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OPINION	:	No. 81-402
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of	:	<u>OCTOBER 6, 1981</u>
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THE HONORABLE MARIAN BERGESON, MEMBER OF THE ASSEMBLY, SEVENTY-FOURTH DISTRICT, has requested an opinion on the following question:

Are the possessory vessel lien provisions of the Harbors and Navigation Code (commencing with § 500) invalid under the rationale of *Adams v. Department of Motor Vehicles* (1974) 11 Cal. 3d 146?

CONCLUSION

While the possessory vessel lien sale provisions of the Harbors and Navigation Code are invalid since they fail to provide a debtor with notice and an opportunity for a hearing prior to the lien sale, the provisions for interim retention of the vessel remain valid.

## ANALYSIS

The exclusive means of enforcing possessory vessel liens are set forth in article 4 of the Harbors and Navigation Code. (Harb. & Nav. Code, § 500.)<sup>1</sup>

Section 501 of article 4 provides in part:

“Every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair or safekeeping of, and for costs incurred in the mooring, berthage, wharfage, and anchorage of, and for the rental of trailer parking space for, any vessel subject to registration with the Department of Motor Vehicles. . . .”<sup>2</sup>

Section 502.5 states:

“If the lienholder is not paid the amount due and for which the lien is given, within 10 days after such amount becomes due, the lienholder may proceed to sell the property, or so much thereof as may be necessary to satisfy the lien and costs of sale at public auction”

And section 503 states:

“Prior to any such sale the lienholder shall give at least 10 days but not more than 20 days notice of the sale by advertising for one issue in some newspaper of general circulation published in the county in which the property is situated. If there is no newspaper printed in such county, notice shall be given by posting notice of sale in three of the most public places in the town or place where the property is to be sold, for 10 days previous to the date of the sale. Prior to the sale of any vessel to satisfy any such lien, 20 days notice by registered mail or certified mail, return receipt requested, shall be given to the legal owner and to the registered owner of the vessel, if registered in this state, as the same appear in the certificate of ownership, and

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<sup>1</sup>Hereafter all section references shall be to the Harbors and Navigation Code unless otherwise indicated.

<sup>2</sup>Every undocumented vessel using the waters or on the waters of this state is required to be currently registered and numbered. (§§ 9850–9853.2.) An “undocumented vessel” is defined as any vessel which is not required to have and does not have a valid marine document issued by the United States Bureau of Customs or any federal agency successor thereto. (§ 9840(g).)

also to the Department of Motor Vehicles by registered mail or certified mail whether or not the vessel is registered in this state.

“The Department of Motor Vehicles shall in like manner immediately notify the legal owner and the registered owner of the proposed sale, but failure on the part of the department to give such notice shall not affect the validity of the sale. All notices required in this article shall specify the builder, and builder’s hull number, if available, of the vessel, and the date, time, and place of the sale. The proceeds of the sale shall be applied to the discharge of the lien and the cost of keeping and selling the property. The remainder, if any, shall be paid to the legal owner, if any, or to the owner if there is no legal owner.”

Section 504 provides for redemption of the vessel within 20 days after its sale under authority of section 502.5 upon payment by the legal owner of the amount of all costs and expenses of the sale with interest thereon.

When these sections were added in 1970, the Legislative Counsel’s Digest stated their purpose to be:

“Deletes provisions of Code of Civil Procedure relating to actions against vessels and adds such provisions to the Harbors and Navigation Code.

“Prescribes possessory vessel lien procedures. Requires keeping of records and rendering of reports with respect to stored vessels.

“Makes related changes and certain clarifying or nonsubstantive, technical changes.” (Stats. 1970, ch. 1341.)

In 1969 the United States Supreme Court determined that, in the absence of extraordinary circumstances, a debtor must be afforded the procedural due process requisites of notice and hearing before his property may be seized. (*Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 339–342 [23 L. Ed. 2d 349, 352–354]; see *Adams v. Department of Motor Vehicles* (1974) 11 Cal. 3d 146, 151.) The “extraordinary circumstances” required to forego procedural due process must be truly unusual; the United States Supreme Court has allowed outright seizure of property without opportunity for a prior hearing in only a few limited situations. (*Fuentes v. Shevin* (1972) 407 U.S. 67, 90–91 [92 S. Ct. 1983, 1999–2000].) The *Fuentes* court stated:

“ . . . First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against economic disaster of a bank failure, to protect the public from misbranded drugs and contaminated food.” (*Id.*, at pp. 91–92; fns. omitted.)

In 1974, the California Supreme Court held the garageman’s lien law invalid under the principles set forth in *Sniadach* and *Fuentes*. (*Adams v. Department of Motor Vehicles*, *supra*, 11 Cal. 3d at pp. 151, 154–155, 157.) The garageman’s lien law was set forth in the Civil Code. (Civ. Code, former §§ 3068–3075)<sup>3</sup> It authorized an unpaid

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<sup>3</sup>The provisions of the Civil Code have been amended several times since the *Adams* decision. The most recent amendment occurred in 1980. (Stats. 1980, ch. 1111.) The former sections (Stats. 1959, ch. 3, § 3) provided as follows:

Section 3068, subdivision (a) stated in part:

“Every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair or safekeeping of, and for the rental of trailer parking space for, any vehicle of a type subject to registration under the Vehicle Code. . . .”

Subdivision (b) provided that repairs in excess of \$300 must be consented to in advance by the owner, and written notice must be given by the person claiming the lien.

Section 3071 provided in part:

“If the lienholder is not paid the amount due, and for which the lien is given, within 10 days after the same becomes due, then the lienholder may proceed to sell the property . . . at public auction.”

Section 3072 read in part:

“Prior to any such sale the lienholder shall give at least 10 days but not more than 20 days notice of the sale . . . Prior to the sale of any vehicle to satisfy any such lien, 20 days notice . . . shall be given to the legal owner and to the registered owner of the vehicle . . . and also to the Department of Motor Vehicles. . . . The department shall in like manner immediately notify the legal owner and the registered owner of the proposed sale, but failure on the part of the department to give such notice shall not affect the validity of the sale. . . .”

The section also provided that, if there are funds remaining after the lien has been paid and the legal owner cannot be located, the funds are deposited with the Department of Motor Vehicles.

Section 3073 provided that:

garageman to retain and sell vehicles to which he had made repairs and required the Department of Motor Vehicles (“department”), upon proof of the lien sale and notice to the owner, to transfer registration of the car to a purchaser without prior hearing. (Civ. Code, former §§ 3068(a), 3071, 3072.)

The *Adams* court reviewed past cases which made a general determination that:

“[P]rocedural due process requires the giving of notice and an opportunity for hearing before the state, in aid of a creditor, may deprive a debtor of *any significant interest, including temporary use and enjoyment*. . . . Of course, the principle established by the . . . cases applies only when a taking involves significant action by the state.” (Emphasis added; *id.*, at pp. 151–152.)

As to “significant state action,” the court found no need for direct state involvement when private conduct became so entwined with governmental action as to become subject to the due process clause of the federal and state constitutions. (*Id.*, at p. 152.) The court observed that the statutes created and governed the lien procedures and the department was involved in administering the procedures. Furthermore, by authorizing and empowering the garageman to sell the car and requiring the department to recognize and record transfer of title, the state delegated to the garageman the traditional governmental function of lien enforcement and enabled him to pass valid title to a vehicle which he did not own. (*Id.*, at p. 153.) The court therefore concluded “the state’s involvement in the imposition and enforcement of the garageman’s lien constitutes state action.” (*Ibid.*) It was recognized that summary procedures may be justified in certain “extraordinary

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“When the lienholder can certify under penalty of perjury that the value of the vehicle subject to the lien does not exceed two hundred dollars (\$200), the lienholder may sell such vehicle at public sale, upon the giving of notice as provided in this section. At least 10 days before the sale, the lienholder shall notify the legal owner, the registered owner and the department by registered mail, return receipt requested, certified mail, or United States Post Office certificate of mailing of the time and place of the sale. At least 10 days before the sale, the lienholder shall also post a notice of the sale in a conspicuous place on the premises where the vehicle is stored, giving the date of the sale and a description of the vehicle. . . .”

Section 3074 provided that:

“Within 20 days after the sale of any vehicle under the authority of section 3071, the legal owner may redeem such vehicle upon the payment of the amount thereof all costs and expenses of said sale, together with interest on said sum at the rate of 12 per cent per annum from the due date thereof or the date when the same were advanced until the repayment. [¶] This section shall not be applicable to vehicles sold under the authority of Section 3073.”

circumstances,” but the garageman’s lien law was not limited to such circumstances:

“The garageman’s lien law applies broadly to labor and materials furnished in the repair of all motor vehicles and is not limited to situations comparable to those enumerated in [*Fuentes v.*] *Shevin*.” (*Id.*, at p. 154.)

The court went on to state:

“Since in the absence of extraordinary circumstances, due process requires notice and hearing be accorded before the state may temporarily take property from a debtor, it follows a fortiori that the same requirement must be met for permanent deprivation. There is no provision in the garageman’s lien law for hearing prior to the sale of the car and the transfer of its registration.” (*Id.*, at p. 155.)

And, in its disposition, the *Adams* court concluded former sections 3071, 3072, 3073 and 3074 of the Civil Code were invalid because they permit involuntary sale and transfer of a vehicle without affording the owner an opportunity for hearing to contest the validity of the lien prior to sale—they deprived the owner of due process of law. (*Id.*, at p. 157.) But the court did not invalidate the entire statutory scheme:

“... a garageman still may retain possession of a car when the owner, for whatever reason, declines to pay for its repair. But the garageman may no longer sell the car to satisfy his claim. If the owner remains unwilling or unable to pay the amount claimed, the parties are relegated to such remedies as are provided by common law [fn. omitted] or statute, consonant with requirements of due process.”<sup>4</sup> (*Ibid.*)

The interim retention of the automobile under the garageman’s lien law was found not to violate the principle of *Sniadach* because, contrary to the cases bearing on the temporary deprivation of use and enjoyment of property, the garageman has added to the value of the vehicle and is in rightful possession at the time he asserts his lien. (*Id.*, at pp. 154–155.) In the usual case the claim of an attaching or garnishing creditor is a general claim unrelated to the specific property seized. The claim of a conditional vendor or chattel mortgagee does arise out of a transaction involving the seized property, but the interest of

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<sup>4</sup>The garageman or possessory lienholder had no power of sale at common law. Any sale in attempted foreclosure of the lien would have been deemed a conversion. The lienholder’s remedy was to bring an action on his claim and obtain a writ of execution on the resulting judgment. (*Id.*, at p. 153. fn 13; *California Garageman’s Lien Impact and Aftermath of Adams v. Department of Motor Vehicles* (1975) 6 Pac L.J. 98, 100.)

such creditor in the seized property is ordinarily purely pecuniary. The creditor has not, subsequent to acquisition of the property by the debtor, mixed his own labor with it, nor added to it materials to which he originally has a right of possession.

As the *Adams* court stated:

“Furthermore, even assuming that the possessor of a garageman’s lien does not have an interest in any sense superior to that of a conditional vendor or chattel mortgagee, or even to that of an attaching creditor, the . . . cases are distinguishable on the ground that creditors there sought assistance of a state officer or proceeded under color of state law to alter the status quo either by dispossessing debtors or by diverting rights or benefits owed the debtors by third parties. Here, however, the creditor is in rightful possession at the time he asserts his lien. To strike down the garageman’s possessory lien would be to alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in *Shevin and Blair* [*v. Pitchess* (1971) 5 Cal. 3d 258].<sup>15</sup>” (*Id.* at p. 155; see *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal. 3d 803, 815, fn. 12.)

Footnote 15 of *Adams* states:

“Implicit in *Shevin and Blair* is the policy of honoring that possessory right actually vested in possession, at least until conflicting claims of possession have been judicially resolved. That policy is consistent with the general policy of the law. Thus even a holdover tenant, though technically a trespasser, is entitled to continued possession of realty as against the landlord until the latter has established his right to possession in court. (See 3 Witkin, Summary of Cal. Law (1960) Real Property, § 287, P. 1113; *op. cit.*, Torts, § 70, p. 1244.) And the owner of a chattel may generally repossess it from a converter only if he can do so without breach of the peace; he is privileged to use force in recaption only if he reacts promptly to the taking and is in fresh pursuit of the converter. (See Rest., Torts, § 103; 2 Witkin, Summary of Cal. Law (1960) Torts, § 71, P. 1245.)” (*Ibid.*)

In the recent case of *Martin v. Heady* (1980) 103 Cal. App. 3d 580,<sup>5</sup> it was determined that the lien sale provisions of the aircraft lien law (Code of Civ. Proc.,

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<sup>5</sup>On May 21, 1980, the California Supreme Court denied a petition to hear the case.

1208.61–1208.68)<sup>6</sup> were invalid. (*Id.*, at pp. 586–589.) The *Martin* court held that the procedure prescribed for summary nonconsensual enforcement of a possessory lien by involuntary sale by the aircraft keeper, being solely and exclusively a creature of statute, constitutes “state action,” even though there is no participation whatsoever in such sale by any state personnel, even ministerially. (*Id.*, at pp. 587.) The court went on to state:

“The involuntary lien sale procedures contained in the aircraft lien law are essentially identical to the former involuntary sale provisions of the garagemen’s lien law federally invalidated by our Supreme Court in *Adams*. There our high court gave as its reason for the invalidity of these statutes the fact that they permitted an involuntary sale and a transfer of a vehicle without affording the owner an opportunity for hearing. [Citation.] The same is true here as regards the customized DC-3. We, therefore, view the sale before us as equally violative of the corresponding procedural due process provision of our Constitution, namely, article I, section 7, subdivision (a).” (*Id.*, at p. 589.)

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<sup>6</sup>The relevant sections of the Code of Civil Procedure provide as follows:

Section 1208.61:

“Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft, also for reasonable charges for the use of any landing aid furnished such aircraft and reasonable landing fees.”

Section 1208.65:

“ If the lienholder is not paid the amount due within 10 days after it becomes due, the lienholder may proceed to sell the property, or so much thereof as is necessary to satisfy the lien and costs of sale, at public auction.”

Section 1208.66:

“Prior to any such sale the lienholder shall publish a notice of the sale pursuant to Section 6062 of the Government Code in a newspaper published in the county in which the aircraft is situated, or if there is no such newspaper, by posting notice of sale in three of the most public places in the city or place where such aircraft is to be sold for 10 days previous to the date of the sale. Prior to the sale of any aircraft to satisfy any such lien, 20 days’ notice by registered mail shall be given to the legal owner as it appears in the registration certificate.”

Section 1208.67:

“The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property. The remainder, if any, shall be paid to the legal owner.”

Section 1208.68:

“Within 20 days after the sale, the legal owner may redeem the aircraft so sold upon the payment of the amount of the lien, all costs and expenses of sale, and interest on such sum at the rate of 12 percent a year from the date it became due or the date when the amounts were advanced until the repayment.”



As in the case of the garageman's lien law, the possessory vessel lien procedures, in conjunction with section 9915(a) of the Vehicle Code,<sup>7</sup> authorize a person possessing a lien pursuant to section 501 to retain and sell the vessels to which he has performed services or supplied materials, and require the Department of Motor Vehicles, upon proof of the lien sale and notice to the owner, to transfer the certificate of ownership of the vessel to a purchaser without prior hearing. (§§ 501, 502.5, 503; see *Adams v. Department of Motor Vehicles*, *supra*, 11 Cal. 3d at p. 150.) Since, at common law, a possessory lienholder possessed no power of sale to enforce his lien, the possessory vessel lien procedure for summary nonconsensual enforcement by an involuntary sale by the vessel's keeper is solely and exclusively a creature of statute. (See *Martin v. Heady*, *supra*, 103 Cal. App. 3d at p. 587.) Therefore, because of the involvement of the Department of Motor Vehicles and the creation of the lien by statute as well as its execution and sale being authorized by statute, the state's involvement in the imposition and enforcement of the possessory vessel lien constitutes "state action." (*Adams v. Department of Motor Vehicles*, *supra*, at pp. 152–153; *cf. Martin v. Heady*, *supra*, at pp. 587–589.)

We previously noted that summary prejudgment remedies may be justified in "extraordinary circumstances." However, the possessory vessel lien statutes are not limited to such circumstances. (See *Fuentes v. Shevin*, *supra*, 407 U.S. at pp. 91–92.) The possessory vessel lien law applies broadly to services and materials furnished to all undocumented vessels (see fn. 2) and is not limited to situations comparable to those set forth in *Fuentes*.

The involuntary lien law sale procedures in the possessory vessel lien law are virtually identical to the former involuntary sale provisions of the garagemen's lien law considered in *Adams*. Section 501(a) differs from former Civil Code section 3068(a) by adding "costs incurred in the mooring, berthage, wharfage, and anchorage" of a "vessel" as entitling the vessel keeper to a lien. Section 502.5 differs from former Civil Code section 3071 only by deletion of the word "then" following the second comma. Section 503 differs from former Civil Code section 3072 by substituting "vessel" for "vehicle" and allowing the 20 days notice to be by "certified" mail, return receipt requested rather than "registered" mail, return receipt requested. Section 503 also requires all notices specify "builder, and

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<sup>7</sup>Section 9915(a) of the Vehicle Code provides:

"(a) Whenever the title or interest of any owner or legal owner in or to a vessel numbered under this code passes to another otherwise than by a voluntary transfer, the new owner or legal owner may obtain a transfer of ownership upon application therefor and upon presentation of the last certificate of ownership and certificate of number issued for the vessel, if available, and any instruments or documents of authority or certified copies thereof as may be required by the department, or required by law, to evidence or effect a transfer of title or interest in or to chattels in such case."

(*Cf. Veh. Code*, § 5909(a).)

builder's hull number" rather than "make, the engine or vehicle identification number, and license number."

In *Adams*, our Supreme Court gave as its reason for the invalidity of the former Civil Code sections the fact that they permitted an involuntary sale and transfer of a vehicle without affording the owner an opportunity for a hearing to contest the validity of the lien. (*Adams v. Department of Motor Vehicles, supra*, 11 Cal. 3d at p. 157.) The same rationale holds true when applied to the possessory vessel lien law. (See *Martin v. Heady, supra*, 103 Cal. App. 3d at p. 589.)

We conclude the possessory vessel lien sale provisions of the Harbors and Navigation Code are invalid since they fail to provide a debtor with notice and an opportunity for a hearing prior to the lien sale. However, as in the *Adams* case, we believe the person to whom the vessel was delivered for repair or improvement may retain possession of the vessel until the labor and materials incorporated into the vessel have been paid for.

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