

Liens: a closer look at some conceptual foundations*

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Abstract

Liens are classified differently in diverse legal systems. The classification of a lien points towards the specific operation thereof. In South African law we distinguish between enrichment liens (real liens) which are regarded as real rights and debtor-creditor liens which are regarded as personal rights. The Dutch law, on the other hand, no longer distinguishes between *zakenrechtelijke retentierechten* (real liens) and *verbintenisrechtelijke retentierechten* (debtor-creditor liens). All liens are classified as *opschortingsrechten* with real operation. Scots law distinguishes between general and special liens and all liens are classified as real rights. A lien is an important and powerful legal remedy and a form of security. Liens are very important in modern day South Africa where access to courts are expensive and time consuming. In this article I look at certain conceptual foundations of liens in South African law, Dutch law and Scots law.

Introduction

A lien is a powerful legal remedy. A lien arises *ex lege* and it confers on the holder an immediate form of security without any court intervention or costly legal actions. The holder simply needs to retain possession of the thing upon which he expended labour or money. The retention of the thing puts pressure on the debtor to perform in order to regain possession of his thing. There is, however, uncertainty regarding the classification of liens and the extent of their operation. In my opening sentence I describe a lien as a legal remedy; it is, however, more than a mere remedy. A lien can also be described as a defence and a form of a real security right, even though it is not a subjective right in the true sense of the word.¹

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¹ See JC Sonnekus ‘Retensieregte – nuwe rigting of misverstand par excellence?’ 1991 *TSAR* 462.

In this paper I shall discuss some² basic problematic concepts regarding liens. I compare the South African legal position liens with those of the Netherlands and Scotland. I chose Dutch law because the South African law of lien is based on Roman-Dutch law and is similar to the position in Dutch law prior to the current *Burgerlijk Wetboek (BW)*. I further chose Scots law because it was also influenced by Roman-Dutch law. Furthermore, like South African law, it is an uncodified mixed legal system.

A lien or a right of retention (*retensiereg* (Afrikaans) or a *retentierecht* (Dutch)) can, in general, be described as the right to withhold or to retain a thing until you are paid for the work done or money spent on that thing. In South Africa, a lien is generally classified as a limited real right.³ In Dutch law a *retentierecht* used to be described as the capacity merely to retain the thing (*terughoudingsbevoegdheid*).⁴ The current *BW*⁵ discusses liens under proprietary rights (*vermogensrechten*) and modern writers describe it as a hybrid legal institution with characteristics of both real and personal rights,⁶ as a species of the genus of *opschortingsrechten*.⁷ It is, however, a specific *opschortingsrecht*.⁸ Scots law on the other hand, classifies a lien as a real right.⁹ South African law distinguishes between enrichment liens (also called real liens) and debtor-creditor liens. An enrichment lien is based on enrichment while a debtor-creditor lien is based on an agreement between the contracting parties.¹⁰ In terms of the current *BW*, Dutch law no longer distinguishes between *verbintenisrechtelijke retentierechten* (debtor-creditor liens) and *zakenrechtelijke retentierechten* (real liens). Scots law draws a distinction between general liens and special liens.¹¹

² This article only focuses on certain conceptual foundations regarding liens in the different systems. There are many more important aspects on this topic which I do not discuss here.

³ TJ Scott *The law of South Africa (LAWSA): lien* Vol 15 Part 2 2008 par 50; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's the law of property* (2006) 412.

⁴ JE Fesevur *De zakelijke zekerheidsrechten naar tegenwoordig en toekomstig Nederlands recht* (1979) 230–231; CCJ Aarts *Het retentierecht* (1990) par 129.

⁵ Article 3:290.

⁶ HJ Snijders & EB Rank-Berenschot *Goederenrecht* (2001) par 716.

⁷ B Knottenbelt, JWP Verheugt & RA Torringa *Inleiding in het Nederlandse recht* (1990) 99.

⁸ A Pitlo *Het Nederlands burgerlijk recht deel 3 goederenrecht* (2001) 658.

⁹ AJM Steven *Pledge and lien* (2008) par 9.01.

¹⁰ TJ Scott *Liens* (2008) par 50; and Aarts n 4 above at par 4.

¹¹ Steven n 9 above at par 9–01.

Historical development of liens

Roman law (during the classical and post-classical period) used the term *retentio* in various contexts, such as retention, keeping in mind, to maintain a physical condition, a legal institute for compensation, the retention or preservation of a *patria potestas*, and so forth.¹² The purpose of a lien in Roman law was to ensure performance of the creditor's claim by the debtor. The retention of the thing served as security for the fulfilment of the claim. The maxim *minus est actionem habere quam rem*¹³ expresses this guarantee of security that possession of the thing grants to the creditor (lien holder). Julianus¹⁴ stated that it is better to be in possession of the thing and to wait, than it is to institute a claim against the debtor.¹⁵

Liens in Roman law were based on *aequitas*¹⁶ according to Paul. The maxim *in omnibus quidem, maxime tamen in iure, aequitas spectanda est*¹⁷ also applied to liens. The operation of liens during the Roman period was very simple: when the debtor claimed his thing with the *rei vindicatio* from the creditor (lien holder), the creditor could return the thing to the debtor or the *praetor* could give the creditor (lien holder) an *exceptio doli* as defence. If the creditor (lien holder) raised the *exceptio doli* as defence, he could also institute the *actio contraria* as a separate action against the debtor. One of the following two orders could then be made:

- Temporary dismissal of the claim. This gave the debtor time to perform in terms of the creditor's (lien holder) claim, whereafter he could claim the thing from the creditor (lien holder); or¹⁸
- The claim was granted on condition that the debtor would perform in terms of the creditor's (lien holder) claim.¹⁹

Both orders therefore forced the debtor to perform. A lien was not an independent legal institution in Roman law, but by applying the *exceptio doli* a creditor (lien holder) could retain the thing until his claim was settled.²⁰

¹² Aarts n 4 above at par 46.

¹³ It is less satisfying to have an action than it is to have possession of the legal object. VG Hiemstra & HL Gonin *Drietalige Regswoordeboek* (1992) 230.

¹⁴ (D 47.2.60) as discussed in Aarts n 4 above at 24.

¹⁵ Aarts n 4 above at par 46.

¹⁶ Equality. VG Hiemstra & HL Gonin *Regswoordeboek* 155.

¹⁷ In all affairs, and principally in those which concern the administration of justice, the rules of equity ought to be followed. VG Hiemstra & HL Gonin *Drietalige regswoordeboek* 206.

¹⁸ Aarts n 4 above at par 55.

¹⁹ *Id* at par 56.

²⁰ JE Fesevur *Retentierecht* (1979) 5.

Germanic law recognised a right of pledge (*pignus*). The pledgee could retain possession of the thing until the pledgor performed in terms of the claim. The pledgee also enjoyed preference over other creditors. A right of retention with preference was therefore recognised in Germanic law.²¹

The *Ordonnances* and the *Coutumes* of French law also recognised liens. The French *Code Civil* of 1804, however, did not give preference to liens. It recognised liens for certain specifically defined circumstances.²² In the *Oud-Vaderlandse Recht* liens could come into operation *ex lege* or by agreement. Liens applied to both movable and immovable property.²³ The *Wetboek Napoleon* of 1809 (for the Kingdom of Holland) contained various aspects of liens as they appear in the current *BW*. Article 1833 made provision for a lien in favour of labourers and article 1834 granted a lien to inn-keepers and carriers. Article 1835 provided preference to all liens. In terms of article 1836, a direct connection between the claim and the thing retained was required.²⁴ The *Ontwerp Kemper* of 1820 made provision for a lien for salvage, maintenance and improvement costs in favour of holders and possessors in good faith. It also recognised an inn-keeper's lien and a carrier's lien. The 1820 *Ontwerp* also granted preference to liens.²⁵

The 1938 *BW* was influenced by Roman law, Germanic law, the French *Ordonnances* and *Coutumes*, the *Oud-Vaderlands Burgerlijke recht*, the *Wetboek Napoleon* and the *Ontwerp Kemper*.²⁶ This *BW* recognised liens but gave them no preference.²⁷ Article 3:292 of the current *BW* grants preference to liens.²⁸

The current *BW* changed the position regarding liens considerably. The old *BW* distinguished between *verbintenisrechtelijke retentierechten* (debtor-creditor liens)²⁹ and *zakenrechtelijke retentierechten* (real liens).³⁰

²¹ Aarts n 4 above at par 71.

²² *Id* at par 72.

²³ *Id* at par 71–72.

²⁴ *Id* at par 73.

²⁵ *Ibid.*

²⁶ *Id* at par 71.

²⁷ *Id* at par 73.

²⁸ Article 3:292 *BW*.

²⁹ Articles 630 (*retentierecht van de bezitter en de houder*), 637 (*retentierecht van de markt koper*), 762 (*retentierecht van de opstaller en de opstalgever*) and 772 (*retentierecht van de erfpachter en de erfverpachter*) *BW* (old).

³⁰ Article 1205 lid 2 (*Retentio Gordiana* (the entitlement of a pledgee to hold the thing until the claim has been settled)), 1400 (*retentierecht in geval van onverschuldigde betaling* (for expenses incurred for taking care of the thing)), 1568 (*retentierecht in geval van*

Verbintenisrechtelijke retentierechten (debtor-creditor liens) originated from an agreement between the parties and could only be enforced against the other contracting party. These liens did not have real operation.³¹ *Zakenrechtelijke retentierechten* (real liens) vested through operation of law and could be enforced against third parties.³² Article 3:290 of the current *BW* defines a lien³³ but draws no distinction between *verbintenisrechtelijke retentierechten* (debtor-creditor lien) and *zakenrechtelijke retentierechten* (real liens). In terms of article 3:291 all liens are enforceable against third parties, not only *zakenrechtelijke retentierechten* (real liens).

South African law still distinguishes between debtor-creditor liens and enrichment liens. Debtor-creditor liens are regarded as personal rights and originate from an agreement between the parties.³⁴ Enrichment liens (real liens), on the other hand, are generally regarded as real rights and originate from enrichment.³⁵ The position in South African law is similar to that of the Dutch law prior to the current *BW*. South Africa adopted the law of the provinces of Holland in 1652 when Jan van Riebeeck arrived in the Cape of Good Hope.³⁶ An in-depth study³⁷ of our case law regarding liens shows that our courts followed the Roman-Dutch law and that our law of lien was not influenced by other legal systems such as English law. The courts mainly followed the work of Roman-Dutch jurists, such as Voet, De Groot,

wederinkoop (when the seller has the right to claim the thing back from the purchaser and the purchaser then has a lien for any expenses incurred with regards to the thing)), 1576o and 1576u (*retentierecht in gevallen van huurkoop* (when a hire purchaser incurred expenses with regards to the thing which is then sold to a third party)), 1612 lid 2 (*retentierecht van de huurder* (when a tenant has a lien for improvements made to the thing)), 1652 (*retentierecht in geval van aanneming van werk* (when a person who did work on the thing has a lien over the thing for the work done)), 1766 (*retentierecht van de bewaarnemer* (when a person stored or preserved a thing and has a lien for the expenses incurred in storing or preserving the thing)), 1746 *juncto* 1766 (*retentierecht van de hotelhouder* (innkeeper's lien)), 1849 *juncto* 85 K (*retentierecht van de lasthebber en de commissionair* (a lien in favour of a mandatory)) and 94 K, 493, 833 (*retentierecht van de (weg)vervoerder, de expediteur, de zeevervoerder en de binnenvaartschipper* (a lien in favour of a carrier)).

³¹ Aarts n 4 above at par 4.

³² *Id* at par 4.

³³ See n 60 below.

³⁴ Badenhorst, Pienaar & Mostert n 3 above at 415.

³⁵ *Id* at 413.

³⁶ HR Hahlo & E Khan *The South African legal system and its background* (1973) 573–574.

³⁷ M Wiese *Die aard en werking van retensieregte – 'n regsvergelykende studie* (chapter 2 of thesis to be published in 2012).

Matthaeus, Groenewegen, Van Leeuwen and Peckius. Even in recent case law³⁸ our courts have referred to the *Placaeten van Holland*.

Scots law of lien also derives from Roman law.³⁹ In early case law, such as *Binning v Brotherstones*,⁴⁰ the courts followed Roman law. The great Scottish jurist, Stair, also followed Roman law in his *Institutions* of 1681.⁴¹ Stair's approach was very similar to that of Voet, and since Voet wrote later than Stair, it is possible that Stair could have influenced Voet.⁴² Bankton was another Scottish jurist whose work followed Roman and Roman-Dutch law.⁴³ Over a period of time the Scots law of lien was influenced by English law: the word 'lien' came from English law to Scots law.⁴⁴ The 19th century jurist, Bell, wrote extensively on securities and real rights. Influenced by the English law, he introduced the distinction between special liens and general liens. Special liens are based on Scots law, while in the case of general liens much reference is made to English law.⁴⁵

Liens in Scots law are real rights which accrue from contractual⁴⁶ obligations.⁴⁷ General liens⁴⁸ arise exclusively in cases of contract and are confined to contractual obligations.⁴⁹ A general lien can arise by implication, such as agency liens, by usage of trade, or through a course of dealing, or can be created expressly. A special lien, on the other hand, developed from the Roman law *exceptio doli* and *exceptio non adimpleti contractus*.⁵⁰ Steven explains as follows: 'A special lien is said to be 'special' because the security which it gives is special to the obligation that gives rise to the lien.'

³⁸ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA).

³⁹ GJ Pienaar & AJM Steven 'Rights in security' in R Zimmermann, D Visser & K Reid *Mixed legal systems in comparative perspective* (2004) 776.

⁴⁰ (1676) Mor 13401 as discussed in Steven n 9 above at par 10–65.

⁴¹ *Id* at par 10–67.

⁴² *Id* at par 10–73.

⁴³ *Id* at par 10–86.

⁴⁴ *Id* at par 10–96 and 10–127.

⁴⁵ *Id* at par 10–129 to 10–133.

⁴⁶ A special lien can accrue from any contract and not only from specific categories of contracts as in the English law. See Steven n 9 above at par 16–01.

⁴⁷ Steven n 9 above at par 11–15, 16–01. GL Gretton & AJM Steven *Property, trust and succession* (2009) par 20.63–64.

⁴⁸ Banker's lien, broker's lien, commercial agent's lien and solicitor's lien. See Steven n 9 above at chapter 17.

⁴⁹ Steven n 9 above at par 17–01.

⁵⁰ *Id* at par 17–07.

Defining and classifying liens*South African law*

Scott⁵¹ defines a lien as follows:

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 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.

Badenhorst *et al*⁵² define a lien as follows: 'A lien is a right of retention 'which arises from the fact that one man has put money or money's worth into the property of another.'

The authors further distinguish between real liens (salvage and improvement liens – enrichment liens) and debtor-and-creditor liens. A real lien is classified as a real right and a debtor-and-creditor lien as a personal right (creditor's right).⁵³

It is important to note that a debtor-and-creditor lien can also be a real lien: Y takes his watch to X who agrees to repair it. Y then refuses to pay X. X has a debtor-and-creditor lien against Y by virtue of their agreement. However, X also has a real lien (enrichment lien) by operation of law against Y, based on Y's enrichment.

Sonnekus⁵⁴ does not agree with this classification of a lien. He provides various reasons why a lien cannot be classified as a real right. He argues that a lien is not a subjective right in the true sense of the word because a lien holder does not have a 'right' that he can enforce against third parties. The lien holder can only rely on his lien when the owner or a third party claims the thing under his control. Research into the historical development of liens shows that a lien developed from the Roman law *exceptio doli*, which was a defence based on common fairness. A lien strengthens the lien holder's underlying personal right against the debtor. Sonnekus further points out that the legal remedies available to holders of real rights, for example the *rei vindicatio* to an owner, is not available to a lien holder.

⁵¹ Scott n 3 above at par 49.

⁵² *Id* at 412.

⁵³ Scott n 10 above at par 50; Badenhorst, Pienaar & Mostert n 3 above at 412

⁵⁴ JC Sonnekus & JL Neels *Sakereg vonnisbundel* (1994) 769–770.

Dutch law

It is important to distinguish between the positions before and after the current *BW* came into operation. The theses of authors like Fesevur⁵⁵ and Aarts⁵⁶ pre-date the current *BW*. The work of Fesevur illustrates the difference in approach before and after the current *BW* came into operation. In his 1988 thesis⁵⁷ he describes a lien as the entitlement to retain possession of the thing. In his 1992 book⁵⁸ he describes it as a right to retain possession of the thing, and in his latest book,⁵⁹ published in 2005, he describes a lien as a security right.

The current *BW*⁶⁰ defines a lien as follows:

Retentierecht is de bevoegdheid die in de bij de wet aangegeven gevallen aan een schuldeiser toekomt, om de nakoming van een verplichting tot afgifte van een zaak aan zijn schuldenaar op te schorten totdat de vordering wordt voldaan.

Asser⁶¹ defines a lien as follows:

De besitter te goeder trouw heeft een retentierecht op de opgeëiste zaak. Hij is bevoegd de afgifte van de zaak op te schorten zolang hij de door de rechthebbende verschuldigde vergoeding niet heeft ontvangen.

The possessor in good faith, therefore, has a lien over a thing and can refuse to return the thing for as long as he has a valid claim against the debtor.

Snijders and Rank-Berenschot⁶² define a lien as follows:

Het retentierecht wordt omschreven als de bevoegdheid van een schuldeiser om de nakoming van zijn verplichting tot afgifte van een zaak aan zijn schuldenaar op te schorten totdat zijn vordering wordt voldaan.

⁵⁵ Aarts n 4 above at 2.

⁵⁶ *Id* at par 56.

⁵⁷ *Retentierecht* (1988).

⁵⁸ *De zakelijke zekerheidsrechten naar tegenwoordig en toekomstig Nederlands recht* 204.

⁵⁹ *Goederenrechtelijke Colleges* (2005) 234.

⁶⁰ Article 3:290.

⁶¹ FHJ Mijnsen, P De Haan, C Van Dam & HD Ploeger *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandse Burgerlijk Recht: Goederenrecht* (2006) par 189.

⁶² Snijders & Rank-Berenschot n 6 above at par 721.

The creditor is entitled to refuse to return the thing to the debtor until his claim has been satisfied. Snijders and Rank-Berenschot⁶³ further describe a lien as a legal institution with a hybrid character straddling a personal right (creditor's right) and a real right.

Scots law

Steven⁶⁴ defines a lien as follows:

A lien is 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 purposes of security.

It is interesting that 'the property not having been delivered to the retaining party for the purposes of security' forms part of this definition. This clearly distinguishes a lien from a pledge where the property is delivered for purposes of security.

A lien is regarded as a real right in Scots law.⁶⁵ Steven⁶⁶ substantiates the classification of a lien as a real right as follows:

First, many authorities not brought together until now state that this is the case. Secondly, lien is normally treated along with pledge and hypothec as a right in security. Thirdly, a lien will prevail over subsequent diligence. Fourthly, a lien-holder, because that party has a real security, is generally not required to give it up in return for being given some personal security, in other words caution.

Scots law also distinguishes between special liens and general liens. A special lien arises when the right to retain the thing is based on performance in terms of a single obligation. When the right to retain the thing is based on more than one obligation it is a general lien.⁶⁷

Summary

It can be stated with certainty that the different legal systems view liens differently. Steven⁶⁸ refers to Gretton's germane comment that 'the most serious difficulty arising from the lack of conceptual foundations in the law

⁶³ *Goederenrecht* par 716.

⁶⁴ Steven n 9 above at par 9–01.

⁶⁵ Steven n 9 above at par 9–01; Gretton & Steven n 47 above at par 20.58.

⁶⁶ Steven n 9 above at par 14–01.

⁶⁷ *Id* at par 9–01; Gretton & Steven n 47 above at par 20.58.

⁶⁸ Steven n 9 above at par 14–01.

of lien is the question whether a lien-holder has a real right'. I now analyse some conceptual foundations in the law of lien from a comparative perspective.

System of real rights

In classifying rights, one can distinguish between a closed and an open system of real rights. A closed system of real rights was the only system Roman law knew. It acknowledged ownership, servitude, pledge, mortgage, building grant and perpetual lease as the *numerus clausus* of real rights. In Roman-Dutch common law, on the other hand, the introduction of feudal rights ensured that a closed system of real rights did not exist.⁶⁹ The advantage of a closed system is that it attains 'certainty and predictability in property law'.⁷⁰ In an open system of real rights new real rights can develop as the need arises. It can, however, be difficult to determine whether a right that does not fit into one of the recognised categories of real rights, should qualify as a real right.⁷¹

South Africa has an open system of real rights.⁷² It is therefore possible for new real rights to develop, or for existing rights to be classified as real rights. As already stated, an enrichment lien (real lien) is generally classified as a (limited) real right.⁷³

The Dutch law has a closed system of real rights.⁷⁴ Book 5 of the *BW* deals with real rights and acknowledges the following rights as real rights: ownership, co-ownership, servitudes, *erfpacht*, *opstal* and *appartementen-recht*. Liens are not classified as real rights. Liens are discussed in Book 3 which deals with proprietary rights (*vermogensrechten*) in general.

Scots law recognises a *numerus clausus* of real rights and it can therefore be said that it has a closed system of real rights. This system differentiates between the principal real right, namely ownership, and subordinate real rights, namely servitudes, negative real burdens, proper life-rents,⁷⁵ rights in

⁶⁹ Badenhorst, Pienaar & Mostert n 3 above at 48.

⁷⁰ *Id* at 47–48.

⁷¹ *Id* at 48–49.

⁷² *Id* at 48.

⁷³ Scott n 10 above at par 50.

⁷⁴ Snijders & Rank-Berenschot n 6 above at 56–57.

⁷⁵ A liferent is a right to enjoy the use and benefit of another's land for the lifetime of the beneficiary.

security and leases of land. A lien falls under rights in security and is therefore classified as a real right.⁷⁶

As South Africa has an open system of real rights it is arguable whether a lien is a real right, or not. A lien is a classic example of one of the rights that does not really fit into one of the recognised real rights. Some authors⁷⁷ are of the opinion that a lien should be recognised as a real right, while Sonnekus⁷⁸ disagrees. The advantage of an open system of real rights is that real rights can develop as the need arises, while a closed system of real rights provides more legal certainty.

Rights of lien holder

Claiming a thing from third party and the effect thereof

In South African law a lien holder cannot claim the thing from third parties with the *rei vindicatio* as an owner can. The lien holder can, however, provided that all requirements⁷⁹ have been met, claim the thing from a third party with the *mandament van spolie* (spoliation remedy)⁸⁰ which is available to owners, holders and possessors. A lien holder can also regain his possession by claiming *restitutio in integrum*⁸¹ against a third party who has no right to exercise a lien over the property and is therefore retaining it unlawfully.⁸² If a lien holder is deprived of his possession through undue means,⁸³ his lien will terminate. It will, however, revive automatically when the lien holder's possession is restored.⁸⁴ Scott⁸⁵ refers to *Donaldson v Estate Valeris*⁸⁶ and *Marinus v Taljaard*⁸⁷ and explains that the lien does not revive in the strict sense. A new right of retention is created from the moment of restoration. Any other real right of another that had been created in the

⁷⁶ Gretton & Steven n 47 above at par 2.9 – 2.10.

⁷⁷ Scott n 10 above at par 50; Badenhorst, Pienaar & Mostert n 3 above at 412.

⁷⁸ Sonnekus & Neels n 56 above at 769–770.

⁷⁹ The applicant must be able to prove that he had peaceful and undisturbed control of the property and that his control was disturbed in an unlawful way. See AJ van der Walt & GJ Pienaar *Introduction to the law of property* (2009) 203 and *Nino Bonino v De Lange* 1906 (T) 120 at 122.

⁸⁰ 'The purpose of the *mandament van spolie* is to restore unlawfully deprived possession at once (*ante omnia*) to the possessor, in order to prevent people from taking the law into their own hands.' See Badenhorst, Pienaar & Mostert n 3 above at 288.

⁸¹ Scott n 3 above at par 53; *Donaldson v Estate Valeris* (1938 TPD 269 272); *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* (1960 2 SA 686 (SR) 689–690).

⁸² Scott n 4 above at par 81.

⁸³ For example fraud, force, threat of force or mistake, *id* at par 53.

⁸⁴ *Id* at par 53.

⁸⁵ *Ibid.*

⁸⁶ 1938 TPD 269 272.

⁸⁷ 1952 1 SA 49 (C) 53–54.

interim period, remains enforceable against the revived lien and ranks above it.

In Dutch law the *BW*⁸⁸ allows a lien holder to claim the thing back under the same conditions as an owner. Article 3:86(3) *BW* provides the owner, other persons entitled to the thing⁸⁹ and a lien holder with the means to claim the thing over which they have a right from third parties.⁹⁰ A lien holder's right terminates if the thing comes under the control of the debtor or other entitled party.⁹¹ When the lien holder regains possession of the thing under the same legal relationship, his lien revives.⁹²

In Scots law a lien holder's lien terminates when the lien holder loses possession of the thing. This general rule, however, does not apply if the property is 'taken away' by undue means. Should the lien holder be forced to part with his possession of the thing by improper means, he can claim the goods with the *spuilzie*. The *spuilzie* is a possessory remedy and is similar to the *mandament van spolie* of South African law.⁹³ The lien holder must prove that he was in possession of the thing and that he was 'viciously'⁹⁴ dispossessed'.⁹⁵ If he is successful with the *spuilzie*, the court will compel the dispossessor to return the property. In my view it can also be argued that a lien holder has an *ius possidendi*⁹⁶ and is therefore also entitled to the 'action for delivery, where the real right to possess is being asserted against another in possession of corporeal movables'.⁹⁷

Steven⁹⁸ refers to Bell's description of the effect of loss of possession. He is of the opinion that a lien does not revive when possession is recovered. In the event of a general lien a new lien would replace the old lien if the lien holder regains possession. A 'general lien is good for all sums owed in a course of trading or employment' and therefore the re-possession will 'once more create a lien which secures the same debts that were secured prior to

⁸⁸ Section 3:295.

⁸⁹ For example a usufructuary.

⁹⁰ FHJ Mijnsen *et al* n 61 above at par 344.

⁹¹ For example a usufructuary.

⁹² See *BW* s 3:294 and Snijders & Rank-Berenschot n 6 above at 731.

⁹³ Steven n 9 above at par 13–27 – 13–28.

⁹⁴ 'Viciously' indicates that it must be unlawful.

⁹⁵ Gretton & Steven n 47 above at par 11.21.

⁹⁶ A right to possess.

⁹⁷ Gretton & Steven n 47 above at par 11.24.

⁹⁸ Steven n 9 above at par 13–33.

relinquishing the custody'.⁹⁹ In the case of special liens, loss of possession extinguishes the lien and it cannot revive.

Enforcing liens against third parties

In South African law an enrichment lien, being regarded as real in nature, gives an absolute right to the lien holder. The lien holder can therefore enforce his lien against the contracting party, against the owner – even if the owner was unaware of the lien – and also against all other third parties.¹⁰⁰ In the very important case of *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons*¹⁰¹ the court emphasised the fact that it would be unjust for a lien holder to lose his lien against the owner of the thing just because the owner was not aware of the agreement to improve his thing.¹⁰²

In Dutch law the *BW*¹⁰³ stipulates that a lien holder can enforce his lien against third parties with an anterior or posterior right to the thing. It seems strange that a lien, which is not regarded as a real right in the Dutch law, gives the lien holder an absolute right enforceable against third parties. According to Fesevur¹⁰⁴ it is similar to other rights with real operation, such as a tenant's personal right.

⁹⁹ Steven n 9 above at par 13–33.

¹⁰⁰ See n 3 above at par 62 and Badenhorst, Pienaar & Mostert n 3 above at 418–419.

¹⁰¹ 1970 3 SA 264 (A).

¹⁰² 'So 'n reëling sou in iedere geval onbillikheid in die hand kon werk. Gewoonlik sou die besitter, wat die saak verbeter of dit teen beskadiging bewaar het uit hoofde van 'n ooreenkoms wat hy met 'n derde aangegaan het, vir die skuld wat uit die kontrak ontstaan, op 'n retensiereg ('debtor and creditor lien') teenoor daardie derde persoon geregtig wees om besit van die saak te behou totdat hy volgens ooreenkoms betaal is. Het hy geen retensiereg teenoor die eienaar nie, en is hy verplig om die saak aan die eienaar af te gee sonder vergoeding vir sy noodsaaklike of nuttige uitgawes, verloor hy, tot sy nadeel (*detrimento*), sy retensiereg teenoor die derde persoon met wie hy gekontrakteer het, terwyl die eienaar verryk is. So 'n reëling sou in stryd wees met die einste beginsel waarop retensieregte gefundeer is, nl. dat *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletioem*. Dit sou dus, met betrekking tot die vraag of 'n retensiereg teen die eienaar tot stand gekom het, nie verkeerd wees nie om te aanvaar dat, totdat die besitter deur óf die eienaar óf die derde persoon behoorlik vergoed word, die verryking van die eienaar in werklikheid ten koste van die besitter is wat die saak verbeter of bewaar het. In iedere geval, 'n besitter wat, ingevolge so 'n ooreenkoms met 'n derde, besit van die saak vir verbeterings of bewaring kry, kom nie op onregmatige wyse in besit daarvan nie, en bewaar of verbeter hy die saak ten voordele van die eienaar, voldoen hy aan al die vereistes vir die totstandkoming van 'n retensiereg teen die eienaar.'

¹⁰³ Article 3:291.

¹⁰⁴ *Goederenrechtelijke Colleges* 236.

Scots law recognises a lien as a real right and therefore ‘good against the world’.¹⁰⁵

Right to transfer

Liens are dependent on possession of the thing. Therefore, in general, liens cannot be transferred. This general rule applies in all the legal systems under discussion.¹⁰⁶ A lien cannot be transferred because the lien would terminate the moment the thing passed from the lien holder’s hands. There are, however, exceptions to the rule: In Scots law, in the case of a banker’s lien, the lien may be assigned¹⁰⁷ to another banker, when the customer agrees to the contract of agency being transferred to another banker. This will also apply to a solicitor’s lien. Bankers’ liens and solicitors’ liens can be assigned because the assignee is to act in the same capacity in relation to the debtor, as the assignor did before the assignation. In the event of the death or sequestration of a lien holder, the lien may also be transferred by judicial assignation.¹⁰⁸

Important differences in different legal systems

Both South African and Scots law recognise a twofold classification of liens. The binary division is, however, different: South African law distinguishes between debtor-creditor liens and enrichment liens, while Scots law distinguishes between general liens and special liens.¹⁰⁹ The binary division in South African law is similar to the twofold classification in Dutch law prior to the current *BW*.¹¹⁰ The current *BW* draws no distinction between different categories of lien.¹¹¹

¹⁰⁵ Steven n 9 above at par 12–04, 14–03 and 14–04.

¹⁰⁶ Scott n 3 above at par 50; JH Nieuwenhuis *et al Nieuw Burgerlijk Wetboek: tekst & kommentaar* (1990) 239; AP Bell *Modern law of personal property in England and Ireland* (1989) 137; S Gleeson *Personal Property law* (1997) 249; M Bridge *Personal property law* (1996) 135; Steven n 9 above at par 14–17.

¹⁰⁷ The transfer of a personal right from one creditor to another is termed ‘assignation’ in Scots law and ‘cession’ in South African law. In Scotland and in South Africa the transferor is called the ‘cedent’. Due to the influence of English law the term ‘assignor’ has recently been used in Scotland to refer to the transferor. In Scots law the transferee is usually called the ‘assignee’ while in South African law the transferee is called the ‘cessionary’. P Nienaber and GL Gretton ‘Assignation/Cession’ in R Zimmermann, D Visser and K Reid *Mixed legal systems in comparative perspective* (2004) 787–788.

¹⁰⁸ Steven n 9 above at par 14–17.

¹⁰⁹ Pienaar & Steven n 39 above at 777.

¹¹⁰ Fesevur n 4 above at 230–231; Aarts n 4 above at par 129.

¹¹¹ Article 3:290–3:295.

In South African law debtor-creditor liens are regarded as personal rights and cannot be enforced against third parties. Enrichment liens, on the other hand, are regarded as real rights and are enforceable against third parties.¹¹² In Scots law both general liens and special liens are regarded as real rights and enforceable against third parties.¹¹³ In Dutch law liens are not regarded as real rights, but rather as proprietary rights in the form of *opschortingsrechten*.¹¹⁴ Even though liens are not recognised as real rights, article 3:292 *BW* grants them real operation.

Debtor-creditor liens in South African law are to a certain extent similar to special liens in Scots law. According to Pienaar and Steven,¹¹⁵ Scots law does not distinguish, as South African law does, between ‘ordinary’ and ‘pseudo’ debtor-creditor liens. An ‘ordinary’ lien would be that of a building contractor, a repairer or carrier as it is based on expenses incurred or work done on the thing. A ‘pseudo’ lien allows the holder to retain a thing where no expenses have been incurred, services rendered, or work done to the thing itself. An example of a ‘pseudo’ lien is an inn-keeper’s lien. In terms of Scots law, a special lien arises out of mutuality of contract, which is when the right to retain the thing is reciprocal to the other party’s duty to pay the sum owed under the contract.¹¹⁶ The *exceptio non adimpleti contractus* forms the basis of this lien.¹¹⁷ Scots law draws no distinction between ‘ordinary’ and ‘pseudo’ debtor-creditors liens. Debtor-creditor liens in South African law arise out of contract *per se*.¹¹⁸ The tendency in Scots law is to confine a lien to contractual obligations, while enrichment liens are just as well established as debtor-creditor liens in South African law.¹¹⁹ There are, however, some examples of enrichment liens in Scots law, such as a salvage lien in favour of people who saved a ship, or a lien in favour of the *bona fide* possessor of land for improvements made to the land.¹²⁰

¹¹² Scott n 3 above at par 50; Badenhorst, Pienaar & Mostert n 3 above at 412.

¹¹³ Steven n 9 above at par 9–01.

¹¹⁴ Pitlo n 8 above at 658 and Snijders & Rank-Berenschot n 6 above at 716.

¹¹⁵ Pienaar & Steven n 39 above at 777.

¹¹⁶ Steven n 9 above at par 11–15.

¹¹⁷ *Ibid.*

¹¹⁸ Pienaar & Steven n 39 above at 778–779. In *United Building Society v Smookler’s Trustees* (1906 TS 623, 628) the court said that ‘such liens ... spring out of the soil of contract, so they are confined within the limits of contractual privity’.

¹¹⁹ Pienaar & Steven n 39 above at 780.

¹²⁰ *Id* at 781.

South African law and Dutch law acknowledge liens over both corporeal moveable and immovable property.¹²¹ In Scots law liens are generally over corporeal movables, but are not restricted thereto. Liens can also vest over incorporeal movables¹²² and immovable property.¹²³

Conclusion

Liens in the legal systems that I have reviewed above all developed from Roman law and later from Roman-Dutch law. The South African law of lien is very similar to the law of lien in the Netherlands prior to the current *BW*. Our law of lien is complex to a certain extent as we recognise liens as personal rights (debtor-creditor liens) and as real rights (enrichment liens). Dutch law has a far more pragmatic approach by allowing a right, such as a lien, to be *sui generis*. The provisions of the *BW* define and prescribe the operation of liens. This approach reduces different interpretations and subsequently provides legal certainty. Although I support this pragmatic approach, I believe the fact that the Dutch law is codified makes it much easier as there is far less scope for interpretation. Should the South African legislature codify the South African law of real securities, it would ensure greater legal certainty and fewer conflicting interpretations of the nature and extent of liens.

Due to the influence of English law on Scots law, Scotland has a different approach when classifying liens into special liens and general liens. Pienaar and Steven¹²⁴ suggest that South Africa could consider recognising a debtor-creditor lien as a *quasi* real right which can be enforced against certain third parties. The lien holder will then be able to enforce his lien against the other contracting party and against other creditors in the case of insolvency of the debtor, but in principle not against the debtor's successors in title. This analysis comes from the Scottish statutory occupancy right of a spouse who does not have ownership in his or her matrimonial home.¹²⁵ I think the possibility of the extension of the operation of a debtor-creditor lien could be considered. The authors¹²⁶ are further of opinion that the South African

¹²¹ Scott n 3 above at par 79; JE Fesevur *Voorrechten en retentierechten* (1992) 48. JH Nieuwenhuis *et al* n 106 above at 239; JHM Van Erp & LPW van Vliet 'Real and personal security' (2002) 6 *Electronic Journal of Comparative Law* 2002 at par 5.

¹²² For example a company who has a lien over shares in security of debts owed by the shareholder to the company. See Steven n 9 above at par 12–05.

¹²³ Steven n 9 above at par 12–01 to 12–08 and Pienaar & Steven n 39 above at 777.

¹²⁴ Pienaar & Steven n 39 above at at 784.

¹²⁵ See *Matrimonial Homes (Family Protection) (Scotland) Act* 1981 (c 59).

¹²⁶ Pienaar & Steven n 39 above at 780.

law governing debtor-creditor liens should be reconsidered in terms of mutuality of obligations, and that the distinction between ‘ordinary’ and ‘pseudo’ liens should subsequently be abandoned. In my opinion this distinction does not really cause problems in the South African law of lien. It is also my submission that debtor-creditor liens in South African law are well established and that the operation of enrichment liens are more often the matter of discussion in case law.

In conclusion, I should like to emphasise the importance of liens as a form of security available to the creditor. Access to courts and to legal aid in the current South African legal system are problematic, expensive and exceptionally time consuming. A lien affords its holder an immediate form of protection. The purpose of my comparative study of liens is to enhance the theory of our law of lien. Such theory should then, hopefully, be fruitfully implemented in practice. It is my opinion that the South African law of lien can be further developed by studying other legal systems.