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THE DUE PROCESS CHALLENGE TO POSSESSORY LIEN ENFORCEMENT

William C. Brown

The possessory lien has been an essential element in the creditor's collection arsenal since the fifteenth century.¹ Nearly every state in the union has continued and expanded the scope of this traditional creditor's remedy by enacting statutes specifying when such liens will attach and how they may be enforced.² As a general rule, these statutes provide that certain possessory liens, such as repairman's and innkeeper's liens, may be enforced by retention of possession of the debtor's property by the creditor, followed by eventual sale of the property at public auction if the due bill is not paid. The typical procedure mandated by statute does not provide the debtor with any opportunity for a hearing prior to the imposition and enforcement of the lien, but merely provides the debtor with notice of the date and place of the foreclosure sale.³

A serious question as to the constitutionality of such a summary enforcement procedure has arisen in the wake of the procedural due process requirements established by the United States Supreme Court in the landmark debtor's rights cases of *Sniadach v. Family Finance Corp.*⁴ and *Fuentes v. Shevin.*⁵ Speaking for the Court in *Fuentes*, Justice Douglas stated:

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 to enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard

1. See Hogan, *The Innkeeper's Lien at Common Law*, 8 HAST. L.J. 33 (1956).

2. E.g., OKLA. STAT. tit. 42, § 39 (1971); OKLA. STAT. tit. 42, § 91 (Supp. 1973); COLO. REV. STAT. § 86-1 (1963).

3. E.g., OKLA. STAT. tit. 42, § 39 (1971).

4. 395 U.S. 337 (1969).

5. 407 U.S. 67 (1972).

must be granted at a meaningful time and in a meaningful manner.⁶

The Court in *Fuentes* went on to invalidate the replevin statutes of Florida and Pennsylvania, which authorized seizure of property by state officers solely on the strength of a creditor's claim, without any prior hearing in which the validity of that claim could be tested. A similar result had been reached by the Court three years earlier in the *Sniadach* case. In *Sniadach* Wisconsin's prejudgment wage garnishment procedures were held to violate the wage earner's due process right to a hearing *prior to* deprivation of his property interest in the continued use of his earned income during the interim period preceding a final judgment on the merits of the cause of action.

These two decisions have provided the impetus for a wave of cases in which all types of summary deprivations have been challenged on due process grounds. Already the guidelines for procedural due process outlined in *Sniadach* and *Fuentes* have been used to invalidate statutes authorizing prejudgment attachment of real estate,⁷ prejudgment garnishment of bank accounts,⁸ and unilateral public utility shutoffs.⁹ One court, although standing alone against the great weight of authority, has even held unconstitutional self-help repossession by creditors under contractual security agreements.¹⁰

Statutory possessory lien enforcement procedures, which provide for retention (and in some cases seizure) and sale of a debtor's property without prior hearing, have not been exempt from this due process challenge. The courts which have considered statutory possessory lien enforcement under the guidelines of *Fuentes* and *Sniadach* have unanimously concluded that such summary creditor action is unconstitutional. Repairman's or artisan's lien enforcement procedures have been held invalid in Georgia,¹¹ West Virginia,¹² and California.¹³ The enforce-

6. *Id.* at 80 (citations omitted).

7. *Bay State Harness Horse Racing & Breeding Ass'n v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085 (S.D. Me. 1973); *Clement v. Four N. State St. Corp.*, 360 F. Supp. 933 (D.N.H. 1973).

8. *Randone v. App. Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972).

9. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

10. *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973); *see Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); *Contra, Adams v. S. Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973); *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972).

11. *Mason v. Garris*, 360 F. Supp. 420 (N.D. Ga. 1973).

12. *Straley v. Gassaway Motor Co., Inc.*, 359 F. Supp. 902 (S.D. W. Va. 1973).

13. *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr.

ment provisions of landlord's and innkeeper's liens have been similarly struck down in at least ten states.¹⁴ All of these decisions are based upon the premise espoused in *Fuentes* that procedural due process requires the giving of notice and an opportunity to be heard before the state—or an individual acting in such circumstances that his acts are classified as “state action”—may deprive a debtor of any significant property interest, including temporary use and enjoyment.¹⁵

In the recent case of *Mitchell v. W.T. Grant Co.*¹⁶ the Supreme Court limited the broad language of the *Fuentes* decision in upholding a Louisiana sequestration procedure very similar to the replevin procedure struck down in *Fuentes*. While the Court refused to overrule *Fuentes*, it did establish that procedures short of notice and hearing could be sufficient to meet due process requirements in certain limited situations involving only temporary deprivations of debtors' property interests. The *Mitchell* decision will provide a basis for upholding a limited number of *ex parte* seizure procedures which include the substantial safeguards the Court found to be present in the Louisiana sequestration procedure. These safeguards include the posting of a bond by the creditor, a requirement that the creditor show by affidavit or verified petition the “specific facts” upon which the claim is based, a requirement that the sequestration writ be judicially approved, and a provision allowing the debtor to immediately seek dissolution of the writ.¹⁷

145 (1974); *Quebec v. Bud's Auto Service*, 105 Cal. Rptr. 677 (Super. Ct. App. Dep't 1973).

14. *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972) (invalidating landlord's lien in Texas); *Barber v. Rader*, 350 F. Supp. 183 (S.D. Fla. 1972) (landlord's lien); *Shaffer v. Holbrook*, 346 F. Supp. 762 (S.D. W. Va. 1973) (landlord's distress procedure); *Die-len v. Levine*, 344 F. Supp. 823 (D. Neb. 1972) (landlord's lien); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972) (innkeeper's lien); *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971) (landlord's distress warrant); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970) (landlord's distress procedure); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971) (landlord's distress warrant); *Blye v. Globe-Wernike Realty Co.*, 33 N.Y.2d 15, 300 N.E.2d 710 (1973) (innkeeper's lien).

15. See *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

16. 416 U.S. 600 (1974).

17. The *Fuentes* Court did concede the existence of an exception to the prior hearing requirement in the case of “extraordinary situations” of a far more limited scope than permitted in *Mitchell*. For the Court, Justice Douglas wrote:

These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has

The possessory lien statutes currently on the books in most states will not, however, fall within the scope of the exception created by the *Mitchell* decision. These statutes typically allow the creditor to impose and enforce the lien without any judicial scrutiny, without posting any bond, and without any of the other stringent safeguards that were present in the procedure approved by the Court in that decision. In addition, the *Mitchell* decision was directed solely to the question of temporary deprivation of property, and is thus not applicable to the permanent termination of a debtor's right to his property that would result from a possessory lien foreclosure sale to a third party.

In this comment the enforcement provisions of statutory possessory lien laws will be examined in light of the due process requirements outlined in *Sniadach* and *Fuentes*. This will entail a discussion of the nature and purpose of possessory liens, the extent to which they violate current standards of due process, the consequences of denying creditors the possessory lien remedy, and some suggestions for sprucing up statutes so as to meet the criteria of *Sniadach*, *Fuentes*, and *W.T. Grant*.

POSSESSORY LIENS

At common law the possessory lien¹⁸ was a judicially created creditor's remedy, generally defined as the right "in one man to retain that which is in his possession belonging to another till certain demands of him in possession are satisfied."¹⁹ This type of lien may be distinguished from the contractual security interest in two ways. First, the possessory lien arises automatically by operation of law in specified default situations and is therefore not dependent upon any consensual agreement by the parties. Second, a possessory lien continues only so long as the creditor retains physical possession of the property; any voluntary loss of possession will immediately destroy the lien.

Possessory liens may be either specific or general. A specific lien is limited in amount to the value of the services performed by the creditor on the specific chattel encumbered by the lien and does not extend to secure any general indebtedness between the parties. The most

been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 90-91.

18. See generally R. BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY, §§ 107-127 (2d ed. 1955); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 33 (1965).

19. R. BROWN, *supra* note 18, § 107 n.1.

common specific lien arises in favor of the artisan or repairman who has been entrusted with possession of a chattel and has performed services thereon. In contrast to the specific lien, the party claiming a general lien may retain the property of the debtor until the full amount owing has been satisfied. The imposition of a general possessory lien is, however, strictly limited to debts arising in favor of specific types of creditors, primarily innkeepers, landlords, attorneys, and bankers.

At common law the possessory lien, whether general or specific, was not enforceable by sale, but solely by the creditor's retaining possession.²⁰ Depriving the owner of his "use" interest in the property was a level by which the creditor could attempt to pressure the debtor into payment. Mere retention of possession by the creditor is a poor remedy, however, especially if the debtor is without funds sufficient to meet the charges. In such a case no degree of pressure can produce payment of the debt, and thus a loss results to the debtor without any gain accruing to the creditor. This negative effect is exacerbated if the property is of a type which depreciates in value and if expenses for storage and preservation are incurred.

Realizing the lack of utility in the limited common law remedy, the great majority of jurisdictions have by statute expanded its scope by authorizing a public sale of the collateral if the debt is not paid within a specified period.²¹ Several states also allow the lien to be maintained by filing, and then foreclosed in much the same manner as a consensual security agreement.²²

Oklahoma's statutory equivalent of the common law artisan's lien provides a typical example of the enforcement by sale procedure that may not conform to the procedural due process requirements of the fourteenth amendment. Oklahoma has extended the scope of the artisan's lien to include virtually any person who while lawfully in possession of an article of personal property renders any service upon it of benefit to the owner.²³ This lien is applicable to all cases where personal property, such as an automobile, has been entrusted to a mechanic for purposes of repair. If the payment due is not tendered within thirty days from the time the lien has attached, the creditor may foreclose as provided in the act. The foreclosure is by public sale

20. *Id.* § 119.

21. *See* note 2 *supra*.

22. IND. ANN. STAT. § 43-809 (1965); KAN. STAT. ANN. § 58-201 (Supp. 1973).

23. OKLA. STAT. tit. 42, § 91 (Supp. 1973).

which cannot be held until ten days after notices of the sale are mailed to the owner and any other party claiming an interest in the property and posted in three public places in the county of the sale. This notice must give the names of the owner and other interested parties, a description of the property, the date and nature of the service performed, the time and place of the sale, and the name of the party or agent foreclosing the lien. It must be emphasized that the holder of a claimed possessory lien is authorized by this statute to retain the property and then sell it to satisfy the amount of the lien without providing the owner with any opportunity for a hearing in which to challenge the validity of the lien. The only notice provided for is notice of the sale itself, not notice which would afford the owner the opportunity to assert any defenses, such as fraud, prior to the sale. Under the current high standards for procedural due process, the owner's lack of an opportunity to be heard would seem to be a fatal flaw in this type of enforcement procedure.

THE GUIDELINES FOR PROCEDURAL DUE PROCESS

At issue in the *Sniadach* case was the constitutionality of a Wisconsin prejudgment wage garnishment procedure under which a creditor could attach a percentage of the debtor's wages upon institution of an action on the underlying debt. The court held that this deprived the debtor of the use and enjoyment of his earned wages during the interim period between attachment and a final judgment on the merits, and that due process requires, absent extraordinary circumstances, that an opportunity for a hearing must be afforded to the debtor before such a deprivation can occur. The *Sniadach* opinion emphasized the special nature of wages as property necessary to sustain the lives of the wage earner and his family. Some courts interpreted this emphasis as a limitation on the applicability of due process requirements, and upheld summary proceedings without prior hearings on the basis that the deprivation was merely of ordinary property, not of property essential to the debtor's survival.²⁴

The Court in *Fuentes* explicitly rejected any such limitation by making clear that the prior hearing requirement of *Sniadach* was not limited to wages or other "essential" types of property but extended

24. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd mem.*, 460 F.2d 1064 (2d Cir. 1972), *cert. denied*, 406 U.S. 961 (1972), *reh. denied* 408 U.S. 932 (1972); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971); *Wheeler v. Adams Co.*, 322 F. Supp. 645 (D. Md. 1971).

to include any significant property interest, including an interest in continued use and possession. Justice Douglas stated for the Court:

The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."²⁵

It is obvious that the summary procedures for enforcement of possessory liens permitted by present statutes do not meet the prior hearing requirements established in *Fuentes* and *Sniadach*. Neither do such statutes contain the extensive alternative safeguards approved by the Supreme Court in *Mitchell*.²⁶ Therefore, in order to successfully challenge the constitutionality of such statutes, all that a party need show is that procedural due process standards apply to the imposition and enforcement of possessory liens. Certain prerequisites must be present before these standards will apply, namely:

- (1) The imposition and enforcement of the possessory lien must constitute a deprivation of a significant property interest protected by the fourteenth amendment.
- (2) The deprivation must result from "state action."
- (3) The debtor must not have executed a valid waiver of his procedural due process rights.

Deprivation

The required deprivation may be found in any of the three distinct steps of the lien enforcement process. These three steps are the initial seizure of possession by the lien claimant, his retention of possession, and the foreclosure sale of the property.

Initial seizure of possession is only present in the enforcement of landlord's and innkeeper's liens, since an artisan or other holder of a specific lien acquires his lien only after he has been entrusted with possession by the owner. The seizure by a landlord or innkeeper is commonly accomplished either by directly seizing the property or by padlocking the debtor's room and denying him access to his property therein.²⁷ This is exactly the type of "use" interest deprivation con-

25. 407 U.S. at 90.

26. See text accompanying notes 16 and 17, *supra*.

27. See cases cited at note 14, *supra*.

demned in *Fuentes*, and the courts have agreed that such procedures clearly constitute an unconstitutional denial of procedural due process.²⁸

The holder of an artisan's or repairman's lien comes into possession by means of a voluntary transfer, so the problem of initial seizure is not involved. The holder of such a lien is entitled under most statutes to foreclose the lien by sale, and to retain the property during the interim period preceding that sale. Obviously, the enforcement by sale procedure would constitute a permanent deprivation and thus be subject to at least the same procedural due process requirements as the temporary deprivation of "use" interests at issue in *Sniadach* and *Fuentes*.

Whether the mere interim retention of the debtor's property constitutes a deprivation of a significant property interest presents a far more difficult question, and the courts have not been united in their answer. In *Hernandez v. European Auto Collision Inc.*,²⁹ the Second Circuit reversed a district court dismissal of a challenge to New York's repairman's lien law. The lower court suggested that by voluntarily surrendering his vehicle to a mechanic, the owner vests the mechanic with substantial property rights in the vehicle which are entitled to due process rights equal to those of the owner. Given such a situation, the lower court said, the mechanic has the right to retain and sell the vehicle unless the owner stops that action by replevin or other judicial action under the reasonable regulation of the state. The Second Circuit reversed and remanded on the ground that a "tenable contention" existed that the statute was unconstitutional.

The reasoning of the lower court in *Hernandez* was specifically rejected in *Mason v. Garris*,³⁰ which invalidated the foreclosure by sale provision of the auto mechanic's lien in Georgia. The court did not rule on the question of interim retention, but did emphasize that the *Sniadach* and *Fuentes* opinions were based on a deprivation of an interest in the continued use of goods, rather than of mere possession. The court said:

In *Hernandez*, as in the present cases, it is the vehicle owner—not the mechanic—who, under the current statute is deprived of the use of his vehicle without the protection of procedural due process. The mechanic's interest is only a se-

28. See cases cited at note 14, *supra*.

29. 487 F.2d 378 (2d Cir. 1973), *rev'g* 346 F. Supp. 313 (E.D.N.Y. 1973).

30. 360 F. Supp. 420 (N.D. Ga. 1973).

curity interest and not a "use" interest. Since the Supreme Court, and this court, have held that statutes cannot constitutionally allow one who has a proprietary interest in goods to take them from the user without abiding by procedural due process, it follows a fortiori that statutes cannot constitutionally allow one who has only a security interest to take them from the user without abiding by procedural due process.³¹

Only one case, *Straley v. Gassaway Motor Co.*,³² has specifically held that the retention provisions of a possessory lien constitute an unconstitutional deprivation. The contrary decision was reached in *Adams v. Dep't of Motor Vehicles*³³ in which the Supreme Court of California held that while the sale provisions of the garageman's lien law were unconstitutional, the mere right of interim retention was not. *Fuentes* and *Sniadach* were distinguished on the ground that the possessory lien holder has a superior claim to that of the ordinary creditor or conditional vendor. This superior claim arises from the fact that, unlike the typical creditor, the specific lien holder has contributed his labor, and added to the chattel other materials to which the lien holder himself had the original right of possession. Speaking for a unanimous court, Justice Clark went on to state:

Furthermore, even assuming that the possessor of a garageman's lien does not have an interest in any sense superior to that of a conditional vendor or mortgagee, or even that of an attaching creditor . . . the creditor is in rightful possession at the time he asserts his lien. To strike down the garageman's possessory lien would be to alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in *Shevin*³⁴ and *Blair*.³⁵

Although it is arguable that retention violates the right of the owner to have his property returned at the completion of the task for which he transferred possession, the courts will probably follow the *Adams* view and allow the status quo to continue. To do otherwise would be to deprive the creditor of rights that existed at common law, substantially increasing his exposure to fraud and chicanery. But, conversely, to hold that retention does not constitute a significant deprivation would allow the creditor to summarily pressure the payment of a

31. *Id.* at 424.

32. 359 F. Supp. 902 (S.D. W. Va. 1973).

33. 11 Cal. 3d 237, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

34. *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (invalidating California claim and delivery statutes).

35. 11 Cal. 3d 237, —, 520 P.2d 961, 966, 113 Cal. Rptr. 145, 150 (1974).

possibly unjust claim by the consumer-debtor, who in all probability would have neither awareness of nor access to the legal remedies which do exist. The court must decide whether to impose an obligation on the creditor to provide notice and some type of hearing prior to or immediately upon his retention of the property, or impose a burden on the debtor to bring his own action to challenge the validity of the retention.

State Action

The fourteenth amendment guarantees of procedural due process apply only to deprivation by the state. It is also well settled that "state action" may be found even where no public officials are involved and no direct government action is present.³⁶ The courts have been unanimous in finding state action in possessory lien enforcement citing either of two distinct theories, the "entwinement" theory or the "state function" theory.³⁷

It is well established that private conduct may become so "entwined" with governmental action as to be subject to the constitutional limits placed on state action by the fourteenth amendment.³⁸ The fact that it is state law which permits creditors to impose possessory liens enforceable by retention and sale has generally been held sufficient state involvement under the entwinement theory to constitute state action. Because the statute shields the foreclosing creditor from liability for conversion of the debtor's property,³⁹ it significantly involves the state in the enforcement procedure even if no public official is involved. The presence of state action is even more evident when the foreclosure by sale is actually to be performed by a state official.⁴⁰

The "state function" concept was promulgated by the Fifth Circuit in the case of *Hall v. Garson*, which involved the statutory landlord's lien in Texas.⁴¹ The court there found state action present when a landlord seized property pursuant to a lien. The court reasoned that such a seizure was traditionally the function of a sheriff or constable

36. *Adikes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1966); *Burton v. Wilmington Housing Authority*, 365 U.S. 715 (1961); See generally, Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 BAYLOR L. REV. 215, App. B (1973).

37. See cases cited notes 11 through 14, *supra*.

38. See cases cited note 36, *supra*.

39. See R. BROWN, *supra* note 18, § 116 n.3.

40. GA. CODE ANN. § 67-2401 (1967).

41. 430 F.2d 430 (5th Cir. 1970).

in Texas.⁴² By vesting the authority to perform such a state function in the hands of a private individual, the state had transformed a self-help seizure into state action.

Where mere retention of possession is the enforcement procedure in question, without seizure or foreclosure sale, state action is not as readily apparent, although its presence has been discovered, without discussion, by at least one court.⁴³ Although retention of possession is authorized by statute, such statutes are merely declaratory of the common law. In addition, allowing retention merely preserves the status quo of possessory interests. Such considerations led the California Supreme Court in *Adams* to reach the conclusion that mere retention does not constitute state action within the scope of the fourteenth amendment.⁴⁴ While the courts may differ on the question of mere retention, it is clear that any statutory procedure which authorizes seizure of a debtor's property, or enforcement by foreclosure sale, will be considered a deprivation by state action and thus will be required to meet the prior hearing standards of procedural due process.

Waiver

Although it would have no effect on the validity of possessory lien statutes, a valid waiver of due process rights by the debtor would have the effect of authorizing the same procedures independent of statutory authorization. The court in *Fuentes* noted the possibility of such a waiver by contract, citing *D. H. Overmeyer v. N. Frick Co.*⁴⁵ In *Overmeyer* the court upheld a waiver by a corporation of its due process rights, but noted that the waiver was entered into "voluntarily, intelligently, and knowingly" between two corporations negotiating at arms length.⁴⁶ The court expressly found that it was not a case of "unequal bargaining power or overreaching."⁴⁷ It is unlikely, however, that any purported waiver by an ordinary consumer would be valid in the face of the court's strict requirements for voluntariness in the waiver of constitutional rights and its clear recognition of the coercion inherent in many debtor-creditor relationships due to the disparity in bargaining power between the parties.

42. *Id.* at 439.

43. *Straley v. Gassaway Motor Co.*, 359 F. Supp. 902 (S.D. W. Va. 1973).

44. 11 Cal. 3d 237, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (by implication).

45. 405 U.S. 174 (1972).

46. *Id.* at 187.

47. *Id.* at 186.

PROPOSED SOLUTIONS

The likely invalidation of current enforcement by sale provisions of possessory lien statutes, and the possible invalidation of even the creditor's right to retain, present a twofold problem to the affected creditors. First, these creditors will be deprived of an important method of securing prompt payment. Second, creditors who sell a debtor's property will no longer have valid statutory authorization to do so, and thus may be liable for the wrongful conversion of that property.

The most readily apparent solution is, of course, simply to require payment in advance. Although such a solution would be difficult to implement in many situations where the amount of the final bill is not initially ascertainable (such as auto repair), the innkeeper, for one, could easily require such payment and thereby eliminate the necessity for the existence of the innkeeper's lien.

The task of creating a new procedure for enforcing the artisan's or repairman's lien will fall upon the state legislatures if they wish to preserve these important creditor's remedies. To be effective, any new enforcement procedure must be as simple as possible (in order to lessen the cost which must ultimately be born by the consumer); and yet it must meet the basic requirements of notice and opportunity for hearing guaranteed by procedural due process.

It is probable that the interim retention of a debtor's property by a lien claimant will be upheld either because it is not a significant deprivation or because it does not constitute state action under the fourteenth amendment. If interim retention is so upheld, a constitutionally valid procedure for sale could be easily adopted in which the debtor would simply be served prior to the sale with notice of a time and place for a hearing at which he could contest the imposition and enforcement of the lien. Such a minimal provision allowing the debtor some opportunity to protect his property is not only mandated by the Constitution, but is also a necessity in the process of achieving justice and fairness in debtor-creditor relations.