 1744.

The rule was confirmed by De Groot<sup>135</sup>, Groenewegen<sup>136</sup>, Van der Keessel<sup>137</sup> and Van der Linden<sup>138</sup>. Van der Keessel pointed out that the reference to foreign rulers was to lawful rulers<sup>139</sup> and that the right to abandon arising from an arrest or detention continued to exist if the ship was arrested or detained at the port of destination while the insurance was still in effect<sup>140</sup>. These qualifications do not appear to require an amendment of the rule as phrased, however. The *Ordonnance de la Marine*<sup>141</sup>, the Königsberg *Ordonnance* of 1730<sup>142</sup> and the English common law<sup>143</sup> recognized that there were cases where the loss was not as yet certain and likewise required the assured to wait for a prescribed period before he could abandon. This principle was

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135 *Inleidinge* 3.24.12.

136 By his footnotes to *Inleidinge* 3.24.12.

137 *Theses Selectae* 755 and *Praelectiones*, 1465 et seq.

138 *Koopmans Handboek* 4.6.8.2.

139 *Praelectiones*, 1466.

140 *Loc cit.*

141 Articles 49 and 50.

142 Article 25.

143 *Magens*, op cit, Vol II, 175, where the early common law was dealt with. On general principle, the English common law did not allow the assured to abandon until there was constructive total loss, which implies that the ship or goods could not be recovered within a reasonable time.

also taken up in the *WvK*<sup>144</sup>.

- 12.4. RULE 4(b): During the relevant waiting period the assured was entitled to tranship the goods at the expense and risk of the insurer. The insurer was entitled to tranship himself, if the assured did not do so, in which event the insurer was liable only for the costs of transhipment and the actual damage suffered in respect of the cargo as a result of the arrest or unfitness<sup>145</sup>.

The rule was confirmed by De Groot<sup>146</sup>, Groenewegen<sup>147</sup>, Van der Keessel<sup>148</sup> and Van der Linden<sup>149</sup> and also applied in the early English common law<sup>150</sup>.

- 12.4.1. RULE 4(c): During the relevant period the assured was entitled to demand security for payment of the

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144 Article 668.

145 Article 8 of the Amsterdam Ordonnance of 1598; article 15 of the Middelburg Ordonnance of 1600; article 13 of the Rotterdam Ordonnance of 1604.

146 *Inleidinge* 3.24.12.

147 By his footnotes to *Inleidinge* 3.24.12.

148 *Theses Selectae* 754, where he further pointed out that the assured was obliged to delay the voyage for a short while rather than tranship if the damage was minor and could be repaired expeditiously.

149 *Koopmans Handboek* 4.6.8.2.

150 Mogens, *op cit*, Vol II, 176.



*insured amount from the insurer.*<sup>151</sup>

The rule was confirmed by De Groot<sup>152</sup>, Groenewegen<sup>153</sup>, Schorer<sup>154</sup>, Van der Keessel<sup>155</sup> and Van der Linden<sup>156</sup>, but was not taken up in the WvK. While the Königsberg Ordonnance contained a similar provision<sup>157</sup>, the requirement that the insurer should provide security for the claim appears to have fallen into desuetude by the end of the eighteenth century.

12.4.2. RULE 5: *The ship of which no news was received at both the port of sailing and of destination was presumed to be lost after the expiry of a prescribed period, which depended on the ship's destination, and the assured was allowed to claim the full amount of the insurance in respect of the*

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151 Article 8 of the Amsterdam Ordonnance of 1598; article 15 of the Middelburg Ordonnance of 1600; article 12 of the Rotterdam Ordonnance of 1604; article 65 of the Rotterdam Ordonnance of 1721.

152 *Inleidinge* 3.24.12.

153 By his footnotes to *Inleidinge* 3.24.12.

154 In his notes on *Inleidinge* 3.24.12, where he added that security could also be had if it was suspected that one of the insurers was insolvent. This provision more properly falls within the ambit of the law of insolvency. In any event, none of the subsequent writers incorporated this provision in their work.

155 *Theses Selectae* 755.

156 *Koopmans Handboek* 4.6.8.2.

157 Article 25. See Magens, *op cit*, Vol II, 192.

*ship upon making an abandonment.*<sup>158</sup>

The rule was confirmed by De Groot<sup>159</sup>, Groenewegen<sup>160</sup>, Scheltinga<sup>161</sup>, Schorer<sup>162</sup>, Van der Keessel<sup>163</sup> and Van der Linden<sup>164</sup>. The time limits were dependant upon the state of navigation and the means of communication of the time. There were therefore amendments to the existing legislation from time to time which took account of new destinations and circumstances. The underlying ordonnances were also worded in such a fashion that the destinations were not circumscribed precisely. There appeared to be a distinction only between intermediate voyages on the one hand and long voyages on the other. The time which had to elapse before the presumption would operate logically depended on the length of the voyage.

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- 158 Article 7 of the Antwerp customs; article 5 of the Amsterdam Ordonnance of 1598; article 12 of the Middelburg Ordonnance of 1600; article 14 of the Rotterdam Ordonnance of 1604; article 67 of the Rotterdam Ordonnance of 1721; article 29 of the Amsterdam Ordonnance of 1744.
- 159 *Inleidinge* 3.24.10.
- 160 In his footnotes to *Inleidinge* 3.24.10.
- 161 *Dictata*, ad *Inleidinge* 3.24.10.
- 162 In his notes on *Inleidinge* 3.24.10.
- 163 *Praelectiones* 1461.
- 164 *Koopmans Handboek* 4.6.9.1.

The amended provision that no news should have been received at the port of destination either took account of the fact that there were more voyages than earlier with an increasing prospect of news being brought back from the port of destination by other ships. The rule that the assured could require security for his claim from the insurer after half the period had elapsed appears to have been peculiar to Amsterdam.<sup>165</sup>.

The missing ship provision is ancient in heritage<sup>166</sup> and applied under the *Guidon de la Mer*<sup>167</sup>, the *Ordonnance de la Marine* of 1681<sup>168</sup>, the Königsberg *Ordonnance* of 1730<sup>169</sup>, and in English common law<sup>170</sup>. The missing ship provisions of the various Dutch local *ordonnances* were consolidated in article 667 of the *WvK*, where periods of six, twelve and eighteen months respectively were introduced for sailings to and from European ports, those in the Atlantic and

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165 Van der Keessel, *Praelectiones*, 1461.

166 Dating back to article 15 of the Barcelona *Ordonnance* of 1435.

167 Article 12.

168 Article 48.

169 Article 27. See Magens, *op cit*, Vol II, 193.

170 Magens, *op cit*, Vol II, 177; Park, *op cit*, 71-72; Marshall, *op cit*, (1865), Bk I, 387.

those further away<sup>171</sup>.

12.5. THE SUBSIDIARY RULES OF ABANDONMENT

12.5.1. RULE 6(a): *The assured was obliged to notify the majority of the insurers who were domiciled at the place where the contract was concluded of any casualty, arrest or loss affecting the insured ship or goods. The notification had to be made through a broker or public person who had to keep a record of the notification given. Where the abandonment could not be made forthwith, time did not begin to run until this notification had been served.*<sup>172</sup>

The principles of this rule were confirmed by De Groot<sup>173</sup>, Groenewegen<sup>174</sup>, Van der Keessel<sup>175</sup> and Van der Linden<sup>176</sup>. They also applied under

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171 See Chapter 6 para 2.5.9 *supra*. These periods were later reduced by the standard policy of the Amsterdam Exchange.

172 Article 28 read with article 8 of the Amsterdam Ordonnance of 1598; article 21 read with article 15 of the Middelburg Ordonnance of 1600; article 16 of the Rotterdam Ordonnance of 1604; article 26 read with article 36 (as amended) of the Amsterdam Ordonnance of 1744. The officer entrusted with this task differed from town to town, but was a public official.

173 *Inleidinge* 3.24.14.

174 His footnotes to *Inleidinge* 3.24.14.

175 *Theses Selectae* 758 and *Praelectiones*, 1472.

176 *Koopmans Handboek* 4.6.8.1.

the Königsberg Ordonnance of 1730<sup>177</sup> and even in the early English common law<sup>178</sup>, but do not appear to have survived in English law. The principle was slightly different under the *Ordonnance de la Marine* of 1681<sup>179</sup>. The rule was also taken up in article 673 of the *WvK* which made it clear that the duty existed only in respect of abandonment cases and not to other losses.

12.5.2. It was later provided expressly that the assured who failed to give such notice would be liable for such damages as may be suffered by the insurer as a result of the breach<sup>180</sup>. Van der Keessel<sup>181</sup> and Van der Linden<sup>182</sup> confirmed the stipulation with regard to damages. On the general principles of the law of contract the breach of the obligation to disclose news of a casualty or a threat to the insurer at the earliest opportunity should give rise to a liability for damages. The rule may therefore be qualified by the statement:

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177 Article 21. See Magens, *op cit*, Vol II, 191.

178 Magens, *op cit*, Vol II, 174.

179 Article 42 provided no penalty for a failure to give the notification or a late notification; see Émerigon, *op cit*, (Meredith edition), 679.

180 The provision for damages emanated from article 54 of the Rotterdam Ordonnance of 1721, was repeated in article 36 of the Amsterdam Ordonnance of 1744 as amended in 1756.

181 *Theses Selectae* 758 and *Praelectiones*, 1472.

182 *Koopmans Handboek* 4.6.8.1.

- 12.5.3. RULE 6(b): *The assured was held liable for any damages suffered by the insurer as a result of his failure to give such notice.*

The liability for damages was also provided for in article 673 of the WvK.

- 12.5.4. RULE 7(a): *The abandonment had to be made in writing and had to be served formally through a public official whose duties included the service of such formal documents and processes.*<sup>183</sup>

French law did not have such a requirement, but the practice at Marseilles was for an entry to be made in a special register<sup>184</sup>. In the English common law no formality was required and the abandonment could be made orally or in writing<sup>185</sup>. Articles 678 and 680(1) of the WvK also obliged the assured to give formal notice of abandonment through service by 'exploit' served by a 'deurwaarder'<sup>186</sup>.

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183 Article 8 of the Amsterdam Ordonnance of 1598; article 15 of the Middelburg Ordonnance of 1600; article 15 of the Rotterdam Ordonnance of 1604; article 61 of the Rotterdam Ordonnance of 1721; Article 36 of the Amsterdam Ordonnance of 1744 as amended in 1756. Who this official was differed from town to town.

184 Émerigon, *op cit*, (Meredith edition), 679.

185 *Parmeter v Todhunter* (1808) 1 Camp 541; Marshall, *op cit*, (1865), Bk I, 485.

186 See Chapter 6 para 3.1 *supra*.

12.5.5. Van den Ende expressed the opinion that a subsequent recovery of the ship or goods had no effect on the assured's right to claim the insured amount, nor on the transfer of ownership<sup>187</sup>. The abandonment fixed the parties' rights and obligations with final effect, and the rule therefore has to be amplified by:

12.5.6. RULE 7(b): *The parties' rights and obligations were determined on the facts as they were on the date when the abandonment was made.*

This principle was established on the authority of Van den Ende's opinion<sup>188</sup> and accorded with French law<sup>189</sup>. Article 679 of the *WvK* preserved this principle. English law differed in that the circumstances as at the date when suit was brought determined whether there was a right to abandon or not<sup>190</sup>.

12.5.7. According to Van den Ende the abandonment was

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187 *Advys* 24, at 71, read with *Advys* 23, at 130 and *Advys* 16, at 88 in *Barels*, *op cit*.

188 *Supra*.

189 Article 45 of the *Ordonnance de la Marine* entitled the assured to work for the recovery of the ship or goods without prejudice to his right to abandon.

190 *Hamilton v Mendes* 2 Burr 1210; *Naylor v Taylor* 9 B & C 718; *Park*, *op cit*, 165, 181-183; *Marshall*, *op cit*, (1865), Bk I, 454-455.

proportional to the extent of the insurance. The abandonment therefore had to extend to the whole interest which was subject to the insurance<sup>191</sup>. The rule is therefore qualified by the principle that:

12.5.8. RULE 7(c): *The abandonment could not be partial.*

This principle applied under the *Ordonnance de la Marine* of 1681<sup>192</sup>, the Königsberg *Ordonnance*<sup>193</sup>, in the English common law<sup>194</sup>, and was taken up in article 677(1) of the *WvK*<sup>195</sup>.

12.5.9. Since the abandonment had the effect of divesting the assured so effectively of ownership that it could transfer to the insurer without further ado, the abandonment could not be made conditionally. This principle imposed a further rule namely:

12.5.10. RULE 7(d): *The abandonment could not be made conditionally.*

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191 *Advys* 16.

192 Article 47.

193 Article 24. See Magens, *op cit*, Vol II, 192.

194 Magens, *op cit*, Vol II, 175; Park, *op cit*, 162; Marshall, *op cit*, (1865), Bk I, 486-487.

195 See Chapter 6 para 3.7 *supra*.



The rule applied in French law<sup>196</sup> as well as the English common law<sup>197</sup> and was taken up in article 677(1) of the *WvK*.

12.5.11. Van der Linden mentioned another principle, namely that the assured, when making the abandonment, had to declare all other insurances he had taken on the insured ship or goods as well as any loans on bottomry that he had taken on them<sup>198</sup>. This principle is not referred to by any of the other Roman-Dutch authors, but appears to have been part of the underlying common law. It was contained in the *Ordonnance de la Marine* of 1681<sup>199</sup> and the English common law<sup>200</sup>. The rule can be stated as follows:

12.5.12. RULE 7(e): *When making the abandonment the assured had to declare to the insurer all other insurances taken by him on the ship or goods, as well as any loans on bottomry he had taken on the security of the ship or goods insured.*

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196 Émerigon, *op cit*, (Meredith edition), 684.

197 Marshall, *op cit*, (1865), Bk I, 487.

198 *Koopmans Handboek* 4.6.8.3.

199 Article 53.

200 Magens, *op cit*, Vol II, 176.

The purpose of the rule was to enable the insurer to determine the exact extent of his own rights after the abandonment, to pursue those rights in relation to the abandoned effects as well as determine his position in relation to third parties such as possible co-insurers and mortgagees. The principles of this rule were taken up in article 675 of the *WvK*<sup>201</sup>.

12.6. THE CONSEQUENCES OF THE ABANDONMENT

12.6.1. RULE 8: *The insurer was obliged to pay the sum insured after the expiry of a prescribed period.*<sup>202</sup>

The rule was confirmed by De Groot<sup>203</sup>, Groenewegen<sup>204</sup>, Van der Keessel<sup>205</sup> and Van der Linden<sup>206</sup>. This principle applied under the *Guidon de la Mer*<sup>207</sup>, in French law

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201 See Chapter 6 para 3.5 *supra*.

202 Article 5 of the Amsterdam Ordonnance of 1598; article 12 of the Middelburg Ordonnance of 1600; article 15 of the Rotterdam Ordonnance of 1604; article 68 of the Rotterdam Ordonnance of 1721.

203 *Inleidinge* 3.24.13.

204 By his footnotes to *Inleidinge* 3.24.13.

205 *Theses Selectae* 757.

206 *Koopmans Handboek* 4.6.9.1.

207 Article 2.

thereafter<sup>208</sup>, under the Königsberg Ordonnance of 1730<sup>209</sup> and in English law<sup>210</sup>. Articles 679 and 690 of the *WvK* confirmed the principle and, in terms of article 680(2) of the *WvK*, interest ran in favour of the assured from the date upon which the insurer became obliged to make payment<sup>211</sup>. The amount recoverable upon an abandonment was abated, at Amsterdam, by any depreciation in the value during the voyage<sup>212</sup>.

- 12.6.2. RULE 9(a): *The effect of the abandonment was that the assured relinquished his rights in relation to the ship or goods insured in favour of the insurer, who acquired ownership of them by operation of law*<sup>213</sup>.

This rule was born out of the mercantile customs which applied throughout western Europe and in England during the seventeenth and eighteenth

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208 *Émerigon, op cit, (Meredith edition), 685.*

209 Articles 22, 25 and 27. See *Magens, op cit, Vol II, 192-193.*

210 *Magens, op cit, Vol II, 175.*

211 This principle, that interest runs in favour of the creditor from the date of *mora*, appears to be a general principle of the Roman-Dutch law rather than a peculiar principle of marine insurance law. See Chapter 6 para 4.6. *supra*.

212 *Van der Keessel, Praelectiones, 1471.*

213 *The Guidon de la Mer, Chapter VII, article 12; Barels, Advysen, 14, 16.*

centuries<sup>214</sup>. It was confirmed as being in force in Holland by being applied by De la Mine<sup>215</sup> and Van den Ende<sup>216</sup> and was taken up in article 678 of the WvK. It was expressly provided for in the *Ordonnance de la Marine* of 1681<sup>217</sup> and was part of the English common law<sup>218</sup>. Under the Königsberg *Ordonnance* the requirement was to the same effect, namely that the assured was '*obliged wholly to transfer the lost Ship or Goods to the Insurer.*'<sup>219</sup>

12.6.3. Van den Ende mentioned a further aspect of the abandonment which elaborates on the principle postulated namely that the abandonment operated as a transfer only to the extent of the insurance<sup>220</sup> so that in the case of under-insurance the assured retained ownership of that portion in respect of which he was regarded as self-insurer. The rule must therefore be extended to add:

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214 See Chapter 14 *supra*.

215 *Consultatie 52*; Van den Berg, *Nederlands Advysboek*, (1693-1698), 112.

216 *Advysen 14, 23 & 16* in Barels, *op cit*.

217 Article 60.

218 Magens, *op cit*, Vol II, 177. In English law the transfer was retro-active to the date of the loss; *Cammell v Sewell* 3 H & N 617; *S.C.* in *Cam. Scacc.* 5 H & N 728.

219 Article 27. See Magens, *op cit*, Vol II, 193.

220 *Advys 16* in Barels, *op cit*, 86.

- 12.6.4. RULE 9(b): *The insurer acquired only that part or proportion of the insured ship or goods which were covered by the insurance.*

This principle was part of the *Guidon de la Mer*<sup>221</sup> and subsequent French law<sup>222</sup> as well as the Königsberg Ordonnance<sup>223</sup> and the English common law<sup>224</sup>. The rule was also taken up in article 677(2) of the *WvK*.

### 13. CONCLUSION

- 13.1. The rules enunciated thus far are the basic principles of abandonment which were transplanted to South Africa by the Dutch settlers in 1652. Those rules developed during the next hundred and fifty years. There was still direct contact with the Roman-Dutch law until 1806 when the Cape of Good Hope became a British possession. The principles which were transplanted to the Cape thus included the underlying common law as contained in the European *jus commune* of insurance, the statutory provisions which applied

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221 Article 7.

222 Émerigon, *op cit*, (Meredith edition), 702.

223 Article 24. See Magens, *op cit*, Vol II, 192.

224 Marshall, *op cit*, (1865), Bk I, 493.

in the Province of Holland and in the writings of the acknowledged authors on Roman-Dutch law up to 1806.

13.2. As was demonstrated, these principles were not only the same or similar to those applying in France, Germany and England at the time, but they were also later taken up in the *WvK* in the Netherlands. The result was that these inherited principles of abandonment were in consonance with the law applying in other countries and were given a new lease of life in the Netherlands in the *WvK* of 1838.

13.3. The codification process in the Netherlands started in the first decade of the nineteenth century and the further development of the Roman-Dutch law in Holland was halted. Since the British rulers of the Cape of Good Hope did not replace the Roman-Dutch law applying at the Cape with their own, any further development of the inherited abandonment principles could only occur by means of local legislation and judicial decisions. While there has been an opportunity between 1806 and the present for English law and practice to influence the inherited principles of abandonment, the extent, if any, to which that has

occurred can only be determined by reference to local legislation and case law.

- 13.4. The extent to which English law and practice and South African legislation and case law constituted new developments in the last two centuries will therefore be considered in the next chapter before the exposition of the principles of abandonment which apply in South African law is finalised. It should be recorded, however, that in the absence of new developments emanating from these sources, the basic rules and principles of abandonment which applied in the Roman-Dutch law constitute the common law principles of abandonment in South African marine insurance law.

## CHAPTER EIGHTEEN

### SOUTH AFRICAN LAW: LEGISLATION AND CASE LAW

#### 1. INTRODUCTION

1.1. In 1806 the Cape of Good Hope was finally conquered by the British and the opportunity arose for the Roman-Dutch law applying at the Cape to be influenced by English law. Within forty years thereafter Natal became a British possession and the same opportunity arose there. On the other hand, during the same period of forty years the two Boer Republics of Transvaal and the Orange Free State were established. Initially the Roman-Dutch law remained the law applying to marine insurance in the two British Colonies, the Cape of Good Hope and Natal, and also in the two the Boer Republics, Transvaal and the Orange Free State.

1.2. The two British Colonies and the two Boer Republics each had its own Parliament and Supreme Court. Each therefore had the opportunity to change the old Roman-Dutch law by means of legislation or by way of judicial interpretation. As will be seen below, there was no predictable pattern so far as the importation of English law principles was concerned. The Cape of Good Hope



passed legislation affecting marine insurance in 1879. The Orange Free State did so in 1902 after it had become a British possession. Natal and Transvaal passed no legislation of their own. So far as decided cases are concerned, four cases were reported in the Supreme Court of the Cape of Good Hope and one in the Durban and Coast Local Division of the Supreme Court<sup>1</sup>. Only one case reached the Appellate Division. It remains to determine to what extent, if any, the local legislation and decided cases influenced the law so far as abandonment is concerned.

## 2. LEGISLATION

- 2.1. In the Cape of Good Hope, where the British forms of government, English institutions and mercantile custom were introduced, it was probably inevitable that the importation of English commercial law was eventually to be advocated by the Chief Justice (1873 to 1910), Lord John Henry de Villiers<sup>2</sup>. De Villiers CJ drafted a Bill which became the General Law Amendment Act 8 of 1879 and came into

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<sup>1</sup> This division of the South African Supreme Court is the successor to the original Supreme Court of Natal, and is by far the busiest maritime jurisdiction in the country.

<sup>2</sup> Van Niekerk, *The Decline, Revival and Future of the Roman-Dutch Law of Insurance in South Africa*, ('Decline'), Monogram 3, (1986) Unisa, 15.

Part V: Chapter 18: South African law: Legislation and case law  
operation on the 11th September, 1879<sup>3</sup>.

2.2. Section 2 of Act 8 of 1879 provided as follows:

*'In every suit, action, and cause having reference to questions of fire, life and marine insurance, stoppage in transitu, and bills of lading, which shall henceforth be brought in the Supreme Court, or in any other competent Court of this Colony, the law administered by the High Court of Justice in England for the time being, so far as the same shall not be repugnant to, or in conflict with, any Ordinance, Act of Parliament or other statute having the force of law in the Colony, shall be the law to be administered by the said Supreme Court or other competent Court.'*

2.3. Section 3 of the act provided that no 'statutory enactment made and passed by the Imperial Parliament after the taking effect of this Act' was to have any effect in the Cape of Good Hope unless such statutory enactment was re-enacted by the parliament of the Cape of Good Hope<sup>4</sup>. Only one case touching upon abandonment was decided by the Supreme Court of the Cape of Good Hope after the

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<sup>3</sup> Van Niekerk, *Decline*, 18.

<sup>4</sup> Van Niekerk, *Decline*, 20.

Part V: Chapter 18: South African law: Legislation and case law  
enactment of Act 8 of 1879. That occurred in 1917.  
In the meantime the Marine Insurance Act 1906  
(‘the MIA’), had come into operation in England  
but was not re-enacted at the Cape.

2.4. In May, 1902 the Republic of the Orange Free State became a British colony. In 1902 the Free State legislature passed the General Law Amendment Ordinance 5 of 1902 which provided that in every action having reference to questions of fire, life and marine insurance brought in an Orange Free State court after the taking effect of the ordinance on 1st August, 1902 the law administered by the Cape of Good Hope Supreme Court for the time being was to be the law to be administered by the Orange Free State court<sup>5</sup>. The MIA was not imported into the law of the Orange Free State either.

2.5. Whilst there may be considerable argument as to what questions precisely are covered by the reference to ‘marine insurance’<sup>6</sup>, there can be no doubt that abandonment falls squarely within the ambit of the term. In fact, as was demonstrated in Chapter 13, abandonment is unique to marine

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<sup>5</sup> Section 1. See Van Niekerk, *Decline*, 21.

<sup>6</sup> See Van Niekerk, *Decline*, 24 et seq.

Part V: Chapter 18: South African law: Legislation and case law insurance. English law was therefore to apply in the Cape of Good Hope from 1879 and in the Orange Free State from 1902 in respect of abandonment. In the case of the Orange Free State, the question is entirely academic since its courts were never called upon to decide any cases involving abandonment<sup>7</sup>. As for the Cape of Good Hope, only one case involving abandonment in marine insurance was decided by the Supreme Court of the Cape of Good Hope during the life of Act 8 of 1879<sup>8</sup>.

2.6. The effect of Act 8 of 1879 (Cape of Good Hope) and Ordinance 5 of 1902 (Orange Free State) was that the English marine insurance concepts of an actual total loss and a constructive total loss were imported into the marine insurance law applying at the Cape of Good Hope and Orange Free State. The principles of the English common law<sup>9</sup> as set out in the judgments of the English courts therefore determined all questions relating to abandonment in these two colonies.

2.7. This resulted in the paradoxical position after

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7 There are no reported cases emanating from this jurisdiction on the question of abandonment in marine insurance.

8 *South African Railways & Harbours v Wm. Anderson & Co.* 1917 CPD 121.

9 The principles of abandonment in the English common law were discussed in Chapter 5 *supra*.

1910<sup>10</sup> that in two of the provinces of the Union of South Africa English law applied to marine insurance contracts whilst the Roman-Dutch law applied to the other two. Two of the provinces were landlocked, yet English law applied in the one but not the other. Two of the provinces were British colonies before 1902, but only one of them adopted English law. The paradox was completed by the fact that one of the former Boer republics and one of the British colonies adopted English law<sup>11</sup> while the other former Boer republic and the other British colony retained the Roman-Dutch law<sup>12</sup>. There was simply no consistency in the situation.

2.8. In 1965 an eminent academic called for the Cape of Good Hope and Orange Free State legislation importing English law to be repealed<sup>13</sup>. So did the author of the most important textbook on shipping and carriage<sup>14</sup>. The Pre-Union Statute Law Revision Act 43 of 1977 which came into operation on 13 April 1977 thereupon repealed the

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10 The four colonies united in the Union of South Africa with effect from 1910.

11 The Orange Free State and Cape of Good Hope.

12 Transvaal and Natal.

13 Professor Ellison Kahn, 'Have certain English precedents binding force in South Africa?' (1965) 82 SALJ 526 at 527.

14 Bamford, *The Law of Shipping and Carriage in South Africa*, 2nd ed, (1973), 2.

General Law Amendment Act 8 of 1879 (Cape of Good Hope) and the General Law Amendment Ordinance 5 of 1902 (Orange Free State)<sup>15</sup>. It remains to be seen whether, during the lives of Act 8 of 1879 and Ordinance 5 of 1902, any of the English law principles relating to abandonment in marine insurance were introduced into South African law. This naturally has to be done by reference to reported cases. As was pointed out in Chapter 15, the Admiralty Jurisdiction Regulation Act 105 of 1983 preserved the '*Roman-Dutch law*'<sup>16</sup> applicable in the Republic as the legal regime regulating marine insurance<sup>17</sup>.

3. DECIDED CASES

Only five cases involving questions relating to abandonment in marine insurance have been reported in the official law reports of the Supreme Court of South Africa and its forerunners in the Cape of Good Hope and Natal. None emanated from the Orange Free State and Transvaal. These five cases span a period of almost exactly one hundred and fifty

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15 Section 1 read with the Schedule to the Act.

16 This is regarded as a misnomer as the inherited Roman-Dutch law has since become known simply as South African law. However, in the discussion of the cases referred to below the language of the court will be retained so far as possible.

17 Section 6 read with Section 1.

Part V: Chapter 18: South African law: Legislation and case law  
years. English law was applied in only one of them<sup>18</sup>. In the intervening period the means of navigation, communication and travel improved dramatically, not only on land but also at sea and in the air.

4. CHIAPPINI & Co v JONES<sup>19</sup>

4.1. THE FACTS: The ship *Hall* was repaired in Simon's Bay at a cost of £1,022 18s 4d, which amount was lent and advanced by the plaintiffs to the owner of the ship against the security of a bill drawn by the master on the owners of the ship. The plaintiffs then purported to insure the ship for £1 000, being her agreed value. The policy of insurance contemplated that if the bill drawn by the master on the owners were to be met after the ship might be lost, the insurers would not be liable. The insurance was free of average, whether general or particular<sup>20</sup>. The ship thereafter sprang a leak en route to Liverpool and put in at the nearest port at Ascension, where she could not be made seaworthy for a passage to England again, there being no means for effecting the necessary

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18 *South African Railways & Harbours v Wm. Anderson, supra.*

19 (1837) 3 Menzies 181.

20 No claim could therefore be made for a partial or average loss.

repairs. The ship was condemned as unseaworthy, was unable to sail to Liverpool and was thus wholly lost to her owners. The bill was presented for payment to her owners but payment refused and the plaintiffs thereupon sued the insurer on the policy. Evidence was given by the plaintiffs' attorney John Barker, who testified that he had

*'applied to the defendant for the amount he had underwritten on the Hall, and told him that the plaintiffs were ready to assign to him all their interest in the bill ... or to lend their names, or to give him any other facility he might suggest, to enable him to receive the money from the owners.'*

4.2. THE ISSUES: The defendant raised two matters relevant to the question of abandonment. The first contention was that the ship had already been unseaworthy when she sailed from Simon's Bay<sup>21</sup>. The second contention was that a formal abandonment was necessary to entitle the plaintiffs to sue and that no such abandonment had taken place<sup>22</sup>. The argument continued that the

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21 At 187.

22 At 188. This argument was based on Van der Linden, *Rechtsgeleerd Practicaal en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 4.8.2, (the English translation by Henry (1828)). The original Dutch edition has the relevant passage at 519 where Van der Linden wrote: 'Dit



plaintiffs were bound to abandon the ship to the underwriters and had not done so<sup>23</sup>.

4.3. THE DECISION: Menzies J, who presided at the trial, held against the defendant on the first point, finding that there was sufficient proof that the ship had sprung a leak at sea<sup>24</sup>. He then held that the plaintiffs had no right in the ship which they could abandon as what was insured under the policy was their interest in the bill drawn in their favour to the value of £1 000,00, not the ship<sup>25</sup>. He further held, without reference to authority, that the plaintiffs' offer to cede to the defendant all their interest in the bill and to do everything which could facilitate payment of the bill was a sufficient abandonment<sup>26</sup>. Judgment was therefore granted for the plaintiffs with interest and costs.

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*abandonnement wordt gedaan bij eene schriftelijke insinuatie, door den Bode van Zeezaaken.'*

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At 188.

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This finding is of importance in that it should always be kept in mind that the right to abandon in the case of innavigability only arises if the loss is caused by a peril of the sea, or, as it has been put, by the action of the sea.

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The ship was apparently not given as security for the advance. She could hardly have been, as a pledge would have been required, placing her in the possession of the plaintiffs. The sum insured determined by reference to the value of the ship, a result of the parties' misunderstanding of precisely what the insured interest was.

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At 188.

4.4. COMMENT: Both the main points argued by the defendant's counsel are relevant to the question of abandonment.

4.4.1. In the first instance, the factual issue concerning the seaworthiness of the ship at the commencement of the voyage was a relevant consideration in determining whether the ship had become innavigable as a result of a sea peril<sup>27</sup>, as the right to abandon the ship would not arise otherwise. However, it was not the ship which had been insured, only the liability of her owners on the bill. It therefore appears that the assured, being the drawee of the bill, had no insurable interest in the ship in any event, but might have had such an interest if the ship or some right in it had been given as security for the advance.

4.4.2. On the question whether the ship ought to have been abandoned the court was clearly correct in pointing out that the insured interest was the plaintiffs' interest in the bill, and that they had no interest in the ship which they could abandon to the defendant. While this reasoning cannot be faulted, the fact is that only the ship and the goods carried on her could be abandoned

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*'onbruikbaarheid door zeeschade'.*

Part V: Chapter 18: South African law: Legislation and case law under the Roman-Dutch law<sup>28</sup>, a principle which was also taken up in the *Wetboek van Koophandel* of 1838 ('the *WvK*') in the Netherlands<sup>29</sup>. The plaintiffs' offer to cede their interest in the bill should rather be seen as an unnecessary offer to transfer their rights against the drawer of the bill. This offer to cede was unnecessary as the insurer would have been subrogated to those rights upon indemnification of their assured in any event<sup>30</sup>.

4.4.3. As to the form and service of the notice of abandonment, the court did not discuss either. It is clear, nonetheless, that the '*offer of the plaintiffs to cede*'<sup>31</sup> their rights in the bill was regarded as sufficient, not only by the court but also by the defendant's counsel. However, since this could not be an abandonment case as the insured interest was not the ship or her cargo,

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28 Only the ship and cargo insured were mentioned in the customs of the Antwerp Exchange, the local ordonnances (Amsterdam, 1598 and 1744, Middelburg, 1600, and Rotterdam, 1604 and 1721), and the works of the Roman-Dutch writers discussed in Chapters 16 and 17 *supra*. There was no mention of any other thing or right being able to be abandoned and the conclusion is inescapable that it was not contemplated that anything other than the ship and her cargo could be abandoned.

29 Article 663. As in the underlying Roman-Dutch law, there was no mention in the *WvK* of anything other than the ship and the goods carried on a ship which could be abandoned.

30 This should not be seen as any serious criticism of the plaintiffs' attorney's conduct as the concept of subrogation was only beginning to emerge as a separate concept from within the wider concept of abandonment at that time. This matter is discussed in Chapter 12 *supra*.

31 As it was put by the court at 188.

the court's remarks on the requirements of the Roman-Dutch law for a proper abandonment were *obiter dicta*.

4.4.4. Nevertheless, the court's approach to the formalities of the notice of abandonment raises the inference that the requirements of the Amsterdam and Rotterdam ordonnances regarding formal service of the notice of abandonment were not applied at the Cape. The judgment cannot be said to go as far as stating that notice of abandonment was unnecessary as there had been a notification which could have been either oral or written<sup>32</sup>.

4.4.5. The court's judgment is reconcilable with Van der Linden's observations that the assured was required to effect an abandonment, '*alvoorens vergoeding te kunnen eischen*', but not with the two requirements he mentioned in respect of the notice of abandonment itself, namely that the notice to be in writing and that it to be served

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The plaintiffs' attorney's evidence (at 186) was that he 'applied' for the sum insured and 'told' the defendant that the plaintiffs were prepared to assign their rights in the bill. It is not clear from the report whether this occurred orally or in writing, or even partly orally and partly in writing.

Part V: Chapter 18: South African law: Legislation and case law by the 'Bode van Zeezaaken'<sup>33</sup>. So far as written notice is concerned, the report of the case is not sufficiently clear for a conclusion to be drawn that written notice was no longer required at the Cape of Good Hope. But so far as service by the 'Bode Van Zeezaaken' was concerned, that could clearly no longer apply at the Cape as the 'Bode' was an official appointed in respect of a particular town or area and apparently never had any equivalent at the Cape<sup>34</sup>.

4.4.6. In summary, *Chiappini & Co v Jones* was not an abandonment case because the insured interest was not a ship or her cargo. At most it was a subrogation case. The distinction between abandonment and subrogation was not yet clear at the time, and the court and the parties, probably for that reason, failed to see the case in the clear light now available.

5. DE PASS v COMMERCIAL MARINE INSURANCE Co.<sup>35</sup>

5.1. THE FACTS: The bark 'Dido' and her cargo of copper

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33 *Koopmans Handboek* 4.8.2. As authority for this requirement Van der Linden relied on article 61 of the Rotterdam Ordonnance of 1721 and on Pothier, *Traité du Contrat d'Assurance*, (1768-1778), 3.1.1.3.

34 Nor anywhere else in South Africa.

35 (1857) 3 Searle 46.

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ore were insured on a voyage from Hondeklip Bay to Swansea on two separate policies, a hull policy and a cargo policy, in an aggregate amount of £797 9s. She was damaged in heavy weather off Madeira as a result of which she was forced to make for Funchal. The plaintiff's case was that she could not be made seaworthy again without '*great and expensive repairs effected upon her*'<sup>36</sup>, and that he was unable to raise the money at Funchal. The master therefore transhipped the cargo, abandoned the *Dido* to the underwriters, and after the abandonment sold her in the interests of underwriters for £800. The plaintiff, relying on the abandonment, claimed £650 10s 10d on the hull policy and £146 18s 2d on the cargo policy, in each case after deduction of various expenses.

5.2. THE ISSUES: The defendant denied any need for the abandonment of the '*Dido*' and the transhipment of the cargo. Counsel for the defendant argued that there was no evidence of an attempt to raise funds to pay for the repairs and further that there was insufficient evidence to support the allegation that the '*Dido*' could not have been repaired at

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Funchal. He referred to two English authorities<sup>37</sup>  
and also to an American authority<sup>38</sup> in support  
his contentions. The plaintiff's counsel had  
referred to the same English authorities in  
support of his submission on the master's  
authority to sell the ship.

5.3. THE DECISION: Each of the three judges gave a  
separate judgment.

5.3.1. Bell J recited the facts and identified the issue  
as whether the plaintiff was entitled to abandon  
the ship. He pointed out that none of the  
authorities cited 'was from the Roman-Dutch law,  
which is the law of this court'<sup>39</sup>. He then  
examined the Roman-Dutch authorities and referred  
to Voet<sup>40</sup>, De Groot<sup>41</sup> and Van Der Keessel<sup>42</sup> as  
well as the Amsterdam, Rotterdam and Middelburg  
Ordonnances and came to the conclusion that 'if a

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37 *Abbott on Shipping*, 8th ed; *Arnould on Marine Insurance*, (probably the first or second edition).

38 Kent, *Commentaries on American Law*, (edition not stated).

39 At 49.

40 *Commentarius ad Pandectas*, (1698-1704), 14.1.3.

41 *Inleidinge tot de Hollandsche Regtsgeleerdheid*, (1631), ('*Inleidinge*'), 3.24.12 and 13.

42 *Theses Selectae Juris Hollandici et Zelandici, ad supplendam Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam*, (1800), ('*Theses Selectae*'), 754 and 755.

vessel is wholly unnavigable the master may immediately abandon her'<sup>43</sup>.

Bell J further held that if the vessel could not be repaired for want of money or credit, or without a ruinous expense, she could be abandoned provided there was proper proof that repairs could not be effected<sup>44</sup>. He reviewed English law through a variety of authorities<sup>45</sup> and cases<sup>46</sup> as well as an American authority<sup>47</sup> and found that there was

'no proof of urgent necessity, which is what all the English cases dwell upon - nor of irreparability which the Dutch law requires, allowing that expression to include impossibility of repairing from the ruinous heaviness of the

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43 This conclusion is in accordance with Van der Keessel's statement in *Theses Selectae*, 755, as also with Van der Linden's *Koopmans Handboek* 4.6.8. where he said that the abandonment could be made 'aanstonds' (forthwith) if the ship had perished or had become unnavigable or the goods had been lost 'met zekerheid'. This part of the judgment confirms Rule 3(a) established in the previous chapter.

44 At 51. This statement is not justified by any of the authorities cited by Bell J, but appears to be the rule in English law.

45 *Abbott on Shipping*, 8th ed, and *Arnould on Marine Insurance*, (probably the first or second edition).

46 *Tremenhere v Tresilian* 1 Sid 452; *Johnson v Shippen* 2 Raym 984; *The Fanny and Elmira Edwards* Adm Rep 117; *Royal Exchange Assurance Co v Idle* 3 Brod & Bing 151; *Robertson v Clarke* 1 Bing 445; *Somes v Sugrue* 4 Car & Payne 276; *Hayman and Others v Moulton* 5 Esp 65 and *Hunter v Parker* 7 M & W 342.

47 Kent, *op cit.*



*expense*'<sup>48</sup>.

Bell J was therefore in favour of absolving the defendant from the instance.

5.3.2. Cloete J concurred in the judgment of Bell J. He pointed out that the policy of insurance was effected at the Cape of Good Hope, by a plaintiff who had a house of trade there and with defendants who had set up a marine assurance company in Cape Town. He therefore was of the opinion that the case had to be decided according to the *lex loci contractus*<sup>49</sup>. He also identified the issue as whether the master '*under the Roman-Dutch law, was justified in proceeding to the act of abandonment*'<sup>50</sup>. Cloete J referred to the old ordonnances of the fifteenth and sixteenth centuries and stated that they never authorised the immediate abandonment of a ship<sup>51</sup> but required a long period of time within which the

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48 At 56.

49 At 57.

50 At 58.

51 This statement appears to be incorrect as it conflicts with the express authority of the Dutch ordonnances dating back to the Amsterdam Ordonnance of 1598 as well as the writings of De Groot, *Inleidinge* 3.24.13; Van der Keessel, *Praelectiones* 1466 *et seq* and *Theses Selectae* 755; Van der Linden, *Koopmans Handboek* 4.6.8.2. and others. Van der Keessel's *Praelectiones* was, of course, not available to the court as that was published only recently.

owner was bound to keep possession of the ship and to expend as much as possible for the purposes of repairing the ship, if that could be done, before he could claim the insurance<sup>52</sup>.

5.3.3. Cloete J also referred to a case reported by Bynkershoek<sup>53</sup> in which the mercantile tribunal at Amsterdam and the Court of Holland had found in favour of the assured where a vessel had been grounded and was abandoned. There was then an appeal to the Supreme Court. On appeal the insurers insisted that the ship might have been refloated and repaired. The court held, firstly, that it had been proved that the expense which would have been incurred in repairing the vessel would have exceeded her value by far and, secondly, that the master had informed the insurers of what had happened, but they gave him no instructions on how to act. Cloete J was of the opinion that this authority was apposite and bore strongly upon the case under consideration. He thus found in favour of the defendants because of lack of proof that the funds to repair the ship

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Cloete J did not distinguish clearly between the cases of unfitness which was repairable and innavigability which meant the ship could not be made seaworthy again. It is clear though that the case before the court concerned the former.

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*Quaestiones Juris Privati*, (1744), 4.14 (at 634 of the particular edition).

were not to be found at Funchal<sup>54</sup>.

5.3.4. Watermeyer J agreed that there should be absolution from the instance because there had been 'a failure of proof as regards the innavigability or constructive innavigability.'<sup>55</sup> He also reviewed the old ordonnances<sup>56</sup>, referred to Voet, Van Der Keessel and the case quoted by Cloete J, and further to the Hamburg Ordonnance<sup>57</sup> attached to the Dutch edition of Roccus<sup>58</sup>. According to Cloete J abandonment was allowed only where there was no hope whatever of the recovery of the ship<sup>59</sup>. He relied upon Van der Keessel for the statement that the ship could be abandoned immediately if the damage caused by the perils of the sea was major and irreparable but that if the

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54 This is a significant development because Roman-Dutch case law was accepted by Cloete J as authority for a point which had not been put forward by De Groot, Van der Keessel and Van der Linden on the point. The principle to be derived from this approach is that the court is at liberty to examine case law to determine the fine issues which may arise on the general principles stated in the various ordonnances and Roman-Dutch authorities.

55 At 59-60. He was of the opinion that in the case of the *Dido* the ship was not alleged to have been beyond repair but it was alleged that the funds to do so at Funchal were lacking. It was for the plaintiff to prove this fact, which was not proved properly.

56 The ordonnances of Philip II of 1563 and 1570, as well as the Amsterdam, Rotterdam and Middelburg ordonnances, in this instance those of 1598, 1604 and 1600 respectively.

57 1731.

58 Feitama, *Merkwaardige aanmerkingen vervat in twee tractaaten, waarvan het eene is handelende over schepen en vrachtgelderden, het anderen over assurantien ofte verzekeringen, mitsgaders eenige uytgesogten gewijsdens*, (1737).

59 At 60.

injury should be *levius* and could be repaired at a moderate expenditure, the assured was obliged to have her repaired<sup>60</sup>.

5.3.5. The defendants were therefore absolved from the instance in respect of the claim on the hull policy but judgment was granted in favour of the plaintiff for the amount claimed in respect of the cargo policy because the plaintiff was found to have been entitled to tranship the cargo onto another ship under the circumstances<sup>61</sup>.

5.4. COMMENT: A number of important principles were established or confirmed in this decision.

5.4.1. In the first place, all three judges held that Roman-Dutch law applied rather than English law, notwithstanding that counsel had argued the matter on the basis of English law.

5.4.2. In the second place, important Roman-Dutch

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60 *Theses Selectae* 755. Watermeyer J thus confirmed the applicability of Rules 3(a) and 4(a) enunciated in the previous chapter.

61 The court therefore confirmed the principle of Rule 4(b) that the assured is entitled to tranship the cargo insured at the cost of the insurers during the period when the final fate of the ship which is unfit or under detention is awaited. It is also apparent from the court's finding in respect of the cargo policy that there may be circumstances where the cargo may be abandoned without there being a right to abandon the ship carrying them. In each case the question would be whether the particular insured interest (the ship or cargo) was lost for certain. This principle is recognized by the *WvK*, (see Chapter 6 para 2.5 *supra*) which specified separate requirements for the right of abandonment to arise in the case of the ship and the cargo.

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authorities were identified. These include De Groot, Van der Keessel, Voet and Bynkershoek. Over and above that the old ordonnances of Amsterdam, Rotterdam and Middelburg were expressly relied upon (and thus given a new life at the Cape of Good Hope).

- 5.4.3. In the third place the court consulted Roccus, an Italian authority on the civil law of the seventeenth century covering maritime and insurance matters, who, in turn, frequently relied on other authors like Santerna and Straccha. This approach allows an examination of the works of these authors in the pursuit of the roots and principles of the Roman-Dutch law of marine insurance applicable at the Cape of Good Hope.
- 5.4.4. Further, one of the judges (Bell J) did a comparative evaluation of English law and Roman-Dutch law on the issues before the court. It is clear from his findings that the result and much of the reasoning would have been the same even if English law had to be applied.
- 5.4.5. The distinction between absolute and relative innavigability also came to the fore. In the case of absolute innavigability the ship is simply

incapable of being repaired. In the case of relative innavigability, the ship is physically capable of being repaired, but the means of repairing her are unavailable at the place where she is, or she cannot be repaired for an amount less than her repaired value. It is apparent from the judgments that all three judges would have granted judgment in favour of the assured if there had been proper proof that the ship could not be repaired for less than her value<sup>62</sup>. This highlights the importance of an abandonment loss as an economic loss. The principle that the economic type of suffered in the case of relative innavigability gives rise to a claim for the full amount of the insurance was therefore reinforced and given effect to in the case of the 'Dido'.

6. THE CAPE OF GOOD HOPE MARINE INSURANCE Co. v BERG<sup>63</sup>

6.1. THE FACTS: The 'Galatea' carried an insured cargo of wood from Knysna to Table Bay. Before the cargo could be delivered in Table Bay, the ship was

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The idea of a constructive total loss as known in English law therefore appears to have had some appeal to the judges presiding. Indeed, Watermeyer J even used the appropriate terminology when he referred to 'constructive innavigability'. This idea will be further developed in the next chapter before a recommendation is made on the adoption of the concept of a constructive total loss.

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(1865) 1 Roscoe 289.

driven by the force of the winds and waves upon the beach at Table Bay where she was wrecked. The defendant, who was the ship's agent, gave notice to owners of the cargo (who were also the charterers of the ship) to remove the cargo on payment of the freight, failing which the cargo would be sold for the benefit of whomsoever was entitled to it. The owners of the cargo declined to remove the cargo from the ship as she lay amidst the surf and abandoned the cargo in favour of the plaintiffs, their insurers. Thereafter the defendant caused the cargo to be sold for a net price of £515. The insurers then instituted action against the defendant for payment of the sum of £515 but the defendant tendered that amount minus the freight. The insurers claimed the full amount of the net proceeds of the sale, £515, but the defendant resisted that claim, again tendering the balance after deduction by the amount of the freight<sup>64</sup>.

- 6.2. THE ISSUES: The issue before the court was whether the freight was earned and recoverable under the circumstances. There was therefore no true abandonment question before the court. Nevertheless, abandonment became relevant in an

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290-291.

oblique fashion in that the plaintiffs as insurers, having accepted the abandonment, instituted the action for the proceeds of the sale which represented the goods.

6.3. THE DECISION: Three separate judgments were given by the members of the court in granting judgment in favour of the defendant.

6.3.1. The Chief Justice, Sir William Hodges, stated that he entertained considerable doubt whether any right of abandonment existed<sup>65</sup>. Nevertheless, on the issue before the court as to whether the freight had been earned, he found in favour of the defendant, after referring to various Roman-Dutch authorities including Roccus<sup>66</sup>, Corin<sup>67</sup> (Coren) and a case referred to by the latter.

6.3.2. Bell J was also of the view that the owners of the cargo were not entitled to abandon it, 'considering that the cargo was in the port of

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65 At 291.

66 *Op cit*, (Feitama's translation). The reference must have been to the first part of Roccus' work where he deals with ships and freight, article 81 at 106 of Feitama's edition.

67 The work referred to must have been *Observationes XLI rerum in Senatu Hollandiae, Zelandiae, Frisiae judicatarum' item consilia XXX quaedam*, (1633), which was available in the library of the court; see Roberts, *A South African Legal Bibliography*, (1942). 89.



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*delivery wholly uninjured*'<sup>68</sup>. He stressed that in all prior cases of abandonment there was always a failure of performance in the sense that the cargo has not reached the agreed port of delivery<sup>69</sup>.

*'The peculiarity in the present case is that the abandonment took place in the actual port of delivery, and after an offer by the shipowner to deliver the goods uninjured by seawater.'*<sup>70</sup>

Bell J was also of the view that the plaintiffs, by assenting to the sale of the cargo and demanding by this very action the proceeds of the sale, had in fact received delivery of the cargo and that the freight was accordingly payable<sup>71</sup>.

6.3.3. Watermeyer J mentioned that he had considered case law in England, Holland, France and America and found that no similar case had occurred in any of those jurisdictions<sup>72</sup>. He thought Lord Mansfield's words in *Luke v Lyde*<sup>73</sup> were apposite,

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68 At 294-295.

69 At 296.

70 At 296.

71 At 297.

72 At 297.

73 2 Burr 822-888.

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namely that 'the maritime law is not the law of a particular country, but the general law of nations'<sup>74</sup>. He found one helpful case in Barels' collection<sup>75</sup> and pointed out that in that case it was not contended in any of the courts that the freight had not been earned at all<sup>76</sup>. He therefore found that the freight had been earned. He concluded by saying that he did not consider it necessary to enquire into the abandonment to underwriters<sup>77</sup>.

6.4. COMMENT: This was not a true abandonment case. Although an abandonment had occurred and had been accepted by the underwriters, the assured never had the right to abandon because the cargo had been saved and had arrived undamaged at the port of destination. Indeed, the facts found proved in respect of the freight claim established the absence of the right to abandon. Nevertheless, because the underwriters had obviously accepted the abandonment, as between them and the assured they were bound by their acceptance.

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74 At 297.

75 *Advysen over den Koophandel en Zeevaart*, (1780-1781).

76 At 299.

77 At 301.

6.5. The cases of the 'Hall', the 'Dido' and the 'Galatea' were all decided by the Supreme Court of the Cape of Good Hope which was under British rule at the time but applied the inherited Roman-Dutch law. The judges also showed themselves quite ready to consult comparative materials in English and American law. However, by the time the next case was to be decided by that court, English law had been substituted in '*every suit, action, and cause having reference to questions of ... marine insurance*'<sup>78</sup>.

7. SOUTH AFRICAN RAILWAYS & HARBOURS v Wm. ANDERSON & Co.<sup>79</sup>

7.1. THE FACTS: The defendant hired a salvage pump and gear valued £1 200 at a rental of £20 per day from the plaintiff for the purpose of pumping water out of the holds of the 'Rangatira' which was ashore at Robben Island. In terms of the contract the defendant had to return the pump and gear in good order and condition. The plaintiff on the other hand had to insure the plant with an insurance company or in its own fund at the defendant's expense. The defendant gave two notices of

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By section 2 of Act 8 of 1879.

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1917 CPD 121.

abandonment, one on the 28th April, 1916 and the other on the 1st May, 1916. In terms of the first notice it also cancelled the contract of hire. This it did because it contended that the sea had become so bad that it was impossible to approach the 'Rangatira'. The defendant also contended that at no time subsequently was it possible to recover the pump and gear, which became a total loss. It was therefore impossible for the defendant to return the plant to the plaintiff. However, during May, 1916 some salvors worked on the 'Rangatira' and a number of items forming part of the hired plant and gear were safely removed, leaving a balance on the ship which was lost, the value of the balance being £300. The plaintiff then sued for the sum of £1 200 and hire at £20 per day for the duration.

- 7.2. THE ISSUES: A number of issues were raised in the case. The first was whether the insurance was for the benefit of the plaintiff or for the benefit of the defendant. Arising from that issue, the question arose whether the defendant, if the insurance was for its benefit, was entitled to abandon. Other issues related to the question of hire.

7.2.1. The defendant's counsel submitted that any movable could be the subject of marine insurance as long as it is subjected to a maritime risk<sup>80</sup>. He therefore contended that the principles of marine insurance applied to the case, and that English law applied by virtue of the General Law Amendment Act 8 of 1879<sup>81</sup>.

7.2.2. The plaintiff's counsel contended that the insurance was for the plaintiff's benefit and that the defendant therefore had no right to abandon. He further contended that only an owner could abandon and, in any event, that the right to recover for a total loss existed only if the danger continued to the time of the action. He added that it had to be proved that a prudent uninsured owner would not have spent any more money on the thing abandoned and that the thing continued in that condition<sup>82</sup>.

7.3. THE DECISION: The court, Juta JP, was of the opinion that the defence of abandonment was misconceived.

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80 This is so in English law but it should be remembered that in the Roman-Dutch and Dutch law only a ship or her cargo could be abandoned.

81 At 123-124.

82 At 125.

7.3.1. He held that

*'(i)n order to justify abandonment as for constructive loss of things subject to marine insurance four requisites seem necessary: the person abandoning must be insured; he must have an absolute right of ownership in the goods, the thing insured must have been reduced to such a state or placed in such a position by the perils insured against as to make its total destruction or annihilation though not inevitable yet highly imminent, and lastly, that such a state or position did not change so before action brought that the insured might have taken possession of the thing insured, wholly uninjured, and could thus have had restoration of it.'*<sup>83</sup>

7.3.2. Juta JP further held, if it was necessary to decide the point, that the agreement was an insurance for the benefit of the plaintiff rather than the defendant<sup>84</sup>. He pointed out that the risk which was run by the defendant was different to that run by the plaintiff, who was the owner of the plant<sup>85</sup>. Juta JP then pointed out that the

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83 At 127.

84 At 127.

85 At 127.

defendant had nothing to abandon because the contract of hire had been terminated and it was not the owner of the plant<sup>86</sup>. He felt that the third and fourth requisites for an abandonment were also absent because 'there were several occasions in May when the pump and gear which were then intact and uninjured could have been safely taken ashore'<sup>87</sup>, and because 'the notice of abandonment, even if given at a time when destruction was imminent, was of no effect at the time of the action'<sup>88</sup>. After discussing the evidence on the question of hire, Juta JP held that the defendant was liable for the value of those items constituting part of the plant hired which was lost and not returned, namely £300, and granted judgment for the plaintiff.

7.4. COMMENT: This case had to be decided according to English law and only English authorities were referred to by counsel in their argument and also

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86 At 127. This finding acknowledges the reason for the existence of Rule 2(b) enunciated in the previous chapter, namely that the abandonment has to be made by the assured as owner of the thing abandoned because the act of abandonment allowed ownership to vest in the insurer. For that reason English law was the same as Roman-Dutch law to the effect that no one other than the owner of the thing (or holder of an insured right) could abandon a thing to the insurer.

87 At 128.

88 At 128. In this respect the finding would have had to be different if Roman-Dutch law had to be applied, because the state of affairs at the time of abandonment determines the parties' rights in Roman-Dutch law, as it also did in Dutch law.

Part V: Chapter 18: South African law: Legislation and case law by Juta JP in his judgment. The court summarised the requirements for an abandonment under English marine insurance law without reference to the Marine Insurance Act, 1906 ('the MIA')<sup>89</sup>. The finding that the insurance had been for the benefit of the plaintiff made it strictly unnecessary to enter upon the question of abandonment at all because abandonment is a remedy applicable only in the case where there is a marine insurance contract in force between the parties. In the light of that finding it would not have made any difference whether the case was decided under English law or the Roman-Dutch law received at the Cape of Good Hope<sup>90</sup>.

8. SHOOTER t/a SHOOTER'S FISHERIES v INCORPORATED GENERAL INSURANCES LTD<sup>91</sup>
- 8.1. THE FACTS: The '*Morning Star*' was insured under two marine insurance policies, a hull and a war

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<sup>89</sup> Section 3 of the General Law Amendment Act 8 of 1879 specifically provided that subsequent statutes of the Imperial Crown would not apply at the Cape of Good Hope unless specifically re-enacted, and the MIA was not so re-enacted at the Cape after it became law in England.

<sup>90</sup> There is one important consequence, however, and that is that this decision demonstrated the ability of a South African court and South African lawyers to apply the English concept of a constructive total loss. That concept, it is submitted, was not entirely foreign to South African lawyers as it actually underlies all abandonment cases in Roman-Dutch law, (and German, French and Dutch law), as was demonstrated in Chapter 14 *supra*. Its presence in cases of relative innavigability in Roman-Dutch law was also hinted at in *De Pass v Commercial Marine Insurance Co.*, *supra*.

<sup>91</sup> 1984 4 SA 269 (D).



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risks policy. The risks specified in the policies were in identical terms, following the standard Lloyd's wording. The '*Morning Star*' was fishing 13.5 nautical miles from the Mocambican coast on 12 April 1983 when she was intercepted by two other trawlers and forced to Maputo, where she remained for the next twenty one days, during which the skipper and engineer were prosecuted for illegal fishing in Mocambican waters. They were convicted and fined the equivalent of R167 000. They were further advised that the vessel would be confiscated by the Government of Mocambique unless the fine was paid within fifteen days. The plaintiff did not have the means to pay the fine. The defendant was invited to pay the fine<sup>92</sup> but it declined to do so, denying liability under the policies. The fine was thus not paid and the '*Morning Star*' was never released. The plaintiff as owner of the '*Morning Star*' and assured under both policies then claimed the full amount of the insurance, namely R300 000<sup>93</sup>.

8.2. THE ISSUES: The plaintiff contended that the loss was covered by the phrase in the risk clause

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92 According to the original case record this occurred on 4 May 1983, within a day or two of the master and engineer being convicted and the crew being repatriated.

93 These facts are recited at various places in the judgment, mainly at 271-273.

*'arrests, restraints and detainment of all kings, princes and people of what nation, condition or quality soever'* in that the loss of the *'Morning Star'* was the result of an arrest and detainment by the *'people'* of Mocambique<sup>94</sup>. The defendant repudiated liability on four grounds. The first ground was that the policy did not cover the arrest or restraint of the vessel pursuant to an order of court in the ordinary judicial process<sup>95</sup>. Allied to the first point was the argument raised by the defendant's counsel *'that the proximate cause of the loss was not the arrest of the vessel but its confiscation by the Mocambican authorities consequent upon the failure by the plaintiff to pay the fine imposed upon the skipper and engineer'*<sup>96</sup>. The second ground of repudiation was that the plaintiff had breached a clause of the war risks policy which warranted that the vessel would engage in *'legal fishing within Mocambique territorial waters'* by illegally fishing within those waters<sup>97</sup>. The third ground was that the defendant had not undertaken to insure the plaintiff against losses resulting from

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94 At 274F.

95 At 274H.

96 At 277D-G.

97 At 279B-C.

Part V: Chapter 18: South African law: Legislation and case law  
his own illegal or unlawful activities<sup>98</sup>. The  
fourth ground was that the plaintiff had failed to  
give notice of abandonment<sup>99</sup>.

8.3. THE DECISION: The court, Friedman J, dealt with  
each of the grounds of repudiation in turn.

8.3.1. As to the first ground, he found that the  
proceedings in question were criminal proceedings  
and that the order of the Mocambican court did not  
have the effect of placing the occurrence outside  
the risk clause in the policies<sup>100</sup>. He found that  
the initial arrest and subsequent restraint and  
detainment constituted an act of '*kings, princes  
and people of what nature condition or quality  
soever*' within the meaning of the risk clause and  
that it was a continuous process commencing with  
the initial arrest and resulting in its ultimate  
confiscation and loss. The interposition of the  
decision of the court between the arrest and the  
subsequent loss did not alter the position<sup>101</sup>.

8.3.2. As to the second ground, he found that the phrase

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98 At 282C-E.

99 At 284I-285C.

100 At 276H-277B.

101 At 277D-E.

'Mocambique territorial waters' in the policy was unambiguous and meant the waters extending twelve nautical miles off the Mocambican coast<sup>102</sup> and, as the plaintiff had established that the '*Morning Star*' was fishing more than twelve nautical miles offshore when she was intercepted, the defendant could not avoid liability on this ground<sup>103</sup>.

8.3.3. As to the third ground, he found that even though the '*Morning Star*' had in fact been fishing illegally by fishing within the exclusive economic zone of Mocambique, the plaintiff had acted in ignorance and there was thus no wilful or intentional misconduct on his part. He therefore held that it would not be contrary to public policy to allow the plaintiff to recover<sup>104</sup>.

8.3.4. Friedman J then dealt with the fourth ground, namely that no notice of abandonment had been given. He pointed out that the loss appeared to be in the nature of a constructive total loss, although there was no distinction between an actual loss and a constructive loss in Roman-Dutch

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102 At 281A-B.

103 At 282A-C.

104 At 284G.

Part V: Chapter 18: South African law: Legislation and case law  
law<sup>105</sup>. He then reasoned as follows:

(a) The law to be applied in the case according to section 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 is '*the Roman-Dutch law applicable in the Republic*'<sup>106</sup>.

(b) The authors Gordon and Getz<sup>107</sup> rely upon passages in Van der Linden<sup>108</sup> and Van der Keessel<sup>109</sup> for their statement that notice of abandonment was a requirement of Roman-Dutch law<sup>110</sup>.

(c) Van der Linden<sup>111</sup>, De Groot<sup>112</sup> and Van der Keessel<sup>113</sup> made it clear that there are two types of notice; the first is mere notice of the loss to the insurer and the second is the notice of

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105 At 285A-C.

106 At 285C.

107 *The South African Law of Insurance*, 3rd ed, (1983), fn 253.

108 *Koopmans Handboek* 4.6.8.

109 *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, (published only in 1961-1967), ('*Praelectiones*'), 3.24.13. (must be 3.24.14.)

110 At 285C-D.

111 *Loc cit.*

112 *Inleidinge* 3.24.14.

113 *Praelectiones*. See also *Theses Selectae* 758 and *Inleidinge* 3.24.14.

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abandonment. The authority relied upon by these authors for the first notice is '*an ordonnance of Amsterdam*' and '*an ordonnance of Middelburg*'<sup>114</sup>. The authority for the second type of notice '*appears to be an ordonnance of Rotterdam*'<sup>115</sup>, Friedman J postulated.

(d) Friedman J then stated that the question was whether '*these ordonnances can be said to be part of the "Roman-Dutch law applicable in the Republic"*'<sup>116</sup>.

(e) Statutory requirements in the various '*provinces of Holland*' of a fiscal or purely local nature, whether passed before or after 1652, are not part of the law of the Republic<sup>117</sup>.

(f) The requirements of the various ordonnances of Amsterdam, Middelburg and Rotterdam referred to earlier are, by their very nature, of local application only and therefore not part of the

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114 At 286A. While Van der Linden referred to the Amsterdam Ordonnance of 1744 in this regard (*Koopmans Handboek* 4.6.8 fn 1) De Groot and Van der Keessel referred to the earlier ordonnances.

115 At 286B. The ordonnance referred to must have been the Rotterdam Ordonnance of 1721, relied upon by Van der Linden in *Koopmans Handboek* 4.6.8 fn 3.

116 At 286B.

117 At 286E.

Roman-Dutch law applicable in the Republic<sup>118</sup>.

(g) It is in any event not clear what form the notice of loss or notice of abandonment should take as the formalities prescribed by Van der Linden and Van der Keessel by their very nature can no longer be operative<sup>119</sup>.

(h) The sanction for the failure to give the first type of notice was that the assured had to make good any loss caused to the insurer<sup>120</sup>. He was not disqualified from claiming the indemnity.

(i) 'It is not clear what, if any, sanction was attendant upon the failure to give the second type of notice.'<sup>121</sup> In any event, the defendant had repudiated liability and the giving of notice of

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118 At 286E-F. That these ordonnances might have set out the basic principles of the European *jus commune* of insurance which were also principles of the Roman-Dutch law of the time was not considered by the court.

119 At 286I-287A. The court here clearly confused substance with procedure. The requirement of an abandonment was and is substantive. The requirement that the notice of abandonment be served by a particular official is merely procedural. The fact that the relevant procedure had no counterpart in South African law did not mean that the substantive provision had fallen away.

120 This is made clear by Van der Linden *Koopmans Handboek* 4.6.8.1. Van der Linden relied on article 36 of the 1744 Amsterdam Ordonnance.

121 At 287B. Gordon & Getz, *op cit*, 3rd ed, (1983), 389 relied on Van der Linden, *Koopmans Handboek* 4.6.10 and Pothier, *Traité du Contrat d'Assurance*, ((1768-1778), 3.1.1.6 for the statement that the failure to give due notice of abandonment was to deprive the assured of the right to claim for a total loss.

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abandonment therefore became unnecessary<sup>122</sup>.

8.3.5. Friedman J therefore granted judgment for the plaintiff in the sum of R300 000,00, interest and costs.

8.4. COMMENT: The case of the '*Morning Star*' was the first and only case after the repeal of the General Law Amendment Act 8 of 1879 (Cape of Good Hope) and the General Law Amendment Ordonnance 5 of 1902 (Orange Free State) in which the question of abandonment came up pertinently for consideration and decision<sup>123</sup>. A number of important findings were made by Friedman J in the course of his judgment.

8.4.1. In the first place, he found that '*the Roman-Dutch law applicable in the Republic*'<sup>124</sup> was the law regulating marine insurance in the Supreme Court of South Africa exercising its admiralty jurisdiction, pursuant to section 6(1)(b) of the Act. That finding was not only endorsed by the

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122 At 287H.

123 Whereas the Pre-Union Statute Law Revision Act 43 of 1977 merely repealed Act 8 of 1879 (Cape of Good Hope) and Ordonnance 5 of 1902 (Orange Free State) without stating explicitly what legal system was to regulate marine insurance in the future, that question was finally resolved by the Admiralty Jurisdiction Regulation Act 105 of 1983.

124 This is the phrase used in section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983.



Appellate Division in the subsequent appeal from his decision, but was also stated to be the case in respect of insurance generally by the Appellate Division in the case of *Mutual & Federal Insurance Co Limited v Oudtshoorn Municipality*<sup>125</sup>.

8.4.2. Friedman J's finding (in relation to the defence that there had been no notice of an abandonment) that '*the requirements of the various ordonnances of Amsterdam etc. referred to above are, by their very nature, of local application only*' and therefore are not applicable in the Republic is, however, plainly wrong. Whilst there may have been local requirements so far as the *service* of the notice of abandonment was concerned, the *giving* of notice was universally required.

8.4.3. Further, although an abandonment generally may be a unilateral act, in marine insurance it is bilateral by its very nature. The insured ship or goods are abandoned *to the insurer*<sup>126</sup>, not to the

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1985 1 SA 419 (A).

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This is apparent from the wording of, *inter alia*, article I, Chapter VII of the *Guidon de la Mer*, ('*faire delais à ses assureurs*'); article 14 of the Customs and Usages of the Antwerp Exchange, ('*tot behoef van den verseekerer*'); articles 14 and 15 of the Rotterdam Ordonnance of 1604, ('*ten profijte van de Verseekeraers*' and '*ten behoeve van hunne Verseekeraers*') and article 28 of the Amsterdam Ordonnance of 1744, ('*ten behoeve van den Verseekeraars*').

Part V: Chapter 18: South African law: Legislation and case law world at large<sup>127</sup>. This emphasises the need for a notice of abandonment. Otherwise the insurer is not to know that he has become or may become the owner of the insured and abandoned ship or goods.

8.4.4. The telex addressed by the plaintiff's attorneys to the defendant on the 4th May, 1983 was thought and apparently conceded not to constitute a notice of abandonment as required<sup>128</sup>. Friedman J ought then to have considered the effect of the failure to give any notice of abandonment on the plaintiff's right to recover the full amount of the insurance. On this question there could not have been any doubt in Roman-Dutch law as Van der Linden had stated the position quite clearly where he wrote that the assured, *'before he claims for a total loss, is bound to abandon the ship or goods, and to renounce all his right or interest therein, in favour of the underwriters.'*<sup>129</sup>

8.4.5. Having regard to the apparent concession that

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127 English law has also come to this conclusion, after an initial moment of doubt. See the trilogy of cases on the point: *Boston Corporation v France Fenwick & Co Ltd* (1919) 15 LLR 85 (KB); *Oceanic Steam Navigation Co Ltd v Evans* (1934) 50 LLR 1 (CA); and *Blane Steamships Ltd v Minister of Transport* [1951] 2 LLR 155 (CA).

128 The plaintiff's counsel, Mr M J D Wallis SC, advised me that he had been compelled to argue that no notice of abandonment was necessary because the plaintiff's attorney had failed to give notice of abandonment. This aspect is discussed in more detail in the text below where the original case record is reviewed.

129 *Koopmans Handboek* 4.8.2. (Henry's translation, 1828).

there had been no notice of abandonment the conclusion ought therefore to have been that the plaintiff could not claim for a total loss unless the loss was final and certain, or in the terminology of English law, an actual total loss. Whether there was such a loss is discussed below.

9. INCORPORATED GENERAL INSURANCES LTD v SHOOTER t/a SHOOTER'S FISHERIES<sup>130</sup>

9.1. THE SUBMISSIONS ON APPEAL: The defendant insurer took the judgment on appeal to the Appellate Division. Written heads of argument were filed by both parties<sup>131</sup>.

9.1.1. In its written heads of argument the defendant made the following submissions:

(a) The court was required to apply the 'Roman Dutch law' to the dispute by virtue of section 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983<sup>132</sup>.

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130 1987 1 SA 842 (A).

131 In the case of the defendant insurer the heads of argument were prepared by counsel who had appeared at the trial before Friedman J. but the appeal was argued by Mr M Tselentis.

132 At 843E.

(b) Whilst English law had great persuasive authority with regard to the construction of the policy, in questions of law the Roman-Dutch law was applicable<sup>133</sup>.

(c) The proximate cause of the loss of the vessel was its confiscation due to the plaintiff's failure to pay the fine. In Roman-Dutch law the defendant as insurer is only liable for such losses as are proximately caused by a peril insured against<sup>134</sup>.

(d) The defendant had succeeded in proving that the plaintiff had breached the warranty<sup>135</sup>.

(e) In English law the assured claiming a constructive total loss has to give due notice of abandonment. Roman-Dutch law did not distinguish between an actual and constructive total loss but required the assured who claimed payment for a

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133 At 843I.

134 At 845D-E. This submission appears to have lost sight of the fact that an abandonment loss, or a constructive total loss in English terminology, may arise from the underlying arrest and detention. In such a case there is no duty on the assured to assume the insurer's obligation by paying the fine or ransom demanded. If this were not so the insurance against arrests and detentions would be of no use or benefit to the assured as he would in practically all cases be able to obtain the release of the vessel by paying some fine, penalty or ransom.

135 At 847A. This submission had been rejected on the facts, properly it is submitted, by Friedman J in the trial court.

Part V: Chapter 18: South African law: Legislation and case law  
total loss to abandon the subject matter of the  
insurer to the insurer in good time<sup>136</sup>.

(f) Friedman J was incorrect in holding that notice of abandonment is not necessary under South African law. Van der Linden<sup>137</sup> and Van der Keessel<sup>138</sup> both required such notice<sup>139</sup>. While Van der Linden relied on article 61 of the Rotterdam Ordonnance of 1721 and Pothier, Van der Keessel did not rely on statute alone. In any event, the statute only regulated the procedure, '*not the necessity for the notice*'<sup>140</sup>.

(g) The telex in question from the plaintiff's attorney to the defendant did not constitute any form of abandonment<sup>141</sup>.

9.1.2. On appeal the plaintiff's counsel took the same stance as before Friedman J on the issues.

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136 At 849I-850A. These submissions were patently correct, as the earlier review in this study of English and Roman-Dutch law amply demonstrates.

137 *Koopmans Handboek* 4.5.8.10.

138 *Praelectiones* 3.24.13.

139 At 850B.

140 It is submitted that these few words distilled the attitude of the Roman-Dutch law into its essence. See the discussion in Chapter 17 *supra*.

141 At 850F.

(a) He argued that the Roman-Dutch law had to be applied<sup>142</sup> and that English authority is merely persuasive<sup>143</sup>.

(b) Counsel for the plaintiff further accepted that *'in order for the insured to recover under the policy the occurrence of the insured peril must be the proximate cause of the loss'*<sup>144</sup>.

(c) He then contended that the plaintiff had been deprived of his vessel in consequence of an exercise of coercive authority by the Government of the State of Mocambique and that such a loss falls within the scope of the risk clause, notwithstanding the interposition of some form of judicial decision<sup>145</sup>.

(d) The plaintiff's counsel repeated his contention in the trial court that there was no requirement of a notice of abandonment under the Roman-Dutch law and in any event submitted that the failure to give notice of abandonment did not result in a forfeiture by the assured of his

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142 At 851B.

143 At 851D.

144 At 853C.

145 At 851H-852C.

claim. Counsel contended that the purpose of giving a notice of abandonment is to enable the insurer, 'by his acceptance thereof' to take such steps as are available to minimise the loss<sup>146</sup>.

9.2. THE ISSUES: At the hearing of the appeal counsel for the defendant insurer abandoned the submissions in the heads of argument drawn by his predecessor so far as the warranty and the question of illegal fishing were concerned, but argued that the appeal should be allowed on either of the following grounds:

(a) That the plaintiff had not discharged the onus of showing that the events which resulted in the loss of the trawler were covered by one of the risks enumerated in the '*risks clause*';

(b) The plaintiff's claim could not succeed because, despite the fact that there was no such requirement in the policy, no notice of abandonment had been given by plaintiff to defendants<sup>147</sup>.

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At 855C-J. This contention was clearly incorrect as it ignored the necessity for an abandonment in order to maintain the integrity of the indemnity principle.

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At 860F-H.

9.3. THE DECISION: Galgut AJA gave the judgment of the majority of the court.

9.3.1. Before dealing with the main contentions of the insurer, Galgut AJA made a number of points.

(a) In the first place, he pointed out that the law to be applied by the court was the Roman-Dutch law applicable in the Republic, by virtue of Section 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983<sup>148</sup>.

(b) In the second place, he pointed out that in terms of Section 63(1) of the Insurance Act 27 of 1943 any question of law arising from a domestic policy, which both policies under consideration were, had to be decided according to the law of the Republic but English decisions were of assistance and are persuasive authority on the meanings of clauses in the policies<sup>149</sup>.

(c) He then pointed out that the trawler was insured only '*against the risk of actual total loss and or constructive total loss*'. This meant that the plaintiff could not claim for any average

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At 857B-C.

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At 857E-F.



or partial loss<sup>150</sup>.

(d) Galgut AJA also pointed out that the policy contained a sue and labour clause<sup>151</sup>. Whilst the court had not been referred to any statutory provision or a case in the Republic dealing with the effect of a sue and labour clause, he was of the opinion that '*an insured is under an implied duty to minimise his loss*'<sup>152</sup>.

(e) After discussing the risk clause he came to the conclusion that the phrase '*detainments of all kings, princes and people*' would, in the Republic, be interpreted to mean the ruling power of the country<sup>153</sup>.

(f) Galgut AJA then went on to mention that there was no statutory requirement in the Republic requiring notice of abandonment when the insured claims for a total loss while such a notice has to be given in England if the claim is for a

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150 At 857H.

151 At 857I.

152 At 859F. The subject is dealt with extensively with reference to Roman-Dutch authorities by Van Niekerk in '*Suing, labouring and the insured's duty to avert or minimise loss*', 1987 MB 144.

153 At 858I.

constructive total loss<sup>154</sup>

9.3.2. Galgut AJA then found as follows:

*'I am, with respect, unable to agree with the finding of the Court a quo that the loss of the trawler was due to a continuous process. A Mocambican tribunal imposed a fine. Had that fine been paid the loss would not have resulted. In my view the confiscation did not result from the arrest of the trawler, it resulted from the failure to pay the fine. That failure was therefore the proximate cause of the confiscation of the trawler. The fact that the plaintiff was unable to pay the fine is irrelevant. The issue is not his ability to pay the fine. The issue is what caused the confiscation. That, as we have seen, was the fact that the fine was not paid. That was not a peril covered by the risk clause. Because of the above finding it is not necessary to discuss the abandonment issue raised in B (the abandonment issue) above.'*<sup>155</sup>

9.3.3. He thereupon allowed the appeal with costs. Rabie CJ, Jansen JA and Van Heerden JA concurred in his

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At 859B-C.

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At 862I-863A.

judgment. Viljoen JA also concurred, save for stating that in his view the case had to be decided according to English law which, on the application of the principles relating to causation, would have given the same result<sup>156</sup>.

9.3.4. Viljoen JA's view was that the language of the policy was that of the standard Lloyd's policy and that the parties must have intended that '*their mutual rights and obligations ... should be determined in accordance with the English law of marine insurance*'<sup>157</sup>.

9.3.5. In the course of his judgment Viljoen JA also quoted from Lord Diplock's speech in *Amien Rasheed Corporation v Kuwait Insurance*<sup>158</sup>:

*'The contract of marine insurance is highly idiosyncratic; it involves concepts that are peculiar to itself such as sue and labour, subrogation, abandonment and constructive total loss, to give but a few examples.'*

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156 . ,At 863D.

157 At 865G. Viljoen JA relied upon and quoted the judgment of the House of Lords in *Amien Rashid Corporation v Kuwait Insurance* 1984 AC 50 (HL).

158 *Supra*, at 62 c-d.

He then added:

*'Subrogation is a well known concept in South African insurance law but the others referred to are completely foreign to our law and peculiar to English marine insurance law.'*<sup>159</sup>

9.4. COMMENT:

- 9.4.1. The court and the parties appear to have been *ad idem* on two aspects of the case. The first was that the law to be applied by the court was determined by Section 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983, namely the Roman-Dutch law applicable in the Republic<sup>160</sup>. The other was that the plaintiff could only recover for a loss proximately caused by a peril insured against<sup>161</sup>. The appeal court applied the proximate cause test and found that the loss had not been caused by an insured peril but by the plaintiff's failure to pay the fine.

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159 At 864G-H.

160 Having regard to the conclusions arrived at in Chapter 15 *supra*, the approach of the parties and the court cannot be criticised except that this conclusion was drawn without any apparent depth of research and discussion.

161 That this is so in respect of an ordinary claim for a total loss, is clear, but in those cases where an abandonment is allowed a different situation arises as the abandonment is allowed notwithstanding that the loss is not an actual loss but an economic loss.

9.4.2. The court expressly declined to deal with the abandonment point altogether and, on the facts of the case, the question of abandonment may not have been relevant at all since the parties approached the matter on the basis that there had not been any abandonment. It would only have been necessary to consider the consequences of an abandonment if the plaintiff had made an abandonment. Viljoen JA's statement that abandonment was not part of South African law was thus obiter, and, in any event, incorrect.

9.4.3. The court's attention was not drawn to some relevant English decisions, nor did the court consider English law notwithstanding the acceptance by the court and both parties that English decisions were helpful as persuasive authority. The most important of these decisions are *Thornely and Another v Hebson*<sup>162</sup> and *Stringer and Others v The English and Scottish Marine Insurance Company*<sup>163</sup>.

9.4.4. In *Thornely and Another v Hebson* the 'William' was sold by order of the Admiralty Court in order to pay salvage earned by the rescue of the ship. The

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2 B & Ald 512.

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(1870) 5 LR (QB) 599.

owner did nothing to raise the funds to pay the salvage. The court unanimously held that the assured's inability to prevent the judicial sale of the vessel through impecuniosity would not have prevented the loss from being a total loss, but there had to be proof of such impecuniosity<sup>164</sup>. Since the assured had failed to produce such proof in the instant case the loss could only be treated as an average loss.

- 9.4.5. The facts of *Stringer and Others v The English and Scottish Marine Insurance Company* were remarkably similar to those of the 'Morning Star'. The insurance was on the goods carried on the 'Dashing Wave' on a voyage from England to Matamores in America. The 'Dashing Wave' and her cargo were captured by an American warship and taken to New Orleans to have her and the goods condemned as lawful prize. The assured did not abandon the goods at this stage, although the court was clearly of the opinion that they were entitled to do so. In other words, a constructive total loss was already present at this stage. The assured, however, did not abandon but sought to defend the claim for confiscation and were indeed successful

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It was put as follows by Holroyd J: 'I think, also, that the sale will not amount to a total loss, so as to entitle the assured to recover, if it was in their power to have prevented it; and it lies upon them to shew that they could not do so.'

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in the trial court. However, the matter was taken on appeal and while the appeal was pending the Supreme Court in Washington ordered that the cargo be sold and the proceeds be held for disposal in terms of the law. Three questions arose, all directly relevant to the case of the 'Morning Star'.

(a) The first question was whether the sale in terms of the court order resulted in a total loss of the goods. The court answered that it did, Martin B putting it as follows:

*'In my judgment, by the sale of these goods under the lawful order of the court of prize, the assured was deprived of all dominion and property in them. They were taken out of his possession. He was deprived of all property in and dominion over his goods; and therefore, in these circumstances, he is entitled to recover the full amount of his insurance, the underwriters, as I have said, being entitled to the proceeds of the sale.'*<sup>165</sup>

The effect of the judicial sale was therefore to divest the assured of his ownership of the goods,

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At 606. The insurer would be entitled to such proceeds by virtue of the principles of subrogation.

a circumstance which amounts in modern parlance to an actual total loss as opposed to a constructive total loss.

(b) The second question was whether the assured were obliged to stave off the sale by putting up security for the prize claim, or, put conversely, whether the assured could be non-suited for their failure to prevent the sale by putting up the security. This question was answered in the negative. Kelly CB held that:

*'(I)f the single question were whether he (the assured) was possessed of the means to give that security it might have been incumbent upon him to shew that he was unable to do so, and so to relieve himself of the duty thus sought to be imposed upon him.'*

He pointed out further that a prudent uninsured owner would not have put up security either. The mere failure to put up the security was therefore not regarded as sufficient to non-suit the assured; they must have had the ability to put up the security; and putting up the security must have been the prudent thing to do in the circumstances.



(c) On the question of causation Kelly CB said:

*'This loss of the goods arose, though not directly, out of the original capture (which was of itself, if it had been so treated, a total loss), through a series of consequences, viz. the institution, the different steps, and the continuance of the suit until the decree was pronounced; and the sale under the decree was - if I may use the expression - a completion of the total loss ... Under the circumstances, it appears to me, that all the requisites concurred necessary to establish a case of total loss, with or without abandonment ...'*

Kelly CB thus saw the whole process which started with the capture of the *'Dashing Wave'* and the goods and which ended in the sale of the goods as a continuous process resulting in a total loss by capture, an insured peril.

(d) Martin B and Channell B concurred, the latter saying:

*'(M)y opinion is founded on the ground that the sale of the cargo by order of the prize court gave the plaintiffs the right to maintain an action on*

*the policy for a total loss.'*<sup>166</sup>

9.4.6. Four important points were made in the judgments, which would have equal force in American law as they deal with English law prior to the *MIA*<sup>167</sup>. Firstly, it is clear that the court viewed the initial capture as an event giving rise to the right to abandon and to claim for a constructive total loss<sup>168</sup>. Secondly, the assured would have been obliged to work for the release of the goods so far as a prudent uninsured owner would have done, but no further, and in particular no further than he could in fact afford. Thirdly, the sale deprived the assured of his ownership in the goods<sup>169</sup>. Fourthly, notwithstanding the effluxion of a period of almost eighteen months from the capture to the sale and notwithstanding the assured's failure to obtain the release of the goods by putting up the security, the loss was regarded as having been caused by the initial

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At 608.

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So far as English law under the *MIA* is concerned these judgments would retain their value as the underlying common law is still used in the interpretation of the *MIA*.

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As Martin B put it at 605: '*The object of the insurance being that the goods should arrive under the control and in possession of the assured at the port of discharge, when they were once captured by a person hostile to the owner, he would have a right to abandon them ...*'

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Martin B opined at 606: '*In my judgment, by the sale of these goods under the lawful order of the court of prize, the assured was deprived of all dominion and property in them.*'

capture. If this reasoning had been adopted in the '*Morning Star*' the court would have had to find that the plaintiff's loss had been proximately caused by the initial capture as the facts of the two cases are for practical purposes identical.

9.4.7. The legal principle was also stated authoritatively in the consolidated appeals of *Cosman v West; Cosman v British America Assurance Company*<sup>170</sup> concerning the barque '*L. E. Cann*'. The Privy Council advised Her Majesty that there is as much a total loss under a marine insurance policy if the owner's right of property and possession are transferred to a purchaser in a sale in terms of a decree of a competent court as there would be if the property were totally annihilated by an insured peril<sup>171</sup>. The same principle manifestly applied to the '*Morning Star*' as the plaintiff had been deprived of ownership by the order of a competent court.

9.4.8. Some guidance on the point could also have been derived from the decision of the French Court of

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(1888) 13 LR (App Cas) 160 (PC).

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This general principle applies as much after the *MIA* as it did at the time it was enunciated.

Appeal in the case of '*L'Arabie*'<sup>172</sup>. The '*Arabie*' was damaged at sea and called at Port Louis in Mauritius, where she was repaired. The master found himself unable to raise the funds to pay for the repairs. The ship-repairer obtained an order for the seizure of the ship in order to enforce his claim. The court ordered the '*Arabie*' to be sold and she was thereafter sold under the authority of the court's order. Her owner thereupon abandoned the ship under article 369(1) of the *Code de Commerce* of 1807 ('the *CdeC*') to his insurers and claimed the full amount of the insurance on the grounds of innavigability as a result of a sea peril. The Court of Appeal ruled that the seizure and subsequent sale of the ship in terms of the order of the court gave rise to the right to abandon where the inability of the master to procure the funds to pay for the repairs and thereby to obtain the release of the ship was not due to any fault on his part. Moreover, the Court stated explicitly that the order of the Mauritian judge who authorized the seizure and the sale of the ship constituted '*une fortune de mer*', a sea peril, as contemplated by article 369 (1) of the *CdeC*. Therefore, notwithstanding the apparently distant relationship between the damage

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*Régis v Leray et Lafargue* ('*L'Arabie*') 1880 (2) DJG 132 (Cour d'Appel).

sustained at sea and the ultimate sale of the ship, the court accepted that there had been an unbroken chain of causation which resulted in the assured being totally dispossessed<sup>173</sup> of his ship as a result of an insured peril. The reasoning adopted in this case is in consonance with that of the English decisions pertaining to the 'William', the 'Dashing Wave' and the 'L. E. Cann' and even implies that the type of dispossession which had occurred amounted to an actual total loss.

9.4.9. The aid of Dutch law could also be invoked to make the same point, namely that the loss became a '*feitelijk geheel verlies*' (a factual total loss) entitling the assured to payment of the full indemnity upon the confiscation. Nolst Trenité wrote the following in his discussion of '*Opbrenging en aanhouding door een vreemde mogendheid*'<sup>174</sup>:

*'Het spreekt van zelf dat het enkele feit dat schepen of goederen zijn opgebracht<sup>175</sup> of aangehouden<sup>176</sup>, geen aanleiding tot abandonnement*

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173 '*totalement dépossédé*'.

174 *Zeeverzekering*, 2nd ed, (1930), Vol II, 647.

175 '*arrested*'.

176 '*detained*'.

behoort te geven. Alleen indien het beslag geruimen tijd duurt, kan men aannemen dat ze voor den eigenaar verloren zijn. Daarom worden in art. 668 K. soortgelijke termijnen gesteld als bij art. 667 K. voor vermissing zijn voorgeschreven, tenzij de opbrenging of aanhouding door verbeurdverklaring is gevolgd. In het laatste geval is er aanstonds zekerheid van het verlies verkregen, en kan dadelijk geabandonneerd worden.'

It is thus clear that in Dutch law the confiscation of the ship or goods gave rise to a claim for the full amount of the insurance on the basis that the loss was certain and final<sup>177</sup>. At the time the 'Morning Star' was before the courts Dutch marine insurance law was very largely based on the provisions of the French CdeC of 1807. Dutch writers like Schook<sup>178</sup>, Mens Fiers Smeding<sup>179</sup> and Nolst Trenité<sup>180</sup> also relied heavily on French authorities in their works. The decision of the French Court of Appeal in the case

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177 The fact that an abandonment was required is incidental as an abandonment was required in that system in all cases where the full indemnity was claimed.

178 *Het Abandonnement*, doctoral thesis, Utrecht, (1858).

179 *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895).

180 *Supra*.

of the 'Arabie'<sup>181</sup> therefore probably also reflects the way a Dutch court would have decided that case and more authority in favour of Shooter's claim could have been found in this way.

9.4.10. In German law the confiscation would simply have created a 'Totalverlust' with the insurer obliged to pay the full indemnity whilst being entitled to deduct the value of any salvage, which there could not be unless the ship was restored to the assured<sup>182</sup>.

9.4.11. It is submitted that the Appellate Division ought to have adopted the reasoning in the English and French cases referred to earlier and could even have relied on the provisions of Dutch and German law as persuasive authority. The court should then have applied the strict or classical Roman-Dutch law principles as follows:

(a) The questions before the court had to be determined according to the principles of the '*Roman-Dutch law applicable in the Republic*' by virtue of section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983, which law should be

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*Supra.*

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See Chapter 7 *supra.*

Part V: Chapter 18: South African law: Legislation and case law referred to as 'South African law' rather than Roman-Dutch law<sup>183</sup>. English decisions are helpful and of persuasive force in interpreting the clauses of the policy.

(b) South African law recognizes the right of an assured to abandon the ship and insured cargo, as the case may be, and to claim the full amount of the insurance.

(c) The right to abandon and to claim the full indemnity may already have arisen when the initial arrest and detention of the '*Morning Star*' by the Government of the State of Mocambique took place, as the arrest and detention fell within the phrase '*detainments of all kings princes and people*' and within the reasoning of the '*Dashing Wave*'.

(d) If it had been proved that Mocambique was an enemy of the Republic of South Africa at the

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It can no longer be seriously denied that South African law is a synthesis of two great legal systems, namely English law and the inherited Roman-Dutch law. Insurance law is a good example of this synthesis. For example, the influence of English law and practice during the application of the General Law Amendment Act of 1879 (Cape of Good Hope) and the General Law Amendment Ordinance of 1902 (Orange Free State) cannot be denied as English law then applied in those provinces to marine and fire insurance. (See Chapter 15 *supra* in this regard.) As was pointed out in Chapter 12 *supra*, the principles of subrogation have been held to have been inherited from English law: see *Ackerman v Loubser* 1918 OPD 31. There are branches of the law where South African law is more Roman-Dutch than English, for example the law of succession, property and of persons. But other branches of the law are virtually identical to English law, especially commercial law and procedural law.



time of the arrest, then the plaintiff would have had the right to abandon the '*Morning Star*' immediately when the initial arrest and detention occurred and to claim the sum insured. If Mocambique was not an enemy at the relevant time, the plaintiff would not have been entitled to abandon the '*Morning Star*' forthwith, but he would have had to wait a reasonable time to ascertain whether there was any reasonable possibility of obtaining the release of the vessel. Whether the detaining power is a friend or an enemy is a question of fact, which is usually determined by evidence from officials of the Foreign Affairs or Defence Department.

(e) Since no evidence had been adduced to show that the State of Mocambique was such an enemy state, the court had to proceed on the basis that there remained some possibility that the vessel may be released.

(f) Since it had been proved that the assured did not have the means to pay the fine and thus to obtain the release of the vessel the loss was recoverable as a total loss of the factual kind. The cases of the '*William*' the '*Dashing Wave*', the '*L. E. Cann*' and the '*Arabie*' and *Nolst Trenité's*

Part V: Chapter 18: South African law: Legislation and case law  
opinion are unimpeachable authority for this  
proposition<sup>184</sup>.

(g) The plaintiff had been obliged to notify the defendant of the fact of the arrest and detention as soon as possible after it occurred. This he had done<sup>185</sup>.

(h) In terms of the classic Roman-Dutch law, the plaintiff would have been obliged to make a valid abandonment to the defendant. In Van der Linden's words, he had to '*abandon the ship and renounce all his right or interest therein, in favour of the underwriters.*'<sup>186</sup> This is the position under the inherited Roman-Dutch law, but in English law no abandonment would be necessary when the loss is an actual total loss.

(i) Since the confiscation had deprived the assured of ownership of the vessel no abandonment was necessary. The rule of the Roman-Dutch law which required an abandonment also in cases where the loss was an actual total loss rather than a

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*Supra.*

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This is the first kind of notice required, according to the authorities cited by Friedman J in the trial court.

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*Koopmans Handboek*, 4.8.2.

'wettelijk geheel verlies' can no longer be applied in South African law as the basis for that rule fell away when subrogation as a concept separate from abandonment came to the fore. There is no need for such a rule in cases of actual total loss or '*feitelijk geheel verlies*' because there is nothing to abandon and nothing for the insurer to acquire. The insurer is adequately protected by the principles of subrogation which allow him to pursue the vessel in the hands of the Mocambican government after the indemnification and the indemnity principle is protected at the same time. In any event, South African law does not require meaningless formality in commercial contracts.

(j) However, if the loss were to be regarded as a constructive total loss, to use English terminology, the plaintiff would not be entitled to claim the full indemnity without a proper abandonment. Since the policies were against total loss only, there could be no claim for an average loss in such circumstances either. The court ought then to have considered whether the plaintiff had given a sufficient notice of abandonment. However, since the question of the *adequacy* of notice of abandonment was not dealt with in the trial court

and in the appeal court's judgments, it becomes necessary to investigate this aspect further by having reference to the original case record.

- 9.4.12. If the court had adopted this reasoning the result would have been in accordance with the Roman-Dutch law as adapted, pre- and post 1906 English law, American law, the then (1983) current Dutch law, current French and German law and justice. Having regard to the history of South African marine insurance law one could hardly hope for a better correspondence of South African law with the legal systems mentioned.

10. THE 'MORNING STAR': THE ORIGINAL CASE RECORD

- 10.1. The original case record of the '*Morning Star*' is still available in the archives of the Appellate Division in Bloemfontein. The record reveals a number of aspects of importance which are not apparent from the trial and appeal judgments as contained in the official law reports.

- 10.2. The action was instituted on 1 November, 1983 by the issue of a Writ of Summons *in Personam* out of the Durban and Coast Local Division of the Supreme Court exercising its admiralty jurisdiction. The

institution of action thus coincided with the first day of operation of the Admiralty Jurisdiction Regulation Act 105 of 1983, and Shooter was probably the first person in South Africa to institute action under the provisions of the Act. He was certainly the first to sue for payment under a marine insurance policy in South Africa in the admiralty jurisdiction of the court<sup>187</sup>. At the time when action was thus instituted no special rules regulating admiralty proceedings had yet been promulgated and the old Rules of the Courts of Admiralty still in force in terms of the Colonial Courts of Admiralty Act 1890 were still applicable and were utilised.

10.3. A Statement of Claim accompanied the Writ. It claimed payment in three paragraphs reading as follows:

*'3. The Plaintiff was the owner of the fishing vessel 'MORNING STAR'.*

*'4. The Defendant was the insurer of the vessel under a Marine Hull Policy No. 37/MI/061107 and*

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By virtue of section 1(1)(ii)(r) of the Act (prior to amendment, now section 1(1)(iv)(u)) a claim for marine insurance was defined as being an admiralty claim and thus fell within the admiralty jurisdiction of the Supreme Court. Prior to the Act marine insurance claims were dealt with under the parochial jurisdiction of the Supreme Court. See Chapter 15 *supra*.

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under a Marine Hull (War Risks) Policy No.  
37/MI/061108.

'5. Under the said policies the Plaintiff claims the sum of R300 000,00 from the Defendant arising from the actual total loss of the said vessel in Maputo on or after the 12th April, 1983; interest thereon according to law; costs of suit and other relief.'<sup>188</sup>

The claim was thus expressly for an 'actual total loss'.

10.4. The defendant insurer requested particulars, including: the respective market values of the vessel when insured and when the loss was sustained<sup>189</sup>; whether it was contended that the loss was an actual total loss or a constructive total loss<sup>190</sup>; and whether notice of abandonment had been given and if so, when and in what terms<sup>191</sup>.

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188 Statement of Claim, 2. This and the following references are to the original and certified record of the case on appeal.

189 Paragraph 2 of Exhibit A ('E'), 187.

190 Paragraph 3, Exhibit A ('E'), 187.

191 Paragraph 4, Exhibit A ('E'), 188.

The plaintiff assured declined to answer the questions about the market value<sup>192</sup>, and repeated that it was contended that the loss was an actual total loss<sup>193</sup>. The last question thus fell away.

10.5. The Main Grounds of Defence included allegations that: the loss was a constructive total loss<sup>194</sup>; no notice of abandonment had been given<sup>195</sup>; the value of the ship was '*substantially less than R300 000,00*'<sup>196</sup>; and that the plaintiff had failed to '*sue, labour and travel*' as a result of which the ship had been confiscated<sup>197</sup>.

10.6. Abandonment was alluded to in three clauses of each policy as follows:

10.6.1. It was provided, under the heading '*CONSTRUCTIVE TOTAL LOSS*' that, for the purpose of determining whether the ship was a constructive total loss, the value was to be taken as repaired value

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192 Paragraph 2, Exhibit A ('F'), 191. This refusal was justifiable because the policies were valued policies and it was for the insurer to prove that the agreed value was not the true value prior to the loss.

193 Paragraph 3, Exhibit A ('F'), 191-192.

194 Paragraph 2.1, Exhibit A ('G'), 195.

195 Paragraph 2.2, Exhibit A ('G'), 195.

196 Paragraph 3.3, Exhibit A ('G'), 196.

197 Paragraphs 4.3-4.4, Exhibit A ('G'), 196-197.

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without taking into account breaking up or wreck  
value<sup>198</sup>.

10.6.2. In case of an actual constructive total loss the  
underwriters for freight were to make no claim to  
the freight whether notice of abandonment had been  
given or not<sup>199</sup>.

10.6.3. No acts of the insurer were to be considered 'a  
waiver or acceptance of abandonment'<sup>200</sup>.

10.7. The telex of 4 May 1983 from the plaintiff's  
attorney to the insurer reads as follows<sup>201</sup>:

*'We confirm that we act for Shooters Fisheries in  
respect of the arrest, restraint and detainment of  
the vessel 'Morning Star' in Maputo by the Peoples  
Republic of Mocambique and/or unidentified North  
Korean or East German fishing trawlers.*

*'We are advised that the brokers Sancura have  
advised you of the circumstances of the matter*

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198. Clause 14, Exhibit A ('G'), 219.

199. Clause 15, Exhibit A ('G'), 219.

200. Main clause, Exhibit A ('G'), 202.

201. Exhibit D, 250. The telex was sent in capital case but for the sake of  
appearance it is reproduced here in lower case.



which have also been widely reported in the press.

*'Our client has a claim in terms of the aforesaid policy (so called "War Risks") in respect of the constructive total loss of the vessel by the arrest restraint and detainment of the vessel as aforesaid for the full insured value thereof alternatively in terms of the suing and labouring clauses alternatively the common law, in respect of the cost charges and amounts payable to obtain the release of the vessel from detention, recrew her repair such damage as may have occurred and to return her to its operating port.*

*'We confirm having telephoned Mr Lundin on the morning of 3.5.83 and having suggested we meet to discuss the matter to ascertain whether an amicable solution to the current impasse could be reached. Mr Lundin undertook to telephone the sender hereof but has not as yet done so.*

*'It would be appreciated if the matter could be afforded your attention.*

*'Regards.'*

10.8. The plaintiff's evidence that he was unable to

raise the money to pay the fine was not disputed<sup>202</sup>.

10.9. COMMENT

10.9.1. An outstanding feature of the of the policy, the pleadings and the telex quoted is that they used the language of English marine insurance law in the repeated references to 'actual' and 'constructive total loss'. There was therefore support for Viljoen JA's approach that the parties probably intended English marine insurance law to apply.

10.9.2. Whilst a claim for an actual total loss without the necessity of an abandonment could be substantiated if the effect of the confiscation was that, under Mocambican law<sup>203</sup>, ownership transferred to the Mocambican Government, that point was not argued in the trial court nor in the Appellate Division. Such would have been the position if English law had to be applied<sup>204</sup>. In

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The plaintiff did not have funds of his own, his bankers would not advance the money, and the defendant insurer refused to come to his assistance; Record: Vol I, 106.

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The *lex loci*.

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It will be recalled that Viljoen J A was of the opinion that the language of the policy was such that the parties must have intended that English law would apply to their contractual relationship. On this point the judgments as reported in the official law reports may lead to one

*Wilson v Forster*<sup>205</sup> the court held that the seizure and sale of a ship by a neutral state without the judgment or order of a competent court did not divest the owner of his property and that an abandonment would be necessary before the assured could recover for a total loss. In the case of the '*Morning Star*' there was such a judgment, and the plaintiff's ownership of the vessel was therefore terminated by the confiscation order. This is also in accordance with the judgments in the cases of the '*William*', the '*Dashing Wave*', the '*L. E. Cann*' and the '*Arabie*'. This means that, in English law, there was an actual total loss and no abandonment was then necessary<sup>206</sup>.

10.9.3. However, if the strict Roman-Dutch principle were to apply to the matter, then an abandonment would still have had to be made as the Roman-Dutch law did not distinguish between an actual total loss

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conclusion whilst the underlying record justifies another. There is a lot to be said for Viljoen JA's approach in the light of the express reference to constructive total loss and actual total loss in the policy document itself.

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. 6 Taunt 25.

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See also *Roux v Salvador* 3 Bing (NC) 266 and *Mullett v Sheddon* 13 East 304 where Lord Ellenborough said: '*But here the property itself was totally lost to the owner, and the necessity for any abandonment was altogether done away.*'

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and a constructive total loss<sup>207</sup>. (For the reasons set out earlier it is contended that this can no longer be the position with regard to cases which amount to actual total loss.) On this construction an abandonment would still have been necessary even if the confiscation order had the effect of vesting ownership of the vessel in the Mocambican Government.

10.9.4. (a) Whether the telex constituted a notice of abandonment is a moot question. It is at least arguable that it did constitute a notice of abandonment in so far as it read:

*'Our client has a claim in terms of the aforesaid policy (so called "War Risks") in respect of the constructive total loss of the vessel by the arrest restraint and detainment of the vessel as aforesaid for the full insured value thereof ... It would be appreciated if the matter could be afforded your attention.'*<sup>208</sup>

(b) Whilst English law, that is as under the common law and the MIA, requires the notice of

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This fact was even recognized in *Roux v Salvador*, *supra*, at 284.

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The original case record does not have reference to any other document or act which might be construed as notice of abandonment or an abandonment.

abandonment to be unmistakable in its terms, indicating the assured's intention to abandon unconditionally, no special form is prescribed<sup>209</sup>. In *Currie v Bombay Native Insurance Co*<sup>210</sup> the court accepted as a valid notice a similar one which read:

*'With regard to the Northland, we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements.'*

(c) It is submitted that the telex sent by the plaintiff's attorney to the insurer also passes the test enunciated by Roche J in *George Cohen, Sons & Co v Standard Marine Insurance Co*<sup>211</sup> where the latter said:

*'On the whole, if necessary, I think I should decide that where a person claims a total loss and asks to be paid the full sum insured, he does sufficiently make it plain to an intelligent underwriter that he is abandoning his interest in*

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209 Ivamy, *Marine Insurance*, 4th ed, (1985), 385.

210 (1869) LR 3 PC 72.

211 (1925) 21 LLR 30 (KB) at 36.

Part V: Chapter 18: South African law: Legislation and case law  
the thing in respect of which he claims to be paid  
as for a total loss.'

In *Parmeter v Todhunter*<sup>212</sup> Lord Ellenborough  
said:

'There is no implied abandonment by a demand of a  
total loss. It would be very well to prevent parol  
(oral) abandonment entirely; but if they are  
allowed, I must insist upon their being express.  
An implied parol abandonment is too uncertain and  
cannot be supported. The abandonment must be  
express and direct, and I think the word "abandon"  
should be used to render it effectual.'

However, the statement that the word 'abandon'  
should be used was an *obiter dictum* and has not  
been followed in subsequent cases<sup>213</sup>. There was  
thus no bar to finding that the telex constituted  
a notice of abandonment which was 'plain to an  
intelligent underwriter' and was therefore  
sufficient.

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212 (1808) 1 Camp 541.

213 Ivamy, *Marine Insurance*, 4th ed, (1985), 385; Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as 'Arnould'), para 1266; *Panamanian Oriental SS Corporation v Wright* [1970] 2 LLR 365 (QBD). See also *Singer Manufacturing Co v Western Assurance Co*, *supra*, (Canada); *Barrs v Merchants' Marine Insurance Co* (1887) 26 NBR 339 (CA), (Canada).

(d) It further does not appear to matter whether this scenario is looked at through the eyes of English law or South African law. In both cases the same conclusion ought to be arrived at as neither legal system is interested in formality above substance. On this basis, therefore, there was a proper abandonment and a claim for the full indemnity ought to have been allowed.

10.9.5. Since the claim was for payment of the agreed value, the onus of proof on the question of the quantum of claim was squarely on the defendant insurer. No evidence of value was given during the trial and, other aspects excepted, Friedman J was thus entitled to find a loss amounting to the agreed value of the vessel, namely R300 000,00.

10.9.6. An important consideration became evident in the scenario thus posed. The ship could have been released upon payment of the fine of R167 000,00. If, therefore, an abandonment had been made before the actual confiscation by the Mocambican Government, the insurer as new owner of the '*Morning Star*' would have been able to acquire her release by payment of that fine. By these means the insurer would have achieved a saving or benefit of some R133 000,00 for itself, being the

difference between the value of the vessel and the fine. This clearly demonstrates the benefit of an abandonment to the insurer and the need that the abandonment be made at an early stage to allow the insurer to save or salvage as much as possible of the insured and abandoned ship or goods. It also demonstrates that there was probably a lack of understanding of the basic principles of abandonment in the insurer's office.

10.9.7. The plaintiff ought therefore to have succeeded.

## 11. CONCLUSION

11.1. This survey of developments in the South African legislatures and the courts did not bring to light any new insights into the ancient institution of abandonment. It appears though that some courts applied, or endeavoured to apply, abandonment principles from time to time, but the opportunities to do so were limited. Further, when the opportunity did arise the facts were often such that the case could be and was decided on another point. In the few cases where abandonment legitimately came to the fore, the courts initially applied the Roman-Dutch law principles adequately, but the recent case of the '*Morning*



*Star'* demonstrated a disturbing lack of understanding of abandonment, coupled with an equally disturbing lack of depth in the research into the subject. A grave injustice appears to have been done in the case of the '*Morning Star*'.

11.2. When the history of abandonment in South Africa is considered against the light of historical developments, especially those which occurred in Europe, it becomes apparent that the inherited Roman-Dutch principles of abandonment were shielded from further development by a number of circumstances. In the first place, the peculiar history of the country resulted in the seventeenth and eighteenth century Roman-Dutch law of the province of Holland becoming the law which regulated marine insurance locally, but that law remained static as subsequent developments in the Netherlands did not become part of South African law. In the second place, the Cape of Good Hope ceased to be a Dutch possession just at the time when the European countries were taking steps to codify their law, during which process the Roman-Dutch principles which applied at the Cape of Good Hope ceased to apply in the country of their origin. In the third place, the conquering power, England, did not replace that Roman-Dutch law with

its own when it took over in 1806<sup>214</sup>. The remoteness of the country from the First World and its relative unimportance as a consumer of foreign goods and supplier of raw materials or finished goods also contributed to this process of stagnation. There was simply no pressure dictating changes to the Roman-Dutch principles of abandonment and consequently the law has been left as it was when it was inherited from Holland. Consequently the institution of abandonment in South African marine insurance has lain asleep like a veritable Rip van Winkle for a period of almost two hundred years. During that period great developments occurred elsewhere<sup>215</sup>.

- 11.3. The result is that the principles of the Roman-Dutch law have survived in South Africa for three centuries, virtually untouched by legislative or judicial hand. By the same token, however, abandonment principles in South African law have lain fallow, and no development has taken place at all. The sources from which development of legal principles usually emanate, academic treatises, legislative intervention and judicial interpretation, have made no mark on abandonment

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See Chapter 15 *supra*.

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These developments were discussed in Chapters 6-10 *supra*.

in South African law.

11.4. It is apparent that some changes will have to be made to the strict Roman-Dutch principles of abandonment. A few examples will suffice at this stage. The time limits attaching to the missing ship are no longer justifiable and will have to be changed to take account of advances in navigation and communication aids. Subrogation has since the early parts of the nineteenth century come to the fore and there would consequently appear to be no further need for the requirement that an abandonment has to be made in all cases where the full indemnity is claimed. The automatic vesting of ownership of the insured ship or goods in the insurer by means of the abandonment may have to be reconsidered.

11.5. In the next chapter suggestions will therefore be made for the adaptation of the Roman-Dutch principles inherited by South African law to bring South African law up to date and into line with developments elsewhere.

## CHAPTER NINETEEN

### SOUTH AFRICAN LAW: GENERAL RECOMMENDATIONS

#### 1. INTRODUCTION

1.1. The origins, history and development of the principles of abandonment have now been traced from ancient Babylon to modern South Africa. In the process the theoretical implications of abandonment were explored in order to determine the *raison d'être* of abandonment in the setting of its relationship with the indemnity principle, subrogation and the transfer of ownership of the abandoned property. Similarly the essential or basic principles of abandonment in six legal systems, including South African law, have been distilled from the available material. This allows some recommendations with regard to the future of South African law to be made<sup>1</sup>.

1.2. Three principal recommendations are to be made in this chapter. The first is that the concept of a constructive total loss should be recognized as a manifestation of economic loss which in the

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<sup>1</sup> In making recommendations the changes which have occurred over the years, the need to maintain not only the precious links between South African law and continental and English law and also the need to maintain continuity in South African law itself will be taken into account.

context of marine insurance gives rise to the right to the full indemnity. The second recommendation is that the law should give recognition to the distinction which is made in insurance theory and practice between a total loss and a partial loss. The third recommendation is that the Roman-Dutch law principles of abandonment should be amended in one important respect, namely to allow the insurer to decline the transfer of ownership of the abandoned ship or goods.

- 1.3. The basic rules or principles of abandonment in South African marine insurance will be re-examined in the next and final chapter and compared briefly to the common principles of abandonment which were distilled from the law of the Netherlands<sup>2</sup>, Germany, France, England and America before final recommendations will be made with regard to the retention, modification or exclusion of individual rules<sup>3</sup>.

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<sup>2</sup> In the process of comparison the law in the Netherlands will be taken to be that which applied immediately before the institution of abandonment in Dutch law was abolished with effect from 1 January 1992.

<sup>3</sup> It should be remembered, however, that abandonment exists within the broader principles of the law of contract, particularly the contract of insurance. Certain principles which apply to all contracts will necessarily apply to marine insurance contracts and therefore to abandonment as well, for example the capacity to contract, the consequences of fraud, mistake and duress, waiver, prescription and compromise. In the discussion which follows those general principles will not be restated as the purpose of this study is to identify the principles of abandonment within the contract of marine insurance.

2. FIRST RECOMMENDATION: THE RECOGNITION OF THE  
CONCEPT OF A CONSTRUCTIVE TOTAL LOSS

2.1. Marine insurance did not originally draw a distinction between what is now called an actual total loss and those losses which comprised or included an element of economic loss and may, for the moment, be termed abandonment losses. Marine insurance practice simply recognized that the assured may suffer a complete loss of the capital invested where his ship or goods are removed from his possession or control. The ship or goods might as well be physically destroyed; the effect is the same to the assured. In order to allow the assured to recover for this economic loss, the risks insured against were so defined that such losses were covered, but the assured was required to make an abandonment when he claimed for an economic loss which was total. Thus, save for requiring an abandonment in cases of economic loss, marine insurance did not distinguish between an actual loss, that is to say a loss affecting the insured object physically, on the one hand, and economic losses on the other.

2.2. Before turning to the individual legal systems, the difference between an actual and an economic

loss may be briefly repeated: In the case of an actual total loss, the thing insured itself is physically lost or damaged or the assured deprived of ownership thereof. The amount which may be recovered in case of such a loss is calculated by reference to the value of the thing and extends to the full value because that is what has been lost<sup>4</sup>. In the case of economic loss the thing insured is not completely lost or damaged or removed from the assured's ownership, but is affected in such a way that it is no longer within the economic possession or control of the assured<sup>5</sup>. The amount recoverable for such an economic loss would, but for abandonment, have to take into account the salvage value of the thing insured. In abandonment cases for example, there remains or may remain some part or salvage of the insured ship or goods, yet the full insured value of the thing insured is paid as the indemnity<sup>6</sup>.

2.2.1. Dutch law allowed an abandonment in three broad

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4 Whether as an indemnity or as damages arising from breach of contract or from delict, the measure of the recoverable loss is the same.

5 See Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, doctoral thesis, University of Michigan, (1983), 1: 'A pure economic loss is a financial loss which is not causally consequent upon physical injury to the plaintiff's ... property.'

6 Thus the indemnity exceeds the actual diminution in value of the thing insured.

categories of cases<sup>7</sup> which are but different categories of economic loss. A total loss was created by means of the legal fiction of a 'wettelijk geheel verlies'<sup>8</sup>, whose effect was to presume that the loss was complete and extended to the full value of the insured ship or goods<sup>9</sup>. The loss so made recoverable, or indemnifiable in insurance parlance, was wholly or partially economic in nature and is easily distinguished from an actual total loss, or 'feitelijk geheel verlies'<sup>10</sup>. The terms 'wettelijk geheel verlies' and 'feitelijk geheel verlies' did not, however, appear in Dutch legislation, but represent the language of marine insurance theory and practice.

2.2.2. In German law the distinction is drawn expressly<sup>11</sup> between total loss, 'Totalverlust', and abandonment losses. The latter category

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7 The first category was where the right to abandon arose immediately upon the happening of the event which threatened the ship or goods. The second category was where a prescribed period had to pass without recovery before the abandonment could be made. The third category was that of the missing ship where the right to abandon was also delayed for a prescribed period. See generally Chapter 6 para 2.5 *supra*.

8 See Mens Fiers Smeding, *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895), 33; Molengraaff, *Leidraad tot de Beoefening van het Nederlandse Handelsrecht*, (1955), Vol III, 679.

9 Mens Fiers Smeding, *op cit*, 29; Dorhout Mees, *Schadeverzekeringsrecht*, 4th ed, (1967), ('Schade'), 637-638.

10 Molengraaff, *op cit*, Vol III, 679.

11 The German concept of a total loss is practically the same as the English concept of an actual total loss.



embraces only two cases of loss which are both economic in nature, namely the cases of capture and of the missing ship<sup>12</sup>. In each of these the ship or goods remain or may remain in existence and remains in the ownership of the assured. The function of the 'Abandonfrist' is to create artificial or presumed total losses, 'Fälle des constructiven Totalverlusts'<sup>13</sup> after the expiry of a suitable period.

2.2.3. French law is similar. The French notion of a 'perte légale' or 'perte fictive' being the essence of abandonment dates back to the time of Émerigon<sup>14</sup> and gives vent to the basic idea, which is that the loss is regarded as total only by virtue only of the operation of a legal fiction.

2.2.4. The English concept of a constructive total loss appears to be the product of judicial attempts in England to find a niche for pure economic loss as

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12 These losses are economic rather than actual because the ship or goods insured continue, or may continue, to exist but they are beyond the assured's physical and economic control.

13 Barkhausen, *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895), 12 et seq.

14 *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition of 1827), Vol II, 211: '... la perte entière est présumée ... et cette présomption, qui est juris et de jure, suffit ... pour donner ouverture à l'action de délaissement.' ('... the total loss is presumed ... and this presumption, which is juris et de jure, suffices to give room to the action of abandonment.') (Meredith's translation.)

an indemnifiable category of total loss in English marine insurance. This is clear from the nature of the events which have traditionally given rise to a constructive total loss, such as capture, detention, arrest, barratry, shipwreck and stranding<sup>15</sup>. All these events leave the ship or goods or part of them in existence, and an abandonment is only required if there in fact remains something of value<sup>16</sup>. The result, it is submitted, is that English law adopted the fiction of a constructive total loss to cater for pure economic loss, in the same way as Dutch, German and French law did. English law accepts evidence of a particular set of facts as conclusive evidence of loss and damage to the extent of the value of the insured thing<sup>17</sup>. Seen in this light, the concept of a constructive total loss does no more than to allow the assured to recover for an economic loss.

2.2.5. It is worth noting that until recently English textbooks did not have a separate chapter headed

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15 The list is not conclusive. See Chapter 5, para 7.9.1 *supra*.

16 See Chapter 5, para 7.9.1 *supra* and especially the authorities referred to in footnote 226.

17 Since this result follows automatically once the prescribed circumstances are present, the presumption is actually a rule of substantive law. See Zeffertt, *The South African Law of Evidence*, 4th ed, (1988), 530-531.

'Constructive Total Loss'<sup>18</sup>, as they now do. Nor did the English courts refer to abandonment losses as cases of constructive total loss until after Lord Ellenborough's famous interjection in *Mellish v Andrews*<sup>19</sup>. The concept of a constructive total loss is a relatively new one but that is not to say that the underlying principle is new. On the contrary, the fact is that in English law, as in continental law, abandonment has always served the function of allowing the assured to be indemnified in respect of his economic loss<sup>20</sup>. The law simply presumed a loss equivalent to an actual total loss in such cases. This fiction, perhaps unhappily<sup>21</sup> termed a constructive total loss in English law, also emphasised the nature of the loss as economic but diverted attention away from the event which

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18 Magens, *An Essay on Insurances*, (1755), Park, *A System of the Law of Marine Insurances*, (1786) and Marshall, *A Treatise on the Law of Insurance*, (1802) treated abandonment in the same way as continental authors and did not distinguish between actual and constructive total losses. Even at the stage of the second edition of Arnould's *A Treatise on the Law of Marine Insurance and Average*, 2nd ed, (1857) this most important of textbooks on the subject of marine insurance made no reference to constructive total loss as a separate category of loss.

19 (1812) 15 East 13.

20 Consider, for example, Park's words: '*When we speak of a total loss ... we do not always mean that the thing is absolutely lost and destroyed: but that by some of the usual perils, it is become of so little value as to entitle the insured to call upon the underwriter to accept what is saved and to pay the full amount of his insurance, as if a total loss had actually happened*'; Park, *op cit*, 161. This is the language of pure economic loss.

21 *Irving v Manning* 6 CB 419; *Rankin v Potter* (1873) 6 AC 83 (HL) at 135 and 166.

caused that loss in the first place<sup>22</sup>.

- 2.3. Continental law requires the loss to be caused by one of the *defined events*, shipwreck, stranding, arrest, absence of news or whatever other event is recognized by the particular legal system<sup>23</sup>. English law merely requires any event insured against to cause a loss in the nature of a constructive total loss<sup>24</sup>. These are important differences between these two systems<sup>25</sup>. Nevertheless, in both English and continental law the assured is allowed to recover for a total loss when the loss is economic in nature. Seen in this light, the differences between the approaches of English law and continental systems do not detract from the principle that abandonment is a device which allows the assured to recover for an economic or partly economic loss.

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22 This shift in emphasis is of the utmost importance for South African law as the concept of a constructive total loss does not require a precise definition of the event which gives rise to the loss, so long as that event is insured against.

23 South African law would therefore not be naturally opposed to the concept of a constructive total loss if it, like English law, is not restricted to a *numerus clausus* of *causae* giving rise to the right to abandon.

24 The difference between the two systems appears to be that continental law emphasises the event which causes the loss while English law emphasises the consequence. It is arguable that the English approach makes it easier to see the loss as an economic loss for which the law allows indemnification.

25 To put it another way, continental law restricts the right to abandon to strictly defined cases, which are a *numerus clausus*, while in English and American law there is no such limitation as the effect of the event rather than the precise mechanism which results in the loss is decisive.

2.4. South African law is in a way closer to English and American law than to current continental law. The reasons for this strange co-incidence are historical. The Roman-Dutch law of the seventeenth and eighteenth centuries allowed the assured to abandon in certain specially named cases as well as similar cases, or '*ghelycke ghevallen*'<sup>26</sup>. All the Roman-Dutch law required was that the loss be certain and irreversible<sup>27</sup>. As in English law, the emphasis was on the loss rather than the event which caused it. However, while the Roman-Dutch principle that losses arising from '*ghelycke ghevallen*' was inherited by South Africa, the codification process in the Netherlands put paid to it in Holland itself, as indeed the whole of the Netherlands, when the *Wetboek van Koophandel* of 1838 ('the *WvK*') adopted the French practice of the *Code de Commerce* of 1807 ('the *CdeC*')<sup>28</sup>, to

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26 The Customs and Usages of the Antwerp Exchange of 1582. This principle was retained in article 25 of the Amsterdam Ordonnance of 1598, article 26 of the Middelburg Ordonnance of 1600, article 12 of the Rotterdam Ordonnance of 1604, article 62 of the Rotterdam Ordonnance of 1721 and article 28 of the Amsterdam Ordonnance of 1744. See Chapters 4 and 17-18 *supra* in this regard.

27 In order to achieve certainty some time limits were introduced, but they merely served the purpose of ensuring that a loss was actually suffered before the obligation to indemnify to the extent of the sum insured arose.

28 Which in turn followed the *Ordonnance de la Marine* of 1681. According to Nolst Trenité, *Zeeversekering*, 2nd ed, (1928), Vol I, 21 and Vol II, 640 the French *Code de Commerce* of 1807 ('the *CdeC*') was an important source of subsequent Dutch marine insurance law while the *Ordonnance de la Marine* of 1681 contained a less developed marine insurance law than the Dutch ordonnances promulgated by the towns.

restrict abandonment to named causes<sup>29</sup>. It has been held that the definition of a constructive total loss in the *MIA* is a complete one in the sense that no case falling outside the categories of loss expressly mentioned in section 60(1) or (2) can be treated as a constructive total loss<sup>30</sup>. The Roman-Dutch law was not so restricted by virtue of the extension of the right to abandon to '*ghelycke ghevallen*'. Abandonment is therefore allowed in South African law in a broader spectrum of cases than English law. This is a good reason why the concept of a constructive total loss as it applies in English and American law need not be introduced expressly into South African law.

2.5. Further, it was pointed out earlier that Dutch, German and French theory and practice also use the term constructive total loss or similar terms to distinguish losses which are total by operation of a legal fiction. South African law can likewise accommodate the *principle* of a constructive total loss without expressly adopting its *terminology*. It can do so without giving up any of its

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29 Thus, while the principle that the assured was also allowed to abandon in cases which resulted in the type of losses as those specifically mentioned was inherited by South African law from the Roman-Dutch law, the principle did not survive the codification process in the Netherlands.

30 *Petros M Nomikos Ltd v Robertson* [1939] 64 LLR 45 (HL), 54; *Irvin v Hine* [1950] 1 KB 555.

inherited Roman-Dutch principles. Further, the whole doctrine of abandonment encompasses the losses which give rise to the fiction of a total loss which is called, in different jurisdictions, a '*constructive total loss*', or a '*wettelijk geheel verlies*', or a '*fingierten oder constuctiven Totalverlust*', or a '*perte fictive*' or '*perte légale*'. It is not without significance that English and continental law have stumbled upon the same concept, namely that of a presumed total loss.

2.6. It is submitted that abandonment should not be relegated to a mere servant of the theory which explains the reason for its existence. This has occurred in English law where abandonment's place has been taken by the concept of a constructive total loss. Continental legal systems have found it unnecessary to import the notion of a constructive total loss into their codes probably because the existing theory is to the effect that the loss is regarded as total by operation of law in any event. Seen from this angle there is no need for change in South Africa.

2.7. These criticisms do not detract from the propriety of referring to abandonment losses, namely losses

giving rise to the right to abandon, as cases constructive total loss. Pappenheim, in his review of Aschenheim's thesis<sup>31</sup>, argued<sup>32</sup> that the term fictional total loss should be avoided and constructive total loss preferred. He reasoned that the term fictional total loss would tend to indicate that the loss is one which is not ordinarily indemnifiable whereas abandonment losses have since time immemorial given rise to an obligation on the part of the insurer to pay for a total loss. This approach, it is submitted, justifies the use of the term constructive total loss for losses which are wholly or partly economic losses. The term constructive total loss would be appropriate for such losses in South African law too.

- 2.8. This does not mean that the English concept of a constructive total loss should be incorporated in South African law. In South African law the right to abandon is not as limited than in English law and it is submitted that it may lead to confusion if the English concept is taken over without full consideration of the difference in approach. Nevertheless, the term is used widely in practice,

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31 *Der Abandon des Versicherten in der Seeversicherung*, (1893).

32 (1899) 44 *Zeitschrift für das Gesamte Handelsrecht* 602.



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even in the continental countries whose laws do not expressly recognize the term.

2.9. An adequate result can be achieved by simply replacing the three existing abandonment categories of the inherited Roman-Dutch law<sup>33</sup> with a single category as follows:

RULE: *If the assured is so deprived of beneficial possession of or control over the ship or goods insured by an insured peril, (including the disappearance of the ship without news for a sufficiently long period to give rise to the reasonable conclusion that the ship and the goods on her have been lost by an insured peril), that it is improbable that the insured ship or goods, as the case may be, will be recovered within a reasonable time, the assured may claim the full amount of the insurance against the abandonment of his rights in and to the ship or goods to the insurer.*

2.9.1. The reasons for the distinction between the first two abandonment categories of the Roman-Dutch

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The category where there is an immediate right to abandon, the category where the right to abandon is delayed, and the category of the missing ship.

law<sup>34</sup> no longer exist. Modern means of communication and travel have made it unnecessary to delay the right to abandon by arbitrary and predetermined periods as reasonable certainty about the ultimate fate of the ship or goods may be obtained fairly soon after the initial event which places them at risk. Under Roman-Dutch law the right to abandon did not arise in any event until it was clear that the loss was certain and final. Even in those cases where the right to abandon was delayed the assured could still abandon immediately when it became clear that the loss was certain and final<sup>35</sup>. The principle proposed solves the problem of introducing artificial time limits whose function is merely to ensure that the loss is certain and final before the right to abandon is granted<sup>36</sup>. The court will ultimately be the final arbiter deciding whether there is a reasonable possibility of recovery within a reasonable time.

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34 Namely the one where the right arises immediately as opposed to the one where the right is delayed.

35 Take the example of the ship which was arrested by a friendly power. In such a case the assured could not abandon until the expiry of the prescribed period but he was allowed to abandon forthwith if the arrest should have been followed by a confiscation, the latter event making the loss both certain and final.

36 The facts of individual cases and the judgment of the court, as final resort, should rather determine whether the loss is final and irreversible.

2.9.2. In essence the rule proposed does not change the existing law as inherited from Roman-Dutch law. It also retains the essential character of an abandonment case as a case where the law irrebuttably *presumes* a total loss when certain facts are present. This approach would accord with that of the legal systems referred to earlier. The idea of a presumed total loss is also not foreign to South African law as the concept of a constructive total loss was part of the marine insurance law of the Cape of Good Hope from 1879 to 1977 and of the Orange Free State from 1902 to 1977. In that period no adverse reports were made as to its application. On the contrary, South African lawyers are well conversant with the notion of a presumed loss, whether the fiction is called a constructive total loss or not.

2.10. The very soul of marine insurance reposes in the unique concept of abandonment. Abandonment distinguishes marine insurance from all other types of indemnity insurance. It is submitted that it is desirable that abandonment in South African law should be allowed to develop rather than stagnate, which it is in danger of doing. The express recognition that a general category of loss such as that proposed exists in marine

insurance would assist in preserving the spirit of South African marine insurance law without estranging it from other legal systems<sup>37</sup>.

3. SECOND RECOMMENDATION: THE RECOGNITION OF THE CONCEPT OF TOTAL LOSS

3.1. South Africa is out of step with the rest of the maritime world in its reluctance, if not failure, to recognize total loss as a separate category of loss. English marine insurance law<sup>38</sup>, like Canadian, Australian, New Zealand and Indian law<sup>39</sup>, expressly recognizes the distinction between total loss and partial loss. So does American law<sup>40</sup>. German law is to the same effect<sup>41</sup>, and even Dutch law has recently introduced the concept of a total loss into its

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37 As things now stand South African law is compatible with both English and continental law so far as the principles of abandonment are concerned. The person trained in English law may abandon using the theory and procedures of English law without fear that his claim will be rejected for having failed to comply with some obscure local provision of South African law. The continental claimant will also recognize the law he encounters as being the same as or so similar to his own as to make no difference.

38 Section 56(1) of the MIA: 'A loss may be either total or partial.'

39 All these countries have marine insurance acts modelled on the English MIA.

40 See Chapter 10, paragraph 2.1 *supra*.

41 Articles 854 and 855 of the *Handelsgesetzbuch* of 1900 ('the HGB').

marine insurance law for the first time<sup>42</sup>. French law has also adopted the term, albeit only recently, by allowing an abandonment in cases of 'perte totale'<sup>43</sup>.

3.2. There appears to be no obstacle in theory which would deny the existence of a separate category of loss termed a total loss. It was pointed out earlier that the triad at the base of the indemnity principle consists of the concepts of interest, value and loss<sup>44</sup>. When these concepts are considered in the typical marine insurance policy on the hull or goods, the following scenario unfolds: The assured's interest is his ownership of the ship or goods<sup>45</sup>. The value of that interest is the market value of the ship or goods<sup>46</sup>. The loss which is recoverable under the policy, which is here assumed to be for full

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42 Article 7.17.2.38.1 of the proposed *Nieuw Burgerlijk Wetboek* provided: '*Er is totaal verlies: a. wanneer de zaak teniet is gegaan; b. wanneer de zaak zodanig is beschadigd dat zij heeft opgehouden een zaak van de verzekerde soort te zijn; c. wanneer de zaak buiten de macht van de verzekerde is geraakt en terugkoming redelijkerwijs niet is te verwachten.*'

43 Article 48 of Law 522 of 1967. In this sense total loss means shipwreck and stranding with breaking up. See Chapter 8, para 3.2.2 *supra*.

44 See Chapter 11, para 2.1.2 *supra*.

45 There could of course be many other insurable interests in the marine insurance setting, for example the charterer's interest in the ship, the buyer's interest in the goods and the mortgagee's interest in the ship.

46 In the case of insurance of interests other than full ownership, the value of the insured interest would ordinarily be less than the market value of the ship or goods, but not necessarily so.

value, is the amount by which the assured's patrimony is reduced by the event insured against<sup>47</sup>. That amount cannot exceed the value of the insured interest. This interaction between the concepts of interest, value and loss therefore determines the extent of the indemnity.

- 3.3. The insurable interest may be so affected that it is either totally lost or partially damaged<sup>48</sup>. The total loss of the insured interest may be either of a factual nature, or of an economic nature. In the former case we speak of an actual total loss. In the latter we have the legal fiction<sup>49</sup> of a total loss which is introduced in different legal systems under different guises<sup>50</sup>. What is of decisive importance is that the assured's recoverable loss is, and should be, the full value of his insured interest. His loss is therefore complete, or total, in relation to the value of the insured interest. The words 'total

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47 This diminution in the assured's patrimony is determined by reference to his before and after (the insured event) financial positions.

48 Partial loss does not enter the reasoning here and may be disregarded for the moment.

49 This may not be the appropriate terminology to use if one accepts that an economic loss is as real as a loss arising from the destruction of the thing insured.

50 Whether this fiction is called a constructive total loss, as it is in English and related legal systems, or a presumed loss, as it is in continental law, the effect remains the same: The loss is treated as if there has been an actual and complete loss in fact of the thing insured although it may continue to exist.

loss' therefore accurately describe the extent of the loss. Why can such a loss not be called what it is, a total loss, and be treated as such by the law?

3.4. Notwithstanding their apparent lack of express recognition in the old authorities and in South African case law, the concepts of total loss, partial loss and economic loss are all recognized and applied by insurance practice in South Africa, as may be demonstrated by referring to motorcar insurance, a type of insurance with which most people are familiar.

3.4.1. If an insured car is totally consumed by fire so that nothing except a heap of twisted and molten metal and synthetic materials of no value is left, the insurer habitually indemnifies the assured by paying the market value of the car as at the time immediately before the damage<sup>51</sup>. Such a loss is factual and total and equates to the actual total loss, or '*feitelijk geheel verlies*', or '*Totalverlust*' of English, Dutch and German law respectively. In such a case the indemnity is calculated with reference to the actual and real value of the thing insured to the assured at the

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Subject to any special terms of the policy.

time of the loss<sup>52</sup>.

- 3.4.2. If the insured car were to be stolen, the assured remains its owner in law, but he is so completely deprived of its use and possession that the car might as well have been consumed by fire, as in the first example. The assured's loss in this instance is in the nature of an economic loss as his car continues to exist and remains in his ownership<sup>53</sup>. Nevertheless, South African insurers habitually indemnify the assured in case of theft of the car by paying the market value of the car at the time of the theft<sup>54</sup>. The assured makes no abandonment in such a case, but if the car should be recovered after the indemnification has taken place the assured is obliged by the principles of subrogation to account to the insurer for the recovered value or leave the salvage to the insurer<sup>55</sup>. The indemnity principle is not breached in this scenario.

- 3.4.3. If, on the other hand, the insured car should be

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52 Joubert (ed), *The Law of South Africa*, ('LAWSA'), (1988), Vol 12, (Insurance), para 203.

53 LAWSA, para 199; *M Zahn Investments (Pty) Ltd v General Accident Insurance of SA Ltd* 1981 4 SA 143 (SECL), 147-148.

54 After a short period during which they await confirmation that the car has not been recovered. See generally LAWSA, para 199.

55 LAWSA, para 199.



damaged in a collision, the damage may or may not be so severe that the car is not capable of being repaired economically. If economical repair is possible, the insurer pays the difference between the pre- and post-collision values of the car<sup>56</sup>, which is normally but not always the cost of repair<sup>57</sup>. This is a case of partial loss. If, however, the car cannot be repaired for an amount less than its value immediately before the collision<sup>58</sup>, South African insurers habitually pay its pre-collision market value minus the value of the wreck<sup>59</sup>, if the assured keeps the wreck. If the insurer takes over the wreck, which the insurer can only do with the consent of the assured, he simply pays the pre-collision market value of the car<sup>60</sup>. In each instance the assured's loss which has to be indemnified is determined by comparing his before and after

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56 LAWSA, para 202.

57 LAWSA, para 203; *Erasmus v Davis* 1969 2 SA 1 (A), 21.

58 A situation described in the parlance of motorcar insurance as a 'complete write-off'.

59 This scenario is so similar to the 'Totalverlust' of German law that it lends further support to the express recognition of the concept of a total loss in South African law.

60 There is nothing extraordinary in these scenarios, and they have their equivalent situations in marine insurance. The difference is that in the case of an economic loss an abandonment is required in marine insurance whereas it is not in ordinary indemnity insurance.

financial positions<sup>61</sup>. In this comparative process the value of the wreck is taken into account where the assured retains possession of it and the indemnity principle is again not offended. This scenario is the same as that which pertains in German law where even in the case of 'Totalverlust' the insurer is entitled to deduct the value of the wreck<sup>62</sup>.

3.5. It appears probable that South African law has not yet expressly adopted or introduced the concept of a total loss in insurance law because such a concept has not been regarded as necessary in the determination of the appropriate indemnity in the variety of scenarios postulated above. Nevertheless, it is submitted that there is no reason why such a concept should not be admitted, especially since it has been applied in insurance practice in South Africa without any difficulty.

3.6. There is some vague justification in Roman-Dutch law for the express recognition of total loss as a separate category of loss. The Roman-Dutch law recognized an average loss as a separate category

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61 This requires in each case that the totality of his assets, his whole estate, be taken into account with the car undamaged in his undisturbed possession in the first instance as contrasted with the assured's actual financial position after the fire or theft or collision.

62 Article 859(1) of the *HGB*.

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of loss for certain purposes<sup>63</sup>. The only type of loss with which an average loss could logically and practically be contrasted is a total loss. This being so, both kinds of loss must have been common in Dutch insurance practice from the earliest time. There is thus no bar in strict theory against the express recognition of partial and total loss as separate categories of loss, each with its own rules relating to the computation of the indemnity.

- 3.7. It is therefore submitted that South African law is capable of accommodating the distinction between total loss and partial loss without difficulty and without impinging on any important principle of the Roman-Dutch law. Moreover, express recognition of such a concept would bring the law into line with insurance practice in South Africa as well as with the insurance principles and practice of overseas countries. It would further allow the concept of an economic loss a separate species of total loss to be accommodated and understood more readily.

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63 . Van der Keessel, *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, ('*Praelectiones*'), (published only in 1961-1967), 1484. Van der Keessel referred to articles 17 and 19 of the Middelburg Ordonnance of 1600 where total and partial losses were dealt with differently so far as prescription was concerned. The same distinction had earlier been made in articles 12 and 13 of the Amsterdam Ordonnance of 1598. Partial loss was referred to in these ordonnances as 'avarye'.

3.8. The notion that Roman-Dutch law did not distinguish between actual and constructive total loss is<sup>64</sup>, it is submitted, also incorrect. This misconception has led Davis to express the view that '*... there was only one kind of total loss, and in order to claim for such a loss the insured must give proper notice of abandonment.*'<sup>65</sup> This statement is refuted by the statement made earlier on the same page by Davis that '*abandonment is unnecessary as being a mere useless formality*' if there remains nothing to abandon<sup>66</sup>. As authority for the statement that there was only one kind of total loss in Roman-Dutch law Davis relies on Van der Linden and Pothier<sup>67</sup>.

3.8.1. However, at the time these authors wrote their works there was not yet a clear distinction between abandonment and subrogation. It is improbable in the highest degree, for the very reason advanced by Davis, that the Roman-Dutch law

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64 Friedman J in *Shooter t/a Shooter's Fisheries v Incorporated General Insurances* 1984 4 SA 264 (D) stated a 285B that '*... the distinction between actual and constructive total loss does not appear to be part of Roman-Dutch law.*' Davis, *The South African Law of Insurance*, 4th ed, (1993), 406 expresses similar sentiments.

65 *Op cit*, 406, where the author relies on Van der Linden, *Regtsgeleerd, Practicaal en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 4.6.8, 10 and Pothier, *Traité du Contrat d'Assurance*, (1768-1778), 3.1.1.6.

66 *Op cit*, 406 fn 273.

67 *Opera cit*.

would have required the empty formality of an abandonment in cases where there was nothing left to abandon. It is more probable that the assured was required to cede his rights of action against third parties to the insurer in cases of '*feitelijk geheel verlies*' even though that cession had to be made before the indemnification and that this was the type of 'abandonment' Van der Linden and Pothier had in mind in the relevant passages.

- 3.8.2. In cases now referred to as abandonment losses or cases of constructive total loss there was always something of value left, or at least the possibility that there was something of value left, so that the abandonment was required to ensure that the assured was not enriched at the expense of the insurer. The abandonment made in such cases was wide enough to include, it is submitted, the rights of the assured against third parties. The language of the *Guidon de la Mer* makes this clear. The assured had to quit and abandon his '*droits, noms, raisons et actions de la propriété*'<sup>68</sup>.

- 3.8.3. When the *WvK* was passed into law in the

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(... rights, titles, claims and actions of ownership'.)

Netherlands in 1838 the position had clarified sufficiently for subrogation to take its legitimate place as a concept standing proud of the concept of abandonment. This final step in the development of man's understanding of these two related concepts allowed, in turn, the proper realisation that, while subrogation applies to all losses, whether they should be total, whether actual or constructive, or partial, abandonment can logically only apply to constructive total losses<sup>69</sup>.

- 3.9. It is submitted that South African law is unlikely to inculcate a proper understanding of the concept of abandonment and to accord it its appropriate place within marine insurance unless there is an express recognition of the distinctions between partial and total losses on the one hand, and between actual and constructive total losses on the other.

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The realisation that some of the traditional abandonment categories were in reality cases of '*feitelijk geheel verlies*' must have been partly responsible for the suggestion made in the 1972 *Ontwerp voor een Nieuw Burgerlijk Wetboek* that a separate category of loss named '*totaal verlies*' should be imported into Dutch law. Of the three categories of cases constituting '*geheel verlies*' according to the *Ontwerp*, the first two were true cases of actual total loss while the third was an abandonment case; see footnote 41 *supra*.

4. THIRD RECOMMENDATION: GRANTING THE INSURER THE RIGHT TO DECLINE THE TRANSFER OF OWNERSHIP

- 4.1. When the abandonment originally resulted in the abandoned ship or goods vesting in ownership in the insurer, such ownership was always to the insurer's benefit as he could dispose of the abandoned effects for his own profit. However, modern rules and laws relating to the control of important navigation routes and channels and the prevention and control of pollution have imposed increasingly severe obligations on the owners of ships and even their cargo<sup>70</sup>. If the insurer were to be vested with ownership of the abandoned ship or goods under circumstances where the owner of the ship or goods is held liable for the cost of clearing a navigational hazard or obstruction constituted by the ship or goods, the insurer may become liable for risks not undertaken by him. At the same time the assured may all too easily escape liability for his unlawful actions<sup>71</sup>. This scenario is exacerbated by legislation and

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70 See for a discussion of recent developments in this field: Hunt, *A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U.S. Federal Oil Pollution Act and U.S. State legislation, as legal mechanisms regulating compensation for tanker source oil pollution damage*, LLM thesis, University of Natal, (1995).

71 Such attempts were successful in *The Crystal* 1894 AC 615 but not in *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 146.

conventions which make the shipowner or cargo-owner liable for the cost and damage caused by oil pollution. For this reason it is no longer necessarily in the interests of an insurer to acquire ownership of the abandoned goods.

4.2. Thus, while it was at first universally provided that the abandoned ship or goods belong to the insurer from the moment of the abandonment at the latest, there has been a concerted move away from that position. The MIA set the tone in 1906 when it provided that the insurer is *entitled* to take over the assured's interests in the remains and proprietary rights in the abandoned effects<sup>72</sup>. Dutch insurance practice went so far as to exclude the right to abandon until the Dutch legislature abolished the concept of abandonment altogether<sup>73</sup>. French law followed the example of English law in 1967, allowing the insurer to decline the transfer of ownership which would otherwise have been the result of the abandonment<sup>74</sup>. The trend is therefore to give the insurer the right to decline to accept the transfer of ownership of the abandoned things.

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72 Section 63(1) of the MIA.

73 See Chapter 6, paragraph 5.9 *supra*.

74 Article 32 of Law 522 of 1967.



4.3. Public policy supports this trend. The assured as party primarily responsible for the obstruction caused by his ship or cargo to navigation or for the pollution similarly caused should not be allowed to escape liability, whether civil or criminal, merely by making an abandonment to his insurer, nor should the insurer automatically be required to shoulder the assured's obligations in these regards. More insurers would be inclined to allow an abandonment by their policy terms if they knew in advance that they would be entitled to decline the transfer of ownership, and with it, the additional obligations which accompany such ownership.

4.4. It is therefore recommended that Rule 9<sup>75</sup> should be amended by the addition of the following proviso:

*'save that the insurer may decline such transfer by notifying the assured in writing within a reasonable time after receipt of the notice of abandonment of his election not to accept transfer.'*

5. CONCLUSION

- 5.1. The recommendations which were made in this chapter ought to put South African law so far as it relates to marine insurance even more in consonance with English law, yet none of the inherited principles of the Roman-Dutch law needs to be denied its place or abandoned as the essence of the Roman-Dutch law is that it is capable of being adapted to changing circumstances. At the same time South African law will retain its contact with continental law as the principles advocated are also compatible with developments in the Netherlands, Germany and France.
- 5.2. These recommendations having been made, the general rules of abandonment as established by the historical-comparative method adopted may now be re-examined individually before final recommendations are made. Recommendations will be made in the next chapter for the principles of abandonment to be included in the proposed marine insurance act based on the principles of the Roman-Dutch law inherited by South Africa from Holland in the seventeenth and eighteenth centuries.

## CHAPTER TWENTY

### SOUTH AFRICAN LAW: COMPARISON AND FINAL CONCLUSION

#### 1. INTRODUCTION

1.1. In an unpublished LLM thesis submitted in 1991 I discussed the history and development of South African marine insurance law generally and wrote:

*'Ultimately, by means of co-ordinating scientific research of the sources and content of the Roman-Dutch law of marine insurance and by a process comparative evaluation of its principles against those of other legal systems, a modern marine insurance act can be drafted for South Africa.'*<sup>1</sup>

I also postulated that English law could legitimately be relied on to provide guidance in a comparative process<sup>2</sup> and said:

*'Marine insurance law in South Africa should be codified ... The law of marine insurance in South*

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1 Marnewick, *A Critical Analysis of the Law to be applied to a Claim for Marine Insurance, with reference to Non-Disclosure and Abandonment, and the Need for Codification*, LLM thesis, University of Natal, (1991), 242.

2 This argument was also advanced by the writer at the 1995 Annual Conference and General Meeting of the Maritime Association of South Africa in an unpublished paper entitled *The Origins, Diaspora and Destiny of South African Marine Insurance Law*, where the following was said: *'A marine insurance act which reflects the wisdom and experience of both the Roman-Dutch and English law ought to be welcomed ...'*

*Africa can benefit, not only "from the world's second greatest private-law system" but from the laws of the countries of western Europe which share a particular legal heritage with South Africa ... in Roman law (and) in the development of the principles of marine insurance law.'*<sup>3</sup>

- 1.2. English law is the 'second greatest private-law system'<sup>4</sup> alluded to while Dutch, German and French law best fit the criteria of a common legal heritage coupled with substantial developments in the field of abandonment in the last three hundred years. English law, of course, also fits this last requirement. The research underpinning this thesis was done in order to find, record and compare the principles of abandonment in these legal systems so that the rules of abandonment in South African law may be set out clearly in an act based on more complete knowledge of this ancient and original institution. Further, if there is to be no such act then it is contemplated that the material collected and collated in this thesis may serve as a guide to the courts and practitioners who have to advance the general knowledge of abandonment

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3 Marnewick, *op cit*, 243.

4 By Hahlo and Khan, *The South African Legal System and its Background*, (1973), 596.

from case to case.

- 1.3. This project has developed in stages from the introduction of abandonment by way of the definitions of abandonment which were mentioned in the first chapter. The reasons advanced for this research in Chapter 2 led to the historical method being adopted in Chapter 3 as the natural and logical research method for this particular subject. When the distant history and development of marine insurance and abandonment were considered in Chapter 4, it became apparent that marine insurance and abandonment in particular are based upon ancient mercantile customs. These customs spread to the trading towns and centres of western Europe and were confirmed in the statutes which were subsequently passed in individual towns and countries, from Barcelona in the west to Italy in the east, from the Mediterranean to the North and Baltic Seas<sup>5</sup>. The historical survey of these customs and statutes shows that South African law, having no independent history nor any unique source of marine insurance principles, must inevitably be based on the same underlying customs and laws which have applied in western Europe and England for centuries.

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Chapter 5 *supra*.

1.4. This conclusion is confirmed by the process which was applied in Chapters 6 to 10, where the principles of abandonment in the individual countries chosen for comparison were discussed and compared. It became apparent when this comparative process was utilised that there are about nine or ten basic or main principles which are peculiar to abandonment, and that these basic rules apply with little deviation in the Netherlands<sup>6</sup>, Germany, France, England and America. The inevitable question which then arose was whether a proper evaluation of South African law would bring any important differences to light. The answer was in the negative as the historical evidence and the sifting process in Chapters 16, 17 and 18 amply demonstrated.

1.5. The consideration of the theoretical aspects of abandonment in Chapters 11 to 15 allowed the concept to be seen in its proper context, namely as a servant of the indemnity principle, which is also the cornerstone of indemnity insurance in South African law. In this scenario abandonment shares common goals with other principles and concepts, some apparently unrelated to abandonment, like the rules relating to insurable

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Until recently, at any rate.

interest, double-insurance, over-insurance, new-for-old insurance, valued policies and the measure of indemnity. One of these concepts namely subrogation is however clearly related to abandonment. All these concepts are also important components of the general rules of indemnification in South African marine insurance law. There is thus no reason why the principles of abandonment in South African law should differ in material respects from those applying in the countries used for comparative purposes<sup>7</sup>.

- 1.6. It remains then to make final recommendations with regard to a set of rules which may either be incorporated in a South African marine insurance act or, failing such an act, may serve as a concise guide to practitioners, insurers and the maritime fraternity. These recommendations are made on the basis that the principles of abandonment of Roman-Dutch pedigree will be used as the nucleus of the South African act but that those principles will be adapted and amended to bring them into line with the principles currently applying on the continent and in English law, so

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In Chapters 6-10 and 11-14 *supra*.

far as that can be done<sup>8</sup>.

- 1.7. The South African lawmakers are, of course, not so limited in the approach they may wish to adopt. They may, for example, opt for an act based on the Marine Insurance Act 1906 ('the MIA'), with or without the more modern language of the Canadian Marine Insurance Act 1993. Or they may find that there is merit in the approach of the French legislature in its Law 522 of 1967 and its accompanying decree. These two models appear to be the most recent or modern representatives of English and continental law respectively and in each case the approach adopted has much to commend itself. However, neither would develop the unique South African principles of abandonment. Adopting either of these models would in fact constitute a replacement of South African law of abandonment with a foreign system. Further, as will be demonstrated below, by adapting or amending the existing principles of abandonment in South African law in some fairly minor respects a result can be achieved which is compatible with both modern English and French law whilst also

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In this form the rules enunciated will have the merit of being in consonance with the inherited Roman-Dutch law while at the same time showing some improvements necessitated by modern circumstances. They are therefore, pending the promulgation of a South African marine insurance act, in a form which a South African court is likely to enforce, having regard to the courts' limited power to bring about changes to the law.



retaining the Roman-Dutch core of the abandonment principles which already apply in South African law.

- 1.8. In the comparative and evaluative process which is adopted in the following discussion only the rules and principles of abandonment which are *peculiar* to abandonment are examined. Rules or principles which form part of the general law of insurance or the law of contract will be alluded to where that is deemed appropriate, however. For example, the right to claim the full amount of the insurance is subject to the prescriptive periods set by the law and the policy itself. The assured is therefore bound to exercise his right to payment by instituting legal proceedings within the applicable time limits. Further, the right to abandon may be excluded by the policy or waived. These principles are not peculiar to abandonment and will therefore not be stated as rules or principles of abandonment<sup>9</sup>. Individual rules will now be stated in the form arrived at in Chapter 17 before being put in the form recommended.

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There are numerous other general principles of insurance or of the law of contract which affect the rights and obligations created by an abandonment in some way or other just as they affect other contracts or relationships. Such principles or rules will also be mentioned as and when it is deemed appropriate to draw attention to them.

2. RULE 1: THE RIGHT TO ABANDON

2.1. RULE 1: *The assured is entitled to abandon in the circumstances recognized by the law or the policy, but is not obliged to abandon.*

2.2. Abandonment is a right or privilege attaching to the assured alone. This age old principle has not been referred to expressly in South African case law, but is so universally applied that there is no reason to change it. The principle is also compatible with the economic loss theory of abandonment. Since the economic loss theory is based on the premise that the assured's economic interests are worthy of protection and are protected by the right to abandon, it stands to reason that the assured alone should determine whether he wishes to claim for such a loss rather than for an average loss.

2.3. The principle is in consonance with the law in Germany<sup>10</sup>, France<sup>11</sup>, England<sup>12</sup> and America, as

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10 Article 861 of the *Handelsgesetzbuch* ('the HGB'); '*Der Versicherte ist befugt...*'; ('The assured is entitled ...')

11 Articles 48 and 55 of Law 522 of 1967: '*Le délaissement peut être effectué ...*'; ('The abandonment may be made ...')

12 Section 61 of the *MIA*: '*... the assured may ...*'.

well as other European countries<sup>13</sup>, and also in the Netherlands until recently<sup>14</sup>. There is no reason to doubt nor to change this rule.

- 2.4. Certain consequences follow from the fact that abandonment is seen as a right which vests in the assured by virtue of the policy. In the first place, the right may be limited or even excluded altogether by the policy. In the second place, the law or the policy may set time limits for the exercise of the right<sup>15</sup>. Where no time limit is set the right to abandon must obviously be exercised within a reasonable time<sup>16</sup>, as it has long been the rule that the assured may not speculate at the expense of the insurer<sup>17</sup>. In the third place, the assured may waive or abandon his right to abandon. Lastly, the right to abandon is

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13 In Belgium, article 222 of the Belgian *Wetboek van Koophandel*: 'Abandonnement kan gedaan worden'; In Italy, articles 540, 541 and 542 of the Navigation Code: 'The assured may abandon...' (my translation); In Greece, article 280 of the Code of Private Maritime Law: 'The assured shall be entitled to abandon...'; In Spain, article 789 of the Commercial Code; In Portugal, article 616 of the Commercial Code; In Russia, article 230 of the Merchant Shipping Code.

14 Article 663 of the *Wetboek van Koophandel* ('the *WvK*'): 'kunnen geabandonneerd worden'.

15 Dutch (article 670 of the *WvK*), German law (article 864 of the *HGB*) and French law (article 4 of the Decree accompanying Law 522 of 1967) set specific time limits after which the assured no longer has the right to abandon but must be content with an average claim.

16 This is the position under English law by virtue of section 62(3) of the *MIA*.

17 See Chapter 9, para 3.1 *supra* and the cases there referred to in footnote 70.

subject to the general principles of the law relating to prescription and to the time limits set out in the policy.

3. RULE 2: THE OBLIGATION TO ABANDON WHEN CLAIMING THE SUM INSURED

3.1. RULE 2: *If the assured elects to abandon, he is allowed to recover the full amount of the insurance provided he first makes a proper abandonment of the ship or goods, as the case may be, to the insurer.*

3.2. This rule has two components. The first is that the right to payment is dependent upon a proper abandonment. The second is that only an insured ship or insured cargo carried on a ship may form the subjects of an abandonment.

3.2.1. The first part of the rule must be seen against the position of Roman-Dutch law which did not clearly distinguish between total loss and partial loss. It simply required an abandonment in all cases where the full amount of the insurance was claimed, but as was pointed out earlier, this was the position when subrogation was still contained within the broad principle of abandonment. If

South African law did not make such a distinction, it would follow that an abandonment would be required in all cases where the full insured sum is claimed. However, such an abandonment has never been required, as far as can be ascertained<sup>18</sup>.

3.2.2. The second part of the rule is that only the insured ship or insured cargo carried or to be carried on a ship may be abandoned. The restriction of the right to abandon to those two categories of insured interests has never been relaxed in Roman-Dutch or Dutch or South African law<sup>19</sup>, nor has any need for the abandonment of incorporeal rights such as the right to freight, commissions or profits become apparent in South African law.

3.3. The requirement of an abandonment applies in all the countries used for comparison. In allowing an abandonment only in respect of the ship or goods which are subject to a marine insurance policy South African law is the same as Dutch law under

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18 See Chapter 19 *supra* where this subject is discussed in more detail.

19 In *Chiappini v Jones* (1837) 3 Menzies 181 the Court, Menzies J, pointed out that the assured had no interest in the ship which could be abandoned. In an *obiter dictum* Menzies J suggested that there had been a proper abandonment of the assured's interests in a bill, but it is submitted that this *dictum* was premised on the principles of subrogation rather than abandonment, the distinction between the two concepts not yet having become clear at that time.

the *WvK*<sup>20</sup> and French law<sup>21</sup>. German<sup>22</sup>, English and American law, however, allow an abandonment in respect of any insured interest under a marine insurance policy, including freight, commission, profits and other interests<sup>23</sup>.

3.4. The essence of abandonment as perceived by Roman-Dutch law and Dutch law is that it relates to corporeal things, namely real rights in the ship or cargo, and that it transfers ownership in such corporeal things or the proprietary rights thereto to the insurer. The other interests which may be insured under a marine insurance contract appear to be interests in the nature of personal rights rather than real rights such as ownership or even use and possession. Subrogation ought to be a sufficient remedy to the insurer in respect of personal rights. Such interests do not lend themselves readily to the abandonment which developed out of the simulated sale. There does

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20 Article 663(1) of the *WvK*.

21 Article 369 of the *CdeC* and articles 48 and 55 of Law 522 of 1967.

22 Articles 854-857 of the *HGB*.

23 The interests which may be insured under a marine insurance policy in English and American law are a ship, the goods carried or to be carried on a ship, freight, profits, commission, wages, the liability of the shipowner to the owner of cargo, loans, advances and disbursements. See Ivamy, *Marine Insurance*, 4th ed, (1985), 8-9. In terms of section 61 of the *MIA* the assured may abandon the 'subject-matter' of the insurance, which would thus include the categories mentioned but excepting the liability of the shipowner to the owner of cargo as that does not constitute an asset but a liability.

not appear to be any sound reason to disturb this long-standing characteristic of the Roman-Dutch law.

3.5. In any event, even in the countries where the abandonment of freight, profits, commissions and other incorporeal interests is possible, (like Germany, England, America and in other countries where the Marine Insurance Act 1906 ('the MIA') has been adopted), abandonment of interests other than the ship or cargo insured occurs so infrequently that no practical need for the right to abandon such interests can be said to exist in South Africa. Further, there is a considerable body of opinion to the effect that the notion of a constructive total loss of freight does not exist, or is at least entirely artificial<sup>24</sup>. There is no reason in practice or in principle why South Africa should take over the problematic concept of a constructive total loss of the expected freight, profits, commissions and the like which are perhaps not even rights at all but mere *spes*. It is therefore recommended that no change be made to the existing position of South African law in this respect.

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Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as 'Arnould'), para 1233.

3.6. No abandonment appears to be required in re-insurance. Section 62(9) of the MIA provides specifically that it is unnecessary for an insurer to abandon to the re-insurer. There does not appear to be any practical advantage to the re-insured nor the re-insurer in abandonment. This is especially the case where there is no longer an automatic transfer of property as a result of the abandonment, as is now the law in England and France, and has been recommended for South Africa in the previous chapter.

3.7. All the requirements of this rule have been taken up in the recommended general rule embracing all three abandonment categories as set out in the first general recommendation made in Chapter 19 and no separate rule appears to be necessary to cope with the principles discussed under this heading<sup>25</sup>.

4. RULE 3: LOSSES WITHOUT HOPE OF RECOVERY

4.1. RULE 3(a): *In the case of capture of the ship or goods insured by the enemy or by pirates, in the case of innavigability ('onseylbaarheid'), and in*

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<sup>25</sup> If there is any perceived need for an abandonment in any given case in insurance of freight or anticipated profits, the policy conditions may stipulate for the right to abandon in such cases.



*any other case where the ship or goods are lost for certain without hope of recovery, the assured is entitled to make an immediate abandonment.*

4.2. The essence of this rule is that an immediate right to abandon, (with its corollary, the right to claim the full amount of the insurance), arises in cases where the loss is certain and there is no likelihood of recovery. It was pointed out earlier that the emphasis is not on the mere description of the event which causes the loss but on the effect of the event insured against. Therefore, as long as the event which causes the loss is one covered by the insurance, the only question is whether the loss is certain and recovery improbable. The essence of this rule is the same as the principle applying to a constructive total loss in English law, namely that a right to abandon arises as soon as an actual total loss appears to be unavoidable or the insured effects cannot be preserved without an expenditure which would exceed their repaired value<sup>26</sup>.

4.3. There is a remarkable correspondence between South African law and English in the respect mentioned. German law is unique in that it requires a

prescribed waiting period, an 'Abandonfrist', to elapse without recovery before the abandonment may be made<sup>27</sup>. The purpose of that requirement in German law is to ensure that the uncertainty which is inherent in the cases which under German law may give rise to the right to abandon is of sufficient duration to allow the for conclusion that the loss is probably irreversible. In this respect German law is the same as for the category of loss referred to below as losses with some hope of recovery. Even in the case of the missing ship there does not appear to be any sound reason to insist on such a pre-determined waiting period when there is proof that the loss is certain and irreversible. France also no longer requires that a general, prescribed period has to elapse before the abandonment may be made<sup>28</sup>, save in the case of the missing ship<sup>29</sup>.

- 4.4. It is therefore recommended that the existing principle be retained but taken up in a single category of loss advocated as the first recommendation in the previous chapter.

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27 .See Chapter 7 *supra*.

28 See Chapter 8 *supra*.

29 Where the period of absence of news is now three months without reference to distance or destination.

4.5. RULE 3(b): *If the goods insured are of such a nature that they would be likely to perish with the mere effluxion of time, detention by a foreign ruler (not an enemy) and unfitness of the ship to continue on the contemplated voyage give rise to an immediate right to abandon in respect of such goods.*

4.6. This principle has not yet been applied in a South Africa marine insurance case. While initially treated as a separate category of loss giving rise to the right to abandon on the continent<sup>30</sup> and even in England<sup>31</sup>, perishables are no longer regarded as a separate class. Such goods are treated according to the general principles applying to all other goods carried on ships. This confirms the shift in emphasis from the cause of the loss to its effect. Since it is a fact that perishables are damaged or become useless sooner than other types of goods, an exception had to be made in the past when time limits in the nature of delaying periods were prescribed. If abandonment is to be allowed as soon as the loss is certain

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30 See for example article 50 of the *Ordonnance de la Marine* of 1861, which provided for shorter periods in the case of perishables than for other goods; article 63 of the Rotterdam *Ordonnance* of 1721; article 29 of the Amsterdam *Ordonnance* of 1744; article 26 of the Königsberg *Ordonnance* of 1730.

31 See Magens, *An Essay on Insurances*, (1755), Vol II, 176.

and without hope of recovery<sup>32</sup>, no special rule would be required for perishables. It is therefore recommended that this rule be abolished as no need for it is apparent.

5. RULE 4: LOSSES WITH SOME HOPE OF RECOVERY

5.1. RULE 4(a): *In the case of detention by foreign rulers who are not enemies and in the case of supervening unfitness or inability of the ship to complete the contemplated voyage, the assured is entitled to abandon the insured ship or goods, as the case may be, after the expiry of a prescribed period, which runs from the date of the notification referred to in Rule 6.*

5.2. In the case of the *Morning Star*<sup>33</sup> the court had the opportunity to apply the principles of this rule. The ship was detained but her fate was not finally determined as the assured could still obtain her release if he paid the fine imposed on the skipper and the engineer. At that stage the loss was not yet certain as there was still a possibility that the ship could be released. It

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32 On balance of probability, as required in civil cases.

33 *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 4 SA 269 (D).

was only when the ship was actually confiscated by and forfeited to the state of Mocambique that the loss became irreversible or without hope of recovery.

- 5.3. This rule is in consonance with German law<sup>34</sup> but not English or French law<sup>35</sup>. The rule ought to fall away completely if it is accepted that there is a right to abandon as soon as it is clear that an insured loss has occurred and is, on the probabilities, irreversible. The need for a separate rule where the right to abandon is delayed will fall away, in any event, if the first recommendation made in the previous chapter is accepted. It is therefore recommended that this category of loss as a separate category no longer has any application and should be abolished.

- 5.4. RULE 4(b): *During the relevant waiting period the assured is entitled to tranship the goods at the expense and risk of the insurer. The insurer is entitled to tranship himself, if the assured does not do so, in which event the insurer is liable only for the costs of transhipment and the actual*

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34 Article 861 of the HGB.

35 Neither English nor French law requires any pre-determined time periods to elapse before the assured may abandon. The requirement appears to be unique to German law.

*damage suffered in respect of the cargo as a result of the arrest or unfitness.*

5.5. The principles enunciated in this rule go no further than the general principle that the assured is obliged to take reasonable steps to prevent or minimise any threatened loss or damage. As such the principle is in consonance with the general principle that a person entitled to compensation must mitigate his damages. The basis for the principle is partly that that part of the loss which could have been avoided by reasonable steps will not be regarded as having been caused by the event giving rise to the liability, or in the case of insurance, by the insured peril. The rights and obligations of the assured and insurer in this respect are in any event covered by the principles of suing and labouring, as it is referred to in English law, or the assured's duty to avert to minimise loss, as it should be referred to in South African law<sup>36</sup>. In South African law the principle is of general application and not restricted to insurance. Similar principles apply in other legal

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Van Niekerk, 'Suing, labouring and the insured's duty to avert or minimise loss', 1987 MB 144, referred to as 'Sue and Labour'.

systems<sup>37</sup>. The principle of this rule is therefore covered in other ways and it is recommended that it need not be stated as a rule peculiar to abandonment.

5.6. RULE 4(c): *During the relevant period the assured is entitled to demand security for payment of the insured amount from the insurer.*

5.7. This principle has never been applied in South Africa and is no longer applied in foreign countries in relation to insurance. There is no reason for the rule in any event as the right to payment ought to arise only when a proper abandonment is made, at which point the assured is entitled to claim payment, not merely security. There is no general right in South African law to claim security from a defendant who is an *incola* of the Republic, nor any reason for such a right to exist in marine insurance law<sup>38</sup>.

6. RULE 5: THE MISSING SHIP

6.1. RULE 5: *The ship of which no news has been*

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37 See Van Niekerk, 'Sue and Labour', *supra*.

38 Such security could, however, be obtained from an peregrine insurer under the provisions of the Admiralty Jurisdiction Regulation Act 105 of 1983, but that could only occur after a proper abandonment has been made.

*received for a specified period is presumed to be lost after the expiry of the prescribed period and the assured is thereupon allowed to claim the full amount of the insurance in respect of the ship (and the goods carried on her) upon making an abandonment.*

6.2. This rule has not yet been applied in South Africa. It was firmly part of the latest Roman-Dutch legislation<sup>39</sup> and common law<sup>40</sup> and remains part of German<sup>41</sup>, French<sup>42</sup>, English<sup>43</sup> and American law<sup>44</sup>. Even where a fixed period is laid down the principle is expressed as a presumption or a presumed loss which operates as a factual presumption only. It could therefore be rebutted by contrary evidence. In English and American law the principle is not tied to any pre-determined period and the facts of individual cases prevail. Advances made in recent years in the means of

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39 Article 67 of the Rotterdam Ordonnance of 1721; article 29 of the Amsterdam Ordonnance of 1744.

40 As expounded by De Groot, Van der Keessel and Van der Linden. See Chapter 17 *supra*.

41 Article 862(1)(1) of the HGB.

42 Articles 48 and 55 of Law 522 of 1967.

43 Article 58 of the MIA.

44 See Chapter 10 para 2.5 *supra*.



communication<sup>45</sup> and navigation<sup>46</sup> have also made a fixed period inappropriate and arbitrary.

6.3. Ships still regularly disappear without trace or any advance warning, especially in the southern oceans<sup>47</sup>, and the rule needs to be preserved. The rule has been included in the first recommendation set out in the previous chapter, but has been qualified in order to replace the arbitrary presumptive periods with 'a reasonable time', the length of which will depend on the circumstances of each individual case.

7. RULE 6: THE DUTY TO GIVE NOTICE OF ANY CASUALTY

7.1. RULE 6(a): *The assured is obliged to notify the majority of the insurers who are domiciled at the place where the contract was concluded of any casualty, arrest or loss affecting the insured ship or goods. The notification has to be made*

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45 Such as improved radio and television links.

46 Of which satellite navigation (Satnav) is the most significant, allowing the master of a ship to pinpoint the position of his ship with an accuracy measured in metres rather than kilometres. When this facility is combined with radio and television communication links and radar, the shipowner's shore-side operations personnel are able to follow the ship wherever she may sail so that they are likely to become aware of any disaster as soon as it occurs.

47 The South African coast is notorious for such disappearances, including that of passenger ship, the 'Waratah', which sailed from Durban on 26 July 1909 and was never heard from again. In recent years a number of small yachts and large bulk ore carriers have disappeared in these seas or on routes passing the South African coast without trace or news.

*through a broker or public person who has to keep a record of the notification given. Where the abandonment cannot be made forthwith, time does not begin to run until this notification has been served.*

- 7.2. This rule has not been applied in a South African case. There appears to be no justification for its retention, particularly since notification of the casualty or a claim under the policy is customarily dealt with in the policy conditions. The general principles of the law of contract appear to be sufficient to deal with this aspect of the relationship between the assured and insurer. It is therefore recommended that the rule be abolished.
- 7.3. RULE 6(b): *The assured is liable for any damages suffered by the insurer as a result of his failure to give such notice.*
- 7.4. This rule ought to fall away with the Rule 6(a). If there were such an obligation under the policy conditions, the assured would be liable for such damages in any event under the general principles of the law of contract. There is thus no need for any special provision to the same effect in

respect of abandonment.

8. RULE 7: THE REQUIREMENTS FOR THE NOTICE OF ABANDONMENT

8.1. RULE 7(a): *The abandonment has to be made in writing and has to be served formally through a public official whose duties include the service of such formal documents and processes.*

8.2. This rule of the Roman-Dutch law was invoked by the insurer in the case of the '*Morning Star*'<sup>48</sup>, where the court held that it had not become part of South African law. However, sight was lost of the fact that the rule actually has three separate components, one of which applied universally and was not subject to the whims of the legislatures of individual towns of Holland.

8.2.1. The first requirement of the rule is that the assured has to make an abandonment. This part of the rule falls under the substantive principle that the assured may only recover the full amount of the insurance in cases where the insured object is not completely destroyed or irretrievably lost

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*Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd*  
1984 4 SA 269 (D).

if he abandons. It need not be restated as part of the subsidiary rules of abandonment.

8.2.2. The second part of the rule is the requirement of writing. The Roman-Dutch law required notice of the abandonment to be in writing. English law (and American law) never had such a requirement but it was specifically provided for in some of the European countries. Whether writing should be required is a policy matter. There appear to be sound reasons why it should. In the first place it would ensure certainty and eliminate unnecessary disputes between the assured and insurer. In the second place, the transfer of ownership of the insured ship or goods is of such serious consequence to third parties that there ought to be some record of the transaction giving rise to it. The possibility of a fraud on third parties would be eliminated or reduced if the abandonment has to be in writing. In any event, the abandonment occurs in writing in all but the rarest cases even in those countries where it is not required to be in writing. It is therefore recommended that the Roman-Dutch rule that the abandonment has to be in writing should be retained.

8.2.3. The third part of the rule is to the effect that the notice of abandonment has to be served on the insurer by the public official whose duties include the service of such formal documents. In the Roman-Dutch law specific officials such as the '*Bode van Zeesaken*' were named. South Africa has neither an equivalent official, nor a Chamber of Insurance equivalent to those which were created in Antwerp and Amsterdam. While the Netherlands required service by the official who is the equivalent to the Messenger of the Magistrate's Court and the Sheriff or Deputy Sheriff of the Supreme Court<sup>49</sup>, other countries did not impose such a requirement. Further, while the assured is at liberty to comply with his obligation to give written notice in any way he thinks fit, he would no doubt be well advised to adopt a method which makes proof of notice to the insurer easy and foolproof. Nevertheless, there appears to be no reason why formal service through a court official should be required.

8.2.4. There is yet a fourth component to this rule namely that the abandonment has to be made within a specified time failing which the assured is limited to an average claim. This was not a

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See Chapter 6 para 3.1 *supra*.

requirement of the local ordonnances of the Dutch towns, nor did De Groot<sup>50</sup> and Van der Linden<sup>51</sup> lay down such a provision, but article 670 of *WvK* stated the principle unequivocally in 1838<sup>52</sup>. The abandonment has to be made within three months of the right to abandon arising, failing which the assured may only claim for an average loss. Time runs from the time the facts which give rise to the right to abandon have come to the notice of the assured<sup>53</sup>. In German<sup>54</sup> and in French<sup>55</sup> law the principle is the same as in English and American law except that no fixed period is laid down<sup>56</sup>. Instead it is required that the abandonment be made within a reasonable time, which will naturally vary according to the circumstances of individual cases. The reason for the requirement that the abandonment be made within a stipulated or reasonable time is that the assured should not be allowed to 'speculate' at

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50 *Inleidinge* 3.14.10-21.

51 *Koopmans Handboek* 4.6.8-11.

52 See Mens Fiers Smeding, *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895), 96-97 and Chapter 6, para 3.2 *supra*.

53 Article 671 of the *WvK* and see Mens Fiers Smeding, *op cit*, 97-98.

54 See articles 864(1) and 865(1) of the *HGB*.

55 Article 4 of the Decree accompanying Law 522 of 1967.

56 Section 62((3) of the *MIA*. See also Chapter 10, para 3.3 *supra*.

the insurer's expense. Allied to this reason is the fact that an early abandonment would allow the insurer to take effective steps to preserve the abandoned property at the earliest opportunity. These reasons are, it is submitted, compelling, and it is therefore recommended that the underlying principle be adopted by South African law<sup>57</sup>.

- 8.3. It is therefore recommended that Rule 7(a) be retained but restated in the following form:

RULE 7(a): *Notice of the abandonment has to be given to the insurer in writing within a reasonable time after the event which gives rise to the right to abandon has come to the notice of the assured.*

- 8.4. RULE 7(b): *The parties' rights and obligations are determined on the facts as they are on the date when the abandonment is made.*

- 8.5. The basic principle of this rule has not yet been applied in South Africa but it could have been in

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It is more likely than not that the principle advocated has always been part of Roman-Dutch law in any event, but the absence of recorded evidence to this effect makes it impossible to be categorical.

the case of the 'Morning Star'<sup>58</sup>. The principle is in accordance with Dutch<sup>59</sup>, German<sup>60</sup>, French<sup>61</sup> and American law<sup>62</sup>, but not English law<sup>63</sup>. There is direct authority for this principle in the inherited Roman-Dutch law in an opinion of Van den Ende, who pointed out that once a valid abandonment had occurred it remained effective even if the ship or goods were later to be recovered<sup>64</sup>.

8.6. Further, if the abandonment has the effect of vesting ownership of the abandoned ship or goods in the insurer, there can logically be no retreat from the position that the abandonment is final and irreversible once it has been made. The English law fiction of a retro-active transfer of proprietary rights to the insurer who accepts the abandonment is difficult to reconcile with Roman

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58 The reasoning of the Appellate Division in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) in particular.

59 See Schook, *Het Abandonnement*, doctoral thesis, Utrecht, (1858), 79 *et seq.*

60 Article 867 of the *HGB*.

61 Émerigon, *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition), (1827), Vol II, 222.

62 See Chapter 10, para 3.2 *supra*.

63 See Chapter 9, para 3.2 *supra*.

64 *Advysen 14 and 23*, in Barel's, *Advysen over den Koophandel en Zeevaart*, (1780-1781), at 70-71.



or Roman-Dutch law and therefore South African law. There is thus no reason to change the inherited rule that the parties' rights and obligations are fixed as at the time of the notice of abandonment.

8.7. RULE 7(c): *The abandonment may not be partial.*

8.8. There has not yet been any occasion for the application of this principle in a South African case. The principle is a natural consequence of the fact that the abandonment vests ownership of the insured property in the insurer. But for those cases where the assured is under-insured with the result that he is entitled to retain that part of the insured property which is uninsured, the abandonment has to be so complete that ownership of the whole of the insured interest is offered to the insurer and can vest in him. It is also logical and just that the insurer who becomes liable as a result of the abandonment to pay the full amount of the insurance should receive, in turn, the whole of the insured interest. A partial abandonment would not be satisfactory.

8.9. The principle that the abandonment may not be

partial also applies in Dutch<sup>65</sup>, German<sup>66</sup>, French<sup>67</sup>, English<sup>68</sup> and American law<sup>69</sup>. It is therefore recommended that it be retained.

8.10. RULE 7(d): *The abandonment may not be conditional.*

8.11. This rule has not yet been applied in a South African case. The rule is also a logical and natural consequence of the fact that the abandonment transfers property. There cannot be a transfer if the abandonment were conditional. The rule applies also in Dutch<sup>70</sup>, German<sup>71</sup>, French<sup>72</sup>, English<sup>73</sup> and American law<sup>74</sup>. It is recommended that it be retained.

8.12. RULE 7(e): *When making the abandonment the assured has to declare to the insurer all other insurances*

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65 Article 677(1) of the *WvK*.

66 Article 866 of the *HGB*.

67 Chapter 8 para 3.4.1 *supra*.

68 Section 62(2) of the *MIA*.

69 Chapter 10 para 3.3 *supra*.

70 Article 677(1) of the *WvK*.

71 Article 866 of the *HGB*.

72 Chapter 8 para 3.4.1 *supra*.

73 Section 62(1) of the *MIA*.

74 Chapter 10 para 3.3 *supra*.

*taken by him on the ship or goods, as well as any loans on bottomry he had taken on the security of the ship or goods insured.*

8.13. This rule has not yet been applied in a South African case. There are good reasons for retaining the principles of this rule.

8.13.1. One of the consequences of the abandonment in South African law as it applies at present is that the insurer is vested, *ex lege*, with ownership of the insured and abandoned ship or goods. The insurer receives such ownership subject to the real rights which third parties have over the ship or goods. Since the insurer is enabled and often required by the circumstances prevailing at the time of abandonment to make decisions regarding the fate of the ship or goods, it is essential for the insurer to know whether he has a free hand or whether third parties are affected by his actions. Conversely, third parties with real rights over the ship or goods have an interest in their preservation and the proceeds of any salvage. Further, if the insurer were to have the right to elect whether he will accept ownership of the abandoned ship or goods he should be allowed to make his election with the benefit of full

knowledge of any obligations and burdens which may accompany ownership. It is therefore desirable that the existence of real rights such as liens and mortgages should be disclosed to the insurer at the time of the abandonment.

8.13.2. In addition to these reasons, in the case of double- or multiple insurance the abandonment may be made to more than one insurer under more than one policy, with the result that the relevant insurers are vested with a joint ownership in proportion to the extent of each one's individual liability. In such a case it is also essential that each insurer should know whether he is vested with sole or joint ownership.

8.14. The Dutch *WvK*<sup>75</sup> was to the same effect as this rule. The rule also still applies in Germany<sup>76</sup> but in France section 5 of the Decree<sup>77</sup> requires the assured only to declare the existence of other insurances which he has taken on the ship or goods or of which he has knowledge. There is no similar requirement in English or American law.

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75 Article 675(1) of the *WvK*.

76 Article 869(1) of the *HGB*.

77 Which accompanies Law 522 of 1967.

8.15. It is recommended that the rule be retained but that its principles be stated more clearly as follows:

RULE 7(e): *The assured is obliged, upon making the abandonment, to declare to the insurer all other insurances taken by him on the ship or goods abandoned as well as any real rights held to his knowledge by third parties in respect of the ship or goods abandoned.*

8.16. If the assured should breach this obligation he would be liable for damages as under the general principles of the law of contract. There is therefore no need to specify a separate rule for marine insurance. The severe penalties which originally accompanied the obligation to make these declarations, namely forfeiture of all benefit under the policy, do not appear to be justified any longer.

9. THE CONSEQUENCES OF THE ABANDONMENT

9.1. RULE 8: *The insurer is obliged to pay the sum insured after the expiry of a prescribed period.*

9.2. This rule does not deserve a separate existence as

it is clear from the substantive rules of abandonment that the assured is entitled to immediate payment, and the insurer obliged to pay, the full amount of the insurance upon a proper abandonment being made. It is therefore recommended that the rule be scrapped so far as it stood as a separate rule.

9.3. RULE 9(a): *The effect of the abandonment is that the assured relinquishes his rights in relation to the ship or goods insured in favour of the insurer, who acquires ownership of them by operation of law.*

9.4. The rule has not yet been applied in a South African case but continues to apply in Germany<sup>78</sup> and America<sup>79</sup>. In France<sup>80</sup> and England<sup>81</sup> the insurer now has the right to decline the transfer of ownership. For the reasons advanced in the previous chapter it is recommended that this rule be amended in accordance with the third recommendation alluded to there to read:

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78 Article 868(1) of the *HGB*.

79 See Chapter 10 paras 4.1 and 4.2 *supra*.

80 Article 31 of Law 522 of 1967.

81 Article 63(1) of the *MIA*.

RULE 9(a): *The effect of the abandonment is that the assured relinquishes his rights in relation to the ship or goods insured in favour of the insurer, who acquires ownership of them by operation of law with effect from the date of the notice of abandonment, save that the insurer may decline such transfer by notifying the assured in writing within a reasonable time after receipt of the notice of abandonment of his election not to accept transfer.*

9.5. It is submitted that the same reasons for the notice of abandonment to be in writing are present in relation to the insurer's election not to receive transfer. As was pointed out earlier, the assured cannot unilaterally divest himself of responsibility for the removal of a wreck or for the damage caused by pollution, and it is therefore important not only for the assured but also for the authorities to know whether the insurer has acquired ownership or not. The requirement of writing would eliminate problems which could arise as a result of uncertainty or disputes about the insurer's election.

9.6. RULE 9(b): *The insurer acquires only that part of the insured ship or goods which were covered by*

*the insurance.*

9.7. The principle has not yet been applied in a South Africa case but applies in the Netherlands<sup>82</sup>, Germany<sup>83</sup>, England<sup>84</sup> and America<sup>85</sup>. In France the point is open to some doubt as article 31 of Law 522 of 1967 provides that the abandonment transfers the rights of the assured in the objects insured to the insurer<sup>86</sup>. The general principle is inextricably wound up with the assured's obligation to abandon the whole insured interest and appears to be merely the converse of that principle. Joint ownership of property is well known to Roman and Roman-Dutch law<sup>87</sup> and the idea of joint ownership held by the assured and insurer in the abandoned ship or goods is therefore not in conflict with the essence of South African law.

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82 Article 678 of the *WvK*.

83 Aschenheim, *Der Abandon des Versicherten in der Seeversicherung*, (1893), 46.

84 This follows in English law as the result of deductive reasoning: In terms of section 62(1) of the *MIA* the assured has to abandon 'the *subject-matter insured*'. That proportion of the subject-matter which was uninsured need therefore not be abandoned and therefore does not transfer to the insurer when he elects to take over the assured's rights in the '*subject-matter insured*'.

85 Phillips, *Treatise on the Law of Insurance*, 4th ed, (1854), Vol II, 401 stated that the insurer is entitled to the property '*so far as it was covered by the policy*'.

86 This could be taken to mean full ownership rather than ownership merely to the extent of the insurance.

87 See De Groot, *Inleidinge*, 2.3.8.



There is no compelling practical reason nor any equitable consideration for the transfer of all the assured's rights in the insured ship or goods when he is to receive but part of their full insurable value. Conversely, there is no reason in fairness and logic why the insurer should benefit by receiving, or possibly receiving, transfer of more than he insured. It is therefore recommended that the principle be retained.

- 9.8. General recommendations were made in the previous chapter. Further but more specific recommendations were also made in this chapter. They have to be considered against the background of the historical record laid bare in Chapters 4 and 5, the comparative process adopted in Chapters 6 to 10 and the theoretical considerations discussed in Chapters 11 to 14. The principles of abandonment in South African law may then be reorganised and restated in a form capable of being taken up in a South African marine insurance act as follows:

10. THE RULES OF ABANDONMENT

- 10.1. RULE 1: *If the assured is so deprived of beneficial possession of or control over the ship or goods insured by an insured peril, (including*

*the disappearance of the ship without news for a sufficiently long period to give rise to the reasonable conclusion that the ship and the goods on her have been lost by an insured peril), that it is improbable that the insured ship or goods, as the case may be, will be recovered within a reasonable time, the assured may claim the full amount of the insurance against the abandonment of his rights in and to the ship or goods to the insurer.*

- 10.2. RULE 2: *The assured is entitled to abandon in the circumstances recognized by the law or the policy, but is not obliged to abandon.*
- 10.3. RULE 3: *Notice of the abandonment has to be given to the insurer in writing within a reasonable time after the event which gives rise to the right to abandon has come to the notice of the assured.*
- 10.4. RULE 4: *The parties' rights and obligations are determined on the facts as they are on the date when the abandonment is made.*
- 10.5. RULE 5: *The abandonment may not be partial nor may it be conditional.*

10.6. RULE 6: *The assured is obliged, upon making the abandonment, to declare to the insurer all other insurances taken by him on the ship or goods abandoned as well as any real rights held to his knowledge by third parties in respect of the ship or goods abandoned.*

10.7. RULE 7: *The effect of the abandonment is that the assured relinquishes his rights in relation to the ship or goods insured in favour of the insurer, who acquires ownership of them by operation of law with effect from the date of the notice of abandonment, save that the insurer may decline such transfer by notifying the assured in writing within a reasonable time after receipt of the notice of abandonment of his election not to accept transfer.*

10.8. RULE 8: *The insurer acquires only that part of the insured ship or goods which were covered by the insurance.*

11. CONCLUSION

11.1. A final definition of abandonment as it applies in South African law may now be adopted as follows:

*Abandonment in marine insurance is a special remedy available to an assured in certain circumstances recognized by the law or the policy in terms of which the assured may claim the full indemnity provided by the policy against the transfer or an offer to transfer his proprietary rights in the ship or goods insured to the insurer.*

11.2. Abandonment is a classic and original institution of marine insurance. It can rightfully be said that the true spirit of marine insurance reposes in this concept, unique to marine insurance. It is a multifaceted concept whose worth has been demonstrated over centuries and in many countries. Its principles have been carried to the far corners and seas of the world, including South Africa, by intrepid merchants, insurers and sailors.

11.3. The future of abandonment in South African law is likely to be determined by the legislature, the courts, and insurance, commercial and legal practice. Thus far the legislature has not given attention to abandonment, except for the general ventures into English marine and fire insurance law in 1879 and 1902 by the Cape of Good Hope and

Orange Free State respectively, which venture terminated in 1977. The courts have not had any reasonable opportunity to shape the law relating to abandonment as there simply have been insufficient cases featuring abandonment to allow a cohesive body of modern principles to be developed. Insurance practice, especially so far as the input of practising lawyers is concerned, has not demonstrated any great understanding of abandonment either.

- 11.4. There is no reason to think that other important aspects of marine insurance have been researched properly in order to determine their exact origins, history and development in the Roman-Dutch law which was inherited by South Africa. This thesis will hopefully assist the lawmakers, the courts, lawyers, the insurance industry and importers and exporters to see abandonment in the light of its full history, its theoretical implications and its basic principles. Thus, whether the codification of South African marine insurance law is pursued or not, it is hoped that the material required for a better understanding of abandonment has been made available in this historical-comparative study.