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**BALANCING ALMOST TWO HUNDRED YEARS OF
ECONOMIC POLICY AGAINST CONTEMPORARY
DUE PROCESS STANDARDS — MECHANICS'
LIENS IN MARYLAND AFTER
BARRY PROPERTIES†**

KENNETH B. FRANK* AND GEORGE W. MCMANUS, JR.**

INTRODUCTION

Collection of accounts receivable can be one of the most important functions a lawyer performs for a client, especially if the client is a small businessman. It can also be one of the most difficult. In Maryland, as an aid in the collection of sums due them, building contractors and materials suppliers have long had the benefit of a statutory lien, called a "mechanics' lien," on the real estate they improve. Until recently, laborers and materialmen could secure sums due them in connection with a construction job merely by recording a lien in the land records of the county where the property was located; if the debt was not satisfied, the lien could be enforced through a foreclosure sale of the property following a judicial determination of the merits of the claim. Many months could and generally did elapse between the initial recording of the lien and the enforcement hearing. Once enforced, the priority of the lien related back to the first day of construction. Therefore, the mere recording of a lien restricted the owner's ability to sell or mortgage the property, often for a substantial period of time.

In early February, 1976, the Court of Appeals of Maryland decided *Barry Properties v. Fick Bros., Roofing Co.*¹ Basing its decision primarily on four recent Supreme Court cases applying due process procedural standards to prejudgment creditor's remedies,² the Court of Appeals held that the mechanics' lien procedure then in force effected a taking of a significant property interest without due process of law. Instead of invalidating the entire law, however, the court resolved the constitutional problems by excising certain

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1. 277 Md. 15, 353 A.2d 222 (1976).

2. *North Georgia Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1967).

portions of the existing statute. This holding significantly impaired the usefulness of the remedy because the court deleted the portions of the statute providing for relation back of the lien; after *Barry Properties* no mechanics' lien took effect until after the claim had been finally determined in a procedurally adequate judicial proceeding, and its priority dated only from that determination.

The *Barry Properties* decision was announced shortly before the deadline for filing bills in the 1976 legislative session.³ The General Assembly rushed to pass a revised statute, Senate Bill 998, apparently on the belief that legislative action was necessary to cure the constitutional defects found by the court. This statute provided owners of real property with notice and opportunity for a hearing prior to subjecting their property to a mechanics' lien. This procedural safeguard had, however, already been achieved by the Court of Appeals' treatment of the prior statute in *Barry Properties*. While the new statute codified a comprehensive procedure, no attempt was made to reinstate the "relation-back" provisions which had been in the law prior to *Barry Properties*. It is possible that the legislature intended to delete this provision from the law for some substantive reason. It is more likely, however, that the General Assembly did not include a relation-back provision in the new law because it assumed that *Barry Properties* held "relation-back" to be unconstitutional under all circumstances. In addition, the new law made no provision for pending claims, and at least one Maryland court has held subsequently that lien claims not finally determined on the effective date of the new statute were extinguished by the repeal of the old law and simultaneous enactment of a new statute without a saving clause.⁴

This article does not attempt to survey the entire subject of mechanics' liens.⁵ Instead, the discussion that follows contains a detailed analysis of *Barry Properties*, focusing primarily on the necessity and exact meaning of that decision with particular emphasis on the application and substance of the due process

3. The decision was announced on February 10, 1976; the deadline for filing bills in the 1976 General Assembly was March 8, 1976.

4. *Guardian Sales & Service Co. v. Harris*, Circuit Court for Montgomery County Equity Case No. 48781 (June 16, 1976); see notes 251 and 256 and accompanying text *infra*.

5. For a thorough survey of mechanics' lien statutes, curiously omitting any detailed discussion of due process issues, see Urban & Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 WAKE FOREST L. REV. 283 (1976). See also Cutler & Shapiro, *The Maryland Mechanics' Lien Law — Its Scope and Effect*, 28 MD. L. REV. 225 (1968). The constitutional questions were addressed in Note, *The Constitutional Validity of Mechanics' Liens Under The Due Process Clause — A Re-examination After Mitchell and North Georgia*, 55 B.U. L. REV. 263 (1975).

standards. The 1976 statutory revisions and implementing amendments to the Maryland Rules of Procedure as well as a 1977 statutory amendment are also analyzed. The final sections raise questions about the retroactive operation of the case and statute and whether the legislature should restore the "relation back" feature stricken by the Court of Appeals.

MECHANICS' LIENS PRIOR TO *Barry Properties*

Mechanics' liens have been in force in Maryland since 1791.⁶ Maryland was, in fact, the first state to enact such a statute.⁷ The first mechanics' lien statute adopted by the Maryland legislature applied to all sums due and owing on written contracts for building a house in the newly developing national capital in the District of Columbia.⁸ The concept had been in use in the major civil law countries, and it has been suggested that Thomas Jefferson learned of the remedy as he studied major European cities in connection with the planning of the capital.⁹ The enactment of this first mechanics' lien law was also a high priority of James Madison and perhaps President Washington as well.¹⁰

The history of the Mechanics' Lien bears out the idea that it arose out of economic conditions, and was a part of the policy of

6. 1791 Md. Laws, Ch. 45, § 10.

7. For a thorough discussion of the historical background of mechanics' liens, see Brief of Amici Curiae at 2-11, *Barry Properties, Inc. v. The Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976). See also *Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc.*, 274 Md. 307, 334 A.2d 526 (1975).

8. The full text of the statute was as follows:

And for the encouragement of master builders to undertake the building and finishing of houses within the said city, by securing to them a just and effectual remedy for their advances and earnings, *Be it enacted*, That for all sums due and owing, on written contracts, for the building of any house in the said city, or the brick work, or carpenters or joiners work thereon, the undertaker, or workmen, employed by the person for whose use the house shall be built, shall have a lien on the house and the ground on which the same is erected, as well for the materials found by him; provided the said written contract shall have been acknowledged before one of the commissioners, a justice of the peace, or an alderman of the corporation of Georgetown, and recorded in the office of the clerk for recording deeds herein created, within six calendar months from the time of acknowledgment as aforesaid; and if, within two years after the last of the work is done, he proceeds in equity, he shall have remedy as upon a mortgage, or if he proceeds at law within the same time, he may have execution against the house and land, in whose hands soever the same may be; but this remedy shall be considered as additional only, nor shall, as to the land, take place of any legal incumbrance made prior to the commencement of such claim.

1791 Md. Laws, Ch. 45, § 10.

9. See *Morris v. United States*, 174 U.S. 196, 344-46 (1899) (White, Peckham, JJ., dissenting).

10. *Id.* at 291 (Peckham, J., dissenting). See also Amicus brief at 4-6, *Barry Properties, Inc. v. The Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976).

developing the country. The first law to be passed was purely local, and applied to the still unbuilt City of Washington. It was felt to be important to have the city constructed quickly. The Commissioners appointed for this purpose held a meeting, September 8, 1791, and adopted a memorial Thomas Jefferson and James Madison were both members of this commission, and were present when the memorial was adopted. The reason for it was clearly stated in the document itself, which said: "your memorialists also conceive . . . that it would encourage master builders to contract for the erecting and finishing houses for certain prices, agreed on, if a lien was created by law for their just Claim on the house erected and the lot of ground on which it stood."¹¹

In 1838, a lien law very similar to the modern statute was enacted for Baltimore City,¹² and over the years the remedy was gradually modified and extended to the other jurisdictions within the state.¹³

Prior to the changes resulting from *Barry Properties* and the enactment of Senate Bill 998,¹⁴ mechanics' liens had functioned in approximately the same fashion for nearly two hundred years. Simply stated, upon compliance with the relevant statutory procedures, suppliers of labor and material used in the construction of a building could obtain a lien on the real property they had participated in improving. Three basic features made this remedy especially useful and effective. First, subcontractors were afforded recourse against the property even though they had not dealt directly with the owner and therefore could not be said to have had privity of contract with him.¹⁵ To enable an owner to protect himself

11. B. Farnam, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1880, 153 (1935). The "memorial" referred to in this quote appears in the Maryland Senate Journal, 1791 at page 11.

12. 1838 Md. Laws, Ch. 205.

13. See note 7 *supra*. The mechanics' lien statute in force at the time of the *Barry Properties* decision was a recodification of the 1957 statute. See 1974 Md. Laws, Ch. 12, § 2. The 1974 statute appears at MD. REAL PROP. CODE ANN. §§ 9-101 to 9-113 (1974) (amending MD. ANN. CODE art. 21, § 9 (1957)). Hereinafter citation to the 1974 provisions will be to § 9-xxx (former statute). The new mechanics' lien statute passed by the General Assembly in 1976, see notes 127 to 208 and accompanying text *infra*, appears at MD. REAL PROP. CODE ANN. §§ 9-101 to 9-113 (Cum. Supp. 1976). Hereinafter citation to the new statute will be by section number alone: § 9-xxx.

14. S.B. 998, the legislature's response to the *Barry Properties* decision, was signed into law on May 4, 1976. See note 215 *infra*.

15. The importance of this fact was recognized by the Court of Appeals when it observed in *Barry Properties*:

One of the key aspects of the lien law is that it creates a remedy against the property, thus effectively against the owner, for subcontractors who perform their contractual obligations but are not paid. In such situations, although the owner benefits by receiving materials or labor from the subcontractor, the subcontractor,

by withholding from a general contractor sums allegedly due to a subcontractor, subcontractors were required to notify owners of their intention to assert a lien claim within a specified time after the completion of the work or last delivery of materials.

Second, the traditional mechanics' lien remedy could be speedily implemented to secure unpaid sums due contractors and subcontractors. Prior to *Barry Properties*, the statute provided that every debt incurred in connection with the erection, repair, rebuilding or improvement of a building to the extent of one-fourth of its value¹⁶ was automatically a lien until after the expiration of 180 days after the work had been finished or materials furnished.¹⁷ This lien existed whether or not a claim was filed with the clerk of the court during that period. The procedure was summarized by the court in *Barry Properties*:

The statute further provides that if either a subcontractor (who gives the § 9-103(a) notice) or a general contractor has not been paid and desires to retain his mechanics' lien, he must within the 180 days prescribed by § 9-105(e) file a claim containing specified information concerning the claim . . . with the clerk of the circuit court of the county where the property is located, at which time the lien will be recorded on a special "mechanics' lien docket." Once filed with the clerk the lien subsists for one year from the date of its filing unless within that period the claimant commences a proceeding to enforce it, in which case the lien is "stayed until the conclusion of the proceeding."¹⁸

Immediately upon filing, the lien claim became an encumbrance of record and a cloud on title¹⁹ sufficient in many instances, given the economic realities, to force an owner to resolve the dispute quickly to clear title to his property. Although the old law allowed any person interested in the property subject to the lien to bring a proceeding in equity to compel the claimant to prove the validity of the lien,²⁰ no expedited procedure existed for such a proceeding, and it was dealt

not being in privity with the owner, cannot sue him in contract; in fact, aside from the statutory lien, subcontractors are remediless with respect to the property and the owner. While such subcontractor would still have a separate and distinct cause of action in contract against the party with whom they had contracted, § 9-109; see *Port City Constr. v. Adams & Douglass*, 260 Md. 585, 593, 273 A.2d 121 (1971), that party may have become insolvent or simply vanished.

277 Md. at 36 n.11, 353 A.2d at 234-35 n.11.

16. § 9-101(a) (former statute).

17. § 9-105(e) (former statute).

18. 277 Md. at 20, 353 A.2d at 226.

19. See notes 33 & 34 and accompanying text *infra*.

20. § 9-106 (former statute).

with in the ordinary course of administration of the court's trial calendar.

The third, and from a practical standpoint the most important aspect of the procedure as it existed prior to *Barry Properties*, was that a mechanics' lien, when finally enforced, related back to the first day of construction and thereby had "priority over any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building."²¹ This feature of the law afforded lien claimants an important measure of protection because the fear of the priority of a mechanics' lien effectively prevented a conveyance or encumbrance of the property after the commencement of construction. For this reason the lien prevented dissipation of the additional value of the property created by the claimant's work or materials.

THE COURT OF APPEALS' DECISION IN *Barry Properties*

Barry Properties, Inc. owned a parcel of ground in Owings Mills, Baltimore County, Maryland. In June 1973, Barry — the Owner — entered into a construction contract with Associated Engineers Corporation — the General Contractor — for the construction on Barry's parcel of a masonry office and warehouse building. Subsequently the General Contractor entered into a subcontract with the Fick Bros. Roofing Company — the Subcontractor — whereby Fick agreed to supply the materials and labor for the construction of the roof of the building. The Subcontractor satisfactorily performed its contract but did not receive the \$11,610 due under the contract. To secure this debt, and presumably to aid in its collection, the Subcontractor resorted to the mechanics' lien procedure.

In December, 1973, the Subcontractor submitted a timely ninety-day notification²² to the Owner of its intention to file a mechanics' lien, and, approximately one month later, the Subcontractor filed its mechanics' lien claim with the Clerk of the Circuit Court for Baltimore County. In March, 1974, the Subcontractor filed a Bill of Complaint to enforce the mechanics' lien against the Owner and the construction mortgagee for the project. The Owner moved to dismiss the Bill of Complaint on the ground, *inter alia*, that imposing a mechanics' lien, although permitted by the relevant Maryland statutes and rules,²³ constituted a deprivation of a significant

21. § 9-107(a) (former statute).

22. See § 9-103(a) (former statute).

23. See §§ 9-101 to 9-112; see also Md. R. P. BG70 to BG76 (1974) (amended 1976).

property interest without due process of law.²⁴ The Owner alleged that because the mechanics' lien had been filed, construction lenders refused to advance the undisbursed portion of the construction loan or to close the permanent loan for the project. Furthermore, the Owner alleged that the mechanics' lien claim made it impossible to obtain secondary financing because the Owner's equity in the project was unacceptable as collateral after the claim had been filed.

After a hearing, the Circuit Court for Baltimore County held that although the effects of the mechanics' lien on the project's financing caused "the Defendant [to suffer] a deprivation of property" such deprivation did not amount to a denial of due process within the meaning of the fifth and fourteenth amendments.²⁵ Judgment was entered on the Bill of Complaint for the Subcontractor against the Owner and for the Owner against the General Contractor on the third party claim which it had filed.

On appeal²⁶ the Court of Appeals affirmed the lower court's result, but it disagreed with the constitutional analysis. It held that certain portions of the mechanics' lien law were unconstitutional

24. The focus of *Barry Properties* was on the due process clause of the fourteenth amendment to the United States Constitution, which provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law" It should be noted that the court's decision was also based upon the similar provisions of Article 23 of the Maryland Declaration of Rights. Article 23 provides

[t]hat no man ought to be taken or imprisoned or disseized of this freehold, liberties, or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land.

Relating the two constitutional provisions, the Court of Appeals in *Barry Properties* stated:

[W]e initially observe that it has long been settled by the decisions of this Court that "these constitutional provisions have the same meaning and effect in reference to an execution of property, and that the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities [as to the proper interpretation of Article 23]. 272 Md. 143, 156, 321 A.2d 748 (1974); *Allied American Co. v. Comm'r*, 219 Md. 607, 615-16, 150 A.2d 421 (1959); 176 Md. 682, 686-687, 7 A.2d 176 (1939).

277 Md. at 22, 353 A.2d at 227. It should be noted, however, that Maryland courts do not necessarily follow the Supreme Court in the area of economic regulation. See *Maryland Bd. of Pharmacy v. Sav-A-Lot*, 270 Md. 103, 117-20, 311 A.2d 242, 250-51 (1973).

25. See Appellant's brief, at E8, *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976).

26. The owner appealed from the circuit court's determination of the validity of the lien claim and the appointment of a trustee to sell the property if the lien was not paid within 30 days. That order was appealable pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12-303(c)(5) (Cum. Supp. 1976). The appeal was taken to the Court of Special Appeals but certiorari was granted by the Court of Appeals while the case was still pending in the Court of Special Appeals pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12-201 (Cum. Supp. 1976).

because their application could result in a taking of property without due process. In order to understand fully this holding and its relationship to the new mechanics' lien statute it is essential to analyze the applicability and substance of "due process" as it relates to mechanics' liens.

*Applicability of "Due Process" Requirements to
Maryland Mechanics' Liens*

The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law. . . ." ²⁷ In the context of an alleged deprivation of property, due process has generally been held to require notice and an opportunity to be heard prior to any taking. ²⁸ Before a court considers whether a challenged procedure meets the requisites of due process, however, it must first conclude that the procedure results in "depriv[ation] . . . of . . . property." ²⁹

In recent years mechanics' liens have come under increased judicial scrutiny, yet their constitutionality has generally been upheld. ³⁰ The initial question faced in these cases, including *Barry Properties*, was whether imposition of a mechanics' lien constitutes a

27. U.S. CONST. amend. XIV, § 1.

28. See notes 43 to 83 and accompanying text *infra*.

29. U.S. CONST. amend. XIV, § 1. The procedural safeguards required by due process are not mandated unless the procedures complained of constitute a deprivation of liberty or property. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972). A party attacking a procedure on the basis of the due process clause of the fourteenth amendment must also show that the procedure involves state action. The Court of Appeals had no trouble finding the requisite state action in the mechanics' lien context: "We think it clear that mechanics' liens involve state action since they are created, regulated and enforced by the State." 277 Md. at 22, 353 A.2d at 227. See *Caesar v. Kiser*, 387 F. Supp. 645, 647-48 (M.D.N.C. 1975); *Connolly Development Inc. v. Superior Court*, 116 Cal. Rptr. 191, 194-95 (Ct. App. 5th Dist. 1974) (appeal pending before Supreme Court of California). It appears that the Supreme Court would agree, considering that it has voided on due process grounds state garnishment and replevin statutes. To have done so the Court must have concluded that there was sufficient state involvement with those prejudgment creditor remedies — which were also created, regulated and enforced by the state — to activate the protections of the fourteenth amendment. 277 Md. at 22-23, 353 A.2d at 227. Indeed, the issue of state action appears to have been raised very infrequently in the reported mechanics' lien cases and no court has given the question more than perfunctory treatment. Since the remedy is purely statutory in origin and its enforcement depends on the recording systems and the courts, the requisite level of state involvement seems clear.

30. In *In re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976) a United States District Court Judge upheld the Virginia mechanics' lien statute against a constitutional attack similar to that maintained in *Barry Properties*. This decision was based primarily on the Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974), see notes 104 to 130 and accompanying text *infra*, and the Supreme Court's opinion in

significant taking of property sufficient to invoke the due process clause. Traditionally the takings of property requiring due process protection involved deprivation of a possessory interest in property. In the context of a mechanics' lien, however, the owner's actual physical possession of the property is not interrupted until a purchaser acquires title through a foreclosure sale pursuant to an enforcement proceeding. Thus, the threshold issue in *Barry Properties* was whether the effects of a Maryland mechanics' lien interfered with the owner's use and enjoyment of the property to such a degree that they amounted to a taking. The Court of Appeals concluded that a mechanics' lien did amount to a taking of a significant property interest, basing its decision on several factors.

First, the court observed that under the applicable sections of the mechanics' lien statute³¹ a "subsisting lien" arises as soon as materials are supplied or work is performed,³² constituting a "cloud on the property owner's title"³³ and, if timely filed, "an encumbrance of record."³⁴ The court went on to state:

Although possession will not be wrested from the owner until a purchaser acquired title through a foreclosure sale and the

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). The Virginia District Court was aware of the contrary holding in *Barry Properties*:

The Court is mindful that that [sic] the Maryland Court of Appeals has declared its mechanic's [sic] lien statute unconstitutional on due process grounds. [Citing *Barry Properties*]. Disagreeing with the Federal court decisions, the Maryland court concluded that the property owner "no longer has unfettered title" and therefore, the lien is a "significant property interest" requiring the requisites of due process — notice and a hearing.

The Court believes the wiser course is to follow the decisions of the other District Courts. The Court, therefore, holds that the Virginia mechanic's [sic] lien statute does not violate the due process clause of the Fourteenth Amendment. 412 F. Supp. at 671. See *Brook Hollow Assocs. v. J.E. Greene, Inc.*, 389 F. Supp. 1322 (D. Conn. 1975); *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974); *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.* 417 U.S. 901 (1974); *Cook v. Carlson*, 364 F. Supp. 24 (D.S.D. 1973). See also *In re The Oronoka*, 393 F. Supp. 1311 (D. Me. 1975) (Maine prejudgment real estate attachment procedure).

31. § 9-101(a) (former statute) provided that [e]very building erected and every building repaired, rebuilt, or improved, to the extent of one fourth of its value, is subject to a lien for the payment of all debts without regard to the amount contracted for work done for or about the building, and for materials furnished for or about the building. . . ."

See also § 9-105(e) (former statute) which provided that "every debt is a lien until after the expiration of 180 days after the work has been finished or the materials furnished, although no claim has been filed for them, but no longer, unless a claim is filed at or before the expiration of that period."

32. In support of this proposition the Court of Appeals cited *Treusch v. Shryock*, 51 Md. 162, 169-170, 173 (1879); *Sodini v. Winter*, 32 Md. 130, 133 (1870); *Franklin Ins. Co. v. Coates*, 14 Md. 285, 296-97 (1859). 277 Md. at 19, 353 A.2d at 226.

33. 277 Md. at 23, 353 A.2d at 228.

34. *Id.* at n.6, 353 A.2d at 228 n.6.

owner can still legally alienate or further encumber the property until that time, in reality, since he no longer has unfettered title, not only will it be extremely difficult for him to do so but additionally his equity will be diminished to the extent of the lien.³⁵

To illustrate its point, the court noted that the filing of the liens in *Barry Properties* had caused the construction lender to withhold disbursement of the balance of the construction loan and had precluded the owner from closing a permanent mortgage or obtaining a second mortgage on the property's equity.³⁶ Second, the court rejected the argument, articulated in two cases from other jurisdictions,³⁷ that "while the value of the property may be diminished by the amount of the lien, the improvements, at least theoretically, have increased the value of the property by the amount of the liens, thereby minimizing the harm to the owner . . ." ³⁸ The Court of Appeals pointed out that such an argument "assumes an equality of value, that the procedural prerequisites were or will be met, and that the work or materials purportedly furnished would legally entitle one to a lien."³⁹ In short, the court concluded that as a practical matter⁴⁰ "an owner is deprived of a significant property interest when a lien is imposed and thus, the limitations of due process are applicable."⁴¹

The Requirements of "Due Process" in the Mechanics' Lien Context

Having reached that conclusion, the Court of Appeals' next task in *Barry Properties* was to define the due process standards and apply them to the mechanics' lien procedure. In that analysis the court was guided primarily by a series of four Supreme Court decisions dealing with a variety of state prejudgment creditors' remedies.⁴²

In 1969, the Supreme Court decided *Sniadach v. Family Finance Corp.*,⁴³ the first of this line of cases. The plaintiff, a Wisconsin

35. *Id.* at 23-24, 353 A.2d at 228.

36. *Id.* at 24, 353 A.2d at 228.

37. *Cook v. Carlson*, 364 F. Supp. 24, 27 (D.S.D. 1973); *Connolly Dev., Inc. v. Superior Court*, 41 Cal. App. 3d 543, 116 Cal. Rptr. 191, 197 (1974).

38. *Cook v. Carlson*, 364 F. Supp. 24, 27 (D.S.D. 1973).

39. 277 Md. at 24, 353 A.2d at 228.

40. See text accompanying notes 29 to 36 *supra*.

41. 277 Md. at 24, 353 A.2d at 228.

42. *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.* 395 U.S. 337 (1969).

43. 395 U.S. 337 (1969).

creditor, instituted proceedings against a debtor and her employer, as garnishee, under that state's garnishment statute. The complaint and summons were served on the defendant wage-earner and the garnishee on the same day,⁴⁴ but the defendant nevertheless claimed that the statute was defective because it did not provide for notice and opportunity to be heard prior to the seizure of the wages. The summons was issued by the clerk of the court upon request of the plaintiff's attorney, and, upon service of the summons, the wages were effectively frozen. No procedure existed whereby the defendant could obtain release of the wages short of prevailing on the merits when, if ever, the main suit was tried.⁴⁵ Speaking for the majority, Mr. Justice Douglas had little trouble in striking down the Wisconsin statute:

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process.⁴⁶

The opinion did indicate that if there were extraordinary circumstances,⁴⁷ a summary procedure might be constitutional. The facts before the Court, however, disclosed no special state or creditor interest sufficient to justify bypassing the safeguards, nor was the Wisconsin statute narrowly drawn to meet a limited or special situation.

Three years later the Supreme Court decided *Fuentes v. Shevin*,⁴⁸ holding the Florida and Pennsylvania replevin statutes unconstitutional because they permitted summary seizure of personal property without notice or meaningful opportunity to be heard prior to the seizure. The statute provided that writs ordering state

44. The Court noted that the Wisconsin statute merely required service on the defendant within ten days after service on the garnishee. See 395 U.S. at 338.

45. The Wisconsin statute provided that the wage-earner was only entitled to a subsistence allowance equal to the lesser of fifty percent of the wages or salary due or \$25.00 for an individual without dependants or \$40.00 for an individual with dependants. The balance of the wages or salary due, apparently without regard to the length of the period involved, was to be subject to the garnishment. See 395 U.S. at 338 n.1.

46. 395 U.S. at 341-42 (footnote omitted).

47. The Court said: "Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey v. Mallonee*, 332 U.S. 245, 253-54; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600; *Ownbey v. Morgan*, 256 U.S. 94, 110-112; *Coffin Bros. v. Bennett*, 277 U.S. 29, 31." 395 U.S. at 339. See also note 53 and accompanying text *infra*.

48. 407 U.S. 67 (1972).

agents to seize a person's possessions could issue simply upon the ex parte application of any person who claimed a right to them and posted a security bond. Neither statute provided for notice to be given to the possessor of the property, nor was the possessor given any opportunity to challenge the seizure at any kind of prior hearing.⁴⁹

In an extension of *Sniadach* beyond the wage-earner situation, the Court emphasized the proper timing of the notice and hearing necessary to satisfy due process:

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." . . . The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.⁵⁰

The *Fuentes* Court resolved this issue in seemingly absolute terms, stating that procedural due process requires notice and an opportunity for an adversary-type hearing before a person can be even temporarily deprived of any possessory interest in personality.⁵¹ Although as in *Sniadach* the Supreme Court did recognize that there might be "'extraordinary situations' that justify postponing notice and opportunity for a hearing,"⁵² it was clear that the *Fuentes* majority considered these exceptions to be "truly unusual."⁵³

49. *Id.* at 70.

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

51. *Id.* at 80-87, 90.

52. *Id.* at 90.

53. *Id.* Examples of such unusual situations cited by the Court in *Fuentes* were: *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent plaintiffs in divorce proceedings); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928) (seizure to protect the public against a bank failure); *Ownbey v. Morgan*, 256 U.S. 94 (1921) (attachment to secure jurisdiction of state court).

The Court of Appeals of Maryland recognized the "extraordinary situation" exception and cited the following examples: *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure of yacht transporting marijuana); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (misbranded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (bank failure); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food). It should be borne in mind, however, that each of these "extraordinary situations" involves an outright seizure of property or an otherwise more direct disruption of property rights than the type of "interference" caused by the mechanics' lien law.

With *Mitchell v. W.T. Grant*,⁵⁴ decided in 1974, however, the Supreme Court retreated from the apparently absolute requirements of prior notice and opportunity for hearing enunciated in *Sniadach* and *Fuentes*. In *Mitchell* the Court considered the constitutionality of the Louisiana "sequestration" statute. W.T. Grant had filed suit against Mitchell for the allegedly unpaid balance of the purchase price of certain items of personal property purchased from Grant. Simultaneous with the filing of the suit, Grant's credit manager also filed an affidavit swearing to the truth of the facts alleged in the complaint and asserting that Grant had reason to believe Mitchell would "encumber, alienate or otherwise dispose of the merchandise described in the . . . petition during the pendency of [the] proceedings and that a writ of sequestration [was] necessary . . ." ⁵⁵ Based upon the petition and affidavit, and without prior notice to Mitchell or affording him opportunity for hearing, the judge of the court in which the petition and affidavit were filed then signed an order issuing a writ of sequestration. After the plaintiff furnished a bond, the constable was directed to sequester the personal property described in the petition and take it into his possession. The writ of sequestration, along with a citation, was issued to Mitchell directing him to file a pleading or appear in the court within five days.⁵⁶

The constitutionality of this procedure was attacked on the ground that it lacked the prior notice and opportunity to be heard ostensibly mandated by *Sniadach* and *Fuentes*. Nevertheless, the Louisiana Supreme Court upheld the procedure, and the Supreme Court affirmed.⁵⁷ The Court advanced two basic reasons for its decision. First, by virtue of a statutory vendors' lien, the seller had a real interest in the property.

Plainly enough this is not a case where the property sequestered by the Court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. *Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.*⁵⁸

54. 416 U.S. 600 (1974).

55. *Id.* at 602.

56. *Id.*

57. *Id.* at 620.

58. *Id.* at 604 (emphasis added).

Second, the statute in question contained a wide range of procedural safeguards: 1) The nature of the claim and the grounds relied upon for the issuance of the Writ of Sequestration were clear from the face of a verified petition or affidavit;⁵⁹ 2) The Writ of Sequestration was issued only upon the authorization of a judge, who presumably reviewed the petition and affidavit;⁶⁰ 3) The creditor seeking the writ was required to post bond to protect the alleged debtor in the event the sequestration proved to have been improvidently granted;⁶¹ 4) Although the writ could be obtained *ex parte*, with no prior notice to the debtor, the debtor could immediately seek dissolution of the writ by requiring the creditor to prove the existence of the debt, lien, and delinquency;⁶² 5) Whether or not the debtor sought a prompt hearing to dissolve the sequestration he was able to obtain a release of the property by filing a bond equal to five-fourths of the lesser of the value of the property or the amount of the claim.⁶³

Aware perhaps that the holding of *Mitchell* might be viewed as a retreat⁶⁴ from the earlier opinions of *Sniadach* and *Fuentes*, the

59. LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

60. The *Mitchell* case arose in Orleans Parish, Louisiana. Pursuant to LA. CODE CIV. PRO. ANN. art. 281 (West 1961) only a judge may issue a writ of sequestration in Orleans Parish. Articles 282 and 283, however, provide that a court clerk could issue such writs in other parishes. The Court observed that "[t]he validity of procedures obtaining in areas outside Orleans Parish is not at issue." 416 U.S. at 606 n.5.

61. LA. CODE CIV. PRO. ANN. art. 3574 (West 1961).

62. *Id.* art. 3506. In the event the creditor was unable to "prove the grounds upon which the writ was issued" the vendee could recover the property, and damages for the period of deprivation of use, including compensation for injury to social standing, humiliation, and mortification. See Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedures*, 38 TUL. L. REV. 1, 21-22 (1963).

63. LA. CODE CIV. PRO. ANN. arts. 3507, 3508 (West 1961).

64. At least four Justices concluded that *Mitchell* overruled *Fuentes*. In his concurring opinion, Mr. Justice Powell observed that "[t]he Court's decision today withdraws significantly from the full reach of [the] principle [of prior adversary hearing], and to this extent I think it fair to say that the *Fuentes* opinion is overruled." 416 U.S. at 623 (Powell, J. concurring). Mr. Justice Brennan was of the opinion that *Fuentes* mandated a reversal of the decision of the Supreme Court of Louisiana. See 416 U.S. at 636. Mr. Justice Stewart observed in his dissent, joined by Justices Douglas and Marshall, that

[t]he Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis*.

416 U.S. at 635 (Stewart, J., dissenting). See Note, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause — A Re-examination After Mitchell and North Georgia*, 55 B.U. L. REV. 263, 277-279 (1975). At least one commentator has suggested that the change in the Court's position resulted directly from a change in Court personnel. See Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUT. L. REV. 541, 561 (1975).

Court expressly addressed the interrelationship between *Mitchell* and previous cases raising similar issues. With respect to the pre-*Sniadach* cases, the Court observed that "they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post termination hearing is provided."⁶⁵ *Sniadach* was distinguished on the ground that the holding in that case was a narrow one, "involv[ing] the prejudgment garnishment of wages — 'a specialized type of property presenting distinct problems in our economic system.'"⁶⁶ As to *Fuentes*, the majority of the Court merely stated that the Louisiana statute under consideration in *Mitchell* contained procedural safeguards lacking in either the Pennsylvania or Florida procedures.

Because carried out without notice or opportunity for hearing and without judicial participation, [the *Fuentes*] seizure was held violative of the Due Process Clause But we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case.⁶⁷

The Supreme Court returned to the subject of prejudgment creditor remedies with *North Georgia Finishing, Inc. v. Di-Chem Inc.*,⁶⁸ the last of the four Supreme Court cases dealing with this area. In *North Georgia* the Court considered the constitutionality of Georgia's garnishment statute, which under certain circumstances allowed the plaintiff in a pending suit effectively to freeze certain of the defendant's assets held by a third party. The only procedural prerequisites were that: the plaintiff or its attorney was required to file an affidavit "stating the amount claimed to be due in such action . . . and that [the affiant] has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue,"⁶⁹ the plaintiff was required to file a bond in double the amount claimed,⁷⁰ and the defendant could dissolve the garnishment by filing its own bond.⁷¹

65. 416 U.S. at 611.

66. *Id.* at 614.

67. *Id.* at 615.

68. 419 U.S. 601 (1975).

69. GA. CODE ANN. § 46-102 (1974).

70. *Id.*

71. GA. CODE ANN. § 46-401 (1974).

The Georgia Supreme Court sustained the validity of the garnishment statute,⁷² basing its decision in part on a belief that *Sniadach* merely created an exception in favor of wage-earners "to the general rule of legality of garnishment statutes."⁷³ In reversing this decision, the Supreme Court observed that the Georgia court had apparently overlooked *Fuentes* and, after a brief review of the factual basis for its decision in *Fuentes*, the Court stated:

The Georgia statute is vulnerable for the same reasons. Here, a bank account, surely a form of property, was impounded and absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or any opportunity for an *early* hearing and *without participation by a judicial officer*.⁷⁴

The Court added that the statute was not saved by *Mitchell* because "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute."⁷⁵

Despite the intimation of the majority in *North Georgia* that its opinion relied primarily on *Fuentes*,⁷⁶ the final outcome was actually governed by the principles announced in *Mitchell*.⁷⁷ As in *Sniadach*, *Fuentes*, and *Mitchell*, the taking in *North Georgia* occurred before the owner was given notice or an opportunity to be heard. The Court held the Georgia statute unconstitutional because of the lack of prior

72. 231 Ga. 260, 201 S.E.2d 321 (1973). In its complaint the plaintiff alleged that defendant owed \$51,279.17 for goods sold and delivered. Simultaneously with the filing of the complaint, but prior to its service, plaintiff filed the requisite affidavit and bond, naming the First National Bank of Dalton as garnishee. The summons of garnishment was issued to the bank on the same day.

73. *Id.* at 264, 201 S.E.2d at 323.

74. 419 U.S. at 606 (emphasis added). The choice of the phrase "early hearing" could be a further indication that *North Georgia* is really an application of *Mitchell*, see note 77 and accompanying text *infra*, since *Fuentes* spoke in terms of a "prior" hearing. See 401 U.S. at 96. In addition, the phrase "without participation by a judicial officer" undoubtedly refers to the judicial rather than clerical supervision of the issuance of the writ of sequestration, heavily emphasized in *Mitchell*.

75. 419 U.S. at 607.

76. *Id.* at 605-06.

77. See note 74 and accompanying text *supra*. Confusion on this point is certainly understandable. Nevertheless, four Justices either wrote or joined in separate opinions relating to the continued vitality of *Fuentes*. In his concurring opinion, Mr. Justice Stewart observed that "[i]t is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated. Cf. S. Clemens cable from Europe to the Associated Press, quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1012)." 419 U.S. at 608 (Stewart, J., concurring). Mr. Justice Powell, on the other hand, joined in the judgment in *North Georgia* but could not concur in the opinion: "I think it sweeps more broadly than is necessary and appears to resuscitate *Fuentes v. Shevin* . . ." 419 U.S. at 609 (Powell, J., concurring). In his dissent, Mr. Justice Blackmun, joined by Mr. Justice Rehnquist, observed that *Fuentes* had been decided

notice and hearing *and* because the statute did not contain the saving procedural safeguards of *Mitchell*. This reasoning affirms an important aspect of *Mitchell*: where sufficient procedural safeguards are incorporated into a creditor's prejudgment remedy, prior notice and opportunity for a hearing are not mandatory.

These cases were thoroughly analyzed and considered in *Barry Properties*, and the requirements of due process were described by the Court of Appeals as follows:

What we glean from *Sniadach*, *Fuentes*, *Mitchell* and *North Georgia Finishing* is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in *Fuentes*, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then, although this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized.⁷⁸

In other words, since the filing of a mechanics' lien claim deprived a property owner of a significant property interest, due process of law would require either prior notice and opportunity to be heard, or a statutory procedure containing the procedural safeguards described in *Mitchell*.

The pre-*Barry Properties* mechanics' lien laws provided neither prior notice⁷⁹ nor prior opportunity for a hearing, nor did the

by a vote of 4 to 3, *see* note 64 *supra*, and stated that had the Court entertained reargument of *Fuentes* before a full court:

whatever its decision might have been, I venture to suggest that we would not be immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case decided in a manner that leaves counsel and the commercial communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D.C. This Court surely fails in its intended purpose when confusing results of this kind are forthcoming and are imposed upon those who owe and those who lend.

419 U.S. at 619 (Blackmun, J., dissenting).

78. 277 Md. at 30, 353 A.2d at 231.

79. Where the contract for furnishing work or materials was with "any person except the owner of the land" the person doing the work or furnishing the materials was entitled to a lien only if he gave written notice to the owner of his intent to claim a lien within 90 days after the completion of his work or furnishing of materials. § 9-103 (former statute). The claim of lien could be filed prior to the giving of notice under that section, *see* *Accrocco v. Fort Washington Lumber Co.*, 255 Md. 682, 259 A.2d 60 (1969). Where the contract was made directly with the owner, no notice was required at all.

procedure include any of the significant *Mitchell* procedural safeguards. There was no requirement of a sworn affidavit setting forth the basis for the lien,⁸⁰ no requirement of a bond to protect the debtor, no scrutiny by any judicial officer, and no real opportunity for a prompt post-seizure hearing.⁸¹ Thus, because the factual contexts of the imposition of mechanics' liens did not appear to come within the "extraordinary circumstances"⁸² exception, the court concluded that "[the mechanics' lien law] is unconstitutional to the extent that it permits a prejudgment seizure."⁸³

The Precise Holding of Barry Properties

The exact holding of *Barry Properties* has been the subject of some confusion and uncertainty; it is probably much narrower than most people believe. To place this holding in focus, it may be helpful at the outset to review the steps in the court's analysis of the case.

Because the priority of a mechanics' lien, once determined, related back to the commencement of construction, the mere recording⁸⁴ of a lien under the old law immediately restricted the owner's ability to sell or mortgage his property. This interference with the incidents of ownership of real property was not minimal, but instead amounted to a "taking" of property. The procedural safeguards attendant to the recording of a lien were insufficient to afford the owner adequate protection, and a substantial period of

80. §9-105 (former statute) merely required that the claim be filed in the office of the clerk of the Circuit Court of the County and that it should set forth:

- (1) The names of the claimant, the owner or reputed owner of the building, and if the contract is made by the claimant with the contractor, or builder, the names of the contractor, architect or builder;
- (2) The amount or sum claimed to be due, the nature or kind of work or the kind and amount of materials furnished, and the time when the materials were furnished or the work done; and
- (3) The locality of the building and a description adequate to identify the building.

81. On this point the *Barry Properties* court observed:

While a property owner "may bring proceedings in equity to compel the claimant to prove the validity of [a lien that has been claimed] or have it declared void," Real Property Article, §9-106; see Rule BG75a, and might be able to seek a declaratory judgment that the lien is invalid, see Courts and Judicial Proceedings Article §§3-401 to -415, he is not thereby entitled to an immediate hearing, as contemplated by the two Supreme Court cases, but only to a hearing in the ordinary course of administering the court's trial assignment calendar.

277 Md. at 32, 353 A.2d at 232.

82. See notes 47 and 53 and accompanying text *supra*.

83. 277 Md. at 32, 353 A.2d at 233.

84. Although filing the lien claim was viewed as the event that caused the taking, the lien actually arose at the moment work commenced or materials were furnished. See §9-105(e) (former statute).

time could, and often did, elapse between the recording of the lien and any notice to the owner or meaningful opportunity to be heard. The taking therefore occurred without due process of law. Nevertheless, the court apparently believed that the situation should, if at all possible, be remedied without striking down the entire mechanics' lien statute.

Given the court's desire to preserve some type of mechanics' lien yet to divest the statute of those provisions resulting in a taking of property prior to a meaningful opportunity for the owner to contest the claim, the outcome of *Barry Properties* was inevitable. The court accomplished both objectives by invalidating two sections of the existing statute. First it "excis[ed] that portion of the statute which purports to create a lien from the time work is performed or materials furnished to the time a lien is established by judicial determination in a proceeding sufficient with respect to due process."⁸⁵ Second, the court stated that

[i]t follows that [the relation back provision] to the extent that it grants mechanics' lien "priority over any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building" but prior to the time the lien is established by a judicial determination is also null and void since to hold otherwise would permit contractors to seize with their left hand what we have said they cannot grasp with their right.⁸⁶

Thus, the statute was henceforth to be read without the provisions which recognized the existence of a lien immediately upon the claimant's supplying of labor or material and, following a judicial determination, which allowed the lien to have priority from the commencement of the building. Although the legislature and most readers of *Barry Properties* have apparently assumed that this excision of the relation back feature extended to all future mechanics' lien statutes, the court's actual holding is much narrower: "We therefore hold that *under the current statute* there can be no existing lien on property until and unless the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding providing notice and a hearing (*i.e.*, a declaratory judgment action)."⁸⁷

85. 277 Md. at 37, 353 A.2d at 235.

86. *Id.* 353 A.2d at 235.

87. *Id.* (emphasis added). 353 A.2d at 235. By "existing lien" the court presumably was referring to two aspects of the prior law, both integral parts of the overall concept of relation back. First, § 9-105(e) (former statute) provided that "[e]very debt is a lien until after the expiration of 180 days after the work has been finished or the materials

The court did not hold that relation back of a mechanics' lien was unconstitutional *per se*. It merely held that such a procedure was defective in the context of the statute before it. That a lien could constitutionally relate back is expressly recognized by the Court of Appeals in *Barry Properties*, for, in a footnote to its holding, the court stated:

We do not here hold that the Legislature could not enact a mechanics' lien law permitting general contractors and subcontractors to obtain liens prior to owners being given notice and an opportunity for a hearing if the statute includes safeguards such as those discussed in *Mitchell v. W.T. Grant Co.* . . . and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* Rather, in this case, we only hold that since the *present law* does not include such safeguards no lien can exist under it until after owners are provided with notice and chance for a hearing.⁸⁸

This language clearly implies that a statute containing the procedural safeguards described in *Mitchell* could constitutionally provide for a mechanics' lien that would exist from the outset of construction and, for purposes of priority, relate back to the commencement of the building.⁸⁹

Such a result finds support in at least two of the previously discussed Supreme Court cases. In *Mitchell* the Supreme Court expressly approved a statute providing the claimant with a lien which related back to an earlier time. The decision to uphold that statute was based on substantive and procedural grounds. In that case the seller had a lien for the unpaid purchase price of certain personal property. Pursuant to the applicable Louisiana statute, the claimant's substantive lien rights arose at the moment of the sale on credit of the personal property and continued in force until either the debt was paid, the lien was enforced, or the seller was otherwise unable to assert its lien.⁹⁰ If enforced, the lien related back to the date of the sale, thus having priority over intervening creditors. That

furnished, although no claim has been filed for them, but no longer, unless a claim is filed at or before the expiration of the period." Thus the lien arose immediately and continued until it expired or a claim was filed. Second, § 9-107(b) (former statute) provided that "[a] mechanics' lien has priority over any mortgage, judgment, lien or encumbrance attaching to the building or ground subsequent to the commencement of the building." Both of these provisions were stricken by the court.

88. 277 Md. at 37 n.12, 353 A.2d at 235 n.12 (emphasis added).

89. By saying that in the absence of procedural safeguards a lien cannot "exist" until after the owners receive notice and an opportunity for a hearing, the court strongly implied that if such safeguards are present a lien can "exist" prior to such notice and hearing. For an analysis of what the court meant when it used the term "exist" in this context, see note 87 *supra*.

90. See LA. CODE CIV. PRO. ANN. arts. 3571, 3327 & 3328 (West 1961).

substantive state law granted the seller an interest in the property was an important consideration in the Supreme Court's decision to uphold the Louisiana procedure.⁹¹ Under the old mechanics' lien law, a lien arose at the moment work or materials were furnished for or about a building and continued until the debt was paid, the lien was enforced, or it expired.⁹² Upon enforcement it related back to the commencement of construction. Clearly there was nothing unconstitutional about the substantive lien rights described in *Mitchell* because the Supreme Court expressly relied on the claimant's interest in the property provided by the lien. A Maryland mechanics' lien claimant's interest in the property under the old law is no different.⁹³

The basic constitutional attack in both *Mitchell* and *Barry Properties* was on the procedure for enforcing the lien, not the existence of the lien itself. In neither the Louisiana nor Maryland procedures was the debtor given notice or an opportunity for a hearing before the taking. The Supreme Court approved the Louisiana procedure because it determined that the statute contained adequate procedural safeguards: the claim was required to be clearly stated in a verified petition or affidavit, a judge authorized the seizure, the creditor posted bond, a prompt post-seizure hearing was available, and the debtor could obtain release of his property by posting bond.

Although the Maryland law contained none of these safeguards, they can be easily incorporated into a mechanics' lien procedure. In both situations, as described by the Supreme Court in *Mitchell*,

the existence of the debt, the lien, and the delinquency . . . are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof.⁹⁴

Thus, *Mitchell* would seem to support the proposition that if adequate safeguards were incorporated into a mechanics' lien statute, a lien could constitutionally arise upon the commencement of work or supplying of materials and, upon enforcement, relate back

91. See 416 U.S. 600, 616-18 (1974).

92. See § 9-105(e) (former statute).

93. A sale of the property by the owner obviously could totally deprive the claimant of his security. Mortgaging of the property may well have the same effect since an encumbrance of the property to the extent of its full value, if superior to the mechanics' lien, would leave no equity with which to satisfy the lien. This is especially unfair in view of the fact that the mechanic's material and labor may be a significant factor in creating or enhancing the property's value.

94. 416 U.S. at 609.

to its inception. Further support for the proposition that the relation back concept is not itself unconstitutional can be found in the Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*⁹⁵ There, the applicable statute provided that the lien obtained pursuant to the Arizona procedure was prior to all "liens, mortgages, or other encumbrances upon the property attaching subsequent to the time the labor was commenced or the materials commenced to be furnished."⁹⁶ In this respect the statute was identical to the old Maryland law. Regardless of what view is taken of the precedential effect of the summary affirmance,⁹⁷ the fact remains that the Supreme Court has approved a procedure containing a relation back provision. If the summary affirmance was based on the reasoning of the lower court that the taking effected by filing a mechanics' lien was not so substantial as to amount to a "taking," it is clear that the possibility that the lien would relate back was an integral part of the effect on the owner. If the affirmance was instead an unstated determination by the Supreme Court that the Arizona statute contained sufficient procedural safeguards, the inclusion of the relation back provision in that statute obviously did not detract from its constitutionality.

The Court of Appeals' holding with respect to the constitutionality of the mechanics' liens law is, of course, the most important aspect of *Barry Properties*. Nevertheless, the application of the holding to the parties to the litigation is interesting and, at first glance, puzzling. Although the Court of Appeals held portions of the statute unconstitutional, it nevertheless upheld the Subcontractor's lien.⁹⁸ In his dissent from this result, but not the constitutional analysis, Judge Levine termed this holding the majority's "own brand of wizardry."⁹⁹ Despite the apparent inconsistency, however, it is hard to see how the majority could have reached a different result. To cure the constitutional defects in the law, the court held that the provision which granted a lien before an owner received notice and an opportunity for a hearing on the claim were void *ab initio*. Since a "suit to enforce the lien"¹⁰⁰ was the only proceeding

95. 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974). For a general discussion of this case, see notes 106 to 110 and accompanying text *supra*. For a discussion of the Supreme Court's summary affirmance, see notes 115 to 130 and accompanying text *infra*.

96. ARIZ. REV. STAT. § 33-992 (West 1974).

97. See notes 127 to 130 and accompanying text *infra*.

98. 277 Md. at 38-39, 353 A.2d at 236.

99. 277 at 30, 353 A.2d at 237.

100. § 9-106 (former statute). It should be noted that this section also provided that the owner could institute an action to require the claimant to prove the validity of its lien.

instituted by the claimant under the old law that satisfied these due process requirements, the practical result of *Barry Properties* was that no mechanics' liens would be effective until a determination in such an action.¹⁰¹ *Barry Properties* produced a seemingly anomalous result because the Subcontractor's lien had been judicially determined in a suit to enforce its lien. The Owner was duly served, a hearing was held and the trial judge determined that the lien should attach. No objection was made to the due process sufficiency of that proceeding.¹⁰² Thus the court determined that even by the due process standards of *Barry Properties*, the Owner had received adequate notice and an opportunity for a hearing. However, the lien would date only from the lower court's final determination. Although the Court of Appeals recognized that the Owner had been deprived of its property prior to that determination, the question of redress for that deprivation was not an issue on appeal. If the court had held that the Subcontractor were not entitled to a lien in this case, the door would have been opened for an attack on all liens finally determined prior to the date of *Barry Properties*.¹⁰³ Although as a matter of policy it is generally wise to provide an incentive for litigants to challenge potentially unconstitutional statutes, the court's resolution of this case necessarily resulted in a victory for the appellant on the fundamental constitutional issues but a defeat in practical terms.

*Should the Constitutional Issues Have Been Decided
in Barry Properties*

While the Court of Appeals' substantive analysis of the due process question appears correct, it can be argued that that issue

101. The Court of Appeals did not address the interrelationship between the doctrine of *lis pendens* and mechanics' lien claims. Under the doctrine of *lis pendens*, one who takes title to property while on actual or constructive notice of pending litigation involving the property takes subject to the outcome of the suit. See, e.g., *Corey v. Carback*, 201 Md. 389, 94 A.2d 629 (1953); *Sanders v. McDonald*, 63 Md. 503 (1885); *Feigley v. Feigley*, 7 Md. 537 (1855). To hold that a petition to enforce a lien constitutes *lis pendens* would be to give some effect to the lien claim prior to any judicial determination. While permitted on constitutional grounds, see notes 87 to 97 and accompanying text, *supra*, this result would run counter to the express priority provisions of the statute and rules, especially in light of the limited scope of the 1977 amendment. See note 189 and accompanying text, *infra*. For this reason it is likely that the Court of Appeals would not allow the application of the doctrine in the mechanics' lien context. A closer question might arise with respect to a suit against an owner or general contractor where the property involved was clearly described in the declaration.

102. 277 Md. at 38, 353 A.2d at 235-36.

103. For a general discussion of the retroactivity of *Barry Properties*, see notes 222 to 240 and accompanying text *infra*.

should not have been reached. The Court of Appeals concluded that the imposition of a mechanics' lien constituted a taking of a significant property interest. But other courts have reached the opposite conclusion on this threshold question. For example, in *Spielman-Fond, Inc. v. Hanson's Inc.*¹⁰⁴ and *Cook v. Carlson*,¹⁰⁵ two United States District Courts held that the impairment of the alienability of real property caused by mechanics' lien proceedings in Arizona and South Dakota, respectively, was not a deprivation of property requiring the procedural safeguards of prior notice and opportunity to be heard. The issues in those cases were virtually identical to *Barry Properties*. In *Spielman-Fond* the plaintiff claimed that because the lien clouded its title to the real estate and severely restricted the free alienation of the property, the operation of the Arizona lien statute amounted to a taking of a significant property interest. A three judge panel distinguished all of the "deprivation of property" cases relied upon by the plaintiff,¹⁰⁶ including the four Supreme Court cases dealing with due process in the context of various prejudgment creditors' remedies.¹⁰⁷ The court reasoned that the takings described in each case were either actual physical takings¹⁰⁸ or "direct and total prohibitions on the right to alienate."¹⁰⁹ By contrast the limited restraint on alienation resulting from the imposing of a mechanics' lien was not a "taking" for fourteenth amendment purposes.

104. 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

105. 364 F. Supp. 24 (D.S.D. 1973).

106. See 379 F. Supp. at 999.

107. See note 2 *supra*.

108. The *Spielman-Fond* court elaborated:

In *Sniadach* [v. Family Finance Corp., 395 U.S. 337 (1969)] there was an actual taking of wages from the party. The effect of the Wisconsin garnishment statute was to freeze the wages in the employer. Thus, funds to which the employee was entitled were kept from him. He was deprived of the actual possession and use of his wages. In *Goldberg* [v. Kelly, 397 U.S. 254 (1970)] the termination of welfare benefits denied possession and use to the funds to the recipient. In *Fuentes* [v. Shevin, 407 U.S. 67 (1972)] the chattels seized were physically taken from the parties. The instant case, by contrast, presents no actual taking of possession of any kind from the plaintiffs. Indeed, the stipulated facts demonstrate that plaintiffs remain in continued possession of their land and continue to rent mobile home spaces to the tenants who are unaware of the lien claims. Thus, plaintiffs here have not been deprived of possession or use of their property as were the cases in *Sniadach*, *Goldberg* and *Fuentes*.

379 F. Supp. at 998-99.

109. *Id.* at 999. The court was careful to draw a distinction between total and partial restrictions on alienation.

Plaintiffs cite *Shelley v. Kramer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1947); *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), and *Kass v. Lewin*, 104 So. 2d 572 (Fla. 1958), as authority for their argument that the right to alienate property is a right which cannot be infringed. Those cases did, indeed,

Here, a lien is filed against the property and clouds title. It cannot be denied that the effect of such lien may make it difficult to alienate the property. If plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance.¹¹⁰

In *Cook v. Carlson*¹¹¹ the Federal District Court for the District of South Dakota took the same position, observing, like the court in *Spielman-Fond*, that the creditors' remedies invalidated by prior Supreme Court decisions had completely, though temporarily, deprived the owner of the use of his property.¹¹² The court held that "the deprivation which results from the filing of a mechanics' lien is *de minimis*."¹¹³ The *Cook* court's analysis parallels that of *Spielman-Fond*, for both decisions rely on the fact that the Owner was not completely deprived of the possession or use of his property. That a lien may make selling or renting the property or borrowing against the Owner's equity in the property more difficult or less profitable was not enough.¹¹⁴

While under ordinary circumstances the Court of Appeals would unquestionably have been free to disregard these holdings, a strong argument can be made that because *Spielman-Fond* was summarily affirmed by the United States Supreme Court,¹¹⁵ the Court of

reaffirm the importance of the right to alienate property. But all the cases involved direct and total prohibitions on the right to alienate. The prohibitions involved were such that, even if a seller could find a willing buyer, the statutory or contractual prohibitions involved prevented consummation of the transaction.

Id. at 999.

110. *Id.*

111. 364 F. Supp. 24 (D.S.D. 1973).

112. *Id.* at 27.

113. *Id.*; cf. *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974) (Florida mechanics' lien statute upheld). The *Ruocco* court observed:

If we were compelled to pigeonhole our analysis into the guidelines set forth in *Fuentes*, we would be content to rest our decision on the conclusion reached in *Spielman-Fond* and *Cook v. Carlson*, to wit, that the infringement on property rights created by the mechanic's [*sic*] lien laws is *de minimis*. But we are not so compelled.

Id. at 436.

114. 364 F. Supp. at 27.

115. 417 U.S. 901 (1974). See also *Ross v. Brown Title Corp.*, 356 F. Supp. 595 (E.D. La.) (three judge court), *aff'd mem.*, 412 U.S. 934 (1973). In that case a lower court upheld the constitutionality of the Louisiana "executory process" statute for

Appeals should not have reached the due process questions. The Supreme Court has recently indicated that summary affirmances are of some precedential value.¹¹⁶ The precise weight to be given a particular summary decision depends on the degree to which the basis of the affirmance of the case can be ascertained and the extent to which that rationale applies to the case under consideration.¹¹⁷

In *Spielman-Fond* the district court's holding was unequivocally clear. Pursuant to the Arizona mechanics' lien statute,¹¹⁸ the defendant had caused liens affecting plaintiff's property to be recorded without affording the owner any prior notice or hearing.¹¹⁹ Although recognizing that the filing of the lien clouded title, made the property difficult to alienate and impinged upon the economic interests of the property owner, the lower court held that "the filing of a mechanics' or materialman's lien does not amount to a taking of a significant property interest, and that accordingly [the Arizona mechanics' lien statutes] are not violative of due process of law" ¹²⁰

The effect of the *Spielman-Fond* summary affirmance has been considered by other courts.¹²¹ In *In re The Oronoka*,¹²² the United

attachment and sale of immovable property. Under that procedure the debtor would not receive notice until shortly prior to advertisement and sale of the property. He would, at that time, have the right to contest the sale. Also, the creditor was required to obtain ex parte judicial approval of the attachment. Although summarily affirmed by the Supreme Court, the issue whether the particular interference constituted a taking for due process purposes does not appear to have been central to the decision.

116. See *Edelman v. Jordan*, 415 U.S. 651 (1974), where Mr. Justice Rehnquist observed that

these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits.

Id. at 671. See also *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); note 129 *infra*. For a general discussion of the precedential value of summary dispositions by the Supreme Court, see Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. Rev. 373 (1972) [hereinafter cited as Note, *Summary Disposition*].

117. In *Mercado v. Rockefeller*, 502 F.2d 666 (2d Cir. 1974) the Second Circuit, while reiterating its position that the privilege of disregarding summary affirmances rests with the Supreme Court alone, recognized that "each case [must] be analyzed carefully in order to discover what issues were actually before the Court . . ." *Id.* at 673. See Note, *Summary Disposition*, *supra* note 116 at 407-12.

118. ARIZ. REV. STAT. §§ 33-981 to 33-1006 (West 1974).

119. 397 F. Supp. at 997-98.

120. *Id.* at 999.

121. In addition to the cases discussed in the text, see *In re Thomas A. Carey, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976).

122. 393 F. Supp. 1311 (D. Me. 1975).

States District Court for the Northern District of Maine held that the summary affirmance could only be interpreted as an approval of the stated rationale of the lower court:

[T]he Supreme Court's summary affirmance of the three-judge District Court in *Spielman-Fond* can only be rationally explained as ratification of the District Court's conclusion that the restriction on the power to alienate real property which results from the imposition of a lien is not a "significant property interest" protected by the Fourteenth Amendment.¹²³

In *Brook Hollow Associates v. J.E. Greene, Inc.*¹²⁴ the plaintiff, a developer and general contractor, sought the convening of a three-judge federal court to consider his claim that the Connecticut mechanics' lien statutes violated the due process clause of the fourteenth amendment. The court dismissed the complaint for failure to present a substantial question, reasoning that the summary affirmance of *Spielman-Fond* was determinative of the issue because of the similarity of the Connecticut statute to the Arizona statute attacked in *Spielman-Fond*.¹²⁵ Nevertheless, the Court of Appeals of Maryland considered itself free to disregard *Spielman-Fond* even though, on balance, the Maryland statute is arguably less burdensome to the owner than either of the other two.¹²⁶

123. *Id.* at 1317 (emphasis added).

124. 389 F. Supp. 1322 (D. Conn. 1975).

125. The court said that to do otherwise would not "promote economic use of our limited judicial resources." *Id.* at 1328. The court's reasoning was that if it convened a three judge court, that court would be bound to follow *Spielman-Fond* and thus, on an appeal of right from such decision, the Supreme Court would be compelled to reconsider the question. If the district judge declined to convene a three-judge panel because of the absence of a substantial federal question, an application for certiorari would afford the Supreme Court discretion as to whether to reconsider or restate the holding of *Spielman-Fond*. See *id.* at 1327-28.

126. The Court of Appeals said:

The Arizona law upheld in *Spielman-Fond*, although it did not provide for notice or a prior hearing, requires the claim to a lien to be made under oath, on personal knowledge and recorded within 60 or 90 days; the owner to be notified within a reasonable time of the filing of the claim; the claimant to institute a suit to enforce the lien within six months after its filing; and permits the owner to discharge the lien by filing a bond. [citation omitted]. Consequently, the Supreme Court may have thought that the Arizona statute contained enough safeguards to satisfy due process; since Maryland's mechanics' lien law lacks most of those protections, we have no trouble in concluding that *Spielman-Fond* is not dispositive of the issue before us

277 Md. at 34-35, 353 A.2d at 233-34.

Nevertheless, the differences between the statutes are not quite as clear as the Court of Appeals suggested. Although in Maryland a claim was not expressly required to be under oath or based on personal knowledge, it was required to be filed within 180 days of completion of the work or furnishing of materials. §9-105 (former statute). In addition, where the contract for furnishing work or materials was with any person

The summary affirmance can be viewed in two ways. One view is that it is an affirmance of the stated holding of the lower court — that the interference with property rights caused by filing an Arizona mechanics' lien is too insubstantial to be a "taking" of property. Since the effects of recording the Arizona and Maryland liens were virtually identical,¹²⁷ acceptance of this interpretation would clearly have required the Maryland court to hold that the Maryland procedure did not effect a taking of property.

The second interpretation, and the one adopted by the Court of Appeals in *Barry Properties*, is that the summary affirmance was not based on the stated rationale of the lower court¹²⁸ but represented instead a determination by the Supreme Court that the Arizona statute "contained enough procedural safeguards to satisfy due process."¹²⁹ The problem with avoiding the Supreme Court's

other than the owner of the land, the person furnishing the work or materials was not entitled to a lien unless the owner was given written notice of intent to claim a lien within 90 days after the completion of the work or the furnishing of materials. § 9-103 (former statute).

In Arizona the lienor had six months within which to institute an action to foreclose the lien, ARIZ. REV. STAT. ANN. § 33-998 (West 1974); in Connecticut the period was two years, CONN. GEN. STAT. § 49-37 (1958); in Maryland, the period was one year, § 9-106 (former statute). The lien may be released in Arizona by posting a bond equal to one and one-half times the amount of the claim, ARIZ. REV. STAT. ANN. § 33-1004. In Connecticut, see CONN. GEN. STAT. § 49-37, and Maryland, see Rule BG75(b) (1974) (amended 1976), the lien could also be bonded, but the amount of the bond was limited to the amount of the claim, plus interest and costs. In all three jurisdictions the lien could, under proper circumstances, be filed against the property without any prior notice to the owner, and only in Maryland could the owner challenge the validity of the lien on his own initiative at any time. § 9-106 (former statute). In Arizona the owner has no right to bring proceedings to challenge the validity of the lien and in Connecticut the right exists but is not unconditional. See *Ravitch v. Stollman Poultry Farms, Inc.*, 162 Conn. 26, 291 A.2d 213 (1971); *Fourth New London Inn NSB Quarters, Inc. v. Wyoming Valley Contractors, Inc.*, 22 Conn. Supp. 293, 170 A.2d 737 (1961).

127. See note 126 *supra*.

128. See *Brook Hollow Assoc. v. J.E. Greene, Inc.*, 389 F. Supp. at 1327 n.7, where the court, commenting upon *Spielman-Fond*, observed:

The lower court's reasoning may not have been the basis of the Supreme Court's summary affirmance, as Chief Justice Burger warned in his recent concurring opinion in *Fursari v. Steinberg* [citation omitted]. The Court may have reasoned instead that there was interference with a significant property interest but that on balance the state's procedure provided sufficient due process protection. Cf. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). Or the Court may have had some entirely different grounds for its decision.

129. In distinguishing the summary affirmance on this basis, the *Barry Properties* court referred to Chief Justice Burger's concurring opinion in *Fursari v. Steinberg*, 419 U.S. 379, 391 (1975) ("When we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached").

affirmance of *Spielman-Fond* in this fashion¹³⁰ is that the Arizona statute contains virtually none of the saving procedural safeguards described by the Supreme Court in *Mitchell*, decided only two weeks prior to the *Spielman-Fond* affirmance. It is inconceivable that the summary affirmance represented a substantial retreat by the Supreme Court from the carefully articulated rationale of *Mitchell*, especially in light of the Court's later reaffirmation of *Mitchell* in *North Georgia*. While it is undoubtedly possible that the summary affirmance was based on grounds other than the stated reasoning of the district court, such grounds would have to be other than the due process sufficiency of the Arizona statute. To date, however, no alternative theory has been advanced.

THE NEW PROCEDURE

The *Barry Properties* case was decided on February 10, 1976, near the end of the 1976 session of the Maryland General Assembly. The new mechanics' lien law, Senate Bill No. 998, drafted by the legislature in response to the Court of Appeals decision, was passed and signed into law as emergency legislation on May 4, 1976. The statute repealed and reenacted with amendments Sections 9-101 through 9-113 of the Real Property Article of the Annotated Code.¹³¹ Although *Barry Properties* had not invalidated the entire mechanics' lien statute,¹³² the legislature did not accept the court's implied invitation to repair the old statute by adding the necessary procedural safeguards.¹³³ Rather, the legislature merely codified the holding of the *Barry Properties* case.¹³⁴ The statutory revisions also made necessary the rewriting of Subtitle BG of the Maryland Rules

130. The Court of Appeals relied in part upon *Roundhouse Constr. Corp. v. Telesco Mason's Supplies Co.*, 168 Conn. 371, 362 A.2d 778, *vacated and remanded*, 423 U.S. 809 (1975), *aff'd.*, 170 Conn. 155, 365 A.2d 393 (1976). In that case the Supreme Court of Connecticut recognized the summary affirmance of *Spielman-Fond* but distinguished it on the basis of the difference in the limitations periods prescribed by the Arizona and Connecticut statutes. While section 49-37 of the Connecticut statute provides that a mechanics' lien can be discharged if an action to foreclose the lien is not commenced within two years after the lien is filed, in Arizona, section 33-998 provided that the lien was valid for only six months unless an action to foreclose it was brought within that period. The *Roundhouse* court dismissed *Spielman-Fond* by observing that "[the six month limitation period] would seem to offer the bare minimum of due process protection consistent with the extent of deprivation." 168 Conn. at 381, 362 A.2d at 783.

131. MD. REAL PROP. CODE ANN. §§ 9-101 to 9-113 (Cum. Supp. 1976). See note 13 *supra*.

132. See notes 85 & 86 and accompanying text *supra*.

133. See 277 Md. at 37 n.12, 353 A.2d at 235 n.12; note 88 and accompanying text *supra*.

134. See note 3 and accompanying text *supra*.

of Procedure, which governs the enforcement of the law.¹³⁵ The revised rules became final on August 9, 1976.

Together, the new statute and revised rules¹³⁶ change the pre-*Barry Properties* mechanics' lien remedy in fundamental ways. The most significant differences between the old and new laws can be summarized as follows: 1) The former procedures provided for enforcement of a mechanics' lien in many cases without prior notice to the owner.¹³⁷ Now in all instances an owner will receive notice and an opportunity to contest the establishment of the lien in a judicial proceeding prior to its establishment.¹³⁸ 2) Mechanics' liens under the new statute date from the time of establishment of the lien by a final order of the appropriate equity court;¹³⁹ no enforcement of the lien can occur until after the lien is established.¹⁴⁰ 3) Priority of mechanics' liens no longer date from the commencement of construction; this elimination of the "relation back" feature¹⁴¹ of the old law permeates the new statute and rules.¹⁴²

For the most part the definitions of major terms used throughout the statute and revised rules effect no substantive changes in prior

135. Md. R. P. BG70 to BG77 (1977) [Hereinafter citation to the revised rules will be by number alone: Rule BGxx]. A special subcommittee of the Court of Appeals Standing Committee on Rules of Practice and Procedure was appointed to prepare a draft of the revision. That subcommittee consisted of the following members of the Maryland Bar: Henry R. Lord, Paul V. Niemeyer, Lawrence F. Rodowsky, and Alan M. Wilner. George W. McManus, Jr., co-author of this article, served as Chairman. William H. Adkins, II, Charles R. Albert, George B. Gifford, Alexander I. Lewis, III, George V. Parkhurst and Philip O. Tilghman served as consultants to the subcommittee.

136. MD. REAL PROP. CODE ANN. §§ 9-101 to 113 (Cum. Supp. 1976); MD. R. PROC. BG70 to 77. The statute contains the substantive provisions and the rules constitute a procedural framework for the operation of the new law. However, some of the new rules appear to differ from or enlarge upon the statute, and, many of the statute's provisions, especially as they relate to due process protections are basically procedural in nature.

137. §§ 9-101(a), 9-103, 9-105 (former statute); see *Barry Properties v. Fick Bros. Roofing Co.*, 277 Md. at 19-20, 353 A.2d at 225-26.

138. See §§ 9-105, 9-106, Rules BG71, BG73.

139. § 9-106. *But cf.* note 101 *supra* (*lis pendens* doctrine).

140. Even the title of the new rules reflects the new thrust of the statute. Previously the rules had merely been called "Mechanics' Lien — Enforcement"; the new title is "Mechanics' Lien — *Establishment* and Enforcement" (emphasis added).

141. See note 21 and accompanying text *supra*.

142. See § 9-106(b). See also Rule BG73d. It should be noted that the legislature rejected an amendment to S.B. 998 that would have continued the concept of "relation back" with respect to judgments entered subsequent to the commencement of the building. Rejection of this amendment was probably based on the belief that such a provision was prohibited by the *Barry Properties* decision. The validity of that conclusion is debatable, however, see notes 87 to 97 and accompanying text *supra*.

law.¹⁴³ With respect to the term "owner,"¹⁴⁴ however, there is an apparent difference between the statute and rules, although it is not clear whether it was intended as a substantive difference or merely a clarification. Whatever the purpose, the discrepancy is worth noting before examining the statute and rules in detail.¹⁴⁵ The statute defines "owner" as "the owner of the land,"¹⁴⁶ while under the Rule the term means "the owner of record of the land."¹⁴⁷ These two definitions can be substantively different in certain factual contexts. For example, although recordation is an essential element of the passage of legal title,¹⁴⁸ the statutory term "owner" is not expressly restricted to holders of legal title.¹⁴⁹ A grantee of an unrecorded deed is the holder of equitable title, subject to being defeated by a subsequent conveyance to a bona fide purchaser for value who records first,¹⁵⁰ and therefore is the "owner" in all respects except bare legal title. In that factual setting, the "owner" and the "owner of record" are not the same.¹⁵¹

143. Nevertheless, the possibility for ambiguity has been greatly reduced by the addition of these express definitions. The term "contract" is defined in section 9-101(a) as "agreement of any kind or nature, express or implied, for doing work or furnishing material, or both, for or about a building as may give rise to a lien." The definition of a "contract" for mechanics' lien purposes has not been a source of much litigation. *See, e.g.,* *Humphrey v. Hamson Bros.*, 196 F.2d 630 (4th Cir. 1952); *T. Dan Kolkder, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956); *Greenway v. Turner*, 4 Md. 296 (1853). However, this term had not previously been expressly defined in the statute. Other terms which are more succinctly defined in the present statute are "contractor" and "subcontractor." A person who has a contract with an owner is a "contractor." § 9-101(c). A person who has a contract with anyone except the owner or his agent is a "subcontractor." § 9-101(f). The definition of land remains essentially unchanged from the former law. *Compare* §§ 9-101(d) and 9-103(a) with § 9-102(a) (former statute). The only apparent addition is the statement that "'land' includes the improvements to the land." § 9-101(a). It is not clear what substantive change, if any, this phrase makes.

144. It should be noted that in many places the Rules use the term "defendant" to mean the owner or other proper party defendant. Thus, while others than the owner may be defendants, the term defendant always includes the owner. *See* Rule BG71c.

145. *See* § 9-101(e); Rule BG70e.

146. § 9-101(e).

147. Rule BG70e.

148. MD. REAL PROP. CODE ANN. § 3-101(a) (1974) provides: "Except as otherwise provided in this section, no estate of inheritance or freehold, declaration or limitation of use, estate above seven years, or deed may pass or take effect unless the deed granting it is executed and recorded."

149. The Rules Committee may have assumed that the legislature really meant to restrict this term to holders of legal title. However, the legislature expressly referred to the granting of legal title only in regard to bona fide purchasers for value. *See* § 9-102(c).

150. *See* MD. REAL PROP. CODE ANN. § 3-203 (1974). *See also* *Bourke v. Krick*, 304 F.2d 501 (4th Cir. 1962); *Mikel v. Brown*, 75 Md. 172, 23 A. 736 (1892).

151. The ultimate effect of this possible discrepancy is not entirely clear. Generally the rules provide that the rights of an "owner" can also be asserted by any other

The heart of the new procedural requirements providing notice and opportunity to be heard prior to any taking of property is found in Section 9-105 of the statute and Rule BG71, relating to commencement of the action, and Section 9-106 and Rule BG73, which describe the procedures after the claim is filed.

To establish a lien, a person entitled to a lien must file a "petition to establish a mechanics lien" in the equity court¹⁵² of the county where all or part of the land to be subject to the lien is located¹⁵³ within 180 days after completion of the work or supplying the materials.¹⁵⁴ Rule BG71 requires that the action be commenced by filing three documents with the clerk of the court: a petition to establish the mechanics' lien,¹⁵⁵ an affidavit "setting forth facts upon which the petitioner claims he is entitled to a lien in the amount specified,"¹⁵⁶ and either original or sworn certified or photostatic copies of all material papers which constitute the basis of the lien claim.¹⁵⁷ The constitutionally mandated notice is furnished when the owner is served with the petition together with the show cause order described in Section 9-106 and Rule BG73.¹⁵⁸

An important procedural provision of Rule BG71c is the establishment of necessary and permitted parties defendant. The owner of the land against which the lien is sought to be established is a necessary party defendant.¹⁵⁹ The petitioner may, but is not

person with an interest in the land. See Rule BG71c(2). The only apparent conflict is where a person petitioning to establish a lien has actual knowledge of an unrecorded conveyance. Read literally, § 9-101(e) of the new statute would require service on the equitable owner, although the rule would not. See notes 144 to 150 and accompanying text *supra*; notes 159 & 160 and accompanying text *infra*.

152. See §§ 9-105(a)(b); Rule BG71a.

153. See Rule BG71(a). This represents a change from the previous corresponding rule, which placed proper venue in the county where the lien claim had been "properly recorded." See Rule BG71(a) (1974). This is typical of the types of changes made necessary by the change of the procedure from one to enforce a recorded lien to one to establish a lien by judicial proceedings.

154. § 9-105(a).

155. See § 9-105(a)(1) of the statute and Rule BG71b.

156. § 9-105(a)(2).

157. § 9-105(a)(3); Rule BG71b(vi).

158. The notice required of subcontractors by § 9-104 must be sufficient to inform the owner of an intention to claim a lien. As a practical matter subcontractors must send two "notices" to the owner. The § 9-104(a) notice is required to be filed within 90 days of completion of the work or supplying of materials; the petition must be filed within 180 days of the completion of work or furnishing of materials. § 9-105(a). Although the statute and rules do not seem to permit it, dispensing with the requirement of the § 9-104 notice where the petition is filed within the 90 day period and contains the information required by § 9-104(b) would seem logical.

159. Rule BG71c(1). Different constructions of the term "owner" could lead to litigation about whether a holder of a particular interest in the land is a necessary

required to, join any other holder of an interest in the land or any other person who may be entitled to a share of the proceeds of a sale of the land.¹⁶⁰ An established mechanics' lien under the new law has priority over other liens or encumbrances only from the date of the establishment of the lien;¹⁶¹ it is therefore unnecessary to join holders of previously established mechanics' liens or other superior interests because they would not be affected by a subsequently established mechanics' lien. But in view of the potential conflict regarding the definition of "owner," it would be wise to join all known but unrecorded holders of interests in the property.¹⁶² In addition, because priority dates from the establishment of the lien, and because, pursuant to a 1977 amendment, the filing of a petition constitutes notice to purchasers of the possibility of a lien,¹⁶³ it is prudent to file as quickly as possible.

The opportunity to be heard is provided by Section 9-106 and Rule BG73 as part of a two-step procedure. The first stage occurs following filing of the petition to establish a mechanics' lien. The court reviews the "documents on file and may require the petitioner to supplement or explain any of the matters therein set forth."¹⁶⁴ The statute then provides that "[i]f the court determines that the lien should attach," it should grant an order giving the owner fifteen days from the date of service of the order to show cause why the lien should not attach.¹⁶⁵

The rules are more specific in their treatment of this procedure and even appear to alter the statute. Rule BG73a requires the court to order the defendant to show cause if the court determines "that there is a *reasonable ground* for the lien to attach."¹⁶⁶ This more flexible standard is a wise modification inasmuch as a literal reading of the statute would appear to require a prejudgment of the very issue which the defendant is to be afforded an opportunity to contest.

Further, while Section 9-106 of the statute states that the show cause order shall inform the owner that "[h]e may appear at [a] time

party defendant, with the resultant effects of a failure to join such a party. See notes 146 to 151 and accompanying text *supra*.

160. Rule BG71c(2).

161. See § 9-106; Rule BG73.

162. See notes 144 to 151 and accompanying text *supra*. The lien is only effective from the date of the final order. If the protections of § 9-102(c) apply only to holders of "legal title" in the strictly technical sense, joinder of holders of known but unrecorded interests would appear to be worthwhile for the reasons described in note 159 and accompanying text *supra*.

163. See notes 181 to 199 and accompanying text, *infra*.

164. § 9-106(a).

165. *Id.*

166. (emphasis added).

stated in the order and present evidence,"¹⁶⁷ the Rules Committee was confronted with another practical difficulty arising from a literal interpretation of this section. It would be virtually impossible to schedule hearings for the purpose of taking live testimony when it is not known in advance whether the defendant wishes to appear personally. Because the fifteen day period runs from the date of service of the show cause order and the precise date of service will not be known until it actually takes place, the termination of the fifteen day period cannot be determined in advance.

In order to ameliorate this problem, the Rules Committee equated the word "appear" with a requirement of filing within the given period of "either . . . a counter-affidavit or a written and verified answer opposing the petition."¹⁶⁸ In the event the defendant files such an affidavit or answer within the allotted time, a hearing "shall be scheduled at the earliest possible time."¹⁶⁹ If no opposing affidavit or verified answer is filed, the facts in the petitioner's affidavit "shall be deemed admitted"¹⁷⁰ and the court may grant the appropriate relief without a hearing or further notice to the defendant.¹⁷¹

It should be noted that neither the statute nor the new rule refers to a decree pro confesso, which requires at least thirty days notice prior to the entry of a judgment where no answer or defense has been filed.¹⁷² Rule BG73c states that if the owner neither answers nor files an opposing affidavit within the proper time allowed, the court may enter an order, depending upon its findings with respect to the absence of a genuine dispute and probable cause, without a hearing or without further notice. Rule BG73 probably should be read in conjunction with Rule 675, "decree pro confesso," since the mechanics' lien procedure is not expressly excluded from the operation of this rule. Thus, if an answer is not filed in a timely manner, the court should sign a decree pro confesso as well as an interlocutory order establishing a mechanics' lien. After thirty days, the court may file a final order establishing a mechanics' lien as of the date of the interlocutory order.

The second stage of the procedure occurs after the appropriate pleadings, affidavits, and other supporting documents have been filed by both sides. The statute provides for three alternatives. If the documents on file and the evidence show "that there is no genuine

167. § 9-106(a)(i).

168. Rule BG73a.

169. Rule BG73c.

170. See § 9-106(a)(2); Rule BG73a.

171. Rule BG73b, c.

172. Rule 675.

dispute as to any material fact and that the lien [or a portion thereof] should attach as a matter of law,"¹⁷³ the court will enter a final order establishing the lien. Similarly, if the court finds that there is no dispute as to any material fact and "the petitioner failed to establish his right to a lien as a matter of law,"¹⁷⁴ a final order is entered denying the lien. In the event, however, that the court determines that the lien should not attach as a matter of law by any final order, "but that there is probable cause to believe the petitioner is entitled to a lien,"¹⁷⁵ an interlocutory order will be entered which establishes a lien¹⁷⁶ on specified land¹⁷⁷ in the amount for which probable cause is found.¹⁷⁸ The order also specifies the amount of a bond which may be filed to release the land from the lien¹⁷⁹ and may require the petitioner to file a bond in an amount fixed by the court to protect the defendant from damages, including "reasonable attorney's fees."¹⁸⁰ Finally, the interlocutory order is required to contain an assignment of a date, within six months of the order, for the trial of all matters necessary to adjudicate the establishment of the lien.¹⁸¹

The statute is silent, however, regarding the possibility that the court may determine that there is not probable cause to believe that the petitioner is entitled to a lien and a final order is therefore not appropriate. This situation is not covered by any of the statutory final or interlocutory order provisions and would appear to fall within the provisions of Section 9-106(d), which provides that "[u]ntil a final order is entered either establishing or denying the lien, the action shall proceed to trial on all matters at issue, as in the case of any other proceedings in equity." The rule addresses this issue more directly. Rule BG73d(3) provides that "[i]f no final or interlocutory order is granted under [the other sections of the rule] the court shall enter an order that the petition for lien be dismissed unless the petitioner, within 30 days thereafter, files a written request that the petition for lien be assigned for trial." The rule places the burden of continuing a facially weak case squarely on the petitioner, while the statute standing alone would appear to allow

173. § 9-106(b)(1); Rule BG73d(1)(a).

174. § 9-106(b)(2); Rule BG73d(1)(b).

175. § 9-106(b)(3); Rule BG73d(2).

176. § 9-106(b)(3)(i); Rule BG73d(2)(i).

177. § 9-106(b)(3)(ii); Rule BG73d(2)(ii).

178. § 9-106(b)(3)(iii); Rule BG73d(2)(iii).

179. § 9-106(b)(3)(iv); Rule BG73d(2)(iv).

180. § 9-106(b)(3)(v); Rule BG73d(2)(v).

181. § 9-106(b)(3)(vi); Rule BG73d(2)(vi). This section, § 9-106(3)(vi), also contains a statement that "[t]he owner or any other person interested in the property . . . may, at any time, move to have the lien established by the interlocutory order modified or dissolved."

such cases to languish on the docket. Since the petitioner's election to request a trial is triggered only by an order of court, which would presumably be served upon the petitioner, it is unlikely that a litigant will inadvertently forego any meaningful right as a result of this procedure.

Section 9-102, "Property Subject to Lien," is substantively unchanged from the prior law,¹⁸² with the exception of the inclusion of "[a]ny machine, wharf, or bridge erected, constructed, or repaired within the State"; these items were previously listed elsewhere in the statute.¹⁸³ Thus, as modified by the new addition, the prior cases regarding the construction of the terms "building,"¹⁸⁴ "work done for or about the building,"¹⁸⁵ "one-fourth of [the building's value]"¹⁸⁶ and related issues would appear to be fully applicable to the revised law.

The protection afforded bona fide purchasers for value underwent revision in 1976 and was also the subject of the only amendment to the mechanics' lien statute in 1977. The pre-*Barry Properties* law provided that a building was not subject to a lien if the evidence showed that the money due for work and material was paid to the person or entity who actually performed the work or supplied the material where "*the building has been granted to a bona fide purchaser for value without notice.*"¹⁸⁷ The 1976 revision, however, eliminated any reference to payment for the work or materials, simply providing that no lien is available "if, prior to the establishment of a lien in accordance with this subtitle, *legal title*

182. Compare § 9-101 (former statute) with § 9-102.

183. See § 9-111 (former statute).

184. In *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 179 A.2d 683 (1962), the lien claimant had constructed a swimming pool. At that time the statute did not expressly include swimming pools, and the Court of Appeals refused to allow the lien. The court defined "building" as follows:

Taken in its broadest sense [building] can mean only an erection intended for use and occupancy as a habitation, or for some purpose of trade, manufacture, ornament, or use, such as a house, store or a church. . . . The word "building" cannot be said to include every type of structure on land.

Id. at 301, 179 A.2d at 685. Subsequently, the legislature added swimming pools to the definition of "building"; the present statute also includes installation of wells, sodding, seeding, planting, grading, filling, landscaping, and paving. See § 9-102(a).

185. For a thorough discussion of the issues involved in an interpretation of "work done for or about the building," see Cutler & Shapiro, *The Maryland Mechanics' Lien — Its Scope and Effect*, 28 MD. L. REV. 225, 227 (1968).

186. See, e.g., *Shacks v. Ford*, 127 Md. 287, 97 A. 511 (1916); *Stebbins v. Culbreth*, 86 Md. 656, 39 A. 321 (1878).

187. § 9-101(b) (former statute) (emphasis added). While the legislature may have only intended this provision to protect purchasers of residential property, as enacted the protection extends to purchasers of all buildings.

has been granted to a bona fide purchaser for value."¹⁸⁸ Thus, the 1976 legislature cut off the mechanics' lien rights of suppliers of work and materials where, prior to the establishment of a lien, record title passed to a good faith purchaser for value. Until the lien was established, the mere filing of a petition to establish a lien did not constitute notice of a type that would destroy the status of a bona fide purchaser. In the 1977 legislative session, however, the General Assembly passed S.B. 1115 which, having been signed by the Governor, adds a new Section 9-102(d) as follows: "The filing of a petition under Section 9-105 shall constitute notice to a purchaser of the possibility of a lien being perfected under this subtitle." Since Section 9-102(c) was not changed and continues expressly to afford protection to a bona fide purchaser for value prior to the establishment of a lien, this new section is somewhat confusing. In spite of the apparent inconsistency, however, the only reasonable interpretation of the amendment is that it is intended to prevent a purchaser from taking free of a subsequently established mechanics' lien if the passage of legal title occurs after the filing of a petition to establish a mechanics' lien. Thus, with respect to purchasers of property,¹⁸⁹ the legislature has created an instance where the practical effects of a mechanics' lien are felt upon the filing of a petition, not exclusively upon its later establishment. Although this change will undoubtedly restrict the free alienability of properties where petitions to establish mechanics' liens have been filed, the procedural safeguards enacted in 1976 are adequate to permit such a pre-judgment "taking."¹⁹⁰

The question of the precise boundaries or quantity of the land sought to be subjected to a mechanics' lien can be quite critical. For example, there may be more than one building on a particular parcel of land and, depending on the boundaries, the lien may extend to

188. § 9-102(c) (emphasis added). This change appears to have been deliberate. The Second Reader version of § 9-102(c) of S.B. 998 provided that a building could not be subject to a lien if prior to the establishment of a lien, "it has been granted to a purchaser for value." The final version, however, was amended to substitute "legal title" for "it" and the words "bona fide" were inserted before "purchaser for value." Because of the paucity of legislative history available in Maryland, no certain explanation for the changes can be documented, but the intent of the language appears clear in light of these amendments. It should be noted that recordation is an essential element of the passage of legal title. See note 148 *supra*.

189. At least one major Maryland title company has taken the position that, based on the new § 9-102(d), the filing of a petition to establish a mechanics' lien constitutes *lis pendens* in all contexts. This would appear to be an unjustifiably broad interpretation of this section. The language of § 9-102(d) is expressly limited to "purchasers" and in no way purports to affect the priority of the lien for any other purpose. With respect to *lis pendens* generally, see note 101, *supra*.

190. See notes 87 to 97 and accompanying text, *supra*.

buildings which the claimant did not participate in constructing. Even where there are not several buildings, the owner may wish to subdivide and sell portions of his unimproved property. Consequently, the statute gives the owner the right to designate "the boundaries of the land appurtenant to the building"¹⁹¹ prior to the commencement of construction and to record the description "which shall be binding on all persons."¹⁹² Rule BG77 requires that the owner file a notice to establish such boundaries prior to beginning construction in an *ex parte* proceeding in any equity court of the county where the property is located.¹⁹³ After construction has commenced, the owner of the land or any other interested person¹⁹⁴ may petition to have the court designate the boundaries.¹⁹⁵

As in the prior statute,¹⁹⁶ the new mechanics' lien law provides that the subcontractor is not entitled to a lien unless "within 90 days after doing the work or furnishing the materials, he gives written notice [to the owner] of his intention to claim a lien."¹⁹⁷ Substantively, this section does not represent any significant change from previous law.¹⁹⁸ The issues related to the running of the ninety day period are still present,¹⁹⁹ although the new law does specify an

191. § 9-103(b).

192. *Id.*

193. Rule BG77(a). The old rule contained no provisions related to the period prior to the commencement of construction. The required notice under new Rule BG77a must include:

- (i) A reference to the conveyance or other means by which the owner acquired title to the land;
- (ii) A description of the newly established boundaries sufficient to identify the land with reasonable certainty; and
- (iii) A brief description of the construction for which the boundaries are established.

The notice must be captioned, filed and indexed as any other proceeding in equity under the name of the owner of the land. *Id.*

194. The statute defines an interested person as "any person having a lien or encumbrance on the land by mortgage, judgment or otherwise entitled to establish a lien in accordance with this subtitle." § 9-103(b).

195. *See id.*; Rules BG77b, BF77b(3). The rule provides for service of such petition and the appointment by the court of a surveyor to determine and describe such boundaries.

196. § 9-103 (former statute).

197. § 9-104(a).

198. An early draft of S.B. 998 reduced the 90 day period to 60 days. The legislature apparently felt that 60 days was too short, however, as the bill was subsequently amended to the present 90 day period. This is a clear example of attempts, mostly successful, to rob the mechanics' lien remedy of much of its utility and effectiveness and to make its use more difficult.

199. Whether the 90 day period begins to run as to an entire account from the last delivery, or whether separate 90 day periods run from each separate order, turns on whether the materials were furnished pursuant to continuing, rather than separate and distinct, contracts. *See T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223

acceptable form and minimum content of the notice.²⁰⁰ Notice is effective if delivered personally to the owner or his agent or if "given by registered or certified mail, return receipt requested."²⁰¹ The statute further provides that where there is more than one owner, the subcontractor may give notice to any of the owners.²⁰² As under the old law,²⁰³ upon receipt of a subcontractor's notice, the owner is authorized to withhold from sums due the contractor the amount the owner ascertains to be due the subcontractor.²⁰⁴

Rule BG74 clearly states that the lien may not be enforced and a petitioner may not execute upon a bond given to release a lien until the lien has been established by judicial order. In addition, a petition to enforce the lien must be filed within one year of the filing of a petition to establish the lien.²⁰⁵ The petition to enforce may be

(1956); *District Heights Apts., Section D-E, Inc. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953); *Trustees of German Lutheran Evangelical St. Matthews' Congregation v. Heise*, 44 Md. 453 (1876); *United States v. Allied Contractors, Inc.*, 171 F. Supp. 569 (D. Md. 1959), *rev'd on other grounds*, 273 F.2d 917 (4th Cir. 1959).

Goods may not be delivered by a materialman merely for the purpose of extending the time for giving the notice. *See, e.g.*, *Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 168 A.2d 383 (1961); *Brunt v. Farinholt-Meredith Co.*, 121 Md. 126, 88 A. 42 (1913); *Greenway v. Turner*, 4 Md. 296 (1853). But where the last delivery was made in good faith at the request of the owner for the purpose of completing the contract, the 90 day period would run from the date of that delivery. *See Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 168 A.2d 395 (1961); *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956). *See generally*, Shapiro & Cutler, *The Maryland Mechanics' Lien Law — Its Scope and Effect*, 28 Md. L. Rev. 225, 238 (1968).

200. *See* § 9-104(b). Sufficiency of the notice required under the corresponding section of the old law, § 9-103 (former statute), had been the subject of much litigation in the past. *See, e.g.*, *Mimisco Steel Corp. v. Holloway Concrete Construction Co.*, 261 Md. 137, 274 A.2d 90 (1971); *United States Tile & Marble Co. v. B & M Welding & Iron Works*, 254 Md. 81, 253 A.2d 838 (1969); *Himmelfarb v. B & M Welding & Iron Works*, 254 Md. 37, 253 A.2d 842 (1969); *Palmer Park Ltd. Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968). Presumably the inclusion of a sample form in the statute will substantially eliminate this issue. The extent to which alternative forms will be accepted by the courts probably will depend on the information communicated by the notice, rather than blind adherence to statutory form.

201. § 9-104(c). The language does not specify whether the mailed notice must be given *only* by registered or certified mail or whether notice would be effective if actually received by the owner, albeit by regular mail. It is clear, however, that in these circumstances the use of regular mail places the burden of proving actual receipt squarely upon the sender. *Cf. Border v. Grooms*, 267 Md. 100, 104, 297 A.2d 81, 83 (1972); *Com. de Astral v. Boston Met. Co.*, 205 Md. 237, 253, 106 A.2d 357, 363 (1953); *Becker v. Crown Central Petroleum*, 26 Md. App. 596, 615 n.10, 340 A.2d 324, 335-36 n.10 (1975).

If notice cannot otherwise be given, § 9-104(e) of the statute allows service by posting in virtually the same manner as the prior law. *See* § 9-103(d) (former statute).

202. § 9-104(d). This section replaces § 9-103(b) (former statute) which provided for notice to either husband or wife where the property was owned jointly by husband and wife.

203. § 9-104 (former statute).

204. § 9-104(f).

205. § 9-109; Rule BG74a.

included in the original petition to establish the lien²⁰⁶ and it would be good practice to combine the two routinely, because the right to enforce the lien or execute upon the bond expires unless the petition is timely filed.²⁰⁷ Upon the timely filing of the petition, the right to enforce the lien or execute on the bond survives until the conclusion of the enforcement proceedings.²⁰⁸

The rule requires that a decree granted pursuant to a petition to enforce shall direct the sale of the land, unless the amount due is paid on or before a specified date no more than thirty days from the date of the decree.²⁰⁹ Presumably the decree would provide for execution on a bond given to obtain release of the land from a lien when the land is no longer available to be sold to satisfy the lien. Sales are conducted pursuant to subtitle BR (Sales — Judicial) of the Maryland Rules of Procedure.²¹⁰

Although not expressly provided for in the statute, the rules afford the owner or other persons interested in the land, upon the filing of a bond, at any time after the filing of a petition to establish a mechanics' lien, the opportunity to file a petition to have the land released from an established lien or a lien which may thereafter be established.²¹¹ All procedures regarding the sufficiency of the bond and related matters are governed by Subtitle H (Bonds) of the Maryland Rules of Procedure.²¹²

This review indicates that the new statute and rules are little more than a codification of the mechanics' lien law as it existed following the *Barry Properties* case. Questions about retroactive application of the changes and whether the legislature should have made further changes are the subjects of the final portions of this discussion.

EFFECTS OF THE CHANGES ON PENDING CLAIMS

Prior to *Barry Properties*, mechanics' liens came into existence at the time of delivery of materials to or performance of work upon a building.²¹³ Assuming timely giving of required notices and recording of a properly prepared lien claim, upon a judicial determination in favor of the lien claimant in an enforcement proceeding, the lien's priority dated from the commencement of construction. This "relation back" of the lien afforded the lienholder

206. Rule BG74a.

207. §9-109; Rule BG74a.

208. §9-109.

209. Rule BG74b.

210. Rule BG74c.

211. Rule BG76a.

212. §9-106(c); Rule BG76a(1).

213. See §9-107 (former statute).

priority over intervening mortgage, lien, judgment, or any other creditor.

When the judicial and legislative changes occurred, a number of lien claims were in various stages in the process of perfection. To understand fully the nature and extent of the effects of the judicial and legislative changes on particular lien claims it is useful to categorize the possible postures of claims and claimants, and then to ascertain the effects of the changes on each category. Basically, lien claims at the time of the judicial and legislative revisions fall into six distinct classifications:

1. A final judicial determination enforcing the lien claim had been obtained prior to the *Barry Properties* decision.²¹⁴

2. A final judicial determination enforcing the lien claim had been obtained prior to the effective date of the new statute.²¹⁵

3. As of the effective date of the new statute, no final judicial determination enforcing the lien had been obtained under the old law but no fatal limitation period for commencement of the new procedure had expired under the new law.²¹⁶

4. As of the effective date of the new statute no final judicial determination had been made in an enforcement proceeding under the old law but a fatal limitation period had expired under the new law preventing the commencement of the procedure. If the notices given under the old law were deemed to satisfy the requirements of the new statute, however, a petition to establish a lien could still be timely filed.

5. Between the date of the *Barry Properties* decision and the effective date of the new statute, a fatal limitation period expired under the old law.²¹⁷

214. *Barry Properties* was decided on February 10, 1976.

215. Although Section 4 of S.B. 998 expressly states that it shall take effect upon passage by three-fifths of the members of each house of the General Assembly, which occurred on April 11, 1976, the bill was not actually effective until May 4, 1976, the date it was signed by the Governor. See *Robey v. Broersma*, 181 Md. 325, 29 A.2d 827 (1943), which held that such "emergency" legislation is effective on the first to occur of: (1) the date of signing by the Governor; (2) the date the legislature overrides the Governor's veto; or (3) if the legislature is still in session, six days after presentment to the Governor, unless the bill is returned to the legislature during that time. Because the legislature adjourned on April 12, 1976, the effective date was the date the Governor signed the bill.

216. Under the new statute the potentially fatal limitation periods referred to in this category are: the 90 day notice required to be given by subcontractors to the owner, § 9-104; the 180 day limitation period for filing a petition to establish a mechanics' lien, § 9-105; and the one year period following the filing of the petition to establish a mechanics' lien within which a petition to enforce a lien or to execute on a bond must be filed, § 9-109.

217. The fatal limitation periods to which this category refers are: the required 90 day notice to the owner if the lien claimant was a subcontractor, § 9-103 (former

6. A fatal limitation period had expired before the date of the *Barry Properties* decision, prior to any final judicial determination enforcing the lien claim.

The Effect of Barry Properties

The effect of the *Barry Properties* holding is that a mechanics' lien's priority would date from the time of a judicial determination of the lien and would no longer relate back to the date of the commencement of construction. The court did not address the question of the retroactive application of its decision, however, and it is not yet clear whether its holding applies to all mechanics' liens or lien claims, past and future, or only to those liens judicially determined following the decision.

Depending on the procedural posture of the lien at the time of the decision, the effects of *Barry Properties* upon lien claimants may differ.²¹⁸ Category 6 is the most easily disposed of. Restated, it describes a claim that expired prior to *Barry Properties* because of the passage of time or ceased to be viable for any reason other than a judicial determination. *Barry Properties* does not revive an otherwise expired cause of action. The effects of *Barry Properties* on Categories 1 (a lien determined prior to *Barry Properties*) and 2 (a lien determined prior to the new statute) raise more complex issues. In this context the relevant Category 2 claims are those for which a final judicial determination was made between the date of *Barry Properties* and the effective date of the new law. The stated effect of the decision is that all such liens have the characteristics of a pre-*Barry Properties* lien, except that priority dates from the final judicial determination and does not relate back to the commencement of construction. In essence, the statute functions as to these liens as if the excised portions had never been part of the law. In *Residential Industrial Loan Co. v. Weinberg*,²¹⁹ the Court of Appeals confirmed this conclusion. There, a decree enforcing a mechanics' lien was entered on February 26, 1976, two weeks after *Barry Properties* was decided. If the lien related back it would have had priority over two deeds of trust recorded subsequent to the commencement of construction. Observing that "the full impact of *Barry Properties* applies in the present suit,"²²⁰ the court held that

statute); the 180 day limitation period regarding the filing of the claim, §9-105 (former statute); and the one year period following the filing of the claim for bringing a suit in equity to enforce the lien, §9-106 (former statute).

218. It should be noted that categories 2 and 3 refer to fact situations relevant to the effects of the new statute only.

219. ___ Md. ___, 369 A.2d 563 (1977).

220. *Id.* at ___, 369 A.2d at 565.

the lien's priority dated from February 26, 1976, the date the claimant prevailed "in an 'appropriate proceeding' to establish the lien's existence,"²²¹ and therefore the claimant's lien was inferior in priority to both deeds of trust.

The holding in *Residential Industrial* represented a prospective application of *Barry Properties*. The Court of Appeals had characterized a post-*Barry Properties* lien claim prior to a judicial determination as a mere "chase in action";²²² consequently the *Barry Properties* change in priority affected a right maturing in the future, not a right vested at the time of the decision. The question of real significance is the effect of *Barry Properties* on the priority of Category 1 liens — those judicially determined prior to the *Barry Properties* decision. In this context, the question of the retroactive application of *Barry Properties* arises.

The ramifications of this issue are enormous. If the decision were to be applied retroactively, it would have the effect of altering the priority of all liens judicially determined prior to February 10, 1976, the date of the *Barry Properties* decision. Since the Court of Appeals in *Barry Properties* did not expressly address this question, the answer must be found elsewhere.²²³

In *Chevron Oil Co. v. Huson*,²²⁴ the Supreme Court addressed the general question of the retroactive application of judicial decisions in noncriminal cases.²²⁵ The case involved an action for personal injury suffered by the plaintiff while working on a drilling rig located off the Gulf Coast of Louisiana.²²⁶ At the time the plaintiff brought his action, most federal court decisions held the equitable admiralty doctrine of laches applicable to such suits.²²⁷

221. *Id.* at —, 369 A.2d at 566.

222. See *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 37, 353 A.2d 222, 235 (1976).

223. This issue has been resolved in other jurisdictions. In *Gunther v. Merchants Warren National Bank*, 360 F. Supp. 1085, 1091 (D. Me. 1973), the federal district court struck down on constitutional grounds a Maine statute providing for prejudgment attachment of real estate but stated that its holding was to be applied prospectively only. *Accord*, *Tapper Brown Constr. Co. v. Electromech, Inc.*, 358 F. Supp. 105, 108 (D.N.H. 1973). For a discussion of the retroactive application of a constitutional decision by the Maryland Court of Appeals in a criminal context, see *Survey of Maryland Court of Appeals Decisions 1974-75 — Juvenile Law*, 36 Md. L. Rev. 405-17 (1976).

224. 404 U.S. 97 (1971).

225. *Id.* The historical development of this question has been the subject of scholarly treatment. See, e.g., Note, *Prospective Overruling and Retroactive Application in Federal Courts*, 71 YALE L.J. 907 (1962); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947).

226. 404 U.S. at 98.

227. *Id.* at 98-99.

While pretrial discovery proceedings were underway in the case, however, the Supreme Court decided *Rodrique v. Aetna Casualty & Surety Co.*,²²⁸ holding that admiralty law did *not* apply to actions such as the plaintiff's and that the state statute of limitations should govern. In *Chevron*, the Court declined to apply the *Rodrique* decision retroactively, citing three separate factors which it deemed relevant.²²⁹ First, for a decision not to be applied retroactively, the Court held that it "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression, whose resolution was not clearly foreshadowed"²³⁰ Second, the prior history of the rule in question and its purpose and effect must be weighed to determine whether retroactive application will further or retard its operation.²³¹ Finally, the possible inequity of retroactive effect must be considered, "for '[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis in [the] cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'"²³²

Applied to the *Barry Properties* case, the *Chevron* guidelines provide a sensible resolution of the retroactivity issue.²³³ The holding of *Barry Properties* was not "clearly foreshadowed"; a number of jurisdictions had reached contrary results and an argument can be maintained that binding Supreme Court decisions should have precluded the Court of Appeals from reaching the question at all.²³⁴ Second, retroactive application of *Barry Properties* would probably neither further nor retard the operation of the holding. The basic rule underlying *Barry Properties* is that no taking of property should occur without adequate procedural safeguards. With respect to owners against whom mechanics' liens had been finally judicially determined as of the date of the *Barry Properties* decision, the taking had already occurred and, in most cases, the effect had been felt.

Even assuming that a retroactive application of *Barry Properties* would not interfere with the operation of the mechanics' lien statute, it is clear that such a result would cause great hardship and injustice. A retroactive application of *Barry Properties* would mean

228. 395 U.S. 352 (1969).

229. 404 U.S. at 106.

230. *Id.* at 106. See *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 542, 572 (1969).

231. *Id.* at 106-107. See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

232. *Id.* at 107 (citing *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)).

233. In *Higley Hill, Inc. v. Knight*, 360 F. Supp. 203 (D. Mass. 1973), the *Chevron* test was applied to determine whether *Fuentes* should be retroactively applied to Massachusetts real estate attachments.

234. See notes 104 to 130 and accompanying text *supra*.

that previously perfected mechanics' lien would, for purposes of priority, date from the final judicial determination in the enforcement proceeding under the old law²³⁵ and not from the date of the commencement of construction.²³⁶ The practical effects of such a result could be devastating. Countless properties have been bought and sold in reliance upon the old procedure; to attempt after the fact to reorder the priorities for each such transaction would result in chaos. Furthermore, support for prospective application of *Barry Properties* can be derived from the analogous position taken by other courts in refusing to give retroactive effect to the Supreme Court's decision in *Fuentes v. Shevin*.²³⁷ For example, in *Douglas-Guardian Warehouse Corp. v. Posey*,²³⁸ the Tenth Circuit held that *Fuentes* did not apply retroactively to state court judgments in replevin actions because "[v]alid judgments were rendered in those proceedings and rights vested in conformity with and reliance upon existing state law. The appellant is bound by those judgments and cannot attack them at this late date."²³⁹ This reluctance to cast doubt upon titles to property and other rights established under the statutes as they previously existed appears in the decisions of other courts as well.²⁴⁰ Retroactive application of *Barry Properties* would create similar uncertainties about property rights. This policy consideration, in tandem with the guidelines of the *Chevron* test, makes it highly unlikely that a Maryland court would apply *Barry Properties* retroactively to alter the rights of holders of mechanics' liens judicially determined prior to February 10, 1976.

The Effect of Senate Bill 998

Barry Properties altered the effective date of the mechanics' lien for priority purposes for liens judicially determined after the decision, potentially causing severe economic effects. Otherwise, the Court of Appeals left the mechanics' lien law essentially intact. The effect of the new statute is not so readily apparent although

235. See *Barry Properties*, 277 Md. at 235, 353 A.2d at 37.

236. See § 9-107 (former statute).

237. See, e.g., *Rutolo v. Gould*, 489 F.2d 1324 (1st Cir. 1974); *Douglas-Guardian Warehouse Corp. v. Posey*, 486 F.2d 739 (10th Cir. 1973); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085 (D. Me. 1973); and *Higley Hill, Inc. v. Knight*, 360 F. Supp. 203 (D. Mass. 1973). It is interesting to note that *Higley Hill* made one exception to its holding of nonretroactivity. All pre-*Fuentes* defendants whose property remained attached as of the date of the *Higley Hill* decision were held to be entitled to a hearing on request if one had not yet been afforded. See 360 F. Supp. at 206.

238. 486 F.2d 739 (10th Cir. 1973).

239. *Id.* at 742.

240. See cases cited in note 237 *supra*.

several of the categories can be dealt with easily. Like *Barry Properties*, the statute did not revive dead causes of action;²⁴¹ thus no lien can arise in a Category 6 situation, where the fatal limitations period had expired prior to *Barry Properties*, or in a Category 5 situation, where the running of the fatal limitation period occurred between the *Barry Properties* decision and the effective date of the statute. Category 3 claims are likewise unaffected by the new statute. With respect to these claims, no fatal limitation period had run, and if the claims were timely filed and properly prosecuted under the new law, they would simply proceed as any other lien claim.

The effects of the new statute on Categories 2 and 4 are more problematical.²⁴² To recapitulate, in Category 2 a final judicial determination enforcing the lien claim had been made before the statute became effective. In Category 4 no final judicial determination had been made as of the effective date of the statute, but a claim could not be commenced under the new law since a fatal limitations period had already expired by the effective date of the new statute. However, a petition to establish a lien could be filed if the timely notices given under the old law were deemed to satisfy the requirements of the new statute. Assuming *Barry Properties* is not applied retroactively, the effect of the new legislation on rights held by Category 2 and 4 lien claimants at the time of the statute's effective date is unclear.

The final version of Senate Bill 998 contained no saving clause and by its terms expressly repealed the entire mechanics' lien law.²⁴³ The Court of Appeals has consistently taken the position that, in the absence of a saving clause, the repeal of a statute "necessarily divests and destroys all *inchoate* interests which have arisen under it, while it leaves unimpaired those which have become vested."²⁴⁴ If the claims described in Categories 2 and 4 were vested interests, presumably they would not be abrogated by the repeal of the old law.

241. An argument might be advanced that claimants who allowed claims to expire between the date of the *Barry Properties* decision and the new statute did so because they thought that the entire statute had been held unconstitutional and therefore such claimants were in "limbo" awaiting a new statute. Because the case did not hold the entire statute unconstitutional, however, this argument should not prevail even though it may well be the product of a good faith, but mistaken, reading of the case.

242. With regard to the effect of the new statute, categories 1 and 2 are the same.

243. §§9-101 to 9-108 and §9-111 & 9-113 (former statute).

244. *State v. American Bonding Co.*, 128 Md. 268, 273, 97 A. 529, 531 (1916) (emphasis added). See also *Beechwood Coal Co. v. Lucas*, 215 Md. 248, 137 A.2d 680 (1958); *Turner v. State*, 55 Md. 240 (1881); *Keller v. State*, 12 Md. 322 (1858); *McMachen v. Mayor and City Council*, 2 H. & J. 41 (1806).

Although as a general matter the term "vested rights" is difficult to define,²⁴⁵ several Maryland cases have examined the concept. In *Wilson v. Simon*,²⁴⁶ the plaintiff sued to enforce a mechanics' lien for materials furnished in the construction of houses in Baltimore City. While the suit to enforce the lien was pending, but before any final determination, the legislature passed a statute repealing all of the sections of the law providing for a lien for materials furnished, and reenacting the law "so as to provide only for liens for the payment of debts contracted for work."²⁴⁷ The legislation contained no saving clause for materials liens, and the Court of Appeals held that the statute validly destroyed all liens for materials except those which had been finally determined prior to the date of the statute's repeal. The court's analysis was based on two propositions. First, with respect to the lien for materials furnished omitted from the new law, "[a]ll such liens, [since there was no saving clause] are obliterated from the laws of the State as completely as if they had never existed, except for the purpose of suits which were commenced, prosecuted *and concluded* whilst it was existing law."²⁴⁸ Second, the court held that such repeal was constitutional because under Maryland law, a mechanics' lien did not constitute a vested right prior to the conclusion of a suit to enforce the lien:

We are of the opinion, therefore, on principle, that the effect of the repealing statute was not to impair any of the obligations of the appellant's contract, though it took from him the lien therefore given him; and that the right to a mechanics' lien for materials furnished under the law of this State is not a vested right, but an extraordinary remedy only, which the State may discontinue at pleasure.²⁴⁹

By definition, then, Category 2 would appear to describe vested rights because they were finally judicially determined prior to the repeal of the old law. The general rule that vested rights are not

245. See generally, Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 331 (1927). The same author observed in a later article that "the distinctions between vested and non-vested rights . . . were found to break down before the hard cases and to serve mainly to label or classify the decisions after they have already been reached on other grounds." Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409 (1928). See also Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303 (1925).

246. 91 Md. 1, 45 A. 1022 (1900).

247. *Id.* at 4, 45 A. at 1022.

248. *Id.* at 5, 45 A. at 1023.

249. *Id.* at 9, 45 A. at 1024; *accord*, *Maryland Cas. Co. v. Lacios*, 121 Md. 686, 690, 89 A. 323, 324 (1913).

disturbed by repeal of a statute has been applied consistently by the Court of Appeals.²⁵⁰ The holding of *Wilson* that rights obtained at the conclusion of mechanics' lien proceedings are vested still appears to be good law, and it is highly unlikely that the new statute would affect Category 2.

Category 4 claims were not concluded prior to the effective date of the repeal of the old law, but by definition cannot be instituted anew under the new statute. Resolution of the issues presented by these claims presents the most difficult problem. Utilizing the *Wilson* test of the point at which rights become vested, Category 4 claims are clearly inchoate as of the repeal of the old mechanics' lien law. In fact, in *Guardian Sales & Service Co. v. Harris*,²⁵¹ in part in reliance on *Wilson*, the Circuit Court for Montgomery County held that the new law obliterated the plaintiff's pending lien claim because it destroyed the plaintiff's inchoate rights. This logic is appealing in its simplicity, but the result is questionable. The crux of the court's holding, the assumption that the plaintiff's right to a mechanics' lien was an inchoate right destroyed by the repeal of the former statute, ignores the fact that Senate Bill 998 simultaneously reenacted in a new procedural framework the substantive rights to a mechanics' lien as they existed after *Barry Properties*. *Barry Properties* had judicially modified the old law to eliminate the relation back provisions; consequently those particular "inchoate rights" were already destroyed. Substantively, mechanics' liens created by the new law are virtually identical to mechanics' liens as they stood following the *Barry Properties* decision. *Wilson* and the other cases dealing with the effect of statutory repeal on inchoate rights all deal with total repeal of the substantive rights in question.²⁵² Total repeal did not occur in this instance; here, the procedure pursuant to which a mechanics' lien could be obtained was changed, but the substantive right to a lien was not eliminated. This situation is similar to *Ireland v. Shipley*,²⁵³ where the Court of Appeals dealt with the repeal and reenactment of the Workman's Compensation Law. The plaintiff's claim had initially been determined under a statute which contained no statute of limitations for reopening the case. Seven years after the initial determination, the legislature repealed and reenacted the law, imposing a limitation

250. See, e.g., *Janda v. General Motors Corp.*, 237 Md. 161, 169, 205 A.2d 228, 232-33 (1964); *Beechwood Coal Co. v. Lucas*, 215 Md. 248, 256, 137 A.2d 680, 684 (1958); *State v. American Bonding Co.*, 128 Md. 268, 97 A. 529 (1916).

251. Circuit Court for Montgomery County Equity Case No. 48789 (June 16, 1976).

252. See cases cited in note 244 *supra*; cf. *Silverman v. Jacobs*, 259 Md. 1, 267 A.2d 209 (1970) (statute abolishing right of dower).

253. 165 Md. 90, 166 A. 593 (1933).

on reconsidering awards to "one year next following the final award of compensation."²⁵⁴ The plaintiff filed his application to have the claim reopened within one year of the new statute, but more than seven years from the date of the award. The Court of Appeals allowed the claim to be reopened, holding in effect that where substantive rights are not intended to be affected by a repeal and reenactment, those substantive rights continue in full force upon compliance with the new procedural requirements. The court's language is clear: "It is also settled law in this state that, when a statute is repealed and re-enacted with amendments, and the amended statute contains substantially the same provisions as the original, the continuity of the original as to those provisions is not affected."²⁵⁵ In *Ireland v. Shipley* the substance of the prior Workman's Compensation Law was unchanged by the new law. Similarly, the substantive lien remedy of the old mechanics' lien law after *Barry Properties* is the same as the new law, notwithstanding differences in the precise language of the two statutes; under the old and new laws a mechanics' lien vests following a final judicial determination. In both the new Workman's Compensation Law considered in *Ireland v. Shipley* and the new mechanics' lien law, the new procedures contained specific limitation periods for the giving of required notices or the institution of proceedings which, if applied for the first time on the date of the new statute, would immediately bar causes of action that had been viable under the prior statute. In *Ireland v. Shipley* the court held that the newly enacted one-year statute of limitations would not bar claims that were more than one year old; as to those, the provision ran only from the date of the new law. A similar situation could exist under the new mechanics' lien law. A lien claimant may have properly instituted a suit to enforce his lien under the old law, but if more than 180 days had passed since the completion of work or supplying of materials, a literal reading of the new law might preclude the filing of a petition to establish a lien.

To conclude that the technical repeal of the old law contained in Senate Bill 998 permanently destroys the substantive right to a lien in cases pending under the old law if the time has passed for commencement of an action under the new law does not make sense. Such a result is unquestionably within the legislature's power to accomplish, but there is no indication that it was intended in this case. Courts confronting the question in the future should allow claimants who have complied with the old procedure to continue

254. *Id.* at 97, 166 A. at 596.

255. *Id.* at 98, 166 A. at 596.

such actions as proceedings to establish a lien under the new statute.²⁵⁶

USEFULNESS OF THE NEW MECHANICS' LIEN; RESTORATION OF RELATION BACK

The utility of the mechanics' lien under the new law is fundamentally changed in certain ways. Although under the new procedure subcontractors may still proceed directly against the real estate provided timely notice is given,²⁵⁷ the traditional benefits of speed and effectiveness are somewhat impaired.

The advantage of speed existed under the old procedure because the lien arose immediately upon the commencement of work or delivery of materials and the claimant could record the lien without delay. On the other hand, it was this very characteristic of speed that prompted the Court of Appeals of Maryland to conclude that in the absence of adequate procedural safeguards, a constitutionally impermissible "taking" of property had occurred.²⁵⁸ Thus, the pressure previously brought to bear on a property owner by making a mechanics' lien an effective collection device for unpaid laborers or materialmen was the reason for the Court of Appeals' insistence on greater protection for owners. Under the new law, while a mechanics' lien is still a relatively speedy remedy in some cases, greater delay unquestionably exists. Assuming immediate issuance of the requisite show cause order in response to the petition to establish a mechanics' lien,²⁵⁹ and assuming that the owner does not file a defense to the claim, the lien may be established by a final

256. In *Landover Assocs. Ltd. Partnership v. Fabricated Steel Prods., Inc.*, ___ Md. App. ___, ___ A.2d ___ (No. 945, September Term, 1976), the Court of Special Appeals dealt with a suit to enforce a lien instituted before but decided after *Barry Properties*. It is not clear from the opinion whether the lower court's decision was prior or subsequent to the new law. Nevertheless, the court stated that *Barry Properties* had the practical effect of "transforming the 'Bill of Complaint to enforce a mechanics' lien.'" *Id.* at ___ Further in obvious dicta, the court said:

Appellants contend here, but did not below, that because the mechanics' lien statute was "repealed and reenacted," a hiatus was created in the law compelling appellee to begin again under the new rules because "repeal" divested appellee of all inchoate interests. Without going into appellants' misunderstanding of legislative procedure, we decline to recognize this issue because it was not tried and decided by the lower court.

Id. at ___ Assuming the court is correct in its evaluation of the effects of *Barry Properties*, a court dealing with the effect of the new statute on category 4 claims should convert proceedings commenced under the old law into the corresponding proceeding under the new.

257. § 9-104.

258. See notes 35 to 41 and accompanying text *supra*.

259. Neither § 9-106(a) of the statute nor Rule BG73 prescribes any time period for the issuance of the order. They merely provide for a review of the pleadings and documents on file and issuance of the show cause order if the court determines that

order at any time following the expiration of the fifteen day show cause period,²⁶⁰ except to the extent of the thirty-day period required by the decree pro confesso rule.²⁶¹ Even if the owner controverts the petition, it is clear that the statute and rules contemplate prompt action by the court in making at least a preliminary determination of whether the lien should attach in whole or in part.²⁶² The most obvious point at which the new procedure threatens greater delay in enforcing a mechanics' lien is the situation where the owner not only answers the petition but seeks an evidentiary hearing. Nevertheless, the possibility of a delay in obtaining a lien does not seriously impair the usefulness of the lien. The new mechanics' lien procedure is still, in most instances, a much faster procedure than a conventional lawsuit and, where the claimant has not dealt directly with the owner, it provides recourse that would not be available in an action for damages.

The most important issues are whether the Court of Appeals and the legislature have, by eliminating the relation back feature of the old law, substantially limited the usefulness and desirability of mechanics' liens as a remedy and whether the relation back features of the old law should be legislatively reinstated. Priority of a mechanics' lien now dates from the time of its establishment pursuant to the new procedure.²⁶³ The property may be freely sold prior to the filing of a petition to establish a lien and freely mortgaged or otherwise encumbered prior to the establishment of a lien.²⁶⁴ Because of this change in time of priority, it is conceivable that a lien claimant could prevail in proceedings to establish a lien only to find that the property has been sold or that it is subject to prior mortgages to the full extent of its value. Both the Supreme Court and the Maryland Court of Appeals have apparently recognized that in a proper procedural setting, a mechanics' lien may constitutionally relate back to the commencement of construction.²⁶⁵ The old law did not provide such a setting but it

there is reasonable grounds for the lien to attach. See notes 164 to 166 and accompanying text *supra*.

260. § 9-106(a) & (b).

261. Rule 675. See note 172 and accompanying text *supra*.

262. The entire preliminary procedure leading to a final or interlocutory order is very similar in nature to a motion for summary judgment. Compare Md. Rule 61(d) with § 9-106(b). As such it would appear inappropriate to allow discovery or other delaying tactics to interfere with a prompt resolution following the service of a show cause order.

263. See notes 140 & 142 and accompanying text *supra*.

264. See §§ 9-102(c) & (d), 9-108. See also notes 187 to 190 and accompanying text, *supra*.

265. See notes 87 to 97 and accompanying text *supra*.

would not have been difficult to incorporate the procedural safeguards described in *Mitchell* into either the former or present mechanics' lien law. Nevertheless, the legislature has not yet seen fit to reestablish this feature.

It is clear from a review of the historical background of the early Maryland statutes that the reasons for the procedure are as relevant today as when they were first enacted. The construction industry was, and continues to be, different from many other businesses. Sellers of many other goods and services may repossess their goods or at least maintain a personal action against the debtor, but once labor is performed and materials are incorporated into a building the remedies of the unpaid laborer or materialman are quite limited. The goods or services cannot be physically recovered since they have often become affixed to the realty. Furthermore, the claimant may have no personal right of action against the owner if there was no direct contractual relationship between them.²⁶⁶ Besides, the developer of the property may have disappeared, become insolvent, or may have sold the property or borrowed so heavily against its value that no equity remains to pay the debts. Just as important, stimulation of the construction industry has always been recognized as a very important goal, given its indirect but undeniably positive effects on employment and the economy. During the nearly two hundred years since the enactment of the first law, the Maryland legislature has consistently taken the position that the protections of this procedure were desirable for the building industry and society as a whole. It is difficult to perceive any sudden substantive change warranting a serious dilution of a remedy supported by such a longstanding policy.

Of course, historical precedent alone is not sufficient justification for any important policy decision. Relation back must be desirable on its merits in today's world to justify its reenactment. Although it is submitted that viewed objectively this provision is a desirable one, to a great degree that question has generally been approached from a more parochial viewpoint. Lenders and title insurance companies have long expressed great antipathy toward this provision. To avoid any possibility that a mechanics' lien could predate a construction mortgage, inspections were routinely made before settlement of a construction loan and pictures were taken to document the fact that no work had begun. For sales or financings attempted while construction was in progress, the problem was not so easily solved. Financially responsible owners were often required

266. See note 15 and accompanying text *supra*.

to furnish personal guarantees against losses due to unfiled mechanics' liens or to provide bonds or other collateral. Waivers of liens, often by sworn affidavit, were regularly required from all laborers and materialmen. Even with respect to completed structures, the possibility of unfiled mechanics' liens posed problems since the lien continued for 180 days after the work was completed or materials furnished even if no lien was ever recorded. Despite these aggravations, however, the building, development, and construction industries flourished, and, generally speaking, the free transfer of property was not substantially impeded.

From the point of view of lien claimants, the protection given to mechanics was significant. Although far from a certain remedy for bad debts, the ability to relate the lien back to the commencement of construction was a valuable right and often a strong weapon. For example, a developer who cannot sell his property or close a permanent loan is much more likely to find the funds to pay his outstanding obligations than if he knows, as is now the case, that such conveyances or mortgages will be superior to a subsequently established lien. Similarly, an unpaid mechanic is much more willing to cooperate with a developer and not take immediate action if he knows that by doing so his ultimate priority will not be adversely affected. Of course, the existence of the relation back feature can have the side effect of making it more difficult for a financially troubled owner to obtain additional financing once the project has been commenced, a difficulty only partially alleviated by the fact that lien rights may voluntarily be waived. Nevertheless, it would appear that the benefits in terms of convenience and certainty for lenders and title insurers are outweighed by the damage to the ability of contractors, subcontractors and materialmen to protect themselves.

In operation, the relation back provision encourages the extension of credit in an industry that is traditionally cash poor. Its elimination may have serious adverse effects. As in most states, the construction industry is an important part of Maryland's economy. It is a significant factor in employment and taxes, not to mention the other indirect "ripple" effects of active and competitive construction, development and related support industries. Over forty states have mechanics' lien statutes that provide liens that relate back.²⁶⁷ Some

267. Alabama — ALA. CODE tit. 33, § 38 (1958); Alaska — ALASKA STAT. §§ 34.35.050, 34.350.60 (1975); Arizona — ARIZ. REV. STAT. §§ 33-992, 33-1000 (1974); Arkansas — ARK. STAT. ANN. §§ 51-605, 61-607 (Repl. Vol. 1971); California — CAL. [CIV. PROC.] CODE §§ 3134, 3136, 3138 (West 1955); Colorado — COLO. REV. STAT. § 38-22-106 (1974); Connecticut — CONN. GEN. STAT. ANN. § 49-33 (West Cum. Supp. 1977); Delaware — DEL. CODE tit. 25, § 2718 (1974); D.C. — D.C. Code Encycl. § 38-109 (West

of those provisions even afford mechanics' liens priority over *all* liens and encumbrances, including those created prior to the commencement of construction.²⁶⁸ Although it probably cannot seriously be contended that the lack of a relation back provision in Maryland will immediately injure the construction industry in this state, over a long period this absence may cause persons to build elsewhere or to curtail the extension of needed credit to Maryland builders or projects. The absence of relation back certainly cannot help Maryland's competitive posture, and the substantial weakening of the position of suppliers and materialmen would not seem to be balanced by the advancement of any other significant policy consideration.

CONCLUSION

Mechanics' liens have been an integral part of the construction industry in Maryland for virtually the entire history of the United States. As a result of the Court of Appeals' application of contemporary due process standards, however, the manner in which this remedy can now be utilized has changed appreciably. The Court of Appeals was aware of the long history and compelling policies behind the procedure when in *Barry Properties* it elected to postpone the priority of a mechanics' lien rather than invalidate the entire procedure. Despite the best intentions, the legislature's response in

1968); Hawaii — HAW. REV. STAT. § 507-46 (1968); Idaho — IDAHO CODE § 45-506 (Cum. Supp. 1976); Illinois — ILL. ANN. STAT. ch. 82, § 16 (Smith-Hurd 1966); Iowa — IOWA CODE ANN. § 572.20 (West 1950); Kansas — KAN. STAT. § 60-1101 (Cum. Supp. 1972); Kentucky — KY. REV. STAT. ANN. § 376.010 (Baldwin 1975); Louisiana — LA. REV. STAT. ANN. § 9:4801 (West Cum. Supp. 1977); Michigan — MICH. COMP. LAWS ANN. § 570.1 (1967); Minnesota — MINN. STAT. ANN. § 51405 (West Cum. Supp. 1977); Missouri — MO. ANN. STAT. § 429.060 (Vernon 1952); Montana — MONT. REV. CODES ANN. § 45-506 (Repl. Vol. 1961); Nevada — NEV. REV. STAT. § 108.236 (1973); New Hampshire — N.H. REV. STAT. ANN. §§ 447:9, 447:11 (Repl. Vol. 1968); New Mexico — N.M. STAT. ANN. § 61-2-5 (Repl. Vol. 1974); North Carolina — N.C. GEN. STAT. § 44A-22 (Repl. Vol. 1976); North Dakota — N.D. CENT. CODE § 35-27-03 (Cum. Supp. 1975); Ohio — OHIO REV. CODE ANN. § 1311.13 (Page Repl. Vol. 1962); Oklahoma — OKLA. STAT. ANN. tit. 42, § 141 (West 1954); Oregon — OR. REV. STAT. § 87.025; Pennsylvania — PA. STAT. ANN. tit. 49 § 1508 (Purdon 1965); Rhode Island — R.I. GEN. LAWS § 34-28-25 (1970); South Carolina — S.C. CODE §§ 45-253, 45-255, 45-257 (1962); South Dakota — S.D. COMPILED LAWS ANN. § 44-9-7 (1967); Tennessee — TENN. CODE ANN. § 64-1107 (Repl. Vol. 1976); Texas — TEX. [CIV.] CODE ANN. tit. 16 § 5459 (Vernon Cum. Supp. 1976); Utah — UTAH CODE ANN. § 38-1-5 (Repl. Vol. 1974); Virginia — VA. CODE § 43-21 (Repl. Vol. 1976); Washington — WASH. REV. CODE ANN. § 60.04.050 (Cum. Supp. 1976); West Virginia — W. VA. CODE §§ 38-2-17, 38-2-18 (Cum. Supp. 1976); Wisconsin — WIS. STAT. ANN. § 289.01 (West Cum. Supp. 1976); Wyoming — WYO. STAT. §§ 29-6, 29-7 (1967).

268. See, e.g., N.H. REV. STAT. ANN. §§ 447:9, 447:11 (1968), which provides that mechanics' liens have priority over all prior claims except tax liens.

terms of the revisions of Maryland's mechanics' lien statute may be an illustration of poor communication between branches of government. The majority opinion in *Barry Properties* seems to have left the door wide open for the legislature to correct the procedural insufficiencies and reinstate the deleted provisions, but for some reason the General Assembly has declined to cross the portal. Although not entirely clear, the 1977 amendment is a small step in this direction. Nevertheless, the legislature ought to fully reinstate a "relation back provision" and restore the economic balance that is so vital to the construction industry.