

STUDY UNIT 5

QUESTION 4 ON PAGE 136

ANSWER:

S can only succeed with the *rei vindicatio* if he can prove that X and Y in fact transferred ownership to him by means of *traditio longa manu* (1). Here transfer of the thing is not possible because of its size or weight (1). In this case the article to be transferred is pointed out (½) to the transferee in the presence (½) of the thing. The transferee is placed in a position enabling him/her to exercise physical control. It is not sufficient merely to point out the thing. The transferee must be placed in a position to take control (1) of the thing to the exclusion of others.



In *Groenewald v Van der Merwe* (1) (1917 AD 233 239), Innes CJ described delivery with the long hand as follows:

But physical prehension is not essential if the subject-matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at his pleasure (1). In that way the physical element is sufficiently supplied; and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession (1), -- that is the delivery --- is in law complete. ... When this deposit of the subject matter in the presence and at the disposition of the new possessor takes the place of physical prehension, the delivery is said to be made *longa manu* ... It is most appropriate to transactions where owing to the weight or bulk of the article concerned, actual delivery is difficult. (*Our emphasis.*)

In *Eskom v Rollomatic Engineering (Pty) Ltd* (1) (1992 (2) SA 725 (A)) the court confirmed this principle.

For S to acquire ownership by means of delivery with the long hand (*traditio longa manu*) **he had to be in the position that he and he alone (1) could deal with the thing at his pleasure (1) in order to comply with the physical element of control (by, for example, placing someone at the windmill until he removes it, or putting up a notice or, as in the case of *Groenewald*, by informing the workers that they would henceforth be using the machinery for his account).** S should also comply with the mental element of control – the intention to receive ownership from X and Y (1).

S did not comply with the physical element of control and did therefore not acquire ownership through delivery with the long hand (*traditio longa manu*). S will not succeed with the *rei vindicatio* (1).

#### QUESTION 4 ON PAGE 143

##### ANSWER:

In order to succeed with the *rei vindicatio*, Y and Y must prove that they are the owners of the machinery.(1) The facts of the question are similar to the facts in *Vasco Dry Cleaners v Twycross* (1) (1979 (1) SA 603 (A)). The question here is whether X and Y became owners through *constitutum possessorium*, because, as the facts reflect, they never took physical control of the machinery.(1)



It has been held in the *Vasco* case that *constitutum possessorium* is the opposite of *traditio brevi manu* (delivery with the short hand). In the case of *constitutum possessorium* the transferor retains physical control of the thing to be transferred. Since this form of delivery creates the possibility of fraud, any assertion that ownership of a movable has passed upon a mere change of mental attitude is carefully scrutinised by the courts.(1)

It has further been held that the real object of the transaction between S and X and Y was not a sale to X and Y which would have entitled them to become owners of the machinery on delivery, but rather that a pledge should be created in their favour.(1) The transaction (sale) between S and X and Y was referred to as a simulated transaction, because it did not reflect the true intention of the parties.(1)

Furthermore, the court held that no pledge was created since *constitutum possessorium* does not constitute delivery for purposes of creating a valid pledge, because the pledged thing remains with the pledgor.(1) This creates ample opportunity for fraud.

The only effective method of constituting a pledge is by an agreement and transfer of control by delivery of the thing to be pledged to the pledgee.(1)

S and X and Y therefore clothed their agreement in the guise of a sale and re-sale. However, the court decided that the true substance of the contract was one of pledge. Therefore X and Y cannot claim the machinery back, because they are not the owners of the machinery.(1)

#### QUESTION 7 ON PAGE 148

##### ANSWER:

Attornment can be defined as a derivative method (1) of transferring ownership where the transferor, (1/2) the transferee (1/2) and a third party (who is in control of the thing and will continue to control it), (1) agree (1) that the third party will control (1) the thing on behalf of the transferee (1) as owner. There are two requirements for attornment to take place, namely:

- (i) A tripartite agreement (1) between the transferor, the transferee and the third party holder in terms of which the holder will continue to hold for the transferee and no longer for the

transferor. (1) All three parties therefore consent to the transfer of ownership.

- (ii) The holder should exercise physical control at the moment of transfer (1) from the transferor to the transferee (*Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* (1) 1980 (3) SA (917 (A) 922—924)).

In *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* (1) (1972 (1) SA 270 (A)) the law relating to attornment was altered and a method of transfer of ownership analogous to attornment was recognized.(1) By this method the third-party holder makes a prior declaration of intention,(1) to the effect that he/she will hold the thing on behalf of a future transferee to whom the owner may transfer ownership. This declaration can take place at a stage when transfer to the transferee has not yet taken place and may, possibly, never take place.(1) When transfer eventually takes place (by means of cession and notice to the transferee), the third party holder may even no longer be in control of the thing. (1)

(Maximum 10 marks)

#### QUESTION (NO NUMBER) ON PAGE 150

#### ANSWER:

S did not become owner of the property (1) **because registration did not take place**. Ownership of **immovable property** (1) can only pass from X and Y to S if X and Y have the intention to transfer ownership to S (1) and if S has the intention to receive ownership (1) (real agreement) and **registration** (1) of the property in S's name takes place.



#### ADDITIONAL QUESTION

Distinguish between delivery with the short hand and *constitutum possessorium* and illustrate the difference between the two with reference to examples. (6)

#### ANSWER:

In the case of delivery with the short hand no transfer (1) of physical control takes place, because the **transferee is already in control** (1) of the thing although not as owner of the thing.

For example if a transferee holds a thing as a lessee and thereafter purchases it; or if a transferee is a buyer in terms of an instalment sale agreement he/she acquires ownership by means of delivery with the short hand on payment of the last instalment. [1 mark for any example]

*Constitutum possessorium* takes place when the **transferor retains (1) physical control** over the thing in which he/she has agreed to transfer ownership to the transferee. Only the intention (1) towards the thing undergoes a change.

For example X buys a watch from a jeweller, but leaves it with the jeweller for cleaning. [1 mark for any similar example]