A South African perspective on a lien as real security right in Scottish law*

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1 *Introduction*

Scottish and South African law share two significant characteristics. First, both legal systems are classified as mixed legal systems based on Roman-Dutch law and influenced, in the main, by English law. Secondly, both are uncodified. In Scotland, the legal reform of security rights over movable property has received considerable attention in recent years through the Scottish Law Commission's "Discussion Paper on Moveable Transactions".[1] It is interesting to note that rights of retention (liens) and set off, which have a security function, are not included in this project. These rights are seen as part of the law of obligations and will be included in a separate general review of contract law. However, this article is concerned only with liens as real security rights. Scottish law sources dealing with the nature and operation of liens date back to the nineteenth century.[2] In 2008 Steven's thesis on pledge and lien appeared. This book[3] is the only source offering a comprehensive discussion of the principles governing liens in the twenty first century. Pienaar and Steven contributed a chapter – "Rights in security" – to *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*,[4] in which they highlight certain differences between the two legal systems. These authors point out that although both systems recognise a dual classification of liens, the basis on which the distinction is made differs: Scottish law distinguishes between general liens securing a balance of debts and special liens securing a specific debt; South African law distinguishes between enrichment liens as real rights, and debtor/creditor liens (I prefer the term "liens *ex contractu*") as personal rights. They also distinguish the legal systems on the basis of both what property can serve as a "security object", and what obligation can be secured. In this article I elaborate on these aspects and point to further differences or points of interest in the two legal systems. The article offers an overview, from the South African perspective, of Scottish liens in the light of the current legal position with regard to: their legal nature; their classification; the object of the security right; possession as a pre-requisite for vesting a lien; and

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1 Discussion Paper June 2011 151.

2 *eg*, Whithaker *A Treatise on the Law of Lien and Stoppage in Transitu* (1812); Montagu *A Summary of the Law of Lien* (1821); Cross *A Treatise on the Law of Lien and Stoppage in Transitu* (1840); Gloag and Irvine *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (1897) and Bell *Principles of the Law of Scotland* (1899).

3 Steven *Pledge and Lien* (2008).

4 Pienaar and Steven "Rights in security" in Zimmermann, Reid and Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 758-785.

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the contractual waiver of a lien. Specific reference is made to different categories of lienholders.

2 *Historical foundations of liens in Roman law, Roman-Dutch law and English law*

In order fully to comprehend the legal nature and operation of a lien in both legal systems, it is necessary to consider the historical foundations of liens in both Scottish and South African law. I turn, therefore, to a consideration of the historical development and legal principles of liens in Roman law, Roman-Dutch law, and English law – which is the foundation of liens in Scottish law. While English law has influenced the Scottish lien profoundly, the South African law governing liens is Roman-Dutch-based and has, as indicated above, seen relatively slight English influence, although one does encounter some references to English law in our case law.[5] A measure of English influence can be seen in *SA Philips (Pty) Ltd v Vermouth*,[6] where the court considered the innkeeper's lien – although this lien was recognised in both Roman-Dutch and English law.[7] In *De Beers Consolidated Mines v London and South African Exploration Company*,[8] the court expressly rejected English law.

A lien is based on the Roman law defence of *exceptio doli*. Steven[9] illustrates that reliance on the *exceptio doli* could arise within property law (in the form of *accessio*) and within the law of contract. Retention based on *accessio* is founded on the principle that no one may be enriched at the expense of another. In the case of *accessio* (movable to movable and movable to immovable) the former owner of the accessory thing suffers a loss and the new owner is enriched at the expense of the former owner. In Roman law retention could be based on various contracts, for example, *pignus* (contract of pledge), *depositum* (a contract in terms of which an owner entrusted his movable thing to another for safekeeping), and *commodatum* (a contract in terms of which an owner loaned movable property to another for use). In essence the *exceptio doli* raised in the case of a contract (retention based on contract), was the *exceptio non adimpleti contractus*. The *exceptio non adimpleti contractus* is an action for enforcing actual performance. It can also be described as a temporary defence aimed at actual performance where performance is still possible. In reciprocal contracts a party cannot, in principle, claim performance without having himself performed.[10]

Kersteman[11] defines a right of retention in Roman-Dutch law as "the right to retain a thing until the owner has paid us what he owes in respect of it". Money must have been due in respect of the thing retained. The right was available to, among others: a *bona fide* possessor of land for improvements made to the owner's land; an agent against his principal for expenses incurred on the property; a seller against the purchaser who had not yet paid the purchase price; a workman for goods repaired and not yet paid for; and a carrier for freight costs. The Roman-Dutch right

5 Wiese *Die Aard en Werking van Retensieregte: 'n Regsvergelykende Studie* (2012 thesis SA) 69.
6 1932 CPD 377.
7 The difference between and innkeeper's lien in Roman-Dutch law and English law is discussed below.
8 (1893) 10 SC 359.
9 (n 3) 10.01-10.23.
10 Christie *The Law of Contract in South Africa* (2006) 421; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 417 and *Smith v Van den Heever* 2011 3 SA 140 (SCA) par 14 and 15.
11 *Woordenboek*, *sv* "Retentie" 629.

of retention was, however, not confined to money due in respect of the thing: an innkeeper could rely on the innkeeper's lien and retain his customers' clothes to cover outstanding board and lodging.[12]

In English law the term "lien" has various connotations. Firstly, it may refer to a right similar to the tacit hypothec of Roman-Dutch law, for example maritime and equitable liens. These liens are defined as "rights to have certain specific property primarily applied in satisfaction of certain claims".[13] Second, is a trustee's lien in respect of the trust property for expenses incurred. Thirdly, we find a *cestui que* trust's lien in favour of the trust beneficiary in respect of breach of trust by the trustee. However, only possessory liens correspond to liens in Roman-Dutch law. In this regard English common law distinguishes between particular and general liens. A particular lien is the right to retain a specific thing to satisfy a claim in respect of that specific thing. This lien arises through operation of law in one of the following cases: (i) the creditor is compelled by law to receive the goods or perform services to the owner of the goods; and (ii) the creditor has expended money, skill, or labour on the specific thing.

A distinction should be drawn between the innkeeper's lien in Roman-Dutch and in English law. In Roman-Dutch law the innkeeper's lien is an exception to the rule that money must be due in respect of the thing retained (customer's clothes). English law acknowledges an innkeeper's lien based on the innkeeper's duty to provide accommodation to those who seek it ((i) above). A general lien in English law vests when a creditor retains property of the debtor "other than that [property] in respect of which the demand arises". A solicitor has, for example, the right to retain all papers or documents of a client even if the debt due is not in respect of those papers or documents. These liens must be established by contract or in terms of custom.[14]

The ensuing discussion analyses the development of liens in Scottish and South African law.

3 *Development of liens in Scottish and South African law*

To begin with, the development of liens in Scottish law is briefly discussed. Relying on Roman law principles, the 1681 *Institutions of Stair* as analysed by Steven, acknowledges retention as "a defence which is generally available within the law of obligations". It is, however, not clear from Stair's work whether the retention is limited to the law of obligations. According to Steven[15] it should be assumed that Stair did not intend to limit retention to the law of obligations – had he so intended, he would have stated this clearly. Stair further states that "retention is a way of exception" without differentiating between the *exceptio doli* and the *exceptio non adimpleti contractus*.[16] Two cases on liens were reported in 1682 and 1735. The first case[17] acknowledged seamen's right to retain a ship to satisfy their claims for outstanding wages. Steven[18] explains that this right of retention is dependent on possession and is a real right enforceable against the owner of the ship. In the second

[12] Morice *English and Roman-Dutch Law* (1905) 67.
[13] Morice (n 12) 68.
[14] Morice (n 12) 69.
[15] (n 3) 10.74 and 10.77.
[16] (n 3) 10.77.
[17] *Seamen of 'The Golden Star' v Miln* 1682 Mor 6259 as referred to by Steven (n 3) 10.80.
[18] Steven (n 3) 10.80.

case,[19] a right of retention in favour of a factor was acknowledged. This right was, however, regarded as implicit in the contract and attached to money received by the factor. During this period a right of retention was referred to as a *ius retentionis et hypothecat* (or simply a tacit hypothec or a hypothec). A hypothec, as defined by Stair, is a non-possessory security right. Referring to retention as a hypothec is, strictly speaking, incorrect as a hypothec refers to non-possessory security and retention depends on possession. According to Bankton's *An Institute of the Laws of Scotland*[20] a right of retention was available to a *bona fide* possessor for necessary and useful expenses incurred, other than luxurious expenses. This right correlates with the Roman-Dutch law right of retention based on unjustified enrichment. Bankton equates a right of retention to a hypothec, but qualifies the right as a tacit security for the credit grantor. According to Bankton, a right of retention applies only to corporeal movables. Erskine's view of a right of retention corresponds to that of Bankton and is well founded in Roman law. He does not, however, discuss the right of retention as a security right.[21]

In 1779 the court of session[22] used the term "lien" for the first time. In the context the term was used as a synonym for "nexus" in the sense of the "nexus created by a real security on a piece of property".[23] "Lien" and "right of retention" were, however, not interchangeable terms. In the eighteenth century a lien in Scottish law was regarded (in the main) as a real right, and a right of retention as an example of a lien. In the nineteenth century, Bell used the term "lien" as a synonym for "possessory retention" "within the general context of nexus".[24] Bell no longer used "lien" meaning "nexus", but "lien" meaning "possessory retention". Under English law influence, Bell distinguished between a special lien and a general lien. The existence of a lien is dependent on possession – a requirement firmly based on English law.[25]

In South African law the Roman-Dutch principles applied to liens. In 1883 in *Trustee of Walker v Jones, Cosnett and Ball*[26] the court held – referring to Roman-Dutch law – that a tacit hypothec (in the form of right of retention) can only vest over an asset on which labour has been expended. In *The Colonial Government v Smith, Lawrence and Mould*[27] a lien was defined, again with reference to Roman-Dutch law, as "a right to retain a thing upon which you have spent labour or money".[28] *United Building Society v Smookler's Trustees and Golombick's Trustee*[29] is important for liens in South African law. Bristowe J relied on Roman-Dutch law to find that a lien for useful and necessary expenses is always an enrichment lien and therefore a real security right. Consequently the lien enjoys preference over a bank's mortgage. This judgment is the foundation for the distinction between the different

[19] *Stephens v Creditors of the York Buildings Company* 1735 Mor 9140 as referred to by Steven (n 3) 10.81.
[20] 1751-1753 as referred to by Steven (n 3) 10.86.
[21] *An Institute of the Laws of Scotland* as referred to by Steven (n 3) 10.86.
[22] *Dunlop v Spiers* 1779 Mor 14107 as referred to by Steven (n 3) 10.108.
[23] Steven (n 3) 10.120.
[24] Steven (n 3) 10.131.
[25] Steven (n 3) 10.130-10.131.
[26] (1883) 2 SC 354.
[27] (1886) 4 SC 194.
[28] 197.
[29] 1906 TS 623.

types of lien and their nature and operation in South African law. Despite criticism[30] of this judgment, it has often been referred to as authoritative in subsequent cases. It suffices to say that in South African law a lien is based on Roman-Dutch principles. There is some confusion as to the nature and operation of liens based mainly on the incorrect interpretation of Bristowe J's judgment in *United Building Society v Smookler's Trustees and Golombick's Trustee*.

I now turn to an analysis of the definition of a lien, its legal nature and the classification in Scottish law, from a South African (also an uncodified mixed legal system) perspective.

4 *Defining a lien*

In Scottish law a lien is classified as a real right (*jus re in aliena*). A clear distinction should be drawn between retention and lien. In most legal systems it is common to refer to a lien as a right of retention. In Scottish law "retention" has a distinct meaning and its legal consequences differ from those of a "lien". Both are rights in security: a "lien" is a real right over someone else's thing (*jus in re aliena*); while "retention" is a security over property in which the creditor (holder of the security) has *dominium*. The effect of the right of retention is that the creditor, who has *dominium*, is "entitled to withhold the property from the debtor until all sums owed by the debtor are paid".[31] Although the legal nature and operation of this "right of retention" fall outside the ambit of this discussion, it is important to note that in Scottish law the term "right of retention" does not have the same connotation as "right of retention" in the South African and many other legal systems.

The differences in the definition of a lien in both legal systems are now briefly considered. The legal nature[32] and classification[33] of liens are dealt with below. The object of security[34] (movable and/or immovable property, corporeal and/or incorporeal property, and property improved or unimproved by the lienholder), possession[35] as a prerequisite for the vesting of a lien, and the contractual waiver[36] of a lien are dealt with comprehensively later.

Scottish law defines a lien as "a real right to retain property until the discharge of an obligation or certain obligations, the property not having been delivered to the retaining party for the purpose of security".[37]

In South African law, Scott provides the following comprehensive definition of a lien:

> "A lien (right of retention, *ius retentionis*) is the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to

[30] This decision can be criticised with regard to the following aspects: the case is in general illogical; some statements are confusing; it appears that the judge is unsure of his views; no authority or explanation is provided for the classification of a lien for useful and necessary expenses as a real right; the judge's assumption that an enrichment lien is in question while the improvements were made in terms of an agreement and the regarding of a lien as an exception to the *prior in tempore* rule. See Wiese (n 5) 185-210.

[31] Steven (n 3) 14.16.

[32] See par 5 below.

[33] See par 6 below.

[34] See par 7 below.

[35] See par 8 below.

[36] See par 9 below.

[37] Gretton and Steven *Property, Trust and Succession* (2013) 20.58 and Steven (n 3) 10.01.

> the expenditure of money or something of monetary value by the possessor (termed "*retentor*" or "lien holder", while exercising his or her lien) on that property, until the claim has been satisfied."[38]

Both legal systems refer to the principal debt (an obligation or certain obligations). Scottish law expressly states that a lien is a real right, whereas South African law refers to a lien as a right, and this right can be either a real right (enrichment liens) or a personal right (liens *ex contractu*).

Possession of the thing by the lienholder is required in both legal systems. It is interesting to note the emphasis in the Scottish definition on "property *not having been delivered* to the retaining party *for the purpose of security*".[39] The holder of the lien obtained control over the property based on a legal relationship other than that arising from the granting of security. This speaks to the *ex lege* operation of a lien which applies in both legal systems: a lien is a tacit hypothec (security right), and not an express form of real security (for example, a pledge where the pledge object is delivered to the pledgee as security in terms of an agreement). In Scottish law it is said that a special lien arises by operation of law – "it cannot be regarded as a consensual security in the same way as a pledge, where debtor and creditor have the *animus* to create a real right".[40] A lien arising by operation of law requires no *animus* on the part of the debtor to create a real right. In South African law in *Ninian and Lester (Pty) Ltd v Perry NO*,[41] Shearer J held that contracting parties could agree to a lien. Sonnekus and Neels[42] criticise this statement and indicate that an agreement between parties to use a movable thing as security can only be a pledge.

The South African definition expressly states that the lien is over someone else's property "whether movable or immovable". There is some uncertainty about the existence of a lien over immovable property in Scottish law.

5 *Legal nature of a lien*

The legal nature of a right is important as it determines the content of the right and the entitlements of its holder.[43] In general, real rights have real operation (they are enforceable against the "world at large"), while personal rights are enforceable against a specific person or group of persons (*inter partes*) only.[44] As seen above, a lien in Scottish law and an enrichment lien in South African law are classified as real rights. In South African law liens *ex contractu* are not classified as real rights: they are on occasion referred to as personal rights enforceable only *inter partes*.[45] In Scottish law a real right is defined as "a right directly in a thing".[46] The primary real

[38] Scott "Lien" in 15(2) *LAWSA* re (2008) par 49. This definition is the most comprehensive definition of a lien and correlates with most definitions by other authors. For a comprehensive analysis of the different definitions see Wiese "A critical evaluation of the nature and operation of liens in South African law in comparison with Dutch law" 2014 *SA Merc LJ* 487.

[39] my emphasis.

[40] Steven (n 3) 13.44.

[41] 1991 1 SA 66 (N) 72D-E.

[42] Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 779.

[43] Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* (1995) 545-546.

[44] Du Bois (ed) *Wille's Principles of South African Law* (2007) 427. See Sonnekus "Saaklike regte of vorderingsregte? – tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173 for a comprehensive discussion of the difference between real and personal rights.

[45] Wiese (n 5) 178-179.

[46] Gretton and Steven (n 37) 1.16.

right is ownership. A subordinate real right is a real right in another person's thing.[47] Ownership is described as "a residual right … without term and survives the expiry of all lesser rights; is an absolute right … enforceable … against all other people".[48] The subordinate real rights are absolute but not residual.[49] The South African counterpart of a subordinate real right is a limited real right which is also referred to as a *jus in re aliena*. Scottish law – as in both Roman and Roman-Dutch law – recognises a *numerus clausus* of real rights. The list of real rights acknowledged in Scottish law is: primary – ownership; and subordinate – servitude, negative real burden, proper life rent, rights in security, and lease of immovable property. Pledge, lien and standard security are rights in security.[50] New types of security right can only be created by legislation.[51] South African law does not recognise a *numerus clausus* of real rights.[52]

Scottish law classifies a lien as a real right (*jus in re aliena*), namely, a right in security. Steven[53] provides the following reasons for the classification of a lien as a real right: (i) many authorities state that a lien is a real right; (ii) a lien is treated as a right in security together with pledge and hypothec; (iii) a lien prevails over later diligence of unsecured creditors; and (iv) a lienholder "will normally not have to release the lien on caution being given for the debt" secured by the lien. Reasons (i) and (ii) are similar to the reasons why an enrichment lien is classified as a real right in South Africa. Reasons (iii) and (iv) deal with the real operation of a lien. Pienaar and Steven state as follows: "A fundamental issue is whether a lien is a real right, or in other words whether it can be enforced against the owner of the property, his successors in title and his creditors."[54]

In general, South African law classifies an enrichment lien as a real security right (and a lien *ex contractu* as a personal right). This classification was, however, questioned in *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*[55] and has come in for academic criticism.[56] The principal argument against the classification of an enrichment lien as a real security right is the fact that an action is always required as an element of a right. A lienholder has no legal action to institute his lien against the debtor. He can retain possession and wait for the owner to claim the thing from him at which point he can raise a lien as a defence against the owner's *rei vindicatio*. Acknowledging a lien as a real right would be contrary to the legal maxim *ubi ius ibi remedium* (where there is a right there must be an action or legal remedy to enforce that right). Because of the historical development of liens (from the *exceptio doli* of Roman law), a lien is a defence against the owner's *rei vindicatio* and not a right (neither a real right nor a personal right).[57] A clear distinction should

47 Gretton and Steven (n 37) 2.2.

48 Reid and Van der Merwe "Property law: Some themes and some variations" in Zimmermann, Reid and Visser (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 638 638-9.

49 Reid and Van der Merwe (n 48) 639.

50 Gretton and Steven (n 37) 2.8.

51 Gretton and Steven (n 37) 2.10.

52 Du Bois (n 44) 431 and De Waal "*Numerus clausus* and the development of new real rights in South African law" 1999 *EJCL* http://www.ejcl.org/33/art33-1.html (10-05-2016).

53 Steven (n 3) 14.01.

54 Pienaar and Steven in Zimmermann *et al* (n 4) 783.

55 1998 1 SA 939 (C) 944E-F.

56 Sonnekus and Neels (n 42) 771-772; Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97 102-106; "Retensieregte – nuwe rigting of misverstand *par excellence?*" 1991 *TSAR* 462 and Wiese "The legal nature of a lien in South African law" 2014 *PER/PELJ* 2526.

57 Sonnekus and Neels (n 42) 769.

be drawn between: (i) the creditor's *claim* against the debtor (based on contract or enrichment); and (ii) the creditor's *lien* securing the creditor's *claim*. The right in (i) is a right enforceable by the creditor by instituting an action either in terms of the contract, or in terms of an enrichment claim against the debtor. The "right" in (ii) cannot be enforced. I therefore regard a lien as a legally recognised retention capacity to which the lienholder has an extrajudicial[58] claim, and as a defence against the owner's *rei vindicatio* (or the claim to the thing of another real claimant).

Two questions arise: against whom can a lien be enforced; and in classifying a lien as a real right is it granted real (absolute) operation? In South African law it is often said that a lien is a real right because of its real operation. The question of the legal operation of liens against third parties has contributed to some extent to the classification of liens as real rights (enrichment liens), and personal rights (liens *ex contractu*). The need for this classification probably arose from the question of at what point and in what circumstances the lien is enforceable against the owner.

The requirements for the vesting of a lien are: (i) the lienholder must have a valid and enforceable claim against the party who claims the thing from him; and (ii) the lienholder must be in physical control of the thing. Should the lienholder have no claim against the person who claims the thing from him, he cannot rely on a lien. A lien is a defence against the owner's *rei vindicatio* and effective against the owner if the lienholder has a claim based on either enrichment or contract against the owner. The question arising here is against whom, other than the owner, the lien can be enforced. If, for example, the owner sells his thing to a new owner, will the lien be enforceable against the new owner? If the owner is insolvent, will the lien be enforceable against the curator of the insolvent estate? If the property was subject to a mortgage, will the lienholder's lien be enforceable against the bank if the owner defaults?

The lien is enforceable against the curator of the owner's insolvent estate because the curator steps into the shoes of the owner.[59] According to Van der Merwe,[60] in terms of the doctrine of notice, a lienholder can enforce his lien against the debtor's universal successors in title if the successors were aware of the existence of the lien. In the following cases the lienholder will not be entitled to exercise his lien against a new owner: (i) immovable property subject to a lien is sold in execution to a purchaser who is unaware of the lien; and (ii) immovable property subject to a lien is sold and the lienholder knew about the sale but failed to inform the new owner (purchaser) of the lien.[61]

Other claimants who could possibly lay claim to the thing are the owner's other creditors and, specifically, real claimants to the thing. A mortgagee is an example of another creditor (real claimant). This calls for a practical example to illustrate the problem with the current classification and operation of liens in South African law. X, the owner of a farm, enters into an agreement with Y to build a house on the farm. When X bought the farm he registered a mortgage over the farm in favour of B Bank to secure a loan. After Y had completed the house, X experienced financial difficulties and failed to pay Y for the work that he had done. X also failed to pay his monthly instalments to B Bank. Y remained in control of the building and wishes to rely on his lien. B Bank wishes to realise its security by selling the farm but X

[58] The lien arises *ex lege* and no judicial procedures are required for its existence.
[59] Sonnekus and Neels (n 42) 773.
[60] *Sakereg* (1989) 724.
[61] Scott (n 38) par 62.

refuses to give B Bank control over the property. Is the lien enforceable against B Bank?

In accordance with the classification of liens *ex contractu* as personal rights (not real rights), Y's lien will only be enforceable against X and not against B Bank. Y will have to give up control of the building to B Bank who will sell the farm and Y's claim against X will be unsecured. However, according to Sonnekus and Neels,[62] in the case of a concurrence of creditors the mortgagee will undoubtedly have been enriched by the creditor's (lienholder's) actions, and the lien should therefore be applicable against the mortgagee who has a mortgage over the land. Van der Merwe[63] is of the opinion that a lien is enforceable against other real claimants, since the expenditure of money or labour by the creditor increases the value of the thing, or at least prevents it from declining. He states that this arrangement is not unfair in practice and that it is equitable that a lienholder's lien should also apply against other real claimants. Although their explanations differ, both Van der Merwe and Sonnekus are of the opinion that a lien has real operation or third party action based on equity – not because it is a real right.

Sonnekus and Neels[64] indicate that the distinction between a real right and a personal right is not found in the real or absolute operation of the respective rights. Both real and personal rights consist of a subject-subjects relationship:

> "It is therefore better to regard a right as a dual relationship: on the one hand the relationship between a legal subject, the bearer of a right, and the object of his right, that is the thing to which he has a right [subject–object relationship]; and on the other hand the relationship between the bearer of the right and all other legal subjects on whom the duty rests to respect and not to violate this right [subject–subjects relationship]."[65]

The subject-subjects relationship acknowledges the right of the bearer that exists against all other legal subjects who must respect it.[66] According to Sonnekus and Neels,[67] the distinction between a real right and a personal right based on its real or absolute operation confuses the party from whom performance can be recovered with the so-called respect by third parties (*respekteleer*) attributed to all subjective rights. In the case of an enrichment claim, the creditor has a claim only against the enriched party, but the subject-subjects relationship entails that all third parties must respect the creditor's enrichment claim.

Despite the criticism of the classification of an enrichment lien as a real right, both Scottish and South African law acknowledge liens (excluding the South African lien *ex contractu*) as real rights, mainly due to a lien's real operation. A lien's "real/relative" operation against third parties is justified as indicated above. Because the holder of a lien has no action to enforce the "right", it cannot be classified as a subjective right and so also neither as a real nor as a personal right. Liens *ex contractu* have "real/relative" operation against third parties although they are not classified as

62 Sonnekus and Neels (n 42) 773.
63 Van der Merwe (n 60) 724 n 930.
64 Sonnekus and Neels (n 42) 773.
65 Hosten *et al* (n 43) 544.
66 See Kruger and Skelton (eds) *The Law of Persons in South Africa* (2010) 12.
67 Sonnekus and Neels (n 42) 773.

real rights. Classifying a lien as a real right based on its "real/relative" operation is questionable in that "real/relative" operation is not limited to real rights.[68]

6 *Classification of liens*

6.1 Introduction

Scottish law divides liens into two categories: general liens and special liens. In principle a general lien arises only in certain cases of contract. A special lien may arise when there is a contract between the creditor and the debtor, and also when there is no contract between the parties. A special lien vests in terms of a single obligation, whereas a general lien vests for multiple obligations.[69] The binary division of liens in Scottish law is whether the lienholder may retain the thing for: (i) a general balance (general lien); or (ii) only for a specific debt (special lien).[70] In South African law the binary division is between enrichment liens (real rights) and liens *ex contractu* (not real rights / personal rights).[71] The basis for the binary division is clearly not the same in the two legal systems.

In Scottish law a lien vests only if the obligation/s (referred to above) is/are valid and outstanding.[72] This corresponds to the well-known accessory principle in South African law of real security rights.[73] The legal nature of general liens and special liens individually is now examined.

6.2 General liens

A general lien is defined as:

> "[T]he right of a first party to retain property from a second party until that party discharges a balance of debt owed for all work performed by the first party in the same capacity in which that first party holds the property. For example, a solicitor has the right to retain his or her client's papers until paid for all work carried out as solicitor, whether the work related to those papers or not."[74]

A general lien arises only when there is a contract between the parties. It has its roots in English law, and most civilian and mixed legal systems are not familiar with the concept.[75] A general lien has two important characteristics: (i) it secures a general balance; (ii) arising from services rendered by the lienholder in the capacity in which he holds the property. Any other balances or sums of money owing to the debtor which have not arisen from services rendered in the capacity in which he holds the thing are not secured by the general lien. For example, an attorney has a general lien over all the documentation of his client which he holds in his capacity as attorney and for services rendered as an attorney. If the attorney loans money to his client, his claim for repayment of the cash loan will not be secured by the general

[68] According to Hosten *et al* (n 43) 545-546 "there was a call to 'scrap the notion of absolute and relative rights' and the concomitant distinction between real and personal rights. … While it seems that there is no need to abandon the distinction between the real right and the personal right, the unnecessarily confusing terms 'absolute' and 'relative' with regard to rights should be avoided."

[69] Gretton and Steven (n 37) 20.63-20.64.

[70] Pienaar and Steven in Zimmermann *et al* (n 4) 777.

[71] Scott and Scott *Wille's Principles of Mortgage and Pledge in South Africa* (1987) 93 and Van der Merwe (n 60) 714 and 718.

[72] Steven (n 3) 11.01.

[73] *Thienhaus v Metje & Ziegler Ltd* 1965 3 SA 25 (A) 32.

[74] Steven (n 3) 17.01.

[75] Steven (n 3) 17.07.

lien, as loaning money is not part of his services as an attorney.[76] In the event of the debtor's insolvency, general liens may unfairly prejudice either his other creditors or third parties. The following illustrates possible prejudice to successors: "[I]f A sends goods to B via his carrier, it is rather unfair upon B if the carrier is allowed to retain the goods until all the debts owed by A to him in respect of carriage over the last five years are met."[77]

Therefore, general liens arise in specific circumstances only and must be founded on a contract. The contract may be entered into expressly or may arise by implication. A general lien entered into expressly "will be 'effectual' if 'stipulated in clear and unambiguous terms'".[78] The following are examples of general liens arising by implication: a banker's lien; a broker's lien; a commercial agent's lien; and a solicitor's lien. According to Pienaar and Steven[79] there has been little development in the doctrine of general lien in recent years.

South African law acknowledged a general lien in a 1897 judgment, *In re Dorcy Moncamp v Soobiah*.[80] However, other cases[81] with similiar scenarios failed to acknowledge a general lien. Although South African law acknowledges a general lien in favour of a factor,[82] a general lien does not exist in South African law. Unlike under Scottish law, a solicitor's lien is not a general lien in South Africa but is regarded as a lien *ex contractu*.[83] The attorney may withhold documents he has drafted and any document in respect of which "he is entitled to charge his client a fee … because … it is recognised that he expended work and labour on it".[84] The work performed by the attorney could be reading the documents, amending them, or retaining them in safe-keeping.

6.3 Special lien

Special liens are most frequently used to secure a contractual claim based on the *exceptio non adempleti contractus*. This notwithstanding, a special lien may also secure a claim arising from unjustified enrichment or delict. A special lien in Scottish law is therefore not merely a part of contract law; it is also a doctrine of the law of obligations – the lienholder has an obligation to return the thing, but the debtor owes a counter-obligation to the lienholder. Being classified as a real right, a lien is also part of the law of property, which prescribes that a lienholder may enforce his lien against the debtor, his creditors, and certain successors in title.[85] In line with my contention that a lien is not a real right, I regard a lien as part of the law of property as it involves the retention of a *thing*.

Special liens in Scottish law correspond to both liens *ex contractu* and enrichment liens[86] in South African law. The liens *ex contractu* arise from a contract, whereas enrichment liens arise from enrichment. *Negotiorum gestio* can also give rise to an enrichment lien. A divergence between the two systems is the classification of a lien

[76] Steven (n 3) 17.02.
[77] Steven (n 3) 17.05-17.06.
[78] Steven (n 3) 17.18.
[79] Pienaar and Steven in Zimmermann *et al* (n 4) 779.
[80] 1897 NLR 97.
[81] *Hudson's Trustee v Wiley* 1884 EDC 299; *Stoffberg v Ludorf and Strange* 1912 TPD 226 and *Yeni v Francis* 1938 NPD 80.
[82] Pienaar and Steven in Zimmermann *et al* (n 4) 758 780 and Scott (n 38) par 70.
[83] *Botha v Mchunu* 1992 4 SA 740 (N) 743B and Scott (n 38) par 70.
[84] the *Botha* case (n 83) 747D.
[85] Steven (n 3) 16.01-16.04.
[86] also referred to as real liens. Scott (n 38) par 50.

ex contractu as a personal right (or not as a real right). Scottish law classifies all special liens as real rights.

It is appropriate at this point to consider Scottish law with regard to special liens based on the source of the claim which the lien secures: contract; unjustified enrichment; and delict.

6.3.1 Special lien securing a claim arising from contract

Special liens arise from the principle of the mutuality of obligations. Black *et al*[87] state that "mutuality dictates that a party who is in breach of his obligations under a contract cannot enforce performance by the other (innocent) party" and "continues to operate … after termination of the contract".[88] There must, however, be a clear link between the breach of contract and the performance withheld.[89] South African law knows the reciprocity principle and the *exceptio non adimpleti contractus*. The former refers to the common intention of contracting parties that there should be an exchange of performances. The latter gives effect to the former: the party from whom performance is claimed can raise the *exceptio* as defence until the other contracting party has performed in terms of the contract.[90] In both legal systems a general lien and a special lien in terms of a contract (Scottish law), and a lien *ex contractu* (South African law), are instances of the *exceptio* or mutuality principle. In South African law a lien is a form of the *exceptio non adimpleti contractus*, but the *exceptio non adimpleti contractus* does not always give rise to a lien. It does so only when the performance withheld is the return of a thing. There are many other forms of performance that may be withheld: for example, payment for services rendered in terms of a service agreement, or delivery of goods not paid for in terms of a sale agreement. In Scottish law, the special lien is said to arise from the principle of the mutuality of contract. Pienaar and Steven[91] state that: "South African authorities do not view debtor and creditor liens as arising out of mutuality of contract". They propose a reanalysis of South African liens *ex contractu* in terms of the mutuality principle: a lien *ex contractu* does not arise from the contract *per se* but from the mutuality agreement. Such an interpretation will allow a creditor to retain the thing for any type of performance, not only when performance is the return of the thing. The authors are of the view that this interpretation will do away with the distinction between "ordinary" and "pseudo"[92] liens in South African law. An "ordinary" lien "secures expenses incurred or work done upon the property being retained".[93] A "pseudo" lien secures an obligation where no expenses were incurred or no work has been done upon the retained thing. The "pseudo" lien in South African law is the result of English law influence, as in English law it is not required that expenses have been incurred or work done upon the thing retained.[94]

[87] black, Cabrelli, Hogg and Macgregor *Contract Law Update 2010-2012* (2012) 94.

[88] in their discussion of *Forster v Furgeson & Forster, Macfie & Alexander* 2010 CSIH 38; 2010 SLT 867.

[89] *Bank of East Asia v Scottish Enterprise* 1996 SLT 1213 (HL) and McBryde's note on the decision 1996 *Edinburgh LR* 135.

[90] the *BK Tooling* case (n 10); the *Smith* case (n 10) par 14 and 15; Christie (n 10) 421.

[91] Pienaar and Steven in Zimmermann *et al* (n 4) 780.

[92] See 7.2 for a comprehensive discussion on "pseudo" liens.

[93] Pienaar and Steven in Zimmermann *et al* (n 4) 779.

[94] Pienaar and Steven in Zimmermann *et al* (n 4) 779. See the discussion on the innkeeper's lien in English law in 3 above.

In the light of my submission that a lien is not a real right but a legally recognised retention capacity to which the lienholder has an extrajudicial[95] claim, and a defence against the owner's *rei vindicatio* (or the claim to the thing of another real claimant), the lien vests when the debt is due and the creditor remains in possession of the thing. The expenses for which a lienholder can vest his lien are determined by the origin of the legal claim for which the lien serves as security. In the case of enrichment liens, the lien can vest only for useful and necessary expenses. The extent of the lien is determined by enrichment. Liens *ex contractu* serve to secure the contractual legal claim, and the amount is specified in the contract. I therefore do not agree with the submission that a lien *ex contractu* is "seen as arising out of contract *per se*".[96] It seems more appropriate to say that the *claim* secured by the lien arises out of the contract *per se*. A distinction is drawn between the right that is secured (claim) and the lien. The claim arises from the contract between the parties, whereas the lien arises *ex lege*, when a debt is due and the creditor is in possession of the thing. The lien secures the contractual claim but does not arise from the contract *per se*.[97]

One should distinguish between the following two scenarios: (i) the creditor has an agreement with the debtor who *is not* the owner of the property (security object); and (ii) the creditor has an agreement with the debtor who *is* also the owner of the property (security object).

In the first instance the creditor will rely on the *exceptio non adimpleti contractus* when the debtor (non-owner) claims the thing from the creditor using a personal action in terms of the contract. In my view this is mere reliance on a contractual defence (*exceptio non adimpleti contractus*). When the owner, who is not a party to the agreement, claims his thing from the creditor using the *rei vindicatio*, the latter may rely on his enrichment lien (provided he has an enrichment claim against the owner) as defence against the owner's *rei vindicatio*. The lien will secure only the amount of enrichment (which is the obligation secured by the lien) – regardless of what the debtor (non-owner) and creditor agreed upon in the contract.

In the second instance the debtor (owner) can rely on either a personal action arising from the contract, or his real action (*rei vindicatio*) to claim his thing. Should he rely on his personal action in terms of the contract, the creditor can merely rely on the contractual defence (*exceptio non adimpleti contractus*). If the owner relies on the *rei vindicatio* the creditor may raise his lien as a defence. The creditor may retain the thing until he has been paid the amount agreed upon in the contract (which is the claim secured by the lien).

In Scottish law a special lien securing a contractual claim will not vest if the retention of the property amounts to a breach of contract: for example, a solicitor who has a client's documents and must produce them in court may not claim a lien over the documents.[98] My interpretation is that because of the accessory nature of a lien a creditor who wishes to rely on his lien will be able to do so only if there is an outstanding debt under the contract. If the retention of the property amounts to a breach of contract, the creditor will no longer have a contractual claim against the debtor and will consequently have no lien. The creditor might, however, be entitled to an enrichment lien should he be able to prove enrichment.

[95] It arises *ex lege* and can be enforced without court intervention.
[96] Pienaar and Steven in Zimmermann *et al* (n 4) 779 n 158.
[97] See Sonnekus and Neels (n 42) 772-773.
[98] Steven (n 3) 11.16.

6.3.2 Special lien securing a claim arising from unjustified enrichment

In Scottish law a claim based on unjustified enrichment may be secured by a special lien. A distinction is drawn between a *bona fide* possessor and a salvor. The special lien arising from a *bona fide* possessor's claim for improvements made is restricted to necessary and profitable expenses incurred in respect of the property. In South African law enrichment liens vest to secure enrichment claims. The enrichment liens are divided into improvement liens and salvage liens. An improvement lien secures payment of a claim for useful expenses. The claim is limited to the lesser amount of the actual expenditure or the owner's actual enrichment (amount by which the market value of the thing has increased). A salvage lien secures the payment of a claim for necessary expenses incurred and covers all expenses incurred in the preservation or protection of the thing.[99]

In Scottish law a special lien in favour of a salvor is based on enrichment. A salvor may enrich an owner by saving his (the owner's) goods. In this case the property of one party is in the possession of another who has a counterclaim for expenses incurred in saving the thing.[100] This lien is similar to a salvage lien in South African law for which the lienholder has an enrichment claim against the owner for all expenses incurred for the preservation or protection of the thing. Necessary expenses are not limited to the actual increase in the value of the property. Expenditure on repairs protects an object's value as it preserves the object.[101]

In both legal systems an enrichment lien may arise when a thing is salvaged through *negotiorum gestio*. The party managing the owner's affairs must do so without the owner's authority – should the owner authorise that party to manage his affairs, the claim will arise from an agreement between the parties. This "normal" administration of another's affairs does not necessarily grant the unauthorised administrator an enrichment claim against the owner, but he has a claim for useful and necessary expenses incurred[102] which is secured by an enrichment lien.[103]

In both Scottish and South African law, there have been questionable judgments on the issue of indirect enrichment.[104] Indirect enrichment is generally the enrichment of an owner on the basis of a sub-contract: X lends his car to Y. Y takes the car to a garage for repairs. Does the garage have a lien for improvements made? If the garage can prove an enrichment claim against X, that enrichment claim is secured by a lien. In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd*[105] the court held that there can be no lien if there is no enrichment claim. Eiselen and Pienaar[106] welcome the *Buzzard* decision and state as follows: "The lien or retention right is an ancillary right which supports the main claim, but is also dependent on it. In all cases where a party relies on a retention right the onus is on that party to prove the existence of the main claim without which it cannot survive."

[99] Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 413-414.
[100] Steven (n 3) 11.24-11.26.
[101] Du Plessis *The South African Law of Unjustified Enrichment* (2012) 279.
[102] "And the owner is bound to reimburse the *negotiorum gestor* for all necessary expenses incurred by him in connection with his administration of the owner's business, and to indemnify him against all obligations incurred by him on account of the same, as well as against all losses sustained by him in connection therewith. Maasdorp's *Institutes* (vol III p 416); *Voet* (3, 5, 8; G. 3, 27, 5); *Schorer* (Note 438; XL vol II p 229 Kotzé's Trans)" – *New Club Garage v Milborrow & Son* 1931 GWLD 86 99-100.
[103] Scott (n 38) 61 and Steven (n 3) 11.24.
[104] See *Lamonby v Arthur G Foulds Ltd* 1928 SC 89 as to Scottish law; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) and Pienaar and Steven in Zimmermann *et al* (n 4) 782.
[105] 1996 4 SA 19 (A).
[106] Eiselen and Pienaar *Unjustified Enrichment: A Casebook* (2008) 77-78.

For purposes of the vesting of a lien, the creditor must rely on a valid and enforceable enrichment claim. Sonnekus explains that there will be no claim for unjustified enrichment if there is a valid reason for the transfer of property or value from the impoverished party to the enriched party.[107] The impoverished party must therefore prove that the transfer of property or value was without a valid reason (*sine causa*) in order to prove an enrichment claim (main claim). Pienaar and Steven indicate that enrichment liens "are more or less dormant in Scottish law". They assume that this state of affairs is a result of the influence of English law relied on by Bell in the nineteenth century.

6.3.3 Special lien securing a claim arising from delict

In Scotland delictual liens arise mainly from statutes (*eg* the Harbours, Docks and Piers Clauses Act, 1847).[108] Although there is no delictual lien in South African law, statutory liens are recognised (*eg*, a lien governed by the Merchant Shipping Act 57 of 1951).

7 *Security object*

7.1 Movable and immovable property

Scottish law distinguished between heritable and movable (Scottish spelling: moveable) property. Scottish law acknowledges a lien over corporeal movable property. Steven[109] explains that a lien is generally accepted as a movable security. The question arises whether a lien can vest over both immovable property (Scottish terms: heritage or heritable property)[110] and incorporeal property. The enrichment lien of a *bona fide* possessor for improvements made to land, however, allows a lienholder to exercise his lien over a building and over land. There is a difference of opinion regarding a lien over immovable property that arises by contract. Steven[111] discusses the different opinions. According to Gloag, a lien based on a contractual claim cannot be exercised over immovable property. The author bases his view on case law where the averred lienholder did not have a claim against the averred debtor and could therefore not exercise a lien. Consequently, the reason for not acknowledging a lien was that there was no claim, and not because the security object was immovable. Steven points out that McBryde, on the other hand, submits that "it is inconvenient to have latent rights affecting heritage". He then submits that a lien is not effective against third parties and does not pose a risk of "inconvenience" for heritage (immovable or heritable) property. He therefore argues that a lien as a latent right which is not effective against third parties can be exercised over immovable property. Steven indicates that a lien is a real right and in fact effective and enforceable against third parties. He also specifies that a lien is not a latent right as it depends on possession. Although registration does not take place (rights in heritage (land) must be registered), the lienholder is in possession of the

[107] *Unjustified Enrichment in South African Law* (2008) 63-64, 84-88 and 196-199; "Ook verrykingsretensieregte behoef bewese ongeregverdigde vermoënsverskuiwing" 1996 *TSAR* 583 586-587.
[108] Steven (n 3) 11.32.
[109] (n 3) 12.01.
[110] Law Society of Scotland *Glossary: Scottish Legal Terms, Latin Maxims and European Community Legal Terms* (1992) 35.
[111] Steven (n 3) 12.04.

thing and that serves as compliance with the publicity requirement.[112] Steven points out that both arguments are open to criticism. He submits that there is no sound reason why a lien based on a contract cannot be exercised over immovable property. This is the legal position in South Africa: both enrichment liens and liens *ex contractu* can be exercised over immovable property, as emerges clearly from a number of judgments. In *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd*[113] Van Zyl J distinguished between improvements to land in terms of a contract and those made in the absence of a contract. A lien securing improvements made in terms of a contract will be regarded as a lien *ex contractu* (often also referred to as a builder's lien), whereas a lien securing improvement made without a contract between the parties is an enrichment lien. In terms of the lien *ex contractu,* a lienholder may exercise his lien against the other contracting party only (as it is classified as a personal right) until he has been paid the price agreed upon in the contract. The holder of an enrichment lien can enforce his lien against any person who claims the thing from him (as it is classified as a real right), until he has been compensated for his claim on the basis of enrichment.[114] One should bear in mind that it is possible for one factual scenario to give rise to two possible liens. If X had a contract with a builder, Y, to build a house on Z's land, Y can enforce his lien *ex contractu* against X only. Should X not pay Y for his services, Y may have an enrichment lien against Z, the owner of the land (provided Y can prove the enrichment).[115]

At first glance, I agree with Steven that it does not make sense in Scottish law to allow a lien based on enrichment over immovable property, but not a lien based on contract. The aim of a lien is to frustrate the debtor because he cannot use his thing that is in control of the lienholder until he has paid the debt. It is a measure to apply pressure on the debtor to perform. As long as the lienholder is in possession of the thing and has a valid claim for compensation against the debtor, he can exercise his lien. From a South African perspective a lien *ex contractu* over immovable property may be exercised until the debtor has paid the amount agreed upon in the contract. This amount may include luxurious expenses. A lienholder relying on an enrichment lien over immovable property is entitled to withhold the property only until he has been paid for necessary and/or useful expenses. He is not entitled to exercise his lien to secure any luxurious expenses. A lien *ex contractu* will probably be for a higher amount than an enrichment lien. Since the former is enforceable only against the other contracting party (in South African law), there seems to be no injury to the debtor when the lienholder exercises his special lien securing a contractual claim over immovable property. A special lien in Scottish law is, as indicated by Steven, a real right and in fact effective and enforceable against third parties. A special lien securing a claim arising from a contract over immovable property (with probably a higher amount than a special lien securing a claim arising from enrichment) is effective against third parties and not just against the other contracting party. This point may support the opinion that a special lien securing a claim arising from a contract over immovable property should not be acknowledged.

[112] Pienaar and Steven in Zimmermann *et al* (n 4) 778.

[113] 1989 1 SA 106 (W).

[114] the *United Building Society* case (n 29) 631; *Scholtz v Faifer* 1910 TPD 243; *Phillips & Gordon v Adams* 1923 EDL 104; *D Glaser and Sons (Pty) Ltd v The Master* 1979 4 SA 780 (C); *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 3 SA 73 (W); *NBS Bank Bpk v Dirma BK* 1998 1 SA 556 (T) and *Mancisco and Sons CC (in liquidation) v Stone* 2001 1 SA 168 (W). See Sonnekus and Neels (n 42) 769 and Wiese (n 56) 2526 for criticism of the classification of liens as real rights (enrichment liens) and personal rights (liens *ex contractu*).

[115] See the discussion of indirect enrichment above.

7.2 Property improved / not improved by lienholder

A special lien provides "special" security for the obligation that gives rise to the lien. Two scenarios must be distinguished: (i) a special lien over property held and improved by the lienholder; and (ii) a special lien over property where no improvements have been made, but the property is held by the lienholder in terms of an obligation which gives rise to the lien. An example of the first scenario is a panel beater who improves an owner's car and is in possession of the car. The second scenario can be explained with reference to the following example: X takes his memory card to a photo printing shop to have photos printed. The memory card is in the possession of the photo printing shop, but the shop does not do any work on or improve the card. If X does not pay for the printed photos, will the shop have a lien over the memory card? It is clear that the photos fall within the category of property in scenario one. Scottish law recognises a special lien over the memory card. Steven[116] explains: "In other words the lien-holder's duty to return the property [memory card in my example] is the counterpart to the obligation which the lien secures. The matter of whether property has been improved under the contract is irrelevant."

The above scenarios would be recognised as liens *ex contractu* in South African law. X had an agreement with the photo printing shop and the agreement is the source from which the lien arises. Pienaar and Steven[117] distinguish between "ordinary" and "pseudo" liens *ex contractu*. They explain that a "pseudo" lien *ex contractu* "allows property to be retained where no expenses have been incurred, services rendered or work done to the property itself". Scott[118] refers to certain "artificial" liens which seem to correlate with Pienaar and Steven's "pseudo" liens. He refers to the innkeeper and boarding house keeper's liens over their guest's things securing their claims for board and lodging; an auctioneer's lien over the purchase price securing his commission; and certain statutory liens. In all of these examples the lienholder did not expend money on or improve the property. As authority for the recognition of "pseudo" or "artificial" liens Pienaar and Steven submit that they are a "product of English influence, English law drawing a distinction between particular liens whereby property is improved under a contract and particular liens where the lien-holder's right to retain arises because of his public duty to receive goods". According to Scott, both an innkeeper and a boarding house keeper have been granted a lien "by the institutional writers" (Peckuis, Van Zutphen, Van Leeuwen and Kersteman).[119] In *Ford v Reed Bros* Mason J stated as follows:

> "*Voet* states (16.2.20) that lien more especially applies in respect of a debt arising by reason of (*occasione*) the thing retained, as for instance on account of expenses incurred on it or workmanship or craftsmanship employed about it, and that this is the reason why fullers, tailors, *bona fide* and *mala fide* possessors and masters of ships have a lien."[120]

In *Holmes Garage Ltd v Levin*[121] the court held that an innkeeper could retain the debtor's property (a car) only to secure his own debts. The innkeeper retained the car of a guest for outstanding boarding for himself and a friend, and for money advanced to the guest. Hutton J held that the innkeeper's lien allowed the innkeeper

[116] Steven (n 3) 16.19.
[117] Pienaar and Steven in Zimmermann *et al* (n 4) 779.
[118] (n 38) par 71.
[119] (n 38) par 71.
[120] 1922 TPD 266 270.
[121] 1924 GWLD 58.

to retain only the guest's property for his personal boarding. He could not retain the property for the boarding of the friend or for the money lent to him.

Sonnekus and Neels[122] distinguish between a broad and a narrow interpretation of the connection between the lienholder's claim and his duty to return the thing. The broad interpretation includes a situation where the lienholder has done no work on the thing or improved it, but has a claim against the other contracting party for a debt arising from an earlier obligation. The lienholder will be entitled to retain the thing of the debtor for the outstanding debt. The narrow interpretation is that the lienholder may retain the thing only if he had done work or expended money on the thing. Sonnekus and Neels, together with Van der Merwe, favour the narrow interpretation. A solicitor's lien, as explained above, is, however, an example of a lien over things (generally documents) that have not been improved. As held by the court in *Botha v Mchunu*,[123] the attorney may retain these documents if he is able to charge a fee for them (for example, if he read them or stored them). To my mind the requirement that the attorney must be able to charge a fee for the document may be seen as a form of "money bestowed or work done" on the documents.

To return to the example of the photo printing shop and the memory card, strictly speaking the photo printing shop will not have a lien over the memory card if the narrow interpretation as explained by Sonnekus and Neels is followed. Applying the principles applicable to a solicitor's lien might result in the photo shop being entitled to retain the memory card.

7.3 Corporeal and incorporeal property

In Scottish law a lien extends to incorporeal things, more specifically debts. A lien over shares in security of debts owed to a company by a shareholder is actually "the right to retain the money that the shares represent".[124] A factor also has a lien over the proceeds of goods sold on behalf of his principal. The use of the term "lien" refers to the nexus between the outstanding debt and the thing (corporeal or incorporeal) that is retained. A lien over incorporeal property is not possible. Retention of incorporeal property is the only possible right in security in the case of incorporeal property.[125] As explained above, retention in Scottish law refers to the real security right where the creditor acquires *dominium* over the security object and his obligation to return the thing to the debtor is suspended until the debtor discharges obligations he owes the creditor. In the case of incorporeal movable property a transfer of ownership takes place. For example, a factor (representative engaged in mercantile business) who sells his principal's goods may retain the money paid in trust until the principal has discharged obligations owed to the factor (*eg* commission).[126] Steven explains as follows:

> "When a factor is paid by a buyer of the goods of his or her principal, the price becomes the factor's. The factor must of course account to the principal and it is in this process of accounting that money may be retained until obligations owed by the principal to the factor are discharged."[127]

[122] Sonnekus and Neels (n 42) 778.
[123] (n 83) 743B.
[124] Steven (n 3) 12.05.
[125] Steven (n 3) 12.06.
[126] Steven (n 3) 12.06 and Macgregor "Defining agency and its scope (I)" in DiMatteo and Hoggs (eds) *Comparative Contract Law: British and American Perspectives* (2015) 394.
[127] Steven (n 3) 12.06.

The factor becomes owner of the funds but must account for them to the principal. He can retain the money until that principal discharges all obligations owed by him to the factor.

It is a general principle of South African law (and most other legal systems) that an owner loses ownership of money when it is mixed with other money – for example, when money is deposited in a bank.[128] Money as a fungible thing cannot be claimed with the *rei vindicatio*: the moment it is paid into another person's account it is no longer recognisable (as was the case with a sealed bag of coins in Roman law). When a person pays money into his bank account, the bank becomes owner of the money through the original method of acquisition of ownership named *commixtio*.[129] As stated by Steven, the factor who receives the money on behalf of his principal becomes owner of the money. A lien over money is not possible. The classification of a lien as a real security right makes it impossible to vest a lien over money – a real security right is a right over another person's thing, and in this instance the factor has become owner of the money. Steven[130] explains that the retention of the money should be classified as a right of retention and not a lien. This is comparable to a tenant's right to retain rent until the landlord discharges obligations in terms of the lease. The tenant's right is referred to as a right of retention, not a lien. The factor's right to retain money or the company's right to retain shares are examples of rights of retention that are not liens.

South African law acknowledges a lien over shares in terms of the Companies Act.[131] In company law a company can acquire a lien over shares: a shareholder of a company who is indebted to the company may use his shares as security. The company acquires a "lien" or "quasi-lien" over the shares. The company may not sell the shares and the lien will terminate once the shares subject to the lien have been transferred.[132]

8 *Possession*

8.1 Definition

Steven explains "the very first thing which Bell says about retention … is: 'This right results from possession.' In the view of Goudy, 'Lien is the child of possession'".[133]

The term "possession" has many connotations. The aim of this article is not to establish the legal meaning of "possession". However, it is important to know what is meant by possession as a prerequisite for the vesting of a lien. Possession in Scottish law is when "a person … ha[s] physical control of the thing, together with the intention to possess it". Two things are required for possession "an act of the body … and an act of the mind".[134]

[128] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 1 SA 205 (N*); Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 1 SA 12 (GNP); *Glenrand MIB Financial Services v Van den Heever* 2013 1 All SA 511 (SCA); Malan "Share certificates, money and negotiability" 1977 *SALJ* 245 249 and Thomas and Boraine "Ownership of money and the *actio Pauliana*" 1994 *THRHR* 678.

[129] Thomas and Boraine (n 128) 678.

[130] Steven (n 3) 12.07.

[131] 71 of 2008.

[132] Cassim *et al Contemporary Company Law* (2012) 246.

[133] Steven (n 3) 13.04.

[134] Gretton and Steven (n 37) 11.1 and 11.6.

In South African law possession can be described in a narrow or a broad sense. In the narrow sense possession refers to a person in unlawful control of a thing with the intention of an owner. It is a "compound of a physical situation and a mental state".[135] Possession in the broad sense refers to the "factual, physical, corporeal relationship between a legal subject and a thing".[136] In the context of this discussion possession is used in the broad sense as referring to the physical control of the object.

Van der Merwe and Pope, referring to various institutional writers, textbooks, journal articles and case law, provide the following comprehensive definition of possession:

> "Possession is the compound of a factual situation and a mental state, comprising the actual control or detention of an item of property (*corpus*) coupled with the will to possess the thing (*animus possidendi*). Although, strictly, possession is applicable only to corporeals, the law also recognises quasi possession or juridical possession (*possession iuris*) over incorporeals, in which case factual control consists in the exploitation of the object in accordance to the legal right over the property, for example driving a vehicle over land in the exercise of a servitude way."[137]

I turn now to the two elements making up possession for purposes of vesting a lien.

8.2 Physical element (*corpus*) (control)

Scottish law refers to an act by a body (*corpus*), meaning "there must be an act to detain it [the thing/property] in the first place".[138] In Scottish law a special lien will only vest over property already in the possession of the creditor before the debt falls due. A general lien can, however, vest where the debt became due but the creditor only subsequently acquired possession. An example of the former is a repairer who is in possession of the thing for repair. After he has repaired the thing the owner fails to pay him and his special lien then vests over the thing already under his control. In terms of the general lien, an attorney who receives documents from his client in September may retain the documents as security for a debt (*eg* conveyancing fees) that arose in August. In the first instance the lien will vest once the debt is due. In the second instance the lien will vest once the creditor acquires possession of the thing. In both instances the lien will vest only once the prerequisites have been met: the debt is due, and the creditor must be in control of the thing. Should a debtor be sequestrated, it is important to be able to determine the exact moment at which the lien vested. If the debtor is sequestrated when the creditor is already in control of the thing but the debt is not yet due, the creditor does not acquire a special lien. If the debt is due but the creditor is not yet in possession of the thing when the debtor is sequestrated, he cannot rely on a general lien. Should the debt fall due after sequestration (special lien), or if the creditor acquires physical possession of the thing after sequestration (general lien), the creditor will not acquire a lien, as it is a general principle of the law that a real security right cannot be created after sequestration.[139] The sequestrated person has limited capacity to act and may not dispose of any of the assets in the insolvent estate or conclude any contract that may be detrimental to the insolvent estate.[140]

[135] Badenhorst *et al* (n 99) 273.
[136] Badenhorst *et al* (n 99) 273.
[137] "Property" in Du Bois (n 44) 445. See Gretton and Steven (n 37) 11.1, 11.7, 11.8 and 11.11.
[138] Gretton and Steven (n 37) 11.7.
[139] Steven (n 3) 13.02-13.03.
[140] Du Bois (n 44) 390.

The legal position pertaining to possession for the vesting of a general lien in Scottish law differs from that in South African law. In the case of *Singh v Santam Insurance Ltd*[141] it was held that a lien cannot be completed by subsequent possession. In this case the appellant's vehicle, driven by M, was damaged in an accident. M was insured with Santam and in terms of the insurance policy Santam had to repair the vehicle. Santam instructed a panel beater to repair the vehicle and paid for the repairs. Thereafter it came to Santam's attention that M's monthly payments were in arrears and Santam cancelled the policy and removed the car from the panel beater. Thereafter the appellant claimed her vehicle from Santam, which claimed that it had a salvage lien over the vehicle. According to Schutz JA a salvage lien "operates as security for the recovery of necessary expenditure incurred by him [the creditor] in the course of his possession of another's property".[142] Therefore Santam had to be in physical possession of the vehicle when the improvements were effected in order to rely on a salvage lien. There is a clear distinction between the South African law and the Scottish law in this regard.

8.3 Mental element (*animus*) (persons entitled to lien)

Animus is important in determining who is entitled to exercise a lien. For purposes of this discussion it is assumed that the possessor is in physical control of the thing (*ie* the *corpus* element as discussed above).

Scottish law refers to the *animus* element as an act of mind. This act consists of two intentions: the intention to be in physical control; and the intention to be in control for your own benefit.[143] The law distinguishes between custody and possession. Custody is where a person holds a thing on behalf of someone else with no intention of holding it for his own use. The act of mind for custody is merely the intention to be in physical control (first part of the act of mind) and not the intention to benefit from the control (second part of the act of mind). Possession is to hold someone else's thing for your own use, rights, and interests. Both parts of the act of mind are met. Furthermore "a possessor … believes ownership of the property in question is held and therefore has the *animus* to possess".[144] The general perception is that Scottish law acknowledges only a lien based on possession. Mere custody is insufficient to vest a lien. Steven[145] criticises this viewpoint and submits that a lien may also arise from mere custody. He refers to a number of examples, including manufacturers, carriers, storekeepers, solicitors, and commercial agents, who hold the thing because they have a job to do with regard to it. Manufacturers, carriers and storekeepers are examples of persons who have mere custody and "do not have an *animus* to hold the property in their own interest as they carry out their jobs".[146] He refers to a 1791 case[147] in which it was held that a lien may rest on possession and "mere naked custody". Although this case has been criticised by other academics, Steven argues persuasively that a lien may rest on custody which morphs into possession. A carrier who is transporting goods is in custody of the goods while transporting them. Once he has completed the job he may hold the goods as security for the payment of his charges. He now holds for his own use –

[141] 1997 1 SA 291 (A) 296E-G.
[142] 296C-D.
[143] Gretton and Steven (n 37) 11.11.
[144] Steven (n 3) 13-06.
[145] Steven (n 3) 13.10-13.
[146] Steven (n 3) 13.08.
[147] *Harper v Faulds* 1791 Bell's Octavo Cases 440.

security until payment of his charges. This can be seen as the *animus* to possess for own use or interest. Steven states that "[i]t is difficult to draw a definite conclusion here … [since] the Scots law of possession is badly in need of research and analysis". He further states that the "traditional thesis" which holds that a lien can only be founded on possession and not custody is incorrect. According to Steven, both possessors and custodians can vest a lien.[148]

In South African law, Innes CJ referred in *Scholtz v Faifer*[149] to the two elements of possession – the physical and the mental. He explained that the mental element is "not possession in the ordinary sense of the term – that is, possession by a man who holds *pro domino*, and to assert his rights as owner". The lienholder must merely hold the thing with the "intention of securing some benefit for himself as against the owner". The *animus possidendi* of the lienholder is the "intention of holding and exercising that possession". According to Scott[150] the lienholder must be in physical control of the thing and have the intention to hold the thing as security object. This view supports Steven's argument that a lien may rest on custody that converts into possession.

A distinction should be drawn between the intention with which the lienholder (creditor) possesses the thing: (i) while he spends money or expends labour on it; and (ii) the intention with which he holds the thing as lienholder. As indicated above, in both legal systems the *animus* of a lienholder (in (ii)) is to hold the thing as security. The intention in (i) may, however, determine whether a lienholder will be entitled to rely on a lien. The legal effect of *bona* and *mala fides* on the intention in (i) above is now considered.

Scottish law acknowledges a lien in favour of a *bona fide* possessor of land and corporeal movable property.[151] A *bona fide* possessor is a person in possession of the property without a right to be in control of it, but who reasonably believes that he has a right to possess the property.[152] The law does not acknowledge a lien in favour of a *mala fide* possessor.[153] For example, a creditor who obtains possession of a thing through irregular pounding[154] will not be entitled to a lien over the thing.[155] Custody that is illegitimate does not found a lien and where custody of a thing has been acquired by fraud or in terms of a void contract, a lien will not vest in favour of the custodian.

In South African law a *bona fide* possessor is entitled to a salvage lien to secure the necessary expenses he incurred in saving the thing. He also has an improvement lien to secure useful expenses incurred in improving the thing.[156] A *bona fide* occupier might have an enrichment claim if he can prove that the owner has been enriched. As he knows he is not the owner and that he is holding another person's thing while he improves it, it might be difficult for him to prove that the owner was enriched *sine causa*. A building contractor who has a contract with the owner of

[148] Steven (n 3) 13.24-13.26.
[149] (n 114) 246-247.
[150] (n 38) par 51 n 5.
[151] Steven (n 3) 11.27.
[152] Gretton and Steven (n 37) 11.20.
[153] Bell and Lamond III *Digest of Cases Decided in the Supreme Courts of Scotland From 1800-1868* 1550: "Where a party has held possession of a property mala fide, he is not entitled to recompense for meliorations from the true owner evicting the subject from him; and the doctrine of 1 Stair, 8, 3, considered not well founded. *Barbour v Halliday* (1840) 2 D 1279"; Steven (n 3) 11.21 and 13.36.
[154] distraining or impounding a person's property.
[155] Steven (n 3) 11.21 and 13.36.
[156] Scott (n 38) par 56.

land in terms of which he builds on the land will not enrich the owner *sine causa* since the agreement will be the *causa*. The builder will most likely be able to rely on a lien *ex contractu*. Therefore, a *bona fide* occupier will be able to rely on an enrichment lien only if he has an enrichment claim.[157]

It is uncertain whether a *mala fide* possessor has a claim for compensation for necessary and useful expenses incurred.[158] In *De Beers Consolidated Mines v London and South African Exploration Company*[159] the court stated that a *mala fide* occupier is not entitled to a claim for useful expenses.[160] However, in *Nortje v Pool*[161] *Botha JA* held that a *mala fide* possessor is in the same position as a *bona fide* possessor, and that this position must also apply to occupiers. On this basis it may be argued that a *mala fide* possessor is also entitled to compensation for necessary and useful expenses.[162] Both a *mala fide* possessor who acquired the principal thing wrongfully, and a *mala fide* possessor who did not expect to be compensated, will have no claim for necessary and useful expenses against the owner of the principal thing.[163] A *mala fide* possessor who has an enrichment claim for necessary or useful expenses is also entitled to an improvement lien. A *mala fide* possessor and a *mala fide* occupier will have a claim and therefore an enrichment lien as *negotiorum gestor* if they can prove all the requirements for reliance on *negotiorum gestio*.[164]

9 *Contractual waiver of a lien*

According to Steven a lien will not vest if it is excluded in the contract between the debtor and the creditor.[165] This amounts to a waiver of the lien. A lien can be waived (renounced) either by conduct (not relying on the lien and giving up control) or by means of contract. In South Africa it is common for construction contracts[166] to include a clause in terms of which the builder waives his builder's lien. Two scenarios should be distinguished: a builder who waives his lien in favour of the owner; and a builder who waives his lien in favour of a third party – typically a financial institution holding a mortgage over the property. A contractual waiver to a financial institution does not necessarily deprive the builder of his builder's lien *vis-à-vis* the other contracting party. In order to determine against whom the waiver is effective one should consider who benefits from the waiver and the wording of the waiver itself.

In *Ploughall (Edms) Bpk v Rae*[167] the applicant was a builder who had a written agreement with the respondent to erect buildings on his behalf. The respondent

[157] Scott (n 38) par 58 and the *Buzzard* case (n 105).
[158] Lotz "Enrichment" 9 *LAWSA* re par 233.
[159] (n 8).
[160] The following cases support this view: *Currey v Stevens* (1903) 9 HCG 298; *Raba v Ngoma* 1913 EDL 469 and *Quarrying Enterprises* (*Pvt*) *Ltd v John Viol* (*Pvt*) *Ltd* 1985 3 SA 575 (ZH).
[161] 1966 3 SA 96 (A) 129-130.
[162] See Eiselen and Pienaar (n 106) 244 n (b). In the following cases the courts supported the view that a *mala fide* possessor is in the same legal position as a *bona fide* possessor: *Bellingham v Bloommetje* (1874) 4 Buch 36; *Campbell v The Golden Crescent Gold Mining Co Ltd* (1890) 3 SAR 248; *Lechoana v Cloete* 1925 AD 536 547-8; *Banjo v Sungrown* (*Pty*) *Ltd* 1969 1 SA 401 (N); the *BK Tooling* case (n 10) and *JOT Motors (Edms) Bpk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 2 SA 510 (T).
[163] Du Plessis (n 101) 283-284.
[164] Scott (n 38) par 59.
[165] Steven "Lien as excludable and equitable right" 2008 *Edin LR* 280 and Steven (n 3) 11.16-11.17.
[166] For example the standard Joint Building Contract Committee (JBCC) contract.
[167] 1971 1 SA 887 (T).

arranged with his building society to pay the amount for the building work to the applicant. A person working for the respondent signed a document addressed to the building society in which he waived and abandoned all liens in connection with the building in favour of the building society.[168] The respondent had keys to the building and took up occupation of the building before the building society had paid the outstanding amount to the applicant. The applicant successfully applied for an ejection order against the respondent. The court[169] held that the applicant's lien against the respondent had not been terminated by the waiver of his lien in favour of the building society. The validity of the waiver in favour of the building society was not questioned by the court.[170]

In NBS Bank Bpk v Dirma BK[171] an owner-developer had an agreement with a builder to erect certain buildings. The owner obtained a loan from NBS Bank for the building work and secured the loan with a bond in favour of NBS Bank. A clause in the loan agreement read as follows:

> "The borrower undertakes that all contractors, sub-contractors, builders and other workmen engaged in the work who might have or be entitled to acquire a lien or right of retention on the property shall renounce and waive such right in favour of the NBS in writing and unless and until such lien or right of retention have [*sic*] so been renounced and waived the NBS shall not be liable to make any payment in respect of the loan."[172]

The builder signed a waiver of his builder's lien. The waiver specified that the bank's bond would take priority over any lien of the builder and that the builder would not enforce his lien against the bank or the owner if it would be detrimental to the bank's interests. Because of a dispute over the building works and payment, the owner failed to pay the builder. The builder exercised his builder's lien. NBS Bank applied for an ejection order. Daniels J held that the builder had waived only his rights relating to the rights acquired by the bank under the bond. The builder's waiver did not amount to a general renunciation of the builder's lien, but only to the extent that the renunciation could be disadvantageous to the rights of the bank in the case of the foreclosure of the bond. The owner-developer was not in arrears with his bond instalments and the bond was in place. The bank had made no attempt to foreclose the bond and the court consequently found in favour of the builder and declined to grant the ejection order.

From these two cases it is clear that a waiver clause in favour of a financial institution does not affect the builder's lien *vis-à-vis* the owner, and that our courts interpret a waiver clause to establish who it benefits and exactly what has been waived.

Sonnekus[173] questions the possibility of waiving a lien. His argument may be summarised as follows: Waiver is a *regsontdaningshandeling* which occurs in various forms in the private law. It means that a right (*reg*) is undone (*ongedaan gemaak*). Various rights can be waived, for example, ownership – an owner who no longer

[168] "I, the undersigned, do hereby waive and abandon any and all liens or preferences that I have or may have in connection with the said buildings in favour of your society. … I agree to hand over and deliver up possession of the said buildings immediately the same are erected, notwithstanding any unpaid balance that may be due to me" 890A-B.

[169] 891H.

[170] See Sonnekus "Terughoudingsbevoegdhede: afstanddoening by voorbaat, of hoegenaamd?" 1999 *TSAR* 178 183-184.

[171] (n 113).

[172] 560D.

[173] (n 170) 178.

wishes to own a thing (*eg*, an old washing machine) may discard it at a dumpsite and with that he abandons his right of ownership.[174] In the light of Sonnekus' submission that a lien is not a (subjective) right, the lienholder cannot undo his right because he has no right. He regards a lien as a mere entitlement to withhold, an entitlement peculiar to certain creditors' rights (personal rights). Sonnekus explains the waiver of an entitlement as, for example, where there is a servitude (*usufruct*) registered over an owner's farm: the entitlements of the owner's right of ownership are waived for so long as the *usufructuary* lives on the farm.[175] He refers to Dutch law, where authors acknowledge the waiver of a lien. If closely interpreted it becomes clear that the waiver referred to by these authors is a contractual waiver. The lienholder may waive his lien in a contract and would be bound by the contract to adhere to the waiver clause. He could, however, decide to breach the contract and rely on his lien.[176] Sonnekus further argues that a creditor's right cannot be waived *in favour of someone else*. When the right is waived it is undone and ceases to exist. It is possible to transfer a right by means of cession, but waiver does not constitute a transfer of a right. In the *Dirma BK* case the clause in the bank's standard loan agreement read "shall renounce and waive such right in favour of the NBS". It seems that the bank intended a transfer of the right, but that could not be done by "renounce[ing] and waiv[ing]" the right. Another point of criticism is that the builder in the *Dirma BK* case (and in most cases involving the contractual waiver of a lien) had no right when he signed the waiver. He acquired only a creditor's claim against the owner-developer once he had done some work and payment was due to him. When he signed the waiver he had nothing to waive in favour of another. Moreover, Sonnekus states that a lienholder cannot transfer his lien through *quasi* cession to a bank. Like pledge, a lien cannot be ceded to another person.[177] In my view Sonnekus makes a strong case for the proposition that a lienholder cannot waive his lien in a contract.

In Scottish law it is commercial practice to include a clause "barring the creation of a lien" in certain contracts.[178] In similar vein, Sonnekus[179] proposes a contractual clause in the form of a *pactum de non petendo* preventing a creditor from relying on his lien: the creditor agrees not to rely on a lien in the future. This does not amount to a waiver of a lien.

10 *Conclusion*

Both Scottish and South African law of lien are founded principally on Roman and Roman-Dutch law principles. The influence of English law on liens in Scottish law has been profound, while, save for the innkeeper's lien, South African law has been little influenced by English law. In Scottish law "retention" has a distinct meaning, and its legal consequences differ from those of a "lien". A "lien" is a real right over someone else's thing (*jus in re aliena*), while "retention" is a security over property in which the creditor (holder of the security) has *dominium*. In defining a lien many legal systems refer to a *ius retentionis* or right of retention. A lien (or a *ius retentionis* or right of retention as it is known in other legal systems) is a right in

[174] The nature of the thing also changes: it is no longer a *res alicuius*, it is now *a res nullius*, Sonnekus (n 170) 180.
[175] Sonnekus (n 170) 182.
[176] Sonnekus (n 170) 183.
[177] Sonnekus (n 170) 184.
[178] *eg* hire-purchase agreements. Steven (n 3) 13.42.
[179] Sonnekus (n 170) 184.

security in favour of a creditor over the debtor's thing. The creditor (lienholder) does not have *dominium* of the thing.

Scottish law has a *numerus clausus* of real rights, and a lien is classed as a real security (real right). South African law does not follow the *numerus clausus* principle for real rights, and some academics question the classification of a lien as a subjective right – be it a real or a personal right. The legal maxim *ubi ius ibi remedium* forms part of South African law, and, as a lienholder has no action or legal remedy by which to enforce his lien, the lien does not qualify as a subjective right.

General liens in Scottish law are based on English law and arise only in certain cases of contract. Special liens securing a single obligation may arise when there is a contract between the creditor and the debtor but also when there is no contract between the parties – for example in the case of unjustified enrichment or a delict. The acknowledgement of an innkeeper's lien in South African law is in all likelihood an example of the influence of English law. This creates an exception to the rule that a lien can vest only over a thing on which money has been spent or labour expended. Vesting a lien over incorporeal property is not possible in either legal system. A final significant distinction between the legal systems is the fact that a general lien in Scottish law can vest when a debt is due and the creditor only later secures physical control of the thing. In South African law, a lien can vest only if the creditor is already in control of the thing when the debt falls due.

A lien provides an easy and inexpensive form of security for disadvantaged creditors. As Justinian said, it is better to be in possession and to wait than to institute action. There are, however, uncertainties as to the precise legal nature and certain aspects of the legal operation of liens in many legal systems. Continuing legal research and comparative studies will offer greater legal certainty and empower creditors to rely on a lien with certainty as to their entitlements, in a reasonable way and without prejudice to the debtor.

SAMEVATTING

'N RETENSIEREG AS SAAKLIKE SEKERHEIDSREG IN DIE SKOTSE REG VANUIT 'N SUID-AFRIKAANSE PERSPEKTIEF

Hierdie artikel ondersoek 'n retensiereg ("lien") as saaklike sekerheidsreg in die Skotse reg vanuit 'n Suid-Afrikaanse perspektief. Die historiese ontwikkeling, regsaard en klassifikasie van retensieregte word bespreek. Dan word gefokus op die sekerheidsobjek(te) van retensieregte, die beheersvereiste en kontraktuele afstanddoening van retensieregte.

Die Skotse reg onderskei tussen algemene retensieregte ("general liens") en spesiale retensieregte ("special liens"). 'n Algemene retensiereg word gevestig wanneer daar 'n ooreenkoms tussen die partye is en die skuldeiser 'n algemene eis ("general balance") het vir dienste gelewer. Die skuldenaar se saak moet ingevolge die ooreenkoms aan die skuldeiser in sy hoedanigheid van diensverskaffer gelewer word. 'n Voorbeeld is 'n prokureur wat dokumente van sy kliënt ontvang en die dokumente kan terughou weens enige eis wat spruit uit sy ooreenkoms met die kliënt, selfs 'n eis wat nie met die dokumente wat aan die prokureur in sy hoedanigheid van die kliënt se prokureur gegee is, verband hou nie. 'n Algemene retensiereg word nie in die Suid-Afrikaanse reg erken nie.

'n Spesiale retensiereg ("special lien") verseker 'n eis wat voortspruit uit kontrak, ongeregverdigde verryking of delik. 'n Spesiale retensiereg wat 'n kontraktuele eis verseker, berus op die beginsel van wederkerigheid van prestasie. Daar kan aangevoer word dat so 'n retensiereg in beide regstelsels 'n verskyningsvorm van die *exceptio non adimpleti contractus* is. Die *exceptio non adimpleti contractus* is egter nie altyd 'n retensiereg nie: slegs wanneer die prestasie wat weerhou word, die teruggawe van 'n saak is (en nie byvoorbeeld betaling vir dienste gelewer nie), is dit 'n retensiereg. Hierdie retensiereg ontstaan nie vanuit die kontrak nie; dit verseker die *eis* wat uit die kontrak voortspruit.

'n Spesiale retensiereg wat 'n verrykingseis verseker, berus op die stelreël *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*. 'n Skuldeiser wat 'n verrykingseis

teen die skuldenaar het, kan 'n spesiale retensiereg op die skuldenaar se saak vestig. Die *bona fides* van die skuldeiser ten tyde van die aanbring van verbeteringe sal 'n rol speel by die erkenning van 'n verrykingseis.

Voorts erken die Skotse reg 'n spesiale retensiereg ter versekering van 'n deliktuele eis. Die Suid-Afrikaanse reg erken sekere statutêre retensieregte wat soortgelyk aan hierdie retensiereg is.

Die Skotse reg erken 'n retensiereg op roerende liggaamlike sake. Daar is onsekerheid oor die vestiging van 'n retensiereg (ter versekering van 'n kontraktuele eis) op onroerende sake. Die Suid-Afrikaanse reg erken 'n verrykingsretensiereg en 'n retensiereg *ex contractu* op onroerende sake. Steven voer aan dat daar geen geldige rede is waarom so 'n retensiereg nie op onroerende sake gevestig kan word nie. Die onderskeid tussen die tipes uitgawes aangegaan moet ingedagte gehou word: 'n verrykingseis is beperk tot nuttige en noodsaaklike uitgawes, terwyl 'n kontraktuele eis enige uitgawes, ook luukse uitgawes, insluit. 'n Verrykingseis sal waarskynlik minder wees as 'n kontraktuele eis. 'n Retensiereg (ter versekering van 'n kontraktuele eis) is in die Skotse reg, in teenstelling met die Suid-Afrikaanse reg, afdwingbaar teen derdes. Sommige skrywers meen dat dit "ongerieflik" sal wees as 'n retensiereg op onroerende eiendom vir 'n kontraktuele eis teen derdes geld, aangesien so 'n retensiereg nie geregistreer is nie.

Ingevolge die Skotse reg kan 'n spesiale retensiereg gevestig word op 'n saak ten opsigte waarvan geen arbeid verrig of geld bestee is nie. Die retensiereghouer moes bloot beheer van die saak verkry het ingevolge die regsverpligting wat tot die retensiereg aanleiding gegee het. Ingevolge die Suid-Afrikaanse reg kan 'n retensiereg slegs gevestig word op 'n saak ten opsigte waarvan geld bestee of arbeid verrig is (met uitsondering van "pseudo-" of "kunsmatige" retensieregte, soos 'n losieshuishouer se retensiereg op sy gas se goedere vir die gas se verblyfkoste).

Die Skotse reg erken 'n retensiereg op onliggaamlike sake soos aandele. Hierdie retensiereg is 'n voorbeeld van 'n "right of retention". Die skuldeiser se "right of retention" hou in dat hy *dominium* van die aandele het en sy verpligting om die aandele oor te dra opgeskort word. 'n "Right of retention" in die Suid-Afrikaanse reg is altyd 'n reg op 'n ander se saak en stem gevolglik ooreen met 'n "lien", en nie 'n "right of retention" nie, in die Skotse reg.

In die Skotse reg word nie vereis dat die houer van 'n algemene retensiereg in beheer van die saak moet wees wanneer die eis ontstaan nie. 'n Prokureur kan byvoorbeeld 'n opeisbare vordering teen sy kliënt hê en eers later beheer oor sekere dokumente van sy kliënt verkry, waarop dan 'n retensiereg gevestig word. Ten opsigte van die wilselement van beheer, voer die meeste Skotse skrywers aan dat slegs "possession", en nie "custody" nie, voldoende is om 'n retensiereg te vestig. Steven verduidelik dat "custody" dikwels oorgaan in "possession" en 'n retensiereg dan gevestig word: X vervoer goedere vir Y. X het dus bloot "custody" en geen bedoeling om die goedere in sy eie belang te beheer nie. Wanneer die goedere die eindbestemming bereik en Y X nie vir die vervoer betaal nie, kan X die goedere as sekuriteit vir sy uitstaande vordering hou. X se "custody" het dan oorgegaan in "possession", aangesien hy nou in sy eie belang in beheer van die goedere is en 'n retensiereg kan uitoefen.

Die Skotse reg erken die kontraktuele afstanddoening ("waiver") van 'n retensiereg. Die Suid-Afrikaanse reg onderskei tussen afstanddoening ten gunste van die eienaar van die saak of ten gunste van 'n ander skuldeiser van die eienaar (byvoorbeeld 'n bank). Afstanddoening van 'n retensiereg ten gunste van die een, sluit nie afstanddoening ten gunste van die ander in nie. Sonnekus maan dat die kontraktuele afstanddoening van 'n reg 'n "regsontdaningshandeling" is. Aangesien 'n retensiereg eers gevestig word wanneer die vordering opeisbaar is, kan daar nie by kontraksluiting (voordat die retensiereg gevestig word) van die reg afstand gedoen word nie. Hy stel voor dat die partye op 'n *pactum de non petendo* moet ooreenkom.