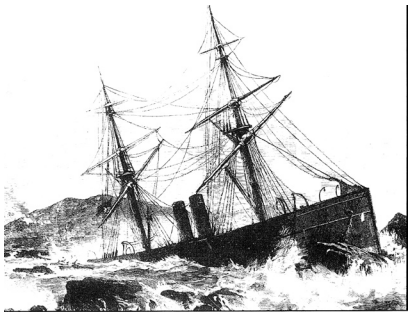


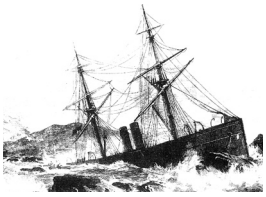
SHIPWRECK

The prudent mariner respects the sea, but fears the land:

And now, lashed on by destiny severe,
With horror fraught, the dreadful scene draw near!
The ship hangs hovering on the verge of death,
Hell yawns, rocks rise, and breakers roar beneath!

[From Falconer *The Shipwreck*]

Admiralty charts use the symbol of a listing and stranded ship to signify the presence of a wreck as a warning to other mariners not to suffer a similar fate. There are over 1000 documented shipwrecks on and near the shores of South Africa. Many are of immeasurable historic significance, and some still conceal priceless treasure. Not nearly as engaging are the many wrecks which litter and pollute. The modern wreck can be a major ecological threat against which the law needs to afford the state and its individuals adequate protection.



Chapter 4
Wreck

§4-1 The jurisprudence of wreck and applicable law

The South African seaboard is littered with wreck, both old and new.[1] When discussing salvage and towage,[2] we shall see that the reassurance provided by the constant salvage presence along the South African coast nowadays is a far cry from the remote and unforgiving shores with which mariners of previous centuries had to contend when circumnavigating southern Africa.[3]

The law relating to wreck regulates the ownership of both contemporary and historical wreck; it needs to recognise the archaeological value and historical significance of wrecks, both old and new; and it needs to provide adequate protection against environmental damage and pollution caused by wrecks. The law of wreck is thus both public and private by nature, and it is to be found in South Africa in a combination of statute, Roman-Dutch and English common-law.

1 No discussion of wrecks in South Africa would be complete without reference to the splendid work of Turner *Shipwrecks and Salvage in South Africa – 1505 to the Present* (1988).

2 In chapters 7 and 8 respectively.

3 In the Great Gale of 1857, 16 ships were wrecked in Table Bay. In 1865 another gale in Table Bay accounted for a further 17 ships, again with appalling loss of life. Yet when the *Oceanos* went down off the east coast of South Africa in 1989, more than 600 passengers and crew were rescued, of whom over 300 were lifted to safety by South African Air Force helicopters from the decks of the listing vessel before she sank. Not a single life was lost.

§4-1.1 Statute law

The Wreck and Salvage Act 94 of 1996 contains a number of provisions regulating the conduct of both the state and individuals in relation to wrecks. The starting point is s 1(xii) of the Act which defines 'wreck' thus:

> 'Wreck includes any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress.'

The section clearly borrows terminology from the 1894 English Merchant Shipping Act upon which provisions relating to wreck in the Wreck and Salvage Act are very closely based. English legislation in turn relied on the categorisation of wreckage defined by the Admiralty Court, in *Sir Henry Constable's Case*.[4]

The Act delegates the powers of the Minister of Transport to a salvage officer who is given extensive powers, not least the power to 'suppress plunder and disorder':

> 'No person shall, when a ship is wrecked, stranded or in distress, plunder, create disorder or obstruct the preservation of the ship or shipwrecked persons or the wreck, and the salvage officer or his or her authorised representative may cause any person contravening the provisions of this section to be detained.'[5]

And lest there be any doubt of the South African legislature's intent to oppugn the exploits of wreckers, s 14 outlaws interference with wreck:

> '(1) No unauthorised person shall board any ship or aircraft wrecked, stranded or in distress without the leave of the person in charge of such ship or aircraft, and any person boarding such ship or aircraft without permission may be repelled by reasonable force.
> (2) No person shall —
> a) impede or hinder the saving of any ship stranded or in danger of being stranded, or otherwise in distress, or of any life from any such ship, or of any wreck;
> b) secrete any wreck, or deface or obliterate any marks thereon; or

4 *Sir Henry Constable's Case: Constable v Gamble* (1601) 77 ER 218. The definitions of flotsam, jetsam and lagan in *Sir Henry Constable's Case* were applied with approval by the Admiralty Court in *R v 49 Casks of Brandy* 1836 3 Hagg 251 in which a lord of the manor claimed ownership of 49 casks of brandy recovered on and off his shores, but seized by the admiralty on behalf of the King. Dr Lushington decided that to be 'wreck', the property must have touched ground, and awarded only 3 casks to the lord. See also *R v Two Casks of Tallow* (1837) 3 Hag Adm 294. See further upon *Sir Henry Constable's Case*, Dr Lushington and the exploits of wreckers, Chapter 7.

5 Wreck and Salvage Act, s 13. The Roman law made plunder of goods washed ashore or found floating on the sea a punishable offence: *Digest* 47.9; Cod 11.6(5).

c) wrongfully carry away or remove any wreck.'

Section 12 of the Wreck and Salvage Act allows rescuers to pass over private land to reach a wreck:

> 'Whenever a ship is wrecked, stranded or in distress all persons may, for the purpose of rendering assistance to the ship or of saving the lives of any shipwrecked persons or of saving any wreck, unless there is some public road or camping site equally convenient, pass and repass either with or without vehicles or animals over any lands and camp on such lands, without being subject to interruption by the owner or occupier, if they do so with as little damage as possible, and may also, on the same condition, deposit on such lands any goods required for the construction of a camp and their stay thereat, and any wreck recovered from the ship.[6]

In providing statutory protection of distressed mariners and shipwrecked property, the legislature echoes the entreaty of Van der Linden:[7]

> 'Humanity demands every possible assistance should be rendered to ships in danger off the coasts and imposes a duty upon the finders of wreck to take care of all stranded goods, at the same time giving notice thereof to the commissioner of pilots or to the local court.'

As we shall see later in this chapter, the South African legislation provides also for wreck removal by order of the state, and for the control of exploration, exploitation and despoiling of wrecks over 60 years old, which are classified as historical 'archaeological objects'.[8]

§4-1.2 Jurisdiction and applicable law

While statute regulates much of the law relating to wreck in South Africa, it is nevertheless to the common-law that recourse should be had to determine most private law disputes about wreck, and particularly disputes about the ownership and possession of wreck. This entails a two-fold enquiry. First, one needs to establish whether disputes relating to wreck are 'maritime claims' as defined by the Admiralty Jurisdiction Regulation Act 105 of 1983. And second, if such disputes are 'maritime claims', does English law or Roman-Dutch law apply, in terms of s 6?

The Admiralty Jurisdiction Regulation Act does not specifically name wreck as a subject of admiralty jurisdiction in its own right. However the Act includes in the purview of its admiralty

6 Subsection (2) allows the recovery of costs incurred in passing over private land to be recovered as salvage.

7 *Van der Linden* 1.8.

8 For wreck removal, see §4-7. For historical wreck, see §4-6.

jurisdiction, maritime claims relating to ownership or possession of a 'ship'.[9] And to the extent that a salvage claim may relate to wreck, this too would be subject to the jurisdiction of admiralty in terms of para (k). The Act defines a ship as:

> '*ship*' means any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not.'[10]

In order to be classified as a maritime claim under the paragraphs covering ownership and possession, wreck claims would have to relate to a wrecked vessel which may still be regarded as a 'ship' — ie to a vessel used or capable of being used afloat. But the Admiralty Jurisdiction Act is intended to give a very broad, if not altogether all-embracing, jurisdiction in admiralty over maritime matters. Claims in relation to wreck could be brought in admiralty under the generalised definition of a maritime claim in para (ee):

> 'any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs'.

As the 'subject matter' of a claim, there should be little difficulty in regarding wreck as 'marine or maritime', especially if the broad definition of wreck given in the Wreck and Salvage Act is taken into account.[11]

Wreck was also not specifically mentioned *per se* as subject to the jurisdiction of the Colonial Court of Admiralty in 1891. At first blush, therefore, s 6 would appear to subject wreck to Roman-Dutch law. By design or by chance, the only case dealing with wreck since the Admiralty Jurisdiction Regulation Act came into effect in 1983 came before the court sitting with common-law jurisdiction. The Cape High Court (and the Supreme Court of Appeal to which the case ultimately went) decided the case according to Roman-Dutch Law, which is rich in sources dealing with abandoned property, 'finding' by *occupatio* and related matters, even in a maritime context.[12]

However, the fact that the English Admiralty Court Acts did not specifically include wreck within the jurisdiction of the Admiralty Court as it was in 1891 does not end the matter. For the 1840

9 Admiralty Jurisdiction Regulation Act, 1983, s 1(1) in the definition of maritime claims, paras (a), (c) and (k) in relation to any claim arising out of the Wreck and Salvage Act..

10 *Ibid*, s 1(1).

11 Upon which see §2-1 and §2-2.5(a).

12 *The Antipolis: Mills v Reck* 1988 (3) SA 92 (C), and on appeal in *Reck v Mills* 1990 (1) SA 751 (SCA), upon which see further §4-4.

Admiralty Court Act, in s 4, gave to the Court of Admiralty jurisdiction to decide all questions 'as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession and salvage'. The 1861 Act extended the jurisdiction of the court in admiralty to enable it to deal with disputes between co-owners of a ship. To the extent therefore that a dispute over a wreck is a dispute over ownership, title or possession, and to the extent also that the wreck in question remains a ship or vessel, the dispute would not only be a maritime claim as defined by the Admiralty Jurisdiction Regulation Act, but also the English Court in Admiralty would have had jurisdiction to decide such questions. Accordingly, English law would now apply in South Africa in terms of s 6.

Deciding whether or not a matter is one concerning a dispute as to title to or ownership of a ship presents little difficulty. What is problematical in the extreme, however, is the issue of when a wreck remains a ship and when it ceases to be so. The English Admiralty Acts do not define a ship. As we have seen, a ship is defined in the South African Admiralty Jurisdiction Regulation Act as being 'any vessel used or capable of being used on the sea or internal waters', and the inquiry would therefore be reduced to a question of whether the ship has ceased to be a vessel capable of being used afloat.[13] Once that capability is lost, the logical conclusion would be that the wreck is no longer a ship, at which time English law would defer to Roman-Dutch law.

The main difficulty in determining the law to be applied to a dispute over ownership or possession of a wreck would occur where the nature of the property changes significantly at various stages during the dispute. Consider a situation where a dispute starts at a time when a wreck is, by definition, still a 'ship' and, although hard aground, is nevertheless still capable of being used on the sea. At that stage of the inquiry, questions of possession and ownership should be settled according to English law. If the ship, during the course of the hearing even, deteriorates to an extent that it becomes a wreck, and is no longer capable of being used as a ship, should Roman-Dutch law then apply? It is surely inconceivable that the law applicable to a dispute should change during the course of an action in which the dispute is to be determined by the court in admiralty? Clearly, once a matter has been brought before court, and the plaintiff or applicant has chosen to invoke an appropriate system of law, the matter should be able to proceed to determination in terms of such law. Conversely, a wreck may be incapable of being used at sea at the time a dispute is initiated between competing parties vying for ownership. During the course of the dispute, the wreck may be salvaged and repaired to the extent that it again falls within the definition of a ship. In such event, a legal dispute between parties seeking the court's assistance to resolve a question of

13 Even if one were to rely a on the definition of a ship contained in the Wreck and Salvage Act, a ship would mean 'any vessel used or capable of being used on any waters'.

disputed title would be subject to Roman-Dutch law at its inception, and the parties should accordingly be able to apply Roman-Dutch law until the conclusion of the matter, notwithstanding the repair of the vessel in the interim. As Professor Staniland writes in his comment on the judgment in *The Antipolis*:

> 'Every ship is a potential wreck, while many wrecks can be repaired and made seaworthy again. To assert that the Admiralty Court has no jurisdiction over a claim to ownership or possession of a wreck, but that once the wreck has been repaired there is jurisdiction, is highly arbitrary. … But if the ship is wrecked during the court hearing, does the court then lose jurisdiction? Say the wreck is repaired. At what point do the repairs give Admiralty jurisdiction again? Upon which rivet is the jurisdiction of the Admiralty Court to hang?'[14]

The application of s 6 to disputes concerning title to wreck is unsatisfactory at best. Even in clear cases of a wreck still being a ship, it is artificial to have to apply English law to questions such as the acquisition of ownership and to disputes between co-owners where a wealth of the Roman-Dutch and developed South African common-law on issues of possession and ownership is available. The application of English law in terms of s 6 can only have the effect of importing with English law an unnecessary uncertainty and difficulty into what should be a parochial inquiry. Indeed, the South African courts have accepted the principle that questions of the transfer of ownership of corporeal movables should be decided according to the law of the forum in which the property is situated.[15] Although the application of English law by reason of s 6 is not strictly parallel, it is significant to note that the application of the *lex situs* to determine ownership disputes is an established English law principle of private international law. The same English law which s 6 seeks to import refers ownership disputes (at least in relation to the transfer of ships) to the *lex*

14 Staniland *Admiralty Jurisdiction over Wrecks 108* SALJ 594 (1991). Professor Staniland suggests that a lead should be taken from the judgment of Lord Stowell in *The Neptune* (1824) 166 ER 81 at 85–6, in which Lord Stowell gave a seaman a right 'to cling to the last plank of his ship in satisfaction of his wages'. The seaman (and the salvor) did not lose their maritime lien because the ship became a wreck: the lien encumbered the last surviving piece of the wreck. Similarly in *The Great Pacific* (1869) ER 683:

> 'It is obvious that a vessel may be so wrecked as to be no longer a vessel *in specie*, and so as to become a mere congeries of planks, and yet that there may be salvage of its materials to a considerable amount.'

In *The Catherine* 15 Jur 232 Dr Lushington says:

> 'If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit.'

15 A South African court exercising its admiralty jurisdiction should in general apply the principles of the *lex situs* in determining the passing of ownership in movable property when the case involves a foreign element and there is a potential conflict of laws: *The Tigr: no 1 (Full Bench)* 1996 (1) SA 487 (C) at 492I–493A; and cf *The Gulf Trader: Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (SCA). See generally on the application of the lex situs Pollack on Jurisdiction AQ: Ed by Pistorius, (2007).

situs in an attempt to avoid a conflict of laws. To conclude that s 6 then refers the dispute back to English law would be to fall into a legal *circuitus inextricabilis*. The *lex situs* principle accepts that the domestic law (and *ex hypothesi*, not an imported system of law) should determine ownership.[16] In the circumstances, it is to be hoped that s 6 would have little application in future matters concerning ownership either of ships or of wrecks. Few should lament its passing.

§4-2 The possession of wreck at common-law

Against this background of the arbitrary distinction between a ship and a wreck for jurisdictional purposes, the decision of the Cape High Court and of the Supreme Court of Appeal in *The Antipolis* is particularly interesting. The *Antipolis* was one of two scrap tankers which broke loose from their tug and ran aground in a storm in Table Bay in 1983 while being towed in tandem around the Cape of Good Hope. Many years later, the wreck of the *Antipolis*, by then scarcely visible on the waterline of low tides, was still delivering bounty. And thus it was that two partners, Messrs Mills and Reck, agreed upon a joint venture to remove copper condenser piping from the wreck for their mutual profit. When the partnership soured, Mills decided to tackle the removal of the copper on his own. After a few days of diving, having cut off and buoyed some of the pipes, worsening wind and sea conditions forced him to retreat to the safety of the shore, leaving the pipes on the seabed in the wreck. Before he could resume his operations, his erstwhile partner, aptly named Reck, sought an interdict from the High Court to prevent Mills from going ahead with the removal of the copper. Mills successfully opposed the interdict in the court *a quo*. In applying the Roman-Dutch law principles of *occupatio*, Burger J adjudged that 'the rules of fairness and justice demand that a person engaged in salvaging a part from an abandoned wreck (though he has not yet succeeded in separating the parts he is working on from the whole) is entitled to an interdict preventing a "gate-crasher" from interfering provided he is still working on the wreck.'

The learned judge concluded that although neither Mills nor Reck had a right of ownership, Mills, as the earlier salvor of the abandoned wreck, should be given a preferent right:

> 'The Court cannot countenance two people quarrelling or even fighting over the same object, and if it has to choose, then the first in time must be given preference, provided that he is still actively engaged upon the activity.'

The Supreme Court of Appeal took a different view and upheld the interdict against Mills. The court relied on the Roman-Dutch remedy of *mandament van spolie* given to a person dispossessed,

16 Although the *lex situs* theory relates specifically to issues of the status of ownership following transfer, the analogy between ownership disputes arising in relation to the transfer of an asset and disputes concerning the ownership or possession of the asset without transfer should at least to give guidance of the best way to apply damage control measures to the application of s 6. (expand lex situs)

which it found required only an inquiry of whether Mills was entitled to a right of possession. The Supreme Court of Appeal found that Mills had failed to prove that he had acquired physical control by attaching a rope to the condenser with a buoy attached, and that Mills accordingly had insufficient grounds to support his contention that his possession of the condenser pipes should be left undisturbed.[17]

The approach of both the court *a quo* and the Supreme Court of Appeal turned upon the right of possession. The appeal court did not trouble itself at all with the law of 'finding' or, as it was known to the Roman-Dutch writers, *occupatio*. It regarded Mills' remedies as purely possessory, and it ignored the possibility that Mills had acquired rights of ownership through *occupatio* by the time Reck happened upon the scene with an interdict. Mills averred that he had (in concert with Reck, but not with the second respondent) acquired ownership of the condenser pipes by *occupatio.* In that respect, the appeal judgment missed an opportunity to deal with *occupatio* of wreck — a concept which has thus far commanded only the first instance attentions of the High Court. For it was common cause that the *Antipolis* was a *res derelicta* and a *res nullius* at all material times. Mills was arguably a 'finder' to whom the law accords rights. In the words of Burger J, the subsequent salvors were 'gate-crashers'.

The Antipolis highlights the two most common problems relating to the acquisition of rights in wreck — first, acquisition of ownership of the wreck; and second, the rights of competing salvors[18] who are directing their efforts at the same wreck. Where a salvor has acquired ownership by *occupatio*, the law will protect that ownership against the world at large, and against subsequent salvors in particular. But even in situations short of *occupatio*, where a salvor has not yet acquired full rights of ownership (and perhaps never will) that salvor may be entitled to undisturbed possession against all but the legal owners of the wreck.

Thus, the salvor of ancient unabandoned wreck is entitled to protection as possessor. As long as salvage operations are in progress, a first salvor has a right of possession as against all subsequent salvors, and indeed against all except the true owner — and then subject to the salvor's right to

17 As has been remarked above, no reference was made, either in the court *a quo* or on appeal, to English law. Professor Staniland in his case comment, *supra* at fn 14, regards the matter as having been wrongly decided because of its reliance upon Roman-Dutch law and not English law. He regards the wreck as being a 'ship' in respect of which an ownership or possession dispute would have been within the purview of the English Admiralty Court. English law may well have produced a different result, for a first salvor's rights to derelict wreck are protected in English law. See §4-6 and the discussion on *The Lusitania.*

18 The expression 'salvor' is used here not necessarily as a legal salvor entitled to a salvage reward, but in its more generalised meaning of a person who recovers property from the sea.

preserve its maritime lien.[19] Where a salvor is temporarily interrupted by adverse weather, he may secure his prior right to possession by clearly marking the wreck upon which work is in progress. However, in the light of the appeal finding of *The Antipolis*, the first salvor would have to 'stake his claim' by something more than a rope and a buoy.[20] The first salvor, even if driven to the surface or ashore by bad weather, should maintain a physical presence as near as possible to the wreck. But it should not be necessary that the salvor has, at the time of the interruption, physically cut away and put aside such portions of the wreck upon which work remains in progress. Any reasonable means to manifest possession and the intention to resume work should be sufficient to ensure protection from 'gate-crashers' at the wreck site. The law owes such a first salvor protection as a matter of public policy, to avoid 'two people fighting over the same object'.[21] Once the weather has abated, any unreasonable delay in resuming the wreck recovery would amount to a relinquishing of possession of the wreck, and the first salvor's rights to undisturbed possession would fall away. It should also be possible that a salvor take possession of only that part of a wreck upon which the salvor is currently working, rather than of the wreck *in toto*. Manifestation of that part possession would be by means appropriate to the circumstances.

The Supreme Court of Appeal in *The Antipolis* took the view that Mills, as first salvor, had not established the prerequisites for a *mandament van spolie*. A spoliation order requires a possessor to have been ousted illicitly from possession.[22] The court found not only that Mills was not in possession at the time Reck sought the interdict, but also that Reck's application for an interdict was not an illicit dispossessing. The court need not have taken the narrowly defined route of the *mandament van spolie*. The summary process of regaining possession by *mandament* was an inappropriate remedy for the circumstances of the case. The rights as a first salvor in possession would have been recognised by Roman-Dutch law and would have been sufficient to found relief independent of the specific remedy of the mandament.[23] Mills's Achilles heel was of course the fact that he had attempted to retain possession during the period of adverse weather by merely

19 *The Hypatia: Underwater Construction and Salvage Co v Bell* 1968 (4) SA 190 (C) upon which see §4-4, but only if there is true legal salvage.

20 This aspect of the decision of *The Antipolis* appeal is unfortunate: in practical terms it is often almost impossible to maintain some physical presence at a wreck site with the onset of bad weather. A marked buoy, with details of the salvor's name and perhaps also asserting some message of exclusivity (even by words such as 'Keep Out') should in appropriate circumstances be sufficient to retain possession *pro tem* until physical possession may be regained.

21 See the comments of Burger J in *The Antipolis* in the court *a quo* at 97.

22 *Wille's Principles of South African Law* 9th ed (2007) at 454.

23 A *mandament van spolie* was not sought in terms by Mills, but the relief Mills sought for the restoration of his possession of the condensers was interpreted by the appeal court *mero motu* to have amounted to a prayer for *mandament*.

buoying condenser pipes on which he was working. This was found by the Appeal Court to be insufficient to constitute the required

> 'physical power of dealing with the subject immediately, and of excluding any foreign agency over it…. This physical power, therefore, is the *factum* which must exist in every acquisition of possession.'[24]

It is to be hoped that any court faced with a similar situation in the future will be able to distinguish the facts which led to the narrow finding of *The Antipolis* appeal, and embrace the more pragmatic approach of Burger J in the decision *a quo*.[25] In any situation in which relief other than by *mandament van spolie* is appropriate, *The Antipolis* appeal should not inhibit a lower court from protecting possession of a first salvor by appropriate alternative remedies (such as a simple interdict where that salvor establishes a clear right to possession).[26]

§4-3 Ownership of wreck: Salvage or finding by *occupatio*?

§4-3.1 Abandon ship!

One of the most popular misconceptions of maritime law is that wreckage is a windfall in the hands of any person who has the luck to come upon it. The misconception is fuelled by the popular notion of abandoning the ship. From the earliest times, and not only in Cornwall, those who come upon a wreck have sought to clothe their nefarious activities with the justification that a ship's master's order to 'Abandon ship!' is sufficient dereliction by the shipowners to allow the first finder to assume full ownership of the ship. The converse is in fact and in law the case.[27] A ship, or any maritime property unattended and in peril, remains the property of its owner and does not become a *res derelicta* and thereby a *res nullius* until its owner takes proper steps to abandon it, or until the law deems it reasonable to presume such abandonment. The significance of a lack of abandonment by the owner is that, without abandonment, no one can acquire rights of ownership by occupation.[28] In consequence, any person who then takes such property in bad faith commits

24 Von Savigny (1779–1861) *Possession* 6th Impression 1848 (translated by Perry) at 142 quoted with approval by Joubert JA in *The Antipolis* appeal at 759.

25 Burger J in *The Antipolis a quo* makes extensive reference to the Roman-Dutch law relating to the wounding of an animal (regarded as a *res nullius*) by one hunter, only to have that animal later captured by another hunter. This is not a valid analogy in salvage; moreover, the Roman-Dutch law was equivocal upon the rights of the two hunters in the result. The analogy was rightly dismissed as unfounded and wrong in the appeal judgment of Joubert JA. But the analogy was not necessary. Mills could have been found to have acquired ownership by *occupatio*.

26 Upon which see Price *The Possessory Remedies in Roman-Dutch Law*.

27 For English decisions in which the effect of an order to abandon ship was considered in establishing whether or not the ship thus 'abandoned' became derelict, see *The Jupiter: Bradley v H Newsom & Sons* [1919] AC 16 and *The Lusitania* [1986] 1 Lloyd's Rep 132 (QBD) at 134.

28 Voet 41.1.9; Van der Keessel 189; Van der Linden 1.7.2.

theft.[29] Nor does an abandonment for the specific purposes of a marine insurance policy, necessarily indicate an intention of the shipowner (and particularly of its assurer) to abandon to the world at large its ownership interest in the ship as the property assured. At best, an abandonment for marine assurance purposes will do no more than transfer rights of ownership from the assured to the assurer.[30]

Grotius tells us that wreckage

> 'used from old to be regarded as the private property of the counts, but in view of the increase of shipping ... the Count, nobles and towns decreed that everyone may recover his shipwrecked and lost property'.[31]

From Grotius' times, unabandoned wreck remains the property of the owner whose rights may be protected against all who seek to dispossess the owner, including *bona fide* salvors.[32]

That a shipowner may abandon its rights of ownership to a ship which has been wrecked is clear. The ownership rights of a shipowner are no different from those of any other owner of moveable property. The owner may not necessarily absolve itself from the concomitant obligations of ownership (such as the statutory obligation to remove wreck),[33] but it may waive its right, title and interest in its ship. In *The Paris Maru*,[34] the owners of a vessel raised as a defence to a wreck removal order their legal abandonment of property in their vessel following her constructive total loss in Algoa Bay. The Supreme Court of Appeal recognised the right of the owner to abandon its property, and ruled that 'liability [for wreck removal costs in terms of the then harbour regula-

29 *Institutes* 2.1.48; *Digest* 41.1.9.8 and 41.1.58. And see Lee *An Introduction to Roman-Dutch Law*, 2nd ed (2006) at 131. The Rhodian Law clearly outlawed wrecking. Art XLVIII read 'Whoever takes anything from a wreck by violence shall restore fourfold.' And Art L states

> 'Whoever violently takes away any of the miserable remains of shipwrecks or takes any advantage of that grievous misfortune, shall restore fourfold to the owners'.

The Rhodian Law did not spare the rod for transgressors. Art LI states:

> 'If any man more grievously oppresses shipwrecked persons, and forcibly carries off any shipwrecked goods, after restitution made, if he be a freeman, he shall be condemned to three years banishment; if a man of low degree, he shall be employed in the public works during that time; and if a slave, he shall be put to the most severe and hardest labour.'

30 On abandonment in marine insurance law, see §18-10.

31 Grotius 2.4.36 and 2.7.2; Van der Keessel 193–197; Van Leeuwen *Commentaries* 3.136.

32 Other than for the limited purposes of a salvor preserving its maritime lien. See §7-10.

33 Upon which see §4-9.

34 *The Paris Maru: Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 168. Extensive authority was cited in the argument for the appellant supporting the contention that an owner is at liberty to abandon its property. That authority relates however to abandonment in marine insurance, and appears to overlook that when an assured abandons its property to its insurer, that insurer has the right to take over ownership (though it is not obliged to do so).

tions] only attaches to him who is the owner at the time the Administration elects to exercise the power conferred on it.'[35]

The law does not lightly presume an abandonment of ownership of a ship or other maritime property, thereby allowing others to step into the void by *occupatio*. For maritime law has, in the doctrine of salvage, a viable alternative which recognises the rights of both the owner and the finder, and which rewards the finder for its efforts in recovering the cargo. Whether the person who recovers wreck is rewarded by full ownership or by a salvage award depends upon whether or not the owner of that wreck is regarded in law as having abandoned its ownership interest in the wreck.

Abandonment is a question of fact, the answer to which depends on the circumstances of each particular case. The erstwhile owner of the property must manifest an intention not to resume ownership.[36] The abandonment of property rights was known in Roman-Dutch law as *derelictio*, and property once abandoned becomes a *res nullius*.[37] It was, for instance, clear that where cargo was jettisoned or lost during a storm at sea, that cargo remained the property of the owners at the time of the loss overboard.[38]

The courts have grappled with determining factual abandonment of wreck, and the international approach is by no means consistent. *The Thermopolae*[39] was wrecked in Table Bay in 1899. She was abandoned by her owners to their underwriters, and soon broke up completely, her cargo strewn over the seabed. For seven years, her underwriters took no steps to recover any cargo. The defendant syndicate, who had a salvage licence to seek treasure, recovered ingots of tin and copper from the wreck site, but the Salvage Association, representing underwriters, intervened, and obtained an interdict from the court preventing the salvors from working the wreck and disposing of any property they had already recovered.

35 *The Paris Maru, ibid* at 177. But cf the dissenting judgments of Beyers and De Wet JJA.

36 *Institutes* 2.1.47; Grotius 2.1.52, 2.32.3; Vinnius 2.1.46 nr1; Van Leeuwen *Censura Forensis* 1.2.1.18, 1.2.3.14; Voet 41.1.10; *Van der Keessel and* Grotius 2.32.3.

37 Per Joubert JA in *The Antipolis* 1990 (1) SA 751 (SCA) at 757C:

> 'Volgens ons gemene reg word eiendomsreg oor 'n saak deur *derelictio* verloor wanneer 'n eienaar sy saak prysgee of abandonneer met die bedoeling om nie meer eienaar daarvan te wees nie.'

[According to our common-law, a right of ownership is lost through *derelictio* when an owner waives or abandons his case with the intention of no longer being owner.]

38 *Institutes* 2.1.48; *Digest* 41.1.7; Grotius 2.1.52; Van Leeuwen, *Censura Forensis* 1.2.3.14. See also *The Antipolis* 1990 (1) SA 751 (SCA) at 757: '*Bona tempestate ejecta* bly die eiendom van hul eienaars en is nie *res derelicta* nie' [Goods thrown overboard during a storm remain the property of their owners and are not derelict goods.]

39 *The Thermopolae: Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169.

De Villiers CJ remarked in his judgment:

> 'A person whose property has gone down in a shipwreck cannot be presumed to have abandoned it because for some years he has taken no steps to raise it. He may hope that in the meanwhile some appliances may be discovered by which the recovery of his property might be facilitated. Anyhow, in my opinion, clear proof of abandonment must be given, and in the present case there is not … such clear proof of abandonment. But the respondents are actually in possession of the field, they are working at this wreck, and they are entitled to recover the cargo except as against the true owner. An owner may always vindicate his property wherever it is found, and, therefore, the true owner in the present case can vindicate his property, but no-one else. The underwriters to whom the owners have abandoned the cargo would, of course, become entitled to the rights of the owners.'[40]

While seven years' inactivity was insufficient to establish an abandonment of ownership in *The Thermopolae*, the English courts have found a period of 67 years of allowing a wreck to lie undisturbed to be indicative of a constructive abandonment. In *The Lusitania*[41] the English High Court was asked to determine ownership of 94 items removed from the wreck of the *Lusitania* which sank off the Old Head of Kinsale after being hit by a torpedo in 1915. In the intervening 67 years, neither Cunard, as the erstwhile owners of the vessel, nor their London underwriters, had taken any steps to recover anything from the wreck. Sheen J found that the divers who had recovered certain artefacts thereby acquired ownership in them, because both Cunard and their assurers might be deemed to have abandoned the *Lusitania*:

> 'The owners had abandoned their ship. So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property.'[42]

The law of the United States is not as generous to the finder of wreck: 'Admiralty has historically disfavoured the law of finds, preferring instead the distinct policies of the law of salvage'.[43] This disfavour was given expression in the controversial case of *The Central America*.[44] The *Central*

40 *Ibid* at 171. It is interesting to note the submission of Searl KC for the applicants that English law and not Roman-Dutch law should apply to 'maritime and shipping law' by Act 8 of 1879. This suggestion is taken up in Lee, *op* 131 fn 9. That Act, the General Law Amendment Act 8 of 1879, imposed English law only on matters 'having reference to fire, life and marine insurance, stoppage *in transitu* and bills of lading', and would not have applied to issues relating to wreck. See further upon the 1879 Act §17-2.1.

41 *The Lusitania* [1981] 1 Lloyd's Rep 132 (QBD). For an historical account of the loss of the *Lusitania* and the effect it had on world politics, see Simpson *Lusitania* (1972).

42 *Ibid* at 135.

43 *Hener v United States* 525 F Supp 350 (1982) AMC 847. See further §4-6 re the wreck of the Titanic.

44 *The Central America: Columbus–America Discovery Group v Atlantic Mutual Insurance Co* (1992) AMC 2705.

America was built to carry passengers down the east coast of the United States to Panama, enabling them there to cross the bight of Panama and make the journey up the west coast to the goldfields of California. She and her sisterships on the run were the only relatively safe means of bringing gold to the markets of New York. When she sailed from the Bay of Panama for New York, the *Central America* had on board 1,6 million, US dollars worth of gold, and more than 500 passengers.[45] She was trapped in a hurricane, and, despite heroic attempts to save her, sank with awful loss of life in September 1857. In 1989, an engineer by the name of Thompson achieved his life's passion by locating the wreck and recovering a substantial quantity of treasure. In doing so, he and his team overcame the hazards of depths, foul weather, and intrusive salvors competing to be the first to find the *Central America.*

Yet, when considering Thompson's claim for ownership of the treasure (which was on the seabed outside of any territorial coastal jurisdiction) the United States Court of Appeal overturned the lower court's finding that Thompson's Columbus America syndicate had acquired ownership of a wreck which had lain undisturbed for over 130 years.[46] It found that the successors to the insurance syndicates (or rather those now surviving) retained ownership of the treasure which they had insured, and referred the salvage syndicate's claim back to the court *a quo* for the assessment of a suitable salvage reward.[47] The Court of Appeal commented that the law of salvage applies in all but exceptional circumstances.[48] Evidence was led that the underwriters had attempted in 1970 and again in 1980 to contract with salvors to locate and recover the *Central America*'s treasure, and the Court of Appeal found this indicative of a reluctance to abandon. But the underwriters' eventual award of only 10% of the value of the treasure recovered, and their loss of possession

45 The full account of the loss of the *Central America* and the fascinating quest for her gold is given in Kinder's *Ship of Gold in the Deep Blue Sea* (1998).

46 On the legal disputes concerning the treasure from the *Central America*, see O'Keefe *Gold, Abandonment and Salvage* [1994] LMCQ at 7; *Treasure — Salvage and Abandonment* [1993] 24 JMLC at 403–412; Siegler *Finders Keepers revised for the High Seas* [1993] 17 Tulane MLJ at 353–364.

47 The United States Federal Court, to which the assessment of the salvage claim was referred, awarded Columbus–America 90% of the value of the treasure recovered from the *Central America*. The syndicated underwriters' appeal against the award was dismissed by the United States 4th Circuit Court of Appeals in Richmond in June 1998.

48 *The Central America* at 2715/17. This accords with clear policy statements of the US courts favouring treating those in possession of wreck as salvors in possession rather than finders seeking ownership. See for example *Hener v United State*s 525 F. Supp 350 (S.D.N.Y1981) at 356 as cited in *R.M.S. Titanic, Incorporated v The Wreck and Abandoned Vessel* 435 F.3d 521

> 'one who would come upon a lost ship on the high seas would be encouraged to refrain from attempting to save it and to entertain the idea of taking valuable cargo for himself as finder. Indeed, a free finders-keepers policy is but a short step from active piracy and pillaging'.

of the treasure to the salvors for marketing purposes, was, in the end, a Pyrrhic victory, and must surely be seen to be an exceptional situation.[49]

Whither therefore abandonment of maritime property in the future? Clearly, the advances of technology enabling treasure to be located and recovered, and the effect that world monetary inflation has on the value of *specie*, will spur salvors to unparalleled efforts to tap what is clearly a vast source of wealth. South African law would do well to follow the conservative approach of the United States courts and view salvors' claims for the recovery of long undisturbed (though not necessarily abandoned) wreck with circumspection. And this would accord with the principles of Roman-Dutch law, which required an intention of the owner to relinquish title before abandonment is presumed.[50] If the property has value, that intention is not lightly presumed.[51] Mere inactivity is generally insufficient.[52] And in the light of these principles, the decision of the English High Court in *The Lusitania* is inappropriate precedent for the South African lawyer.[53]

§4-3.2 Abandoned wreck - finding res nullius

In marked contrast to the situation where there is no abandonment of wreck, is the salvage of *res nullius* by its finder, who may thereby acquire ownership of the wreck. In Roman-Dutch law, the finder who, as *occupator,* establishes physical control over the property with the intention to become owner becomes both possessor and owner.[54]

49 See fn 47. In dismissing the appeal, the Richmond Circuit Court of Appeals awarded Columbus–America sole possession and marketing rights over the treasure, estimated to be worth between $21 million and $1 billion. The court is reported to have commented:

> 'The difficulty in this case is that there is just too much gold involved to allow more than one party to market it.'

50 Wille, *op cit at 940*, citing Grotius 2.1.52; Voet 41.1.10 and *Van* Leeuwen Censura Forensis 1.2.3.14 and Van der Keesel GR 2.4.32.

51 *Doyle v Leyds NO* (1895) 3 OR 22; *SM Goldstean & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (SCA) at 936-7.

52 Wille, *op cit*..

53 The South African courts missed an opportunity to revisit the issue in relation to the wreck of the *Birkinhead*, one of the country's most notorious and tragic wrecks which was lost on Danger Point in 1852. A team of licenced divers have recovered 19 gold sovereigns from the wreck. Before the coins could be released under Customs supervision, the British Treasury intervened and averred that they formed part of a wage packet consigned on board the vessel for the payment of British soldiers. The dispute over whether or not the British Government had proved its claim to ownership of the *specie*. was eventually settled, and there was therefore no opportunity for the High Court to make a ruling.

54 Such physical control was known as *detentio*, *corpus* or *factum*. *Voet* 41.1.2; *Groenewegen* Inst 2.1.47; See also *The Antipolis* at 757. See also *Digest* 41.1.5.1 and *Huber* 2.3.15 (Gane's translation, Vol. 1 at 121); Savigny, *Possession* at 169–171.