Creditors' Provisional Remedies And Debtors' Due Process Rights: Statutory Liens In Arkansas

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I. INTRODUCTION

II. ANALYSIS OF FAMILIAR STATUTORY LIENS
   A. Mechanics' And Materialmen's Liens
      1. Significance of the Property Interest
      2. What Process is Due
   B. Vehicle Repairmen's Liens
      1. Right to Detain
         a. Presence of State Action
         b. Adequacy of Procedural Safeguards
      2. Right to Sell
      3. Right to Perpetuate

III. CONCLUSION

ADDITIONAL

APPENDIX

Draft of a bill to amend the Materialmen's Lien Law promulgated by the Special Lien Committee of the Joint Interim Judiciary Committee of the Arkansas General Assembly.

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I. INTRODUCTION

Breeders, truckers, cobbler, and wheelwrights have something in common in Arkansas. Along with mechanics and materialmen, laborers and artisans, landlords and innkeepers, and other suppliers of goods and services, they are entitled by statute to assert liens to secure the price of their work and materials. In the traditional sense, a lien is "an implied obligation whereby real or personal property is bound for the discharge of some debt or engagement." Many statutory liens derive from the common law which permits "one in possession of the property of another . . . [to] detain it as security for some demand which he has in respect to it." Today, however, legislation is the primary source of law for liens. Statutes have widened the scope of the common law liens, provided additional ways to enforce them, and created new liens.

A statutory lien for services or materials can be an effective provisional creditor's remedy. However, to the extent that its exer-

2. See id. § 51-711 to 714.
3. See id. § 51-417 to 422.
4. See id. § 51-404 to 412.
5. See id. § 51-601 to 641; 51-701 to 714.
6. See id. § 51-301 to 321.
10. See, e.g., the liens authorized in Ark. Stat. Ann., Title 51, ch. 9 (Repl. 1971) for cotton ginner (§§ 51-901 to 902); keepers of livery, sale or feed stables or wagon yards (§§ 51-903 to 904); rice processors (§§ 51-909 to 912); stores of motor vehicles (§§ 51-915 to 916); entrustees for feeding and care of livestock (51-917 to 51-929); furnisher and erecters of gravestones (§§ 51-930 to 51-932). The Uniform Commercial Code also authorizes liens for Warehousemen [Ark. Stat. Ann. §§ 85-7-209 to 85-7-210 (Add. 1961)] and carriers of goods [§§ 85-7-307 to 85-7-308]. There is even a lien for drivers of prize logs. See Ark. Stat. Ann. § 54-309 (Repl. 1971).
12. Id. at § 20.
13. "Creditors remedies" are defined as "a wide variety of time-honored state procedures whereby one party can, without notice or an opportunity for a hearing, summarily seize the property of another under the sanction of state law and often with the aid of state judicial machinery." CATZ & ROBINSON, DUE PROCESS AND CREDITOR'S REMEDIES: FROM SMIADECH AND FUENTES TO MITCHELL, NORTH GEORGIA AND BEYOND, 28 RUTGERS L. REV. 541 (1975). The remedies are "provisional" in that they provide a "temporary process available to a plaintiff in a civil action, which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending." BLACK'S LAW DICTIONARY 1389 (Revised 4th ed. 1968). The scope of creditor's provisional remedies is broad enough to include statutory liens, although in some cases the exercise of the
cise involves state action resulting in the deprivation of a significant property interest, the debtor is entitled to protection under the Due Process Clause of the fourteenth amendment.\textsuperscript{14} Deciding whether its procedural requirements must be satisfied does not depend upon the nature of the remedy. The statutory procedures for creating and enforcing liens are as vulnerable to scrutiny under the fourteenth amendment, assuming its applicability, as those authorizing garnishment\textsuperscript{15} and replevin.\textsuperscript{16}

This article is a sequel to one which examines the constitutionality of attachment in Arkansas.\textsuperscript{17} The due process analysis developed there\textsuperscript{18} will be used in the present study to test the constitutional validity of two of the most familiar of Arkansas' statutory liens. This analysis suggests the important issues to be resolved when testing any of the other liens.

II. ANALYSIS OF FAMILIAR STATUTORY LIENS

A. Mechanics' and Materialmen's Lien

"How to Pay for Your Home—Twice" is the title of a long story recently appearing in a state newspaper.\textsuperscript{19} It begins with an example of a consumer "running into the state law on mechanics' and materialmen's liens. It is a law that almost everyone sees something wrong with, yet it has been on the books since 1895 and all of the efforts to change it, efforts that have been made at practically every legislative session during the last 10 years, have failed."\textsuperscript{20}

The subject of this unfavorable report is Arkansas Statutes An-

\textsuperscript{14} U.S. Const. amend. XIV, § 2. The scope of this article does not include an analysis of due process requirements under state law. See Ark. Const. art. 2, § 8.
\textsuperscript{17} Nickles, Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607 (1978).

\textbf{ERRATA}
The second sentence of the first full paragraph at 31 Ark. L. Rev. 607, 674 (1978) should read as follows:

Although it might be more convenient for a nonresident debtor to remove his property from the state than it would be for a resident, the fact of his nonresidency does not necessarily support the proposition that it will be easier for him or that he will be more likely to do so.

\textsuperscript{18} See, specifically, id. at 623-39.
\textsuperscript{19} Arkansas Gazette, Oct. 28, 1977, at 1B, col. 2.
\textsuperscript{20} Id.
notated Title 51, Chapter 6,21 which provides that a materialman performing work upon or furnishing materials for the construction of or repair to an improvement on land under contract with the landowner or his agent has a lien on the building and the contiguous land.22 If he is not paid, he need only give the owner notice of his

22. Id. § 51-601 provides:

     Every mechanic, builder, artisan, workman, laborer, or other person who
     shall do or perform any work to or upon, or furnish any material, fixtures,
     engine, boiler or machinery for any building, erection, improvement to or
     upon land, or upon any boat or vessel of any kind, or for repairing same,
     under or by virtue of any contract with the owner or proprietor thereof, or
     his agent, trustee, contractor or subcontractor, upon complying with the pro-
     visions of this act (§§ 51-601, 51-604 - 51-626) shall have for his work or labor
     done, or materials, fixtures, engine, boiler, or machinery furnished a lien
     upon such building, erection or improvement, and upon the land belonging to
     such owner or proprietor on which the same are situated, to the extent of one
     [1] acre, or to the extent of any number of acres of land upon which work has
     been done or improvements erected; or if such building, erection or improve-
     ment be upon any lot of land in any town, city or village then such lien
     shall be upon such building, erection or improvements, and the lots or land
     upon which the same are situated; or if such erection or improvement be upon
     any boat or vessel, then upon such boat or vessel, to secure the payment of
     such work or labor done, or materials, fixtures, engine, boiler or machinery
     furnished as aforesaid. . .

In addition to those classes of persons specified in § 51-601, others may assert a lien under the procedures prescribed in Title 51, ch. 6, i.e., manufacturers and contractors furnishing or installing soil or drain pipe or tile for drainage of land (§§ 51-601 to 51-605); engineers and surveyors performing any engineering or surveying work upon land (§ 51-642 (Supp. 1977)); persons performing labor or furnishing materials, etc., in used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining or repairing of any oil or gas well, water well, mine or quarry, or oil or gas pipe line (§ 51-701 et seq. (Repl. 1971)); See also Ark. Stat. Ann § 51-906 (Repl. 1971) regarding the enforcement of liens of employers and employees under contract.

The phrase "materialman" and "supplier" will be used to denote all those persons entitled to enforce a lien under the procedures prescribed in Ark.


Property interests less than fee simple may be subject to a materialmen's lien, see White v. Chaffin, 52 Ark. 59 (1877); Bell v. Koontz, 172 Ark. 870, 290 S. W. 597 (1927); including leasehold interests, see Ark. Stat. Ann. § 51-606 (Repl. 1971); Meek v. Parker, 63 Ark. 367, 38 S. W. 900 (1897). [For present purposes, however, the term "owner" or "landowner" will be used to denote all those persons whose interests in real property, regardless of the extent of those interests, are subject to a materialmen's lien under the procedures prescribed in Ark. Stat. Ann. § 51-601 et seq.] However, public policy forbids materialmen's liens from attaching to public buildings and land, see Holcomb v. American Sur. Co., 184 Ark. 449, 42 S.W.2d 765 (1931); Plummer v. School Dist. No. 1 of Marianna, 90 Ark. 236, 118 S. W. 1011 (1909), and (maybe) to property of public charities. See Eureka Stone Co. v. First Christian Church, 86 Ark.
claim and file an account with the court clerk to insure the lien's continued existence. Unless his claim is satisfied, the materialman can enforce it by proving the claim in court and having the property subject to the lien sold to satisfy his judgment. The defendant-

212, 110 S.W. 1042 (1908). See also Morris v. Howlin Lumber Co., 100 Ark. 253, 140 S.W. 1 (1911). The precedential value of Eureka Stone Co., supra, may have been revived. 1911 Ark. Acts No. 446, § 4 provided for a contractor's bond when constructing churches. Section 5 of that Act provided for a lien if the bond was not filed. Cases which seem to contradict Eureka Stone Co. were decided when Act 446 was effective. See, e.g., St. Matthews Church v. White, 172 Ark. 1152, 291 S.W. 977 (1927); Pfeiffer Stone Co. v. Brogdon, 125 Ark. 426, 188 S.W. 1187 (1916). However, § 4 of Act 446 was repealed by 1953 Ark. Acts No. 351, § 8, and the compiler suggests that the provision granting a lien on churches was also repealed. See Ark. Stat. Ann. § 51-631 (Repl. 1971). The present § 51-639 requires a contractor's bond when repairing or erecting any church or other charitable institution if the price exceeds $1000, but no lien is specifically granted by statute if a bond is not filed. However, § 51-639 requires a contractor's bond for contracts exceeding $3000 for repairing, erecting, etc., public buildings and improvements. Again, the materialmen's lien statute does not provide for a lien if a bond is not supplied. But see Dow Chemical Co. v. Bruce-Rogers Co., 255 Ark. 448, 501 S.W.2d 235 (1973). However, the lien asserted in Dow Chemical was not actually against the city's interest in the property but that of its lessee.

Individual homeowners should be cautioned that the homestead exemption in Arkansas cannot be claimed against a materialman asserting a lien for improving same. See Ark. Const. art 9, § 3.

23. Ark. Stat. Ann. § 51-608 (Repl. 1971). See also id. § 51-609. In several situations, giving the notice prescribed in §§ 51-608 is not required or is excused. For example, the statute itself declares that an original contractor wishing to assert the lien need not give the owner notice. See id. § 51-608. Giving the notice is excused if the lien claimant sold his materials directly to the owner, see Trinity Universal Ins. Co. v. Willbanks, 201 Ark. 386, 144 S.W.2d 1092 (1940); Hess v. A. L. Ferguson Lbr. Co., 155 Ark. 240, 244 S.W. 5 (1922); or if the owner sues the materialman to require him to litigate his claim, see People's Bldg. & Loan Ass'n v. Leslie Lbr. Co., 183 Ark. 800, 38 S.W.2d 759 (1913). See also note 24 infra.

24. Ark. Stat. Ann. § 51-613 (Repl. 1971). At least in cases not involving other claimants, a materialman need not give the notice required in § 51-608 or file an account under § 51-613 if he brings suit to enforce the lien within the time specified for perfecting it under § 51-613, i.e., "within one hundred and twenty (120) days after the things aforesaid shall have been furnished or the work or labor done or performed." Id. see Burks v. Sims, 230 Ark. 170, 321 S.W.2d 767 (1959). However, the action filed within the 120 days must be a proper one. If the materialman fails to join a necessary party, he cannot amend his complaint after the 120-day period has expired. His lien will also have expired because he will have failed properly to perfect his lien as the statutes requires. See B.S.C., Inc. v. McKinney, 263 Ark. 110, — S.W.2d — (1978). Regarding "running accounts," See, e.g., Streuli v. Wallin-Dickey & Rich Lbr. Co., 227 Ark. 885, 302 S.W.2d 522 (1957). However, in an action involving a subsequent encumbrancer, whether the account has been filed can become an important issue in determining priority. See Wiggins v. Searcy Fed. S&L, 253 Ark. 407, 486 S.W.2d 900 (1972).


Section 51-615 provides that the account must be filed "with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated." (emphasis added) And § 51-615 gives to that circuit court jurisdiction to enforce the lien. But chancery courts also may foreclose materialmen's liens. See Rasmussen v. Horner Co., 255 Ark. 1030, 505 S.W.2d 225, and cases cited therein at n.1.

landowner cannot defeat the lien by showing that he paid his agent, usually a general contractor, who dealt with the plaintiff-materialman. In fact, the purpose of the lien is to assure that the materialman is paid regardless of the circumstances or arrangements between the owner and the contractor.

Thomas Jefferson and James Madison helped to enact the nation's first materialmen's lien law 185 years ago. They urged the Maryland legislature to pass such a statute to facilitate construction of Washington, D.C. This measure and others subsequently enacted by other states, including the Arkansas lien, "are designed to encourage construction by ensuring that those who contribute to a project are compensated for their efforts. . . . [They grant] to those who have supplied labor or materials to the creation, erection, improvement or repair of specified property (principally buildings) a lien, enforceable by foreclosure, on the structure and the immediately adjacent land."

27. The general contractor is a necessary party to the suit to enforce a lien, see Burks v. Sims, 230 Ark. 170, 321 S.W.2d 767 (1959); Simpson v. J.W. Black Lbr. Co., 114 Ark. 464, 172 S.W. 885 (1914), because he is required by statute to defend at his own expense any action brought against the owner by materialmen. See Ark. Stat. Ann. § 51-610 (Repl. 1971). See also B.S.C., Inc. v. McKinney, 263 Ark. 110, 562 S.W.2d 600 (1978).

28. However, the materials for the price of which the lien is claimed must have been furnished "under or by virtue of [a] contract with the owner . . . or his agent . . . [or] contractor." Ark. Stat. Ann. § 51-601 (Repl. 1971). See, e.g., Hawks v. Faubel, 182 Ark. 304, 31 S.W.2d 401 (1930). But, "a lien can be created if a contract is shown to exist between a materialman and a contractor representing the owner . . . by express agreement or implied from the circumstances or conduct of the parties." Gillison Discount v. Talbott, 253 Ark. 696, 698, 488 S.W.2d 317, 319 (1972). Nevertheless, even though a general contractor employed by the owner authorized the charges, a materialman supplying labor without a fixed-sum contract for any part of the work on the owner's land is not entitled to a lien. Christy v. Nabholz Supply Co., 261 Ark. 127, 546 S.W.2d 425 (1977). But when, under a contract with the landowner, a contractor orders materials which are supplied and used in an improvement on real estate, the materialmen can establish liens against the property for the full amount of their correct claims and are not limited in recovery to the contract price between the owner and the contractor.

Of course, if and when the lien is foreclosed, and the money brought into court, then in the proceeds, the parties [lien claimants] participate pro rata, as stated in [§ 51-611]. But the allowance of the claims in the first instance is not limited now . . . by the original contract price . . . .


The common law does not recognize liens upon real property32 because the right to detain the object of one's labor until paid for services or materials is the basis of common law liens,33 and one who helps to construct a building "cannot retain possession of real property upon which he has performed labor."34 Materialmen's liens are wholly statutory manifestations of a "strong legislative policy in favor of according special protections to the construction industry."35

The right of a state to grant any such protection has been challenged. Eighty years ago the Sixth Circuit held that the substantive due process rights of a landowner are not violated by a materialmen's lien statute because

Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract . . . . He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transactions. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law.36

Just as long ago, the way in which materialmen's liens are created and enforced was also being attacked. Conceding that a person's property could be appropriated to satisfy a supplier's claim about which the owner has no notice and after he had already paid the contractor, the Tennessee Supreme Court in Cole Manufacturing Co. v. Falls37 offered some helpful hints on how a landowner could protect himself.38 While admitting that the recommended expedients would be inconvenient for the owner, the court concluded that "inconvenience of parties affected is never allowed to defeat a statute. The constitutionality of an act of the legislature cannot be successfully impeached upon the ground that it involves the citizen in mere inconvenience."39 After balancing the "mere inconvenience" of the

32. 2 L. Jones, supra note 11, at § 1184.
33. 1 L. Jones, supra note 11, at §§ 20-26.
34. 2 L. Jones, supra note 11, at § 1184.
35. Comment, supra note 29 at 267.
37. 90 Tenn. 466, 16 S.W. 1045 (1891).
38. In every instance the owner may fully protect himself by withholding the whole or a sufficiency of the price agreed upon from the original contractor until after the expiration of the 30 days [after the construction is completed during which time a materialman could assert a lien], or he may see to it that the subcontractor and material-man [sic] are paid as the work progresses, or he may indemnify himself by bond . . . .
39. Id. at 1047.
40. 16 S.W. at 1047.
owner against the "pecuniary safety" of the materialman, the court found that protecting the supplier was the more important public policy promoted by the procedure which it determined was constitutional. 40

More than eight decades after Cole Manufacturing Co., the courts are still balancing the parties' interests. Now, however, they are also reevaluating "ancient forms" to determine whether their perpetuation in a modern context is justified and consistent with the basic values of our constitutional heritage as presently understood. 41 The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. 42 That statement and the result in Sniadach v. Family Finance Corp., 43 signaled the beginning of a judicial reappraisal of the entire panoply of creditors' provisional remedies. The question asked in Sniadach, Fuentes v. Shevin, 44 Mitchell v. W.T. Grant Co., 45 and North Georgia Finishing, Inc. v. Di-Chem, Inc. 46 is now being raised in cases challenging the constitutionality of materialmen's liens statutes. "[T]he sole question is whether there has been a taking of property without that procedural due process that is required by the fourteenth amendment." 47

1. Significance Of The Property Interest

The threshold problem in answering this question is deciding whether the fourteenth amendment is applicable. The courts have had no difficulty in finding the requisite state action when a materialmen's lien is asserted, 48 but they disagree about whether the debtor whose real property is subjected to the lien is thereby deprived

40. Id. See also, e.g., Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761 (1906).
41. Regarding the ancient remedy of foreign attachment, the Supreme Court in Shaffer v. Heiner, 433 U.S. 186 (1977), said, "[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." Id. at 212.
44. 407 U.S. 67 (1972).
48. No court recently deciding a constitutional challenge to a materialmen's lien statute has resolved the case on a finding of insufficient state action. The reason is that Not only is the lien governed by detailed statutory provisions, but it becomes effective only upon the recordation with the county recorder, and official of the state; moreover, it can be enforced only by resort to the state courts. Connolly Dev. Inc. v. Superior Ct. of Merced Cty., 17 Cal. 3d 808, 815, 553 P.2d 637, 645, 139 Cal. Rptr. 477, 485 (1976). See also Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 358 A.2d 222, 227 (1976). But the question is not always as easily decided in favor of state action when other statutory liens are challenged. See text accompanying notes 198-67 infra.
of a significant property interest.49 As framed by the Maryland Court of Appeals in *Barry Properties, Inc. v. Fick Bros. Roofing Co.*,50 the question is whether "the imposition of a lien under the . . . statute constitute[s], as it must if the due process clause . . . [is] to apply, a 'significant taking of property'. . . ."51 A materialmen's lien in Arkansas attaches when materials are used in repairing or improving the real property,52 and, if "perfected" pursuant to statutory procedures,53 it is superior to intervening incumbrances and conveyances.54

49. "Significant property interest" and "significant deprivation of property" are used interchangeably in this article. There may be a conceptual difference between the two terms of art, but the Supreme Court has used both without suggesting different meanings. Compare Fuentes v. Shevin, 407 U.S. 67, 86 (1972) ("Any significant taking of property by the State is within the purview of the Due Process Clause.") with id. ("The Fourteenth Amendment's protection of 'property' . . . has been read broadly to extend to 'any significant property interest'.").

50. 227 Md. 15, 353 A.2d 222 (1976).

51. 353 A.2d at 227-28.

52. See Eudora Lbr. Co. v. Neal & Jones, 269 Ark. 40, 562 S.W.2d 294 (1978), and cases cited therein. But see U.S. v. McGhee, 237 Ark. 698, 700, 375 S.W.2d 365, 367 (1964) (lien attaches as of the date of furnishing materials or performing labor). See also note 54 infra. Therefore, "[i]n order for a materialman to establish a lien under § 51-601 et seq., he must both allege and prove that the material, on which he bases his claim to a lien, was delivered to and used in the building against which he claims his lien." Stone Mill & Lbr. Co. v. Finsterwalder, 249 Ark. 363, 365, 459 S.W.2d 117, 118 (1970). However,

We have always held that the lien claimant established a prima facie case by showing that the materials for which he claimed a lien were delivered at or near the building site at the place designated by the contracting party and that the building was constructed of materials of the description of those furnished; and, when this is shown, the burden rests upon the owner to show that they were not so used.

Eudora Lbr. Co. v. Neal & Jones, 237 at 44. The reason for this rule is that "it is unreasonable to require a materialman to follow the materials from his place of business to the building in order to make positive proof of its use therein, and because the owner of the building is in a superior position to know whether the materials were actually used . . . ." Stone Mill & Lbr. Co. v. Finsterwalder, 249 Ark. at 365, 459 S.W.2d at 118.


54. Ark. Stat. Ann. § 51-601 (Repl. 1971) provides that a materialman shall have a lien "upon complying with the provisions of this act [§§ 51-601, 51-604 - 51-626]," not upon the date of furnishing and using materials or performing labor as the Arkansas Supreme Court has said. See text accompanying note 52 supra. Among the act's requirements are notifying the landowner (§ 51-608) and filing an account "with the clerk of the circuit court of the county in which the building erection or other improvement to be charged with the lien is situated . . . within one hundred and twenty (120) days after the things aforesaid shall have been furnished or the work or labor done or performed . . . ." (§ 51-613). But see notes 23 & 24 supra. The 120-day period begins to run when the last item of work, labor or materials is done, performed, or furnished. See Van Houten Lbr. Co. v. Planters' Nat'l Bank, 159 Ark. 535, 252 S.W. 614 (1923). But see, e.g., Ark. La. Gas Co. v. Moffitt, 245 Ark. 992, 436 S.W.2d 91 (1969); Southern Lbr. Co. v. Riley, 224 Ark. 298, 273 S.W.2d 848 (1954); East Lbr. Co. v. Gerald, 185 Ark. 42, 45 S.W.2d 862 (1932); Cunningham v. J.S. Kimbro Lbr. Co., 151 Ark. 194, 235 S.W. 416 (1921). These and other cases clearly establish the proposition that if the "account" or "lien" is not filed within the 120-day period and the filing is not excused, no lien exists, or, if one did, it is void. See also Wiggins v. Searcy Fed. Sav. &
The lien necessarily impedes the landowner's ability freely to alienate his property or to use it as security. However, pending possible foreclosure, he is not denied the use or possession of the real property, and, subject to the lien, theoretically may sell or encumber it.55 The precise issue, then, is whether the imposition of the lien results in a "significant" deprivation of property considering the owner's right to use or dispose of the realty prior to the lien's enforcement by sale after trial if judgment is for the materialman.

The identical question arises when real property is levied upon under a writ of attachment.56 The arguments are basically the same whether the remedy is attachment or a materialmen's lien. Most courts conclude that in either case the owner is not deprived of a significant property interest.58 The leading case involving a mate-

55. Loan Ass'n, 253 Ark. 407, 486 S.W.2d 900 (1972); Rea v. Lammers, 212 Ark. 792, 207 S.W.2d 740 (1948). And it is important that the account be "verified by affidavit." See Rasmussen v. Horner Co., 255 Ark. 1030, 505 S.W.2d 225 (1974). The court in Wiggins, supra, referred to the filing of the account pursuant to Ark. Stat. Ann. § 51-615 (Repl. 1971) as an act of "perfection" which is "essential to [the lien]s continued existence after the expiration of the 120-day period." 253 Ark. at 409, 486 S.W.2d at 902. In any event, substantial compliance with the perfection requirement gives the lien priority from the time work was commenced on the improvement. See Ark. Stat. Ann. § 51-607 (Repl. 1971); Wiggins v. Searcy Fed. Sav. & Loan, supra. This priority rule may be the basis for the court's frequent statement of the general rule that the lien attaches when the materials are used in the building. For priority purposes, however, a perfected lien dates from the time construction is commenced on the improvement even though the particular materialman claiming a lien did not furnish supplies or labor until days, weeks, or months after the beginning of construction. See Planters Lbr. Co. v. Jack Collier East Co., 234 Ark. 1091, 556 S.W.2d 631 (1962). But deciding when work was "commenced" is not always clear. See, e.g., Mark's Sheet Metal, Inc. v. Republic Mtg. Co., 242 Ark. 475, 414 S.W.2d 106 (1967).


57. For a dated but helpful analysis of priority conflicts involving materialmen's liens, see Comment, Priority of Liens on Real Property in Arkansas: Mortgages, and Mechanics' and Materialmen's Liens, 12 Ark. L. Rev. 170 (1957-58).

58. Purchasers buy the lien as well as the property, see, e.g., Owen v. Continental Supply Co., 175 Ark. 741, 300 S.W. 398 (1927) ("There can be no innocent purchasers of property as against mechanics' liens which are asserted within the time and in the manner provided by law."). even though the lien has not been filed. See Ark. Foundry Co. v. American Portland Cement Co., 189 Ark. 779, 75 S.W.2d 387 (1934); Bell v. Koontz, 172 Ark. 870, 290 S.W. 597 (1927). And, of course, an intervening mortgagee's interest is subordinate to the lien. See note 54 supra. See also Jack Collier East Co. v. E.C. Barton & Co., 228 Ark. 500, 307 S.W.2d 863 (1957), regarding the relative priority of a mortgage executed prior to the beginning of construction but not recorded later afterwards.

rialmen's lien is *Spielman-Fond, Inc. v. Hanson's Inc.*° The federal district court based its conclusion that the lien did not effect a significant taking of property on the absence of "direct and total prohibitions on the right to alienate."° While conceding that the filing of a lien "clouds title . . . and may make it more difficult to alienate the property,"° the court reasoned that

If the plaintiffs can find a willing buyer . . . there is nothing in the statutes or the liens which prohibits the consummation of the transactions. Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do not interfere more than impinge upon the economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance.°°

The *Spielman-Fond* analysis is faulty for reasons noted elsewhere,°° and the Supreme Court's summary affirmance of the decision is not conclusive.°°

The better reasoning leads to the opposite conclusion. "A deprivation need not reach the magnitude of a physical seizure of property in order to fall within the compass of the due process clause,"°° observed the California Supreme Court in *Connolly Development, Inc.*

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60. 379 F. Supp. at 999. See note 236.1 infra.
61. 379 F. Supp. at 999.
62. Id.
63. See Nickles, supra note 17, at 664-69. See also Comment, supra note 29, at 271-76.
v. Superior Court of Merced City. And it proceeded to evaluate more realistically the extent of the lien’s impingement upon the owner’s economic interests.

Although the imposition of a mechanics’ lien does not deprive the owner of the interim use of his property, it may severely hamper his ability to sell or encumber that property. Subsequent purchasers whose title will be subject to the lien may be unwilling to purchase a lawsuit with the land; lenders may refuse a loan on property subject to lien claims; the owner may in some cases be forced to pay a possibly invalid claim in order to clear title to his property in time for a pending transaction to be consummated. The Maryland court in Barry Properties also considered the fact that the owner’s equity is diminished to the extent of the lien. In that case, “due to the [materialmen’s] lien, [the landowner] was deprived of the balance of its construction mortgage and was unable to close a permanent mortgage or to obtain a second mortgage on the property’s equity.” Temporarily losing possession of a stereo radio is a significant deprivation of property. How less significant is the inability to finance an office building or a home caused by a lien claimant the owner may have never seen and the existence of whose claim may be disputed by a general contractor who the owner has already paid?

In deciding what interests are within the fourteenth amendment’s protection of “liberty” and “property,” the Supreme Court considers that the terms are “broad and majestic . . . . They are among the [great [constitutional] concepts . . . . purposefully left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” The conclusion that a materialmen’s lien does not involve a significant deprivation of a landowner’s property demonstrates a failure to explore fully and realistically the domain of social and economic consequences which experience shows an owner can suffer as a result of the lien’s imposition. It does not simply “make

67. Id. at 812, 553 P.2d at 643, 132 Cal. Rptr. at 483.
68. 353 A.2d at 228.
70.1 A lengthy casenote on Connolly Development was recently published by a law student who is a construction engineer and licensed general contractor with eighteen years experience in private and public construction work. Considering the thoroughness of his analysis, as well as his practical experience, he clearly is familiar with materialmen’s liens and how they operate. He concludes without qualification that such a remedy “can cause a severe deprivation of the debtor’s property” and warns that “[t]he opportunities for mistake and abuse found in its procedures are many.” Note, Connolly Development, Inc. v. Superior Court: Procedural Due Process and the California
it more difficult to alienate the property" as the court in *Spielman-Fond* believed. A more accurate assessment of the situation supports the conclusion reached by the Connecticut Supreme Court that the "lien, while it does not prevent alienation of the property, does, as a practical matter, severely restrict the opportunity for and possibly of its alienation" and thereby results in a significant taking of property.

2. What Process is Due

If the procedural due process guarantees of the fourteenth amendment do apply to a materialmen's lien, the next problem is to determine what process is due the landowner. Three sets of procedural requirements have already been identified in the previous article, i.e., the most rigid requirement of seizure notice and hearing opportunities demand by *Sniadach-Fuentes*; the "other procedural safeguards" rule of *Mitchell-North Georgia*; and, the least demanding standard established by the "extraordinary situations" exceptions to *Sniadach* and *Fuentes*. However, the assertion of a materialmen's lien in a dispute between private parties is not an "extraordinary situation." And the difficult issue whether to apply the *Sniadach/Fuentes*.


71. 379 F. Supp. at 999.


The filing of a lis pendens, see *Ark. STAT. ANN. § 27-501 et seq.* (Supp. 1977), may have a similar effect because subsequent purchasers and encumbrancers take subject to the rights of the parties to the litigation. See *Ashworth v. Hankins*, 241 Ark. 629, 408 S.W.2d 871 (1966); *Mitchell & Shaw v. The Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943). The district court in *Batey v. Digirolamo*, 418 F. Supp. 695 (D. Hawaii 1976) upheld the state's lis pendens law after examining the interests advanced by it. *But see Lake Tullock Corp. v. Dingman*, WEC-27140 (Super. Ct., L.A. City., June 1, 1973), discussed in Comment, *Does California's Statutory Lis Pendens Violate Procedural Due Process*? 6 PAC. J. 72 (1973); Note, *Lis Pendens And Procedural Due Process*, 1 PEPPERDINE L. REV. 433 (1974). But the court in *Batey, supra*, refused to base its decision on the absence of a significant property interest because "it should not be the business of this Court to make nice distinctions between different types of property rights which may be asserted before the courts." 418 F. Supp. at 697. *Contra*, Empfield v. Superior Ct., 32 Cal. App. 3d 105, 108 Cal. Rptr. 375 (1973), holding that the notice of lis pendens does not deprive landowners of any significant property interest even though the marketability of the property may be impaired because they may still use the property and enjoy the profits from it. 32 Cal. App. 3d at 108, 108 Cal. Rptr. at 377. However, the precedential value of this holding in *Empfield* by an appellate court in California is now questionable after the decision by the California Supreme Court in *Connolly Development, Inc. v. Superior Court of Merced Cty.*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976), discussed in text accompanying notes 65-67 supra.

73. *See generally id.* at 635-36. *But compare* Barry Properties, Inc. v. Fick Bros. Roofing Co., 227 Md. 15, 353 A.2d 222, 222-330 (1976) ("A survey of the situations which have been held to be sufficiently extraordinary [by the Supreme Court] . . .

HeinOnline -- 32 Ark. L. Rev. 197 1978-1979
rule of preseizure notice and hearing opportunity or the Mitchell/
North Georgia "other procedural safeguards" standard\textsuperscript{75} is less im-
portant when considering the Arkansas lien statute\textsuperscript{76} since its proce-

makes it clear that mechanics' liens ... do not fall within this exception."\textsuperscript{)} with Cook v. Carlson, 364 F. Supp. 24, 28-29 (D.S.D. 1975) ("I conclude, ... especially in light of the insignificant deprivation, that the situation giving rise to the mechanics' and materialmen's lien is an 'extraordinary situation'. ... ").

75. Among the procedural safeguards mentioned by the Supreme Court in Mitchell and/or North Georgia are these:

(a) The applicant for the provisional writ must make a verified showing by petition or affidavit from "specific facts" the nature of his claim, its amount, if any, and the grounds relied upon for the issuance of the writ. The affidavit must go "beyond mere conclusory allegations and clearly [set] out the facts entitling the creditor to [to remedy]," and it must be made by one having personal knowledge of the facts.

(b) Under the Louisiana sequestration procedure approved in Mitchell, "[T]he requisite showing must be made to a judge, and judicial authorization obtained." The Court was concerned that the debtor not be "at the unsupervised mercy of the creditor and court functionaries," and it appreciated the fact that "[T]he Louisiana law provides for judicial control of the process from beginning to end." The Georgia procedure was criticized in North Georgia because the writ of garnishment was issuable "by the court clerk, without participation by a judge."

(c) The creditor must post a bond to guarantee the debtor against damage or expense in the event the exercise of the provisional remedy is shown to be mistaken or otherwise improvident.

(d) The debtor may regain possession by putting up his own bond to protect the seller.

(e) [T]he debtor may immediately have a full hearing on the matter of possession following execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession. The Court has suggested that at the hearing the burden is on the creditor either to prove the grounds upon which the writ is issued or at least to demonstrate probable cause for the writ.

(f) Finally, the Court noted in Mitchell that under the Louisiana procedure "should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.'"

Nickles, \textit{supra} note 17, at 676-77. For a detailed analysis of these safeguards in the context of the remedy of attachment, see id. at 677 \textit{et seq.}

76. Deciding which set of procedural safeguards is applicable requires balancing the respective interests of creditor or debtor. Unless those of the former predominate over those of the latter, the creditor is not entitled to "somewhat more protection" under Mitchell and the debtor must be given preseizure notice and hearing opportunities. \textit{See generally id. at 625 \textit{et seq.}} Courts deciding that the fourteenth amendment applies and then judging the constitutional validity of materialmen's lien statutes have used the Mitchell-North Georgia standard. The reasons have varied. In one case the court found (1) that materialmen have an \textit{interest} in the improved realty because they can assert a lien only against property the value which has been enhanced by their labor and (2) that the policy of protecting their interests outweighs the seriousness of the deprivation caused the debtor which, although significant for fourteenth amendment purposes, is nonetheless of relatively minor effect. Connolly Dev., Inc. v. Superior Ct. of Merced Cty., 17 Cal. 3d 803, 558 P.2d 637, 649, 652, 132 Cal. Rptr. 477 (1976). Concluding that the Supreme Court has not yet spoken definitively on the subject of due process requirements in the context of materialmen's liens, another court simply cited Mitchell and North Georgia as establishing general requirements to be satisfied. Roundhouse Const. Corp. v. Telesco Masons Supplies Co., Inc., 168 Conn. 371, 362 A.2d 778 (1975), vacated to consider whether judgment is based upon federal or state constitutional grounds, or both, 425 U.S. 809 (1975), \textit{reaffirmed}, 170 Conn. 155, 365 A.2d 395.
dures do not satisfy either set of requirements.  

The first defect is that the landowner does not receive notice prior to, at the time of, or soon after the taking of his property. In fact, he will not be notified of the "lien," and thus the taking, until months later when suit is filed to enforce the lien. The Arkansas lien law does require that the owner in some cases be notified of a materialmen's "claim" if the materialman wishes to "perfect" his lien. However, the Arkansas Supreme Court has concluded that the lien arises as soon as materials are used and not when the lien is "perfected." Substantial compliance with the statutory requirements of giving the landowner notice and filing an account is a critical step in securing the lien's continued existence and priority over other interests, and the priority granted perfected liens precipitates the taking of the owner's property. However, the fact that a materialmen has furnished supplies or labor and at that point has a lien, albeit inchoate, which can have priority from the time work commenced, is the reason third parties will be unwilling to buy the property or accept it as collateral. The point at which the owner's ability freely to alienate his property becomes restricted is the time when his property is taken for due process purposes. This inability, and the lien, first arise when materials or labor are supplied and used.

The "perfection" requirement may arguably be viewed as a pro-

(1976) (decided on both due process clauses). cert. denied, 429 U.S. 889 (1976). And one court decided that the statute before it failed under any set of due process requirements without concluding definitely which standard was the more appropriate one for judging materialmen's liens. Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976). However, since (1) the materialman has no pre-existing interest in the property prior to the lien's creation by statute, (2) the statutes generally do not limit liens to cases in which there is a real risk that the property will be conveyed or destroyed, (3) the real property to which the lien attaches cannot be removed, and (4) the deprivation may result in a severe hardship which drives the debtor to the wall, e.g., if the realty constitutes a family home, an argument can be made that the procedure is unconstitutional unless it provides for notice and an opportunity for a hearing prior to the seizure. See Nickles, supra note 17, at 623 et seq.

76. See note 236.2 infra.

77. ARK. STAT. ANN. § 51-609 (Repl. 1971). Original contractors need not give the notice. Id. See also § 51-609 regarding service on nonresidents or residents who conceal themselves, abscond or otherwise act to avoid receiving the notice required to be given under § 51-608.

78. See note 52 supra and accompanying text.

79. See note 54 supra.

80. See discussion regarding lien effecting a significant taking of property at text accompanying notes 48-72 supra.

81. That the lack of the lien's perfection has nothing to do with its existence was recognized by the court in United States v. Westmoreland Manganese Corp., 134 F. Supp. 898 (E.D. Ark. 1955). One party trying to establish priority over a materialmen's lien argued that its mortgage was perfected prior to the time that the suppliers took the statutory steps to perfect their lien. The court responded, "The priority of a mechanic's lien under Arkansas law, however, does not depend upon the quality of the lien as 'choate' or 'inchoate,' but rather upon the time at which the lien attaches, which is when the first materials are furnished." Id. at 942.

82. See note 54 supra.
censura safeguard in a very broad sense because it limits the time during which a lien can be filed in order to perpetuate its existence. The fact that the lien is voided if not perfected is irrelevant in deciding when the taking occurs. At least for constitutional purposes, the existence of the lien during the 120 days after the last materials or labor has been furnished is not dependent upon claiming the lien by filing an account within that time period since the furnishing and using of materials or labor will, under the present lien law, impair the landowner’s ability to alienate his property. The principal connection between the perfection of a lien and the taking of property is that the former perpetuates the latter. Perfecting the lien continues its existence and priority for fifteen months, within which time it must be enforced. The only notice the landowner receives prior to a suit to enforce the lien is part of the perfection requirement which may come months after the lien first arises upon the furnishing of materials or labor, and even then the notification does not advise the owner that a lien already exists and may be filed in order to continue it.

83. For example, in holding its materialmen’s lien law, the Tennessee Supreme Court considered important the relatively short time periods for recording a lien and bringing suit to enforce it. Silverman v. Gossett, 553 S.W.2d 581, 583 (Tenn. 1977).


85. The notice need only state that the materialman “holds a claim against such building or improvement, setting forth the amount and from whom same is due.” Id. § 51-608. Local practice may be that the notice include a warning of an intention to claim or file a lien. For example, attached to a complaint in an action pending in Benton County, Arkansas, is a notice to the defendant-landowner containing this language:

This notice is to advise you . . . that the undersigned sub-contractor holds a claim against a house for labor furnished in the construction thereof, said house located upon property owned by you described as follows, to wit: [legal description]. That the amount claimed is for . . . labor . . . for a sum of $3,510.00 and . . . framing . . . for the sum of $1000.00, making a total sum of $4,510.00, and that said sum is due to the undersigned from Doyle Robinson d/b/a Robinson Construction Company, the prime contractor for construction of said house on the aforesaid lands. The undersigned, a sub-contractor under Doyle Robinson in construction of said house, shall file a labor lien in the sum of $4,510.00 against the aforesaid house and property ten (10) days from the filing date of this notice pursuant to Arkansas Statute 51-609.”

[The above notice appears in the record of a case styled Miesner v. Robinson d/b/a Robinson Const. Co., CIV 75-103, filed March 6, 1975, in the Circuit Court of Benton County, Arkansas.] However, the notice to the landowner is not required by statute to mention the existence of a lien or an intent to perfect one. And the case law does not require it. In Bobo v. Sebree, 244 Ark. 915, 429 S.W.2d 95 (1968), the Supreme Court reversed the trial court’s decision that the following notice was insufficient:

The Notice began with “Marion Bobo . . . claimant and subcontractor,” and was directed to appellants (naming them) as property owners, and to A. F. Kelley as the contractor, and was in form and substance, as follows:

Notice is hereby given: that appellant has a claim against the following property (describing appellant’s property) to secure the amount of $1,613.15 for furnishing and installing said carpeting.

The Notice was signed by appellant’s attorney.

244 Ark. at 917-18. However, a notice which did mention the filing of a lien was found inadequate in Scott v. LeGrande, 255 Ark. 1022, 287 S.W.2d 456 (1956):

The notice was sent by registered mail and reads as follows:
notice need not precede the taking of property under the *Mitchell*-North Georgia approach, clearly it must be given either at the time of the taking or soon thereafter so that the debtor can take full advantage of procedural safeguards which that approach does require for the debtor's protection.\textsuperscript{85.1}

The second major constitutional objection to the procedure is that the lien arises and is perfected \textit{ex parte} without authorization,

\begin{quote}
[Property owners' names and addresses]

"This is to notify you that within ten days after you receive this notice, we will file a lien on your property located at 500 N. Arkansas in Crossett, Ark., for materials bought and put in this property.

"Unless provisions are made within this time to satisfy the indebtedness.

"Signed: Victor Scott
Triangle Biders. Supply"

The notice is defective because it does not set forth in the notice the amount claimed and from whom the same is due. The notice was not served in person by anyone authorized to serve such notice as required by [Ark, Stat. Ann. § 51-608 (repl. 1971)].

The mailing of the notice by registerd mail to the appellees is an insufficient compliance with this statute.

225 Ark. at 1203-24.

However, simply stating in the notice that the materialman may file a lien, or perfect one, pursuant to section 51-613, in addition to complying with the requirements of section 51-608, does not resolve a constitutional question regarding the adequacy of the notice. In Barry Properties, Inc. v. Fick Bros. Roofing Co., 227 Md. 15, 353 A.2d 222 (1976), the Maryland court held that even a notice to a landowner of an "intent to claim a lien" was inadequate. 353 A.2d at 231-32. It was also found that "[t]he filing of a claim to a lien [with a court clerk], although recorded, . . . does not give the property owner constructive notice to the lien." 353 A.2d at 232. Due process requires that notice be meaningful as well as timely. See generally Memphis Light, Gas & Water Div. v. Craft, 98 S. Ct. 1554 (1978); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). See also note 85 infra regarding the timeliness of the notice.

85.1 The Supreme Court noted in *Mitchell* that "[t]he danger of destruction or alienation [of the property] cannot be guarded against if notice and a hearing before seizure are not supplied. The notice itself may furnish a warning to the debtor acting in bad faith." 416 U.S. at 609. In *Mitchell*, however, the debtor was officially notified of the seizure at the time the sheriff executed the writ of sequestration. The citation directed to the debtor "recited the filing of the writ of sequestration and the accompanying affidavit, order, and [creditor's] bond." 416 U.S. at 602. What importance, for example, would the right to an \textit{early} hearing have unless the debtor is notified \textit{early} not only that his property has been taken (which will be obvious in the case of a possessory seizure) but also, by and for whom, and for what reason or by what authority? A debtor who suffers a non-possessory taking by virtue of a materialmen's lien is no less entitled to receive notice conveying similar information. And since he is not dispossessed of the real property subject to the lien, such notice may be the only way he can quickly learn of the actual taking and exercise immediately his right to an early hearing. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972). "[T]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Sniadach v. Family Fin. Corp., 395 U.S. 357, 359-40 (1969). If a debtor is entitled under *Mitchell* to an early post-seizure hearing, he must necessarily be entitled to \textit{meaningful} notice soon after the taking.
supervision, or control by a judicial officer. Even if perfecting the lien is assumed to be the point at which the taking of property occurs, filing the account does not involve judicial participation which is required by the due process clause. "[A] just and true account of the demand due . . . containing a description of the property to be charged with the lien, verified by affidavit . . ." must be filed with the court clerk. But the clerk acts only as an administrator in this regard. He is not permitted to exercise judicial discretion as to the probable validity of the materialman's claim; he is not even required by the statute to approve the form or sufficiency of the account. It is simply filed with his office. At all stages prior to the lien's enforcement, the landowner is at the "unsupervised mercy of the creditor and court functionaries." 89

Another problem is that the procedure favors the materialman even to the extent of not requiring him to post a bond to protect the owner against damages from an unsupportable claim. Bonding for the debtor's protection is standard fare with other traditional creditor's provisional remedies and is a procedural safeguard the Supreme Court has considered important. 90 But not until 1963 did the

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86. For a full discussion of the due process requirement with respect to "judicial participation," see Nickles, supra note 17 at 682-84.


88. Mitchell and North Georgia require that a creditor seeking to assert a provisional remedy "must make a verified showing by petition or affidavit from 'specific facts' the nature of his claim, its amount, if any, and the grounds relied upon for the issuance of the writ. The affidavit must go 'beyond mere conclusory allegations and clearly [set] out the facts entitling the creditor to the remedy' . . . ." Nickles, supra note 17, at 676-77. Even assuming that the materialman's account filed in accordance with Ark. Stat. Ann. § 51-613 (Repl. 1971) contains more than conclusory allegations, its filing does not involve any judicial authorization. The Supreme Court observed in Mitchell that "in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization [for the writ sequestration] obtained." 416 U.S. at 616. Again in North Georgia, the Court noted the importance of participation by a judge before the creditor's remedy is exercised. See 419 U.S. at 607. More important than an active role by a judge is that "the official making the required determination exercise some discretion and possess the necessary professional competence." Jonett v. Dollar Sav. Bank, 530 F.2d 1123, 1150 n.15 (3d Cir. 1976). A court clerk is sufficiently competent. See Nickles, supra note 17, at 684. The problem with the filing of the materialman's account is that the clerk in whose office the account is filed cannot refuse to accept it. The account is not a petition; it is merely a statement. The account does not pray for relief; it simply tells the world that a lien is claimed ex parte. The clerk is involved not to test the claim's validity as a judicial officer might, but only to act as the official responsible for seeing that the account is placed in the appropriate file or index.


90. See, e.g., Ark. Stat. Ann. § 31-108 (Repl. 1962) (order of attachment shall not issue until creditor executes a bond to the effect that he will pay to the debtor all damages sustained by reason of a wrongful attachment order); Ark. Stat. Ann. § 34-2105 (Repl. 1962) (execution of an order of delivery in replevin action dependent upon the plaintiff giving bond). When evaluating the Louisiana procedure in Mitchell, the Court observed that "the seller was required to put up a bond to guarantee the buyer against damage or expense, including attorney's fees, in the event the sequestration is shown to be mistaken or otherwise improvident." 416 U.S. at 608.
legislature amend the lien law even to permit the landowner to discharge a perfected materialmen's lien by posting his own bond.91

However, the most glaring procedural defect in the statutory scheme is the absence of any hearing concerning the lien prior to a trial on the merits to enforce it. A "provision for an early hearing at which the creditor would be required to demonstrate at least probable cause . . ."92 for the lien is absolutely essential to the constitutional validity of the procedure. The Connecticut materialmen's lien statute held unconstitutional in Roundhouse Construction Corp. v. Telesco Masons Supplies Co.93 also lacked any provision "whatsoever for any sort of timely hearing either before or after the recording of the lien, which would give the property owner an opportunity to be heard or require the lienor to justify his lien."94 As a result, the lien was permitted "to continue for two more years without any further action on the part of the lienor, during which time the owner of the property is without recourse in the courts to contest the merits of the claim underlying the lien."95 The Arkansas procedure differs only in the length of the statute of limitations which is fifteen months.96

The California Supreme Court has concluded that the failure of the materialmen's lien statute itself to provide for an early hearing is not fatal as long as some state law "offers equitable remedies which the owner . . . can employ to obtain a speedy hearing on the probable validity of the lien."97 Under California law, if a landowner receives notice of an intention to record a lien from one not entitled to claim it, he may

immediately file suit to enjoin the claimant from asserting the lien.

By use of temporary restraining order if necessary, the plaintiff could secure a hearing before the lien was imposed.

Even after the lien has been recorded . . . the owner may in many instances seek a mandatory injunction ordering the claimant to release the lien. In any event, the owner need not wait until the

93. 168 Conn. 371, 362 A.2d 778 (1975), vacated to consider whether judgment is based upon federal or state constitutional grounds, or both, 423 U.S. 809 (1975), reaffirmed, 170 Conn. 155, 356 A.2d 393 (1976) (decided on both due process clauses), cert. denied, 429 U.S. 889 (1976).
94. 362 A.2d at 784. See note 236.1 infra.
95. 362 A.2d at 784. Compare Gibor Associates v. City of New York, — Misc. 2d —, 399, N.Y.S.2d 84 (1977), holding that the filing of a lien by the City on real property pursuant to the Administrative Code of the City of New York § 1160-1.0 et seq. does not violate due process because "an opportunity for an immediate hearing exists upon application either to enforce or to discharge the lien. Upon such a proceeding, the propriety of the lien and the existence of appropriate grounds therefor can be tested and a hearing directed where necessary." 399 N.Y.S.2d at 87.
claimant sues to enforce the lien; the imposition of that lien, and the owner's denial of its validity, comprise a controversy sufficient to permit an immediate suit for declaratory relief. Such a declaratory relief action can claim priority on the calendar of the trial court. Thus by filing an action for injunctive relief or declaratory relief, the owner . . . or lender can obtain a hearing either before imposition of the lien or within a reasonable period thereafter.\textsuperscript{98}

There are, however, several problems with using this procedural approach to salvage such a lien law, especially in Arkansas.

The most obvious is simply that the lien does not arise under California law until the owner has been notified and the lien recorded.\textsuperscript{99} But, since the lien arises before notice and without recordation in Arkansas,\textsuperscript{100} the landowner in this state is at a practical disadvantage in trying to enjoin its imposition. However, more fundamental objections inhere in an approach which substitutes the possibility of injunctive or declaratory relief beyond the scope of a materialmen's lien statute for an early hearing provision as a part of it. First, seeking this type relief against a materialmen's lien may not always be considered an appropriate remedy under state law.\textsuperscript{101}

\textsuperscript{98} 17 Cal. 3d at 822-23, 553 P.2d at 650-51, 132 Cal. Rptr. at 490-91.

\textsuperscript{99} Interpreting the California procedure, the court in \textit{Connolly Dev., Inc.} said that the mechanic's lien constitutes a direct lien on the property "once recorded." 553 P.2d at 640 (emphasis added). "To secure a lien, a materialman must file a preliminary notice with the owner, the general contractor and the construction lender within 20 days after furnishing the materials, and thereafter record his claim of lien within 90 days after completion of the improvement." \textit{Id.} \textit{See CAL. CIV. CODE} \textsection{} 3097, 3114, 3116, 3123, 3128, 3129 (West 1974 & Supp. 1978).

\textsuperscript{100} \textit{See} text accompanying notes 77-85 supra.

\textsuperscript{101} Although the general rule regarding declaratory relief is that "a declaratory action will lie when the object is to seek a determination of a judgment on other asserted liens," 2 W. ANDERSON, \textit{ACTIONS FOR DEclarATORY JUDGMENTS} \textsection{} 596, at 1332 (2d ed. 1951), \textit{accord}, 26 C.J.S., \textit{Declaratory Judgments} \textsection{} 75 (1956), the cases cited in support of the rule do not squarely confirm the proposition that a private landowner whose real estate is subjected to a materialmen's lien can seek a declaratory judgment to determine the validity or extent of the underlying claim. \textit{See}, e.g., Ackroyd v. Brady Irr. Co., 27 F. Supp. 503 (D. Mont. 1939) (whether land belonging to non-profit, quasi-public reservoir company is subject to a contractor's lien and execution); Lattue v. Dougherty, 34 Cal. 1, 206 P.2d 640 (1949) (creditor suing to have declared a vendor's lien); Howell v. Bennett, 140 Fla. 837, 192 So. 409 (1939) (creditor's bill action to reach equitable asset allowed absent nulla bona return in action at law); Continental Oil Co., Agrico Chem. Co. Div. v. Sutton, 126 Ga. App. 78, 189 S.E.2d 925 (1972) (creditor suing to settle priority dispute as to conflicting interests in personality and fixtures); Baxter v. Baxter, 195 N.E.2d 877 (Ind. App. 1964) (determination as to whether judgment for alimony established by divorce decree constitutes a lien on real estate); Cataldo v. Hanover Ins. Co., 33 A.D.2d 549, 304 N.Y.S.2d 612 (1969), \textit{aff'd}, 30 N.Y.2d 715, 332 N.Y.S.2d 890 (1972) (plaintiff attempting to assert priority of an attorney's lien in sum due from U.S. to client); Philso Estates, Inc. v. Riordan, 240 A.D. 998, 258 N.Y.S.2d 255 (1963) (involved a claim against a defendant title insurance company with respect to liability for defective and unmarketable title and no other remedy was open to the plaintiff).

The cases more clearly in point are few and not conclusive of the issue. \textit{See}, e.g., Rabren v. Andalusia Lbr. & Supply Co., 279 Ala. 551, 188 So. 2d 279 (1966) (landowner may maintain declaratory action to determine validity and priority of liens for
labor and materials furnished contractor in construction of house). Contra, Rott v. Standard Accident Ins. Co., 299 Mich. 384, 300 N.W. 134 (1941) (in the case of materialmen's liens filed against property the proper remedy is to determine their validity and amount in statutory foreclosure proceeding). The Rott case suggests the uncertain availability of declaratory relief. Granting it is discretionary, and, although the existence of another adequate remedy does not bar a declaratory action, "[t]he court . . . in the exercise of the discretion that it always has in determining whether to give a declaratory judgment, properly may refuse declaratory relief if the alternative remedy is better or more effective." 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROEDURE § 2758, at 770-71 (1973). Consequently, "[d]eclaratory relief ordinarily should not be granted if a special statutory proceeding has been provided for the determination of particular questions." Id. at 783. The court in Rott v. Standard Accident Ins. Co., supra, believed the better way to determine the validity of a materialman's lien was by the creditor pursuing the statutory procedure for enforcing a lien and not by the debtor bringing a declaratory action. Also, the Arkansas declaratory judgments statute provides that a "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Ark. Stat. Ann. § 34-2505 (Repl. 1962). An Arkansas court may be unwilling to entertain a declaratory action by a landowner, if at all, unless and until all possible lien claimants and others asserting rights in the property can be identified. The construction of a house or office building, for example, may take many months. During that time different suppliers will perform services and provide materials at varying intervals. To wait until all possible lien claimants can be identified may mean that a landowner could not challenge the validity of earlier established liens until long after the time those liensors caused a taking of property. In the Rabren case, supra, allowing a landowner to initiate a declaratory action, four liensors were parties, and the court noted that "the obvious purpose of the bill is to have determined, in a single proceeding, what rights, if any, the several claimants have . . . ." 188 So. 2d at 280 (emphasis added). The first lien was filed on September 20, 1962. The declaratory action was not begun until five months later.

The availability of injunctive relief against the assertion of a materialmen's lien is also uncertain. The granting of an injunction is discretionary. See Arkansas Public Service Comm'n v. Arkansas-Missouri Power Co., 220 Ark. 39, 45, 246 S.W.2d 117 (1952). But before a chancellor can reach the stage of deciding whether to exercise his discretion in the light of the facts and circumstances of a particular case, i.e., evidence of injury to the petitioning party, he must first decide whether he has jurisdiction to act in any such case. A landowner seeking to enjoin the assertion of a lien will always be heard by the court in the sense that the relief is sought by appropriate pleadings, motions, and, perhaps, hearings before the court. But if the judge decides that an injunction is improper in this type of case regardless of the particular circumstances, i.e., that equity has no jurisdiction, the merits of the parties' arguments as to the probable validity of the lien will not be heard. And it is this type of hearing Mitchell requires.

However, it is far from certain that a chancellor will find that injunctive relief is proper in materialmen's lien cases because of the well-known maxim that such relief is inappropriate if an adequate legal remedy exists. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, §§ 2.5 & 2.10 (1973). The fact that the landowner will ultimately have a plenary hearing on the merits under the lien statute at which he may assert his defenses may persuade the court not to intervene. See Wolf v. Glassport Lbr. Co., 210 Pa. 370, 59 A. 1105 (1904). Cf. Earle's Adm'r v. Hale's Adm'r, 31 Ark. 473 (1876) (cannot enjoin law proceedings to deprive plaintiff possession of land because plaintiff's right to land can be interposed as a defense in the action at law). But see Boswell v. Jordan, 112 Ark. 159, 165 S.W. 295 (1914). Michael's Jewelers v. Handy, 6 Conn. Cir. Ct. 103, 266 A.2d 90 (1970) (court is without legal authority to grant injunction for release of attachments because proceedings to release or dissolve attachments are governed by statute); Triumph Metal Products, Inc. v. Snyder, 133 So. 2d 344 (Fla. Ct. App. 1961) (court should not enjoin garnishment proceedings where issues of fact raised by debtor are proper matters for defensive pleading in the garnishment action); Straub v. First Mut. Bldg. & Loan Ass'n, 178 Ga. 672, 173 S.E. 714 (1934) (garnishment cannot be

And the right of the landlord to discharge the lien by posting a bond (see Ark. Stat. Ann. § 51-614 (Repl. 1971)) may also be a significant factor when deciding if injunctive relief is appropriate. See Charles Simkin & Sons, Inc. v. Massiah, 186 F. Supp. 230 (D.N.J. 1960), rev’d, 289 F.2d 26 (3rd Cir. 1961) (general contractor who sought injunction to force subcontractor to withdraw lien had already posted an $826,000 performance bond which protected subcontractor and subcontractor was bound by a contractual waiver of lien). Cf. Valley Drive-In Theatre Corp. v. Superior Ct., 79 Ariz. 396, 291 F.2d 213 (1959) (defendant in replevin action cannot enjoin plaintiff from taking property because a redelivery bond is the exclusive method by which defendant can have possession of the property pending litigation). Also refusing to enjoin replevin, see Commercial Fin. Co. v. Brooksville Hotel Co., 98 Fla. 410, 133 So. 814 (1929); Speed Oil Co. v. Draper-Owens Co., 183 Ga. 788, 190 S.E. 22 (1937) (injunction against distress warrant not proper where petitioner refused to give bond allowing it to replevy the distrained property); Summers v. Besterman, 254 Ky. 231, 71 S.W.2d 450 (1944) (attachment levy cannot be enjoined because party can retain possession by executing bond). [It is true that the bonding procedure simply means that the debtor is required to substitute one form of property for another. See Fuentes v. Shevin, 407 U.S. 67, 85-86 (1972).] But the debtor’s redelivery bond was counted as a procedural safeguard when the Supreme Court considered the constitutionality of the Louisiana sequestration statute in Mitchell. See Mitchell v. W.T. Grant, 416 U.S. 600, 608 (1974).] In some cases, a creditor’s liability for damages on his bond in the exercise of a remedy has been a reason not to enjoin the proceeding. See Walker v. Kingsbury, 195 S.W.2d 213 (Tex. Civ. App. 1946) (relying on Beck v. Friddy, 252 S.W. 476 (Tex. Civ. App. 1923)); Hill v. Brown, 237 S.W. 252 (Tex. Civ. App. 1922); see also Harris v. Siegel, 68 S.W.2d 330 (Tex. Civ. App. 1934). In Arkansas, however, the materialman need not post a bond for the owner’s protection in order to assert and enforce a lien.

Under the Mitchell set of due process requirements, the debtor should have an unequivocal right to an early hearing at which the creditor must establish the probable validity of his claim. The law in California is now clear after the announcement in Connolly Development that a landowner can sue to enjoin the filing of a materialmen’s lien and have a hearing on the lien’s validity in that suit. But authority elsewhere is scarce on the issue of whether the assertion of a materialmen’s lien is the proper subject of an injunction proceeding. [For cases involving owners and third parties seeking to enjoin the enforcement of a materialmen’s lien, see e.g., McGraw v. Walsh, 232 F. 122 (4th Cir. 1916) (relief not proper); Sylvester v. Strickland, 278 Ala. 278, 177 So.2d 905 (1969); Hilton v. Reed, 46 Cal. App. 2d 449, 116 P.2d 98 (1941); Winn v. Henderson, 63 Ga. 365 (1879) (relief not proper); Raymond v. Ewing, 26 Ill. 329 (1861); Garretson v. Appleton Mfg. Co., 61 Ill. App. 443 (1895); Gates v. Ballou, 56 Iowa 741, 10 N.W. 258 (1881); Dixieaire Air Condition Co. v. Harper, 239 So. 2d 373 (La. App. 1970) (relief not proper); Chertok v. Morang, 228 Mass. 598, 118 N.E. 285 (1918); Patch v. Collins, 158 Mass. 468, 33 N.E. 567 (1893) (relief not proper); Ruberstein v. People’s Lbr. Co., 231 Mich. 674, 204 N.W. 723 (1925); Parsons v. Foster, 154 Miss. 563, 122 So. 387 (1929); Macklin Investment Co. v. Ferry, 341 Mo. 492, 105 S.W.2d 21 (1937) (relief not proper); Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 S.W. 588 (1907); Burgess v. Joplin, 235 Mo. App. 909, 145 S.W.2d 1004 (1941); Robertson v. Mine & Smelter Supply Co., 15 N.M. 606, 110 P. 1037 (1910); Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977); Katersky v. P.D. Humphrey Co., 49 R.I. 181, 142 A.2d 147 (1958) (relief not proper); Freed v. Bozman, 304 S.W.2d 235 (Tex. Civ. App. 1957); Bond v. Carroll, 71 Wis. 347, 37 N.W. 91 (1888).]
tionally, the owner seeking immediate relief by a temporary restraining order must be prepared to post a bond.\textsuperscript{102} And in the case of either the injunction or declaratory judgment remedy, the alleged debtor and not the creditor is the party who initially carries the burden of proof.\textsuperscript{103} Therefore, the procedural substitution approved

In Arkansas and other states a landowner's right to an early hearing on the validity of a materialmen's lien in a suit to enjoin its assertion is questionable because it is uncertain, or at least not clearly established, that equity has jurisdiction to issue such an injunction in this type of case. And the Mitchell "early hearing" requirement is not satisfied by the mere possibility of one in a proceeding which, regardless of the particular facts and circumstances of the case, may not be available to the debtor as a matter of right.


\textsuperscript{103} The general rule regarding declaratory actions is said to be that the burden of proof . . . is the same as in ordinary actions at law or suits in equity, and the plaintiff bringing a declaratory judgment action must, in order to succeed, prove his case in accordance with and within the meaning of such rules, and this rule is not affected by the fact that a negative declaration is sought—of nonliability. . . . T]he burden of proof is upon the plaintiff to show that conditions exist to justify the court in exercising its discretionary powers to grant declaratory relief pursuant to the declaratory judgment statute. . . . H]e has the burden of showing that present justiciable controversy exists, . . . So, also, where the plaintiff makes allegations which are denied by the defendant, then the onus is thrown on the plaintiff to prove the allegations charged in the pleading.

2 W. Anderson, supra note 101, § 375 at 882. While recognizing contrary authority, Professors Wright and Miller believe "a good deal [can] be said for the . . . view that the party who institutes an action . . . should carry the burden [of proof]." 10 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2770 (1975). Assuming that the contrary view is adopted, they state that it is generally held that the party in the declaratory action voluntarily goes forward and attempts to prove his case, he will be held to have assumed the risk of nonpersuasion." \textit{Id.}


is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence. It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. It is generally upon the party who will be defeated if no evidence relating to the issue is given on either side.

\textit{Id.} In this case an insurer filed the declaratory action seeking a determination of its obligations under a life insurance policy. It denied liability for accidental death benefits under several policies. The court found that the insurer-plaintiff had the primary
by the California court is not necessarily possible in every state, raises obstacles to the right to an early hearing not approved by the Supreme Court, and may not squarely place the responsibility with the materialman for justifying the grounds for his lien.

Another problem with adopting the California approach involves the procedure's timeliness. In finding its state lien law unconstitutional; the Maryland Court of Appeals in Barry Properties considered the absence of several procedural safeguards demanded by Mitchell and North Georgia, including a provision for an early hearing as a part of the statutory scheme. A Connelly Development type substitute was found inadequate.

burden of proof but decided that when "defendants offered evidence in support of their right to recover . . . they thus became the actors, [and] the burden of proof in its secondary sense—the obligation of going forward with the evidence—shifted to them, and they were obliged to meet with evidence the prima facie case created against them." Id. The insurer was arguing a negative position, i.e., non-liability. A landowner seeking a declaration of rights against a materialman asserting a lien would be arguing a similar position. Therefore, even under the Eighth Circuit approach it would be the debtor and not the creditor who would have the burden of proof, at least in its primary sense. The Supreme Court requires that the creditor have the burden of proof in the early post-seizure hearing to determine the probable validity of his claim, and it has not approved a procedure by which that burden on the central issue is shared from time to time throughout the hearing. Furthermore, should the rule be adopted that the defendant-materialman has the burden of proof to establish his claim, the plaintiff-landowner still would have the initial burden of showing entitlememt to any hearing at all, i.e., that the dispute is a proper one for declaratory relief. See note 101 supra. Therefore, the debtor's right to a hearing would be a contingent one and not one allowed by right as is the case under the Louisiana sequestration approved by the Supreme Court in Mitchell.

The rule regarding the showings required by a party seeking injunctive relief is well-settled.

In any situation where injunctive relief is sought, the applicant must satisfy each of the traditional criteria . . .: (a) that the applicant establish a substantial likelihood of success on the merits; (b) that without relief the applicant will suffer irreparable harm; (c) while at the same time convincing the Court that no substantial harm will result to the opposing party; and (d) that it is in the public interest to grant the relief. Trans World Airlines, Inc. v. Federal Energy Office, 380 F. Supp. 560, 567 (D.D.C. 1974), aff'd, 520 F.2d 1399 (D.C. Cir. 1975). Mitchell requires that at the early hearing the creditor shall have the burden of showing the probable validity of his claim. But at the hearing in an injunction proceeding, the landowner, who is the alleged debtor but who is also the movant in this proceeding, "has the burden of showing . . . the substantial probability of success at trial . . . ." Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323, 1326 (8th Cir. 1973). See also American Train Dispatchers v. Burlington Northern, 551 F.2d 749, 751 (8th Cir. 1977). See generally 7 J. Moore, Moore's Federal Practice § 65.04[1] (1975). Cf. Ridge Community Investors, Inc. v. Berry, 31 N.C. App. 642, 284 S.E.2d 6 (1977) (preliminary injunction precluding laborer from enforcing laborer's lien should not be granted where movants fail to establish "probable cause for supposing that [they] will be able to sustain their primary equity"). And should the landowner suing to enjoin a materialmen's lien be able to meet this burden, he still is not entitled to relief unless he makes the other traditional showings detailed above. But see note 101 supra regarding the availability of injunctive relief in this type of case.
There is no requirement . . . that the debtor be granted an opportunity for a prompt post seizure hearing . . . . While a property owner "may bring proceedings in equity to compel the claimant to prove the validity of [a lien that has been claimed] or have it declared void, and might be able to seek a declaratory judgment that the lien is invalid, he is not thereby legally entitled to an immediate hearing, as contemplated by the two Supreme Court cases, but only a hearing in the ordinary course of administering the court's trial assignment calendar.\textsuperscript{104}

Declaratory actions may be granted priority on court calendars in California, but not in Maryland or in Arkansas.\textsuperscript{105}

The approach adopted by the California court in \textit{Connolly Development} is a simple one, \textit{i.e.}, salvage on otherwise unconstitutional materialmen's lien statute and, presumably, other suspect creditors' remedies by looking to the availability of some ancillary procedures which the debtor might pursue. Considering the problems discussed above, however, the constitutional validity of this boot strapping technique is questionable because it fails adequately to insure that a debtor will receive the fully panoply of required due process protections. Suspicion is heightened by a recent Supreme Court decision which either rejects the California approach or, at least, casts serious doubt on it. In \textit{Memphis Light, Gas & Water Div. v. Craft},\textsuperscript{105.1} the Court held that the municipal utility's procedures for terminating service to customers deprived them of an interest in property without due process of law. The utility contended "that the available common-law remedies of a pre-termination injunction, a post-termination suit for damages, and post-payment action for a refund are sufficient to cure any perceived inadequacy in MLG&W's procedures."\textsuperscript{105.2} The Court rejected the argument.

The injunctive remedy referred to by petitioner would not be an adequate substitute for a pre-termination review of the disputed bill . . . . Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of injunctive relief or recovery provisions [citing \textit{North Georgia, Fuentes}, and \textit{Sniadach}, among other cases]. It was thought that such remedies were likely to be too bounded by procedural constraints and too susceptible to delay to provide an effective safeguard against an erroneous deprivation.\textsuperscript{105.3}

As a theoretical possibility, the right of a debtor to seek injunctive or declaratory relief from any creditor's remedy always exists. But in \textit{Mitchell} it was the statutory procedure establishing the challenged

\textsuperscript{104} 353 A.2d at 232.
\textsuperscript{105} See ARK. STAT. ANN. § 34-2501 to 2512 (Repl. 1962).
\textsuperscript{105.1} 98 S. Ct. 1554 (1978).
\textsuperscript{105.2} \textit{Id.} at B1895.
\textsuperscript{105.3} \textit{Id.} at B1896.
remedy which the Supreme Court examined and found to effect “a constitutional accommodation of the conflicting interests of the parties.”¹⁰⁶ Louisiana law provides for injunctions and declaratory actions,¹⁰⁷ but the debtor’s right immediately to have a “full hearing on the matter of possession . . . thus cutting to a bare minimum the time of creditor- or court-supervised possession”¹⁰⁸ was established by the sequestration statute itself.¹⁰⁹ Injunctive and declaratory relief is not foreign to the law of Georgia,¹¹⁰ but the Supreme Court in North Georgia nevertheless found that the “Georgia garnishment statute has none of the saving characteristics of the Louisiana statute,”¹¹¹ e.g., “[t]here is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.”¹¹² The fact that an Arkansas landowner may be able to force a hearing on the validity of a materialmen’s lien by some ancillary proceeding not necessarily providing an immediate or traditionally available (and therefore uncertain) forum does not establish that the owner is entitled to the type of early hearing envisioned by the Supreme Court under the Due Process Clause.

In one of its most recent acts amending the statute, the Arkansas General Assembly declared that the law relating to materialmen’s liens was in an “uncertain condition,”¹¹³ that “owners of property in many instances are being defrauded of funds paid to contractors,”¹¹⁴ and that “owners are being subjected to unjust claims of liens.”¹¹⁵ Changing the procedure as the legislature did by that act to allow the owner to discharge a lien by posting bond¹¹⁶ did little to cure these ills. At a minimum, the owner should be protected by the procedural safeguards which the Fourteenth Amendment requires. The better conclusion is that the materialmen’s lien statute in Arkansas is unconstitutional in failing to provide them, and the proposed legislative response to criticisms of the lien law will not save the statute.¹¹⁷

¹⁰⁶ 416 U.S. at 610.
¹⁰⁷ See generally La. Code Civ. Pro. Ann. arts. 1871 to 1883 (West 1961) (declaratory judgments); Id. arts. 3601 to 3615 (injunctions).
¹¹¹ 419 U.S. at 607.
¹¹² Id.
¹¹⁴ Id.
¹¹⁵ Id.
¹¹⁷ In response to a resolution adopted by the Seventy-First Arkansas General Assembly meeting in regular session in 1977, the legislative Joint Interim Judiciary Committee created a special committee to study the materialmen’s lien law and to make recommendations to the Judiciary Committee. The Special Lien Committee has draft-
ed a proposed bill to amend the law. It is attached to this article in an Appendix. Essentially, it is a disclosure law. Original or principal contractors who under contract are to improve land for a charge of $200 or more must give the following notice to landowners:

WARNING

PERSONS PERFORMING LABOR ON YOUR PROPERTY OR FURNISHING MATERIALS FOR THE CONSTRUCTION, REPAIR OR IMPROVEMENT OF YOUR PROPERTY ARE ENTITLED TO A LIEN AGAINST YOUR PROPERTY IF THEY ARE NOT PAID IN FULL EVEN THOUGH YOU PAY THE FULL CONTRACT PRICE TO YOUR CONTRACTOR. THIS LIEN CAN BE ENFORCED BY SELLING YOUR PROPERTY. TO AVOID THIS RESULT YOU MAY ASK YOUR CONTRACTOR FOR LIEN WAIVERS FROM ALL PERSONS SUPPLYING MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN YOUR CONTRACT. YOU MAY WITHHOLD PAYMENT TO THE CONTRACTOR IN THE AMOUNT OF ANY UNPAID MATERIALS OR LABOR. YOU MAY REQUEST THE CONTRACTOR TO FURNISH YOU A LIST OF ALL HIS SUPPLIERS AND LABORERS UNDER YOUR CONTRACT, AND YOU MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS AND LABOR FURNISHED FOR YOUR PROPERTY HAVE BEEN PAID FOR.

§ 1. And every materialman supplying materials to any original or principal contractor to be used for any building or improvement upon land for which the total charge will be $200 or more must give the landowner this notice:

NOTICE

YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED IS SUPPLYING MATERIALS TO (THE NAME OF ORIGINAL OR PRINCIPAL CONTRACTOR, SUBCONTRACTOR OR OTHER PERSON TO WHOM MATERIALS ARE SUPPLIED) FOR IMPROVEMENTS TO PROPERTY UNDER YOUR CONTRACT WITH (NAME OF ORIGINAL OR PRINCIPAL CONTRACTOR). YOU ARE FURTHER NOTIFIED THAT WE ARE ENTITLED TO A LIEN ON THE PROPERTY BEING IMPROVED IF NOT PAID IN FULL FOR ALL MATERIALS FURNISHED FOR THE IMPROVEMENTS. THIS LIEN CAN BE ENFORCED BY SELLING YOUR PROPERTY. TO AVOID THIS RESULT YOU MAY ASK YOUR CONTRACTOR FOR LIEN WAIVERS FROM ALL PERSONS SUPPLYING MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN YOUR CONTRACT. YOU MAY WITHHOLD PAYMENT TO THE CONTRACTOR IN THE AMOUNT OF ANY UNPAID MATERIALS OR LABOR. YOU MAY REQUEST THE CONTRACTOR TO FURNISH YOU A LIST OF ALL HIS SUPPLIERS AND LABORERS UNDER THE CONTRACT, AND YOU MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS AND LABOR FURNISHED FOR YOUR PROPERTY HAVE BEEN PAID FOR.

§ 4. An original or principal contractor or a materialman failing to give the required notice is denied lien rights. §§ 2, 5. No notice is required to be given by materialmen supplying materials directly to the landowner under a contract providing that the landowner is directly liable to the materialman for the cost of materials. §§ 3, 6. And, "[i]f a contractor supplies a bond as provided by law, then the giving of notices . . . shall not be mandatory and the lien rights . . . shall not be conditioned on whether the notices have been given." § 9.

The proposed bill also reduces the time for perfecting a lien under Ark. Stat. Ann. § 51-613 (Repl. 1971) from 120 to 60 days after the materials or labor have been furnished. § 7. And the time for enforcing liens under Ark. Stat. Ann. § 51-616 is reduced to six months after the lien is filed. § 8. Other provisions of the bill relate to criminal penalties. See §§ 10 & 11.
B. Vehicle Repairmen’s Lien

A topic which consistently generates an unusual amount of interest among law students in creditors’ rights classes at Arkansas is the lien given persons repairing vehicles. One reason is that many students are familiar with the problem confronting the frequent visitors to the law school clinic who complain about a dispute with an automobile mechanic. In a typical case, the client has taken his car to a service station or garage for repairs. The owner of the car claims that the service was unsatisfactory, unauthorized, or more costly than expected. He refused to pay the bill, and the mechanic refuses to return the car. The outraged car owner asks, “He can’t keep my car, can he?”

The answer is found in Arkansas Statutes Annotated Title 51, Chapter 4. An automobile mechanic who has performed work or furnished parts for the repair of a vehicle has an “absolute lien” on it “for the [unpaid] sum of money due for such work . . . and materials . . . .” “[T]his law entitles the mechanic or repairman to retain possession of the car in the repair of which service has been rendered,

The proposed legislation could help to solve the statute’s lack of a notice requirement, see text accompanying notes 77-85 supra, but it will do nothing to remedy the other principal inadequacies of the existing materialmen’s lien law. See text accompanying notes 86-115 supra. Even if the bill is adopted, the procedural deficiencies of the statute as amended will still be fatal to the law’s constitutionality under the Supreme Court’s guidelines in Mitchell and North Georgia.

117. Such complaints by car owners must be common. United States Senator Wendell H. Ford recently polled each state’s consumer agency to discover the nature of consumer complaints. “The vast majority stated that automobile repair problems were the number one area of consumer complaint.” Proposed Amendments to the National Traffic and Motor Vehicle Safety Act of 1966 and the Motor Vehicle Information and Cost Savings Act: Hearings on S. 2604 Before the Subcomm. on Consumer of the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 2d Sess. (1978) (opening statement by Senator Wendell H. Ford, Chairman). It was recently reported that in 1977 in excess of $20 billion dollars was wasted on inadequate, incompetent, unnecessary or fraudulent auto repairs and maintenance. Almost 40 cents of every dollar spent on car repairs is wasted.

Poll after poll identifies auto repairs as one of the nation’s most pressing consumer problems. Taking a car to a repair garage has surpassed going to the dentists in the level of fear it strikes in the hearts of most citizens. Id. (statement of Joan B. Claybrook, Administrator, National Highway Traffic Safety Administration, Department of Transportation, March 21, 1978).

118. See Ark. Stat. Ann. §§ 51-404 to -412 (Repl. 1971). This lien is referred to as the “vehicle repairman’s” one to distinguish it from other liens given to laborers generally. See id. § 51-301 to 321 (lien on that produced by one’s work and labor); id. § 51-317 et seq. (lien only on the object of one’s labor). The former statute §§ 51-301 gives laborers “a statutory lien on the production of their labor.” Ruddell v. Reves, 146 Ark. 259, 261, 225 S.W. 316 (1920); the latter one §§ 51-317) “enlarged the rights of laborers so as to give a lien ‘on any object, thing, material or property’ on which they performed labor.” Id.

until these services have been paid for." 120 And if the debt remains unpaid, the lienor has the right to sell the vehicle. 121

"By the common law, a workman who by his skill and labor has enhanced the value of a chattel has a lien on it for his reasonable charges . . . 122 Therefore, a "wheelwright" who has repaired a wagon is not bound to deliver it until he is paid. 123 Automobiles are a relatively recent species of vehicle when compared to wagons, but "little doubt can be entertained that in the absence of a statute on the subject, . . . mechanics [in Arkansas] would be entitled to a lien on an automobile the same as upon any kind of vehicle repaired." 124 However, Arkansas does have a statute which, in fact, supersedes the common law lien. 125 It enumerates specific categories of repairmen and others entitled to a lien for services and materials supplied with respect to all "motor propelling conveyances," 126 and the statute establishes a procedure unknown at common law whereby the lien can be enforced by sale.

122. 1 L. Jones, supra note 11, at § 791.
125. See, in this order, Shelton v. Little Rock Auto Co., 103 Ark. 142, 146 S.W. 129 (1912); Lowe Auto Co. v. Winkler, 127 Ark. 433, 191 S.W. 927 (1917); Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W.2d 780 (1968).

All blacksmiths, horseshoers, wheelwrights, automobile repairmen, airplane repairmen, machine shops, farm implement repairmen, automotive storagemen, firms and corporations, who perform or have performed work or labor for any person, firm, or corporation, or who have furnished any materials or parts for the repair of any vehicle or farm implement, including tires and all other motor accessories and bodies for automobiles, trucks, tractors, airplanes and all other motor propelling conveyances, or who stores on his or its premises any automobile, truck, tractor, airplane, or other automotive vehicle, if unpaid for same, shall have an absolute lien upon the product or object of their labor, repair, or storage and upon all such wagons, carriages, automobiles, trucks, tractors, airplanes, farm implements, and other articles repaired or stored and all horses or other animals shod by them, for the sums of money due for such work, labor, storage, and for such materials furnished by them and used in such product, the shoeing and repairing, including the furnishing of tires and all other accessories and bodies for automobiles, trucks, tractors, airplanes and all other motor propelled vehicles.

For present purposes, all those entitled to the lien are referred to collectively as "repairmen." Electrical equipment repairmen also are given a similar lien, see id. §§ 51-418 to 416, as are cleaners, laundries, dyers, tailors, hat renovators, and shoe repairmen. See id. §§ 51-417 to 422.
If the repairman continuously maintains possession of the vehicle, he can sell it after thirty days from the time his work was completed. He need only make a demand on the owner, give public notice, post a bond, and hold the sale "at public outcry for cash in hand to the highest and best bidder." In some cases, however, the repairman may surrender the vehicle to the owner before the debt is paid. At common law, the lien would be lost. But the Arkansas statute provides a procedure for preserving the lien even though the repairman has parted with possession, i.e., filing an account with the circuit clerk of the county of the debtor's residence within 120 days after the work or materials have been furnished. Complying with the statute in this regard continues the lien for eighteen months within which time it may be enforced by suing to foreclose it. Regardless of the enforcement technique, however, the

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127. See id. §§ 51-405 to 406. But see note 137 infra.
129. Id. § 51-406.
130. Id. § 51-408.
131. Id. § 51-406.
132. 1 L. JONES, supra note 11, at § 745. See also Kersten v. Black, 235 Ark. 991, 364 S.W.2d 150 (1963). In Kersten, see particularly n.2, and note the summarization of the Arkansas cases regarding common law liens and how far they have been affected by statutory liens, 295 Ark. at 995-96.
133. ARK. STAT. ANN. § 51-409 (Repl. 1971). The Arkansas Supreme Court has used the concept of "preserving" the lien when referring to the filing of an account. ("[W]here the lienholder parts with the possession of the chattel repaired, the only way to preserve the lien is to file an itemized account in the county where the debtor resides. L. O. Umstead Auto Co. v. Edwards, 159 Ark. 327, 330, 251 S.W. 878, 879 (1923). "The place where the debtor resides . . . means his home, not some place where he happens to be sojourning." Id.) The time for filing the account begins to run from the date of the last debit item on the account. Terrell v. Loomis, 218 Ark. 296, 298, 235 S.W.2d 961 (1951). This construction is identical to that given ARK. STAT. ANN. § 51-613 (Repl. 1971) with respect to filing accounts to preserve materialmen's liens. Id. See note 54 supra. But see Crump & Rodgers Co. v. Southern Implement Co., 229 Ark. 285, 316 S.W.2d 121 (1958). The account must be an itemized one setting forth the demand due after allowing all credits and containing a description of the property. ARK. STAT. ANN. § 51-409 (Repl. 1971). The safer practice is to be as detailed in the accounting as possible. See, e.g., Taylor v. Crouch, 219 Ark. 858, 865, 245 S.W.2d 217 (1952).
134. If a repairman who has parted with possession of the repaired property fails to preserve the lien by timely filing an account, the lien is lost, although he may still sue for a money judgment for the amount due on the account. See, e.g., Brittain v. Mammoth Spring Motor Co., 233 Ark. 468, 345 S.W.2d 373 (1961). However, just as filing an account to preserve a materialmen's lien may be excused if suit is brought within the period for the account filing, see notes 25 & 24 supra, the same is true in the case of enforcing a repairman's lien. See Reconstruction Fin. Corp. v. Kern-Limerick, Inc., 192 F.2d 978, 980 (8th Cir. 1951).
135. ARK. STAT. ANN. § 51-411 (Repl. 1971). In addition to chancery courts, liens can be enforced in municipal courts or, if the county has no municipal court, by justices of the peace of townships in which actions accrue. Giving jurisdiction to the municipal and justice of the peace courts is valid under the Arkansas Constitution as long as the amounts sued for are within those courts' jurisdictional limitations. See ARK. CONST. art. 7, §§ 40 & 43. Paragould Motor Co. v. McDonald, 184 Ark. 52, 41 S.W.2d 976 (1931). Compare United Loan & Investment Co. v. Chilton, 225 Ark. 1037, 287 S.W.2d 458 (1956); Lingo v. Myers, 211 Ark. 638, 201 S.W.2d 745 (1947).
lien has priority over "any mortgage or other obligation attaching against such property."\footnote{136}

The Arkansas vehicle repairmen's lien statute, therefore, apparently affords the unpaid creditor three different remedial rights.\footnote{137} Specifically, the repairmen's lien is subordinate to the lien of a vendor of a vehicle retaining title and claiming the balance of purchase money due him. See, e.g., Corning Motor Co. v. White, 173 Ark. 144, 293 S.W. 46 (1927). A "vendor's lien" includes an Article 9 security interest. See Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W. 2d 780 (1968). But the priority has been denied to an assignee of a chattel mortgage given for all or part of the purchase price of a vehicle. See Commercial Credit Co. v. Haynes-Lamb Motor Co., 174 Ark. 945, 298 S.W. 217 (1927). Since U.C.C. Article 9 applies to all transactions intended to create security interests in personal property whether created by title retention instrument or chattel mortgage, Ark. Stat. Ann. § 85-9-102 (Supp. 1977), the precedential value of Commercial Credit Co., supra, is now questionable, at least where the secured party is the original seller or vendor. But authority does exist for the proposition that an assignee of the vendor is entitled to the priority given the vendor. See Powell v. Pacific Fin. Corp., 216 Ark. 884, 227 S.W. 2d 965 (1950). However, if the repairman is in possession of the property when the priority conflict arises, Ark. Stat. Ann. § 85-9-310 (Add. 1961) controls. It provides that the statutory lienor will prevail over the secured party "unless the lien is statutory and the statute expressly provides otherwise." The repairman's lien is statutory, but the statute, i.e., Ark. Stat. Ann. § 51-412 (Repl. 1971), does not expressly provide that an assignee of the vendor shall have priority over the repairman.

The other exception to the general rule of priority for a repairmen's lien is that a bona fide purchaser for value takes free of the lien. See, e.g., Kern-Limerick, Inc. v. Emerson., 214 Ark. 780, 218 S.W. 2d 78 (1949).

Some case law in Arkansas suggests that the right to retain the vehicle, the only enforcement possibility at common law, does not necessarily coexist with the statutory right to sell the property. The question is whether the sale procedure is an alternative or a required remedy. The narrowest statement of the issue is whether the right to detain is conditioned upon compliance with any statutory requirements such as the filing of an account. Ark. Stat. Ann. § 51-404 (Repl. 1971) provides that the repairman shall have an "absolute lien." Neither it nor any other section explicitly provides that the lienor has the right to retain indefinitely the object of his labor. But see id. § 51-405. However, the Arkansas Supreme Court in numerous cases has interpreted § 51-404 as entitling the lienor to retain the property "until [his] services have been paid for." See, e.g., cases cited note 120 supra. A classic treatise on liens supports the court's interpretation. In reference to statutory enactments giving a lien to those performing labor on personal property, it is said that "the term lien as used in the statute means the same as it ever did,—the right to hold the thing until the payment of the reasonable charges for making, altering, repairing, or bestowing labor upon it. Possession of the article is essential." 1 L. JONES, supra note 11, at § 749.

However, in Lowe Auto Co. v. Winkler, 127 Ark. 433, 191 S.W. 927 (1917), plaintiffs sued to recover possession of an automobile held by the defendant at its garage. The defendant claimed a lien for payment of a repair bill incurred by plaintiffs. The plaintiffs prevailed. The court recognized that under the common law an automobile mechanic had a lien but concluded that the exclusive remedy was that provided by statute which, in this case, was 1903 Ark. Acts No. 147. The court decided that the common law lien has been superseded by the statutory one and that the remedy prescribed by statute must be pursued, i.e.,

that a person desiring to avail himself of its provisions \textbf{must}, within thirty days after work or labor is done, file with the clerk of the circuit court of the county in which the debtor resides, an account of the demand due and description of the property to be charged with the lien, and that the lien accruing under this statute may be enforced at any time within four months after the account has
been filed with the clerk in the manner provided by statute for the enforce-
ment of laborer's liens. The statute has since been amended so as to make
ninety days the time allowed for filing the account in the office of the circuit
clerk . . . .

Id. at 436, 191 S.W. at 928. If the court was referring to the laborer's lien statute now
appearing as Ark. Stat. Ann. § 51-301 to 321 (Repl. 1971), enforcement involved a
show cause hearing before a justice of the peace, an attachment of the property
pending the hearing, and a public sale of the property after judgment that the claim is
due.

In a later case, the court stated that 1903 Ark. Acts No. 147, described above, was
superseded by 1919 Ark. Acts No. 140, which is the foundation for the present
statutory scheme. See Bond v. Dudley & Moore, 244 Ark. 568, 571, 426 S.W.2d 780,
781 (1968). It, also, provides for filing an account and enforcing the lien in court. See
supra, under the old statute is not necessarily inconsistent with the court's conclusion
under the newer one that a repairman has the right to retain the vehicle until the bill is
1903 Ark. Acts No. 147, under which Lowe Auto Co., supra, was decided provided that
an account shall be filed. 1903 Ark. Acts No. 147, § 2. The present statute requires a
similar filing only if the lienor has parted with possession. Ark. Stat. Ann. § 51-409
(Repl. 1971). The purpose is to preserve the lien so that it may later be enforced in
court. See id. § 51-411. But filing an account apparently has nothing to do with the
lienor's right to detain the property or to sell it himself if he continuously retains
possession. See id. §§ 51-405 to 408. The rule announced in more recent cases such as
Smith v. Checker Cab Co., supra, i.e., that the repairman has the right to detain, is a
later statement by the court interpreting a procedure different from the one involved
in Lowe Auto Co., supra, holding that the common law right to detain had been
superseded by the statutory remedy. And the court in Kern-Limerick, Inc. v. Emerson,
214 Ark. 780, 782, 218 S.W.2d 78, 79 (1949), clearly recognized that retaining the
property was an alternative to other remedial rights under the present statute. "The
statute authorizes the repairman to retain possession of the repaired article and, if
necessary, to sell same in satisfaction of the debt. [And] [i]f the repairman voluntarily
parts with possession of the repaired property, he may still preserve the lien by filing
his claim with the court clerk. . . . " Id.

These more recent cases under the present statute clearly suggest three options for
the repairman, i.e., to detain; to sell; or to preserve the lien when the repairman is out
of possession and to enforce it in court. And these options as separate, alternative
possibilities can be identified in the statutes. However, the wording of Ark. Stat. Ann.
§ 51-411 (Repl. 1971) regarding the enforcement of liens presents a problem. This
section apparently deals only with the case in which a lienor has parted with possession
and filed an account to preserve his lien. To enforce it, he must sue within 18 months
after the account is filed. But notice the exact language of the statute: "Liens accruing
under the foregoing provisions of the act (Sections 51-404 to 412) may be enforced
at any time within eighteen months after such accounts are filed, by suits . . . . " Id. An
inference is that all liens established under the act are so enforceable and not just those
continuing when the lienor is out of possession by virtue of an account being filed. The
compiler apparently believed this because of the reference to "Sections 51-404 to 51-
412." The original act does not contain this cross-reference. See 1919 Ark. Acts No.
140, § 8. And the quoted section cannot be interpreted to mean that the only enforce-
ment technique is a suit to foreclose under § 51-411 because that section refers to the
time of filing "such accounts." Filing accounts is not required when the repairman
simply retains possession as case law permits or sells the property he retains as au-
thorized by § 51-405. "Forgoing provisions" as used in § 51-411 must mean only §§ 51-
409 to 410 dealing with the preservation of a lien when the repairman has lost
possession of the property. It is possible to argue, however, that the 18 month limitation
for enforcing a lien when the repairman is out of possession applies equally as well to
enforcing one by either simple retention under § 51-404 or sale under § 51-405. But in
(1) He may retain possession of the vehicle until his claim is satisfied.
(2) If he maintains possession, he may sell the vehicle. (3) Or, if he has parted with possession, the repairman may preserve the lien by filing an account and enforce it by suing in court. The exercise of each of these rights requires a separate due process analysis to determine whether it complies with procedural requirements under the fourteenth amendment.

1. Right to Detain

To argue that the repairman’s right to detain the vehicle violates procedural due process requires responding to several arguments supporting the opposite conclusion.

a. Presence of State Action

The first is that the detention does not involve state action sufficient to invoke the fourteenth amendment. The leading case supporting this minority view is Parks v. “Mr. Ford.”¹³⁸ The Third Circuit, sitting en banc, found that repairmen’s retention of vehicles under the Pennsylvania garageman’s lien law does not fall within any of three general categories of state action cases, identified as those

(1) where state courts enforced an agreement affecting private parties; (2) where the state ‘significantly’ involved itself with the private party; and (3) where there was private enforcement of a government function.¹³⁹

The majority determined that action pursuant to the lien statute was not “state action” because (1) the repairmen “never invoked the assistance of the state courts to enforce their liens;”¹⁴⁰ (2) the state neither compelled nor coerced the [repairmen] to retain possession of the vehicles¹⁴¹ nor became a “willing participant in joint activity” with them;¹⁴² and (3) the assertion of liens by repairmen is not the exercise of a power “‘traditionally associated with sovereignty’” because (a) the lien was recognized in Pennsylvania long before the enactment of the

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¹³⁹ 556 F.2d 132, 135 (3d Cir. 1977).

¹⁴₀ Id.

¹⁴¹ Id. at 136.

¹⁴² Id.
fourteenth amendment\footnote{143} and (b) the right to retain a car until a bill is paid is not an attribute of sovereignty.\footnote{144} Despite a lengthy analysis supporting the majority's opinion, four of the nine judges disagreed and concluded that state action was present.\footnote{145}

Finding "the rubric that is the most apposite to this case is that of 'public function,'"\footnote{146} Judge Adams' separate opinion persuasively articulates important considerations ignored by the majority in deciding whether a public function is delegated to a repairman retaining possession to force payment of his claim. He contends "that since the garageman's lien is, at least in part, a device for conflict resolution, it must be considered to be the exercise of a delegated public function."\footnote{147} The majority opinion stresses what is believed to be a critical distinction between the present situation and cases in which the Supreme Court has found state action because sovereign powers were delegated, \textit{i.e.}, a garageman's 'power' or right to retain the cars of customers who have not paid their bills is an essential attribute of possession, not of sovereignty.\footnote{148} Judge Adams exposes the flaw in this distinction insofar as the majority focuses on the particular activity, \textit{i.e.}, detainer pursuant to a common law lien, as distinguished from the broader generic category of resolution of conflicts."\footnote{149} As a result, "it tends to obscure the inquiry that illuminates the intellectual justification of the public function rule: namely, whether the type of activity involved is ordinarily associated with the state, thus requiring that its exercise be subjected to constitutional limitations."\footnote{150}

One statement of the test for deciding whether a public function is present is this: "[W]hen private individuals or groups are endowed by the State with powers and functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."\footnote{151} The \textit{Parks} majority erred when it looked only to the right which the lienor has, \textit{i.e.}, to detain the vehicle, and not to the power which this right confers. By having the statutorily endowed \textit{right} to retain a customer's car, the repairman has the power to force payment of a disputed claim, which is a function more governmental than private in nature. And, as an additional or alter-

\begin{itemize}
\item \textit{Id.} at 138-39.
\item \textit{Id.} at 139.
\item \textit{See id.} at 143-48 (Adams, J., concurring); \textit{id.} at 148-59 (Gibbons, J., concurring); \textit{id.} at 164-66 (Sitz, C.J., joined by Aldisert, J. concurring and dissenting in part).
\item \textit{Id.} at 144.
\item \textit{Id.}
\item \textit{Id.} at 145.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
native reason, the repairman's action in this regard should be attributed to the state for purposes of the fourteenth amendment since the state gives the right to the repairman and sanctions and facilitates the exercise of the power which flows from it. The repairman's right to retain exists not by agreement between the parties, but because state law creates it. "The [repairman's] choice to continue in possession is a private election in the volitional sense, but it is [state] law that creates, purports to legitimize, and sanctions the right of continued possession that is complained of. . . . If it seems plain that the common law possessory lien is a product of state action." 152

152. Parks v. "Mr. Ford," 556 F.2d at 148 (Gibbons, J., concurring). Citing Barrows v. Jackson, 346 U.S. 249 (1953) and Shelley v. Kramer, 334 U.S. 1 (1948), Judge Gibbons notes that state sanctioning or facilitation of private transactions is within the reach of the fourteenth amendment. Id. at 154-55. The majority distinguished those cases on the ground that "the defendants never invoked the assistance of the state courts to enforce their liens." Id. at 135. Judge Hunter suggests a fatal weakness in this distinction.

[The state courts would have enforced defendants' right to retain these automobiles against any attempt by plaintiffs to replevy them. If the state action analysis of these possessory liens turned upon the presence or absence of such state court involvement, the due process requirements attending the same conduct would vary from case to case. Surely the due process consequences of possessory liens should not vary at the whim of the private actors.]

Id. at 162 (Hunter, J., concurring). The extent of the state's willingness to enforce the repairman's right to retain is even greater in Arkansas. In Pennsylvania the car owner can bring an action in replevin against the repairman. Such an action is not available to a car owner in Arkansas. See note 164 infra and accompanying text.

However, Judge Hunter also suggests that the "enforcement doctrine" should be limited to racial discrimination cases because expanding it to its logical conclusion would "completely emasculate the concept of state action." Id. Professor Tribe articulates this concern, i.e., the Shelley reasoning, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." L. Tribe, American Constitutional Law § 18.2, at 1156 (1978). However, as Judge Gibbons observes, "I know of no principled basis upon which to say that the national law in one area is less entitled to implementation by virtue of the Supremacy Clause than the national law in another area. State action is not a unitary concept, but neither is it a chameleon, changing hue depending on which provisions of the Bill of Rights or which clause of the fourteenth amendment is involved." 556 F.2d at 154 (Gibbons, J., concurring). Extending the enforcement theory of state action to cases like the present one, in which the right of a private party to detain another's property and the power to force payment of a disputed claim exist and have substance and force solely by virtue of state sanctioning and facilitation, does not tend to emasculate the concept of state action. No one, including Judge Gibbons, suggests that "because all human activity takes place within the framework of law all human activity involves state action." Id. at 155. But the Parks majority and Judge Hunter seem to fear floodgates opening if state action is found in private activities not presently categorized as being within the purview of the fourteenth amendment. But simply because the line between private and state action is hard to draw in many cases is no justification for refusing to attribute the actions of a repairman to the state when they result solely from the state's sanction and facilitation of them.

If the U.C.C. § 9-503 cases need to be distinguished, they can be on at least two grounds. In most cases the secured party's repossession "involved actions between individuals arising out of the express written agreement of [the] parties." Teeter Motor

Also, it has been noted that

In most of the cases where the constitutionality of self-help repossession has been challenged, the debtor has argued that section 9-503, . . . supplies the state action necessary to invoke the fourteenth amendment on the theory that it authorizes or encourages repossessions . . .

[But] [e]ven if it were assumed that state action is present when the challenged private conduct is "authorized" or "encouraged" by some form of state statute, the application of such a test to section 9-503 would nevertheless seem to lead to the conclusion that the requisite state action is not present. The actual effect of section 9-503 . . . is more restrictive than authoritative or creative because it restricts the creditor’s pre-code rights by prohibiting repossession where a breach of the peace may result. The very expansive definition given to the term “breach of the peace” by modern courts has meant that section 9-503 prohibits any repossession under circumstances involving actual or potential force, violence, intimidation, trickery or fraud.

Burke & Reber, supra, note 138, 47 S. CAL. L. REV. at 13, 15. But see, e.g., the pre-Code case of Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934) (repossession under contract clause permitting same permitted only when the retaking can be done peaceably).

Instead of trying to distinguish the U.C.C. 9-503 cases, however, one might reconsider them in terms of the presence or absence of state action by placing proper emphasis on the procedure after repossession. Suppose, for example, that the collateral is an automobile, as is so often the case. "Unless otherwise agreed a secured party has on default the right to take possession of the collateral . . . without judicial process if this can be done without breach of the peace." U.C.C. 9-503 (1972 version). But then, however, the secured party must dispose of the vehicle by sale, lease, or otherwise. Id. § 9-504(1). Or, in some cases, he may retain it in satisfaction of the obligation. Id. § 9-505. Whether the secured party sells the vehicle under § 9-504 or keeps it under § 9-505, he or the buyer will necessarily involve the state in having title transferred. This type and degree of state involvement has been sufficient to find state action for purposes of the fourteenth amendment in another, but similar, context. See note 201 infra and accompanying text. The point is that the right to repossess under § 9-503 cannot be exercised without the secured party also taking further action to dispose of the collateral. This disposition will often significantly involve the state. In his concurring opinion in Parks, Judge Gibbons questions the correctness of the decision in Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974), in which the Third Circuit decided that self-help repossession under U.C.C. § 9-503 did not involve the requisite "state action" necessary to support a claim under 42 U.S.C. § 1983. According to Gibbons,

Candor requires the disclosure that the author of this opinion has always contended that Gibbs v. Titelman was incorrectly decided because of the necessary involvement of the Bureau of Motor Vehicles. Judge Hunter’s concurring opinion in this case suggests that even the author of Gibbs v. Titelman is having second thoughts.

Parks v. "Mr. Ford," 556 F.2d 122, 159 n.11 (3d Cir. 1977) (Gibbons, J., concurring). In his concurring opinion, Judge Hunter commented on the majority’s finding of state action when a garageman enforces his possessory lien by selling the vehicle. See generally
The *Parks* majority also looked to the antiquity of the repairmen's lien as a reason for not finding a delegated public function giving rise to action. The fact that "private individuals engaged in a particular activity long before the enactment of the Fourteenth Amendment . . . is strong evidence that the activity in question is not one 'traditionally' exclusively reserved to the State." Judge Adams' reply "[t]hat a practice existed prior to 1867 should not, standing alone, be sufficient to insulate it from constitutional scrutiny," is supported by statements of the Supreme Court and the conclusion of the authors of perhaps the definitive work on state action in the creditors' rights context.

The focus for state action purposes should always be on the impact

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135. 556 F.2d at 138-39.
134. Id. at 146.
133. Id. at 146.
132. "[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

[B]asic rights do not become petrified as of any one time. . . . It is of the very nature of a free society to advance its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

of the law upon private ordering, not the law's age or historical underpinnings. . . . To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical state action in some states while not in others depending solely upon the fortuitous and unimportant circumstance of the age and history of the law.156

Contrary to the Parks decision, a number of courts have used the delegated public function or some other rubric to find state action in the exercise of possessory liens.157 The court in Caesar v. Kiser158

156. Burke & Reber, supra note 138, at 47.
157. Though an "innkeeper's lien" was recognized at common law, see 1 L. Jones, supra note 11, at § 498 et seq., a number of courts have found state action where a hotel acts under statutory authority to lock a guest out of his room and to hold the guest's personal property to secure payment of hotel charges. And they have declared these statutes unconstitutional because the procedures are inadequate under the due process clause. See Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973). See also Brooks v. LaSalle Nat'l Bank, 11 Ill. App. 3d 791, 298 N.E.2d 262 (1975). But see Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975). Arkansas law gives a lien to "[t]he keeper of any inn, hotel, rooming house or boarding house . . . on the baggage and other property belonging to or under the control of his guests . . . for the proper charges due him from such guests . . . ."

158. ARK. STAT. ANN. § 71-1111 (Repl. 1957). The hotelkeeper may retain the guest's property for 90 days and then sell it at public auction. Id. § 71-1112. The only procedural safeguard is the requirement of notice to the public and the guest of the time and place of the sale. Id. Therefore, the Arkansas "innkeeper's lien" law is suspect under the authority cited above.

concluded that the creation and enforcement of the North Carolina possessory lien statute constitute state action because the state is actively involved with each aspect. The California Supreme Court has also decided that the imposition of a garageman’s lien constitutes state action on the basis of the state’s involvement. In sum, most courts judging the constitutionality of a repairman’s right to retain possession have either found or assumed the presence of sufficient state action. And an important reason why that conclusion is the

entitled to judicial protection.” Mihans v. Municipal Court for Berkeley-Albany Jud. Dist., 7 Cal. App. 3d 479, 87 Cal. Rptr. 17, 20 (1970). However, under the Arkansas procedure, a tenant can be ejected from the premises by a sheriff in response to a writ issued upon the ex parte application of the landlord. See Ark. Stat. Ann. §§ 34-1506 & 34-1510 (Repl. 1962). The tenant is not entitled to an early hearing, but he may retain possession by posting a bond. Ark. Stat. Ann. § 34-1510 (Repl. 1962). Clearly, however, “[w]hen officials . . . seize one piece of property from a person’s possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision.” Fuentes v. Shevin, 407 U.S. 67, 85 (1972). The procedural safeguards provided in Arkansas’s unlawful detainer statute appear to be inadequate under either the Snidach-Fuentes or the Mitchell-North Georgia due process standard. Compare the Oregon procedure considered by the Supreme Court in Lindsey v. Normet, 405 U.S. 56 (1972).


159. Id. at 647.
160. Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145, 149 (1974). The court also discussed other theories appropriate for finding state action, at least with respect to the enforcement aspect of the lien. See id. But see discussion of this case at text accompanying notes 171-77 infra.
better one is to avoid "immunizing" the creditor.

The question is not whether all conduct sanctioned by the statute constitutes state action, but whether characteristics unique to the operation of certain possessory liens support a finding of state action. Unjustified interference with possessory rights normally constitutes the tort of conversion; both conversion actions and due process guarantees are meant to protect private citizens' possessory rights. Conversion actions prevent the private abuse of power; due process, the public abuse. Enabling statutes authorize creditor conduct which if privately done in the absence of sanction would constitute conversion, and if performed by a state agent would create a fourteenth amendment denial of due process. The issue more precisely stated, therefore, is whether creditor enabling statutes are to form a hybrid procedure immune from attack both as private conversion and due process denial. State action must be found to avoid such immunization. 162

Assuming arguendo that Parks was correctly decided under Pennsylvania law, there are reasons to reach a contrary result in Arkansas. Under the Pennsylvania procedure found in Parks not to constitute state action, a person having his car repaired and refusing to pay a disputed bill can bring a replevin action against the repairman and a court will settle the dispute. 163 A replevin action cannot be maintained in Arkansas against a repairman in possession who claims a lien for repairs, 164 and he is not liable for conversion if he retains

N.M. 494, 558 P.2d 1311 (1976), and another court decided not to base its decision upholding the repairman's right to detain solely on the proposition that state action was lacking. Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), cert. denied, 420 U.S. 934 (1975).


164. Smith v. Checker Cab Co., 208 Ark. 99, 101-02, 184 S.W.2d 901 (1945). The reason that the property cannot be repleived is that the plaintiff is unable to show that he is entitled to immediate possession because the repairman has the right to retain possession by virtue of his lien. Id. But see note 166 infra. However, the result is different if the plaintiff attempting to replevy can show that he has priority over the repairman under an exception to the general rule of ARK. STAT. ANN. § 51-412 (Repl. 1971). See, e.g., Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W.2d 780 (1968); Corning Motor Co. v. White, 173 Ark. 144, 293 S.W. 46 (1927).

Would the constitutionality of the right to detain be assured if the owner could maintain an action in replevin? The answer is no. The reason is suggested by Chief Judge Seitz in a separate opinion in Parks. He believes state action is present when a repairman retains a vehicle pursuant to a possessory lien, and he commented on the predictment in which an owner finds himself under the majority view to the contrary.

This court now says that those [due process] procedures need not apply when a repairman deprives an owner of possession. The supreme irony of this result is that the only legal recourse open to a dispossessed owner pending final judgment is to seek replevin in the shoes of a creditor under the same court rules designed to protect debtors from oppressive creditor tactics. The debtor-creditor world is turned upside down when the debtor-owner cannot regain his property without posting a double bond, filing suit and affording the creditor an early hearing—procedures designed to prevent a debtor from
the property pursuant to such a lien. The owner who needs his vehicle has no practical alternative to paying the bill. The state gives the repairman the right to retain the vehicle and gives him immunity from the types of actions most generally used to decide whether one's interference with another's property is rightful. State action must be found so that the debtor will at least be entitled to minimum procedural safeguards which will insure that any dispute between the parties is fairly and justly settled within a reasonable time frame, assuming, of course, the other requisites necessary to invoke the fourteenth amendment are present.

wrongfully losing possession. The consumers who won procedural protection against arbitrary and mistaken seizure when the court ruled were amended to comply with Fuentes and Mitchell have been hoisted with their own petard. Parks v. "Mr. Ford," 556 F.2d at 166 (Seitz, C.J., with whom Aldisert, J., joined, concurring and dissenting in part).


166. What can the owner do? In Smith v. Checker Cab Co., 208 Ark. 99, 184 S.W.2d 901 (1945), the court suggested that a replevin action could be maintained against a repairman detaining property "if and when the bill for repairs has been paid or tendered." 208 Ark. at 102 (emphasis added). But what amount need the owner tender, i.e., the amount the repairman claims to be owed or the amount the owner believes is due? The quoted language seems to suggest the sum claimed by the repairman, i.e., "the bill for repairs . . ." But if an owner alleges in his replevin complaint the amount he believes is due and that he has tendered this amount, and if he can make prima facie showings on these issues, see ARK. STAT. ANN. § 34-2121 (Supp. 1977), why should he be denied an order of delivery? As a general proposition, the only reason the owner cannot get a replevin action is because the repairman, and not the owner, is entitled to immediate possession. But the repairman's right to possession depends upon the owner's failure to pay or tender the charges legally due. If the owner can make a prima facie showing that he has tendered that which is legally due, the repairman's claim to possession is relatively less substantial than the owner's. The repairman's interest would not go unprotected if the owner successfully replevies because of the plaintiff's replevin bond. See ARK. STAT. ANN. § 34-2105 (Repl. 1962).

If replevin is not available as described above to the owner, he apparently may pay the charges claimed by the repairman and then maintain an action in restitution to recover the difference between the amount paid and the amount actually owed. Cf. Murphy v. Brilliant Co., 323 Mass. 526, 83 N.E.2d 166 (1948) (suit to recover overcharges paid for the repair of plaintiff's boat). However, this remedial alternative is objectionable. In Memphis Light, Gas & Water Div. v. Craft, 98 S. Ct. 1554 (1978), the Supreme Court held that the municipal utility's procedures for terminating service to customers deprived them of due process of law. The utility contended that ancillary remedies available to a customer were sufficient to cure any perceived procedural inadequacy. One of those suggested was a post-payment action for a refund. 38 CCH S. Ct. p. B1895. The dissent also argued that "a customer can always avoid termination by the simple expedient of paying the disputed bill and claiming a refund." Id. at B1905.

The majority rejected these arguments because it recognized "the predicament confronting many individuals who lack the means to pay additional, unanticipated automobile repair expenses confront an equally serious perdicament.

167. A finding of state action when a repairman detains property is not sufficient by itself to invoke the fourteenth amendment. The action must result in a deprivation of a significant property interest. A number of courts have considered that the owner's voluntary surrender of his property to a repairman is an important fact in deciding
b. Adequacy of Procedural Safeguards

The next issue to resolve is whether the statutory procedures under which a repairman retains possession satisfy the due process clause. Since there are no procedures under the Arkansas statute, the answer is easy. The Arkansas Supreme Court has interpreted section 51-404\(^{168}\) to give the repairman the right to detain a vehicle until his claim for services and materials is satisfied by the owner.\(^{169}\) The right apparently carries with it no requirements for, or limitations on, its exercise and no safeguards for the debtor's protection.\(^{170}\) Unless the fourteenth amendment as applied in this context requires no safeguards, the repairman's remedy of detention in Arkansas is uncon-whether due process is violated by the repairman's detention. See notes 171-81 & accompanying text infra. But no court has directly held that the detention is not a "deprivation" for the explicit purpose of determining the fourteenth amendment's applicability. Such a holding would be wrong.

While the consumer's interest in continued use and possession constitutes the "substantial property interest," it could be argued that there has not technically been a "deprivation" because the consumer originally turned the property over to the creditor voluntarily. The "deprivation" must come with the artisan's . . . refusal to return the goods on demand. In the light of the consumer's expectation, this constitutes a deprivation. The consumer's temporary relinquishment of possession for a limited purpose is based on the assumption that he will reacquire the goods after that purpose is completed. The frustration of that purpose constitutes deprivation in the same way as the actual taking of goods via replevin.

Clark & Landers, Smidach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 355, 386 (1973). As noted by one judge when the Second Circuit considered the constitutionality of the sale provisions of New York's lien law:

Here, it is true that appellant in a sense voluntarily delivered his car for the purpose of temporary storage and eventual repair. But it cannot be seriously contended that at the same time he voluntarily relinquished his property interest in the car. Indeed, the law is clear that, while a bailment creates a new property interest in the bailee, it does not divest the bailor of his continuing interest and title.


Clearly the debtor is deprived of a property interest, i.e., continued use and possession of a vehicle to which he will usually have title. A person is deprived of "property" within the fourteenth amendment's protection when the deprivation is of his "interest in continued possession and use of the goods." Fuentes v. Shevin, 407 U.S. 67, 86 (1972). And the fact that the repairman may also have an interest by virtue of his lien does not make the owner's interest any less significant for purposes of deciding whether the fourteenth amendment applies. But cf. Rendlemen, The New Due Process: Rights and Remedies, 63 Ky. L.J. 531, 542 (1975); Note, Possessory Liens: The Need for Separate Due Process Analysis, 16 Wm. & Mary L. Rev. 971, 981 (1975). But see id. at 981 n.54. When the Supreme Court in Mitchell recognized that the creditor's interest needed protection, it did not find that the debtor had no interests deserving of protection under the fourteenth amendment. It was applicable regardless of a duality of interest.

\(^{168}\) ARK. STAT. ANN. \S 51-404 (Repl. 1971).

\(^{169}\) See, e.g., cases cited note 120 supra.

\(^{170}\) See note 137 supra.
stitutional. However, some courts appear to have concluded that none are required.

A number of courts deciding the constitutionality of a repairman’s right to detain have followed the reasoning in Adams v. Department of Motor Vehicles. The California Supreme Court decided that the interim retention of an automobile by a creditor under the state’s garagemen’s lien law did not violate due process. The court distinguished other creditors’ remedy cases such as Snidach and Fuentes from the one before it on the basis of the garagemen’s “possessorcy interest . . . in a car left for him to repair with his own labor and materials . . . . [H]e has added to it materials to which he originally has a right of possession.” These other cases were also distinguishable “on the ground that creditors there sought assistance of a state officer or proceeded under color of state law to alter the status quo either by dispossessing debtors or by diverting rights or benefits owed the debtors by third parties.” The court refused to strike down the garagemen’s possessory lien because it would “alter the status quo in favor of an opposing claimant” and thereby deprive the garagemen of his possessory interest. The district court in Cockerel v. Caldwell upheld the detention features of the Kentucky statute on the basis of the Adams reasoning “with regards to preserving the status quo and protecting the laboring and property interest of the repairman . . . .” In fact, practically every court upholding the repairman’s right to detain has adopted this reasoning, and most have cited Adams.

Adams, however, was decided before Mitchell and North Georgia. The California Supreme Court had to confront the holdings in

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172. 520 P.2d at 966, 113 Cal. Rptr. at 150.
173. Id.
174. Id.
176. Id. at 498. The court apparently believed that the California Supreme Court in Adams did not find state action when a repairman asserts his right to detain possession of the property. See id. But see Adams v. Department of Motor Vehicles, 11 Cal. 3d at 146, 520 P.2d at 961, 113 Cal. Rptr. at 148-50 (1974).
Sniadach and Fuentes suggesting that creditors' interests were unimportant in the due process analysis. Consequently, if the court had been unable to distinguish the garagemen's situation, applying those two Supreme Court precedents would have demanded that the garageman's interest in the vehicle go unprotected until a hearing could be held, thereby emasculating the possessory lien. To protect the repairman's interest, the California court in Adams had no choice but to conclude, as it did, that the interim retention by the garagemen did not violate the principle of Sniadach.\textsuperscript{178}

After Adams, however, the Supreme Court reinstated a due process analysis more flexible than the one required by Sniadach and Fuentes. It recognized in Mitchell the need to protect the creditor's interests, but it did not abandon the debtor to the unsupervised mercy of his creditors. Nevertheless, several courts judging repairmen's liens statutes after the Mitchell decision have continued to rely on the Adams reasoning. Considering Indiana's lien in Phillips v. Money,\textsuperscript{179} the Seventh Circuit distinguished Mitchell because it involved "a seizure of goods from the debtor altering the status quo pending a final judgment on the merits . . . ."\textsuperscript{180} The court believed the situation before it was significantly different.

[H]ere the voluntary surrender of the motor vehicle to the garageman, albeit for the limited purpose of performing authorized repairs, results in the garageman having both a legal property interest, in the form of a lien, and actual possession. Interference with the status quo would be necessary to enable the owner to regain possession prior to final judgment. Under these circumstances we cannot conclude that the Indiana procedure, permitting the repairman to retain possession and imposing on the car owner the burden of initiating litigation to challenge his right and resolve the disputes is fundamentally unfair.\textsuperscript{181}

Perhaps the situation is not unfair to the repairman, but consider the debtor's plight. Engaging in a due process analysis assumes in the first instance that the debtor is deprived of a significant property interest. The car owner clearly is,\textsuperscript{182} and the status quo is initially

\textsuperscript{180} Id. at 994.
\textsuperscript{181} Id. at 994-95.
\textsuperscript{182} See note 167 supra.
altered by the repairman unexpectedly keeping possession of the vehicle. If the purpose of the fourteenth amendment is to insure that statutory procedures effect a constitutional accommodation of both parties' interests, a due process analysis which ignores the debtor's interests and emphasizes only the creditor's does not promote the constitutional objective. Clearly the repairman has an interest, and an important one, to protect. But, under the due process analysis developed in Mitchell, deciding that the creditor has an interest deserving of protection does not lead to the conclusion that the debtor's interests should go unprotected. Balancing each party's interests is necessary to decide the type of procedures required to safeguard both parties' interests. The Supreme Court in Mitchell, after identifying a duality of interests, proceeded to decide if the Louisiana sequestration procedures were adequate to protect the concerns of both parties. The Mitchell approach may be appropriate for judging the constitutionality of repairmen's liens statutes, but deciding that statutory procedures satisfy its requirements also means deciding that the interests of the debtor, as well as the creditor's, are protected under the statutory scheme.

Using Mitchell's set of procedural safeguards as a guide in testing the constitutionality of a statute giving a repairman the right to detain property does not imply the abolition of possessory liens. A statute

184. The Court's analysis throughout the opinion was premised on the assumption that "[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." Id. at 604. The court identified the creditor's interests, id. at 604, 607-08, and then found after reviewing the statutory procedures that "[t]he system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with. . . ." Id. at 618. This was the "somewhat more protection for the seller" which the state could provide in light of the "reality" of his interests. Id. at 608. The ultimate conclusion was that the "procedure as a whole . . . [reaches] a constitutional accommodation of the respective interests of buyer and seller." Id. at 610 (emphasis added).
185. Assertion of a repairmen's lien is not an "extraordinary situation" calling for the application of the least stringent due process standard. See, e.g., Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145, 149-50 (1974); Quebec v. Bud's Auto Serv., 105 Cal. Rptr. 677, 679-80 (1973). Also, see generally Nickles, supra note 17, at 650-56. However, an argument can be made that the Smiadach-Fuentes set of due process safeguards, i.e., pre-seizure notice and hearing, is the appropriate one to apply in this situation. Modern society is truly dependent upon automobiles. A car may even be considered a "necessity of life" to the extent that it is essential in the pursuit of a livelihood. Cf. Bell v. Burson, 402 U.S. 535, 559 (1971) ("continued possession [of drivers' licenses once issued] may become essential in the pursuit of a livelihood"). The impact of the deprivation, i.e., detaining the owner's car, may outweigh the risks to the creditor if notice and prior hearing are supplied. "Consideration of the impact of the deprivation on the debtor is . . . under Mitchell . . . a factor to be weighed in determining if concepts of due process validate specifically the ex parte seizure under review." Guzman v. Western State Bank, 516 F.2d 125, 132 (8th Cir. 1975). See Mitchell v. W.T. Grant, 416 U.S. 600, 610 (1974). Also, see Nickles, supra note 17 at 623-25.
can be drafted which protects the repairman by permitting him to retain possession of property improved by him but which also protects the debtor from repairmen's abuses of that right. But a statute which permits a repairman to keep possession without providing a single procedural safeguard for the debtor's protection must be unconstitutional. Arkansas' statute has no debtor safeguards. And to rely on the reasoning in Adams and Phillips to uphold it is further complicated by differences in the debtor's remedial rights generally under the laws of the states involved. In Indiana a debtor can sue to replevy his vehicle from a repairman detaining it, and in California he can sue in conversion. An Arkansas debtor cannot maintain either action. The Seventh Circuit's conclusion about fairness of a creditor's right to detain property is premised on the assumption that some process, e.g., replevin, is available by which the debtor can challenge that right. A repairmen's lien statute is unconstitutional if it denies the debtor minimum due process protections; but, aside from the constitutional issue, the situation is simply unjust if no mechanism is available under state law for a timely judicial review of the creditor's claim which supports his right of detention.

2. Right to Sell

In addition to the right to detain, a repairman in Arkansas "retaining possession of the . . . article repaired . . . by virtue of the lien thereon for labor or materials, shall have the right to sell same for the satisfaction of the debt for which the property is held." The sale cannot "take place until the expiration of thirty [30] days from the time the work is completed," and the lienor's duties with regard to

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186. See notes 171-181 and accompanying text supra.
187. About the debtor's remedy in Indiana the Seventh Circuit stated, "[T]he owner may seek a resolution of a dispute over the facts on which the lien is predicated through replevin, or otherwise . . . ." Phillips v. Money, 503 F.2d 990, 992 (7th Cir. 1974). And the California Supreme Court noted the possibility of a conversion action against a repairman in that state. Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145, 151 (1974).
188. See notes 164-66 supra, and accompanying text.
189. 503 F.2d at 995.
191. Id. § 51-406.

In addition to having possession of a vehicle because the owner voluntarily surrendered it for the purpose of having it repaired, a repairman may come into possession another way. For example,

(a) The police department is hereby authorized to remove a vehicle from a street or highway to the nearest garage or other place of safety, or to a garage designated or maintained by the police department or otherwise maintained by the city, under the circumstances hereinafter enumerated:

(i) When any vehicle is left unattended upon any bridge, viaduct or causeway or in any tunnel where such vehicle constitutes an obstruction to traffic.
(2) When a vehicle upon a highway is so disabled as to constitute an
obstruction to traffic and the person in charge of the vehicle is, by
reason of physical injury, incapacitated to such an extent as to be
unable to provide for its custody or removal.

(3) When any vehicle is left unattended upon a street and is so parked
illegally as to constitute a definite hazard or obstruction to the nor-
mal movement of traffic; when any vehicle is left continuously and
unattended upon any street for a period of more than forty-eight
(48) hours; and any time a vehicle is parked in a prohibited area that
is so designated by signs or other official markings.

FAYETTEVILLE, ARK., CODE § 19-140 (1965). The University of Arkansas, Parking and
Traffic Regulations (1977-78) has a similar provision.

The University reserves the right to remove by impounding any vehicle that is
parked in such a way as to constitute a serious hazard. Also, the owner of any
vehicle that impedes vehicular or pedestrian traffic movement, the operation
of emergency equipment; the making of essential repairs or services; or
parked in violation of restricted areas, will be required to pay all costs for the
removing, impounding and storing of such vehicles.

... An authorized commercial garage will carry out any towing action. The
resulting charges will be paid directly to the towing company by the owner of
such vehicles including removal, impounding and storage.

University of Arkansas, Fayetteville Campus, Parking and Traffic Regulations ¶ F.3.
(1977-78). Both the City of Fayetteville and the University of Arkansas utilize privately
owned garages and service stations to tow vehicles.

Similar statutes in other jurisdictions also give repairmen a lien for towing and
storage charges with the rights to detain and sell. The courts have had no difficulty in
finding state action and declaring such laws unconstitutional as violative of due process.
See, e.g., Stypmann v. City & Cty. of San Francisco, 557 F.2d 1338 (9th Cir. 1977);
370 F. Supp. 974 (N.D. Ill 1974) (state and city codes which permit towing of aban-
donated motor vehicles without notice or an opportunity for a hearing on the abandon-
ment issue and which require payment of miscellaneous fees as a condition precedent
to the release of such a vehicle without such a hearing violate due process). But cf.,
(notice and hearing prior to seizure of cars repeatedly ticketed for parking violations
may not be necessary, citing Mitchell, Calero-Toledo v. Pearson Yacht Leasing Co., 416
U.S. 663 (1974), and Fuentes’ “extraordinary situations” exception); Baker v. City of
Iowa City, 260 N.W.2d 427 (Iowa 1977) (city ordinance authorizing use of “Denver
boot” to immobilize illegally parked motor vehicles is constitutional because it satisfies
three-pronged “extraordinary situation” due process test, citing Calero-Toledo and
Fuentes). As an example, however, the Fayetteville Code does not purport to give the
repairmen who has towed a vehicle a lien, and he could not claim one for towing
charges under Ark. STAT. ANN. § 51-404 (Repl. 1971), which gives a lien only for
repairs. But he might attempt to claim a lien, and the right to detain and sell, on the
basis of the storage charges. See id. § 51-913. The problem with trying to assert the lien
on this basis is the lack of the owner’s consent to the storage and charges. See Younger
v. Plunkett, 395 F. Supp. 702 (E.D. Pa. 1975). And even if the repairman can assert a
lien for storage costs, state action clearly is involved since a state official directed the car
be removed and stored.

A police officer makes the initial determination that a car will be towed and
summons the towing company. The towing company tows the vehicle only at
the direction of the officer. The officer designates the garage to which the
vehicle will be towed. The officer notifies the owner that his vehicle has been
removed, the grounds for the action, and the place of storage. The towing
company detains the storage charges pursuant to a statutory scheme designed
solely to accomplish the state’s purpose of enforcing its traffic laws. Thus, the
the sale are to

(1) give public notice ten days before making the sale;  

(2) file a copy of the notice with a justice of the peace in the
    township where the repairman's place of business is located;

(3) post bond with the justice of the peace for the property
    owner's protection "in the event the lienholder is not entitled to the
    lien and for the payment of any damages if the sale is wrongfully
    made;"  

(4) make demand on the debtor by registered letter for pay-
    ment of the debt owed the repairman;

(5) hold a public sale and sell to the highest bidder, and,

(6) account to the owner for any surplus resulting from the sale
    if he demands it.

There is also a general requirement that the lienholder act in good
faith and be responsible for any abuse of his power and authority
under the statute.

The possessor lienor had no power of sale at common law, but
a statutory enforcement procedure similar to Arkansas' is common
among states giving liens to repairmen. The courts have had no

private towing company is a "willful participant in a joint activity with the State
or its agents, ... and there is a "sufficiently close nexus between the State
and the challenged action of the [towing company] so that the action of the
latter may be fairly treated as that of the State itself."

Stypmann v. City & Cty. of San Francisco, 557 F.2d 1338, 1341-42 (9th Cir. 1977).
Therefore, the owner, who is deprived of a significant property interest, is entitled to
due process protections.

    the front door of his place of business, and at least five [5] other of the most public
    places in the township, written notice of the proposed sale, specifying the property
to be sold, name of the owner or debtor, and the time and place of sale, which notice
shall be signed by the lienholder . . . ." Id.

193. Id. § 51-408.

194. Id. The debtor's remedy in either event apparently is to sue on the bond.


196. Id. § 51-406.

197. Id.

198. Id. § 51-407.

199. See Brown, Personal Property § 119 (2d ed. 1955). "The right of public sale
    enlarges on the common law right of possession of a lienholder. . . . After reducing
his underlying claim to a judgment the lienholder at common law could obtain execution
on the property retained by him." Whitmore v. New Jersey Div. of Motor Vehicles,

    Code Ann. §§ 64-1901 & 64-2101 et seq. (Repl. 1976). And compare the pre- and
    post-amendment versions of Cal. (Civil) Code §§ 3068(a) & 3071 (West Cum. Supp. 1978),
difficulty in finding sufficient state action to invoke the fourteenth amendment when a repairman acts pursuant to statutory authority to sell a customer’s property.201 And every court considering the constitutionality of such a procedure has determined that it violates the due process clause. The conclusion in practically all of the cases, most of which ante-date Mitchell, has been based on the absence of a hearing prior to the sale as required by the Sniadach-Fuentes due process standard.202 However, the Third Circuit decided with respect to the Pennsylvania sale procedure that “even if we were to ignore Fuentes, it seems evident that the . . . statutes at issue in this case do not pass muster when tested by the due process standards expressed in . . . Mitchell . . . and North Georgia Finishing, Inc. . . .”203 The


It is not clear, however, that a statute authorizing a repairman to sell a vehicle under procedures fully complying with those under Mitchell and North Georgia would be valid. The most important procedural safeguard under all the cases, including Sniadach and Fuentes, is the right to a hearing. The hearing need not be one in which the issues are finally decided on the merits. The Court said in Fuentes that it must, however, provide a “real test” and that its aim at least be to establish the probable
same conclusion can be reached about the Arkansas procedure.

In Pennsylvania and, although less certainly, in Arkansas, a repairman must give notice of the sale to the debtor, but in neither state must he first obtain judicial authorization of the sale. Also, both states' statutes fail to provide the debtor with an opportunity for a hearing at which he can challenge the repairman's claim. It is true that unlike the Pennsylvania scheme, an Arkansas repairman must post bond to protect the owner. But a Pennsylvania debtor can prevent a sale by initiating a replevin action and posting a replevin bond. An Arkansan does not have that option and the lien statute does not permit the debtor to discharge the lien by posting a bond.

What is true about the Pennsylvania statutes is true of Arkansas', i.e., they "display few of the 'saving characteristics' of the provisions sustained in Mitchell and exhibit many of the provisions struck down in North Georgia Finishing, Inc." The Third Circuit concluded, validity of the creditor's underlying claim. Fuentes v. Shevin, 407 U.S. 67, 97 (1972). Accord, Mitchell v. W.T. Grant, 416 U.S. 600, 609 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). However, those cases dealt with temporary deprivations by a creditor. The sale of a vehicle by a repairman effects a final deprivation of the debtor's property, and none of the Supreme Court cases mentioned above supports the proposition that a final deprivation need be preceded only by a probable cause type of hearing. Additionally, under Mitchell the hearing may be a post-seizure one. But if one rejects the notion that the taking is the retention of the vehicle, see note 167 supra, then the taking must occur in the context of the sale. It is nonsensical to conclude that the hearing, regardless of its form and nature, can be held after the sale takes place. The better conclusion is that no sale can occur until after a full, plenary hearing on the merits in which judgment is rendered finally for the repairman.

204. The Arkansas statute requires that the repairman make a demand on the debtor for payment. See Ark. Stat. Ann. § 51-407 (Repl. 1971). The demand letter need not advise the debtor that his property will be sold unless the repairman's claim is satisfied. The Third Circuit in Parks seems to interpret the notice requirement under the Pennsylvania statute as informing the debtor of the possibility of sale. 556 F.2d at 142. But see Pa. Stat. Ann. tit. 6, §§ 11-12 (Purdon 1965).

205. In Pennsylvania, "once the debtor has been served and thirty days have elapsed, [the repairman] may proceed with the sale without first obtaining judicial authorization." 556 F.2d at 142. The Arkansas repairman must file a notice of sale and a bond with a justice of the peace, see Ark. Stat. Ann. § 51-408 (Repl. 1971), but that official's approval of the sale is not necessary.


208. See, e.g., Smith v. Checker Cab Co., 208 Ark. 99, 184 S.W.2d 901 (1945). But see note 166 supra.


210. 556 F.2d at 142. The only debtor safeguards the Arkansas sale procedure clearly provides are the repairman's bond and his liability for damages on the bond if the sale is wrongful. Ark. Stat. Ann. § 51-408 (Repl. 1971). When compared to those the Supreme Court believed important in Mitchell and North Georgia, see note 75 supra,
"When all these factors are considered, it is plain that these [Pennsylvania] statutes violate Fourteenth Amendment due process."211 The conclusion is just as plain with respect to the Arkansas sale procedure.

3. Right To Perpetuate

At common law, the repairmen's lien for services and materials depends on possession. If the repairman returns the property to the owner, the lien is lost.212 Arkansas statutory law changes that result. A lienholder voluntarily parting "with possession of any property upon which he has a lien under . . . [§ 51-404] . . . may still avail himself of such a lien . . . "213 by filing an account with the circuit clerk within 120 days after the work or materials are furnished.214 The effect of this filing is to preserve the lien215 and thereby to perpetuate it for as long as eighteen months within which time it must be enforced.216

If a repairman out of possession timely files an account, the lien and its priority over other encumbrances continue from the date it arose. With two exceptions, the lien "shall take precedence over and be superior to any mortgage or other obligation attaching against said property in all cases where the holder of such mortgage shall permit such property to remain in the possession and be used by the person owning and bound for the amount therefore . . . ."217 The repairman's right to perpetuate the lien thus impedes the owner's ability to alienate the property. For example, a person buying an automobile from an owner in possession takes subject to a repairman's lien which has been asserted by the filing of an account.218 Also, such a lien is

the only conclusion is that the safeguards the statute does provide are inadequate to reach a "constitutional accommodation" which protects both parties' interests.

211. 556 F.2d at 143.
212. 1 L. JONES, supra note 11, at § 745. See also Kersten v. Black, 235 Ark. 991, 364 S.W.2d 150 (1963); Bennett v. Taylor, 185 Ark. 794, 49 S.W.2d 608 (1932); Driver v. Jenkins, 30 Ark. 120 (1875).
214. Id. Regarding when the 120 days begins to run, see, e.g., Crump & Rodgers Co. v. Southern Implement Co., 229 Ark. 285, 316 S.W.2d 121 (1958); Terrell v. Lomis, 218 Ark. 296, 255 S.W.2d 961 (1951).
217. Id. § 51-412. The two exceptions are (1) "that the lien herein provided for shall be subject to the lien of a vendor of automobiles . . . and all other motor propelling conveyances retaining title therein, for any claim for balance of purchase money due thereon . . . " id. (see note 136 supra); (2) "that said lien shall not take precedence [precedence] over a bona fide purchaser for value of any such . . . motor propelled conveyances without notice either actual or constructive." Id.
probably superior to a lender’s non-purchase money security interest in the car attaching after the lien arises.\textsuperscript{219}

A debtor is deprived of a significant property interest when his right freely to alienate his property is restricted. This proposition has been demonstrated with regard to the effect of a materialmen’s lien on real property,\textsuperscript{220} and the reasoning there is equally apposite to a repairman’s lien on a vehicle. The fact that personal and not real property is the subject of the lien does not change the conclusion. As one court has commented regarding the effect of an attachment lien,

\begin{quote}
[T]he existence of a nonpossessory attachment on personality, as well as one on realty, can result in the “curtailment of economically important property uses.” . . . It is clear that . . . property uses, such as the ability to secure credit on the basis of personality, can . . . be profoundly affected by a nonpossessory attachment of personality. These effects apply equally to realty and personality.\textsuperscript{221}
\end{quote}

Since the procedure involving the filing of an account to preserve a repairman’s lien and thus to deprive the owner of a significant property interest involves state action,\textsuperscript{222} the fourteenth amendment’s due process requirements must be satisfied. However, the Arkansas statutory scheme provides no procedural safeguards to protect the debtor when a repairman out of possession perpetuates his lien. Therefore, it must be unconstitutional principally because the statutory right to perpetuate, like other aspects of the vehicle repairman’s lien and the materialmen’s lien, represents a traditionally acceptable, but currently objectionable, pattern of creditor “overprotection.”

\textsuperscript{219} The court clearly implied that if the repairman had filed his account prior to the sale, the purchaser would have had constructive notice of the lien and taken subject to it.

\textsuperscript{220} For example, D owns a car subject to a repairman’s lien. D is in possession. Bank loans D money and takes a U.C.C. Article 9 security interest in the car. In a priority dispute between the repairman and Bank, the repairman probably will prevail under Ark. Stat. Ann. § 51-412 (Repl. 1971). The Bank cannot claim the benefit of either exception to that priority rule. \textit{But see} U.C.C. definitions of purchase and purchaser, Ark. Stat. Ann. § 85-1-201(32)(33) (Add. 1961). The conclusion is probably correct regardless of whether the repairman filed his account before or after the security interest attached, as long as an account is eventually filed within the statutory time period. \textit{See} Ark. Stat. Ann. § 51-409 (Repl. 1971). A somewhat analogous case involving an attachment lien is L.O. Umsted Auto Co. v. Edwards, 159 Ark. 327, 251 S.W. 878 (1923).

\textsuperscript{222} Article 9 would not apply to determine the priority conflict between a secured party and a statutory lienor out of possession. The only priority section in Article 9 dealing with conflicts between secured parties and lienors for goods and services is 9-310, and it applies only when the lienor has possession of the property. \textit{See} Ark. Stat. Ann. § 85-9-310 (Supp. 1977).


\textsuperscript{222} The state is actively involved because the lien is filed with a court clerk and is finally enforced by a state court. \textit{See} Ark. Stat. Ann. §§ 51-409 & 51-411 (Repl. 1971). State officials perform ministerial functions similar to some of those performed under the procedures involved in \textit{North Georgia, Mitchell, Fuentes}, and \textit{Smidach}. Finding state action in this context can be based on the reasons for doing so in cases involving materialmen’s liens. \textit{See} note 48 and accompanying text supra.
III. CONCLUSION: "OVERPROTECTED" CREDITORS

The materialmen's and vehicle repairmen's liens are probably the most familiar among the statutory liens in Arkansas, but many others are sprinkled throughout the statutes.223 Some of these, such as the liens for keepers of livery224 and ginners of cotton,225 are bench marks in the social and economic development of the state. Together they suggest a strong legislative policy in favor of protecting the investments of those who help to produce and improve property. The fact that all the liens are of relatively ancient origin does not dilute the importance of the function they serve. However, the fact that most of their forms and procedures have remained unchanged for decades invites constitutional challenges based upon modern notions about due process of law.

Most statutory liens were enacted during or before a period when the due process clause clearly was not thought to "impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."226 The function of the fourteenth amendment was believed to be "negative, not affirmative . . ."227 carrying "no mandate for particular measures of reform . . ."228 and not furnishing a "universal and self-executing remedy . . ."229 for improving old forms of procedure with the progress of time. Courts recoiled at the suggestion that a customarily employed procedure which had been adopted by the states to suit their circumstances and needs could be inconsistent with due process of law.230

Today, however, the adequacy of a procedure under a "feudal regime" is not conclusive of its constitutional validity.231 A hearing prior to the deprivation of property was not a concept first introduced by the Supreme Court in Sniadach, but the Court there did expand a "deprivation" in terms of the fourteenth amendment to include a temporary, as well as a final, one.232 And the Court shortly began to apply the amendment to protect against hardships peculiarly

223. See, e.g., notes 1-10 supra and notes 224 & 225 infra.
227. Id. at 112.
228. Id.
229. Id.
230. Id. at 111.
significant to contemporary debtors. Even today the due process clause does not impose a duty upon any state to establish ideal systems of justice with every modern improvement providing against every possible hardship. But it is now understood to require states either to abandon old remedies which in application are practically insensitive to any debtor hardships or to revise their procedures by lessening the possibility or the impact of the hardships which may result. A closer approximation of the ideal system with a greater appreciation of the competing interests involved now seems to be a positive goal of the courts in applying the fourteenth amendment.

The judicial reexamination of debtors' due process rights in the area of creditors' provisional remedies happens to coincide with legislative consideration of demands for greater consumer protection in many areas. One Arkansas state legislator has recently suggested, however, that consumers are "over-protected" and asked whether enough attention has been given lately to protecting the businessman. Statutory liens in Arkansas continue to exist in their old forms and, in terms of modern due process, "over-protect" the creditor. For this reason, the materialmen's and vehicle repairmen's liens are unconstitutional, and many other liens, by implication, are suspect.

The problem with judicially invalidating any one of them is that the creditor loses completely all the protection the statute afforded him. Nevertheless, courts can consider the legitimate interests of the creditor only to the extent of deciding the particular process due him and the debtor. Finding that the statute gives the businessman ample protection is not a sufficient basis for upholding a procedure which fails to protect adequately the equally legitimate interests of the consumer. The courts' function is to determine if the procedures as a whole reach a constitutional accommodation of both parties' interests. If the procedures fail in this respect, the courts' duty is to declare the statutes unconstitutional, and the responsibility for rewriting them rests with the legislature. Any statutory lien can be raised above constitutional suspicion by amending it to provide minimum procedural safeguards. The fourteenth amendment neither requires "overprotecting" nor allows "underprotecting" either party's inter-

236. Very recently the Arkansas Supreme Court observed that change in the materialmen's lien statute "is a matter that addresses itself to the General Assembly, not this court." Eudora Lumber Co. v. Neal & Jones, 263 Ark. 40, 43, — S.W.2d — (1978).
What the state representative was suggesting for the consumer protection movement in Arkansas is exactly what the Supreme Court demands in the context of debtors’ rights and creditors’ remedies, i.e., a balanced approach.236.2

236.1 In a recent case challenging the constitutionality of its state’s materialmen’s lien law, for example, the Iowa Supreme Court observed that “[i]nvolved here is a balance between protection of mechanics and materialmen, on one side, and owners, on the other.” Keith Young & Sons Construction Co. v. Victor Senior Citizens Housing, Inc., 262 N.W.2d 554, 556 (Iowa 1978). The court appreciated the “[r]ealities indicating “that mechanics and materialmen need some readily-available security.” Id. However, it also realized that the landowner needed protection from creditor abuses. One of the features of the Iowa procedure important in the decision to uphold the lien law is a provision which insures that the “owner is not helpless against the lien; by the simple expedient of written demand, he can compel the lienholder to commence foreclosure within 30 days or lose his lien.” Id. See IOWA CODE ANN. § 572.28 (West 1950). But see text accompanying notes 91-96 supra regarding the Arkansas procedure. And not only is the Iowa owner given the power “at any time to require a plenary suit within 30 days,” 262 N.W.2d at 557, “in the suit the owner is not compelled to rid his property of the lien; rather, the onus is on the lienholder to substantiate and enforce the lien.” Id. at 556. Which party has the burden of proof is an important factor in the due process analysis. See generally text accompanying notes 97-113 supra and particularly note 103 supra. The object of due process should be to strike a balance between competing interests, and the Iowa Supreme Court believes its state’s “statutory scheme . . . constitute[s] a tolerable legislative adjustment between security for those who improve the property and the interest of the owner.” 262 N.W.2d at 557.

The Iowa court did recognize that the non-possessorial materialmen’s lien is “less drastic than seizing chattels under an ex parte writ of replevin or cutting off wages or funds by garnishment.” Id. at 556. However, the court apparently considered the landowner’s ability to use or alienate real property encumbered by a lien as a factor affecting the nature of procedural safeguards required by the fourteenth amendment and not the debtor’s entitlement to due process protections. See text accompanying notes 48-72 supra.

236.2 The existing Arkansas materialmen’s lien law was very recently declared unconstitutional by the trial court in Miesner v. Robinson Civ.-75-103 (Cir. Ct., 19th Jud. Cir., Ark.). In a letter opinion granting defendant-landowner’s motion for summary judgment, Hon. W. H. Enfield wrote that

Although the U.S. Supreme Court has not directly ruled on the subject of the due process requirements of mechanic’s lien statutes, it is apparent from analysis of the preceding opinions that due process requires a procedure whereby (1) the debtor must be given prior notice of the claim and a prior opportunity to be heard on the probable validity of the claim, or (2) in the absence of prior notice and a hearing “other procedural safeguards” must be mandated by the statute.

Examination of the Arkansas mechanics’ lien statute, and the procedures established thereby, discloses a failure to satisfy either requirement.

Addendum

Much of the discussion in this article regarding vehicle repairmen’s liens deals with the “state action” issue. Is the state so involved or implicated when a repairman detains or sells a vehicle encumbered by a statutory lien for services or materials that the debtor is entitled to fourteenth amendment due process protection against “state action”? The answer given is yes. But just before the presses were scheduled to begin rolling on this issue of the Arkansas Law Review, the United States Supreme Court stopped them with its decision in Flagg Brothers, Inc. v. Brooks. The answer to the state action question must now be reconsidered, but not necessarily changed. The primary purpose here is not to criticize the decision, although criticism surely and justly will come from many others. The modest goal in this limited space is principally to distinguish the case or reconcile its result with conclusions in this article regarding the presence of state action when a vehicle repairmen’s lien is asserted in Arkansas.

For several months Ms. Brooks stored her family’s household possessions in the warehouse of Flagg Brothers, Inc. She and the warehouseman engaged in a series of disputes over the storage charges. Finally, Flagg Brothers threatened to sell the furniture to satisfy its claim under the procedure prescribed by § 7-210 of New York’s Uniform Commercial Code. Ms. Brooks sought to enjoin the sale and to recover damages by bringing suit under 42 U.S.C. § 1983 and arguing that the sale would violate due process and equal protection clauses of the fourteenth amendment. The district court dismissed her complaint; the Second Circuit reversed, and the Supreme Court granted certiorari to decide whether Ms. Brooks had a claim for relief under § 1983 for deprivation of a right “secured by the Constitution and laws” of the United States. Since “only a State or a private person whose action ‘may fairly be treated as that of the State itself’ may deprive [a person] of ‘an interest encompassed within the Fourteenth Amendment’s protection,’ . . . the only issue presented by this case [in which no state official is overtly involved] is whether Flagg Brothers’ action may fairly be attributed to the State of New York.” The majority concluded that it may not.

The respondents based their assertion of state action on two theories. The primary one was “that New York has delegated to Flagg Brothers a power ‘traditionally exclusively reserved to the State.’” They argued “that the resolution of private disputes is a traditional function of civil government, and that the State in

240. Ms. Brooks “was later joined in her action by Gloria Jones . . . whose goods had been stored by Flagg Brothers following her eviction.” 46 U.S.L.W. at 4439.
242. 533 F.2d 764 (2d Cir. 1977).
243. 46 U.S.L.W. at 4440. See note 255 infra.
244. 46 U.S.L.W. at 4440.
245. Id.
§ 7-210 has delegated this function to Flagg Brothers. The Supreme Court conceded that in some cases the resolution of creditor/debtor disputes may be subject to constitutional restraints, but held that the present one was free of them (at least on the basis of the asserted state action theory) because "the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute." To find state action using the public function rubric, "the feature of exclusivity" is essential. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" Resolving the type of dispute between Ms. Brooks and Flagg Brothers is not one of those few.

The principal evidence the Court adduces to support its conclusion that New York has not "delegated to Flagg Brothers an exclusive prerogative of the sovereign" is a "system of rights and remedies [which recognizes] the traditional place of private arrangements in ordering relationships in the commercial world . . . ."

Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. The challenged statute itself provides a damage remedy against the warehouseman for violations of its provisions.

Distinguishing its earlier elections and municipal function cases, the Court decided that the "entire field of activity" involving commercial liens and other remedies is beyond the scope of those sovereign function cases. The sweeping conclusion is that "the settlement of disputes between debtors and creditors is not

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246. Id.
247. Id. at 4442 n.12.
248. Id. at 4441.
249. Id.
250. Id. at 4440.
251. Id. at 4441.
252. Id.
253. The Court discussed two branches of the public function doctrine, and each of them involves activities traditionally "exclusively reserved to the State."

One such area has been elections. While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function. This principle was established by a series of cases challenging the exclusion of blacks from participation in primary elections in Texas. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

46 U.S.L.W. at 4440. The second line of public function cases deals with municipal functions. This branch of the doctrine originated with Marsh v. Alabama, 326 U.S. 501 (1946). Just as the Texas Democratic Party in Smith and the Jaybird Democratic Association in Terry effectively performed the entire public function of selecting public officials, so too the Gulf Shipbuilding Corporation performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned. Under those circumstances, the Court concluded it was bound to recognize the right of a group of Jehovah's Witnesses to distribute literature on its streets. The Court expanded this municipal function theory in Amalgamated Food Employees Union v. Logan Plaza, Inc., 391 U.S. 308 (1968), to encompass the activities of a private shopping center. . . . This Court ultimately . . . limited [the] reach of Marsh in Hudgens v. NLRB, 424 U.S. 507 (1976), in which it announced the overruling of Logan Valley.

46 U.S.L.W. at 4441.
254. 46 U.S.L.W. at 4442.
traditionally an exclusive public function."255

The other state action theory urged by the respondents was "that the State has authorized or encouraged [Flagg Brothers' proposed action] in enacting § 7-210."256 The Court almost summarily rejected this alternative argument.

Our cases state "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State has acted, but that it has refused to act.257

Relying principally on the public function and encouragement doctrines, this article advances the argument that the actions of a garageman are attributable to the state when he detains and/or sells a vehicle pursuant to a repairman's lien.258 Flagg Brothers obviously tends to undermine that argument. The case seems clearly to affirm the reasoning in Parks v. "Mr. Ford"259 which rejects state action on any theory with respect to the repairman's detention. Assuming arguendo that Parks is correctly decided under Pennsylvania law, however, this article demonstrates why a contrary result is desirable and possible in Arkansas.260 Parks is distinguished because at least one important remedial option available to a debtor in Pennsylvania is denied to one in Arkansas. This distinction is even more important after Flagg Brothers and supports an argument that the public function doctrine, although not now applicable to sale of goods under a warehousemen's lien in New York, is applicable to enforcement of a vehicle repairmen's lien in Arkansas.

An owner whose vehicle is detained in Pennsylvania pursuant to a repairmen's lien can bring a replevin action against the mechanic, and the dispute will be settled in court.261 The Flagg Brothers majority assumes that this option is also available to a New York bailor seeking to prevent a U.C.C. § 7-210 sale of his property by a warehouseman. The replevin possibility was cited by the Court as one of the alternative rights and remedies available to a debtor, thereby demonstrating that the § 7-210 sale is not the only means of resolving the dispute with the creditor.262

The availability of other remedies, including replevin, seems critical to the Court's justification of its conclusion that resolution of conflicts between creditors and debtors is not traditionally an exclusive public function.

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255. Id. at 4441. North Georgia, Fuentes, and Sniadach were distinguished because of the "total absence" in Flagg Brothers of "overt official involvement."

256. It must be noted that respondents have named no public officials as defendants in this action. The City Marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties.

257. Id. at 4440.


262. 46 U.S.L.W. at 4441.
Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function. However, the majority's justification, if literally interpreted, supports the opposite conclusion because two of the three alternative rights and remedies it suggests, replevin and a damages action, require resort to state courts. Therefore, the state resolves the conflict, not the parties themselves. And as to the third alternative, waiver, if one had been obtained at the time of contracting, the creditor's only option for resolving later disputes would be a suit in court on the debt owed him.

To reconcile the conflict between the majority's reasoning and its conclusion, emphasis must be placed not on the "exclusivity" of the function in terms of the state's traditional association with its exercise but, instead, on the extent to which private parties are permitted to perform the function, i.e., to share in the function's exercise. The majority necessarily admits, by its reference to the replevin and damages actions, that the state has traditionally exercised, at least to some extent, the conflict resolution function. But the point of the reference is to demonstrate that the state's delegation of the function to private parties, as through U.C.C. § 7-210, has not been exclusive. The majority is not denying that conflict resolution between creditors and debtors is a function sometimes engaged in by the state, but it argues that the function is a shared one which is neither totally controlled by the state nor exclusively delegated to private parties. The Court then is concerned with the extent of the authorization (or delegation) and not simply with the degree to which the function's exercise has traditionally been associated only with the state.

The majority may have reached the same result in Flagg Brothers even if it accepted the argument that conflict resolution is the principal reason for the state's existence. In the past the Court has focused on the exclusivity of the nature of the power or function exercised by private parties, i.e., the extent to which it can be characterized as "governmental." In more recent cases the wording of the public function test has changed, and, especially in Flagg Brothers, the emphasis is on the exclusivity of the function's exercise by private parties, i.e., the extent to which the state continues to perform the function. If the delegation does not amount to complete abandonment of the function by the state—if the state reserves some role in its exercise—then the private party is not exercising power exclusively reserved to the state and the state is not sufficiently implicated to invoke the fourteenth amendment. Whether this is the proper type of inquiry for deciding the applicability of the due process clause is a separate issue not addressed here, but the majority clearly seems to use this modified public function test in Flagg Brothers.

In any event, the Court places great emphasis on the fact that "creditors and debtors have had available to them historically a far wider number of choices than one who would be an elected official or a member of Jehovah's Witnesses who wishes to distribute literature in Chickasaw, Ala. . . ." Regardless of whether the public function doctrine is perpetuated in its traditional or modified

263. Id.
264. Id.
266. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) ("supplying of utility service is not traditionally the exclusive prerogative of the State").
267. 46 U.S.L.W. at 4441-42. See note 253 supra.
form, after Flagg Brothers it is certainly arguable that the fewer the available remedial choices, the more likely it is that the state's authorization of a particular remedy amounts to delegation of a traditionally exclusive public function (or the exclusive delegation of a function traditionally associated to some extent with the state). If that is true, which among the possible alternative rights and remedies are the ones properly to consider? Surely the Flagg Brothers majority, placing substance over form as all judges do, would consider only those alternatives which are significant and practical, i.e., "real" choices.

The Court mentioned three: waiver, replevin, and a damages remedy. About the first, the Court observed that Ms. Brooks "has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage." It is easy to understand the reason why. One imagines that a person earning $87 a week, who has been evicted from her home, and is in the position of having the city marshall "arrange" for the storage of her furniture will not ordinarily have the presence of mind to try to understand, much less negotiate, the terms of the bailment. Was Ms. Brooks more perceptive than Ms. Fuentes who agreed to contract terms which "were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning"? Did Ms. Brooks even anticipate a dispute? Suppose she did, suppose she knew about the lien law, and, finally, suppose she had tried to obtain a waiver. It is doubtful that the bargaining position of a New York consumer has advanced beyond that of one in Wisconsin where there is "no bargaining over contractual terms between the parties who, in any event, [are] far from equal in bargaining power."

A consumer bailor asking a warehouseman to waive his lien is in much the same position as a consumer buyer wanting to delete the limiting language in a standard new car warranty. As described by the New Jersey Supreme Court,

The warranty before us is a standardized form designed for mass use. It is imposed upon the automobile consumer. He takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it . . .

The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of express warranty. Where can the buyer go to negotiate for better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common law principles of freedom of contract.

The Fuentes v. Shevin decision demonstrated that the Supreme Court is among those courts which are "sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions . . ." Therefore, it is difficult to believe that the Flagg Brothers majority seriously considers the waiver

268. Id. at 4441.
269. Id.
270. It was reported that respondent Gloria Jones "took home $87 per week from her job . . ." Id. at 4443 (Marshall, J., dissenting).
271. Both respondents, Brooks and Jones, had been evicted from their apartments, and in each case the City Marshal of Mount Vernon, New York, had supervised the evictions.
273. Id. at 95.
possibility as a "real" choice among the alternative rights and remedies available for settling creditor/debtor disputes.

A case decided only two weeks before Flagg Brothers suggests that most members of the Court also believe a damages action is not a "real" choice for a debtor. In Memphis Light, Gas & Water Division v. Craft, the Court held that the municipal utility's procedures for terminating service to customers were unconstitutional under the fourteenth amendment. The utility contended that the existence of several common law remedies which customer-debtors could pursue, including a post-termination suit for damages, was sufficient to cure any procedural inadequacies. The Court rejected the argument because "judicial remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit." The option of avoiding termination of service by paying the disputed bill and claiming a refund was likewise unacceptable because "many individuals . . . lack the means to pay additional, unanticipated utility expenses." Ms. Brooks and others similarly situated are in no better positions regarding unexpected storage costs. The Court in Memphis Light, Gas & Water Division characterized termination of utility services as a "uniquely final deprivation." However, losing one's household possessions at a U.C.C. Article 7 sale involves an equally unique deprivation. Utilities can ultimately be restored, but goods sold at a § 7-210 sale cannot be returned to the debtor when the dispute with the creditor is finally settled. And it is doubtful that the size of a potential recovery in a damages action will ordinarily be large enough to justify litigation. The Court itself noted that self-help remedies, particularly the warehouseman's lien, are seldom the subject of judicial review.

Replevin is the final remedial option mentioned in Flagg Brothers. Although problematic as an option for a debtor in resolving a conflict with a warehouseman threatening to sell stored goods, it does offer the advantage of testing the valid-

278. Id. at 1565.
279. Id. at 1566.
280. Id. at 1566 n.26.
281. Id. at 1566.
282. U.C.C. § 7-210(5) provides, "A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section." See Ark. Stat. Ann. § 83-7-210(5) (Add. 1961).

The state not only authorizes the warehouseman to resolve the dispute with the bailor/debtor by selling the stored goods, but it also permits him unilaterally to divest the debtor of title to the goods. The Flagg Brothers majority did not consider this latter function in deciding whether the warehouseman, acting pursuant to U.C.C. § 7-210, is exercising a traditionally exclusive public function. But see note 152 supra.

283. 46 U.S.L.W. at 4441 n.11.
284. Justice Marshall emphasizes the principal problem with a replevin action. In order to obtain replevin in New York . . . respondent . . . would first have had to present to a sheriff an "undertaking" from a surety by which the latter would be bound to pay "not less than twice . . . the value" of the goods involved and perhaps substantially more, depending in part on the size of the potential judgment against the debtor. . . . Sureties do not provide such bonds without receiving both a substantial payment in advance and some assurance of the debtor's ability to pay any judgment awarded.

The Court's assumption that respondent would have been able to obtain a bond, and thus secure return of her household goods, must under the circumstances be regarded as highly questionable. While the Court is technically correct that
ity of the creditor's lien before the goods are sold, not afterwards as in the case of a damages action. The Court may have been emphasizing the possibility of the replevin remedy when it observed that "[t]here is no reason whatever to believe that . . . respondents could not, if they wished, seek resort to the New York courts in order to . . . prevent the 'surrenders of property' . . . , and that the compliance of petitioner with applicable New York law would be reviewed after customary notice and hearing in such a proceeding." Even though a debtor is not entitled to due process of law in a § 7-210 disposition, he can still have a hearing simply by changing hats with the lienor and assuming the position of a creditor in a replevin action.

The replevin alternative is more "real" than the others because it, unlike the waiver possibility, does not depend upon the creditor's acquiescence; and it can be used to prevent the sale while the damages remedy can only compensate for the creditor's abuses after the sale has taken place. Replevin is the only one of the rights and remedies cited by the Court as alternatives for settling debtor/creditor disputes which approaches the level of a "real" choice, procedurally if not practically. A Ms. Brooks cannot hope to negotiate with a creditor about waiving a lien or other remedy because she has no bargaining power and, at the time of contracting, probably has no reason to expect a later dispute. And suing for damages after a self-help sale has occurred, even if the debtor can afford it, amounts in most cases to economic nonsense. Replevin then is the most logical alternative for the debtor to pursue, and, at least, it does afford the debtor-turned-creditor half a due process loaf. If it is not available against a creditor acting pursuant to a lien statute, the debtor has no "real" alternative for settling the dispute. Based on the majority's reasoning in Flagg Brothers, such a conclusion suggests that a creditor's actions may then be attributable to the state under the public function doctrine.

Therefore, assuming arguendo that Flagg Brothers was correctly decided under New York law, a contrary result is possible in Arkansas regarding presence of state action when a mechanic detains and/or threatens to sell a car pursuant to a vehicle repairmen's lien. The reason is that a replevin action cannot be maintained in Arkansas against a repairman in possession claiming a lien for repairs. The availability of that remedy to a debtor in Pennsylvania is also the reason given in this article for distinguishing Parks. This distinction is an important one because Arkansas does more than simply authorize the lien procedure which the Court believes is an insufficient basis upon which to found a claim of state

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285. But see note 164 supra.
286. But see note 164 supra.
287. The three alternative rights and remedies mentioned by the Court are merely illustrations. Other alternatives exist. The most obvious ones are injunctive and declaratory actions, but they are not necessarily "real" choices either. See notes 101 & 103 supra regarding the problems faced by a debtor in trying to use them to challenge the validity of a materialmen's lien. The same problems would be present in trying to obtain either injunctive or declaratory relief against a warehousemen's or repairmen's lien.
288. Smith v. Checker Cab Co., 208 Ark. 99, 184 S.W.2d 901 (1945), and see discussion pp. 224-25 supra. But see note 166 supra.
289. See pp. 224-25 supra.
action.\textsuperscript{290} It also denies the debtor the only practical alternative to settling the dispute. In essence the denial of a replevin action compels the debtor to submit to the procedure authorized by the state. Neither the waiver of lien nor the damages action alternative is more "real" simply because the creditor is an automobile mechanic and not a warehouseman.

The public function doctrine was applied in \textit{Smith v. Allwright},\textsuperscript{291} and \textit{Terry v. Adams},\textsuperscript{292} because "the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas . . ."\textsuperscript{293} A candidate for public office has no choice but to seek their nominations. The doctrine was applied in \textit{Marsh v. Alabama},\textsuperscript{294} because "the streets owned by the Gulf Shipbuilding Corporation were the only streets in Chickasaw . . ."\textsuperscript{295} The Jehovah's Witnesses has no choice but to distribute literature on those streets. It should then be applicable to the exercise of a vehicle repairmen's lien in Arkansas because the debtor has no meaningful alternative to submitting to the lien procedure. Unlike the debtor in Pennsylvania or New York, one in Arkansas simply has no "real" choice.

\textsuperscript{290} 46 U.S.L.W. at 4442-43.
\textsuperscript{291} 321 U.S. 649 (1944). See note 253 supra.
\textsuperscript{292} 345 U.S. 461 (1953). See note 253 supra.
\textsuperscript{293} 46 U.S.L.W. at 4441.
\textsuperscript{295} 46 U.S.L.W. at 4441.
APPENDIX

A Bill

For An Act To Be Entitled

AN ACT TO AMEND ACT 146 OF 1895, AS AMENDED [ARK. STATS. 51-601 ET. SEQ.], TO REQUIRE CONTRACTORS AND MATERIALMEN TO GIVE NOTICE TO PROPERTY OWNERS OF THEIR LIABILITY UNDER ARKANSAS LIEN LAWS; TO PROVIDE CRIMINAL PENALTIES FOR DEFRAUDING THE PROPERTY OWNER; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Hereinafter each original or principal contractor shall with respect to all written or verbal contracts for work to or upon any building, erection or improvement to or upon land, which could form the basis for any lien granted by virtue of Act 146 of 1895, as amended, and for which the total charge therefor is Two Hundred Dollars ($200.00) or more, furnish to the owner of such land or other person with whom the contract is made a notice which shall state the following:

WARNING

PERSONS PERFORMING LABOR ON YOUR PROPERTY OR FURNISHING MATERIALS FOR THE CONSTRUCTION, REPAIR OR IMPROVEMENT OF YOUR PROPERTY ARE ENTITLED TO A LIEN AGAINST YOUR PROPERTY IF THEY ARE NOT PAID IN FULL EVEN THOUGH YOU PAY THE FULL CONTRACT PRICE TO YOUR CONTRACTOR. THIS LIEN CAN BE ENFORCED BY SELLING YOUR PROPERTY. TO AVOID THIS RESULT YOU MAY ASK YOUR CONTRACTOR FOR LIEN WAIVERS FROM ALL PERSONS SUPPLYING MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN YOUR CONTRACT. YOU MAY WITHHOLD PAYMENT TO THE CONTRACTOR IN THE AMOUNT OF ANY UNPAID MATERIALS OR LABOR. YOU MAY REQUEST THE CONTRACTOR TO FURNISH YOU A LIST OF ALL HIS SUPPLIERS AND LABORERS UNDER YOUR CONTRACT, AND YOU MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS AND LABOR FURNISHED FOR YOUR PROPERTY HAVE BEEN PAID FOR.

If such contract is in writing the above notice shall be set out in a special paragraph exactly as herein stated in all capital letters, and if said contract is not in writing said notice shall be given in writing
exactly as herein stated to the owner or owners of such land, or either of them, with whom the contract is made before work is commenced, and such notice shall be accomplished by securing the signature of the owner of the land or other person on a copy of such notice acknowledging receipt thereof, or, by registered or certified mail, return receipt requested, in which case the signed return receipt shall constitute proof of such service.

SECTION 2. Any original or principal contractor failing to give the notice required herein, shall have no lien rights under Act 146 of 1895, as amended, for his contract, and shall be deemed guilty of a misdemeanor, and upon conviction, be fined in any sum not less than Five Hundred Dollars ($500.00).

SECTION 3. Any mechanic, builder, artisan, workman, laborer, materialman or other person who shall furnish any material, fixtures, engine, boiler or machinery directly to the owner or owners, or either of them, for any building, erection or improvement to or upon land, under which contract the owner or owners, or either of them, is directly liable to said supplier for the entire cost of such materials or supplies shall not be deemed an original or principal contractor for the purpose of this Act and shall not be required to furnish the notice by Section 1 of this Act.

SECTION 4. Hereafter each mechanic, builder, artisan, workman, laborer, materialman or other person who shall furnish any material, fixtures, engine, boiler or machinery to any original or principal contractor for any building, erection or improvement to or upon land, which would form the basis for any lien granted by virtue of Act 146 of 1895, as amended, and for which the total aggregate charge therefor is Two Hundred Dollars ($200.00) or more, shall, in order to avail himself of the benefit of the provisions of Act 146 of 1895, as amended, furnish to the owner or owners of such land, or either of them, a notice which shall state the following:

NOTICE
YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED IS SUPPLYING MATERIALS TO (THE NAME OF ORIGINAL OR PRINCIPAL CONTRACTOR, SUBCONTRACTOR OR OTHER PERSON TO WHOM MATERIALS ARE SUPPLIED) FOR IMPROVEMENTS TO PROPERTY UNDER YOUR CONTRACT WITH (NAME OF ORIGINAL OR PRINCIPAL CONTRACTOR). YOU ARE FURTHER NOTIFIED THAT WE ARE ENTITLED TO A LIEN ON THE PROPERTY BEING IMPROVED IF NOT PAID IN FULL FOR ALL MATERIALS FURNISHED FOR THE IMPROVEMENTS. THIS LIEN CAN BE ENFORCED BY SELLING YOUR PROPERTY. TO AVOID THIS RESULT YOU MAY ASK YOUR CONTRACTOR FOR LIEN WAIVERS FROM ALL PERSONS SUPPLYING MATE-
RIALS OR SERVICES FOR THE WORK DESCRIBED IN YOUR CONTRACT. YOU MAY WITHHOLD PAYMENT TO THE CONTRACTOR IN THE AMOUNT OF ANY UNPAID MATERI-
ALS OR LABOR. YOU MAY REQUEST THE CONTRACTOR TO FURNISH YOU A LIST OF ALL HIS SUPPLIERS AND LABORERS UNDER YOUR CONTRACT, AND YOU MAY
CHECK WITH THEM TO DETERMINE IF ALL MATERIALS AND LABOR FURNISHED FOR YOUR PROPERTY HAVE BEEN PAID FOR.

Said notice shall be in writing exactly as herein stated and shall be furnished to the owner or owners, or either of them, within ten (10) days of the date on which the supplier has furnished any such material the total aggregate charges for which equal or exceed Two Hundred Dollars ($200.00) whether or not said materials are supplied under separate contracts. Such notice may be served by any officer authorized by law to serve process in civil actions or by any person who would be a competent witness, in which case if served by an officer, his official return endorsed thereon shall be proof thereof, and when served by any other person, the fact of such service shall be acknowledged on a copy of said notice signed by the person served, or shall be verified by affidavit of the person so serving, or such notice may be sent by certified mail, return receipt requested, in which case the signed return receipt shall be proof thereof.

SECTION 5. Any mechanic, builder, artisan, workmen, labor-
er, materialman or other person, failing to give the notice required herein, shall have no lien rights under Act 146 of 1895, as amended.

SECTION 6. Any mechanic, builder, artisan, workman, labor-
er, materialmen or other person who shall furnish any material, fixtures, engine, boiler or machinery directly to the owner or owners, or either of them, for any building, erection or improvement to or upon land, under which contract the owner or owners, or either of them, is directly liable to said supplier for the entire cost of such materials or supplies shall not be required to furnish the Notice required by Section 4 of this Act.

SECTION 7. Section 11 of Act 146 of 1895, as amended, the
same being Arkansas Statutes 51-613, is hereby amended to read as follows:

"Section 11. It shall be the duty of every person who wishes to avail himself of this act to file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within sixty (60) days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit."
SECTION 8. Section 15 of Act 146 of 1895, as amended, the same being Arkansas Statutes 51-616, is hereby amended to read as follows:

"Section 15. All actions under this act shall be commenced within six (6) months after filing the lien and prosecuted without necessary delay to final judgment, and no lien shall continue to exist by virtue of the provisions of this act for more than six (6) months after the lien shall be filed, unless within that time an action shall be instituted thereon as hereinbefore described."

SECTION 9. If a contractor supplies a bond as provided for by law, then the giving of the notices required by Sections 1 and 4 of this Act shall not be mandatory and the lien rights arising under Act 146 of 1895, as amended, shall not be conditioned on whether the notices have been given.

SECTION 10. It shall be unlawful for any contractor or subcontractor or other person who has performed work or furnished materials for the improvement of any property, where such work or materials may give rise to a mechanic's, laborer’s or materialman’s lien under the laws of this State, or the assignee of such person to knowingly receive payment of the contract price or any portion thereof without applying the money received to the discharge of any such liens known to exist by such person or properly recorded as required by statutes, with the intent thereby to deprive the owner or person so paying the contractor, or other person receiving payment, of funds without discharging the liens and thereupon to defraud the owner or person so paying. In any prosecution under this Act as against the person so receiving payment, when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer or materialman and that such lien has been filed within the time provided by law for the filing of such liens, and that such contractor, subcontractor or other person charged has received payment without discharging the lien to the extent of the funds received by him, the fact of acceptance of payment without having discharged the lien within ten (10) days after receipt of such payment or the receipt of notice of the existence of such lien, whichever event shall occur last, such showing in evidence shall be prima facie evidence of intent to defraud on the part of the person so receiving payment. A person convicted of fraud under this Section shall be deemed guilty of a Class D felony.

SECTION 11. It shall be unlawful for any contractor or subcontractor or other person who has performed work or furnished material for the improvement of any property, where such work or materials may give rise to a mechanic’s, laborer’s or materialman’s lien
under the laws of this State to knowingly execute an affidavit or other writing stating either that no mechanic's or materialman's liens exist for the work done or materials supplied or that no sums remain owing for work done or materials supplied for which mechanic's or materialmen's liens could exist and thereby defrauding the owner or person requesting such affidavits or other writings. In any prosecution under this Act as against the person making such affidavits or other writings, when it shall be shown in evidence that any actual or potential lien for labor or materials existed in favor of any mechanic, laborer or materialman and that such lien had been filed within the time provided by law for the filing thereof or that such time had not yet run, such showing in evidence shall be prima facie evidence of intent to defraud on the part of the person making such affidavits or other writings. The party making such affidavits or other writings shall be deemed guilty of a Class D felony, and, upon conviction, shall be punished accordingly.

SECTION 12. All laws and parts of laws in conflict with this Act are hereby repealed.