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A repairman's lien1 is a security interest in a chattel for the value of services and materials supplied. Such liens commonly arise in the context of automobile repairs. However, these liens will encompass an increasing number and variety of transactions as machines requiring long-term maintenance proliferate.

At common law the lien entitled the repairman to possess the chattel until his bill was paid. The existence of the lien depended solely on continued possession. Most states have added statutory foreclosure and sale remedies, and some have notice and filing provisions, as well. Both common law and statute govern repairmen's liens in Illinois.2 The distinction between common law and statutory liens implicates special problems created by the operation of section 9-310 of the Uniform Commercial Code,3 which controls priority between the repairman and a prior-perfected secured party.4

The United States Supreme Court has enunciated some due process guidelines in the area of creditors' prejudgment remedies.5 Because repairmen’s liens, as one such remedy, must comply with these guidelines, they have come under judicial scrutiny.6 Insofar as the Illinois repairmen's lien acts were drafted before the Supreme Court decisions, they must be examined to see whether they are in accord with due process requirements.

This article will consider Illinois repairmen's lien statutes to determine: (1) the effect of 9-310 on priority between repairmen's liens and prior-perfected security interests, and (2) the constitutionality of their enforcement procedures.

1. This term is used because it reflects the usual relationship and activity involved in these kinds of liens. They are also called artisans' liens, garagemen's liens, and, incorrectly, mechanic's liens. Mechanic's liens refer to work done on real property. BLACK'S LAW DICTIONARY 1072 (4th ed. 1968).
3. ILL. REV. STAT. ch. 26, § 9-310 (1975); the Uniform Commercial Code will hereinafter be referred to as UCC or Code.
4. See notes 24 through 39 infra and accompanying text.
The Rule of Priority in Section 9-310

With the exception of 9-310, article nine of the Uniform Commercial Code does not deal with liens. Section 9-310 states a simple rule for determining priority between a lien for materials and services and a security interest in the same chattel:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.\(^7\)

This section applies only to possessory liens; liens that rely on notice and filing requirements are outside its purview.\(^8\) Section 9-310 operates to give these possessory liens priority over other security interests in all situations save one. This exception occurs when the possessory lien is statutory and a provision expressly states that preference be given to the security interest. Thus, liens based on common law or on statutes silent as to priorities take over prior-perfected security interests.\(^9\)

The drafters of the UCC adopted a uniform rule of priority in order to minimize the differences among the states' various lien statutes.\(^10\) This rule reverses the pre-Code scheme of priority in many states, including Illinois.\(^11\) It also works a major exception to the general rule of article nine that first to perfect obtains priority. If two conditions are met—the goods or services are furnished in the ordinary course of business and the lienor retains possession of the chattel\(^12\)—a lien that arises without notice\(^13\) can defeat a prior-perfected security interest in the same chattel.\(^14\) By requiring reference to the various states’ statutory lien provisions for priority, sec-

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12. See note 8 supra.
13. Such as a common law lien.
14. Miller, supra note 10, at 224. Because of the perceived threat that these liens pose to Code priorities and uniformity, Miller would restrict the benefit of § 9-310 to those liens which encourage artisans to improve goods and thus increase their value for owners and holders of secured interests.
tion 9-310 permits non-uniformity among the states. Moreover, it can produce varying results within a single state with many lien statutes, such as Illinois.

The official comments to 9-310 indicate that the basis for the repairman's priority resides in his enhancement or preservation of the value of the collateral. Allowing the creditor to claim improved property at the expense of the repairman's interest would grant the creditor an unfair windfall. However, the typical repairs made on an automobile neither enhance nor preserve the value of the collateral. Frequently, repair bills exceed the value of the property. Thus, from a practical standpoint the basis for the repairman's priority is weak.

Balanced against this conceptual support for the repairman are arguments that favor the secured party. The security interest ordinarily precedes the lien, and one rationale for giving priority to that interest is "first in time, first in right." Illinois courts, among others, have held that the secured party has a property interest that should not be defeated or diluted without his consent. Because security interests are usually recorded, the repairman has constructive notice of the prior interest, and thus is in a position to protect himself.

THE EFFECT OF 9-310 IN ILLINOIS

The basic Illinois statutory lien for repairs and storage author-

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15. Id. at 228.
16. See notes 42 through 44 infra and accompanying text.
17. See UCC Comment 1 to 9-310.
21. Ill. Rev. Stat. ch. 82, §§ 40-47 (1975), which provide as follows:

§ 40. Every person, firm or corporation who has expended labor, skill or materials upon any chattel, or has furnished storage for said chattel, at the request of its owner, reputed owner, or authorized agent of the owner, or lawful possessor thereof, shall have a lien upon such chattel beginning on the date of the commencement of such expenditure of labor, skill and materials or of such storage for the contract price for all such expenditure of labor, skill or materials, or for all such storage, or in the absence of such contract price, for the reasonable worth of such expenditure of labor, skill and materials, or of such storage, for a period of one year from and after the completion of such expenditure of labor, skill or materials, or of such storage, notwithstanding the fact that the possession of such chattel has been surrendered to the owner, or lawful possessor thereof.

§ 41. Such lien shall cease at the expiration of sixty (60) days from the date of the delivery of such chattel to the owner thereof, or his duly authorized agent, unless the lien claimant shall within said sixty (60) days, file in the office of the
recorder of deeds of the county in which said labor, skill and materials were expended on such chattel, or storage furnished for such chattel, a lien notice, which notice shall state the name of the claimant, the name of the owner or reputed owner, a description of the chattel, sufficient for identification, upon which the claimant has expended labor, skill and material, or has furnished storage, the amount for which the lien is claimed, and the date upon which such expenditure or storage was completed, which notice shall be verified by the oath of the claimant, or by some one in his behalf, having personal knowledge of the facts, and may be in substantially the following form:

Claimant, v. Defendant.

Notice is hereby given that claims a lien upon (describe the property) for, and on account of labor, skill, and materials expended upon, and storage furnished for the (property); that the name of the owner or reputed owner, is that the said labor, skill and materials were expended, or storage furnished upon the said property between the day of , and the day of ; that sixty days have not elapsed since that time; that the amount claimant demands for said labor, skill and materials so expended, or storage furnished, is $; that no part thereof has been paid except $; and that there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of $, in which amount he claims a lien upon said property.

(Signed) Claimant

Address of Claimant

State of Illinois,
County of

being first duly sworn, on oath say that I am named in the foregoing claim; that I have heard the same read, and know the contents thereof, and believe the same to be true.

Subscribed and sworn to before me this day of .

§ 42. Upon presentation of such notice to the recorder of deeds of any county, it shall be the duty of the said recorder of deeds to file the same in his office and to index the same in a book to be kept by him for that purpose and called “index of liens upon chattels”. The recorder of deeds shall be entitled to charge and receive from the person filing such a notice of lien a fee of $5.

§ 43. The lien created by this Act shall be subject to the lien of any bona fide security interest as defined in the Uniform Commercial Code upon the same chattel recorded prior to the commencement of any lien herein created, but the lien herein created shall be in addition to, and shall not exclude, any lien now existing at common law, and any lien existing by virtue of “An Act concerning liens for labor, services, skill, or materials expended upon chattels,” filed July 24, 1941.

§ 44. Any lien provided for in this Act may be released and discharged by the lien claimant, or his agent, filing with the recorder of deeds a satisfaction piece, which shall be acknowledged in the same manner as provided by law for the acknowledgment of deeds, which shall also be indexed in the “index of liens upon chattels”. The owner of said chattel may also file with the recorder of deeds any written document which would show or tend to show the non-existence, satisfaction, or termination of such lien which written document shall also be indexed in the “index of lien upon chattels”.

The fee for filing any document under the provisions of this section shall be one dollar and the fee for furnishing a certified copy of any document filed with the
§ 45. Liens provided for in this Act may be foreclosed by suit in chancery in the Circuit Court of any county in the State of Illinois, or they may be foreclosed by advertisement and sale of the chattel, subject to the lien, in the following manner: That the person, or claimant, desiring to foreclose such lien by advertisement and sale, shall deliver to the sheriff of the county in which such chattel is then situated, a certified copy of the notice of lien duly certified to by the recorder of deeds where the same was filed, with the request endorsed thereon, signed by the claimant, or his attorney, for the foreclosure of said lien. Thereupon said sheriff, upon the claimant giving to him a bond as in cases of replevin, shall take the property described in said notice of lien into his possession, and for such purpose shall have power to enter any building, garage or other inclosure where the same may be stored or held, in the same manner as provided by law under a writ of replevin, and shall at the time of such taking, deliver to the person having possession of such chattel, if such chattel is found in the possession of any person, and mail postage prepaid to the owner or reputed owner and to any mortgagee or his assignee if known, having a duly recorded unpaid chattel mortgage upon the chattel described in such lien, a copy of said lien notice, certified to by the lien claimant or his attorney, together with an itemized bill of particulars of the said lien claimant's demand, also certified to by such lien claimant or his attorneys; the person or persons claiming to own or to have an interest in the said property, may at any time within ten days after such service and mailing of notice herein provided for, deliver to the sheriff a written and verified denial of any allegation contained in said lien notice or bill of particulars, and if such denial or any allegation of payment on the part of any such person, or persons, be so made and served upon the officer then in possession of said chattel, such officer shall then and in such case retain the possession of said personal property, subject only to the order or orders of the Circuit Court having jurisdiction of the parties, or the subject matter, in a foreclosure suit to be prosecuted by such lien claimant, which foreclosure suit shall be begun and prosecuted within an additional period of ten days from the time of service upon such officer of such denial or allegation of payment. In such case, if the lien claimant shall fail to commence and prosecute such foreclosure suit within such period of ten days, the sheriff shall release the said personal property from such levy and deliver the same to the person or persons having, or claiming, an interest therein. If such suit be commenced within said period of ten days, the sheriff shall retain the property in his possession subject to the final judgment or decree of the court in such suit. If the person claiming to own said personal property, or to have an interest therein, or someone in his behalf, shall not, within the period of ten days herein provided for, make a written denial of any allegation contained in said lien notice or bill of particulars, or allege full or partial payment of the sum demanded by lien claimant, the said sheriff shall advertise the said property for sale in the manner provided by law for the sale of personal property on execution, for a period of not less than ten days, and after giving such notice of sale, shall sell such chattel at public auction to the highest bidder for cash, to satisfy such lien, accrued interest, costs of seizure and filing and recording such lien and certified copies thereof, and storage; and the proceeds derived from such sale shall be applied to the payment of costs as herein provided, and the amount of such lien and accrued interest in the order named, and the overplus, if any there be, shall be paid to the owner of such chattel; provided, that any person claiming to own or to have an interest in the said personal property, shall, after making such denial of any material allegation in the lien notice or bill of particulars, or alleging payment in whole or in part of the lien claimed, make, execute and cause to be delivered to the sheriff then having the possession of such chattel, a good and sufficient undertaking executed by one or more sufficient sureties in the sum of not less than one hundred dollars ($100.00), and equal to double the amount of the lien claimed, undertaking to redeliver such chattel in like order and condition as it was when
izes a 1-year lien for services rendered, materials furnished, or chattels stored. The year begins upon completion of the rendered services. Once the lienor gives up possession of the chattel, he has 60 days to file a lien notice with the recorder of deeds in order to preserve his right. Though the statute allows a repairman to retain possession, record his lien, and foreclose, it encourages relinquishment of the chattel. This result is desirable in light of the importance the Supreme Court has attached to the owner's interest in the continued possession and use of his chattel.

Since this Illinois statutory lien is basically non-possessory, it is not controlled by the rule of priority in 9-310, at least in situations where the repairman has given up possession. However, the statute provides its own rule of priority. Section 43 states that a repairman's

§ 46. In all cases where suit is brought in the Circuit Court of any county in the State of Illinois for the purpose of foreclosing the lien herein provided, the court shall, upon entering judgment for the complainant, allow as a part of the costs in said suit all moneys paid, if any, for the foreclosure by advertisement and sale of the chattel under section 6 of this Act, together with the costs of filing and recording such lien and certified copies thereof.

§ 47. The invalidity of any section or sections of this Act shall not affect the validity of the remainder of this Act. If for any reason section 6 of this Act shall be held to be invalid, the liens provided for in this Act may be foreclosed by bill in equity in the Circuit Court of any county in the State of Illinois having jurisdiction of the persons or the subject matter.

22. This is primarily a non-possessory lien.
23. See notes 48 through 70 infra and accompanying text.
lien is subject to another lien upon the same chattel of any bona fide security interest as defined in the UCC, so long as that security interest was recorded prior to the commencement of the repairman’s lien.\textsuperscript{25} Therefore, because of this express statutory provision, the secured party will have priority even if the repairman retains possession of the chattel.

Section 9-310 insures that the repairman’s lien will prevail if the state statute does not explicitly give preference to the secured party. Before the Illinois legislature amended section 43, the interaction of that provision and 9-310 could engender an anomalous result. In \textit{Westlake Finance Co. v. Spearmon},\textsuperscript{26} for example, the application of 9-310 to the language of the unamended section 43 reversed the judicial principles reflected in pre-Code decisions. Section 43 had the words “chattel mortgage” instead of “bona fide security interest” as defined by the Uniform Commercial Code.\textsuperscript{27} Plaintiff, holder of a conditional sales contract interest in an automobile, instituted an action of replevin when the owner defaulted on payments. The car was taken from the possession of the defendant repairman, who immediately filed his lien notice after the sheriff replevied the car. Because the language in section 43 mentioned only chattel mortgages, and not conditional sales contracts, the appellate court was compelled by 9-310 to give priority to the repairman’s lien. Case law prior to the adoption of the UCC had interpreted the language of section 43 to include conditional sales contracts,\textsuperscript{28} but because it was not expressly stated, priority could not be given under 9-310.

By broadening the statute to include all bona fide security interests, the legislature demonstrated that it intended to follow the policy of giving priority to prior-perfected security interests. Nevertheless, during the amendment process the legislature seems to have overlooked other language in section 43 that thwarts its intent. The neglected language concerns common law repairmen’s liens.\textsuperscript{29}

\textbf{The Co-Existent Common Law Lien}

Section 43 states that the lien created by the statute “shall be in

\textsuperscript{25} ILL. REV. STAT. ch. 82, § 43 (1975).
\textsuperscript{26} 64 Ill. App. 2d 342, 213 N.E.2d 80 (1st Dist. 1965). When this case was decided, the amendment was already in effect, but the conflict had arisen under the prior language.
\textsuperscript{27} ILL. REV. STAT. ch. 82, § 43 (1963).
\textsuperscript{28} Motor Acceptance, Inc. v. Newton, 262 Ill. App. 335 (4th Dist. 1931).
\textsuperscript{29} This result was not apparent unless one was familiar with the effect of 9-310. It was not until 6 years after the enactment of 9-310 that a common law lien was asserted in this situation. Pennington v. Alexander, 103 Ill. App. 2d 145, 242 N.E.2d 788 (5th Dist. 1968). Unfortunately for the plaintiff repairman, he failed to assert the common law lien at trial, so the court refused to consider the matter at the appellate level.
addition to, and shall not exclude, any lien now existing at common law. . . ."30 This language allows a common law artisan's lien to co-exist with its statutory counterpart.31 At common law an artisan who, with the owner's approval, enhanced or repaired a chattel through the expenditure of his labor and materials was entitled to retain possession of the chattel until his bill was paid. Foreclosure and sale provisions are statutory additions that were unknown at common law. The common law lien is thus limited to the right to retain possession, nothing more.

The standard interpretation of 9-310 gives a common law lien priority over another security interest.32 This interpretation, coupled with the language in section 43, allowed the appellate court in National Bank of Joliet v. Bergeron Cadillac, Inc.33 to conclude that a repairman who retained possession of an automobile and asserted a common law lien was to be given priority over the holder of a prior-perfected security interest. The repairman's common law interest, the right to retain possession, was sufficient to defeat an action of replevin brought by the secured party.

Although the court did not allude to it, this decision was made possible by the language in section 43 authorizing a co-existent common law lien.34 While the Illinois Code Comment to 9-310 indicates the same result,35 Judge Craven, in a dissenting opinion, criticized this outcome by observing that the Illinois lien statute sought to establish an exclusive statutory scheme that eliminated common law liens.36 Although the language of the statute does not support his position, a consideration of policy and the practical problems raised by this result does.

The Bergeron Cadillac holding puts a repairman who complies

30. ILL. REV. STAT. ch. 82, § 43 (1975).
31. The predecessor of sections 40-47, the Garage Keeper's Lien Act of 1917, was held "not declaratory of a common law lien . . ." in Jensen v. Wilcox Lumber Co., 295 Ill. 294, 297, 129 N.E. 133, 135 (1920).
32. See note 9 supra.
34. The court based its decision chiefly on an assertion of a well-established common law lien in Illinois, although its cited precedent was not overwhelming, as pointed out in Judge Craven's dissent. 38 Ill. App. 3d at 602, 347 N.E.2d at 878.
35. The Illinois Code Comments discussed the fact situations of Ehrlich v. Chapple, 311 Ill. 467, 143 N.E. 61 (1924) and The Nathan M. Stone Co. v. Ellerson, 230 Ill. App. 593 (1st Dist. 1923), in which subsequent possessory repairmen's liens had been asserted against chattels that were subject to a prior chattel mortgage. The courts had refused to give priority to the repairmen. The Comments concluded:
To the extent that a possessory lien may be found to rest on a common law basis in the circumstances of these cases under the Code, this section would establish a rule contrary to these two decisions and others to the same effect.
36. 38 Ill. App. 3d at 602, 347 N.E.2d at 878.
with section 40 in a worse position than one who merely retains possession.\textsuperscript{37} The ability to withhold possession of a chattel can be a powerful bargaining force in obtaining payment. For instance, an automobile is vital to many people. Possession of it may induce payment as effectively as threat of sale. It can be expected that repairmen will assert a common law lien in order to gain the benefit of priority over the secured party, even though they must sacrifice the remedy of foreclosure and sale.\textsuperscript{38} Section 40 offers a compromise by protecting the interest of the repairman through registration and sale while allowing the owner to quickly regain possession of the chattel. A court that enforces the repairman’s common law right to retain possession undermines this statutory compromise and impairs the efficacy of the statute.

In amending the language of section 43, the legislature expressed an intent to give priority to security interests over repairmen’s liens.\textsuperscript{39} Moreover, although the common law lien is limited to possession, it can prevent the secured creditor from taking action to satisfy the owner’s obligation upon default. Since the repairman’s common law lien defeats an action for replevin, the creditor has limited options until the repairman is paid. Consequently, it is evident that, in amending section 43, the legislature found the will, but not the way.

**EFFECT OF 9-310 ON THE ILLINOIS MECHANIC’S SMALL LIEN ACT**

The *Bergeron Cadillac* court mentioned another method of asserting a lien for materials and services in Illinois: the Mechanic’s Small Lien Act.\textsuperscript{40} This lien is limited to claims of $200 or less. The Act

\textsuperscript{37} Id.

\textsuperscript{38} The court indicated uncertainty as to what would occur if the repairman claiming a common law lien subsequently wished to move for foreclosure and sale. It would seem clear that in order to avoid semantic fiction, the lienor who wishes to sell would have to proceed under sections 40-47, and thereby give up his priority.

\textsuperscript{39} See notes 27 through 29 *supra* and accompanying text.

\textsuperscript{40} ILL. REV. STAT. ch. 82, §§ 47a-47f (1975):

\textbf{§ 47a.} Every person expending labor, services, skill or material upon or furnishing storage for any chattel at the request of its owner, authorized agent of the owner, or lawful possessor thereof, in the amount of $200 or less, shall have a lien upon such chattel beginning upon the date of commencement of such expenditure of labor, services, skill, or materials or furnishing of storage, for the contract price for all such expenditure of labor, services, skill, or material, until the possession of such chattel is voluntarily relinquished to such owner or authorized agent, or to one entitled to the possession thereof.

\textbf{§ 47b.} Unless the chattel is redeemed within 90 days of the completion of the expenditure of such labor, services, skill, or material or furnishing of storage, or within 90 days of the date agreed upon for redemption, the lien may be enforced by a public sale as hereinafter provided.
authorizes a repairman to retain possession of the chattel and, unless it is redeemed within 90 days of the completion of services, to sell it at public sale.⁴¹ Because the Act does not expressly provide for the priority of security interests, 9-310 operates to give the lienor preference.⁴² Thus, the amount of the claim determines whether the

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§ 47c. Such sale shall be held only after giving 10 days' notice of the time and place of such sale, by publication once in some newspaper of general circulation in the city, village, or incorporated town in which such lienor expended such labor, services, skill, or material or furnished such storage, or if there be none, or if the labor, service, skill or material was not expended in a city, village, or incorporated town, then in some newspaper of general circulation in the county in which such lienor expended such labor, service, skill, or material or furnished such storage, and also by mailing, 10 days before such sale, a copy of such notice addressed to the person requesting such expenditure of labor, services, skill, or material or furnishing of storage, if his address is known, or if his address is unknown, to the last known address of such person. If no address is known or discoverable after reasonable inquiry, the sale may be made without mailing such notice. The published notice required by this Section shall be in substantially the following form:

NOTICE IS HEREBY GIVEN
That on (insert date), a sale will be held at (insert place), to sell the following articles to enforce a lien existing under the laws of the State of Illinois against such articles for labor, services, skill or material expended upon a storage furnished for such articles at the request of the following designated persons, unless such articles are redeemed within ten days of the publication of this notice.

<table>
<thead>
<tr>
<th>Name of Person</th>
<th>Description of Article</th>
<th>Amount of lien</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
</tbody>
</table>

A separate notice need not be published for each lien to be enforced, but several may be combined in one publication.

47d. If the chattel or chattels are not redeemed within 10 days after the publication of the notice required by Section 3 of this Act, 1 the lienor may sell such articles at public auction on the day and at the place specified in such notice. The proceeds of the sale in excess of the charges for the expenditure of such labor, services, skill, or material or furnishing of storage, and the necessary expenses of the procedure required by this Act, shall be held by the lienor for a period of 6 months, and if not reclaimed by the owner thereof within that time shall be deposited with the county treasurer of the county in which such labor, services, skill or materials were expended or such storage was furnished. The said treasurer shall credit such excess to the general revenue fund of the county, subject to the right of the owner or his representatives to reclaim the same at any time within 3 years of the date of such deposit with the treasurer.

47e. Conformity to the requirements of this Act shall be a perpetual bar to any action against such lienor by any person for the recovery of such chattels or of the value thereof, or of any damages growing out of the failure of such person to receive such chattels.

§ 47f. The purpose and intent of this Act is to provide an inexpensive means of enforcing liens for small amounts, and to that end the provisions of this Act shall be construed to create a lien in addition to, and shall not exclude, any lien which may exist by virtue of either the common law or any other statute of the State of Illinois.

⁴¹ ILL. REV. STAT. ch. 82, §§ 47a-47b (1975).
⁴² See note 9 supra.
repairman has priority over the secured party. For instance, a repairman retains possession of a chattel after he has completed his services. If his bill is over $200, he can assert a lien under section 40. His lien will be subject to any prior-perfected security interests in the chattel under section 43. However, if in the same situation the claim were under $200, the repairman could assert his lien under this Act and obtain priority over a secured party.

The purpose of the Mechanic's Small Lien Act is to allow expeditious, inexpensive means of enforcing small claims. Yet, it is unlikely that the legislature intended to give special preference to small liens when large claims are not afforded the same shelter from security interests. One could argue that small liens need special treatment because of their size. But a more convincing explanation would be that insofar as the statute was drafted when the prevailing case law gave priority to security interests, there was no reason to include a separate provision on priority. Former case law that construed silent statutes to give priority to the secured party is not relevant to the operation of 9-310. This illustrates a major flaw in the effect of 9-310; it can react to pre-Code wording or silent statutes by producing a result contrary to the former scheme of priority. Former case law that construed silent statutes to give priority to the secured party is not relevant to the operation of 9-310. This illustrates a major flaw in the effect of 9-310; it can react to pre-Code wording or silent statutes by producing a result contrary to the former scheme of priority. For this reason, if the legislature is to make a conscious choice as to the priority it wishes each lien to enjoy, it should review current lien statutes in light of the results produced by 9-310. A clear statement of legislative policy would be preferable to priority by happenstance.

If the legislature wishes the repairman to enjoy his preferred status under the Mechanic's Small Lien Act, then it should consider what title would be passed by a sale under this statute. Because no provision is made to reissue title upon sale, the buyer would take a title upon which there is a bona fide security interest outstanding.

44. Gilmore has noted that many courts desire to protect the repairman because he is a small businessman, not usually conversant with the laws. GILMORE, supra note 11, at 881-82. By the same token, smaller claims may be in need of more protection by the state in order that they may be enforced at all. If this is the desired policy, then the legislature should make it clear.
45. See note 11 supra.
46. UCC Comment 2 to 9-310, which provides in part:
   If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.
This would discourage rapid sale of the chattel and would jeopardize use of the Act as an efficient means of settling small claims.

**Due Process Standards for Repairmen's Liens**

The Supreme Court in recent years has attempted to forge due process standards relevant to the area of creditors' prejudgment remedies. Unfortunately, the Court has failed to enunciate the underlying bases of its decisions. It has relied on factual distinctions rather than readily discernable standards that are applicable and adaptable to the various creditors' remedies. Nevertheless, the Court has supplied a basic due process framework.

Courts apply a two-step analysis when a prejudgment remedy is constitutionally challenged. First, it must be determined whether the statute violates the due process guarantee. The appropriate standard is straightforward: whether by state action there has been a deprivation of a significant property interest. In this context, the typical property interest at stake is the owner's or possessor's interest in the continued use and possession of his property. Furthermore, deprivation need only be temporary in order to invoke due process protections. Once the requisite state action and "taking" have been established, the second step of the analysis concerns the procedural protections required by due process. Herein lies the confusion. In *Fuentes v. Shevin*, the Court seemed to establish inflexible requirements of notice and opportunity for a prior hearing before a state could authorize its agents to seize property in the possession of a person upon the application of another. Two years after it decided *Fuentes*, the Court in *Mitchell v. W. T. Grant Co.* upheld a Louisiana sequestration statute which, in its effect upon

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53. Separate Due Process Analysis, supra note 50, at 980.


56. The sequestration procedure allows a lien holder to obtain, upon *ex parte* application, a writ of sequestration to forestall waste or alienage of the liened property. Upon issue of the writ, the sheriff takes possession of the property in question and holds it pending litigation. No notice is given, and hearing will only occur within 5 days after the seizure.
the owner of property, was indistinguishable from the challenged
replevin statutes in Fuentes. Yet that statute did not provide for a
hearing before seizure. In Mitchell the Court gave greater considera-
tion to the nature of the creditor's interest than it had in Fuentes,
oberving that the vendor's lien in Mitchell represented a current,
real interest in the property seized, whereas the creditors in Fuentes
had no present interest in the property. Therefore, the due process
examination entailed review of the interests of both debtor and
creditor. The Court did not clarify to which part of the two-step
analysis the creditor's interest pertained. Was it relevant to the
issue of whether a due process violation had occurred, or was it the
chief factor in determining the scope of the procedural safeguards
required? When the interests are balanced, according to one read-
ing of Mitchell, no due process protection of the debtor's interest
need take place. But this frustration of due process should yield
to a better interpretation of Mitchell, focusing on the procedures
mandated by due process to protect the constitutionally cognizable
property interests of both parties.

In North Georgia Finishing, Inc. v. Di-Chem, Inc., the Court
seemed to endorse this approach. In assessing the constitutionality
of a Georgia garnishment statute, the Court compared the features
of that statute to the steps involved in the Louisiana sequestration
procedure. The saving features of the sequestration statute were:
the participation by a judge in the issuance of the writ of sequestra-
tion, the requirement of more than mere conclusory allegations in
filing the affidavit, and the requirement for a prompt post-seizure
hearing and dissolution of the writ if the creditor failed to prove his
grounds for sequestration. While this last procedure appears to be
irreconcilable with the Fuentes holding, it must be understood that
under Louisiana law any transfer of possession of the chattel by the
debtor can defeat the creditor's vendor's lien. Thus, the peculiar
vulnerability of the creditor's interest was crucial to a determination
of the allowable procedural requirements.

North Georgia Finishing, Inc. v. Di-Chem, Inc., though it ap-
ppears to limit Mitchell to its facts, did not return fully to the notice
and prior hearing requirements of Fuentes. The unconstitutional

57. 416 U.S. at 604.
58. Separate Due Process Analysis, supra note 50, at 981 n.54.
59. Id.
60. Id.
62. Id. at 606-07.
63. LA. CIV. CODE ANN. art. 3228 (West).
64. 419 U.S. 601 (1975).
garnishment statute in Di-Chem failed because seizure of property was carried out without notice or opportunity for an early hearing, or other safeguard against mistaken repossession.\textsuperscript{65}

One commentator has suggested that an effective way to reconcile these decisions is to consider them as reference points along a continuum of due process procedural requirements.\textsuperscript{66} The procedures required in Fuentes would represent the end of the continuum most favorable to debtors' interests, whereas those in Mitchell would cluster at the opposite pole, favoring creditors' interests. Di-Chem would occupy a point in-between, closer to Fuentes because of its factual similarity to that case. To use the continuum, one would compare the interests in need of protection in a particular case to those in the reference cases. From that, one could ascertain which procedures would be appropriate. The Court's attention to specific features of the challenged statutes in Mitchell and Di-Chem would lend support to this interpretation.\textsuperscript{67} Furthermore, a consideration of the underlying purposes of the Court's entrance into the creditors' remedies area clarifies its chosen course of action.

In Fuentes, the Court discussed why a hearing prior to seizure was deemed essential to due process. The right to be heard guards the use and possession of property from arbitrary encroachments and discourages mistaken or unfair deprivations.\textsuperscript{68} A preliminary determination of the probable validity of the creditor's claim supplies a method for reducing the chance that seizure will unfairly infringe upon the debtor's right to continued possession.\textsuperscript{69} In most cases a hearing is the only procedure that gives this assurance.\textsuperscript{70}

However, in light of Mitchell and Di-Chem one could say that a prior hearing is not mandated in every case. In Mitchell a prompt post-seizure hearing was adequate, while in Di-Chem an early hearing or similar safeguard would have been necessary.\textsuperscript{71} The purpose of due process procedural requirements is to prevent mistaken or unfair deprivations of property. Arguably, as long as a statute contained sufficient safeguards to accomplish this purpose, then due process would be satisfied. While a prior hearing is the best safeguard, it may not always be practical or possible to supply it. The

\begin{footnotes}
\textsuperscript{65} Id. at 606.
\textsuperscript{66} Separate Due Process Analysis, supra note 50, at 1002-03.
\textsuperscript{67} 419 U.S. 601, 606-07 (1975).
\textsuperscript{68} 407 U.S. 67, 81 (1972).
\textsuperscript{69} Rendleman, The New Due Process: Rights and Remedies, 63 Ky. L.J. 531, 557 (1975) [hereinafter cited as Rendleman].
\textsuperscript{70} The Court in Fuentes stated that a "right to a prior hearing" is the only truly effective safeguard against arbitrary deprivation of property. 407 U.S. at 83.
\textsuperscript{71} See notes 62 through 65 supra.
\end{footnotes}
expense and time may not be commercially reasonable; the creditor has the increased risk of damage to the collateral; and the procedure may overburden the courts. Moreover, some combination of other procedures may accomplish the same results in certain cases—the creditor might be required to establish to the satisfaction of a judicial officer a factual basis for the need to seize possession, he might be under a strict burden of proof to do so, and he might be penalized if at a later date the seizure was found to be without merit.\footnote{2}

The Court has a second concern in restructuring debtor-creditor relationships in prejudgment remedies: preventing private individuals from abusing the state seizure power.\footnote{3} This consideration is intertwined with the Court's desire to prevent unfair deprivations of property. The state's ability to seize a person's property is one of the most formidable expressions of its police power and one that should be well controlled. Yet, in the challenged statutes private individuals were able to put this machinery into operation without having to meet any true tests as to the necessity for this action. These broad statutes contained few provisions that would curb misuse of this police power.\footnote{4} Therefore, due process requires effective regulation of the state's seizure power.

**DUE PROCESS EXAMINATION OF ILLINOIS LIEN STATUTES**

Section 45 of Illinois' primary repairman's lien statute\footnote{5} details the procedures for foreclosure and sale of a liened chattel. Once the lienor has filed his lien with the county clerk, he may move immediately for foreclosure by delivering a certified copy of the lien notice with a signed foreclosure request endorsed thereon to the sheriff. The lienor must also post a bond equal to twice the amount claimed. The sheriff is then empowered to take the chattel into his posses-

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\footnote{2}{These suggestions might be particularly appropriate in a situation in which uncomplicated, documentary proof of the claim is available. This analysis should be approached from the viewpoint of the total effect of the procedures in preventing arbitrary deprivations of property.}


\footnote{4}{The Court in *Fuentes* criticized the challenged Florida and Pennsylvania replevin statutes in this regard:
No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. 407 U.S. at 93. In *Di-Chem, Inc.*, the same lack of controls existed. One seeking garnishment was only required to make conclusory allegations concerning one's reason to apprehend loss if garnishment did not issue before a clerk of the court. 419 U.S. at 607.}

\footnote{5}{ILL. REV. STAT. ch. 82, §§ 40-47 (1975).}
sion, as in cases of replevin. The sheriff must deliver a copy of the lien notice and a certified, itemized bill of particulars to the possessor of the chattel at the time of the taking, and mail a copy of the notice to the owner or holder of a chattel mortgage.

The owner may at any time within 10 days of service deliver a written and verified denial to the sheriff. He may also post a bond equal to twice the amount of the lien in order to regain possession. The owner must post bond when he serves the denial, or possession will be retained by the sheriff until the foreclosure suit is decided. If no denial is served within 10 days, then the sheriff advertises sale of the chattel for 10 days and conducts a public sale.

Should the lienor neglect to commence a foreclosure suit within 10 days after service of denial, the chattel is returned to the owner. Thus, unless owner posts bond, he will not be able to regain quick possession of his chattel unless the lienor fails to commence a foreclosure suit. Otherwise, he must wait until the suit has been adjudicated.

Section 45 can be divided into a seizure provision and a sale provision. The sale section need not be discussed in detail insofar as it does provide for notice and a hearing before the state conducts the sale. Under the two-step analysis a sale falls within the scope of the due process guarantee. There is action by the state (a public sale conducted by the sheriff) that constitutes a deprivation of a significant property interest (owner is permanently and totally deprived of all property rights in the chattel). Applying the second step of the analysis to determine the adequate procedural safeguards, one would place a sale provision on a continuum of procedural requirements at the Fuentes position because the debtor’s need for protection is great. Therefore, the statute must provide for notice and prior hearing in order to safeguard the totality of the debtor’s property rights against the extreme form of deprivation represented by a sale. The sale portion of section 45 insures that the owner is given notice of the foreclosure as well as opportunity to respond to and deny the lienor’s claim. At this point the onus rests with the lienor to pursue his claim. The owner has the opportunity to engage in a foreclosure suit before the chattel may be sold. Thus, the sale portion of section 45 is constitutionally sufficient to protect the debtor’s rights, and would be able to withstand a due process challenge.

76. Actually a sale is a more extreme measure than a temporary seizure, as in Fuentes, and would therefore be placed along a continuum at a point beyond Fuentes, except that notice and prior hearing appear to be the ultimate procedures mandated by due process.
The seizure part of section 45 presents a more complex situation. Again, the first step of the analysis is no obstacle. State action takes the form of an officer exercising the police power to seize a chattel in the possession of one individual at the instigation of another. The property interest infringed is the "use" interest described by Justice Harlan in *Sniadach v. Family Finance Corp.* The ability of the debtor to regain possession of his chattel by posting bond does not nullify the deprivation. In *Di-Chem*, the Court reasoned that such a provision merely substituted one form of property for another, and therefore did not alter the character of the seizure as a deprivation of a significant property interest.\(^7\)

In trying to determine due process requirements, one faces the difficult question of where to place the seizure remedy along the continuum of procedures. This section is markedly similar to the replevin procedures in *Fuentes*. The lien notice contains only allegations as to the existence and amount of the lien and the amount unpaid. It is verified by oath of the claimant or someone having personal knowledge of the facts. The notice and a certified, itemized bill of particulars are served upon the owner at the time of the seizure.\(^7\) In this respect the Illinois statute differs from the procedures attacked in *Fuentes*, *Di-Chem*, and *Sniadach* in that the lienor furnishes some documentary proof substantiating the validity of his claim. But the distinction is slight. This proof does not appear to be an essential element in setting the seizure machinery in motion, nor will failure to provide the sheriff with a copy necessarily prevent a seizure.

While the indexing and filing of liens established by sections 41, 42, and 44\(^8\) may constitute constructive notice to the owner that a claim has been filed against him, usually the lienor may file and move for foreclosure in the same day. In that case, if it is determined that the owner had adequate notice of the claim and possible seizure, then notice becomes a concept without meaning. The owner normally receives notice of the repairman's actions when the sheriff takes possession of the chattel, but by then he is without recourse to prevent the seizure. Thus, by allowing a lienor to invoke the power of the state to seize another's property upon the mere verification of a conclusory statement as to the lienor's entitlement, without adequate prior notice, section 45 parallels the unconstitutional procedures in *Fuentes*.

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\(^8\) 419 U.S. at 607-08.
\(^9\) ILL. REV. STAT. ch. 82, § 45 (1975).
\(^40\) Id. at §§ 41, 42, 44.
However, an important distinction between the situation in *Fuentes* and repairmen's liens lies in the nature of the creditor's interest. The repairman's lien for materials and services has a dual nature. As a means of securing payment, it is a security device; but it is a property interest by virtue of the labor expended and the addition of goods to the chattel. The effect of the repairman's rights upon due process analysis depends upon one's reading of *Mitchell*. As in that case, both the owner and the repairman have concurrent, real interests in the chattel seized. If no due process protection need occur when the creditor's and debtor's interests balance, then one could argue by analogy that the repairman's rights offset the owner's, thus precluding a finding of due process violation. The seizure procedure would stand.

However, even this interpretation may turn on which aspect of the repairman's lien a court chooses to emphasize, the security interest or the property interest. In *Mason v. Garris*, the court found a repairman's lien to be merely a security interest, unlike the property interest created by the conditional sales contract that had been insufficient to prevent due process analysis in *Fuentes*. The court reasoned that since one with a property interest in the goods could not take them from the user without abiding by procedural due process, a repairman with only a security interest would also need to meet identical constitutional standards. This approach has the drawback of ignoring the dual nature of the repairman's interest and in this regard it is superficial.

The reading of *Mitchell* that permits a court to stop at the first step of the due process analysis has another flaw. The purpose of due process is not fulfilled simply because both the owner and the repairman have current, real interests—namely, the owner's use interest and the repairman's property interest. The basic question is whether the creditor has unfairly or mistakenly deprived the debtor of property. An analysis that fails to reach the procedural circumstances of the taking cannot answer this fundamental due process question. A court should go to the second step and inquire into the probable validity of the creditor's claim before seizure occurs. The extent of procedural protections should reflect the comparative weights of the opposing interests. Yet, even in situations where the creditor stands in a more vulnerable position than the debtor, lien statutes should require that a court insist upon certain

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81. See notes 58 through 60 supra and accompanying text.
83. *Id.* at 424.
fundamental procedural safeguards aimed at regulating seizures. One must recall that the sequestration statute in *Mitchell* passed constitutional muster because of its saving procedural features.\(^8\) Regardless of the intensity of the creditor's interest in the property, his remedy should not entail abrogating procedural safeguards for the debtor.

To incorporate this basic purpose, section 45 should provide for notice and a hearing prior to any seizure by the state. The issues raised by such seizures are indistinguishable from those in *Fuentes*, and therefore it might be advisable to adopt the procedures approved in that decision.

The creditor's interest in *Mitchell* was totally unprotected, necessitating procedures that allowed taking prior to judicial questioning.\(^8\) The Illinois repairman is rarely in such a vulnerable position, because his claim can only be defeated if the liened chattel is unavailable for sale.

In extreme cases the degree of protection afforded by the approved *Mitchell* procedures would suffice: nature of the claim shown by more than conclusory allegations; participation by a judicial officer; and prompt, post-seizure hearing entitling the owner to regain possession unless the repairman shows cause why the chattel should be held pending litigation.\(^8\) The repairman would merit increased protection in instances where he knows or has reason to suspect that the chattel will be destroyed or unavailable for sale.

Because the repairman's interest ordinarily does not require an extraordinary degree of protection, Illinois lien statutes should provide for some form of notice to the owner and a preliminary hearing into the necessity for seizure of the chattel. A court should determine at the outset whether the debtor ought to furnish security, and if so, in what form. The foreclosure suit would determine the merits of the claim.

Other procedures aimed at establishing validity and controlling seizure machinery might protect the debtor's interest while providing flexibility for the creditor.\(^8\) Emphasis upon documentation of claims is one approach. To establish that a claim exists, the court could inspect signed repair estimates, authorization forms, unpaid bills, and requests for payment. However, this inspection would not

\(^{84}\) See note 61 *supra*.

\(^{85}\) See note 62 *supra* and accompanying text.

\(^{86}\) *Id.*


\(^{88}\) See notes 72, 80 and 81 *supra* and accompanying text.
determine the validity of the claim in certain instances. For example, a customer may have authorized a repair costing $300, but he may not have received $300 worth of service (i.e., his car still does not work correctly). In this case, the repairman's claim for $300 would still be invalid. Although these features would be useful in one of the exceptional cases where a post-seizure hearing would be allowed, they do not represent a substitute for a prior hearing in the majority of cases.

A hearing prior to seizure is the most direct means of accomplishing the Court's two purposes: preventing unfair or mistaken deprivations and restraining the states' seizure power. However, in the absence of specific guidelines as to the proper procedures to be applied to various factual situations, there is room for experimentation by the legislature to achieve a scheme that is both practical and responsive to the interests of both parties.

State Action in Illinois Mechanic's Small Lien Act

Whereas the due process analysis of sections 40 through 47 required no consideration of the presence of state action, the provisions in sections 47a through 47f must be examined to resolve this threshold issue before any further analysis can occur. This statute allows the repairman to retain possession of the chattel. If after 90 days following completion of labor the owner has not redeemed the chattel, the repairman may extrajudicially sell the chattel at public auction after publishing notice. Nowhere does the statute provide for participation by a state office or officer. The actions are those of a private individual. Nonetheless, they may yet be considered actions of the state for fourteenth amendment purposes if one or more theories of state action apply to them.

Authorization and Encouragement Theory

Under this theory, when the state designs its statutes to allow individuals to act in constitutionally forbidden ways, the sanctioned activity is state action within the meaning of the fourteenth amendment. The case most often cited as support for this position is Reitman v. Mulkey, which invalidated an amendment to the California Constitution that, in effect, authorized private racial discrimination. The Supreme Court held that the amendment significantly involved the state in this forbidden discrimination.

89. Ill. Rev. Stat. ch. 82, §§ 40-47 (1975). Because of the sheriff's involvement, state action was clearly present.
90. Id. at §§ 47a-47f.
In the case of the repairman’s lien, the state encourages the creditor to act unconstitutionally by authorizing him to deprive the owner of property without notice or opportunity for hearing. Courts that have considered possessory repairman’s liens like Illinois’ have divided on whether to accept the encouragement theory. This theory received its most extreme extension in Cockerel v. Caldwell where the court stated that legislative embodiments of the public will are considered actions of the state when the consequences of the statute enable private citizens to act in derogation of the Constitution.

Courts that refuse to accept this theory in the context of creditors’ remedies advance a number of arguments against it. Since racial discrimination is the particular target of the fourteenth amendment, courts have stretched state action theories to their outermost limits to reach the problems peculiar to race discrimination. However, they lack justification for expanding the theory to unrelated areas.

A second argument states that the encouragement theory leads inexorably to the conclusion that the state authorizes anything it neglects to forbid, ultimately destroying the distinction between state action and private action. A third argument supports the theory but finds that its emphasis should be on whether the state compelled the individual to take this course of action. The challenged activity must significantly implicate the state in more than a neutral capacity—mere authorization will not suffice.

The Public Function Theory

A more persuasive theory, and one more applicable to possessory repairmen’s liens, is the public function theory of state action. Under this theory, private action becomes the equivalent of state action when the state delegates a duty it traditionally performs to

95. Phillips v. Money, 503 F.2d 990 (7th Cir. 1974).
Repairmen's Liens

a private individual; normally in the case of a possessory lien, the
sheriff performs the function of detention and sale. Again, accept-
ance of this theory into the field of creditors' remedies has been
mixed.77 Those factions of the judiciary which accept the doctrine
seem to take it at face value. The courts that reject this theory as a
basis of state action claim that it should be limited to the contexts
in which it arose, racial discrimination cases and cases involving the
first amendment.78 Others refuse to characterize the activity as one
traditionally or exclusively performed by the state, noting the com-
mon law origin of most possessory liens.79

Given the courts' division over whether these theories of state
action should apply to creditors' remedies, it is wholly uncertain
whether Illinois' detention and sale provisions would be deemed
actions of the state. Two federal courts, when faced with a challenge
to Illinois' innkeeper's lien statute100 came to divergent conclusions
as to the presence of state action. In Collins v. Viceroy Hotel
Corp.,101 the district court relied on Reitman v. Mulkey102 and the
authorization and encouragement theory to find state action in the
extrajudicial detention and sale of a guest's goods pursuant to the
Illinois innkeeper's lien. Because the statute provided neither notice
nor hearing prior to detention, nor hearing prior to sale, it was found
to be violative of due process. In Anastasia v. Cosmopolitan Na-
tional Bank of Chicago,103 the Court of Appeals for the Seventh
Circuit found insufficient state action under either the authoriza-
tion theory or the public function theory to warrant due process
scrutiny. The court rejected the authorization rationale because the
state's impact on private ordering was found to be minimal. It put
aside the public function theory because the state had not tradition-
ally asserted and enforced innkeeper's liens.

845 (5th Cir. 1972) (landlord's lien) are two of the cases adopting this theory. Phillips v.
Money, 503 F.2d 990 (7th Cir. 1974) and Anastasia v. Cosmopolitan National Bank of Chi-
cago, 527 F.2d 150 (1975), cert. denied, 424 U.S. 928 (1976), have rejected it.
98. The racial discrimination cases which first employed the public function language
were the "white primary cases." Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright,
321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941). This theory has also been
developed in cases dealing with the first amendment: Amalgamated Food Employees Union
(1946).
99. Anastasia v. Cosmopolitan National Bank of Chicago, 527 F.2d 150, 156 (7th Cir.
100. ILL. REV. STAT. ch. 71, § 2 (1975); Id. ch. 82, § 57 (1975).
103. 527 F.2d 150 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976).
The courts' treatment of this lien is important because of its procedural similarities to the repairman’s lien in section 47a: both allow the lienor to retain possession of the liened chattels, wait for redemption, then move to sell the items after notice has been published and a copy mailed to the owner’s residence. Neither provided for any form of hearing. However, two distinctions limit the usefulness of the comparison for constitutional purposes. The innkeeper’s lien involves an actual invasion of the debtor’s premises and a seizure of his chattels, since possession is usually not given over to the innkeeper when a guest enters the premises. This contrasts with the repairman’s ability to retain possession of a chattel that was originally surrendered voluntarily to him. Furthermore, the innkeeper’s interest in the chattels is general in that any one or all of the debtor’s effects may be used to satisfy the lien. The repairman’s interest in the liened chattel is specific, and has the quality of being a property interest as well as a security interest.

These distinctions combine to make the innkeeper’s lien more injurious to the debtor’s interest and more constitutionally suspect. While these distinguishing features might dispose a court to find state action more readily with innkeeper’s liens than repairmen’s liens, they do not necessarily constitute a valid basis for refusing to acknowledge state action in the operation of possessory repairmen’s liens. For reasons already discussed,104 the repairman’s lien is sufficiently threatening to the debtor’s interest to warrant due process scrutiny.

Of the two theories, the public function theory would be the more likely basis for establishing state action in Illinois’ sections 47a through 47f. The theory stresses the extent of the possessory and removal powers which the state or its private delegate may wield. If the state chooses to empower an individual to resolve a commercial dispute for the sake of convenience or economy, the state should limit this authority by applying the same restraints that it imposes upon itself. This argument has persuasive force when the state is delegating a major power. The sale provision qualifies as such because it enables an individual to extinguish permanently and totally another’s property rights in a chattel. Thus, not only from a constitutional perspective, but from a practical one as well, there should be some statutory control along with delegation to prevent abuse of this power.

If, under either approach, state action is found in sections 47a through 47f, then the sale provision would clearly fail to meet due

104. See notes 76 through 88 supra and accompanying text.
process standards under the same analysis applied to section 45.105. The detention provision presents a different question because, strictly speaking, there is no seizure of goods involved. The issue is whether the ability to retain possession of a voluntarily surrendered chattel is a deprivation for due process purposes.

Though few courts have considered the question, the weight of authority supports the position that retention of possession by the repairman is not a constitutional deprivation. The majority cite the voluntary nature of the owner's original surrender of possession as the crucial factor. A deprivation is fair if the owner has voluntarily given up possession. And unlike most state seizures, the elements of surprise or arbitrariness are not present. The majority mentions the repairman's property interest as a second factor which prevents a finding of unfair deprivation. In so doing, these courts stop at the first step of the due process analysis.

These arguments are susceptible to criticism. The Supreme Court's language relating to deprivation of "use" interests was not limited to seizures. A deprivation may result from refusal to permit the owner to repossess the chattel as surely as it may when one removes the chattel from the owner's control. The unfairness occurs, not when the owner gives the chattel to the repairman, but when the repairman refuses to give it back. In essence, the repairman declares the validity of his claim and thereby places the burden on the owner to prove otherwise. And until the owner meets this burden, it is the repairman who retains possession. Thus, the state bestows a remedy upon the repairman, yet fails to exact its due—proof of the claim.

The Supreme Court has raised the debtor's interest in continued use and possession of property to a constitutionally significant level. By refusing to consider the repairman's detention as a deprivation, some courts have ignored the debtor's interest and circumvented the Court's purposes.

If detention by the repairman is constitutionally permissible either because it is not state action or a deprivation, then the legislature might wish to avoid the necessity for two hearings in the section

105. See note 76 supra and accompanying text.
statute by eliminating the seizure provision in section 45 and making the lien possessory. If this were the case, there would be two possessory repairmen's liens, both requiring notice and hearing prior to sale of the chattel, the only distinction then being the amount of the claim. Such repetition would be unnecessary. Even if sections 40 through 47 are not amended, the requirement of a hearing prior to sale in section 47c would add to the expense of enforcing that lien. The utility of a separate statutory lien would be questionable in any event, given this impairment of its purpose to provide a quick and inexpensive method for enforcing small claims.

CONCLUSION

The Illinois legislature should address the problems attending the priority of subsequent repairmen's liens over perfected security interests. Though the major lien statute provides a realistic and practical accommodation of interests, UCC 9-310 allows the common law possessory lien to work an anomalous result. Furthermore, the Mechanic's Small Lien Act gives the lienor priority if his claim is under $200. The legislature should either formulate a uniform policy of priority or justify the results obtained under 9-310.

The common law lien circumvents the expressed intent of the legislature to grant preference to prior security interests. Furthermore, the repairman's retention of possession invites abuse of the system. Indeed, the Supreme Court has looked askance at interference with the owner's right to continued possession and use of his chattel. The legislature should reconsider whether possession by itself actually represents a valid basis for establishing a repairman's lien.

The Court has also devoted considerable attention to the constitutionality of various prejudgment remedies of creditors. Though the Court has not addressed repairmen's lien statutes specifically, it has established the constitutional significance of the debtor's interest in continued use and possession of his property. The burden of creating a procedural scheme that adequately protects the debtor's interest from arbitrary or mistaken infringement rests with the legislature. Concurrently, it must restrain unfettered use of the state's police power.

The seizure and sale provisions in section 45 of the major Illinois lien statute demand revision. Notice and hearing before sale appear to be the only procedures that can adequately protect the debtor's
rights. Moreover, it is quite probable that notice and hearing are constitutionally mandated before any seizure of the chattel by the state.

The Mechanic's Small Lien Act may withstand a due process analysis. However, one or more theories of state action might render the sale provision constitutionally infirm. In that event, the sale provision would also require notice and a prior hearing. The detention section of the Mechanic's Small Lien Act could remain unchanged if retained possession were not held to constitute an unfair deprivation. However, a close reading of the Supreme Court's recent expositions could lead one to conclude that a detention is as violative of due process as a seizure.

Unless the legislature can justify the separate existence of the Mechanic's Small Lien Act, it should subsume the Act into a single lien statute, simply by revising sections 40 through 47. It should be non-possessory and incorporate certain fundamental procedures: filing of lien, notice of claim, preliminary hearing to determine the propriety of seizure of the chattel or posting other security, and lastly, a foreclosure suit on the merits. The revised statute should identify situations requiring extraordinary protection of the creditor's interests and should provide for appropriate relief in such exceptional circumstances.

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