THE DEPERSONALIZATION OF THE CONCEPT OF OWNERSHIP IN CONTEMPORARY SOCIETY BROUGHT ABOUT BY THE USE OF TITLE AS A SECURITY DEVICE

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Mr Vice-Principal, sir, honoured guests, colleagues, ladies and gentlemen, the topic of my address tonight is the depersonalization of the concept of ownership in contemporary society brought about by the use of title as a security device. I intend to have a look at the concomitant tensions that this phenomenon has given rise to in the law and which, in my opinion, cannot be adequately resolved with reference to the existing principles of the Law of Property. It is an undeniable fact that the various rules and concepts of the Law of Property reflect the social policy of the society in which the legal system prevails.[1] The comprehensive regulation of production and the allocation of resources is of fundamental importance to the wellbeing of any society. In the contemporary world such co-operation and co-ordination necessary to achieve social purposes, will take one of two basic forms: autonomous ordering or collective ordering.[2] According to the thinking of capitalist free enterprise Western society, substantive decisions relative to the production and distribution of goods and services should, as far as possible, be autonomous rather than collective.[3] Thus it is that natural and juristic persons, on their own account, make significant decisions regarding the utilization and allocation of resources and, through a process of dickering, co-operate to achieve economic and social purposes.[4] In these societies the Law of Property is highly developed. The concept of private ownership forms the cornerstone of the economic system and commercial activity is motivated purely by economic considerations.[5] In socialist societies, on the other hand, where the utilization and allocation of resources is effected by collective ordering, the Law of Property is poorly developed.[6] The state enterprises involved in production and distribution make no significant

decisions regarding the utilization and distribution of resources. The responsibility for making such decisions is placed in the hands of public officials charged with social and economic planning who, by means of a planned economy, are able to achieve social purposes directly.[7]

Bearing in mind that the rules and principles of the Law of Property necessarily reflect the economic realities of a given society, it is important to appreciate that these rules and principles "once established and defined...seem to move among themselves according to the rules of a game which exists for its own purposes".[8] Such movement is an indication of the fact that the substance of the rule may have changed whilst its form has been preserved. In consequence of such "movement", a legal rule which was originally developed to meet a particular economic or social situation is subsequently applied to an entirely different set of circumstances in order to bring about a result that was never intended or even contemplated when the rule was first introduced.[9]

One of the most striking examples of the change in the function of legal rules and principles to meet new circumstances has been the development of the hire-purchase[10] concept and more recently the use of the legal device of a lease in sectors of the economic market in which previously the Law of Purchase and Sale dominated. It is a fact of life today that office equipment, industrial machinery, motor vehicles and durable consumer goods are as often hired out by large financial corporations as they are sold. Indeed, finance corporations actively discourage the acquisition of such property (even on hire-purchase terms) by advertising that the modern businessman does not burden himself with the ownership of plant and equipment, etc, but rather leases them. The effect of these developments has been to bring about a depersonalization of the concept of ownership. These developments have, to a large extent, resulted in the

disappearance of the highly personal and individual character of ownership, in the sense of an owner exercising personal control over the thing which he owns. Until relatively recently, a highly personal characteristic was inherent in the very notion of ownership and in the Law of Property generally. The depersonalization of the idea of ownership and the loss of the personal contact between the owner and that which he owns, has in many instances meant that an owner will often no longer exercise the degree of control over his property to which he is entitled in law. Moreover, it has meant that the owner often does not exercise the degree of control over his property which he ought to exercise to make it possible for the rules of the Law of Property to be effectively and efficiently applied. These rules were developed against the social and economic background of a society in which it was assumed that the owner of the thing would usually be in actual control of it.[11]

It seems apposite , at this stage, to say something about the nature of the Law of Property. Were a layman to be asked to define "property", he would most likely say that "property" is something tangible "owned" by a natural or juristic person. Such a response would be inaccurate from a lawyer's point of view. In legal language the word "property" is a complex term. Its exact meaning can only be defined in the context in which it is used. Reduced to its most elementary components, the word "property" has two different legal meanings. It will always signify two distinct and separate legal concepts: first, the right of ownership in a thing and secondly, the thing to which the right of ownership relates.[12]

It must not be supposed from what has just been said, however, that the Law of Property is concerned solely with a study of the right of ownership.[13] It has a wider scope than that. In essence it is that branch of the private[14] law which deals with real rights in property or physical corporeal things[15] in

general. The rights which flow from the Law of Property are real rights in the sense that that are, in general, enforceable against all other persons. In other words, such rights are enforceable against any person who seeks to deal with the thing in any manner inconsistent with the power of the holder of the real right to exert control over the thing. A real right thus gives rise to a direct relationship between the holder of the right and the thing to which that right relates.[16] The object of a real right is the thing itself and the duty correlative to the right is generally[17] binding on all other persons.[18] In contradistinction, a personal right is binding only against certain persons. The object of a personal right is the legally enforceable claim against another, that that other will do a given act or not do a given act,[19] and the duty correlative to the right is binding only on those legal subjects who are aware of the existence of the right.[20] The Law of Property thus embraces the concept of ownership, possession and various so-called jura in re aliena, ie real rights in the property of another - more particularly servitudes, mortgages, hypothecs, pledges and liens.

Ownership is an abstract legal conception which comprises of the aggregate of all the interests (ie the rights, powers and privileges) which may exist between a person and a thing. Such interests are traditionally[21] said to be :

(1) The right to possess - ius possidendi.
(2) The right of exclusion - ius prohibendi.
(3) The right of disposition - ius disponendi.
(4) A right of use - ius utendi.
(5) A right to use and enjoy the fruits and profits - ius fruendi.
(6) A right of destruction -ius abutendi.

The first and the second of these interests, namely, the ius possidendi and the ius prohibendi are clearly rights under the

Hohfeldian analysis of such interests. The ius utendi, the ius fruendi and the ius abutendi would be better categorized as "privileges" and the ius disponendi as a "power". In Civil law tradition, South African law adopts a unitary[22] view of ownership and emphasizes dominium, ie the aggregate of all the various interests that may exist between a person and a thing, rather than the various separate interests that are included in ownership, as does the Common law.[23] The unitary concept of dominium does not envisage that all the various rights, powers and privileges in relation to the thing owned must vest in the owner at any one time. The owner has the capacity to vest some or other of his interests in another person or other persons for a period. An owner may, therefore, vest in another the right to possess, together with the privilege to use and to enjoy the fruits of the property, by letting the property in terms of a lease agreement. Likewise, the owner may grant to another the real right of security in some property of his in order to secure a debt or the performance of some obligation which is due to that other. The real right of security confers upon the holder of the right the power to demand that the property be sold in the event of the debtor's failure to perform and the privilege to have his claim paid out of the proceeds of the property in priority to any other unsecured creditor. A right of security thus creates a direct relationship between the holder of the right and the subject matter which serves as the object of his right, while at the same time laying lame the various rights, powers and privileges which the law vests in the owner by virtue of his ownership.

A question which naturally arises in this regard is why the modern hire-purchase transaction and the leasing contract of durable consumer goods, as well as commercial and industrial capital goods, has become so prevalent in the economic market in which previously the Law of Purchase and Sale dominated. There seem to be two main reasons for this development. First, leasing contracts provide an opportunity to obtain tax benefits and

concessions which would otherwise not be available.[24] Secondly, and perhaps more importantly for the purpose of my discussion tonight, both are devices designed to overcome difficulty encountered by suppliers in obtaining adequate security for relatively long term financing. The difficulty arises because the creation of a real right of security in movable property by way of a pledge, requires that the pledgee be given and retain possession of the movable property which serves as the object of the right of security.

The availability of credit is of crucial importance in any developed economy. Inasmuch as commercial contracts merely give rise to the creation of personal rights against the debtor, the extension of credit is, to a large extent, dependent upon the availability of devices which enable a creditor to ensure the satisfaction of his claim in the event of non-performance by the debtor of his obligations arising out of the contract. The need for such devices arises out of the fact that the contractual remedies available against the debtor take time to enforce and may indeed, turn out to be worthless should the debtor prove to be a man of straw. The insolvency of a debtor brings about a concursus creditorum, a coming together of all the creditors who share proportionately in the proceeds of the debtor's estate. In the absence of special provisions, each creditor is limited to a proportionate sharing in the proceeds of the debtor's estate. The prudent creditor, therefore, requires some means whereby the satisfaction of his claim can be secured.

Various devices[25] exist in our law for the purpose of creating a right of security by agreement[26] between the debtor and the creditor. Of particular importance to the topic under discussion is the creation of a real right of security by agreement. This involves the situation whereby a specified asset (or assets) belonging to the debtor, or to someone acting on behalf of the debtor, is set aside for the purpose of ensuring satisfaction of

the creditor's claim in the event of non-performance by the debtor. In this regard a distinction is drawn between real rights of security created in movable and in immovable property. In relation to immovable property, real rights of security are created by registration of a special mortgage bond over immovable property in the Deeds Registry. With the exception of special notarial bonds created in Natal in terms of the Special Notarial Bond Act,[27] special and general notarial bonds of movable property provide an inferior form of protection for the creditor and it is really a misnomer to refer to them as a form of security.[28] Outside of Natal, therefore, the only institution for the creation of a real right of security in movable property in South African law is by way of pledge. In contemporary society, however, pledge is an unsatisfactory institution for the creation of real rights of security and has, for that reason, declined in importance to the extent that it is rarely used in practice today, not only in South Africa, but also in other Civil Law based legal systems.

There are three basic and essential requirements for a workable system of real security.[29] First, the world at large should be adequately informed of the creditor's right. It is only proper that other creditors, actual or potential, of the debtor should know that a creditor, by reason of his right of security, has a preferential claim to the proceeds of some asset forming part of the debtor's patrimony. In the case of pledge this requirement is achieved by demanding that the creditor be placed in possession and that he retain possession of the property which serves as the object of his right of security.[30] Secondly, the creditor must be adequately protected . With pledge this is achieved by giving the creditor a real right in and to the property pledged, a right in other words, which avails against all the world as it were.[31] Thirdly, the debtor must be adequately protected against abuse by the creditor. This is achieved in the case of pledge by reserving the right of ownership in the property to the debtor,[32] and he retains the

right to redeem the property on payment of the debt. This right cannot be taken from the debtor even if he agrees with the creditor, at the time of creating the security, that he shall be deprived thereof in certain contingencies - pacta commissoria are illegal.[33]

It is the first essential requirement of a workable system of security, namely, the publicity requirement, which makes the institution of pledge an unworkable system of real security in contemporary society. Creditors often do not have the facilities to take charge of and do not want the responsibility of taking care of the debtor's property for the duration of the existence of the right of security. Moreover, the debtor normally has need of and is unwilling to part with possession of the property tendered as security for the payment of the debt. These factors, which make it difficult to obtain security to finance the acquisition of plant, equipment and durable consumer goods have given rise to the use of title, or the right of ownership of movable corporeals, as a means of obtaining security for the repayment of loans advanced by financial institutions for the acquisition of such goods. A typical example is the use a hire-purchase transaction. A supplier sells the goods in terms of a hire-purchase agreement, the price to be paid in instalments over a period. In order to secure his right to payment, the supplier, by means of a pactum reservati domini, reserves the right of ownership in the goods until such time as the price has been paid. On default of the purchaser, the supplier is entitled to rescind the contract and claim return of the property sold. In addition, by reason of his right of ownership, the supplier is unaffected by a subsequent re-sale of the property by the hire-purchase buyer in contravention of the agreement. As the owner, he has a vindicatory action. This action entitles him to recover the property from whomsoever may be in possession and without the necessity of having to pay compensation - not even to a bona fide subsequent purchaser who acquired the property from

the fraudulent hire-purchase buyer.[34] A hire-purchase transaction coupled with a pactum reservati domini, alters the normal consequences of delivery of property in pursuance of a contract of sale where the purchaser is given credit, in other words, where he is allowed time within which to pay the price.

There are three fundamental points which are of importance in relation to the topic under discussion tonight. First, delivery or traditio is a derivative mode of acquisition of ownership - the transferee acquires ownership from the transferor. Traditio thus requires the co-operation of both parties. Secondly, in South African law, following Roman and Roman-Dutch law, the conclusion of a contract of sale does not involve a passing of ownership of the subject matter of the contract. The purchaser, therefore, does not become the owner until the thing sold has been delivered to him.[35] Moreover, the seller, in entering into the contract of sale, does not guarantee that he is the owner or that he will make the purchaser the owner, he merely undertakes to give the purchaser vacant possession and warrants that the purchaser will not be disturbed in his possession by some third party who has a valid title to the property.[36] It follows, therefore, that there can in our law be the valid sale of a res aliena ie property belonging to a third party.[37] The fact that the seller is not the owner and cannot make the purchaser the owner of the property sold, therefore does not invalidate the sale.[38] In the absence of fraud on the part of the seller, the purchaser will have no cause for complaint until such time as he is disturbed in his possession by a third party who has a

breach of his so-called warranty against eviction.[39] Thirdly, South African law applies an abstract theory of the passing of ownership. In terms of this theory, the intention of the parties is of crucial importance in determining whether ownership will pass on delivery or traditio - not the validity of the underlying causa, in the form of a contract of sale, donation or exchange, which gives rise to the decision to pass ownership.[40]

According to the abstract theory , there are three requirements which must be satisfied for traditio pursuant to a contract of sale, for instance, to effect a transfer of ownership from the seller to the purchaser. First, there is a mental element of a justa causa traditionis: there must be a serious and deliberate intention to pass and to receive ownership. Secondly, there is the factual element which requires an actual or constructive delivery of the subject matter of the contract by the seller to the purchaser. Thirdly, there is an incidental element which arises out of the rule expressed by the maxim nemo dat quid non habet. It follows, therefore, that the transferor must be the owner or have the authority of the owner, either actual or apparent, to effect a transfer of title to the purchaser. In the sale of movable goods, the first requirement of a valid traditio - the justa causa traditionis - has to be determined inferentially from the circumstances of the case.[41] In this regard a distinction is traditionally drawn between a cash and a credit sale. If the sale is for cash, then in addition to delivery, ownership passes to the purchaser only upon payment of the price. On the other hand, if the sale is on credit, the presumed intention of the parties is that ownership will pass on delivery. These so-called rules of cash and credit sales are rules of construction based upon the implied intention of the parties. The contract of sale is a synallagmatic contract, which gives rise to an inference that one party is prepared to perform his part of the bargain on condition that the other party performs his obligations under the contract. In the case of a cash sale, therefore, the inference is that the seller, in delivering the subject matter of the contract, intends to pass

ownership against performance by the purchaser of his obligation, with the result that ownership only passes once the price is paid. In the case of a credit sale, on the other hand, because the seller is prepared to rely upon the good faith of the purchaser, in allowing him time within which to pay the price, his intention must be to pass ownership upon delivery of the subject matter of the contract.[42] The rule that in the case of a cash sale of movable property ownership passes only upon payment of the price is inextricably tied up with the question of title to the goods. In Roman-Dutch law it came to be realised, however, that the rule relating to cash sales could work injustices upon a bona fide subsequent purchaser who acquired the property from the purchaser on the strength of a belief that he was the owner of the property and, therefore, had the right to dispose of it. Roman-Dutch law thus introduced a modification to the rule to the effect that if the seller wished to retain the security of a right of ownership in the property sold, he had to assert his ownership within a specified period. Should he fail to do so, an irrebuttable presumption arose of an intention to give credit and hence an intention to pass ownership to the purchaser.[43] The position is the same in modern South African law, save that there is no specified time within which the seller must assert his right of ownership. The rule simply is that the seller must do so by claiming return of the property, within a reasonable period.[44]

The rule that in the case of a credit sale, ownership passes to the purchaser on delivery may always be altered by agreement between the parties. As I mentioned earlier, the practice in hire-purchase transactions, of including a pactum reservati domini, ie a clause expressly reserving ownership in the goods sold until the full price has been paid, is firmly entrenched as a security device in our law.[45] The reservation of ownership in a hire-purchase agreement is undoubtedly one of the most widely used security devices in relation to corporeal movable property in contemporary South African law. More recently, the use of a "sale and leaseback transaction" has been successfully invoked as

a security device.[46]

The use of title in this way, as a security device, is very effective in so far as the creditor is concerned. He retains or acquires ownership of the property which serves as the object of his right of security and enjoys the protection of a vindicatory action. The interests of the debtor are, likewise, protected. The Credit Agreements Act[47] which embraces not only instalment sale transactions (the new form of hire-purchase sales) but also leasing transactions, was introduced with the specific object of protecting debtors against abuse by their creditors. Security title, however, fails as an institution for the creation of a real right of security because it does not comply with the first requirement - the publicity requirement - of a workable system of real security. It provides no means whereby third parties can be appraised of the limitations on the right of the debtor, the hire-purchase buyer or lessee, in the property concerned. A subsequent purchaser of the property, for instance, is left wholly dependent upon the good faith of the debtor.

I have time to consider only one or two specific cases to illustrate my proposition that the depersonalization of the concept of ownership, brought about by the wide-scale use of title as a device to secure the payment of a debt, has created problems in the South African law which cannot be resolved with reference to the existing principles of law.

Boland Bank Bpk v Joseph[48] is a good illustration of the complexity of a transaction using title as a security device and of the predicament which is created for the bona fide third party. The case arose out of an application brought by Boland Bank for an order authorizing the Deputy-Sheriff of Durban to take possession of a 1973 model Audi 100 from the respondent, Joseph, and to deliver it to Boland Bank. The facts which gave rise to the application were as follows. In June 1973, Lenbou

Motors (Pty) Ltd acquired a franchise to sell Audi and Volkswagen motor vehicles. On 27 June 1973, Lenbou entered into a so-called floor-plan agreement with a finance house which set out the terms on which the vehicles were acquired by Lenbou for purposes of re-sale. The agreement reserved the right of ownership in the vehicles to the seller until the full price had been paid. Lenbou financed the purchase price of the vehicles by means of a time draft which was drawn on, and accepted, by the finance house, payable on 27 September 1973. Prior to acquiring this franchise, Lenbou had held a sub-agency to sell Peugot motor vehicles. In conducting the sub-agency, Lenbou had likewise entered into a floor-plan agreement with the applicant, Boland Bank, which had provided the financing for the purchase of Peugot motor vehicles for re-sale by Lenbou. That agreement had contained similar, though not identical terms with regard to the reservation of ownership, as those contained in the floor-plan agreement with the finance house. On 16 July 1973, Lenbou entered into an agreement with Boland Bank in terms of which it sold the Audi 100 to Boland Bank and simultaneously leased the vehicle back from Boland Bank. The object of these transactions was to enable Lenbou to acquire the Audi 100 for the private and business use of Hamlett, one of the directors of Lenbou, as the supplier insisted that a franchise-holder make use of its products. Similar transactions had in the past been concluded with Boland Bank in respect of Peugot vehicles which had been used by Lenbou as demonstration models and courtesy vehicles. Lenbou thus sold the Audi 100 to Boland Bank at a time when it had not yet acquired ownership of the vehicle in terms of the floor-plan agreement with the finance house. According to that agreement, ownership was only to pass on payment of the price. Payment was not affected until 5 October 1973 when the sight draft was presented for payment and met.[49] Thereafter, on 18 October 1973, Lenbou sold the Audi 100 on hire-purchase to Joseph and simultaneously ceded all its rights under the contract to the finance house which had provided the funds to enable Joseph to make the purchase. (This was the same finance house which had extended credit facilities to Lenbou, in terms of the floor-plan

agreement, to enable it to acquire the vehicles for the purpose of re-sale).

The question which the court had to decide was where the right of ownership in the Audi 100 vested. If Boland Bank was the owner, it was entitled to succeed in its application, unless Joseph was able to raise an estoppel to Boland Bank's vindicatory action. On the other hand, if ownership vested in Joseph, Boland Bank could not succeed in its application. The court came to the conclusion that ownership lay with Boland Bank. It reasoned [50] as follows. In terms of the floor-plan agreement, Lenbou was entitled to possession of the vehicles and to deal with them as owner by selling them. In other words, he acquired possessio civilis of the vehicles, ie the right to have physical detention of the vehicles with the intention of dealing with them as owner. When the sale and leaseback contracts were concluded with Boland Bank, Lenbou had not yet acquired ownership and, therefore, could not pass ownership to Boland Bank. Rather, it transferred to Boland Bank all the rights which it had to the Audi 100 in terms of the floor-plan agreement, namely the right to possessio civilis of the vehicle, together with the right to become the owner of the vehicle on payment of the price. It followed, therefore, so the court reasoned, that when the price was paid on 5 October 1973, ownership did not vest in Lenbou, but passed to Boland Bank in terms of the contract for the sale of the Audi 100 concluded with Boland Bank on 16 July 1973. In the result, when Lenbou purported to sell the Audi 100 to Joseph, the only right which it had in and to the car was the right to possess in terms of the lease agreement with Boland Bank. That, therefore, was all that Lenbou could transfer to Joseph on delivery of the vehicle to him pursuant to the contract of sale concluded with Joseph on 18 October 1973.

The correctness of this decision has been queried.[51] It seems clear that the court came to this conclusion on the basis of a

value judgment. It was faced with the need to balance the interests of two innocent parties, the financier, Boland Bank and the innocent purchaser, Joseph, one of whom had to suffer at the hands of the fraudulent and dishonest dealer, Lenbou. The court was placed in the position of having to make such a judgment because our legal system does not provide a satisfactory institution for the creation of real rights of security in corporeal movable property. As we have seen, the use of title as a security device breaks down because third parties are not informed of the fact that ownership of the property, which serves as the object of the security, resides in someone other than the debtor. The only hope of the innocent third party, the innocent purchaser of such property, to ward off the vindicatory action of the true owner, the creditor, is where he can successfully plead an estoppel against the owner. To succeed in this defence, he must be able to show that the owner, negligently made or permitted a representation to be made that the debtor, the person from whom he acquired the property, was the owner or had a ius disponendi.[52] The innocent purchaser in these circumstances bears a very heavy evidential burden in this regard.[53] How does he prove that the representation was culpably made? The mere fact that the debtor had possession of the property is not sufficient.[54] In addition, it has been suggested that the fact that the person from whom he acquired the property was a dealer in the class of goods concerned is not sufficient.[55] Moreover, in relation to motor vehicles, it has been held by the Appellate Division[56] that the fact that the car is registered in the name of the person from whom the vehicle was acquired by a bona fide purchaser cannot be relied upon, for the purpose of a defence of estoppel, as evidence that that person was the owner or had a ius disponendi.

It will be appreciated, therefore, that the use of title to provide security in corporeal movable property constitutes an inappropriate security device. It fails as an institution of real security by reason of the fact that it provides no means by

which the world at large can be appraised of the fact that the right of ownership resides in someone other than the debtor in possession of the property. Bona fide third parties who have dealings with the debtor are left wholly dependent upon the good faith of the debtor.[57] In other Civil Law based systems which, on account of the shortcomings of the institution of pledge in contemporary society, have resorted to the use of title in corporeal property as a security device for credit facilities advanced, the innocent third party who purchases from the debtor who has not yet acquired ownership does not find himself in the same predicament as does his counterpart in South African law. This is so because in France[58] and Germany,[59] for instance, the bona fide acquisition of property in these circumstances is recognized and enforced. These systems have recognized the need to protect innocent purchasers in the interests of commerce and trade. Thus where an owner has voluntarily parted with possession to a person who disposes of the property to a bona fide third person, the owner loses his right to vindicate the property.[60] Before attempting to suggest a possible solution to the problem, I would like to have a look at just one other aspect of the Law of Property which clearly illustrates my thesis that the depersonalization of the concept of ownership flowing from the use of security title, has created tensions in the Law of Property which cannot be resolved with reference to the existing principles of the law.

So far we have had a brief look at the difficulties brought about by the depersonalization of the concept of ownership in relation to traditio as mode of acquisition of property.[61] There are, however, other ways in which ownership can be acquired in South African law. These are the so-called original modes of acquisition of ownership. They are called original, because a person acquires ownership of property belonging to another, in certain circumstances, but not as a result of a deliberate intention of the parties to transfer ownership from one to another. One such mode of acquisition of ownership is known as

accessio.[62] This may come about as a result of the action of nature, for instance, the progeny of animals and the production of fruits of trees. Accessio may also come about as a result of the intervention of man whereby two or more separate things are joined together in such a way that they henceforth form an entity. Where this joinder takes place in such a way that an accessory thing is added to a principal thing, the owner of the principal thing, by virtue of his ownership of it, acquires ownership of the accessory thing which is added to it. In circumstances where accession takes the form of inaedificatio, ie where a movable thing is added to an immovable in such a way that the owner of the immovable also becomes the owner of the movable, the depersonalization of the concept of ownership brought about by the use of title as a security device, has resulted in tensions in the law.

In accordance with the rule expressed by the maxim omne quod inaedificatur solo, solo cedit the permanent annexation of a movable to land or to buildings erected on land, in such a way that the movable loses its separate identity becomes the property of the owner of the land to which it has become attached by accessio. In determining when accessio in the form of inaedificatio can be said to have taken place three guidelines are applied by the courts:[63]

(i) The nature of the movable thing;
(ii) the manner in which it has been affixed; and
(iii) the intention with which movable was attached at the time of its annexation.

According to the traditional approach, if upon a consideration of the first two guidelines, which are determined objectively, an unequivocal inference as to the intention with which the annexation was made results, the third guideline may be virtually

ignored. On the other hand, if a consideration of these factors produces an equivocal inference of intention, the third guideline, namely that of intention, becomes important.[64] In applying these guidelines, the courts initially looked to the intention of the person who made the annexation.[65] Later, however, it came to be realized that the annexor and the owner of the movable thing may not be the same person and the courts started to emphasise that it is the intention of the owner of the movable property which must be looked to.[66]

This change in emphasis is significant to my thesis for the case in which the change first took place, **Mac Donald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd**,[67] raised the question as to whether a refrigeration plant which had been purchased on hire-purchase subject to the usual **pactum reservati domini**, acceded to the building to which it was annexed. As it turned out in that case, a consideration of the first two guidelines namely, the nature of the thing and the manner of annexation, did not produce an unequivocal answer as to the intention with which the attachment was made. It was possible to remove the plant without appreciable damage to either the plant or the building, with the result that the intention with which it was annexed became of importance. Chief Justice Innes stated:[68]

> '[T]he intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the **dominium** of movable property, must surely be the intention of the owner. It is difficult to see by what principle of our law the mental attitude of a third party could operate to effect so vital a change.'

He continued:[69]

> '[It is] a fundamental principle that (subject to few exceptions) dominium cannot be transferred or altered, save by intent of the dominus....A house acceded to the soil in which it was built; but even in that case the materials, if originally in different hands from the ownership of the soil, was governed in strict law by the state of mind of the dominus.'

In more recent years it has be held that this intention is to be determined upon a consideration of all three guidelines which carry almost equal weight.[70] This new approach in essence seems to mean that the intention of the owner of the movable is really the only criterion for determining whether an accession has taken place or not.[71] So much so is this the position, that there are cases in which the professed intention of the owner of the movable has been allowed to override the inference of intention which would otherwise be drawn from a consideration of the first two guidelines, namely, the nature of the thing and the manner of its annexation.

The case of Melcorp SA v Joint Mutual Pension Fund (Tvl)[72] provides a good illustration of the difficulty created by this approach. In this case Melcorp contracted with R Company for the supply and installation of two lifts in a building erected by R Company. The contract contained a pactum reservati domini reserving the right of ownership in the lifts to Melcorp until the final payment on the lifts had been made. The contract also reserved the right of Melcorp to repossess the lifts in the event of a default in payment, irrespective of the manner of their attachment to the realty. The finance for the erection of the building had largely been obtained by means of a loan from the Joint Mutual Pension Fund, the repayment of which was secured by a mortgage bond over the building in favour of the Joint Mutual Pension Fund. R Company fell into arrears with payment to

Melcorp and under the bond to Joint Mutual Pension Fund. Ultimately the Joint Mutual Pension Fund foreclosed on the bond and caused the property to be sold in execution. It purchased the property at the sale in execution. Melcorp, thereafter, sought to enforce its right to remove the lift installation. The question which the court had to determine was whether or not the lifts had acceded to the building. McEwan J came to the conclusion that a consideration of the nature of the thing and the manner of attachment was inconclusive in determining whether the lifts could be said to have lost their separate identity so as to become part of the building. In the result, the intention of the owner of the lifts in making the attachment was deemed to be of paramount importance.

McEwan J conceded that:[73]

> '[A] lift installation is an integral part of a multi-story flat building. If those facts stood alone it would be a proper and necessary inference that the person who installed the lifts intended them to form part of the structure and consequently acceded to it.'

However, the learned judge continued:[74]

> 'In the circumstances it appears to me that it would quite artificial to impute a so-called 'real intention' to the plaintiff in conflict with such an unequivocal stated professed intention. It might be otherwise if the installation was (contrary to my earlier finding) not readily removable. In other words, after weighing together the inferences derivable from the nature of the installation against the evidence of the contract, I have formed a view that the annexor's intention was

not to make the installation a permanent one until such time as the plaintiff had been paid for it.'

With respect to the learned judge, it is distinctly arguable that this is a case in which a consideration of the nature of the thing and the manner of its annexation produced an unequivocal answer - the lifts acceded to the building.[75] The lifts were built into the building and became part of the fabric of the building in the same way that the doors and windows and ceilings become part of the fabric of the building and hence accede to it. Doors and windows can be removed from a building without causing appreciable harm either to them or the building, but no-one would seriously suggest that they do not accede to the building in circumstances in which they have been sold on hire-purchase subject to a pactum reservati domini.

Once again it is instructive to note that Melcorp's[76] case involved a situation where movable property had been sold on terms and the seller reserved title in it as a security device until the full price had been paid. In the case of Theatre Investments (Pty) Ltd and Another v Butcher Bros Ltd[77] (decided two years earlier by the Appellate Division) it was held that chairs and lighting equipment installed in a theatre building which were, likewise, removable without injury to themselves or the building, had acceded to the building so as to become immovable. The distinction between the cases lies in the fact that in the latter case, there was no reservation of title as a security device. Rather, the movables were annexed to the building by the owner of the movables.

The trend observable in recent cases seems to be that emphasis is placed almost exclusively on the professed intention with which the annexation was made,[78] even to the extent that it may override the natural inference to be drawn from a consideration

of the nature of the thing and the manner of its annexation. This shift in emphasis is welcomed by some writers,[79] but criticized by others[80] on the ground that it confuses the requirements necessary for a translation of ownership by traditio, a derivative mode of acquisition of ownership, with those required for accessio which is an original mode of acquisition of ownership.[81] In the result, it would seem that in modern South African law there are no rules which can be applied in classifying things as either movable or immovable, for a thing may be movable today but immovable tomorrow when the last instalment on the agreed price has been paid. The courts in making the classification, in concrete fact situations, would seem to use such classification as a device to to resolve conflicting interests in a manner which is deemed to be fair and equitable in the circumstances.[82] The shift in emphasis to the extent that the intention of the owner of the movable is now almost of paramount importance in determining when accessio in the form of inaedificatio has taken place, came about partly, if not entirely, as a result of a desire to give efficacy to the reservation of title in movable property as a security device. Clearly, if the professed intention of the owner who has sold the thing on credit, expressly reserving the right of ownership until the full price has been paid, can be overridden by an inference of intention drawn from the nature of the thing and the manner of its annexation, the very object of resorting to a reservation of title would be rendered nugatory. At the same time, however, it must be emphasized that the use of title in this way as a security device breaks down as an institution of real security because it fails to comply with the publicity requirement of a workable system of real security. How is a prospective purchaser or mortgagee to know that a lift installation in a multi-storeyed building, for instance, does not from part of the fabric of the building , but is liable to be removed by the supplier of the installation in the event of a default in the payment of the price of the lifts.[83]

I think that it will be apparent from consideration of the few cases which I have mentioned here tonight, that South African law has really reached an impasse. The use of title in hire-purchase transactions and "sale and leaseback transactions" is a wholly inappropriate means of providing security for the payment of a debt. It provides no machinery whereby members of the public at large can be informed of the creditor's right of security. At the same time the use of title as a security device in this way is firmly entrenched in our law.

How then are the problems which flow from the depersonalization of the concept of ownership brought about by the wide-scale use of title as a security device, in these kind of transactions, to be overcome? If the law is to fulfil its function of regulating the conduct of individuals in society and of provided a just and equitable sollution in circumstances in which a conflict of insterest arises, it is apparent that a change to the law is required. It seems to me that there are two possible solutions, both of which would require statutory intervention. The first would be to introduce a limitation upon the right of an owner to vindicate movable property, in certain circumstances. The limitation which I have in mind would be similar to that which exists in French and German law, in terms of which the bona fide acquisition of property by a third party from a person to whom the owner had voluntarily given possession of his property should be recognised and enforced.[84] Such a limitation would certainly go a long way to protect the interests of a bona fide third party who at present has no independent means of discovering any limitation upon the right of the person, from whom the property is acquired, to alienate it. Such a change in the law, however, would seriously impede commercial activity. It would deprive the creditor of the right of security which the reservation of title seeks to give him, unless suitable criminal sanctions could be introduced which would discourage the buyer from fraudulently acting in breach of his contract. A more fruitful and successful approach, it is submitted, would be to

introduce legislation along the lines of the Special Notarial Bond Act of Natal so as to make it possible to create a real right of security by means of a special notarial bond of movables.[85] The registration of valuable movables should not present any real practical difficulty in the Deeds Registry.[86] Moreover, with the computerization of the system of registration in the Deeds Registry there would be no real difficulty for prospective purchasers and creditors to undertake a search in the Deeds Registry so as to ascertain where the ownership of specific property lies and what real rights, if any, have been conferred upon others in relation to specific property.[87] To make the registration of real rights of security in movable property a workable system, however, it would be necessary, at the same time, to cut down on the effect of a reservation of title in a hire-purchase sale and the effect of a "sale and leaseback transaction".[88]

In conclusion Mr Vice- Principal, sir, I would like to add that I consider it a great privilege to have known and to have had the opportunity to work together with Professor Kerr, especially is this so since we share an interest in and facination for the Law of Contract as a chosen field of specialization. Professor Kerr has set an extremely high ideal for anyone to try to emulate with his long list of published books in the field of the Law of Contract, which are cited by the courts and legal academics alike as authority on the South African law. It was with a little disappointment, in coming to Rhodes University, that I realized that I could not expect to teach much in the Law of Contract, however, that fact in itself has meant that I have acquired an interest in an equally fascinating and important branch of the Private law, namely the Law of Property.

NOTES

1 R W M Dias **Jurisprudence** 4ed (1976) 406ff; F H Lawson **The Rational Strength of English Law** Hamlyn Lectures (1951) 79. Though not free from criticism, private ownership of property has been the norm in most of Western Europe from the end of the Middle Ages. Various theories have been advanced over the ages in support of the notion of private ownership (see Roger A Cunningham, William A Stoebuck and Dale A Whitman **The Law of Property** 2ed (1984) 1ff). In recent years a number of American scholars have advocated an economic theory of property. Thus R Posner **Economic Analysis of Law** (1972) 10-39, asserts that the legal protection afforded to property rights performs an important economic function by creating incentives for the efficient use of resources and is a normative proposition rather than a factual description of the way in which the rules of the Law of Property operate within the society. However, contrast the views of Karl Renner **The Institutions of Private Law and their Social Functions** (edited, with an introduction and notes by Otto Kahn-Freund, translated by A Schwarzschild) (1949) 83. Renner maintains that legal institutions are normatively pure; that legal norms are indifferent towards their social functions and that any economic effect is extraneous to such norms.

2 See Arthur Taylor Von Mehren & James Russell Gordley **The Civil Law System : An Introduction to the Comparative Study of Law** 2ed (1977) 786.

3 See R L Birmingham (1970) 24 **Rutgers LR** 273 at 274 n3; Friedrich Kessler & Grant Gilmore **Contracts: Cases and Materials** 2ed (1970) 35.

4 E Allan Farnsworth (1969) 69 **Columbia LR** 576 at 578.

5 C G van der Merwe Sakereg (1979) 2.

6 In socialist states such as that of the Soviet Union, East Germany, and indeed most of Eastern Europe, ownership of the "means of production" is vested in state owned enterprises charged with the allocation and distribution of resources. In socialist societies private ownership of property has not been entirely abolished. Private ownership is permitted in respect of property which is intended for the satisfaction of the citizen's material and cultural needs. A citizen may thus own income from work, savings, a house or part thereof, household articles for personal use and convenience and subsidiary house hold production. No citizen, however, may derive non-labour income from privately owned property (Art 105 of The Civil Code of the Russian Soviet Federated Socialist Republic). From the outset, the Soviet political regime realized the potential of the use of land ownership as a tool of political, social and economic engineering. Within two weeks of its ascending to power, the Soviet Government established a monopoly of all land in the Soviet Union which remains absolute and unmitigated today. This monopoly extends not only to the soil but to everything attached to it by the course of nature - all minerals, water, forests (including all trees, herbage, birds and animals that inhabit the forests). Land in the Soviet Union is a res extra commercium. It cannot be the object of any commercial contract. It cannot be purchased or sold, mortgaged, leased, exchanged or disposed of by testamentary act to a third party by the original grantee. Modern Soviet law has established complex rules and regulations pertaining to the right of use of portions of the land by individual users, which are designed to secure the state's monopolistic dominium over all land in the Soviet Union. Even in 1948 when the right to the private ownership of dwellings was introduced, the immutable principle of Soviet land law, that of state ownership, was preserved. This was achieved by the establishment of an artificial distinction between ownership

of the house or an apartment in a block and the land upon which it stands. The recognition of ownership of private dwellings was necessitated by a need to overcome a housing shortage (see C Osakwe 1985 Acta Juridica 147).

7 See Harold J Berman and William R Greiner The Nature and Functions of Law (1972) 542.

8 F H Lawson loc cit.

9 See Silberberg and Schoeman The Law of Property 2ed by J Schoeman (1983) 5.

10 It is strictly speaking incorrect to speak of "hire-purchaser transactions": these contracts are now termed "instalment sale transactions" in terms of the Credit Agreements Act No 75 of 1980, which repealed and replaced the Hire-Purchase Act No 36 of 1942.

11 Which accounts for the general presumption of the law that the possessor of a movable thing is the owner and the age-old adage that possession is nine-tenths of the law. At the time when the concept of ownership or dominium was first developed, it constituted an expression of economic relations when the superstructure and the substructure of the institution were in conformity with one another (Renner loc cit 83). Since then, however, the function of ownership has in many instances altered without any change in the norms which make up the Law of Property. Ownership, has in some instances become a source of power which is not represented by actual control of the thing owned.

12 Thus, for instance, it may be said that property in a thing has passed when the right of ownership or title to the thing is transferred from one person to another. But when a person demands return of his property he does not demand return of the right of ownership. That he has never lost:

rather, he insists that the subject matter of his right of ownership be handed back to him. Likewise, where it is said that there has been a disposition by a man of his property, that denotes the transfer of the right of ownership in a thing owned by him, irrespective of whether he parts with possession of the thing itself or whether he retains possession of the thing, but henceforth in some capacity other than that as owner. On the other hand, the removal of a man's property always requires that the thing itself be somehow or other dealt with, but does not necessarily involve a transfer or relinquishment of the right of ownership in respect of the thing.

13 The word "property" is not a term of art from which it can be inferred that a person is the owner of a particular thing.

14 Traditionally the Law of Property has been regarded as the pith and essence of private law. More and more, however,at least in relation to land, the Law of Property has become the concern of public law (see Carole Lewis 1985 **Acta Juridica** 241).

15 According to our Roman law sources, private law was divided into three categories - the law relating to persons; the law relating to things and the law relating to actions (see D H Van Zyl **Geskiedenis en Beginsels van die Romeinse Privaatreg** (1977) 122; Gaius **Institutes** 1.8 read with books 2 and 3; Justinian **Institutes** 1.2.12 and D 1.5.1). The Law of Obligations and the Law of Succession was **ius ad res pertinens** and fell within the second category - the Law of Things. It followed from this that not only physical corporeal objects, but also rights because of their identification with the objects to which they relate, were regarded as things or property in a legal sense. The Roman texts do not contain a comprehensive definition of a thing. Several attempts in this regard have been made, however.

(See, for instance, Sohm Institutes 302, who defines a thing as 'anything that can form part of a man's property...'. See also J A C Thomas A Textbook of Roman Law (1976) 125 where a thing is defined as 'whatever could be assessed in terms of money, have a cash value placed upon it...any economic asset'). Similarly wide definitions are to be found in our Roman-Dutch common law sources (see, for instance, Grotius Inleiding 2.1.3; Van der Keessel Praelectiones ad Grotius 2.1.3; Voet 1.18.11; Van Leeuwen Het Roomsch Hollansch Recht 2.1.4,5; Censura Forensis 1.2.1; 2.1.1) and in the writings of modern South African jurists (see H R Hahlo and Ellison Kahn The Union of South Africa: The Development of its Laws and Constitution (1961) 571; A F S Maasdorp Institutes of South African Law Vol II The Law of Property 10ed by C G Hall (1976) 1). So wide a definition of a thing has been criticized as being vague and unsatisfactory for the purposes of modern South African law. South African law, it is argued, draws a clear distinction between the legal relationships in the Law of Obligations, which give rise to personal rights, and the legal relationships in the Law of Property which give rise to real rights. Moreover, since the introduction of the concept of Executorship and the Administration of Estates, as a result of the influence of English law, the death of the decent, unlike the position in Roman and Roman-Dutch law, no longer vests ownership of the assets of the decedent in the heir, the Law of Succession is better categorized as falling outside the scope of the Law of Property. Finally, for the purposes of exposition, a distinction is customarily drawn between the various categories of rights in accordance with the nature of the object of the right, namely, between real rights in relation to physical corporeal things; personal rights in relation to performance due in terms of a contract; personality rights in relation to a person's reputation, etc and immaterial property rights in relation to patent, copy right etc. For these reasons some modern writers tend to limit the definition of a thing for the

purposes of the Law of Property to physical corporeal objects. (See W A Joubert (1958) THRHR 98 at 113-115; C G Van der Merwe Die Beskerming van Vorderingsregte uit Kontrak teen Aantassing deur Derdes (1959) 141; Silberberg and Schoeman op cit 11; C G van der Merwe Sakereg op cit 18-19).

16 See Grotius Inleiding 2.1.58; Voet 5.2.1; Van der Keessel Praelectiones ad Grotius 2.1.58; Van der Linden Koopmans Handboek 1.6.1.

17 No real right is absolute in the sense that it operates against all legal subjects in all circumstances. The notion that a real right is binding on all the world, as it were, operates subject to the exception provided by the doctrine of estoppel.

18 The right of ownership of a person whose thing has been stolen may, for instance, be enforced against, and the property recovered from, whomsoever may be in possession of it and irrespective of whether that person is a thief, a purchaser in good faith and for value or any other person. Similarly, the holder of a right of servitude in respect of immovable property, for instance, has the power to exercise the right of servitude against not only the grantor of the right, but also, for the duration of his servitude, against all successors in title to the servient tenement and his creditors, irrespective of whether they had knowledge of the existence of the servitude or not.

19 See Voet 5.2.1.

20 Thus an intentional interference with or violation of a legal right of another, committed without justification and tending to injure the plaintiff is an actionable wrong in our law (Solomon v Du Preez 1920 CPD 401 at 404; Isaacman v Miller 1922 TPD 56 at 61; Dunn v SA Merchants Combined

Credit Bureau 1968 (1) SA 209 (C) at 215G). Likewise, in terms of the rule expressed by the maxim qui prior est tempore potior est iure a person's knowledge of the existence of another person's personal right is binding on the former (see J E Scholtens (1953) 70 SALJ 22 and (1954) SALJ 71).

21 This , however, does not represent a complete list of interests which exist between a person and a thing. (See A M Honore 'Ownership ' in Guest (ed) Oxford Essays in Jurisprudence (1961) 107; Carole Lewis 1985 Acta Juridica 241; Silberberg and Schoeman op cit 162).

22 The so-called absolute and unitary nature of ownership which is discernible in South African law, it seems is something that was not inherited from Roman-Dutch law, but evolved as a result of a reception of the highly individualistic theories of nineteenth century Pandectism (see D P Visser 1985 Acta Juridica 39).

23 See Roger A Cunningham, William B Stoebuck and Dale A Whitman The Law of Property 7.

24 See E G Broomberg Tax Strategy 2ed (1983) chapters 12 and 22.

25 Security for the payment of a debt or the performance of an obligation may be furnished by way of personal security. This is achieved by means of the contract of suretyship in terms of which the creditor contracts with a third party (a surety) to the effect that he will, on default of the debtor, meet, in whole or in part, the obligation due by the debtor. The effect of this arrangement is to extend the creditor's right of action against the debtor, thereby giving his a right not only against the debtor, but also against the surety who has undertaken either primary or secondary liability depending upon the terms of the

suretyship contract.

Rights of security may also be created in incorporeals by way of a cession in securitatem debiti in terms of which a debtor cedes to the creditor a right which he (the debtor) has against a third party, to secure the debt owed to the creditor. Though the precise nature of the institution by which rights are ceded in securitatem debiti is a matter in respect of which there has been considerable academic debate (see, for instance, J C De Wet & J P Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg 4ed (1978) 366-7 and 370ff; T K Pahl Die Aanwending van Vorderingsregte ter Versekering van Skulde 177ff (unpublished LLD thesis University of Stellenbosch 1972)); C G van der Merwe Sakereg 480ff; Susan Scott The Law of Cession (1980) 135 et seq ; J R Harker (1981) 98 SALJ 56; G F Lubbe in W A Joubert (ed) The Law of South Africa XVII (1983) sv 'Mortgage and Pledge' para 482 n16; Ellison Kahn Contract and Mercantile Law Through the Cases 2ed (1985) II 880n(a); H J Delport & N J J Olivier Sakereg Vonnisbundel (1985) 414n ; J R Harker (1986) 103 SALJ 200) the cession of rights in securitatem debiti is firmly entrenched as a security device is South African law (Leyds NO v Noord-Westelike Kooperatiewe Landboumaatskappy Bpk en Andere 1985 (2) SA 769 (A); Marais en Andere NNO v Ruskin NO 1985 (4) SA 659 (A); Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A)). Where the right ceded in securitatem debiti is an incorporeal immovable , for instance, a mortgage of land or of a real right to land, such as a registered lease or sublease, to be effective in creating a right of security in the cessionary, the cession in securitatem debiti must be registered (Lief NO v Dettmann 1964 (2) SA 252 (A) at 273).

26 Apart from rights of security created by agreement between the parties, rights of security also come into existence simply by operation of law. Thus there are various tacit

hypothecs, for instance that, of the landlord in respect of arrear rent and tacit hypothecs created in term of some statute, for instance, that of the hire-purchase seller in terms of s 84 of the Insolvency Act No 24 of 1936. There are also various liens or rights of retention which secure a claim to compensation for improvements effected to property of another. (See in this regard C G van der Merwe op cit 494ff; T J Scott (in W A Joubert (ed) The Law of South Africa XV (1981) sv "Liens" para 122-128; Delport and Olivier op cit 400-401). The seller of movable property in terms of a cash sale also enjoys a right of security in that ownership in the goods is reserved to him until such time as the price is paid (Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A); Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A); Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 (4) SA 464 (A); D H van Zyl (1974) 91 SALJ 337; J R Harker (1974) 91 SALJ 350; M A K Lambiris (1985) 102 SALJ 452). In order that third parties should not be misled, however, the seller's right of security arising out of the tacit reservation of ownership in the goods sold, is limited to the extent that he should within a reasonable period , in the event of non payment of the price, assert his right of ownership by reclaiming the goods (Nowell v Franzen 1956 (4) SA 35 (C); Pienaar v G North & Son (Pty) Ltd 1979 (4) SA 522 (O)).

27 No 18 of 1932. Section 2 of the Act provides that movables specially hypothecated by a notarial bond shall be deemed to have been pledged to the holder of the bond as security, in the same manner as if they had been delivered to him as a pledge. This section thus creates a possessionless pledge. To have the effect of creating a real right of security in this way, the goods must have been specially described and enumerated in the bond. Moreover, the movable must have been capable of being delivered to the bond holder at the time the bond was registered (Rosenbach & Co (Pty) Ltd v

purposes of the Law of Property to physical corporeal objects. (See W A Joubert (1958) THRHR 98 at 113-115; C G Van der Merwe Die Beskerming van Vorderingsregte uit Kontrak teen Aantassing deur Derdes (1959) 141; Silberberg and Schoeman op cit 11; C G van der Merwe Sakereg op cit 18-19).

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26 Apart from rights of security created by agreement between the parties, rights of security also come into existence simply by operation of law. Thus there are various tacit

hypothecs, for instance that, of the landlord in respect of arrear rent and tacit hypothecs created in term of some statute, for instance, that of the hire-purchase seller in terms of s 84 of the Insolvency Act No 24 of 1936. There are also various liens or rights of retention which secure a claim to compensation for improvements effected to property of another. (See in this regard C G van der Merwe op cit 494ff; T J Scott (in W A Joubert (ed) The Law of South Africa XV (1981) sv "Liens" para 122-128; Delport and Olivier op cit 400-401). The seller of movable property in terms of a cash sale also enjoys a right of security in that ownership in the goods is reserved to him until such time as the price is paid (Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420 (A); Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A); Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola 1976 (4) SA 464 (A); D H van Zyl (1974) 91 SALJ 337; J R Harker (1974) 91 SALJ 350; M A K Lambiris (1985) 102 SALJ 452). In order that third parties should not be misled, however, the seller's right of security arising out of the tacit reservation of ownership in the goods sold, is limited to the extent that he should within a reasonable period , in the event of non payment of the price, assert his right of ownership by reclaiming the goods (Nowell v Franzen 1956 (4) SA 35 (C); Pienaar v G North & Son (Pty) Ltd 1979 (4) SA 522 (O)).

27 No 18 of 1932. Section 2 of the Act provides that movables specially hypothecated by a notarial bond shall be deemed to have been pledged to the holder of the bond as security, in the same manner as if they had been delivered to him as a pledge. This section thus creates a possessionless pledge. To have the effect of creating a real right of security in this way, the goods must have been specially described and enumerated in the bond. Moreover, the movable must have been capable of being delivered to the bond holder at the time the bond was registered (Rosenbach & Co (Pty) Ltd v

Dalmonte 1964 (2) SA 195 (N)). A special notarial bond only has the effect of creating such a real right of security in movables which are situate in Natal. Moreover, the right of security is lost in the event of the movables being moved from Natal and sold and delivered to a bona fide purchaser elsewhere in the country (Milne and Du Preez v Diana Shoe and Glove Factory (Pty) Ltd 1957 (3) SA 16 (W)).

28 The creditor obtains no real right in the movables which the debtor purports to hypothecate in terms of the bond. Such a bond merely confers upon the creditor a preference over the concurrent creditors of the debtor in the event of the debtor's insolvency. In the case of a general bond the preference extends to all movables owned by the debtor at the time of his insolvency and in the case of a special notarial bond over all movables specified therein. The preference is lost , however, should the debtor alienate or pledge the movables in contravention of the terms of the bond to a bona fide third party (Hare v Trustee of Health 3 SC 32; Vrede Koop Landboumaatskappy Bpk v Uys 1964 (2) SA 283 (O)). Actual knowledge of the existence of such a bond would have to be established before a third party could be said to have acted mala fide (Meyer v Botha and Hergenroder (1882) 1 SAR 47).

29 See J R Harker (1981) 98 SALJ 56 at 61f; Ellison Kahn Contract and Mercantile Law Through the Cases 2ed (1985) II 843; see also C G van der Merwe Sakereg (1979) 12f, 443 and 491f.

30 The debtor must divest himself of control of the subject matter of the pledge. The reason for this rule is to prevent other persons from being misled into granting credit to the pledgor on the strength of a belief that he is possessed of assets which will be available to creditors for the purposes

of execution of a judgment, or in the event of a concursus creditorum ; as well as to prevent fraud being committed by a debtor in dealing with the property is if it was unencumbered (Lighter & Co v Edwards 1907 TS 442). It follows, therefore, that the doctrine of constitutum possessorium can have no place in the case of pledge where the debtor is to remain in possession of the movable property to be used by him for his own benefit (Vasco Drycleaners v Twycross 1979 (1) SA 603 (A) at 612). The pledgee's possession must not only be effective, it must also be continuous. Thus a voluntary loss of possession by the pledgee will generally terminate the creditor's real right of security should he not recover possession before a bona fide third person acquires rights in the property (Standard Bank SA Ltd v Trust Bank of Africa Ltd 1968 (1) SA 102 (T) at 109). A right of real security arising out of a pledge, however, is not lost if the thing pledged is taken from the pledgee against his will. Even an acquisition of the property by a bona fide third party for value does not destroy the pledge (Heydenrich v Saber (1900) 17 SC 73) unless an estoppel can be raised against the pledgee. Moreover, it seems that the pledgee can by means of "quick pursuit" recover the thing not only from the spoliator but also from third parties (Theron v Gerber 1918 EDL 288).

31 National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 242. Thus on the insolvency of the debtor the creditor has a preferential real right to be paid out of the proceeds of the property and, moreover, were the debtor to sell the property the right of the creditor would be preferred to that of the buyer.

32 Roodepoort United Main Reef GM Co Ltd (in liquidation) v Du Toit No 1928 AD 66 at 71.

33 Mapenduka v Ashington 1919 AD 343. On the other hand, an agreement that the creditor may take over the property at a

fair valuation has been held to be valid (Ex parte Mabunya (1903) 20 SC 165), as has an agreement that the creditor may, on default of the debtor, sell the property without recourse to a court of law. In such a case, however, it is open to the debtor to obtain protection of the court by showing that the creditor in executing the agreement acted in a manner prejudicial to the rights of the debtor (Osry v Hirsch Loubser & Co Ltd 1922 CPD 531; Aitken v Miller 1951 (1) SA 153 (SR) at 156).

34 The law reports abound with examples of innocent third parties being compelled to part up with their purchases to the true owner of the goods which were originally sold on hire-purchase coupled with a pactum reservati domini (Morum Bros Ltd v Nepgen 1916 CPD 392; Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A); Olivier v Van der Berg 1956 (1) SA 802 (C); Pennefather v Gokul 1960 (4) SA 42 (N); Forsdick Motors Ltd v Lauritzen & Another 1967 (3) SA 249 (N); Hendler Bros Garage (Pty) Ltd v Lambons Ltd 1967 (4) SA 115 (O); Westeel Engineering (Pty) Ltd v Sidney Clow & Co Ltd 1968 (3) SA 458 (T); Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 (1) SA 394 (A); Alpha Trust (Edms) Bpk v Van der Watt 1975 (3) 734 (A)).

35 Crockett v Lezard 1903 TS 590 at 592f; Commissioner of Customs and Excise v Randles Bros Ltd 1941 AD 369 at 398; Lendalease Finance (Pty Ltd v Corporacion de Mercadeo Agricola supra.

36 See Alpha Trust (Edms) Bpk v Van der Watt supra at 745.

37 Ibid.

38 Ibid.

39 Ibid.

40 Commissioner of Customs and Excise v Randles Bros Ltd loc cit. Trust Bank van Suid-Afrika v Western Bank 1978 (4) SA 281 (A) at 301H-302A; Air-Kel (Edms) Bpk a/h Merkel Motors v Bodenstein 1980 (3) SA 917 (A) at 913H. In those systems which apply the causal theory of the passing of ownership delivery is seen merely as evidence of an intention to pass ownership and whether ownership passes on not depends upon the validity of the underlying causa. (See, for instance, the English case of Cundy v Lindsay (1878) 3 App Cas 459).

41 Lendalease (Pty) Ltd v Corporacion de Mercadeo Agricola supra 498.

42 Ibid.

43 Thus at Amsterdam the seller was allowed a period of 6 weeks within which to assert his right of ownership. At Leyden the period was fixed at 2 weeks (Van leeuwen Censura Forensis 1.4.19.20; Van der Keessel Theses Selectae Th 203. Generally in relation to the Roman Dutch law in this regard see J R Harker The Nature and Scope of Rescission as a Remedy for Breach of Contract: A comparative study 187-190 (unpublished PhD thesis (Natal) 1981).

44 The ten day period prescribed by s 35 of the Insolvency Act No 24 of 1936 provides a useful guide (Nowell v Franzen supra at 38; Pienaar v G North & Son (Pty) Ltd supra).

45 Daniels v Cooper (1880) 1 EDC 174; Fazi Booy v Short (1882) 2 EDC 301; Quirk's Trustee v Assignees of Liddle & Co (1885) 3 SC 322; Leo v Loots 1909 TS 366; McDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd 1915 AD 454.

46 Boland Bank Bpk v Joseph 1977 (2) SA 82 (D); Western Bank Ltd v Trust Bank of Africa Ltd 1977 (2) SA 1008 (O); Trust Bank van Afrika Bpk v Western Bank Bpk supra; Trust Bank van Afrika Bpk v Van Jaarsveldt; Trust Bank van Afrika Bpk v

Bitzer 1978 (4) SA 115 (O). The courts have approached these transactions with caution. They have emphasized the need to be satisfied that there existed a genuine intention to transfer ownership in terms of the transactions and that they were not simply simulated (see Boland Bank Bpk v Joseph supra at 86-7; Trust Bank van Afrika Bpk v Western Bank Bpk supra at 301-2; Trust Bank van Afrika Bpk v Van Jaarsveldt; Bitzer supra at 124-5 and 127; Delport v Strydom & Another 1977 (3) SA 325 (O)).

47 Supra.

48 Supra.

49 Lenbou had requested an extension of time for payment to which the finance house agreed.

50 At 89.

51 See C G van der Merwe Sakereg 218; D S P Cronje 1977 THRHR 391.

52 It in not enough to prove that he was misled by the representation made by the owner, he must go further and establish that the misrepresentation came about as a result of negligence on the part of the owner. Failure to establish such negligence will mean that his defence of estoppel will fail (Grosvenor Motors (Potchefstroom) Ltd v Douglas supra; Johaadien v Stanley Porter (Paarl) (Pty) Ltd supra; Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)).

53 See the criticism of the need to establish negligence as a requirement of the defence of estoppel to a vindicatory action expressed by Rumpff JA in Johaadien's case supra at 412A-B; Amicus Curiae (1977) 94 SALJ 256 at 257.

54 See **Lawless v Lane** 1909 TS 589; D J Joubert **Die Suid-Afrikaanse Verteenwoordigingsreg** (1979) 124.

55 See **Electrolux (Pty) Ltd v Khota** 1961 (4) SA 244 (W) at 247; **Barclays Western Bank Ltd v Fourie** 1979 (4) SA 157 (C). While that may be the case in relation to the application of the defence of estoppel and the application of the doctrine of apparent authority in the law of agency (**Pretorius v Loudon** 1985 (3) SA 845 (A)), it is not the case, it is submitted, in relation to the application of the rule relating to the sale of movable property by a factor or an agent for sale. Seventeenth century Roman-Dutch law, which forms the basis of modern South African law, found it necessary, in the interests of commerce and trade, to protect bona fide third parties by placing limitations on the right of an owner to vindicate his property in certain circumstances. Thus we have seen that the rule of Roman law that ownership of movable property sold in terms of a cash sale does not pass until the price is paid, was ameliorated in Roman-Dutch law to the extent that the seller wishing to retain the security of ownership of the property had to assert his right of ownership within a specified period. Likewise, it was, inter alia, a rule of Roman-Dutch law than an owner could only recover his property from a bona fide purchaser who had acquired the property from a factor or agent for sale if he compensated the purchaser in the amount of the purchase price (Voet 6.1.12; Van der Keessel **Praelectiones ad Grotius** 2.3.5. Van der Keessel 368n14 indicates several decisions of the court of Holland to this effect). It was believed that this rule formed part of modern South African law (**Adams v Mocke** (1906) 23 SC 782; **Morum v Nepgen** supra; **Ross v Barnard** 1951 (1) SA 414(T) at 418; **Blackwood Hodge South Africa (Pty) Ltd v Elco Steel Dealers** 1978 (3) SA 852 (C) at 856; **Grosvenor Motors (Potchefstroom) Ltd v Douglas** supra at 427 A). It is submitted that this rule, though not expressly so stated, formed the basis of the decision of the court in United Cape

Fisheries (Pty) Ltd v Silverman 1951 (2) SA 612 (T) and Akojee v Sibanyoni 1976 (3) SA 440 (W) (see the comments on the case by Amicus Curiae (1977) 94 SALJ 256; A J Kerr (1977) 94 SALJ 260). In a recent decision of the Appellate Division, Pretorius v Loudon supra, Rabie C J in an obiter dictum (at 13) expressed doubt as to whether the rule had become part of South African law and indeed, whether it should be recognized as part of modern South African law. The learned Chief Justice seemed to be of the opinion that the rule had in fact been supplanted by the doctrine of estoppel and the doctrine of apparent authority in our modern law of agency. It is submitted that there is a very real need for the rule pertaining to the sale of movable property by a factor or agent for sale in modern South African law. The rule constitutes an exception to the general rule of our law that in order to succeed in a defence of estoppel to a vindicatory action brought by the owner of the property, the bona fide purchaser must prove fault on the part of the owner in misleading him or permitting him to be misled that the person from whom the property was acquired had a ius disponendi. The rejection of the rule is to be regretted as a retrograde step. In passing it is worth noting that English and American law also found it necessary to introduce special protection for the bona fide acquirer of property from an agent whom, by the very nature of his business, the purchaser was entitled to assume that he was the dominus or had a ius disponendi (see s 2(1) of the English Factors' Act of 1889 and s 2-403(2) of the Uniform Commercial Code and the American Restatement Second, Agency ss 175 and 201; J R Harker 1986 THRHR 411 at 419-8). However, contrast the view taken by Carole Lewis (1986) 103 SALJ 69. The author supports the notion that the so-called 'factor or agent for sale' rule has been subsumed by the doctrine of estoppel. Realising the need to protect the interests of the bona fide acquirer of the property, however, she suggests (at 82) that the owner should be presumed to have been negligent for the

purpose of a defence based upon estoppel to the owner's vindicatory action in circumstances where the property was acquired from a factor or agent for sale. The onus thus would be cast upon the owner to rebut the presumption of negligence, rather than impose the evidential burden upon the bona fide acquirer of the property, to establish negligence on the part of the owner, and against whom the scales would otherwise be too heavily weighted. This is not an unattractive thesis. It fails , however, to take account of the fact, as is clearly indicated by the facts of Pretorius v Loudon supra, that neither the doctrine of estoppel nor the rules relating to apparent authority in the Law of Agency suffices to do justice to the bona fide acquirer of property from a factor or agent for sale (J R Harker 1986 THRHR at 415).

56 Pretorius v Loudon supra at 859. Notwithstanding that the owner had given the registration certificate of the vehicle to the fraudulent dealer which made it possible for him, by forging the owner's signature on the requisite transfer forms, to obtain registration of the car in the name of the dealer. See also Akojee v Sibanyoni supra at 442 where it was held that possession or otherwise of the registration certificate and license of a vehilce cannot be relied upon as indicative of the fact that person in possession either has or does not have a ius disponendi, as they are not documents of title to the motor vehicle. The question as to where ownership of the vehicle vests is a matter governed by the common law. See also Broekman v TCD Motors (Pty) Ltd 1949 (4) SA 418 (T) where Dowling J (at 423-425) declined to follow the lead given by Murray J in Bold v Cooper 1949 (1) SA 1195 (W) who would apparently have been prepared to apply the doctrine of estoppel had the "change of ownership notice" signed by the owner been exhibited to the bona fide third party by the person who wrongfully disposed of the vehicle.

57 It is of course not only the bona fide acquirer of property from the debtor who may be misled. The depersonalization of ownership brought about by the use of title as a security device may also work to the prejudice of other creditors of the debtor. For instance, they may contract with him on the strength of the belief that, in the event of non-performance, they will be able to execute against his assets only to find that ownership of some or other of these assets vests in someone else. It is for this very reason that courts look with suspicion upon constitutum possessorium as a mode of transfer of ownership of movable property (Goldinger's Trustee v Whitelaw & Son 1917 AD 66) and have frequently struck down as simulated transactions a sale and resale of movable property on the ground that the true intention of the parties was to create a possessionless pledge (see , for instance, Vasco Dry Cleaners v Twycross supra).

58 Article 1141; 2279 and 2280 of the French Civil Code.

59 Section 929 and 932 of the BGB.

60 Both French and German law, however, preserve the right of the owner to recover his property in those circumstances in which he did not voluntarily part up with possession to someone, who in breach of good faith, disposed of the property, but where the property was lost or stolen from him (J R Harker 1986 THRHR 411 at 421 - 22).

61 It, is of course, the most important and most frequently used mode of acquiring ownership.

62 Accessio in the context of the Law of Property literally means the increase or addition to a thing.

63 These three guidelines were first laid down for South African law in Olivier and Others v Haarhof & Co 1906 TS

497 at 500. They were applied by the Appellate Division in MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd supra at 466 and have been applied in numerous cases ever since.

64 The MacDonald case supra at 467. The third criterion mentioned above has often been said to be the most important of the three criteria (see the MacDonald case loc cit; Newcastle Collieries Co Ltd v Borough of Newcastle 1916 AD 561 at 564; Standard-Vacuum Refining Co of South Africa (Pty) Ltd v Durban City Council 1961 (2) SA 669 (A) at 677H).

65 Olivier and Others v Haarhof & Co loc cit; Victoria Falls Power Co Ltd v Colonial Treasurer 1909 TS 140 at 145; Deputy-Sheriff of Pretoria v Heymann 1909 TS 280 at 284; the Mac Donald case supra at 466 and 476; Newcastle Collieries Co Ltd v Borough of Newcastle loc it.

66 The MacDonald case supra at 467; Land and Agricultural Bank of SWA v Howaldt and Vollmer 1925 SWA 34 at 37; CIR v Le Seur 1960 (2) SA 708 (A) at 712 and 718.

67 Supra.

68 At 467.

69 At 468.

70 Theatre Investments (Pty) Ltd v Butcher Brothers Ltd 1978 (3) SA 682 (A) at 688D-H; Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl) 1980 (2) SA 214 (W) at 222-3; Carole Lewis (1979) 96 SALJ 94 at 106.

71 Carole Lewis loc cit.

72 Supra.

73 At 222F.

74 At 224 B-C.

75 That being the case , according to the traditional approach, the professed intention of the owner of the movable was really irrelevant.

76 Supra.

77 Supra.

78 Theatre Investments (Pty) Ltd and Another v Butcher Bros Ltd loc cit; Melcorp SA v Joint Mutual Pension Fund (Tvl) loc cit; Carole Lewis loc cit. It has recently been argued that the third-mentioned guideline for determining whether or not an accession has taken place, namely, the intention with which the movable is annexed to the immovable, although said to be based upon Roman-Dutch authorities, in fact, has come about as a result of the influence of English law (see C G van der Merwe Sakereg 164-8).

79 Carole Lewis (1979) 96 SALJ 94 at 105-7.

80 Van der Merwe loc cit; Silberberg and Schoeman op cit at 220.

81 Van der Merwe op cit 168.

82 Silberberg and Schoeman op cit at 222.

83 Melcorp SA v Joint Mutual Pension Fund (Tvl) supra; Van der Merwe op cit at 12, 13 and 491; Silberberg and Schoeman op cit at 220. Silberberg and Schoeman loc cit state that the role of intention in determining whether accessio in the

form of inaedificatio can be said to have taken place needs careful reconsideration. Moreover, in relation to the shift in emphasis observable in recent cases, it is stated that the approach initially adopted by the courts has the advantage of a built-in safeguard and protection of bona fide third parties, where the physical features clearly point to the permanency of the annexation. Bona fide third parties and particularly (potential) creditors often have nothing other than an inference to be drawn from the physical features to rely upon.

84 Page 11 supra ; J R Harker 1986 THRHR op cit at 421-422. English law has also recently introduced special protection along similar lines in relation to the bona fide acquisition by a private person of a motor vehicle, which is subject to a hire-purchase sale, from a seller who is not the owner of the car. Schedule 4, para 22 of the Consumer Credit Act of 1974 provides that the innocent purchaser in these circumstances will acquire a good title to the vehicle.

85 Note 26 supra.

86 Van der Merwe op cit at 492.

87 The use of a special notarial bond to create a real right of security in movable property does not appear to have created any major difficulties in Natal. The computerization of the system of registration in the Deeds Registry would mean that a creditor, by conducting a search in the Deeds Registry, should be able to ascertain what real rights by way of a special notarial bond have been created anywhere in South Africa in respect of specific assets of a particular person. In the state of Louisiana it was, likewise, found necessary to introduce a so-called "chattel mortgage" making it possible to create a real right of security in movable property because the pledge of movables no longer satisfied the needs of society. A "chattel mortgage" in Louisiana

creates a privilege and does not involve a transfer of title in the property. It works in the same way as the pledge of movables. It confers on the secured creditor a right of preference to be paid out of the proceeds of the property and also the right to follow up the movable where alienated in contravention of his real right in the property. The holder of a chattel mortgage may also enforce his right where a corporeal movable has been so attached to an immovable as to become part and parcel of the immovable (Louisiana Civil Law Treatise Vol 2 "Property" by A N Yiannopoulos (1967) s 105). This would thus clearly cater for the problems which arose in the MacDonald case and the Melcorp case without doing violence to the principles which govern the immobilization of movables by accessio.

88 Once the special notarial bond of movables is established as a form of real security in South African law there would be no need to resort to use of title in an instalment sale transaction and in the so-called "sale and leaseback transaction" as a security device. However, should the total rejection of the effect of the reservation or acquisition of title in these sort of transactions be seen as too drastic a change in the law, it may be possible to cut down on their effect by providing that a creditor will only enjoy the real right of ownership in the property if the contract is registered in the Deeds Registry. See, for instance, the provisions of s 20 in the Alienation of Land Act No 68 of 1981 which provides for the recording of a contract for the sale of land on instalments. The object of recording the contract is to protect the interests of the buyer of the property against the subsequent acquisition of real rights in the property which forms the subject matter of the sale.