



UNIVERSITY OF TM
KWAZULU-NATAL
—
INYUVESI
YAKWAZULU-NATALI

MARITIME LIENS:

**A CRITICAL DISCUSSION OF THE ENFORCEABILITY OF
MARITIME LIENS AGAINST BONA FIDE PURCHASERS**

THANDEKA B HADEBE

208523609

A dissertation submitted in partial fulfilment of the requirements for
the Degree of Masters of Law in the School of Law, University of
KwaZulu Natal (Howard College)

Supervisor: Dusty Lee Donnelly

DECLARATION

I, Thandeka B. Hadebe, declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
- (iv) This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
 - (a) their words have been re-written but the general information attributed to them has been referenced;
 - (b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.
- (v) Where I have reproduced a publication of which I am author, co-author or editor, I have indicated in detail which part of the publication was actually written by myself alone and have fully referenced such publications.
- (vi) This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the dissertation and in the References sections.

TB HADEBE

ACKNOWLEDGMENTS

Writing this thesis has not been effortless. It has been challenging, time consuming and strenuous. However, with the assistance of certain individuals who went beyond their call of duty to ensure that my dissertation was of good quality, I managed to eventually complete it.

Firstly, I would like to express my humble gratitude to my supervisor Dusty-Lee Donnelly whose direction, motivation and unforgiving criticism greatly contributed to a successful completion of this thesis.

Secondly, I would like to thank Dr Caroline Goodier who, in addition to assisting me with writing this thesis, has also taught me much about writing in general. Her teachings were not only useful in writing this thesis but I will continue to utilize them to improve my writing as a practitioner and aspirant writer.

Lastly, I would like to thank my family for their support; they have been very patient and tolerant with my constant postponements of home visits. I dedicate this thesis to my mother who is currently battling with cervical cancer yet continues to be my pillar of strength.

ABSTRACT

The law of maritime liens has been a subject of great uncertainty for a long period of time and there has not been any unanimity in terms of certain aspect of this concept. Domestic law vary with regards to the recognition and enforcement of maritime liens. In an attempt to settle some of the uncertain aspects of maritime liens, three international conventions have been adopted to set out a universal list of maritime liens as well as to make uniform the mode of enforcing those maritime liens.

The first attempt to achieve uniformity in the law of maritime liens was the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926. However this convention did not receive acceptance in most jurisdictions. In 1967, a similar convention was formulated but like its predecessor, it was also not a success. The latest Convention was formulated in 1993 but despite the inclusion of seemingly attractive provisions in terms of ranking and classification of maritime claims, it also failed to get the required accessions and ratifications.

This persistence by the international community in trying to regulate maritime liens serves as proof to show that admiralty law is faced with many challenges and inexplicable principles when it comes to maritime liens. This dissertation will grapple with what some may call a very old and distinct aspect of maritime liens, that is, its enforcement against buyers for value without notice. This aspect may very well be common with other types of liens but taking into consideration some of the reasoning behind its existence, perhaps the time has come to look into this issue.

TABLE OF CONTENTS

CHAPTER	PAGE NO
DECLARATION	02
ACKNOWLEDGEMENTS	03
ABSTRACT	04
CHAPTER ONE I. INTRODUCTION	08
CHAPTER TWO I. THE NATURE OF MARITIME LIENS (a) Definition (b) Characteristics of a maritime lien (c) Claims to which a maritime lien may attach i. Salvage ii. Collision damage caused by a ship iii. Seaman's wages iv. Master's wages and disbursements II. CONCLUSION	11 11 13 15 17 18 18 19 19
CHAPTER THREE I. ENFORCEABILITY OF COMMON LAW LIENS, MARITIME LIENS AND THE STATUTORY RIGHT IN REM CONTRASTED (a) Common law liens (b) Common law liens and third parties (c) The Landlord's hypothec (d) Statutory liens II. CONCLUSION	21 22 23 24 25 28
CHAPTER FOUR I. THE ORIGINS OF THE MARITIME LIEN (a) Possible sources of maritime liens (b) Personification theory (c) Procedural theory (d) Conflict theory II. CONCLUSION	29 29 31 33 36 38
CHAPTER FIVE I. THE ENFORCEMENT OF MARITIME LIENS-A GENERAL DISCUSSION (a) Enforceability against other creditors	36 42

(i) South African law	42
(ii) English law	42
(b) Enforceability against a purchaser of the asset once the lien has become attached	43
(c) Enforceability against the asset when the present owner is not liable in personam	44
(i) Acts of compulsory pilots	44
(ii) When the ship is in control of charterers	46
II. CONCLUSION	47
CHAPTER SIX	
I. ENFORCEMENT OF MARITIME LIENS AGAINST GOOD FAITH PURCHASERS WITHOUT NOTICE	48
INTRODUCTION	48
(a) Case law	48
(b) A critical analysis of the common reasons for the enforcement of maritime liens against bona fide purchasers	50
(i) Inchoate nature of the maritime liens	50
(ii) Security	50
(iii) Public policy	51
(c) South Africa's Constitutional position in relation to the enforcement of maritime liens against innocent purchasers	52
(d) South Africa's position in relation to the enforcement of maritime liens against good faith purchasers and the 1993 Maritime Liens Convention	57
II. CONCLUSION	58
CHAPTER SEVEN	
I. RECOMMENDATIONS	59
(a) Registration of maritime liens	59
(b) Limitation of the maritime lien's indelibility	62
II. CONCLUSION	65
BIBLIOGRAPHY	66

CHAPTER ONE

I. INTRODUCTION

Since their inception, maritime liens have been a very complex, and much disputed and debated concept of admiralty law.¹ The numerous theories and sources advanced to explain their existence are proof that the concept of maritime liens is indeed ‘shrouded in obscurity’.² This dissertation will therefore not focus on locating the precise sources of maritime liens but will extract the few that have been commonly accepted as sources of maritime liens (i.e. personification, procedural and conflict theories) and establish whether these can be used to justify the enforceability of maritime liens against innocent purchasers. Prior to examining this issue, it is deemed necessary to first set out the reasons for the writer’s interest in this topic.

The Bold Buccleugh,³ a leading case on the topic of maritime liens, established that maritime liens represent ‘a legal charge against a ship for a debt unpaid by the owner for service rendered to the ship or a tortious act committed by the ship’.⁴ For example, if salvage services are given to save the ship and it leaves the port without paying the salvor his fees, that ship will have a salvage lien attached to it. If the ship owner fails to pay that salvage debt, the claim can be enforced against the ship by means of an arrest in rem.⁵ Maritime liens are peculiar in that unlike most liens, which are validated by possession, they do not require possession. For instance, if A (a salvor in Panama) provides salvage services to B’s ship and for some reason, B cannot pay A his salvage fees, A can let the ship go without fear of losing his lien against it because possession is not a requirement for maritime liens.

Assume now that the ship thereafter sails to Durban and B offers to sell his ship to C. C has no idea that the ship left a salvage debt in Panama and B assures him that there are no encumbrances or maritime liens against the ship, so he accepts the offer and buys the ship. In such a case, the law of maritime liens, as it currently stands, provides that A (the lien holder) has a lien against the ship that ‘travels with the ship and is not extinguished by transfer of

¹ Nigel Meeson & John A Kimball *Admiralty Jurisdiction and Practice* (2011).

² Paul Macarius Hebert ‘The Origin and Nature of Maritime Liens’ (1929-1930) 4 *Tul.L.Rev.* 381 at 382 (I).

³ *Harmer v Bell The Bold Buccleugh* (1852) 7 Moo.P.C.267; 13 ER 884 (‘*The Bold Buccleugh*’).

⁴ *Ibid* at para 284 -285 per Sir John Jervis.

⁵ Section 3(4)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (‘AJRA’).

ownership'.⁶ This is so regardless of the fact that C did not know about the salvage lien because maritime liens are secret and invisible.⁷ The only time that C will become aware of this lien is when A decides to arrest the ship and C's only option at that time will be to give the arresting creditor security for the debt.⁸ This effectively means that C (a bona fide purchaser for value without notice) is now burdened with having to satisfy a debt which was created by B.⁹

This raises a number of issues or concerns that call for a critical analysis of maritime liens and this dissertation will address some of those issues. The main objective will be to closely scrutinise the secret nature of maritime liens and the negative impact this might have on an innocent purchaser for value without notice from a South African law perspective but drawing common features and differences from English and American law.

In achieving this objective, the structure of the dissertation will be as follows:

Chapter two will set out the nature of maritime liens as established by various authors, case law and legislation (foreign and domestic) and also set out the characteristics and types of maritime claims recognised as maritime liens under South African admiralty law. The reason behind outlining the characteristics of a maritime lien is to highlight its difference when compared to other types of liens. These differences are outlined in chapter three. With regards to identifying the specific maritime claims, the aim is to indicate that maritime claims with maritime lien status under South African Admiralty law are more limited than those recognised in other countries. In addition to identifying those maritime claims, the reasons behind giving them maritime lien status will also be set out with the aim of (at a later stage in Chapter 6) weighing those reasons against the property rights of a bona fide purchaser.

Chapter four will discuss the origins of this very unique concept, briefly setting out the possible sources from which it was derived and going on to discuss the theories advanced to explain their enforcement. Thereafter, chapters five and six will discuss the enforceability of maritime liens, in general as well as against the innocent buyer, focusing particularly on South African law in comparison with English and American law in order to ascertain whether there are any differences or similarities. Depending on the conclusion reached in the

⁶*The Bold Buccleugh supra* note 3 at 284-285.

⁷*Ibid*

⁸ Section 3(10)(a) of AJRA.

⁹See similar examples explained in Peter Heathcote 'Maritime liens: How to Protect the Innocent Purchaser' (2003) 17 *MLAANZ Journal* at 125.

preceding chapters, chapter seven will propose recommendations that may be used to address the shortcomings (if any) of the enforceability of liens against innocent purchasers.

CHAPTER TWO

I THE NATURE OF MARITIME LIENS

The lien is not an easy legal concept to define, and even more so the maritime lien. In fact, according to *The Father Thames*¹ the maritime lien is ‘more easily recognised than defined’. This is due to the fact that most jurisdictions have avoided or ‘shied away’ from giving the concept a precise definition.² The three international conventions³ on maritime liens have also refrained from defining the maritime lien. In *The Fidias*⁴ the court, referring to South Africa’s Admiralty Jurisdiction Regulation Act 105 of 1983, held that:

‘The Legislature, for some reason or another, deliberately chose not to define the term “maritime lien”. That can only mean that the Legislature was content to leave it to the English Law to fix the limits and the contents of this legal phenomenon.’

Shaw⁵ indicated that ‘it is perhaps fortunate that the Legislature has refrained from attempting to deal with the intractable subject of the definition of a maritime lien’. This non-existence of a precise definition leaves one with no option but to resort to case law in order to ascertain the meaning of a maritime lien.

a) Definition

The first attempt to define a maritime lien was made by Justice Story in *The Nestor*⁶ where he defined it as a privilege which gives the privilege holder a right in the property (ship or cargo) of another. However most authors⁷ are of the view that *The Bold Buccleugh*⁸ was the first case that gave a precise definition of the maritime lien. In this case, Sir Jervis defines the maritime lien as follows:

‘A claim or privilege upon a thing to be carried into effect by legal process...this claim or privilege travels with the thing, into whosoever’s possession it may come. It

¹*The Father Thames* [1979] 2 Lloyd’s Rep 364 at 368.

²Douglas J Shaw *Admiralty Jurisdiction and Practice* (1987) at 86.

³International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926, 1967 and the International Convention on Maritime Liens and Mortgages 1993. These will be discussed further in chapter seven.

⁴*Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D) at 717 I-J.

⁵Shaw *op cit* note 2.

⁶*The Nestor* (1831) 18 Fed .Cas 9 at 83.

⁷Edward F. Ryan ‘Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective’ (1968) 7 *Ontario L. Rev.* 173; Neil Hutton ‘The Origin, Development, and Future of Maritime Liens and Action In Rem’ (2003) 28 *Tul. Mar. L.J.* 81 and John K. Beach ‘Relative Priority of Maritime Liens’ (1924) 33 *The Yale Law Journal* 841.

⁸*Harmer v Bell The Bold Buccleugh* (1852) 7 Moo PC 267, 13 ER 884.

is *inchoate* from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.’⁹ [Emphasis added]

Ryan acknowledges that this is not the case that gave birth to the concept of the maritime lien but states that it is the first case that ‘unveiled this concept and placed it in full view’.¹⁰ He further states that ‘prior to *The Bold Buccleugh* what did exist was a body of jurisprudential clay that awaited the touch of the maker to animate it as a viable entity’¹¹ and he notes that the difference between *The Nestor* and *The Bold Buccleugh* is more real than apparent:

‘Justice Story spoke of maritime liens only in the sense of a different legal right that was peculiar to the Admiralty law. The Privy Council, on the other hand, seized both the term and its definition and declared that the maritime lien was the very foundation of the whole Admiralty jurisdiction, and applied without distinction to collision, salvage, bottomry and seamen’s wages. They took Story’s phrase and in it found the daylight towards which the Admiralty had been groping for two hundred years.’¹²

The Bold Buccleugh is the first case that sheds light or gives more flesh to the complex concept of the maritime lien. However some argue that it fails to reflect the principal points of the maritime lien, ‘its essence, establishment, subject matter and efficiency, placing too much emphasis on procedure’.¹³ The most enlightening definition of the maritime lien can rather be found in *The Tolten*¹⁴ where Scott LJ held the following:

‘The essence of the ‘privilege’ was and still is, whether in Continental or in English law, that it *comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the ‘privileged’ creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages.*’ [Emphasis added]

⁹ *Ibid* at para 284-285.

¹⁰ Ryan *op cit* note 7 at 199.

¹¹ *Ibid* at 197.

¹² *Ibid* at 200.

¹³ Wu Huanning ‘China and Maritime Law’ (1988) 5 *MLAANZ Journal* 38 at 39.

¹⁴ [1946] P. 135 (C.A.) at 150.

This definition is said to be the most enlightening in that, Scott LJ fully explains the nature of the maritime lien whilst Sir Jervis's definition is short of the first stage in the development of the maritime lien, namely, its establishment. Sir Jervis's definition only addresses the enforceability and the effect of maritime liens.

In *The Ripon City*¹⁵ Barnes J suggested that a maritime lien is 'a right acquired by one over a thing belonging to another- ius in res aliena' but Marias J in *The Andrico Unity*¹⁶ cautioned against this language and said that:

'...the special characteristics of a maritime lien should not be taken too literally and should not be allowed to obscure the fact that it is not in truth a jus in re aliena, nor is it a subtraction from the absolute property of the owner in the ship. It is a concept which is sui generis and its reason for existence is to improve the holder's prospect of his claim being paid. It is therefore designed to secure payment and to confer some priority when there is competition for payment.'

Subsequent to discussing the nature of maritime liens, and establishing that it is not an easy concept to define it seems logical to discuss the characteristics of a maritime lien and ascertain if they can shed light in understanding this complex concept.

b) The characteristics of a maritime lien

The main distinctive feature of the maritime lien is that, unlike common law liens, its existence does not depend on possession of the res.¹⁷ The maritime lien is not possessory and thus a maritime lien holder who allows the ship to sail without recovering his debt cannot be said to have waived his lien.¹⁸ The law of maritime liens is structured upon the fact that 'a ship is a profit earning machine and has no value when lying idle'¹⁹ therefore possession of the vessel would hinder the vessel from earning freight required to pay the lien holder.²⁰

¹⁵ *The Ripon City* (1897) P226.

¹⁶ *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 821D-F.

¹⁷ Hayden RP & Leland KC 'Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens' (2004) 79 *Tul. L. Rev.* 1227 at 1233, *The Bold Buccleugh supra* note 8 at 284.

¹⁸ *Ibid.*

¹⁹ Ryan *op cit* note 7 at 188.

²⁰ Griffith Price *The Law of Maritime Liens* (1940) 115-25 at 117.

Another essential feature of the maritime lien is that it attaches to the res as soon as the claim giving rise to it occurs²¹ and remains attached like a ‘leech to human skin’ secretly travelling with it through the changes of ownership.²²

Its peculiarity also lies in the fact that it is inchoate until it is enforced through an action in rem and upon enforcement relates back to the period when it attached.²³ According to Justice Story:

‘Wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem... A maritime lien is the foundation of *all proceedings in rem*- a process to make perfect a right inchoate from the moment the lien attaches, and whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found equally true that in all cases where a proceeding in rem is a proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whosoever’s possession it may come.’²⁴ [Emphasis added]

It is submitted that Justice Story is correct in saying that a maritime lien is enforced through an action in rem and that ‘in all cases where a proceeding in rem is a proper course, there a maritime lien exists’. However it is important to note that as much as this may have been true of American law then and may very well still be the case now,²⁵ South African law holds a different position in that one does find instances where a claim that is not a maritime lien is enforced through an action in rem. In terms of S3 (4) of the Admiralty Jurisdiction Regulation Act: ‘a maritime claim may be enforced by an action in rem if (a) the claimant has a maritime lien over the property to be arrested; or (b) the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned’. This section shows that in South Africa, an action in rem is not limited to maritime liens only but it extends to other maritime claims as well.

²¹ Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2012) at 252.

²² Christopher Hill *Maritime Law* 6th ed (2003) 119.

²³ D Rhidian Thomas *Maritime Liens* (1980) para 12-13.

²⁴ *The Nestor supra* note 6.

²⁵ See James Allsop ‘Maritime Law- The Nature and Importance of its International Character’ (2009) 34 *Tul. Mar. L. J.* 555 at 574-576 and 581

South African law is derived from English admiralty law and in England the Admiralty Court Acts of 1840 and 1861 included a number of maritime claims which were not necessarily maritime liens but could be enforced through the action in rem.²⁶

However, as indicated earlier, for the purposes of this dissertation, the most relevant characteristic of the maritime lien is that it is secret in nature. In order for one to hold a lien over a ship there is no formality or procedure that has to be followed, it attaches automatically and need not be recorded or registered. Therefore it may well be unknown to third parties (creditors and innocent purchasers) and more often than not, this operates to their prejudice.²⁷

Another characteristic of the maritime lien is that it is a secondary right or interest and it is 'indelible'. The maritime lien always goes hand in hand with the principal claim and its extinction is a consequence of a few specific occurrences, namely, destroyed res; judicial sale; payment and unreasonable delay.²⁸

One further characteristic of a maritime lien is that it enjoys a relatively high priority with regards to ranking but this only becomes an issue in a case where the proceeds of the sale of an arrested vessel are insufficient to satisfy all maritime claims and this is not an infrequent occurrence.

c) Claims to which a maritime lien may attach

The maritime lien is *sui generis*²⁹ in that, despite the fact that the 'underlying claim may arise *ex delicto*, *ex contractu* or *quasi ex contractu*,' in contrast to most legal concepts, the maritime lien 'arises *ex lege* as an automatic incident of a particular relationship between the parties or the occurrence of particular events'.³⁰ The problem that arises is that there is no international uniformity with regards to the precise acts and events that give rise to maritime liens; they differ from one jurisdiction to another.

²⁶ DG Scott 'Admiralty Jurisdiction in South Africa Prior to 1983' (2002) 8 *Fundamina* 204 at 208; Gys 'Admiralty Jurisdiction in South Africa' (1982) 30 *Acta Juridica* at 35 and Allsop *op cit* note 25 at 576.

²⁷Graham Bradfield 'The Nature and Scope of the Contemporary Maritime Liens in South African Admiralty Law' (2009) LLM Dissertation available at www.uct.ac.za at para 1.

²⁸Thomas, *op cit* note 23 at para 13; Huanning *op cit* note 13 at 42; Jeremy Browne 'The Extinction of Maritime Lien' 2003 *LMCLQ* 361 at 362.

²⁹*The Andrico Unity supra* note 16.

³⁰Hofmeyr, *op cit* note 21 at 280.

For example, ‘according to United States law, maritime liens arise from a far wider range of maritime claims, both in contract and in tort’.³¹ Namely:

1. ‘Seaman’s claims for wages
2. Salvage
3. Tort
4. General average
5. The preferred ship mortgage
6. Supplies and repairs
7. Towage, wharfage, pilotage, stevedoring etc.
8. Cargo damage caused by improper loading, stowage, custody etc.
9. Ship’s claims against cargo for unpaid freight etc.
10. Charter-parties
11. Bottomry and respondentia bonds’³²

On the other hand, in jurisdictions that share a common heritage with English maritime law, such as Australia³³ and South Africa,³⁴ the only maritime claims recognised as conferring maritime liens are the following:

1. Claims for salvage remuneration payable to a person who has rendered assistance to a ship in danger or otherwise at risk;³⁵
2. Collision damage caused by a ship;³⁶
3. Seaman’s wages;³⁷
4. Masters wages and master’s disbursements in the course of a voyage;³⁸

³¹*Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) at 331 H-I.

³² Grant Gilmore & Charles L. Black, Jr *The Law of Admiralty* 2nd ed (1975) at 627 – 33.

³³*The Acrux* [1965] P 391, 403.

³⁴*The Andrico Unity supra* note 16.

³⁵ Thomas, *op cit* note 23 at para 6.

³⁶*The Bold Buccleugh supra* note 8 at 283.

³⁷*The Neptune* (1842) 166 ER 81.

5. Bottomry and respondentia;³⁹

Each of these will be discussed below but prior to this discussion it should be noted that in terms of section 6 (1) of the Admiralty Jurisdiction Regulation Act⁴⁰ South African courts must apply the law which the High Court of Justice in the United Kingdom in the exercise of its jurisdiction would have applied as at 1 November 1983.⁴¹

(i) Salvage

Section 1(1) (k) of the South African Admiralty Jurisdiction Regulation Act⁴² (AJRA hereinafter) provides that the Supreme Court can exercise admiralty jurisdiction for salvage claims.

Initially, English law recognised salvage claims that occurred on the high seas as the only salvage claims that could give rise to maritime liens.⁴³ Section 6 of the Admiralty Court Act⁴⁴ extended the salvage jurisdiction to include salvage within the territorial waters. However, in order to acquire a maritime lien, the underlying claim has to meet the pre-requisites of a salvage claim; namely, the property salvaged must be in imminent danger, the salvor must render his services with the aim of saving the res and the services must be rendered voluntarily and not pursuant to a contractual or legal duty.⁴⁵

In *The Cleopatra Dream*⁴⁶ it was held that:

‘The rationale for not allowing a salvage reward to a salvor acting under a pre-existing duty to render assistance, whether the duty arises from a contract or otherwise, is that

³⁸*The Ever Success* (1999) 1 Lloyd’s Rep 824.

³⁹Hofmeyr, *op cit* note 21 at 166.

⁴⁰S6(1) reads: Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall:

- a. with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
- b. With regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

⁴¹In *The Andrico Unity supra* note 16 at 339 it was held that reference to the High Court of Justice of the United Kingdom in s6(1)(a) of AJRA must be read as referring to the Supreme Court of England and Wales.

⁴²Admiralty Jurisdiction Regulation Act 105 of 1983.

⁴³Hofmeyr, *op cit* note 21 at 167.

⁴⁴Admiralty Court Act of 1840.

⁴⁵*Transnet Ltd t/a National Ports Authority v The MV Cleopatra Dream and Another* 2011 3 All SA 279 (SCA) at para 30.

⁴⁶*Ibid*

such a person should not be encouraged to neglect his duty and, by doing so, cause or contribute to the danger necessitating salvage. Nor should the (prospective) salvor be tempted to refuse to render services falling within his duty in order to obtain a salvage reward.’⁴⁷

(ii) Collision damage caused by a ship

English law addressed the issue of whether a maritime lien arises from collision damage in *The Bold Buccleugh*⁴⁸ where the court held that damage creates a lien on the ship causing the collision and this decision was endorsed in the case of *Currie v M Knight*.⁴⁹ The damage lien includes both the damage to property as well as personal injury so long as the ship was the ‘instrument of damage’.⁵⁰

(iii) Seaman’s wages

Thomas⁵¹ is of the view that this lien may have been influenced by considerations of public policy and the special sympathy extended by the court to the common seaman. One justification for granting seamen a lien against the ship is because of ‘the idea that they have provided service to the ship itself, not necessarily to the owner or charterer’.⁵² Tetley⁵³ writes that ‘the seamen’s lien is a true traditional maritime lien’. This is so because for wages liens are regarded as ‘sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages’.⁵⁴

This lien was introduced by s10 of the Admiralty Act of 1861 and according to Hofmeyer, wages encompass:

‘whatever could fairly be said to have been earned by the seaman’s services or whatever the seaman received in the course of such service as recompense for the

⁴⁷ *Ibid* at para 31.

⁴⁸ *The Bold Buccleugh supra* note 5 at 284.

⁴⁹ *Currie v M Knight* [1897] AC 38 and Bradfield *op cit* note 27 at para 2.1.

⁵⁰ Hofmeyer, *op cit* note 21 at 156.

⁵¹ Thomas, *op cit* note 23 para 302.

⁵² John Lane ‘Should Australian Courts Accept or Refuse the Aid of Private International Law When Considering to Enforce Foreign Maritime Lien?’ (2009) *eLaw Journal: Murdoch University Journal of Law* 16(1) at 34. See *The Tacoma City* [1991] 1 Lloyd’s Rep 330; *The Ruby (No 2)* [1898] P 59; *The Chieftain* (1863) 167 ER 316.

⁵³ William Tetley *Maritime Liens and Claims* 2nd ed (1998) at 271.

⁵⁴ *The Madonna D’Idra* (1811) 1 Dods 37, 40; 165 ER 1224 at 1225; See Michael Ng ‘The Protection of Seafarers’ Wages in Admiralty: A Critical Analysis in the Context of Modern Shipping’ (2008) 22 *MLAANZ* at 134.

execution by the seaman of his or her duties or the benefits which accrued to the seaman by reason of his or her employment.’⁵⁵

Section 1 (1) (s) of AJRA read with s6 (1) leads to the conclusion that since English law confers maritime lien status on a wages claim,⁵⁶ a claim falling under s1 (1) (s) will accordingly have the protection of a maritime lien in South African law.⁵⁷

(iv) Master’s wages and disbursements

South African and English law recognise a maritime lien in respect of master’s wages and disbursements provided that the services or disbursements were for benefit of the vessel and within scope of master’s (ostensible) authority.⁵⁸ Section 41 of the English Merchant Shipping Act 1995 clearly stipulates that disbursements do not include disbursements made on account of charterers as opposed to the shipowners.⁵⁹

II CONCLUSION

This chapter has discussed the nature of the maritime lien and it has been established that it is not an easy legal concept to define. The courts have advanced several definitions and each is not without flaws, so, as it has been the case for years, the maritime lien is still more easily recognised than defined. In relation to the characteristics of maritime liens, there seems to be unanimity in that it does not depend upon possession and that it can only be extinguished when the res ‘is destroyed, sold in a judicial sale, laches (unreasonable delay), satisfaction of the underlying claim, or by the consent of the lien holder’.⁶⁰ However, the issue of which claims give rise to maritime liens has not enjoyed unanimity. In fact, courts have grappled with this issue for years⁶¹ and many academics have dealt with the topic⁶² but there is still no uniformity as to which maritime claims enjoy maritime lien status.

⁵⁵Hofmeyr, *op cit* note 21 at 157

⁵⁶ Section 1(1)(s) provides : maritime claim means any claim for, arising out of or relating to: the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman.

⁵⁷*Mt Argun; Master and Crew of the Mt Argun v Mt Argun* 2003 (3) SA 149 (C).

⁵⁸Hofmeyr, *op cit* note 21 at 161.

⁵⁹*The Castlegate* [1893] A.C 38.

⁶⁰Jeremy Browne ‘The Extinction of Maritime Liens’ (2003) *LMCLQ* 361 at 365.

⁶¹*Ocean Ship Supply, Ltd. v. MJV Leah* 729 F.2d 971, 1984 AMC 2089 (4th Cir. 1984) ; *Bankers Trust Int'l, Ltd. v. Todd Shipyards Corp. (The Halycon Isle)* [1980] 2 Lloyd's Rep. 325, 330 ; *Transol Bunker B.V. v. M/V Andrico Unity*, 1989 (4) S.A. 325, 354 , *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D).

⁶² Gys Hofmeyr . ‘Admiralty Jurisdiction in South Africa’ (1982) 30 *Acta Juridica*; Hilton Staniland ‘Should Maritime Liens be Recognised’ (1991) *SALJ* 293; William Tetley ‘Maritime Liens in the Conflict of Laws’ (1994) 6 *U. S. F. Mar. L. J.* 1; Booyesen, Hercules ‘The Recognition of Foreign Maritime Liens in South African Law: A Final Word by the Appellate Division’ (1991) 40 *International and Comparative Law Quarterly* 151-162.

CHAPTER THREE

I. ENFORCEABILITY OF COMMON LAW LIENS, MARITIME LIENS AND THE STATUTORY RIGHT IN REM CONTRASTED

The beginning of wisdom in the law of maritime liens is that maritime liens and land liens have little in common. A lien is a lien is a lien, but a maritime lien is not.

Grant Gilmore & Charles L.Black, Jr *The Law of Admiralty* 2 ed 1975

In an attempt to understand the unique concept of a maritime lien, its characteristics were discussed. In order to shed more light on this matter, this chapter will compare and contrast maritime liens with common law liens, and the statutory right in rem with the aim of extracting common features and differences.

At common law, a lien is defined as, ‘a right to retain possession of a chattel pending the discharge of an outstanding obligation incurred in respect of services rendered to the chattel’.¹ Common law liens² are distinguishable from maritime liens in that a creditor can retain property only if he is in possession of it and if he surrenders possession, he loses the right of lien. For example in *Singh v Santam Insurance Ltd*,³ Singh owned a motor car that was damaged in an accident while being driven by Muthusamy who was insured with Santam. Santam instructed a panel beater to carry out the necessary repairs to the car, for which Santam paid. Then it was discovered that Muthusamy had not paid premiums on his insurance policy. Consequently Santam cancelled the policy and took possession of the motor car. Singh instituted a claim for return of the car on the ground that she was the owner. Santam countered on the basis that it had acquired a lien over the car because it had spent money to repair it.

The court rejected Santam’s argument, explaining that a lien is acquired only if the person has the property in question in his possession. The repairs had been carried out and paid for before Santam acquired possession of the motor car, which meant that Santam could not have

¹ D Rhidian Thomas *Maritime Liens* (1980) at para 3.

² South African law recognises a number of common law liens, there are two categories (1) debtor-creditor liens (2) enrichment liens, e.g. (i) carrier’s lien -the carrier has a lien on the goods he or she carried for the payment of freight on those goods. In order to exercise this lien the carrier is entitled to rent premises in order to store the goods. The lien is dependent on possession, and once the carrier has given up possession, he or she loses the lien. *Van den Bout v Van den Berg Transport (Pty) Ltd t/a Frasers International World Wide Removals* 1978 (3) SA 529 (T), (ii) contractor’s lien - upon due and final completion of the work the contractor may legitimately refuse to surrender possession if he or she has not been properly paid for his or her work.

³*Singh v Santam Insurance Limited* 1997 (1) SA 291 (SCA).

acquired a lien. The court emphasised that ‘what the law requires is that outlay should occur while the party claiming is in possession of the subject matter’.⁴

(a) Common law liens

In contrast to maritime liens, common law liens have the following characteristics:

- (i) In terms of ranking among competing liens, the rule that applies is “first in time is first in right”.⁵ This means that the creditor whose lien attached and was perfected first, will be the first one to receive a share of the proceeds of the sale.
- (ii) It is a common law right conferring by contract a right of retention of the property already in the lien holder’s possession.⁶
- (iii) Jackson⁷ referred to common law liens as a remedy in that :
 ‘It is a method of asserting a claim based on grounds entirely independent of the “lien” (e.g. debt), and it creates a right in that it may translate a claim enforceable only against the other party into an interest enforceable against a third party (creditors or purchasers).’
- (iv) The lien holder may enforce his lien by legal process or through extra legal action.
- (v) The creditor is empowered to sell the res in order to satisfy his debt.

A maritime lien can be distinguished from the common law lien in that:

- (i) Priority among competing liens of the same type is determined by the time of their attachment i.e. ‘last in time is first in right’⁸
- (ii) It is not dependent on possession.⁹
- (iii) In contrast to some common law liens e.g. a landlord’s hypothec, the lien is used to satisfy a debt against the arrested vessel. In other words, a maritime lien cannot be used to assert a claim based on grounds entirely independent of the lien.
- (iv) The maritime lien can be enforced only by the admiralty court acting in rem.

⁴*Ibid* at 295.

⁵ Grant Gilmore & Charles L.Black, Jr *The Law of Admiralty* 2 ed 1975 at 586.

⁶ D.C Jackson *Enforcement of Maritime Claims* 4 ed (2005) at 529.

⁷*Ibid*.

⁸ Gilmore *op cit* note 5 at 588.

⁹*The Tervaete* [1922] at 259; Raymond P Hayden ‘The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens’ (2005) 79 *Tul.L.Rev* 1227.

(b) Common law liens and third parties

In contrast to maritime liens, common law liens do not form the basis of an independent claim or action. They are used as a defence against an owner who is claiming her property back with the *rei vindicatio*.¹⁰ The lien holder refuses to return the res and holds on to it until the outstanding debt is paid. However, it is a discretionary remedy so the court may decide whether or not to recognise the lien.¹¹

Debtor -creditor liens are only enforceable against other contracting parties, whereas an enrichment lien, being regarded as real in nature, initially gave an absolute right to the lien holder.¹² The holder of the real lien could therefore enforce his lien against the owner (even if the owner was unaware of the lien) and also against all other third parties.¹³ In the case of *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons*,¹⁴ 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. However, this position was abolished in the case of *Buzzard Electrical v 158 Jan Smuts Avenue*,¹⁵ where it was established that a subcontractor could not in any circumstances sue the owner in enrichment and did not have a lien against the owner.¹⁶

In summary, contrasting maritime liens with common law does not shed much light upon the unique concept of maritime liens. This is so because unlike maritime liens, common law liens, as mentioned earlier are not possessory in nature; they are a defence against an owner who wants to claim his property and in so far as property rights of third parties are concerned, this is not really a concerning issue with common law liens because such parties have notice of the lien since the property is in the creditor's possession. This therefore confirms Gilmore & Black's assertion in saying that 'a lien is a lien is lien but a maritime lien is not'.

¹⁰ AJ van der Walt & GJ Pienaar *Law of Property* 6th ed at 283.

¹¹ *Ibid.*

¹² TJ Scott 'Lien' in *LAWSA Vol 15(2)* 2nd ed at paras 62 and 71.

¹³ *Ibid.*

¹⁴ 1970 3 SA 264 (A).

¹⁵ *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 (4) SA 19 (A).

¹⁶ Daniel Visser *Unjustified Enrichment* (2008) at 623.

(c) The Landlord's hypothec

Another security interest worth comparing to maritime liens is the landlord's hypothec. In terms of the landlord's hypothec if the goods of the lessee on the leased property are not sufficient to secure the lessor's claim, goods of other persons on such premises may, subject to certain conditions, fall under the hypothec.¹⁷ The said conditions were set out in the *Bloemfontein Municipality v Jackson Ltd*¹⁸ case where the court stated that:

‘When goods belonging to a third person are brought on to the leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of ownership to the landlord, fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's hypothec, and liable to attachment.’

In *Barclays Western Bank Ltd v Dekker and Another*¹⁹ the court said that implied consent can be inferred in an instance where the owner of the goods failed to inform the lessor of his ownership of the goods when he could reasonably be expected to have done so. McLennan²⁰ is critical of this and is of the view that since there is no contractual privity between the lessor and the third party therefore no rational legal basis exists for allowing the lessor to exercise his hypothec over a third party's property. McLennan further argues that implied consent, fault and appearance cannot be said to be viable explanations for such imposition.²¹ He opines thus, ‘What we are dealing with is an arbitrary- and highly anomalous- rule of ancient law, which continues to exist in a socio economic environment that the ancients would have dreamed of.’²²

Fortunately, the legislature has introduced legislation that offers some form of protection to third parties; section 2(1)(b) of the Security by Means of Movable Property Act²³ provides

¹⁷ AJ Kerr *The Law of Sale and Lease* 3 ed (2004) at 394

¹⁸ 1929 AD 266 at 271

¹⁹ 1983 (3) SA 220 (D) at 222-3

²⁰ JS McLennan ‘A Lessor's Hypothec over the Goods of Third Parties-Anomaly and Anachronism’ (2004) 16 *S. Afr. Mercantile L.J.* 121 at 123

²¹ *Ibid*

²² *Ibid*

²³ 57 of 1993

that, ‘movable property to which an instalment sale agreement as defined in section 1 of the Credit Agreement Act (1980), relates, shall not be subject to a landlord’s tacit hypothec.’

Therefore, in conclusion it can be said that even though it permits the attachment of goods belonging to third parties, such attachment is somewhat regulated in that there are certain conditions that have to be met prior to the attachment. In addition to that the legislature has intervened and offered some form of protection to innocent third parties whereas in the case of maritime liens, such regulations do not exist and all that is required is for the person intending to proceed in rem, to have a maritime lien against the ship.

(d) Statutory liens

The AJRA provides for another type of lien, namely, a statutory lien. A statutory lien arises at the time of the issue of the writ of arrest and not from the time the ship causes damage or when services are rendered to the vessel.²⁴

Section 3(4)(b) of the AJRA provides that a maritime claim may be enforced by an action in rem if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned. This section discredits Justice Story’s assertion in *The Nestor* where he said that the maritime lien is the foundation of all proceedings in rem.²⁵ In fact Staniland²⁶ has tackled the question of ‘whether s 3(4) creates a numerous clausus so that unless a claim falls within the description contained in s 3(4) (a) or s 3(4) (b) no action in rem is maintainable’ and in answering that question he quoted Bristow J in *Dias Compania Naviera SA v MVAL Kaziemah*²⁷ who held that since s 3(4) does not contain the word ‘only’, there is no numerous clausus. The case considered whether a shipowner could arrest his own ship to enforce a vindicatory action.

In supporting this assertion, Bristow J said that the converse would

‘...lead to the startling proposition that the buyer with a right to institute an action in rem for an order that he be entitled to delivery and thus the ownership of a ship, but a shipowner could not likewise institute an action in rem to defend his title and to claim

²⁴Drobning ‘International Encyclopedia of Comparative Law, Instalment 12’ (1981) at 111.

²⁵*The Nestor* (1831) 18 Fed .Cas 9 at 83.

²⁶Hilton Staniland ‘Admiralty Law’ 1994 *Ann. Surv. S. African L.* 637 at 644.

²⁷1994 (1) SA 570 (D) at 574 D-F.

possession of his own ship since such a claim does not fall within either s 3(4) (a) or s 3(4) (b).’²⁸

His view was indorsed by Howie J in *Great River Shipping Inc v Sunnyface Marine Ltd*²⁹ then he observed that if this section created a numerous clausus:

‘It could mean leaving a shipowner to attempt vindication by way of an action in personam against a defendant who, having been traced to his domicile across the world, could overcome a vindictory order by simply keeping the ship out of the reach of the claimant.’³⁰

In relation to the requirement in s 3(4) (b), Howie suggests that it could ‘lead to the effect that the ship to be arrested must not be the property of the claimant and would lead to another absurdity since no arrest in rem would be possible if neither rival litigant were to qualify as owner for the purpose of s 3(4) (b)’.³¹ Staniland says that not limiting the action in rem device to claims where the claimant is not the shipowner is in line with English law which also allows an owner to arrest his ship in rem.³²

With regards to the enforceability of a statutory lien, the traditional English law position was that a statutory lien did not travel with the ship into the hands of a third party purchaser.³³ However, this position has changed; whereas initially the statutory arrest in rem was available only in relation to property when the owners of the property are liable in personam, the current position is that enforceability of the lien against persons other than the shipowner liable in personam depends on the nature of the claim.³⁴

Thus, in the case of *The Monica S*³⁵ cargo owners issued a writ in rem against shipowners in November 1966, describing the ship proceeded against as the Monica Smith and claiming damages for breach of a contract of carriage of goods. On or before 4 January 1967, the shipowners sold the ship and transferred her to the defendants, her name being changed to Monica S. On 9 February 1967, the writ was amended, the description of the ship being

²⁸*Ibid.*

²⁹1994 (1) SA 65 (C).

³⁰*Ibid* at 69G.

³¹*Ibid* at 69I.

³² Hilton *op cit* note 17.

³³ Drobning *op cit* note 16.

³⁴ Jackson *op cit* note 6 at 496-499, a statutory arrest in rem is available in England if the claim is within s20(2)(e)-(r) of the Supreme Court Act 1981.

³⁵*Owners of Cargo Laden on Ship Monica Smith v Owners of Ship Formerly Monica Smith Now Monica S* [1967] 3 All ER 740.

altered to ‘the ship Monica Smith now known as Monica S’ and the description of the owners being similarly altered; the writ was served on the ship on the same day (9 February). At the end of March, 1967, the ship was sold again. The defendants applied for an order setting aside the amended writ or service of it and for a declaration that no lien or charge or other right against the Monica S arose by reason of the issue of the writ or service of the amended writ. The court held that the defendants were not entitled to the relief sought on the motion because the ‘change of ownership of the ship after the issue of the writ in rem but before service or arrest did not defeat a statutory right of action in rem’.³⁶

Mandaraka-Sheppard³⁷ comments on the effect of *The Indian Grace*³⁸ on *The Monica S*. The *Indian Grace* held that the action in rem is effected at the time of service or arrest. This finding has the consequence of preventing a claimant who has issued a writ in rem (but has not received security) from receiving an order to arrest the ship if a foreign court has adjudicated on the matter. Mandaraka-Sheppard further contends that this judgement will only affect the claimant’s right to proceed in rem in so far as it relates to a cause of action that has been adjudicated upon in a foreign court. Therefore she argues that ‘if the arrest is made only for the purpose of obtaining security to satisfy the judgement, the principle of *The Monica S* is not undermined.’³⁹

Mandaraka-Sheppard then distinguishes the two cases as follows:

‘*The Monica S* dealt with the issue of the accrual of a security interest in the ship from the issue of the in rem proceedings, whereas the *The Indian Grace* dealt with personal jurisdiction over the relevant defendant created from the time of service of the in rem proceeding for the purpose of res judicata.’⁴⁰

She considers what the effect of the judgments would be in a scenario where the ship has been sold after the claim arose and the writ was issued, but before the writ was served on the ship. She says that:

³⁶ *Ibid* at 759.

³⁷ Mandaraka-Sheppard ‘*Modern Admiralty Law: With Risk Management Aspects*’ 2001 at 94. (Please note that there the latest edition is the 2007 2 ed but the writer did not have access to that edition)

³⁸ *Republic of India v India Steamship Co Ltd (No 2)* 1998 1 Lloyd’s Rep 1.

³⁹ Mandaraka-Sheppard *op cit* note 37.

⁴⁰ *Ibid* at 95.

‘The effect of *The Indian Grace* is to make the previous owner only, who would be interested in defending the claim, bound by the proceedings personally from the time of the service, and not the bona fide buyer of the ship.’⁴¹

Mandaraka- Sheppard’s discussion of these two cases supports Jackson’s view with regards to the enforceability of statutory lien against third parties, that is, it may be enforced but such enforceability will depend on the nature of the claim.⁴²

II. CONCLUSION

In summary, this chapter has established that a lien has little in common with common law liens and statutory liens. Maritime liens are peculiar in that they attach to the property and enforced against the res, in other words, they exist apart from the ship’s ownership.⁴³ The lien ‘is not a security interest arising from the personal obligation of the vessel’s owner or operator under a contract, but instead the vessel itself owes obligations that may be breached’.⁴⁴ Moreover, maritime liens do not require possession and their ranking system is exclusive to admiralty law.

With regards the enforceability of common law liens, it has been determined that the mere use of the word ‘enforceability’ is actually misleading because common law liens are not necessarily enforced but are used as a defence against owners who are trying to vindicate their property.⁴⁵ The landlord’s hypothec on the other hand has a lot in common with the maritime lien because it can also be enforced against third parties but at least with the landlord’s hypothec there are requirements and legislation put in place to protect the property rights of third parties.

The statutory lien may appear similar to the maritime lien but this chapter has shown that this is not so because, although the statutory lien may be enforced against third parties, this will depend on the nature of the claim. The following chapter will consider the founding theories of the maritime lien in order to reveal the rationale behind this unique concept of maritime liens.

⁴¹ *Ibid.*

⁴² Jackson *op cit* note 6 at 499.

⁴³ Michael A.Orlando & Meyer Orlando ‘A Lien Is a Lien Is a Lien, but a Maritime Lien Is Not’ (2003) *IRMI* at 1 available at www.irmi.com accessed on 04 June 2013.

⁴⁴ *Ibid.*

⁴⁵ AJ van der Walt & GJ Pienaar *Law of Property* 6 ed at 283.

CHAPTER FOUR

I THE ORIGINS OF THE MARITIME LIEN

With regards to the origins of the maritime lien, the first thing worthy of note is that there has not been any unanimity as to the exact roots of this peculiar concept. Thus, according to Thomas¹ ‘the historical derivation and development of maritime liens is a subject of great uncertainty and although various theories have been advanced the subject remains one of notorious obscurity’. Various sources have been advanced as sources of maritime liens and these will be discussed briefly. However, the focus of this chapter will be an exploration of the three theories suggested by several authors to be explanations of the legal basis of the maritime lien.² It should be acknowledged that the said theories are mostly used to explain the nature action in rem proceedings but they apply to maritime liens, as a maritime lien can only be enforced by way of the action in rem.

The first one of these theories is the personification theory, the second one is the procedural theory and the third one is the conflict theory. In this chapter these theories will be analysed in turn with the aim of ascertaining their underlying rationale. Subsequently the viability of maritime liens as they have developed to modern times will be critically discussed.

a) Possible sources of maritime liens

The personification theory is said to be one of the theories that form the legal basis behind the concept of maritime liens. However prior to embarking on a discussion of this theory, this paper will briefly set out a few possible sources of the maritime lien, namely, Rhodian, Ancient Greek and the Roman Law (hypotheca).

There is substantial legal literature³ that seems to suggest that maritime lien may be rooted in Rhodian Law since ‘the Rhodians were great seafarers and during developed customs by which sea traders regulated their activities’.⁴ However, these suggestions have been

¹ D Rhidian Thomas *Maritime Liens* (1980) para 7-8.

² Robert Force *Admiralty and Maritime Law* (2006); Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2012) ; D C Jackson *Enforcement of Maritime Claims* (2005) ; F. L. Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970); Thomas *op cit* note 1; Price *Law of Maritime Liens* (1940).

³ J Reddie *A Historical View of the Law of Maritime Commerce* (1841) at 63; W Tetley *Maritime Liens and Claims* (1998) at 7-8; AR Emmet *Roman Traces in Australian Law* (2001); GW Paulsen ‘A Historical Overview of Development of Uniformity in International Maritime Law’ (1983) 57 *Tul.L.Rev.* 1065 at 1068.

⁴ Gys Hofmeyr ‘Admiralty Jurisdiction In South Africa’ (1982) *Acta Juridica* 30 at 31.

discredited by some authors⁵ who argue that Rhodian Law ‘was a mere fetish, and never had existence in fact at any time’.⁶ Hofmeyr⁷ is of the view that, practically, the controversy surrounding the possibility of Rhodian Law is irrelevant ‘except to the extent that particular laws attributed to the Rhodians have been incorporated in the *Digest* or later codes’. Therefore, he concludes, ‘this body of law (if indeed there was ever such a compilation) need not be considered further’.⁸

In relation to Ancient Greek Law as one of the possible sources of maritime liens, Lord Mackenzie stated that in various departments of intellectual fields that the Greeks were very influential but their contribution to jurisprudence is hardly notable.⁹ Their contribution to the law of maritime liens is doubted by Trichart who argues that the authorities used to support arguments that the maritime lien is somehow rooted in Greek Law are not necessarily accurate.¹⁰ Staniland has also stated that Greek Law does not seem to have influenced maritime liens.¹¹

Roman Law, on the other hand seems to be commonly viewed as the most likely source from which maritime liens originated.¹² Trichart suggests that ‘phrases such as *ius in rem*, *ius in re*, *ius in personam*, and *ius ad rem* are also bandied about in discussions about maritime liens, not least to show the Roman Law roots of the maritime lien’.¹³ Tetley pointed out that ‘the first glimmerings of maritime liens or privileges are to be found in the *Digest*’.¹⁴ The said glimmerings are the ‘*nauticum foenus*’, a loan to build, buy or equip a ship by privilege and a privilege for repairing the ship or supplying the crew.¹⁵ Staniland¹⁶ is critical of Tetley in this regard and he states that ‘there never were, or are, maritime liens for such claims’.

⁵ Benedict ‘The Historical Position of the Rhodian Law’ (1909) 18 *The Yale Law Journal* 223; Grant Gilmore & Charles L. Black, Jr *The Law of Admiralty* 2nd ed 1975 at 3-5; FW Raikes ‘The International Law Association Conference, 1899’ (1899-1900) 25 *Law Magazine and Review: A Quarterly Review of Jurisprudence* 60 at 65.

⁶ Raikes *op cit* note 5.

⁷ Hofmeyr, *op cit* note 4 at 31.

⁸ *Ibid.*

⁹ Lord Mackenzie *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* (1865) at 1.

¹⁰ Trichart Anton ‘Maritime liens and the Conflict of Laws’ *Transactions of the Centre for Business Law* (2011) Issue 47 at 40.

¹¹ Hilton Staniland ‘Comparative Analysis of Maritime Liens’ *unpublished PhD dissertation, University of Southampton* (1990) at 103.

¹² WP Gormley ‘The Development of the Rhodian –Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision’ (1961) 3 *Inter-American Law Review* 317; W Tetley *International Maritime and Admiralty Law* (2002) 473-474; Tetley *op cit* note 3 at 9.

¹³ Trichart *op cit* note 10 at 47.

¹⁴ Tetley *op cit* note 3 at 9.

¹⁵ *Ibid.*

With respect to liens that arise *ex contractu* and *quasi ex contractu*, the common view seems to be that these were derived from the Roman doctrine of hypothecation.¹⁷ Hypothecation refers to a ‘right which a creditor has over a thing belonging to another, in order to secure payment for a debt’.¹⁸ Roman law recognised an express hypothecation of a vessel by means of a contract very similar to the now extinct bottomry bond.¹⁹ It also recognised that one who repaired or fitted out a vessel had a personal privilege which amounted to a tacit hypothecation.²⁰

b) Personification theory

In so far as the maritime lien arising out of collision is concerned, Holmes²¹ and several authors²² are of the view that it may be explained by the juristic technique of personifying the res. According to this ‘fiction’, ‘the res is personified and regarded as a distinct juristic entity, bound by its contracts and responsible for torts’.²³ The ship is considered to be capable of committing wrongs or assuming the obligations of contracts just as a natural person does.²⁴ When damage is caused by the res, it is the offender or wrongdoer and is condemned for its blameworthiness.²⁵ Holmes explains this theory by referring to Roman and Greek law as well as to biblical references, where if an object caused harm or death to a person, the object was to be forfeited to the person in compensation for the harm.²⁶ Holmes further states that this forfeiture of the object substantially led to the substitution of the liability of the owner of the responsible thing for the thing itself.²⁷

In the early nineteenth century, this theory of giving the res a personality of its own was adopted into English admiralty law and a vessel was held liable for her wrongdoings. This enabled the Admiralty Court to seize and obtain jurisdiction over the vessel and the English courts embraced this theory for some time. Thus in *The Bold Buccleugh* it was established,

¹⁶ Hilton Staniland ‘Roman Law as the Origin of the Maritime Lien and the Action in rem in the South African Court’ (1996) 2 *Fundamina* 285.

¹⁷ Holmes *The Common Law* 28 (1881).

¹⁸ Trichart *op cit* note 10 at 67.

¹⁹ Paul Macarius Herbert ‘The Origin and Nature of Maritime Liens’ (1929-1930) 1 *Tul.L.Rev.* 381 at 382.

²⁰ *Ibid.*

²¹ Holmes *op cit* note 17 at 5.

²² Herbert *op cit* note 19, Neill Hutton ‘The Origin, Development, and Future of Maritime Liens and the Action in rem’ (2003- 2004) 28 *Tul. Mar.L.J* 81 at 92.

²³ Herbert *op cit* note 19.

²⁴ Holmes *op cit* note 17 at 10.

²⁵ *Ibid.*

²⁶ For example, the notion of the “*deodand*”, a medieval concept, whereby inanimate objects which have been the instruments of physical harm were forfeited to the crown. Holmes, *op cit* note 2 at 2-3.

²⁷ *Ibid* at 10.

with respect to the personification theory that the action in rem is not a procedural device to obtain jurisdiction over a ship owner but a proceeding directly against the ship.²⁸ This theory was favoured for a number of years until Sir Francis Jeune in *The Dictator* advanced contrary reasoning that later came to be termed the procedural theory.²⁹

American Courts, on the other hand, still subscribe to the personification theory. It was first referred to in *The Little Charles*,³⁰ a case that dealt with a vessel forfeited for violation of the Embargo Act of 1807 and 1808, where Chief Justice Marshall wrote:

‘...but this is not a proceeding against the owner, it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore, not unreasonable, that the vessel should be affected by this report.

It is submitted that this was a less than convincing defence of the personification theory in that Justice Marshall is contradicting himself by saying that this was a proceeding against the vessel for an offence committed by the vessel but going on to argue that the vessel is controlled by the master and cannot do anything except through the control of the master. This argument is not only weakly premised but it is also illogical. Marshall’s view is similar to one saying that a car that collides with another car should be found blameworthy for its conduct but simultaneously admitting that had it not been for the negligence of the person behind the steering wheel, that accident would not have happened.

This analogy may be criticised by saying that, unlike a car, a vessel is viewed under the personification theory as a ‘juristic person’ and as such, it is responsible for its actions. In this regard, it is submitted that this is also illogical in that a vessel is an asset of a juristic person (which is the ship owning company) and cannot also be a juristic person. For example, you cannot call an ‘ENGEN’ truck (which an asset of a juristic person Engen Ltd) a juristic person. Thus calling the ship a ‘juristic person’ is in itself a ‘fiction’ and has no legal basis.

²⁸*Harmer v Bell The Bold Buccleugh* (1852) 7 Moo PC 267, 13 ER 884.

²⁹*The Dictator*, (1892) P.304 per Juene, P at 308-09.

³⁰*The Little Charles* 26 Fed Cas .979.

The Admiralty Jurisdiction Regulation Act also does not confer the status of a juristic person on the ship.

In *The Bring MalekAdhel*³¹ Justice Story wrote as follows:

‘The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner... It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.’³²

Justice Story’s view may be interpreted as meaning that the personification theory was resorted to out of necessity. In other words, that it was the only available remedy for indemnifying the injured party. If this interpretation is correct, it is submitted that this may perhaps be one of the few explanations that remain viable and it shows why the personification theory has survived in American law.

c) Procedural theory

The personification theory was supported in England until *The Dictator*³³ in 1892. From that point onwards, English law subscribed to procedural theory. In terms of the procedural theory, the maritime lien can be traced to the process of arresting the vessel as a means of guaranteeing the appearance of the ship owner and developed into a procedure to ‘secure a pool of finance from which the potential judgement may be awarded’.³⁴ The procedural theory is explained by Marsden³⁵ as follows:

‘The ordinary mode of commencing the suit (in the sixteenth century) was by arrest either of the defendant or of his goods. Arrest of goods was quite as frequent as the arrest of the ship, and it seems to have been immaterial what the goods were, so long

³¹ 43 U.S (2 How) 210 (1844).

³² *Ibid* at 233.

³³ *The Bold Buccleugh supra* note 28.

³⁴ *Ibid*.

³⁵ RG Marsden ‘Two Points of Admiralty law’ (1886) 2 *L.Q.Rev* 357 at 370.

as they were the goods of the defendant and within the admiral's jurisdiction at the time of the arrest ...scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien, the fact that goods and ships that had no connection with the cause of the action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgement should be satisfied.'

Ryan³⁶ suggests that the arrest of the vessel was a coercion device in that:

'A ship is a profit-earning machine and has no value when lying idle by compulsion of process. A defendant would naturally urge upon the court some means whereby the vessel could be put underway before the wheels of justice begin their grind. In addition, neither the merchant nor their growing international trade could tolerate any system that delayed goods and ships, and with them profits, after some cause of action had arisen.'

These two authors demonstrate that there are at least two reasons for ordering the arrest of the vessel firstly, to obtain security³⁷ and, secondly, to compel the defendant to appear before the court. Therefore it can be assumed that the ultimate aim is to place the liability where it belongs, that is upon the person liable in personam. This makes it difficult to explain the arrest of the vessel in instances where the owner is not liable in personam. The question arises whether it makes sense for the court to arrest a vessel when the owner was not privy to the incident that gave rise to the lien.

It can be argued that perhaps *The Dictator* did not completely discard the personification theory. What it did was to dismiss it only in so far as it relates to arresting a vessel as a means of compelling the appearance of the owner. It can be noted that in instances where a ship is arrested to obtain security from a third party not liable in personam, English Courts still ascribe to the personification theory. If that was not the case, courts would not be continuing to order the arrest of a vessel to enforce a maritime lien after a bona fide sale in good faith to a third party.³⁸ This suggests that English Courts still regard the vessel as the offending party.

³⁶ Edward F. Ryan 'Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective' (1968) 7 *W. Ontario L.Rev.* 173 at 188.

³⁷ *Ibid.*

³⁸ *The Halcyon Isle* (1981) AC. 221,228 (PC 1980).

In *The Indian Grace (No 2)*³⁹ the House of Lords stated that the fiction that an action in rem was not against the owners of a ship but against the ship had to be discarded; however the issue of the enforcement of some maritime liens against the ship without liability of the owner in personam or despite a sale was not analysed, and it was put aside as it was not relevant to the case.⁴⁰ Steyn, L.J said the following:

‘Thomas has pointed out that the procedural theory does not explain why a maritime lien may be enforced against a bona fide purchaser and that it is not entirely consistent with the fact that certain maritime liens accrue independently of personal liability of the shipowner. These may be regarded as distant echoes of the personification theory. But this case is not concerned with maritime liens. That is a separate and complex subject which I put to one side.’⁴¹

It is submitted that despite the fact that this case dealt with the action in rem, Steyn’s statement is commendable in that it shows that English courts are cognisant that the procedural theory cannot be harmonised with the fact that maritime liens may be enforced against a bona fide purchaser. One can only hope that the court will soon get an opportunity to deal with this aspect fully since Steyn’s statement does raise a concerning issue regarding maritime liens and how the enforcement of maritime liens against innocent purchasers has remnants of the personification theory.

The consequences that result from the procedural theory are summed up by Herbert⁴² thus:

- There may be a right to proceed in rem regardless of the existence of a maritime lien.
- The proceeding in rem based on a maritime lien is in substance an action against the owner of the vessel and the vessel is not liable unless the owners are personally liable.
- The recovery in an action in rem is not limited to the value of the res where the defendant has appeared to defend the suit in rem.⁴³

³⁹ [1998] 1 Lloyd’s Rep 12 (CA).

⁴⁰ *Ibid* per Steyn, L.J at 7.

⁴¹ *Ibid*.

⁴² Paul Macarius Herbert ‘The Origin and Nature of Maritime Liens’ (1929-1930) 1 *Tul.L.Rev.* 381.

⁴³ *Ibid* at 385.

It may be suggested that Herbert's analysis is flawed in that he overlooked the fact that one can proceed in rem upon a maritime lien notwithstanding that the owners are not personally liable.⁴⁴

d) Conflict theory

A compelling theory has also emerged, which is discussed as the conflict theory, that the arrest in rem emerged as a device to avoid writs of prohibition of the English Admiralty Court.

According to the conflict theory, the maritime lien and the action in rem grew from 'the great contest between the courts of common law and Admiralty'.⁴⁵ Medieval England had two separate and competing court systems.⁴⁶ These were the common law courts and the Admiral's court.

According to Ryan⁴⁷ :

'The King used the Admiral to collect droits, profits and emoluments of the sea. In addition to these "prerequisites" the Admiral exercised disciplinary powers over the fleet and acted as a court in piracy and maritime causes.'

These powers often overlapped with those of the common law courts, thereby carving away some of their jurisdiction. In an attempt to avoid this, common law courts approached Parliament and were instrumental in having numerous statutes enacted to reduce powers of the Admiral.⁴⁸ One of these statutes provided that 'the Admiral shall not meddle in anything done within the realm, but only of a thing done upon the sea.'⁴⁹ In response, the King adopted the practice of including a clause of non obstante statuto⁵⁰ in the Admiral's patent. However, it was declared null and void and 'such manoeuvres by the King had no force of the law...and cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament'.⁵¹ This restriction led to the decline of the Admiralty court but, towards the end of the fifteenth century, 'under the aegis of the renewed

⁴⁴ Section 3(4)(a) of the Admiralty Jurisdiction Regulation Act.

⁴⁵ Ryan, *op cit* note 36 at 173.

⁴⁶ Neil Hutton 'The Origin, Development, and Future of Maritime Liens and the Action in Rem' (2003-2004) 28 *Tul.Mar.L.J* 81 at 101.

⁴⁷ Ryan, *op cit* note 36 at 173.

⁴⁸ *Ibid.*

⁴⁹ 13 Rich.2, stat.1, c.5.

⁵⁰ "judgement notwithstanding statute"

⁵¹ Ryan, *op cit* note 36 at 173

strength of its royal patron, the Admiralty court became a recognised tribunal of the law merchant, with jurisdiction over practically all mercantile and shipping cases'.⁵²

This resurgence of the authority of the Admiralty Court did not sit well with the common law courts as it meant that shipping matters were now falling outside their jurisdiction and thereby negatively affecting their financial interest.⁵³ Common law courts felt that this 'interloper had to be cut down to size'⁵⁴ so they developed the device of issuing writs of prohibition against admiralty courts. These writs were described by Blackstone⁵⁵ as follows:

'A prohibition is a writ issuing properly only out of the court of the King's bench, being the King's prerogative writ.....,directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction....This writ may issue to ...the court of Admiralty where it concerns itself with any matter not within its jurisdiction.'⁵⁶

The Admiralty courts made several attempts to protect the Admiralty jurisdiction but most of them failed and according to Ryan 'if the Admiralty were to survive the buffetings of this turbulent era, it was clear that it would henceforth have to depend upon its ingenuity, traditions, and if possible, to secure its existence through the operation of its own peculiar system of laws'.⁵⁷

Subsequently, Lord Coke addressed the problems faced by common law courts, asserting that admiralty courts were not courts of record and therefore could not take any cognisance as a common law court might.⁵⁸ The admiralty lawyers argued that the money provided to secure the release of an arrested ship was not a cognisance at all but a stipulation.⁵⁹ The stipulation is 'a form of express hypothecation with the stipulation being a solemn promise to repay the money loaned on the terms agreed'.⁶⁰ This argument saved the admiralty court with Coke accepting the distinction between the admiralty bail and a court of record cognisance. The

⁵² Ryan *op cit* note 36 175.

⁵³ *Ibid* at 176.

⁵⁴ Ryan *op cit* note 36 at 184.

⁵⁵ *Ibid*

⁵⁶ *Ibid* at 112.

⁵⁷ Ryan *op cit* note 36 at 183.

⁵⁸ Sir Edward Coke, *The Fourth Part of the Institution of the Law of England* 135 (1644) cited in Ryan *op cit* note 36 at 184.

⁵⁹ Tetley (1985) *op cit* note 12 at 227.

⁶⁰ Ryan *op cit* note 36 at 184.

proceeding on a maritime lien by way of an action in rem remains the foundation of modern admiralty jurisdiction.⁶¹

Roscoe agrees that it is the conflict between the admiralty court and the common law courts that developed the admiralty court's method of proceeding in rem.⁶² In *The Halcyon Isle*⁶³ case; Lord Diplock indicates support for this theory. He stated:

‘Jurisdiction in rem and a maritime lien went hand in hand . This had been true when the jurisdiction of the Court of Admiralty was at its lowest ebb in the early years of the 19th century as a result of harassment by the courts of common law.’⁶⁴

II CONCLUSION

The personification theory (which the USA still subscribes to) provides that the ship is the offending thing and it is the defendant in a proceeding in rem. According to this theory, proceedings are not against the owner but are against the vessel for an offence committed by the vessel. In criticising the personification theory, one author argued that this theory fails to satisfactorily justify why ships are treated like people.⁶⁵ He pointed out that the theory ‘answers the question of why ships are treated like people by that it is because ships are ‘personified’ and this kind of circular reasoning does not add much explanatory value’.

Perhaps this is one of the reasons why English law discarded the personification theory in *The Dictator*⁶⁶ and *The Indian Grace*,⁶⁷ referring to it as nothing more than a fiction with the court clearly stating that a ship is not the guilty party and that the action in rem is merely used as means of getting the ship owner to appear before the court. However, this attracts some criticism in that if the ship is not the ‘offending’ party and the action in rem is merely used as a procedural device, it is unviable for courts to allow the enforceability of liens against innocent purchasers. One author has suggested that despite its shortcomings, in practice, admiralty lawyers appreciate its value.⁶⁸ He further points out that any lawyer who has

⁶¹ *Ibid.*

⁶² Roscoe ES *The Admiralty Jurisdiction and Practice of the High Court of Justice* 5 ed (1931) at 27-28.

⁶³ *The Halcyon Isle* [1981] A.C 221.

⁶⁴ *Ibid.*

⁶⁵ John Lane ‘Should Australian Courts Accept or Refuse the Aid of Private International Law When Considering to Enforce Foreign Maritime Liens’ (2009) *eLaw Journal: Murdoch Electronic Journal of Law* 16(1) at 37.

⁶⁶ *The Dictator*, [1892] P 304,311 and *The Christina* [1938] 1 All ER 719.

⁶⁷ *Republic of India and Another v Indian Steamship Co Ltd (The Indian Grace) (No 2)* [1996] 2 Lloyd’s Rep 12 (CA).

⁶⁸ Alex T. Howard, JR ‘Personification of the Vessel: Fact or Fiction?’ (1990) 21 *J.Mar.L. & Com.* 319 at 238.

represented a maritime lien holder or a person whose ship has suffered damage caused by vessel under the control of a compulsory pilot appreciates the convenience of personifying the ship since the process of determining the current owner can be such a challenging endeavour.⁶⁹ It is acknowledged that this may be true to a certain extent but practicality is not a solid reason for violating a third party's property rights.

In terms of the procedural theory it is proposed that it ought to be restructured in order to explain the rationale behind enforcing liens against third parties who were not liable upon the cause of action because in its current structure, the procedural theory cannot explain the reason for arresting the property of innocent buyers. Courts are burdening the innocent purchaser with a debt that he was not a party to and had no means of knowing about.

The conflict theory attributes the arrest of a ship to the conflict that existed between common law and admiralty courts. It asserts that this form of arrest was used to avoid writs of prohibition issued against the admiralty court. The admiralty court therefore had to personify the ship and endow it with physical qualities and declare it to be at fault.⁷⁰ Marsden said that, 'this served as a convenient reason to explain why ships were liable to arrest even though the underlying claims could not be enforced against the owner.'⁷¹ In modern times, however, with the jurisdiction of admiralty courts clearly established and widely accepted, explaining the enforcement of maritime liens against third parties by using the conflict theory is confusing and it is suggested that perhaps this system of recovering maritime claims may have lived beyond its intended life span and therefore ought to be discarded.

⁶⁹ *Ibid.*

⁷⁰ RG Marsden 'Two Points of Admiralty Law' (1886) 2 *Law Quarterly Review* 357 at 368.

⁷¹ *Ibid* at 368.

CHAPTER FIVE

THE ENFORCEMENT OF MARITIME LIENS -A GENERAL DISCUSSION

The focus of this chapter will be the enforcement of maritime liens, mainly from the perspective of South African Admiralty law and comparing it with English Admiralty law and to United States law. As mentioned in chapter two, contrary to United States law, England and Commonwealth countries that apply English maritime law, recognise a more limited list of maritime liens which will permit the arrest of the ship absent the liability of the owner thereof, namely, seamen's wages, master's wages, master's disbursements, salvage, damage (caused by the ship), bottomry and respondentia.¹ Other maritime claims, like claims for necessities provided to the vessel and claims for cargo damage do not give rise to maritime liens.²

In South Africa, the admiralty jurisdiction of courts is governed by the AJRA.³ This jurisdiction vests in the High Court and the appellate jurisdiction vests in the Supreme Court of Appeal. Section 3(1) provides that a maritime claim may be enforced in an Admiralty Court if it is a 'maritime claim' as defined in S1 of the AJRA.

Section 3 (2) provides for two methods of enforcing a maritime claim:

- Proceedings in personam, in which the debtor or wrongdoer is cited as the defendant.
- Proceedings in rem, in which the ship against or in respect of which the claim lies, is cited as the defendant.

When one proceeds in personam, the essential prerequisite is that the defendant be personally liable to the plaintiff for the maritime claim.⁴ In order to acquire jurisdiction the court must attach the defendant's property so as to found or confirm jurisdiction unless the defendant has consented to the jurisdiction of the court or is resident in or conducts business in South Africa.⁵ As regards the action in rem, there are two prerequisites, firstly, that the claimant

¹ Tetley *Maritime Liens in the Conflict of Laws* (2002) at 30.

² Hilton Staniland 'Is the Admiralty Court to be Turned into a Court of Convenience for the Wandering Litigants of the World?' (1986) 103 *SALJ* 350; *Oriental Commercial and Shipping Co Ltd v mv Fidias* (1986) 1 ALL SA 449 (D); *Transol Bunker BV v MV Andrico Unity and Others*; *Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A) and *mv Mega S Brigde Oil Ltd v Fund Constituting Proceeds of the Sale of the mv Mega S (Formerly mv Aksu) and others* 2007 (3) SA 202 (C).

³ 105 of 1983.

⁴ S3(4)(b) of AJRA.

⁵ S3(2)(a), (b) and (c).

either has a maritime lien over the property to be arrested, or that the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned; and secondly, arrest of the property against or in respect of which the claim lies.⁶

In relation to the enforceability of maritime liens, according to English and South African law these are, ‘inchoate and perfected or crystallised by an action in rem’.⁷ The action in rem gives the maritime lien holder a right to bring suit against the res and request that the res be arrested and sold.⁸ The proceeds of the sale will then be used to satisfy the claim and the ‘purchaser's title is free and clear of all claims and is good against the world’.⁹ In *The Tolten*,¹⁰ Scott L.J described the role of the Admiralty Court in relation to maritime liens as follows:

‘...the court has an executive function of arresting and selling the ship, so as to give a clear title to the purchaser and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities and subject thereto rateably.’¹¹

According to Jackson, English law recognises three different aspects of enforceability of maritime liens:

- Enforceability against other creditors;
- Enforceability against a purchaser of the asset, once the lien has become attached and
- Enforceability against an asset when the owner of the asset at the time the lien is attached is not liable on the claim in personam.¹²

Each of these will be explained in turn below.

⁶ S(3)(4) (a) and (b)

⁷ D Rhidian Thomas *Maritime Liens* (1980) at para 13

⁸ Walker Constance ‘Due Process and Rule C: The Constitutionality of the Admiralty in rem’ (1981) 6 *Mar. Law.* 249 at 252

⁹ *Ibid*

¹⁰ *The Tolten* [1946] P.135

¹¹ *Ibid* at 145-146

¹² D.C Jackson *Enforcement of Maritime Claims 4thed* (2005) at 488 para 18.46

(a) Enforceability against other creditors

i. South African Law

A maritime lien holder enjoys preferential ranking under s11 of AJRA.¹³ The order of maritime claim ranking is given in s11 (5) and the claims listed in s11 (4) (c) include claims giving rise to maritime liens and, with the exception of the salvage lien, they rank *pari passu*.¹⁴ They rank before the claim of a mortgagee as provided for in s11 (4) (d). If, however, ‘a claim arose earlier than one year before the commencement of proceedings to enforce it or before the submission of its proof, it falls to be ranked after the other creditors’.¹⁵

ii. English Law

According to Thomas,¹⁶ ‘the English Admiralty and Appellate Courts have adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case’. This, however, does not mean that English law is uncertain; there are a number of guiding factors that the Court takes into consideration. Thomas sets them out as follows¹⁷:

- ‘A lien holder who has rendered a service to a res, against which other liens already attach, and thereby contributes to the preservation of the res, is entitled in equity to a priority over all pre-existing liens for in preserving the res the service has equally operated to preserve the liens which attach to it.’¹⁸
- Considerations of public policy secure for maritime liens a high priority in relation to other classes of claimants.
 - i) ‘interests of masters and seaman (the wages lien)’¹⁹
 - ii) ‘encouragement of salvage (the salvage lien)’²⁰

¹³ Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2009) at 41.

¹⁴ 11(4)(c)(vi) of AJRA.

¹⁵ *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others* [2001] 3 All SA 392 (A) at 396

¹⁶ Thomas *op cit* note 7 at para 418.

¹⁷ *Ibid* para 419-433.

¹⁸ *Ibid* para 419.

¹⁹ Jackson *op cit* note 12 at 591.

²⁰ *Ibid* at 592.

iii) ‘safe navigation and recompense for loss suffered through failure to carry it out (damage lien)’²¹

- ‘The Court may have regard to the circumstances in which the lien arose and in particular the degree of discretion and choice which was open to a lien holder’.²²
- ‘Where a lien holder acting within the proper scope of his authority is instrumental in the creation or in encouraging the creation of a further lien in circumstances wherein the original lien holder assumes a direct or indirect personal liability, then, notwithstanding what order of ranking might otherwise subsist between the respective liens, the court will not permit the original lien holder to take a priority over the lien he has created and in relation to which the lien holder is personally liable.’²³
- ‘Where a lien holder in breach of a prevailing duty of care has caused an involuntary and reparatory lien to be created there is good reason in equity to postpone the lien of the wrongdoer.’²⁴
- ‘Where a lien holder also possesses an alternative and feasible remedy in personam it is eminently reasonable to take this fact into account when considering priority of the lien.’²⁵

(b) Enforceability against a purchaser of the asset once the lien has become attached

This aspect of the maritime lien will be discussed in detail in chapter six so at this stage it can be noted that one of the most striking features of the maritime lien is the fact that, once it attaches to a res, it ‘travels with the thing into whosoever’s possession it may come’.²⁶ The maritime lien ‘gives a right against the ship, which continues notwithstanding a change of ownership’.²⁷ A purchaser of the res therefore takes the res subject to the maritime lien and it

²¹*Ibid.*

²² Thomas *op cit* note 7 para 428.

²³*Ibid* para 429.

²⁴*Ibid* para 430.

²⁵*Ibid* at para 431.

²⁶*Harmer v Bell The Bold Buccleugh* (1852) 7 Moo PC 267, 13 ER 884 at 284; *Oriental Commercial & Shipping Co Ltd v Fidiast, MV* 1986 1 All SA 449 (D); 1986 1 SA 714 (D) 717I-J; *Gulf Oil Trading Co v The Fund Comprising Proceeds of the Sale of the MV Emerald Transporter* 1985 2 All SA 453 (N); *Transol Bunker BV v MV Andrico Unity: Grecian-Mar SRL v MV Andrico Unity supra*; *MT “Argun” v Master and Crew of the MT “Argun”* 2003 4 All SA 139 (SCA); 2004 (1) SA 1 (SCA).

²⁷*Ibid.*

is of ‘no avail to plead want of notice’.²⁸ This is the case in South Africa, United States as well as England.

(c) Enforceability against asset when the present owner is not liable ‘in personam’

In addition to the enforcement of maritime lien against bona fide purchasers, courts may also order the arrest of the vessel in instances whereby the lien arose from the following:

- (i) Acts of compulsory pilots.

In *The China*²⁹ the Supreme Court held that *The China*, a foreign vessel, was liable for the running down of an American vessel despite the fact that the collision had occurred solely by reason of the compulsory pilot’s negligence.³⁰ According to Gilmore and Black, this is in line with commercial usage and jurisprudence and ‘the primary responsibility is upon the vessel, and that of the owner is not personal, but merely incidental to his ownership’.³¹

*The Stella Tingas*³² is a good example of how maritime claims are enforced in compulsory pilotage cases in South Africa; the facts of the case are as follows:

A collision occurred in Durban harbour between the mv *Atlantica*, which was piloted by a compulsory pilot, and the mv *Stella Tingas*, which was berthed at Island View. The owners of the mv *Stella Tingas* instituted action against the *Atlantica*. They contended that had it not been for the negligence of the master or pilot, the collision would not have occurred. With regards to the action of the pilot they claimed that owners of the *Atlantica* were liable because in terms of S35 of the UK Pilotage Act, the owner of a vessel is liable for the negligence of a compulsory pilot.

The appeal court held that:

‘It was clear from paragraph 10 of the First Schedule to the Succession Act³³ (which was a provision within the meaning of s 6(2) of the Admiralty Jurisdiction Regulation

²⁸ Thomas *op cit* note 7 at para 13.

²⁹ *Wall US* 53 (1868).

³⁰ Grant Gilmore & Charles L. Black, Jr *The Law of Admiralty* 2 ed (1975) at 600.

³¹ *Ibid.*

³² *Transnet LTD t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA).

³³ Para 10 of the Act provides that: (1) The harbours of the Company are compulsory pilotage harbours with the result that every ship entering, leaving or moving in such a harbour shall be navigated by a pilot who is an employee of the Company, with the exception of ships that are exempt by statute or regulation.

Act and thus had to prevail over English law) that the pilot was an employee of Transnet and that the ship's master was prohibited from interfering in any way with the navigation or movement of the ship or preventing the pilot from carrying out his duties while the ship was under pilotage, except in a case of emergency. Therefore to hold the shipowner liable for the negligence of a compulsory pilot would clearly be contrary to the provisions of paragraph 10 of the Succession Act.’³⁴

He further held that:

‘This is wholly inconsistent with the position in England where the pilot, whether voluntary or compulsory, is the shipowner’s servant. The court said that the effect of s 6(2) of the AJRA, read with paragraph 10 of the Succession Act, precludes the application of s 35 of the UK Pilotage Act in South Africa.’³⁵

It is important to note at this stage that the damage lien does not automatically accrue because the vessel was the cause of damage.³⁶ It must be proved that but for the conduct of the person who owns or controls the vessel, the collision would not have occurred.³⁷ The breach ‘must be a breach which renders the owner of the offending ship liable, either directly or vicariously’.³⁸ This means that *MV Stella Tingas* did not have a maritime lien against the *MV Atlantica* because, when damage was caused to the ship, the owners of the *MV Atlantica* were not negligent or at fault, either directly or vicariously, since the ship was under compulsory pilotage and they were prohibited from interfering with the navigation of the ship.

The compulsory pilot or port authority was also not in breach of duty because s10 (7) of the Succession Act which provides that ‘the Company and the pilot shall be exempt from liability

(4) A master shall at all times remain in command of his ship and neither he nor any person under his command may, while the ship is under pilotage, in any way interfere with the navigation or movement of the ship or prevent the pilot from carrying out his duties except in the case of an emergency, where the master may intervene to preserve the safety of his ship, cargo or crew and take whatever action he deems necessary to avert the danger.

(5) Where a master intervenes, he shall immediately inform the pilot thereof and, after having restored the situation, he shall permit the pilot to proceed with the execution of his duties.

(6) The master shall ensure that the officers and crew are at their posts, that a proper look-out is kept and that the pilot is given every assistance in the execution of his duties.

(7) The Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.

³⁴ *MV Stella Tingas supra* note 32 at para 30.

³⁵ *Ibid* at para 31.

³⁶ There is an exception in the case of a charter by demise, a damage lien will attach to a charter by demise despite the fact the owner is not in breach of a duty. Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2006) at 154.

³⁷ *Ibid.*

³⁸ *Ibid.*

for loss or damage caused by a negligent act or omission on the part of the pilot'. However, it is also important to note that South African law has changed since the *MV Stella Tingas* case. In 2005, the National Ports Act³⁹ was introduced and s76 of this Act provides the following:

'76.(1) Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in terms of this Act.

(2) Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot. '

This means that, if a similar incident were to occur now, the aggrieved party would have a maritime lien against the guilty ship under compulsory pilotage. The pilot would be deemed to be the servant of the owner or master of the guilty ship, thereby rendering the owner or master in breach of duty.

(ii) When the ship is in control of charterers

A vessel may be held liable for liens created while it was under the control of third parties, that is, charterers or stevedores, so long as they were lawfully in possession of the ship.⁴⁰

This is based on the argument that agreements made by the owner that transfer control to a third party should not affect the claimant's security. This also applies in cases of demise charterers; however, if the claimant had notice of the agreement, this may limit his claim.⁴¹

In *The Barnstable*⁴² the *Barnstable* collided with the *Fortuna*, resulting in the total loss of the *Fortuna*. The owners of the *Fortuna* proceeded against the *Barnstable* alleging negligent navigation. The owners of the *Barnstable* accepted liability but initiated a proceeding for indemnity against the bareboat charterer of the vessel. The court a quo and the court of appeal found in favour of the charterer, quoting a clause in the charter requiring the owner to pay for insurance as evidence of intent that, as between the owner and the charterer, the owner was to bear responsibility for the loss of the *Fortuna*. The Supreme Court reversed the decision and took the chance to discuss the subject of the respective responsibilities of the owner, the charterer, and the vessel under demise, stating that 'the vessel is liable in rem for damages

³⁹ No 12 Of 2005.

⁴⁰ Jackson, *op cit* note 9 at 490.

⁴¹ *Ibid.*

⁴² *The Barnstable* U.S 464, 21 S Ct.684 (1901).

arising out of the charterer's negligence, even though the owner is completely innocent but the charterer is obligated to indemnify the owner against liability suffered by the vessel as a result of the charterer's negligence'.⁴³

Gilmore and Black caution against a wide interpretation of this dictum (it has been accepted as settled law in American law) and suggest that it should be narrowly construed, that is, this rule will only apply in tort claims and will not be applicable to contract liens if the charterer has not been granted power to create contract liens by the terms of the charter.⁴⁴

II. CONCLUSION

In summary, according to English and South African law there are three different ways in which a maritime lien can be enforced, namely: enforceability against other creditors; enforceability against a purchaser of the asset once the lien has become attached and enforceability against an asset when the owner of the asset at the time the lien is attached is not liable on the claim in personam. The enforcement of a maritime lien against other creditors has been a subject of debate for years but as pointed out earlier, for purposes of this dissertation that aspect is irrelevant. As regards the enforcement of maritime liens against a purchaser what can be established at this stage is that there is no legislation regulating this aspect and reliance is placed upon the common law to explain the existence of this right to enforce the maritime lien.

⁴³ *Ibid.*

⁴⁴ Gilmore & Black, *op cit* note 26 at 601.

CHAPTER SIX

I. ENFORCEMENT OF MARITIME LIENS AGAINST GOOD FAITH PURCHASERS WITHOUT NOTICE

INTRODUCTION

This chapter forms the crux of this dissertation and will critically analyse enforcement of maritime liens against innocent purchasers. This will be done by considering the English cases that first spoke of this characteristic of maritime liens. Thereafter the reasons put forward by English courts and English law academics for the indelible nature of maritime liens will be scrutinised. These reasons will be analysed in light of South African admiralty law in order to establish whether they can be applied in South African courts. In a separate section, the Constitutional implications of the enforcement of maritime liens even when the property has been transferred to a third party will be explored. Lastly this chapter will briefly discuss relevant sections of the International Convention on Maritime Liens and Mortgages 1993 and consider whether adopting the Convention would address the constitutional concerns discussed in the preceding section.

(a) Case law

One of the striking legal characteristics of a maritime lien as discussed in preceding chapters is that it is not extinguished by transfer of ownership.¹ Thomas describes it as, ‘an invisible, secret, indelible or inalienable encumbrance.’² A buyer for value without notice therefore acquires ownership of the res subject to the maritime lien.³ The first case that brought up the issue of the ship’s liability despite the owner’s innocence was *The Bold Buccleugh*.⁴ The facts of that case were as follows:

A collision occurred between *The Bold Buccleugh* and *The Williams*. The owners of *The Bold Buccleugh* sold her after the collision. Shortly afterwards, and as soon as she came within the jurisdiction of the English Admiralty Court, she was arrested at the suit of the owners of *The William*. The purchaser, her owner at the date of the arrest, appeared in the Admiralty Court under protest and contended that he could not be liable for a collision which occurred before

¹ *Harmer v Bell The Bold Buccleugh* (1852) 7 Moo PC 267, 13 ER 884 at 284; Hill *Maritime Law* (2003) at 119.

² D Rhidian Thomas *Maritime Liens* (1980) para 13.

³ *Ibid.*

⁴ *The Bold Buccleugh*, *supra* note 1.

he bought her. The court accepted the assumption that the buyer was a bona fide purchaser and lacked notice but relied on *The Nestor*⁵ and decided as follows:

‘A maritime lien does not include or require possession. The word is used in maritime law not in the strict sense in which we understand it in courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and by which in either case the right travelled with the thing into whosoever’s possession it came....This claim or privilege travels with the thing into whosoever’s possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.

The court further held that:

‘This rule, which is simple and intelligible, is applicable to all cases, it is not necessary to say that the lien is indelible and may not be lost by negligence or delay where the rights of third parties may be compromised, but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosoever’s possession the thing may come.’⁶

In *The Ripon City*⁷, Burnes J admitted that the rule set out above may prejudice the innocent purchaser but if it did not exist, shipowners could avoid lien debts by transferring the vessel to third parties.⁸ According to Schoenbaum⁹, the logic behind this rule is that while the owner may have changed, the vessel as its own entity continues in existence and remains responsible for the claims and debts against it. Therefore, a purchaser of a vessel who does not acquire it through a judicial sale has an imperfect title.¹⁰ His protection is limited to an indemnification or damages clause in the contract of sale and the judicial doctrine of laches.¹¹

⁵ *The Nestor* (1831) 18 Fed.Cas 9.

⁶ *The Bold Buccleugh*, *supra* note 1 at 284-285.

⁷ *The Ripon City* [1897] P.226.

⁸ *Ibid* at 246.

⁹ Schoenbaum TJ, *Admiralty and Maritime Law*, 5 ed (2005).

¹⁰ DB Toy, *Introduction to the Law of Maritime Liens* at 565.

¹¹ *Ibid* – ‘The doctrine of laches is an English and American law concept based on the maxim that "equity aids the vigilant and not those who slumber on their rights." (Black's Law Dictionary). The outcome is that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the

Gilmore and Black noted that this doctrine may be used as a defence by the bona fide purchaser to obliterate the permanence of the maritime lien.¹²

(b) A critical analysis of the common reasons for the enforcement of maritime liens against bona fide purchasers

i. Inchoate nature of the maritime lien

One reason for the enforceability of the maritime lien against bona fide purchasers that has been put forward by English courts is the argument that a maritime lien is inchoate.¹³ In *The Halcyon Isle*,¹⁴ Lord Diplock said that a maritime lien created ‘no immediate right of property.’¹⁵ The lien is ‘devoid’ of any legal consequences unless and until carried into effect by a proceeding in rem, but once carried into effect ‘the charge dates back to the time that the claim on which it is founded arose.’¹⁶ Lord Diplock carried to say that:

‘It is only this retrospective consequence that enables a claimant, whose entitlement to a maritime lien is still inchoate and has not yet come into effect, to pursue his claim to the lien, as it were proleptically, in a proceeding in rem against the ship at a time when it no longer belongs to the shipowner who was personally liable to satisfy the claim in respect of which the lien arose.’¹⁷

This reasoning equally applies in South Africa. Thus in the *MV Andrico Unity*¹⁸ it was held that the ‘lien is asserted by the arrest of the ship in rem and it then relates back to the time when it first attached’.

ii. Security

One other possible reason for the enforcement of maritime liens against third parties is to ensure that lien holder is able to give up possession of the ship without hesitation.

adverse party. Elements of laches include knowledge of a claim, unreasonable delay, neglect, which taken together hurt the opponent.

¹² Grant Gilmore & Charles L. Black, Jr *The Law of Admiralty* 2 ed (1975) at 597.

¹³ *The Ripon City* [1897] P 226 at 242, *The Tervaete* [1922] P 259 at 264 and *The Tolten* [1947] P 135 at 144

¹⁴ *The Halcyon Isle* [1981] AC 221.

¹⁵ *Ibid* at 285.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Transol Bunker BV v MV Andrico Unity* 1987 (3) SA 794 (C) 811E ; *Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (A)

Commenting on the history of English admiralty jurisdiction, Ryan¹⁹ observed that ‘a ship is a profit earning machine and has no value when lying idle’. Therefore if a lien holder had to have possession of the ship in order for his lien to be valid, it would adversely affect the shipping business. South African courts would most probably accept this reasoning, however, it is submitted that this form of reasoning should be used with some measure of caution since South Africa has not adopted any checks and balances to limit the lien’s indelibility and in the absence of such checks and balances, the maritime lien’s indelibility has the potential to trample over the property rights of third parties.

iii. Public policy

With regards to the salvage and wages lien, English courts justify the preference given to the lien holder over a bona fide purchaser of the ship for value without notice upon the grounds of public policy.²⁰ ‘Principles of public policy,’ states Eyre CJ²¹ ‘dictate to civilised and commercial countries not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service.’ The damage lien, on the other hand, ranks high in the order of priority and may be enforced against bona fide purchasers because a sufferer by collision has no option, and his remedy in many cases, especially where the ship is foreign, is against the ship alone.

In *The Ripon City*,²² Barnes J gave consideration to the enforcement of maritime liens against good faith purchasers of maritime liens and observed that, ‘...although it may be hard on an innocent purchaser, if it did not exist a person who was owner at the time a lien attach could defeat the lien by transfer if he pleased.’²³ This justification is also relevant when one looks at it from a South African law perspective because failure to consider public policy principles has the potential to take us back to a situation similar to the pre-1983 problem of single ship companies. Indebted owners could try and extinguish maritime liens by transferring the ship to third parties thereby leaving the claimant with no remedies to recover their debts.

However, in relation to English law, one would have to weigh public policy considerations against the rule of equity. Maritime liens ‘represent an invisible, secret, indelible or

¹⁹ Edward F. Ryan ‘Admiralty Jurisdiction and the Maritime Lien: A Historical Perspective’ (1968) 7 *W.Ontario L.Rev.* 173 at 188.

²⁰ RG Marsden ‘Two Points of Admiralty law (1886) 2 *L.Q.Rev.* 357 at 364.

²¹ *Nicholson v Chapman*, 2 H.BL.254,259.

²² [1897] P.226.

²³ *Ibid* at 246.

inalienable encumbrance’²⁴ and can only be extinguished by specific occurrences; otherwise they remain attached to the ship.²⁵ According to Marsden,²⁶ ‘this is contrary to a rule of equity well established in the case of dealings with real property, that a purchaser for value is protected by the legal estate against prior equitable charges of which he had no notice.’ In support of this argument it may be noted that a maritime lien is usually unknown to purchasers, thereby having the effect of operating to the prejudice of innocent purchasers. Therefore, it can be assumed that the rules of equity would be applied to mitigate the rigour of this admiralty concept. However, with maritime liens, rules of equity are not applied and this means that an innocent purchaser who has no lien insurance is left unprotected.²⁷

When looking at this issue from South African law perspective, one would have to weigh public policy considerations against the property rights provided for in the Constitution²⁸ and this will be done in the following section.

(c) South Africa’s Constitutional position in relation to the enforcement of maritime liens against innocent purchasers.

Section 25(1) of the South African Constitution provides that:

‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’

However, before the *First National Bank v Commissioner, South African Revenue Service*²⁹ judgement, courts failed to take this provision into consideration when dealing with security interests. In this case FNB had leased two vehicles and sold one to two companies but in both

²⁴ Thomas *Maritime Liens* (1980) at para 13 (5).

²⁵ A maritime lien may be extinguished in the following instances: if the res is destroyed; by a judicial sale; forfeiture; satisfied claim; laches; consent-Jeremy Browne ‘The Extinction of Maritime Liens’ (2003) *LMCLQ* 361 at 365-376.

²⁶ RG Marsden ‘Two Points of Admiralty law’ (1886) 2 *L.Q.Rev.* 357 at 363.

²⁷ Iain GoldRein, QC Paul Turner *Ship Sale and Purchase* (2003) at 87 para (c) - ‘If the commercial balance between the parties is such that buyers are unable to obtain security for the performance of sellers’ obligations, buyers may still be able to cover themselves (to a certain extent) against any maritime liens after they have taken delivery of the ship by taking out a form of insurance known as lien insurance. The purpose of this insurance is to provide the buyers with cover in respect of monies which the buyers are required to pay as result of liens (for which sellers are responsible under the sale contract) being enforced against the ship after the sellers have delivered the ship to buyers. Lien insurance will generally indemnify buyers for any sums they may have to pay as a result of maritime liens attaching to ships declared under the policy in circumstances where such liens are the responsibility of the ships’ former owners –but typically the indemnity will only cover liens which are not capable of being registered.’

²⁸ Constitution of the Republic of South Africa no. 108 of 1996.

²⁹ 2002 (4) SA 768 (CC).

cases remained the owner of the vehicles. The Commissioner of SARS took possession of one of the two leased cars claiming that he has a lien over it. He did this to get security for the company owners' outstanding customs debt. FNB challenged the constitutionality of s 114 of the Customs and Excise Act³⁰ (Act hereinafter), which allowed the Commissioner (in order to collect a debt owed) to sell goods without a court order. Since the section also allows the Commissioner to sell goods not belonging to the customs debtor but to a third party, FNB contended that this section constituted an unjustified infringement of its constitutional right to the protection of its property.³¹

In dealing with this issue (third party's constitutional rights), the Constitutional Court (CC hereinafter) pointed out the High Court's error when it stated that:

'... there is no equity about a tax. It is not more inequitable that a credit grantor should suffer than that the master of a ship should in certain circumstances incur liability.'³²

Ackermann J found that:

'The flaw in this reasoning is that s 114 does not make the third party a customs debtor; it makes the goods of that party liable to be seized in execution of someone else's customs debt. The third party does not become a co-debtor and has no liability to the Commissioner to pay any tax at all. If the property is realised and there is a balance due on the tax debt, that remains the responsibility of the customs debtor. The question here is not about equity in tax, but whether it is constitutionally permissible to seize a third party's property for another person's customs debt.'³³

'...The crucial issue to be determined is accordingly whether, in the absence of a relevant nexus between the goods and the customs debtor, the sale by the Commissioner - under s 114 of the Act - of goods owned by someone who is not a customs debtor amounts to an unjustifiable infringement of the owner's s 25 property rights.'³⁴

The property challenge issues that arose in this case were the following:

³⁰ 91 of 1964.

³¹ Section 25 of the Constitution of the Republic of South Africa no 108 of 1996.

³² *First National Bank v Commissioner, South African Revenue Service* *supra* note 5 at para 27.

³³ *Ibid* at para 37.

³⁴ *Ibid* at para 38.

- ‘(a) Does that which is taken away from FNB by the operation of s 114 amount to “property” for purpose of s 25?
- (b) Has there been a deprivation of such property by the Commissioner?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the deprivation comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?’³⁵

In dealing with the issues raised in this case the court first considered the wide interpretation of s 25. The judge referred to section 25(4)(b) to clarify that for purposes of the section, “property” is not limited to land. Thus:

‘The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.’³⁶

He therefore concluded that in this case ‘...it is sufficient to hold that ownership of a corporeal movable must lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of s25.’³⁷

In dealing with the approach to deprivation in the context of s 25, he said that:

‘ The term “deprive” or “deprivation” is somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact the term “deprivation” is distinguished very clearly from the narrower term “expropriation” in constitutional jurisprudence worldwide.’³⁸

³⁵*Ibid* at para 46.

³⁶*Ibid* at para 49.

³⁷*Ibid* at para 51.

³⁸*Ibid* at para 57.

‘In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.’³⁹

He then started his constitutional analysis of the alleged infringement of property rights by looking at s 25(1). In doing that, he thought it necessary to first define the meaning of “arbitrary” in s 25. These were his findings:

‘The word “arbitrary”, depending on its statutory context, may only impose a low level of judicial scrutiny, requiring nothing more than the absence of bias or bad faith to satisfy such scrutiny. For example, it has been held to mean capricious or proceeding merely from the will and not based on reason or principle.’⁴⁰

...Context is crucial, both in the sense that the concept “arbitrary” appears in a constitution and in the sense that it must be construed as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution.⁴¹

...In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.⁴²

Having said this, he then concluded that:

‘a deprivation of property is “arbitrary” as meant by s 25 when the “law” referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.’⁴³ Once the deprivation has been adjudged to be arbitrary, no scope remains for justification under s 36.’⁴⁴

He applied the law to the facts before the court and ruled that:

³⁹ *Ibid.*

⁴⁰ *Ibid* at para 61.

⁴¹ *Ibid* at para 63.

⁴² *Ibid* at para 66.

⁴³ *Ibid* at para 100.

⁴⁴ *Ibid* at 110.

‘...there is no connection between FNB or its vehicles and the customs debt in question. Under these circumstances the object achieved by s 114 is grossly disproportional to the infringement of FNB's property rights.’⁴⁵

‘....the infringement by s 114 of s 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is accordingly constitutionally invalid.’⁴⁶

In view of the court’s decision in this case, it can be argued that the enforcement of maritime liens against bona fide purchasers also unjustifiably infringes upon property the rights of third parties and South African courts should consider s39(2) of the Constitution which provides that:

‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

Wallis⁴⁷ commenting on the majority judgement of *The Heavy Metal*⁴⁸ (a case that dealt the associated ship provision⁴⁹) pointed out that:

‘The interpretation favoured by the majority must inevitably involve a breach of the rights of the owner of the associated ship under section 25(1) of the Constitution of the Republic of South Africa, 1996 in circumstances where the limitation of rights involved cannot be justified under section 36 of the Constitution.’

Wallis further suggests that:

‘The majority approach led to an arbitrary deprivation of property whilst the minority approach did not. Accordingly the minority approach to the interpretative question should have been favoured. On constitutional grounds therefore the majority judgment cannot be accepted.’⁵⁰

⁴⁵*Ibid* at 111.

⁴⁶*Ibid* at 113.

⁴⁷Malcolm Wallis *The Associated Ship and the South African Admiralty Jurisdiction* (2010)

⁴⁸*MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

⁴⁹Section 3(7)(b)(iii) of AJRA.

⁵⁰Wallis *op cit* note 47.

In the *Carmichele*⁵¹ case it was held that ‘the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary’ but that the ‘courts are under a general obligation’ to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2) objectives’.⁵² This basically means that every law, be it common or statutory, must pass constitutional muster before being enforced by the courts. This obligation is not limited to the Constitutional Court but also extends to ‘every court’, including courts exercising their admiralty jurisdiction. It is thus suggested that the reasoning used by the Constitutional Court in the FNB case should also be used in cases where maritime liens are enforced against bona fide purchasers.

There are at least two principles established in the FNB case which should also be considered in cases of maritime liens against innocent purchasers. Firstly, this case has established that the protection offered by s25 is not limited to serving the public interest, for example, land reform, but it also extends to private property rights including corporeal movables. In light of these findings by the Constitutional Court it is argued that ships are also deserving of the protection of s25 in the same way as other corporeal movables.

Secondly, arresting a ship belonging to an innocent purchaser perfectly fits the description of “deprivation” provided by the Constitutional Court in the FNB case. Arresting a ship belonging to a bona fide purchaser amounts to an ‘interference with the use, enjoyment or exploitation of private property’ and accordingly to the meaning of “arbitrary” furnished in this case. It is also arbitrary because some of the reasons provided by the law of maritime liens for such arrest are not sufficient to justify such deprivation. It is submitted that depriving an innocent party of his property and basing such deprivations on questionable theories like the personification theory ought to be reviewed and weighed against constitutional values.

(d) South Africa’s position in relation to the enforcement of maritime liens against good faith purchasers and the 1993 Maritime Liens Convention.

The 1993 Convention⁵³ only provides for the registration of mortgages and charges but fails to provide for the registration of maritime liens. The effect of this omission is that most maritime liens are left unregistered and this puts purchasers at risk of buying a ship that may

⁵¹*Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

⁵²*Ibid* at para 39. See *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC).

⁵³Article 1 of the International Convention on Maritime Liens and Mortgages 1993.

be subject to arrest at a later stage. The only commendable provision that could possibly offer some protection to an innocent buyer is article 9 of the 1993 Convention which provides for the extinction of maritime liens after a one year period and article 6, which provides that additional maritime liens that may be recognised by national law expire within six months from the time when the claims secured by the liens arose. Therefore when looking at Article 9 and 6 in isolation it would make sense for South Africa to adopt the Convention and this would go long way towards protecting the property rights of bona fide purchasers and could definitely address some of the concerns raised in the above section.⁵⁴ However doing so may conflict with other aspects of South African admiralty law.

II. CONCLUSION

This chapter's discussion about the enforcement of maritime liens against bona fide purchasers has revealed numerous concerning factors about maritime liens. Notwithstanding the number of reasons advanced for the indelible character of maritime liens, it appears that the negative effects of this character far outweigh its reasons or justifications. The most concerning effect of this character is its potential to unfavourably affect property rights of third parties. However, suggesting that we completely rid South African admiralty law of this character of maritime liens would be too irrational considering the fact that public policy demands that lien holders should be compensated for their services. Therefore it is suggested that there should be some regulations put in place to ensure that the rights of lien holders and those of innocent purchasers are equally balanced. The following chapter will recommend possible solutions for balancing the said rights.

⁵⁴ See Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2009) at 169- He suggests that adopting the Convention may be in conflict with the associated ship provisions in the AJRA.

CHAPTER SEVEN

I RECOMMENDATIONS

At this juncture it can be concluded that the enforceability of maritime liens against third parties is a remarkably challenging aspect of maritime liens. It is opined that this may be due to the theories upon which it is based. In the preceding chapters the personification and procedural theories have been discussed and it has been proved that these theories were structured around premises that do not withstand scrutiny in the light of modern legal principles and constitutional values. Therefore, in this chapter, a few possible solutions to the areas of concern surrounding the enforcement of maritime liens against bona fide purchasers will be discussed.

There are a number of solutions that may assist in addressing the issue of the enforcement liens against an innocent purchaser. The following recommendations are suggested and will be explained in turn:

- i. Registration of maritime liens;
- ii. Limitation of the indelibility of maritime liens

(a) Registration of maritime liens

In the previous chapters, it has been established that maritime liens can be distinguished from other liens in that they do not require registration. They attach to the ship *ex lege* without any antecedent formalities.¹ This means that when someone purchases a vessel, he is susceptible to the seller's unsatisfied debts.² Heathcote indicates that 'this potential risk is aggravated by the fact that the buyer has no means of avoiding it'.³ It is acknowledged that some countries do provide for the registration of maritime liens but registration is optional and failure to register will not extinguish a maritime lien.⁴ For example, the United States Coasts Guard has established the National Vessel Documentation Centre where maritime lien holders can file a notice of claim of lien.⁵

¹ William Tetley 'Maritime Liens, Mortgages and Conflict of Laws' (1994) 6 *U. S. F. Mar. L. J* 1 at 4; Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2006) at 148-149.

² Peter Heathcote 'Maritime Liens: How to Protect the Innocent Purchaser' (2003) 17 *MLAANZ Journal* at 126.

³ *Ibid.*

⁴ See <http://www.uscg.mil> accessed on 14 December 2013.

⁵ *Ibid.*

However there is no international uniformity on the issue, except in the case of a mortgage lien. Article 1(b) of The International Convention on Maritime Liens and Mortgages 1993 provides for the registration of mortgage liens but it is silent on the registration of maritime liens. Heathcote is of the view that non-registration of maritime liens hinders the buyer from ascertaining information on the vessel's outstanding maritime lien claims so he has to rely on the information furnished to him by the seller.⁶

It may be argued that shipowners usually have an indemnification clause in the sale agreement providing that the seller will indemnify the buyer should a lien attach against the ship.⁷ It is submitted that such a clause may not be effective because when the lien attaches, the buyer cannot immediately resort to the seller. In order to avoid harm to his business, he will have to put up security and only revert to the seller for recourse afterwards. It is for this reason that it is suggested that the lien holder should be legally obliged to register his lien so that purchasers could be informed of liens that may attach to the ship at a later stage and protect themselves accordingly.⁸

Heathcote⁹ is of the view that:

‘Such a requirement would not only protect an innocent purchaser ,it would also encourage the vendor to pay his debts, since the debt which give rise to a maritime lien is now registered on the public record for all to note. This would operate in much the same way as one can, in some jurisdictions, register a default judgement against a debtor's real property which forces the debtor to pay the amount of the judgement before he can sell his property with free and clear title.’¹⁰

A maritime lawyer¹¹ has proposed an establishment of an international register of liens and mortgages. This would be similar to a scheme called Seadocs Registry Limited which was formed for registering bills of lading.¹² In terms of this system, as soon as a bill of lading is issued or transferred, it had to be filed with the registry and the registry had authority to issue

⁶ Heathcote *op cit* note 2 at 126.

⁷ Goldrein *Ship Sale and Purchase* (2012) at 126.

⁸ Heathcote *op cit* note 2 at 126.

⁹ *Ibid* at 127.

¹⁰ *Ibid*.

¹¹ J.R James, Partner ,Norton Rose ,Hong Kong , ‘International Register of Maritime Liens and Mortgages’ , a paper prepared by the Regional Seminar on Charter Parties and Ship Finance, organised by ESCAP ,UNCTAD and BIMCO,Bangkok,30 October -3 November 1995.

¹² Boris Kazolchyk ‘Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective’ (1992) 23 *J.Mar.L& Com* 161 at 166.

it to the rightful consignee.¹³ However, this system failed and it has been argued that a similar international registry for the maritime liens would also fail.¹⁴

However, this assumption (that an international registry for maritime liens would fail) may be challenged. Seadocs Registry did not fail due to operational or legal difficulties; it failed because it did not attract the needed support from users to make it financially viable.¹⁵ It can be argued that perhaps a similar registry for maritime liens would not fail because the targeted users (lien holders) would be more than willing to support an initiative aimed at protecting their interests and ensuring that when they decide to enforce their liens, whoever is in charge of the res is aware that there is maritime lien attached to it thereby avoiding disputes and unnecessary litigation.

Alternatively, South Africa could introduce domestic legislation similar to that regulating the registration of notarial bonds. Notarial bonds are security to ensure that performance can be obtained either by means of personal security or by means of real security.¹⁶ They are similar to maritime liens in that they are means by which a debtor may hypothecate movable property without delivering it to the creditor in whose favour the bond is passed.¹⁷ It should however be observed that notarial bonds can be classified as either special notarial bonds or general notarial bonds.¹⁸ General notarial bonds need to be perfected in order to confer any real security upon the bond holder whereas special notarial bonds are bonds registered under the Security by Means of Movable Property Act¹⁹ and the property over which a special bond has been registered is deemed to have been pledged to the bond holder. The holder of a special bond is in the same position as if the secured object was in his possession.²⁰ It is suggested that similar legislation should be introduced for the registration of maritime liens as this will enable third parties to have notice of the lien's existence and justify the priority ranking of maritime liens.

¹³ Robert Merges et al 'Toward a Computerized System for Negotiating Ocean Bill of Lading' (1986) 6 *J.L. & Com.* 23 at 26.

¹⁴ Heathcote *op cit* note 2 at 128.

¹⁵ Emmanuel *Paperless Trade: Opportunities, Challenges and Solutions* (2002) at 81.

¹⁶ Marlize Jansen 'Security by Means of General Notarial Bonds' (2003) *JBL* 154 at 155

¹⁷ *Ibid*

¹⁸ Philip Sacks 'Notarial Bonds in South African Law' (1982) 99 *SALJ* 605 at 607

¹⁹ Section 1(1) of the Security by Means of Movable Property Act 57 of 1993

²⁰ PJ Badenhorst, Jaunita P Pienaar and Hanni Mostert *Silberberg and Schoeman's The Law of Property* (2003) at 370 and Marlize Jansen 'More Legal Security Regarding Security by Means of General Notarial Bonds' (2003) 15 *SA Merc. LJ* at 488

Another form of legislation regarding registration that may serve as good precedent for the drafting of legislation regulating maritime liens is the South African Ship Registration Act.²¹ This act effectively governs the registration, form, transfer and deletion of a South African registered ship and perhaps South African admiralty law may positively benefit from the introduction of similar legislation.

To ensure that the registration of maritime liens eliminates the problem of third parties being deprived of their property without notice, such registration will have to be a strict prerequisite for enforceability of maritime liens against innocent buyers.

(b) Limitation of the maritime lien's indelibility

Maritime liens are infamous for their indelibility; they are said to be indelible because they establish a right which can only be extinguished by limited events.²² It has been 'regarded as unsatisfactory that the holder of a maritime lien should be allowed to keep the lien in abeyance indefinitely until it suited him to enforce it by the action in rem to which it entitled him'.²³

The issue of the maritime lien's indelibility has been a matter of concern for years for a number of reasons. Firstly, since the introduction of the maritime mortgage there has been strife between maritime liens and ship mortgages.²⁴ Prior to the Convention on Maritime Liens and Mortgages coming into force, mortgagees were concerned about the priority afforded to lien holders and maritime lien holders wanted to maintain the priority of their liens over mortgagees.²⁵ This strife influenced legislators as well as scholars to revisit the topic of ranking and as means of addressing this issue the Conventions on Maritime Liens and Mortgages were adopted.²⁶ However, it should be noted that South Africa is not a contracting state in any of these Conventions but this paper will discuss some of the significant issues addressed in these Conventions and make a recommendation on whether or not South Africa should accede to them.

²¹ Act 53 of 1998

²² For example, destroyed res, judicial sale, payment and unreasonable delay-Jeremy Browne 'The Extinction of Maritime Lien' 2003 *LMCLQ* 361 at 362.

²³ *Madsen CV and another v Fund Constituting the proceeds of the sale of the MV Forum Victory and another* [1999] JOL 4523 (D) at 9.

²⁴ Jose Maria Alcantara 'A short Primer on the International Convention on Maritime Liens and Mortgages, 1993' (1996) *J.Mar.L. & Com.* 219 at 219.

²⁵ *Ibid.*

²⁶ *Ibid* –International Convention on Maritime Liens and Mortgages 1926, 1967 and 1993.

The Conventions touched on several issues regarding liens and mortgages but for purposes of this paper of this paper, only the enforceability and extinction of maritime liens will be discussed. In relation to the enforceability of maritime liens, all three of the Conventions enumerate mandatory liens which must be recognised by all states and affords them priority over the mortgage.²⁷ They further provide for liens that may be granted lien status by individual contracting states and that those will rank below the mortgage.²⁸ However, the latest Convention (1993) differs from its predecessors is one important aspect, that is, it specifies the party against whom the maritime lien is enforced.²⁹ Article 4 provides as follows:

‘Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel.

- a) Claims for wages...
- b) Claims for loss of life or personal injury...
- c) Claims for the reward for the salvage of the vessel ...
- d) Claims for port, canal, and other waterway dues and dues
- e) Claims based on tort arising out of physical loss or damage caused by the vessel....’

Alcantara is of the view that this provision is an ‘attempt to compare maritime liens to an unsecured claim and to link the specified liens with the claims contained in article 1 of the 1952 Arrest Convention as well as to anticipate future revision of the 1993 Convention’.³⁰ He further points out that the 1993 Convention is restrictive in terms of the people against whom a lien may attach. In the preceding Conventions the term owner included the ‘time charterers’ as well but the 1993 Convention has excluded time charterers and this will be beneficial to ship mortgagees in that the number of possible claimants has been reduced.³¹

Moreover, article 9 of the 1993 Convention has established a one year life for maritime liens. This provision differs from the 1926 and 1967 Convention in that this fixed term will not be

²⁷ International Uniformity of Maritime Liens and Mortgage: The 1965 New York Conference of the Comité Maritime International (1966) 41 *N.Y.U.L. Rev.* 939 at 944.

²⁸ *Ibid.*

²⁹ Alcantara *op cit* note 18 at 224.

³⁰ *Ibid.*

³¹ *Ibid.*

subject to interruption thereby eliminating any uncertainties and the possibility of ‘invoking grounds for interruption found in domestic legislation of the state of forced sale’.³² South Africa has not acceded or ratified the 1993 Convention but the article 9 of the Convention is similar to s11 (4) (c) of the AJRA.

Section 11(4) of the AJRA provides that:

‘claims shall be paid in the following order :

‘(a) a claim in respect of costs and expenses incurred to preserve the property or to procure its sale, and in respect of the distribution of the proceeds of the sale;

(b) a claim to a preference based on possession of the property in question , whether by way of a right of retention or otherwise;

(c) a claim which arose *not earlier than one year before the commencement of the proceedings , to enforce it or before the submission of proof thereof* and which is a claim :

(i) contemplated in paragraph (s) of the definition of ‘maritime claim’ [i.e. wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement in connection with their employment on the ship];

(ii) in respect of port, canal and other waterways dues or pilotage dues...;

(iii) in respect of loss of life or personal injury, whether occurring on land or on water, directly resulting from the employment of the ship;

(iv) in respect of loss of or damage to property, whether occurring on land or on water, resulting from delict and not giving rise to a cause of action based on contract, and directly resulting from with the operation of the ship;

(v) in respect of the repair of a ship or the supply of goods or the rendering of services to or in relation to a ship for the employment maintenance, protection or preservation thereof;

³² *Ibid.*

(vi) in respect of the salvage of the ship, removal of any wreck of a ship and any contribution in respect of a general average act or sacrifice in connection with the ship.’ [*Emphasis added*]

It should be noted that the inclusion of the one year term in this provision in the AJRA is useful only in so far as the ranking of claims is concerned but it does not prevent a lien holder from arresting a ship after the one year period has lapsed; the only difference is that his claim will not be afforded the same priority it would have received if was enforced within a year. Article 9 of the 1993 Convention on the other hand provides for a complete extinction of the maritime lien after a period of one year. This Convention may therefore seem attractive to South Africa in so far as Article 9 is concerned, however, it is appreciated that ‘South Africa is unlikely to be in a position to accede to or ratify the 1993 Convention because of the novel nature of its associated ship arrest provision’.³³ Hence it is proposed that s3 (4) (a) should be amended as follows:

‘ Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action in rem:

(a) If the claimant has a maritime lien over the property to be arrested, which arose not earlier than one year before the commencement of proceedings to enforce it. ’

This provision will ensure that maritime lien holders enforce their lien within reasonable time (one year) thereby limiting the maritime liens indelibility, although where the action is commenced by the issue of an in rem summons in terms of section 1(2)(a)(iii) of AJRA, and the summons is only served twelve months later, or within an extended time permitted by the Court, this might result in the lien being enforced more than one year after it arose.

II CONCLUSION

This chapter has considered two possible solutions to the issue of the enforcement of maritime liens against bona fide purchasers and each of these recommendations may have some complications but it is submitted that adopting both of them, one in addition to the other would be giant step towards the protection of bona fide purchasers for value without notice.

³³Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (2009) at 169.

BIBLIOGRAPHY

PRIMARY SOURCES

INTERNATIONAL CONVENTIONS

1. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926
2. International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967
3. International Convention on Maritime Liens and Mortgages 1993

SOUTH AFRICAN LEGISLATION

1. Admiralty Jurisdiction Regulation Act 105 of 1983
2. Constitution of the Republic of South Africa, 1996
3. Customs and Excise Act 91 of 1964

ENGLISH LEGISLATION

1. Admiralty Court Act of 1840
2. British Pilotage Act 1987

CASE LAW

SOUTH AFRICAN CASE LAW

1. *Barclays Western Bank Ltd v Dekker and Another* 1983 (3) SA 220 (D)
2. *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266
3. *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A)
4. *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 (4) SA 19 (A)
5. *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC)
6. *First National Bank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC)

7. *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC)
8. *Gulf Oil Trading Co v The Fund Comprising Proceeds of the Sale of the MV Emerald Transporter* 1985 (4) SA 133 (N)
9. *Madsen CV and another v Fund Constituting the proceeds of the sale of the MV Forum Victory and another* [1999] JOL 4523 (D)
10. *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others* [2001] 3 All SA 392 (A)
11. *MV Stella Tingas; Transnet LTD t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA)
12. *mv Mega S Bridge Oil Ltd v Fund Constituting Proceeds of the Sale of the mv Mega S (Formerly mv Aksu) and others* 2007 (3) SA 202 (C)
13. *MT "Argun" v Master and Crew of the MT "Argun"* 2003 4 All SA 139 (SCA) ; 2004 (1) SA 1 (SCA)
14. *Oriental Commercial and Shipping Co Ltd v MV Fidias* 1986 (1) SA 714 (D)
15. *Transol Bunker BV v MV Andrico Unity and Others: Grecian Mar SRL v MV Andrico Unity and Others* 1987 (3) SA 794 (C)
16. *Transol Bunker BV v M/V Andrico Unity* 1989 (4) SA 325 (A)
17. *Transnet Ltd t/a National Ports Authority v The MV Cleopatra Dream and Another* 2011 3 All SA 279 (SCA)
18. *Singh v Santam Insurance Limited* 1997 (1)SA 291 (SCA)
19. *Van den Bout v Van den Berg Transport (Pty) Ltd t/a Frasers International World Wide Removals* 1978 (3) SA 529 (T)

ENGLISH CASE LAW

1. *Currie v M Knight* [1897] AC 97
2. *Harmer v Bell The Bold Buccleugh* (1851) 7 Moo.P.C.267,13 ER.884
3. *Nicholson v Chapman*, 2 H.BL.254
4. *Owners of Cargo Laden on Ship Monica Smith v Owners of Ship Formerly Monica Smith Now Monica S* [1967] 3 All ER 740

5. *Republic of India and Another v Indian Steamship Co Ltd (The Indian Grace) (No 2)* [1996] 2 Lloyd's Rep 12 (CA)
6. *The Acrux*[1965] P 391
7. *The Castlegate* [1893] A.C 38
8. *The Chieftain* (1863) 167 ER 316
9. *The Colorado* [1923] P.102
10. *The Dictator*, [1892] P. 304
11. *The Ever Success* [1999] 1 Lloyd's Rep 824
12. *The Father Thames* [1979] 2 Lloyd's Rep 364
13. *The Halcyon Isle* (1981) AC. 221
14. *The Madonna D'Idra*(1811) 1 Dods 37; 165 ER 1224
15. *The Neptune* (1842) 166 ER 81
16. *The Ripon City* [1897] P.226
17. *The Ruby (No 2)* [1898] P 59
18. *The Tacoma City* [1991] 1 Lloyd's Rep 330
19. *The Tervaete* [1922] P.259
20. *The Tolten* [1946] P.135

AMERICAN CASE LAW

1. *Ocean Ship Supply, Ltd. v. MJV Leah* 729 F.2d 971, 1984 AMC 2089 (4th Cir. 1984)
2. *The Barnstable* U.S 464 ,21 S Ct.684 (1901)
3. *The Bring Malek Adhel* 43 U.S (2 How) 210 (1844)
4. *The Little Charles* 26 Fed Cas.979,Case No.15,612
5. *The Nestor* (1831) 18 Fed .Cas 9
6. *The Palmyra* 25 U.S (12 Wheat) 1 (1827)
7. *Wall US* 53 (1868)

SECONDARY SOURCES

Textbooks

1. Browne A, *A Compendious View of the Civil Law and the Law of Admiralty* 2 ed. Butterworths, London and Dublin 1802.
2. Drobni KZU, *International Encyclopedia of Comparative Law*, Instalment 12 Martinus Nijhoff Publishers 1981.
3. Force R, Yiannopoulos AN and Davies M, *Admiralty and Maritime Law* Beard Books 2006.
4. Gilmore G and Black CL, *The Law of Admiralty*, 2nd ed. Mineola. New York 1975.
5. Goldrein I *et al*, *Ship Sale and Purchase*, 6 ed. Informa 2012.
6. Hafizullah M *et al*, *Arrest of Ships-5* LLP, London 1987.
7. Hare J, *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed. Juta & Co Ltd, Cape Town 2009.
8. Hill C, *Maritime Law* 6 ed. LLP, London and Hong Kong 2003.
9. Hofmeyr G, *Admiralty Jurisdiction: Law and Practice in South Africa* 2 ed. Juta 2012.
10. Holdsworth WS *A History of English Law* 7 ed. AL Goodhart & HG Hanbury 1922.
11. Holmes OW, *The Common Law*, Quid Pro, LLC 1881.
12. Jackson DC, *Enforcement of Maritime Claims*, 4 ed. LLP, London and Singapore 2005.
13. Kerr AJ, *The Law of Sale and Lease*, LexisNexis Butterworths 2004.
14. Laryea ET, *Paperless Trade: Opportunities, Challenges and Solutions*, Kluwer Law International 2002.
15. Mackenzie T, *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland*, W Blackwood & Sons 1865.
16. Mandaraka-Sheppard, *Modern Admiralty Law: With Risk Management Aspects*, Routledge Cavendish, London and New York 2001.
17. Meeson N, *Admiralty Jurisdiction and Practice*, 4 ed. Informa 2011.
18. Price G, *Law of Maritime Liens* Sweet & Maxwell 1940.

19. Reddie J, *An Historical View of the Law of Maritime Commerce* W Blackwood & Sons 1841.
20. Roscoe ES, *The Admiralty Jurisdiction and Practice of the High Court of Justice*, 5 ed. Geoffrey Hutchison, 1931.
21. Schoenbaum TJ, *Admiralty and Maritime Law*, 5 ed. Thomson West, 2005.
22. Scott DG ‘Admiralty Jurisdiction in South Africa Prior to 1983’ (2002) 8 *Fundamina* 204
23. Scott TJ, *Lien in Law of South Africa* Vol 15 Part 2, 2 ed. Lexis Nexis Butterworths, 2008.
24. Shaw DJ, *Admiralty Jurisdiction and Practice*, Juta & Co Ltd 1987.
25. Silberberg H and Schoeman J, *Silberberg and Schoeman’s The Law of Property* Lexis Nexis Butterworths 2003.
26. Tetley W, *Maritime Liens and Claims*, 2 ed. International Shipping Publications, Montreal 2008.
27. Thomas DR, *Maritime Liens*, LLP, London 1980.
28. Van der Walt AJ & Pienaar GJ, *Introduction to the Law of Property* 6th ed. Juta 2011.
29. Visser D, *Unjustified Enrichment* Juta 2008.
30. Wallis MJD, *The Associated Ship & South African Admiralty Jurisdiction*, Siber Ink 2010.
31. Wiswall FS, *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press 1970.

Journals

1. Alcantara JM, ‘A Short Primer on the International Convention on Maritime Liens and Mortgages, 1993’ (1996) *Journal of Maritime Law and Commerce* 219.
2. Allsop J, ‘Maritime Law- The Nature and Importance of its International Character’ (2009) 34 *Tulane Maritime Law Journal* 555.
3. Beach JK, ‘Relative Priority of Maritime Liens’, (1924) 33 & *The Yale Law Journal* 841.
4. Benedict, ‘The Historical Position of the Rhodian Law’ (1909) 18 *The Yale Law Journal* 223.

5. Booyesen H, 'The Recognition of Foreign Maritime Liens in South African Law: A Final Word by the Appellate Division' (1991) *International and Comparative Law Quarterly* 40.
6. Browne J, 'The Extinction of Maritime Lien' (2003) *Lloyd's Maritime and Commercial Law Quarterly* 361.
7. Cadwallar FJJ, 'The Court of Admiralty and Equity: Principles and Practice of Maritime Law' (1990) 138 *Royal Society of Arts Journal* 119.
8. Coote HC, 'On the Peculiarities of Maritime Liens' (1852) 17 *Law Magazine* 211.
9. Dyason J, 'South African Maritime Law-An Overview of Some Developments' (2001) 32 *Journal of Maritime Law & Commerce* 3.
10. Emmett AR, 'Roman Traces in Australian law'(2001) *Australian Bar Review* 1.
11. Gormley WP, 'The Development of the Rhodian –Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision' (1961) 3 *Inter-American Law Review* 317.
12. Hayden RP & Leland KC, 'Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens'(2004) 79 *The Tulane Law Review* 1227.
13. Heathcote P, 'Maritime Liens: How to Protect the Innocent Purchaser' (2003) 17 *Maritime Law Association of Australia and New Zealand Journal* 125.
14. Herbert PM, 'Origin and Nature of Maritime Liens'(1929) 4 *The Tulane Law Review* 381.
15. Hofmeyr G, 'Admiralty Jurisdiction in South Africa'(1982) *Acta Juridica* 30.
16. Howard AT, 'Personification of the Vessel: Fact or Fiction', (1991) 21 *Journal of Maritime Law and Commerce* 319.
17. Hutton N, 'The Origin, Development, and Future of Maritime Liens and the Action In Rem' (2004) 28 *Tulane Maritime Law Journal* 81.
18. Jansen M, 'Security by Means of General Notarial Bonds' (2003) *The Quaterly Law Review for the People in Business JBL* 154.
19. Jansen M, 'More Legal Security Regarding Security by Means of General Notarial Bonds' (2003) 15 *South African Mercantile Law Journal* 488.
20. Lane J, 'Should Australian Courts Accept or Refuse the Aid of Private International Law When Considering to Enforce Foreign Maritime Lien?' (2009) (16)(1) *eLaw Journal: Murdoch University Journal of Law* 32.
21. Kazolchyk B, 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' (1992) 23 *Journal of Maritime Law and Commerce* 161.

22. Marsden RG, 'Two Points of Admiralty Law' (1886) 2 *Law Quarterly Review* 357.
23. Michael NG, 'The Protection of Seafarers' Wages in Admiralty: A Critical Analysis in the Context of Modern Shipping' (2008) 22 *Maritime Law Association of Australia and New Zealand Journal*.
24. McLennan JS., 'A Lessor's Hypothec over the Goods of Third Parties-Anomaly and Anachronism' (2004) 16 *South African Mercantile Law Journal* 121.
25. Merges R *et al*, 'Toward a Computerized System for Negotiating Ocean Bill of Lading' (1986) 6 *Journal of Maritime Law & Commerce* 23.
26. Orlando MA, 'A Lien Is a Lien Is a Lien, but a Maritime Lien Is Not' (2003) *International Risk Management Institute* 1.
27. Paulsen GW, 'An Historical Overview of Development of Uniformity in International Maritime Law' (1983) 57 *The Tulane Law Review* 1065.
28. Price G, 'Maritime Liens' (1941) 57 *Law Quarterly Review* 409.
29. Raikes FW, 'The International Law Association Conference, 1899' (1899-1900) 25 *Law Magazine and Review: A Quarterly Review of Jurisprudence* 60.
30. Ryan E, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) *Western Ontario Law Review* 173.
31. Sacks P 'Notarial Bonds in South African Law' (1982) 99 *South African Law Journal* 605
32. Sauveplanne JG, 'The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law' (1965) 29 *The Rabel Journal of Comparative Law and International Private Law* 651.
33. Scott DG, 'Admiralty Jurisdiction in South Africa Prior to 1983' (2002) 8 *Fundamina* 204.
34. Staniland H, 'Is the Admiralty Court to be Turned into a Court of Convenience for the Wandering Litigants of the World?' (1986) 103 *South African Law Journal* 9.
35. Staniland H, 'Should Maritime Liens be Recognised' (1992) 108 *South African Law Journal* 293.
36. Staniland H, 'Admiralty Law' (1994) *Annual Survey of South African Law* 637.
37. Staniland H, 'Roman Law as the Origin of the Maritime Lien and the Action in rem in the South African Court' (1996) 2 *Fundamina* 285.
38. Straw RL, 'Off-record Risks for Bona Fide Purchasers of Interests in Real Property' (1968) 72 *Dickinson Journal of International Law* 35.

39. Tetley W, 'Arrest, Attachment and Related Maritime Law Procedures' (1999) 73 *Tulane Law Review* 1895.
40. Trichart A, 'Maritime liens and the Conflict of Laws' (2011) 47 *Transactions of the Centre for Business Law* 373.
41. Toy DB, 'Introduction to the Law of Maritime Liens' 47 *The Tulane Law Review* 559.
42. Walker C, 'Due Process and Rule C: The Constitutionality of the Admiralty in rem' (1981) 6 *The Maritime Lawyer* 249.
43. Wu Huanning, 'China and Maritime Law' (1988) 5 *Maritime Law Association of Australia and New Zealand Journal* 38.

INTERNET SOURCES

1. James JR, 'International Register of Maritime Liens and Mortgages' (1995) a paper prepared by the Regional Seminar on Charter Parties and Ship Finance. Available at www.unctad.org accessed on the 15th October 2013.

THESIS

1. Bradfield G, 2009, 'The Nature and Scope of the Contemporary Maritime Liens in South African Admiralty Law' LLM Dissertation. Available at www.uct.ac.za

