Denver Law Review

Volume 57 | Issue 4 Article 10

February 2021

Rights of Landlords in Tenants' Personal Property

James E. Gigax

THE RIGHTS OF LANDLORDS IN TENANTS' PERSONAL PROPERTY

The Colorado Court of Appeals, in *Christensen v. Hoover*,[1] filled a void in Colorado case law by holding that an evicting landlord is not liable for damages occurring to a tenant's personal property in the process of removal and storage. The decision was basically twofold. First, the court held that the landlord was an "involuntary bailee" and, as such, should not be liable unless he willfully, maliciously, or through gross negligence caused the damage. Second, it was found that a professional mover that the landlord engaged to remove and store the property was an independent contractor, thereby releasing the landlord from any imputed negligence. The Colorado Supreme Court has granted certiorari.[2]

It is the thesis of this note that while the court in *Christensen* reached the right result, the opinion was cryptic and conclusory. The decision left some key issues unanswered and, as a precedent, has little guidance value for landlords and tenants. To what standard of care is a landlord held in respect to the personal property of an evicted tenant? May the landlord seize and have a lien upon the tenant's property? Although a determination of the latter issue is implicit in the former, whether a landlord's lien exists is an issue complex enough to merit separate treatment. Accordingly, the landlord's standard of care is examined in detail within the facts of *Christensen*, while the landlord's lien is dealt with more tangentially.

THE FACTS

The plaintiff was a tenant in a house owned by the defendants, the Hoovers. In December, 1976, the defendants commenced a forcible entry and detainer action to regain possession of the house.[3] Judgment was entered for the Hoovers and a writ of restitution was issued. On the same day of the judgment Mr. Hoover contracted with one Mr. Slatten, a professional mover, to move and store the plaintiff's personal property. Messrs. Hoover and Slatten and a deputy sheriff arrived at the premises and posted the writ. Slatten removed all of the plaintiff's property and placed it in a storage facility where the plaintiff reclaimed it some two months later. The plaintiff then brought an action alleging that her property had been damaged by Slatten and the Hoovers when the property was removed or stored.[4]

1. — Colo. App. —, 608 P.2d 372 (1979).

2. *Id.*

3. Landlords in Colorado are by the forcible entry and detainer statute provided with a procedure whereby tenants at sufferance and others can be removed from the premises and the landlord restored to possession. COLO. REV. STAT. § 13-40-115(1)(1973). In addition, although there is a modern trend against the enforcement of private summary remedies which entail force, *see* 6 A.L.R. 3d 177 (1966), the lease agreement may provide the landlord with the independent right to enter and remove the tenant and his effects using whatever reasonable force necessary to effect the removal. Goshen v. People, 22 Colo. 270, 44 P. 503 (1896).

4. 608 P.2d at 374.

The trial court found that $1,025 damage occurred to the plaintiff's property in the process of being removed, transported, and stored, and that the Hoovers had employed Slatten as their agent. The court further found that the Hoovers and Slatten owed the plaintiff a duty of due care in the removal and storage of the property, and that this duty had been breached. Accordingly, a money judgment was entered jointly and severally against Slatten and the Hoovers.[5] On appeal, the Colorado Court of Appeals affirmed the trial court in its determination of Slatten's liability, while it reversed the lower court's finding that the Hoovers were liable.[6]

I. THE MOVER AS AN INDEPENDENT CONTRACTOR

The first and perhaps easiest issue before the court of appeals was whether Slatten had acted as the Hoovers' agent or as an independent contractor. The rule controlling the court's decision was set out in *Dumont v. Teets*[7]: Does the employer retain or have the right to control the person as to all details of the work, or does the discretion rest solely with the person so engaged?[8] The court found that Slatten and his employees had retained total control over how the goods were removed, transported, and stored and was, therefore, an independent contractor—not an employee or agent of the Hoovers. Accordingly, Slatten's negligence could not be imputed to the Hoovers.[9] Further, although the issue was neither defined nor expressly disposed of, persons who engage independent contractors have a duty to exercise reasonable care in selecting the contractor.[10] The court did hold, however out of context, that the Hoovers, "by employing a professional mover, without having any reason to believe that the mover would act irresponsibly, cannot be accused of negligence . . . ."[11] Setting the trend for the rest of the opinion, the court here reached the right decision without showing the basis for its conclusion.

II. A BASIS FOR LANDLORD'S LIABILITY

A. *Introduction*

The central issue before the court of appeals was whether the landlords were independently liable as bailees or upon some other theory based upon the landlord-tenant relationship. In keeping with the tenor of the rest of the opinion, the court's reasoning here was brief and without support. The court determined that the tenant, by failing to surrender the premises,

> placed the landlord in the position of having to take possession and remove the tenant's effects so that he might regain his, the landlord's premises. The landlord, then, as an involuntary bailee, should not be forced to bear the risk of damage to the tenant's

5. *Id.*
6. *Id.*
7. 128 Colo. 395, 262 P.2d 734 (1953).
8. *Id.* at 397, 262 P.2d at 735.
9. 608 P.2d at 374 (citing Western Stock Center v. Sevit, Inc., 195 Colo. 372, 578 P.2d 1045 (1978)).
10. Western Stock Center v. Sevit, Inc., 195 Colo. 372, 376, 578 P.2d 1045, 1048 (1978).
11. 608 P.2d at 374.

> property unless he *maliciously or wilfully or through gross negligence* causes that damage.[12]

The court cited no other authority for this proposition than *Days v. Hall*,[13] a 1946 New York decision. *Days* is a short per curiam affirmance with no recital of facts which in turn cites *Ide v. Finn*,[14] an appellate division case replete with citations but short on any firm holdings. The question becomes, therefore, whether there is any authority in *Days, Ide*, or elsewhere to support the court's finding of such a low standard of care for landlords. Specifically, was there a bailment created when the Hoovers had the tenant's property removed, and, if so, were they liable? Secondly, in the absence of a bailment, is a landlord independently liable for damage to an evicted tenant's personal property? In other words, to what standard of care must a landlord conform in removing a tenant's personal property? The issue of bailment is dealt with first.

B. *Bailment*

A bailment is a delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the property will be returned or accounted for when the specific purpose has been accomplished or when the bailor reclaims the property.[15] While delivery can be constructive by, for example, simply taking possession,[16] the creation of a bailment requires that possession and control over the subject property pass to the bailee.[17]

A formal creation of a bailment between the parties is not necessary. Where a person comes into lawful possession of the personal property of another, even though there is no meeting of the minds between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires.[18] Such bailments are known as constructive or involuntary bailments,[19] and the law imposes upon the recipient the duties and obligations of a bailee.[20] In the facts of *Christensen* there appears to have been a constructive bailment between Slatten and the plaintiff. Slatten came into possession of the property through the legal process of a forcible entry and detainer action. Further, if it is assumed that the Hoovers retained control over the property while it was in storage, there well could have been a bailor-bailee relationship between the plaintiff and the Hoovers.[21] However, a

---

12. *Id.* (emphasis supplied).
13. 67 N.Y.S.2d 238 (Sup. Ct. 1946).
14. 196 A.D. 304, 187 N.Y.S. 202 (1921).
15. Mayer v. Sampson, 157 Colo. 278, 281, 402 P.2d 185, 187 (1965); Simons v. First Nat'l Bank of Denver, 30 Colo. App. 260, 262, 491 P.2d 602, 603 (1971).
16. Theobald v. Satterthwaite, 30 Wash. 2d 92, 190 P.2d 714 (1948).
17. Rocky Mountain Bridge Co. v. Martin K. Eby Constr. Co., 543 P.2d 1288 (Colo. App. 1975).
18. Loomis v. Imperial Motors, Inc., 88 Idaho 74, 78, 396 P.2d 467, 469 (1964).
19. Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 721, 144 P. 961, 963 (1914); Grice v. Berkner, 148 Minn. 64, 180 N.W. 923 (1921).
20. 148 Minn. 64, 180 N.W. 923 (1921); *see* Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943).
21. *See generally* Rocky Mountain Bridge Co. v. Martin K. Eby Constr. Co., 543 P.2d 1288, 1290 (Colo. App. 1975).

finding of a bailment is not per se determinative of the issues of duty or negligence.

The standard of care imposed upon a particular bailee depends upon the classification into which the bailment falls. The modern test is whether the bailment was gratuitous or for compensation.[22] The fundamental principle is the premise that upon the bailee whose labors or efforts are to go unrewarded should rest most lightly the obligation of care.[23] If the bailment is for hire or otherwise for the benefit of the bailee the standard of care for either is the same:[24] ordinary care—"that degree of care which an ordinary, prudent person would exercise under similar circumstances."[25] However, if the bailment is gratuitous, the bailee is held merely to a standard of slight care.[26] Therefore, such a bailee is liable only for gross negligence[27] or for willful acts.[28] No matter how the bailment is characterized, if it is shown that items are delivered to a bailee in good condition and he returns them in a damaged condition, a presumption of negligence arises. The bailee then would have the burden of going forward to rebut that presumption[29] by showing that he met the particular standard of care imposed upon him.[30]

Generally, a constructive trustee will receive nothing from the owner of the property and has no right to recover anything from the owner for what he does in caring for the property.[31] It is plain here that unlike Slatten, the Hoovers received no compensation for having the property stored. In fact, the Hoovers themselves paid for the property's storage.[32] Further, it appears that the Hoovers had no right to seize and have a lien upon the tenant's property. The trial and appellate court opinions make no reference to any lien reserved to Hoover in the lease, nor is the renter of a house provided with a lien in Colorado's landlord lien statute.[33] Therefore, by having the property stored, the Hoovers could hope to derive no benefit from the assumed bailment—the property could not be held for security, nor would they have a right to compensation for storage expenses.[34] Accordingly, it seems fair to assert that the property was stored for the purpose of its safe-

22. Loomis v. Imperial Motors, Inc., 88 Idaho 74, 78, 396 P.2d 467, 469 (1964).

23. *Id.*

24. Johnson v. Willey, 142 Colo. 512, 513, 351 P.2d 840, 841 (1960).

25. Michigan Stove Co. v. Pueblo Hardware Co., 51 Colo. 160, 165, 116 P. 340, 342 (1911).

26. United States Fire Ins. Co. v. Paramount Fur Serv., Inc., 168 Ohio St. 431, 437, 156 N.E.2d 121, 126 (1959); 96 A.L.R. 909 (1935).

27. Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976) (concurring opinion); Pettinelli Motors, Inc. v. Morreale, 39 Misc. 2d 813, 242 N.Y.S.2d 78 (1963); *see* Carico v. Fidelity Inv. Co., 5 Colo. App. 56, 37 P. 29 (1894).

28. 168 Ohio St. at 438, 156 N.E.2d at 126.

29. Chabot v. Williams Chevrolet Co., 30 Colo. App. 277, 491 P.2d 612 (1971) (citing Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968)).

30. *See* Preston v. Prather, 137 U.S. 604, 610 (1891); Johnson v. Willey, 142 Colo. 512, 515, 351 P.2d 840, 842 (1960).

31. United States Fire Ins. Co. v. Paramount Fur Serv., Inc., 168 Ohio St. 431, 437, 156 N.E.2d 121, 126 (1959).

32. Petition for Writ of Certiorari at 4, Christensen v. Hoover, 9 COLO. LAW. 356 (Colo. App. 1980) (No. 78-664), *cert. granted*, No. 80SC46 (March 17, 1980).

33. COLO. REV. STAT. § 38-20-102(3) (1973). See text accompanying notes 50-57 *infra*.

34. 168 Ohio St. at 438, 156 N.E.2d at 126; Grice v. Berkner, 148 Minn. 64, 180 N.W. 923 (1921); *see* COLO. REV. STAT. § 38-20-109 (Supp. 1978). *Ide* v. *Finn* did find, however, that there was an implied covenant on the part of the tenant to reimburse the landlord for any

keeping in a place where it could be and was reclaimed by the plaintiff. As bailments for safekeeping are usually embraced within the gratuitous bailment classification,[35] it seems clear that the Hoovers were gratuitous bailees.

Finally, although it could be argued that the bailment, assuming it existed, was for the Hoovers' sole benefit or even for the mutual benefit of the Hoovers and the plaintiff, such a construction seems strained. The bailments ordinarily encompassed under the mutual benefit label (and thus for recompense) are those in which the bailee receives his compensation in the profits of the business to which the bailment is an incident, such as where a storekeeper's customer lays aside his clothes while trying on new ones,[36] or where goods are furnished to a person or an association for exhibition to the public.[37]

Thus, although it is not clear how, the court in *Christensen* seems to have reached the right result on the bailment issue. The Hoovers were indeed gratuitous, involuntary bailees and should therefore be held to a minimal standard of care. Mr. Slatten, on the other hand, received compensation and was appropriately held to a higher standard of ordinary care.

C. *An Independent Basis*

Implicity raised but never disposed of in the opinion was whether, regardless of the existence of a bailment between the landlord and tenant, the landlord is independently liable for damages which occur to an evicted tenant's personal property in the process of removal. The court in *Christensen* relied on *Days v. Hall*[38] wherein is set out a "willful and wanton" standard,[39] but it is not very clear under what circumstances such a standard is to be imposed. Recall that in a normal forcible entry and detainer (f.e.d.) action, a sheriff is issued a writ of restitution,[40] and it is his duty not only to remove the overstaying tenant, but also the tenant's personal property and effects.[41] As a practical matter, however, it may be the landlord himself or his servant who removes the property, either alone or with the assistance of the sheriff.

As for acts of the sheriff, a landlord generally is not liable for the manner in which the sheriff executes the writ unless either the landlord has directed its execution[42] or the writ is irregular, unauthorized, or void.[43] Mere participation with the sheriff is not treated as direction. One case cited with approval in *Ide* held that a landlord in a dispossess action who, at the consta-

expenses incurred in removing the property from the premises. 196 A.D. at 313, 187 N.Y.S. at 209.

35. Slack v. Bryan, 299 Ky. 132, 184 S.W.2d 873 (1945); Acme Ribbon Mills, Inc. v. City of New York, 30 N.Y.S.2d 369 (Sup. Ct. 1941), *aff'd* 266 A.D. 656, 41 N.Y.S.2d 201 (1943).

36. 1 A.L.R.2d 802 (1948).

37. Kay County Free Fair Ass'n v. Martin, 190 Okla. 225, 122 P.2d 393 (1942); *see* Johnson v. Willey, 142 Colo. 512, 351 P.2d 840 (1960).

38. 67 N.Y.S.2d 238 (Sup. Ct. 1946).

39. *Id.* at 239.

40. COLO. REV. STAT. § 13-40-115(1) (1973). *See* note 3 *supra*.

41. Miller v. White, 80 Ill. 580 (1875); Ide v. Finn, 196 A.D. 304, 187 N.Y.S. 202 (1921). *See* note 3 *supra*.

42. 196 A.D. at 313, 187 N.Y.S. at 209 (citing with approval Jansen v. Bernard, 12 N.Y. Wkly. Dig. 499); *see* Rosenfield v. Barnett, 26 Tex. Civ. App. 71, 64 S.W. 944 (1901).

43. 196 A.D. at 314-15, 187 N.Y.S. at 210.

ble's request, helped remove the tenant's property to a sidewalk during a rainstorm was not liable unless he acted maliciously or willfully.[44] This language was perhaps the basis for the holding of *Days*.

If a directing landlord is to be held "liable for the unlawful acts of the constable,"[45] to what standard of care is the landlord held? To begin, the sheriff or constable himself is held to a fairly low standard:

> an officer armed with such a writ [of restitution] can enter forcibly, in order to execute it . . . and . . . it is his duty to remove whatever chattels or property may be in the house, doing as little damage as possible—no more than is necessary to effect the purpose, and which would be the natural consequence of a hasty removal. By the writ, the landlord is to be put in full possession . . . of the premises only, divested of such property as may be found therein. Should the officer *wantonly injure* the chattel property, he would be liable to the extent of the injury.[46]

Since the negligence of the sheriff is sought to be imputed to the landlord,[47] it seems reasonable to hold the landlord to the sheriff's standard of care: some degree of care in excess of wantonness. There are additional reasons to impose a relatively low standard on the landlord. First, it is primarily the duty of the tenant to remove his own property.[48] Second, it is the duty of a tenant whose personal property has been removed under a writ of restitution to use his best efforts to protect it from damage.[49] Given these duties, it is the view of this writer that even if the landlord alone removes the property, in a legal entry with reasonable notice to the tenant, it is equitable to require of the landlord only that he not willfully or maliciously damage the tenant's property. While this issue has not been clearly determined in any decision, especially in *Christensen*, a lower standard of care for an evicting landlord seems reasonable and fair. It will be up to the Colorado Supreme Court, however, to make this determination.

III. THE LANDLORD'S LIEN

As *Christensen* illustrates, in any eviction proceeding there is raised the question of what rights and responsibilities a landlord has in the tenant's personal property. Although it was not broached in the *Christensen* opinion, the landlord's lien is a central right in the landlord-tenant relationship. A determination of the existence of a landlord's lien is crucial to fully assess the rights and obligations of the parties in the tenant's personal property. The significance of a finding of a landlord's lien extends beyond the mere fact that the landlord would then have the rent obligation secured in his favor. Should the landlord seize the tenant's personal property to enforce the lien, a

44. *Id.* (citing Higenbothem v. Lowenbein, 28 How. Prac. 221 (1864), "The law does not [in dispossess actions] recognize the state of the weather." *Id.* at 223). *Ide* had previously cautioned, however, that property's removal to the street and alley "could only be justified under the warrant." *Id.* at 313, 187 N.Y.S. at 208.

45. *Id.* at 314, 187 N.Y.S. at 210.

46. Miller v. White, 80 Ill. 580, 584 (1875) (emphasis supplied); *see* 56 A.L.R. 1039 (1928).

47. *See* W. PROSSER, THE LAW OF TORTS § 69 (4th ed. 1971).

48. 196 A.D. at 313, 187 N.Y.S. at 208.

49. Przybylski v. Remus, 207 Ill. App. 106, 108 (1917).

bailment would be created. Moreover, since the landlord would obviously derive some benefit out of the bailment, he would not be a gratuitous bailee. His standard of care toward the property would therefore be considerably higher than if he had simply had the chattels carried away and stored to be freely reclaimed by the tenant. The following section is intended to survey this very important lien.

At common law, a landlord had no lien upon any property of his tenant as security for rent. However, the landlord did have the right to distress[50] or seize the tenant's personal property found on the demised premises and hold it without sale until the rent was paid.[51] To the extent that the landlord actually seized the goods and was in possession of the goods, he acquired a peculiar right in the distressed property which was in the nature of security.[52] This right to distress has never existed in the State of Colorado.[53]

While the first legislature of the territory of Colorado adopted the common law of England, it limited its adoption to laws "of a general nature, and all acts and statutes of the British Parliament made in aid of or to supply the defects of the common law prior to the fourth year of James the First."[54] *Herr v. Johnson*[55] found that a landlord's right of distraint under the English law did not arise until *after* the fourth year of the reign of James I.[56] Accordingly, to determine whether a landlord has the right to distress or have a lien upon a tenant's personal property, one must look to the lease agreement between the parties[57] or any statutory provision.

Colorado landlords and innkeepers have been provided with a statutory lien upon their tenants' personal property found on the premises for the amount of any unpaid board, lodging, or rent, as well as for any reasonable costs incurred in enforcing the lien, not including legal expenses.[58] The landlord lien encompasses household furniture, appliances, and other personal property. Certain items, such as cooking utensils, necessary clothing, and the tenants' personal effects, are excluded. The landlord may peaceably enter the premises and seize any property subject to the lien.[59]

---

50. Morgan v. Campbell, 89 U.S. (22 Wall.) 381, 391 (1874).
51. 62 A.L.R. 1106, 1107 (1929).
52. Henderson v. Mayer, 225 U.S. 631, 638 (1912).
53. Herr v. Johnson, 11 Colo. 393, 18 P. 342 (1888).
54. 1861 Colo. Sess. Laws (codified at COLO. REV. STAT. § 2-4-211 (1973)).
55. 11 Colo. 393, 18 P. 342 (1888).
56. *Id.* at 395, 18 P. at 343.
57. A.B.R. Distrib., Inc. v. Sterling Properties, 161 Colo. 460, 423 P.2d 1 (1967); Illinois Bldg. Co. v. Patterson, 91 Colo. 391, 401, 15 P.2d 699, 702 (1932). *Illinois Bldg. Co.* suggested that while a landlord's lien reserved in the lease agreement was to be recognized and enforced, it was to be treated as a chattel mortgage and as such controlled by the provisions of Colorado's chattel mortgage act as to recordation. *Id.*, 15 P.2d at 702. However, the Uniform Commercial Code (U.C.C.) now stipulates that its secured transactions provisions do not apply to landlord's liens. COLO. REV. STAT. § 4-9-104(b) (Supp. 1978).
58. COLO. REV. STAT. § 38-20-101 to -116 (Supp. 1978).
59. COLO. REV. STAT. § 38-20-102(3) (1973), in relevant part, provides:
(3)(a) Any person who rents furnished or unfurnished rooms or apartments for the housekeeping purposes of his tenants, as well as the keeper of a trailer court who rents trailer space, shall have a lien upon the tenant's personal property that is then on or in the rental premises. The value of the lien shall be for the amount of unpaid board, lodging, or rent, and for reasonable costs incurred in enforcing the lien, not including attorney fees. The lien shall be upon the household furniture, goods, appliances, and

As any statutory creation of a right in landlords to distress or to impose a lien is in derogation of Colorado's common law, it must be strictly construed.[60] For example, in *Morse v. Morrison*,[61] an innkeepers lien provision that "[t]he keeper of any hotel, tavern or boarding house, or any person who rents furnished or unfurnished rooms, shall have a lien upon the baggage and furniture of his or her patrons . . ."[62] was denied application to a lessor of an office who sought to impose a lien on the lessee's office equipment and furniture.[63] Accordingly, in the absence of an agreement, if a particular landlord-tenant relationship has not been provided for the statute, the landlord has no right to seize and have a lien upon the tenant's chattels.

While the landlord's lien statute appears to be an outgrowth of the English common law of distraint, it differs in a very important respect—it gives the lienor the right to sell the seized property. The statute provides a mandatory procedure for the sale and disposal of goods seized and on which a statutory lien is given.[64] Thirty days after the charges for which a lien arises under the statute become due and payable, the lienor "may file a foreclosure action in the county, superior, or district court of the county or city and county in which the contract or agreement between the lienholder and the owner of the property was signed or entered into."[65] If the lienholder does not commence a judicial action to foreclose the lien within sixty days after the charges become due and payable, the lien will terminate.[66] Providing the lienor receives a judgment, he may sell the property at a public auction after giving ten days prior notice. Such notice may be given by publication, or, under some circumstances, by mail to the chattel owner's "usual place of abode."[67]

Colorado's landlord lien statute is at least arguably unconstitutional in sofar as it creates a right in the landlord to seize a tenant's property without

---

other personal property of the tenant and members of his household then being upon the rental premises, but exclusive of small kitchen appliances, cooking utensils, beds, bedding, necessary wearing apparel, personal or business records and documents, and the personal effects of the tenant and the members of his household.

(b) In the event the tenant has vacated the premises, the landlord shall allow the tenant and members of his household access to the premises at any reasonable time and in a reasonable manner to remove any property not covered by the lien.

(c) In the event the tenant has not vacated the premises, the landlord or his agent may enter upon the premises at any reasonable time for the purpose of asserting the lien and, in a reasonable manner and peaceably, the landlord may assert dominion over the personal property covered by the lien. Assertion of the lien provided in this section in a manner which substantially interferes with the tenant's right to reasonably occupy and enjoy the premises is unlawful and shall cause forfeiture of the lien and shall give rise to an action for damages.

60. *See* McKee Livestock Co. v. Menzel, 70 Colo. 308, 310, 201 P. 52, 53 (1921); Scanlan v. LaCoste, 59 Colo. 449, 149 P. 835 (1915).

61. 16 Colo. App. 449, 66 P. 169 (1901).

62. *Id.* at 170.

63. *Id.* at 169.

64. COLO. REV. STAT. § 38-20-107 (Supp. 1978). A tenant has a cause of action against his landlord-lienor who does not follow this procedure; however, an exception is made for abandoned property. COLO. REV. STAT. § 38-20-107(3) (Supp. 1978).

65. COLO. REV. STAT. § 38-20-107(1) (Supp. 1978).

66. *Id.*

67. COLO. REV. STAT. § 38-20-109(1) (Supp. 1978).

a prior hearing.[68] As there is no common law right of landlords in Colorado to seize the tenant's property,[69] any such action under a state-created right could be viewed as state action within the meaning of the fourteenth amendment of the United States Constitution. The right to a prior hearing attaches to the deprivation of property interests encompassed within the fourteenth amendment's protection.[70] Although the tenant could institute a replevin or trespass action for damages or for the return of the goods and ultimately prevail,[71] and despite the fact that the tenant could prevail at the hearing provided for under Colorado law,[72] even a "temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment."[73] The "Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."[74]

The tenant's personal property upon which the landlord holds a lien will not always be valuable enough to warrant the expense of a foreclosure action and sale. After a tenant in arrears has left or been forcibly removed from the premises,[75] he may have left behind personal property that is essen-

68. COLO. REV. STAT. § 38-20-102(3)(c) (1973).

69. Herr v. Johnson, 11 Colo. 393, 395, 18 P. 342, 343 (1888).

70. A possessory interest in chattels is within the protection of the fourteenth amendment. Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

71. Wilde v. Rawles, 13 Colo. 583, 22 P. 897 (1889); Wolfe v. Abbott, 54 Colo. 531, 131 P. 386 (1913).

72. COLO. REV. STAT. § 38-20-108 (Supp. 1978).

73. Fuentes v. Shevin, 407 U.S. 67, 85 (1972); *see* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

The *Fuentes* Court held that by not providing for prior notice and a "meaningful" opportunity to be heard prior to the property's seizure, the prejudgment replevin statutes of Florida and Pennsylvania violated the fifth and fourteenth amendments in that they worked a deprivation without due process of law. 407 U.S. at 96. While the statutes involved in *Fuentes* and *Sniadach* can be distinguished from Colorado's in that they involved the actions of constables, court clerks, and other agents of the state, a Colorado landlord would have, in the absence of an agreement, no right to seize a tenant's property without the state statute. In Hall v. Garson, 468 F.2d. 845 (5th Cir. 1972), the court, citing *Fuentes* and *Sniadach*, struck down Texas's landlord lien statute which was very similar to Colorado's. Specifically, the court found that because the statute clothed "the apartment owner with the clear statutory authority to enter" and seize the property, the landlord's action became that of the state. 468 F.2d at 848. *See* Screws v. United States, 325 U.S. 91, 110-11 (1945).

Although the Court has permitted prehearing seizures in "extraordinary situations," Boddie v. Connecticut, 401 U.S. 371, 379 (1971), "[t]hese situations, however, must be truly unusual" and necessary to secure an important governmental or general public interest which demands very prompt action. *Fuentes*, 407 U.S. at 90-91. To illustrate, summary seizure of property has been permitted to collect the internal revenue of the United States, Phillips v. Commissioner, 283 U.S. 589, 597 (1931), and to meet the exigencies of a national war effort, Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1922).

Finally, under 42 U.S.C. § 1983 (1941), Congress has created a cause of action against any person who "under color of any statute, ordinance, regulation, custom, or usage of any State," deprives another of "any rights, privileges, or immunities secured by the Constitution and laws. . . ." A Colorado tenant's cause of action under this section seems clear: under the aegis of a state-created right, a landlord has deprived the tenant of the possession of his property without the procedural due process recognized in *Fuentes*. In Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972), it was held that a landlord who summarily evicted a tenant and seized his property as permitted under Florida's landlord lien statute acted under "color of state law" within the meaning of 42 U.S.C. § 1983. Accordingly, given the dim view taken of statutes providing for summary landlord action, a Colorado landlord would be well-advised to provide for a separate lien in the lease agreement.

74. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

75. COLO. REV. STAT. § 13-40-101 (1973); *see* note 3 *supra*.

tially worthless. Furthermore, by seizing the tenant's property pursuant to the landlord's lien statute,[76] the landlord may find himself in possession of chattels of little resale value. Under these circumstances, or even if the landlord finds himself in the possession of valuable property, the landlord is not required to commence an action to foreclose his lien if the property has been abandoned.[77]

Property is presumed to be abandoned if its owner has failed to contact the lienholder "for a period of not less than thirty days"[78] and the lienholder has no reason to believe that the property owner does not intend to abandon his chattels.[79] Here the statute seems to leave the means of disposal to the discretion of the landlord: "[a]t least fifteen days prior to *selling or otherwise disposing* of abandoned property, the lienholder shall notify the owner of the *proposed manner* and date of disposition . . . ."[80] Therefore, a landlord will likely be within his rights to dispose of abandoned property by informal sale or even destruction. Furthermore, the landlord can dispose of abandoned property at his convenience as the sixty-day limit relates only to the commencement of required foreclosure proceedings for nonabandoned property.[81] Finally, as to both contractual and statutory liens on property, it is axiomatic that the lienor, subject only to the sixty-day limit where applicable,[82] may simply retain the property until the tenant pays the debt upon which the lien is based. Such payment will extinguish the lien,[83] and terminate the landlord's right to retain the property.[84]

A landlord seeking to foreclose or otherwise enforce a statutory or contractual lien upon a tenant's chattels should be aware of some of the issues concerning the priority of competing lienholders in the same property. Colorado's landlord lien provisions are silent as to priorities[85] and there is not an overabundance of Colorado case law on the subject. However, at least in other jurisdictions, a landlord's lien is superior to other liens, including judgments acquired upon the property subsequent to its being brought upon the premises, and it may ordinarily be enforced against all but prior liens and bona fide purchases without notice.[86] For example, a statutory lien was held

76. COLO. REV. STAT. § 38-20-102(3)(c) (1973).

77. COLO. REV. STAT. § 38-20-107(3) (Supp. 1978).

78. COLO. REV. STAT. § 38-20-106 (Supp. 1978).

79. *Id.* For purposes of the lien and the right to dispose of the abandoned property, it probably is not necessary that the personal property have been left behind by a tenant in arrears. A former tenant, by abandoning property on the premises, becomes a tenant at sufferance and such property thereby is subject to the landlord's lien. Cabre v. Brown, 355 So.2d 846, 847 (Fla. Dist. Ct. App. 1978).

80. COLO. REV. STAT. § 38-20-116(2) (Supp. 1978) (emphasis supplied).

81. COLO. REV. STAT. § 38-20-107(3) (Supp. 1978).

82. COLO. REV. STAT. § 38-20-107(1) (Supp. 1978).

83. *See* COLO. REV. STAT. § 38-20-102(2) (1973).

84. *See generally* Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949); Henson v. Henson, 151 Tenn. 137, 149, 268 S.W. 378, 381 (1921).

85. COLO. REV. STAT. § 38-20-102(1)(b) (Supp. 1978) does, however, stipulate priority for agistor's liens.

86. *See* Brunswick Corp. v. Long, 392 F.2d 337 (4th Cir.), *cert. denied*, 391 U.S. 966 (1968); Farmers & Merchants Nat'l Bank v. Boymann, 155 N.J. Super. 120, 382 A.2d 437 (1977); *In re* Brooklyn Bridge Southwest Urban Renewal Project, 31 A.D.2d 895, 297 N.Y.S.2d 835 (1969). Statutory liens, Howard v. Calhoun, 155 Fla. 689, 695, 21 So.2d 361, 364 (1945), as well as

superior to a chattel mortgage given by the tenant in certain commercial showcases and fixtures after this property was brought upon the premises.[87] Analogously, a contractual lien is normally inferior to the rights of the tenant's prior conditional vendor of the subject chattel.[88] The result could be less predictable, however, if the prior party's security interest was not properly perfected.[89]

Because the Uniform Commercial Code provisions on secured transactions as adopted in Colorado do not apply to landlord's liens (apparently of any kind)[90] the priorities between a prior party with an unperfected security interest and the landlord-lienor are unclear.[91] *Illinois Building Co. v. Patterson*,[92] however, offers an interesting parallel in resolving priorities between a prior conditional vendor and a landlord. Unlike today where security interests are governed by Article Nine of the Uniform Commercial Code,[93] when *Illinois Building Co.* was decided (1932) a conditional vendor had to conform with the recordation and other provisions of Colorado's chattel mortgage act.[94] The court held that by clothing the tenant with indicia of ownership in the chattels, the conditional vendor will be denied the right to assert his ownership to the landlord. The court reasoned that because the vendor had not given notice of his ownership by proper recordation, the landlord should be entitled to the protection and priority given to creditors who have relied to their detriment upon a conditional vendee's apparent ownership.[95] For purposes of the Code's application in a priority dispute with a landlord's lien, it is significant that the court in *Illinois Building Co.* treated the landlord as a creditor insofar as the Code stipulates that unperfected security interests are inferior to persons who become "lien creditors" without knowledge of the security interest.[96] A "lien creditor" is defined to be a "creditor who has acquired a lien on the property involved by attachment, levy, or the like . . . ."[97] This language clearly suggests that a landlord who seizes a tenant's property without knowledge of a prior unperfected interest in that property would have a lien superior to any such prior lien. Accordingly, while this section is a cursory examination of priorities, a landlord at first blush would have a substantial position from which to challenge a prior unperfected interest in the property seized by the landlord, and would be well-advised in most situations to seize the property before unknown prior interests can be perfected.

---

contractual liens, A.B.R. Distrib., Inc. v. Sterling Properties, 161 Colo. 460, 423 P.2d 1 (1967), are superior to judgments.

87. Dewar v. Hagans, 61 Ariz. 201, 146 P.2d 208 (1944); *see* Beall v. White, 94 U.S. 382, 386 (1876).

88. Beebe v. Fouse, 27 N.M. 194, 198, 199 P. 364, 366 (1921).

89. *See* Illinois Bldg. Co. v. Patterson, 91 Colo. 391, 399, 15 P.2d 699, 702 (1932); COLO. REV. STAT. § 4-9-301 (1973).

90. COLO. REV. STAT. § 4-9-104(b) (Supp. 1978).

91. *See id.* § 4-9-312 (1973).

92. 91 Colo. 391, 15 P.2d 699 (1932).

93. COLO. REV. STAT. § 4-9-102 (1973).

94. Illinois Bldg. Co. v. Patterson, 91 Colo. 391, 399, 15 P.2d 699, 702 (1932).

95. *Id.* at 405, 15 P.2d at 705.

96. COLO. REV. STAT. § 4-9-301(1) (1973).

97. *Id.* § 4-9-301(3).

CONCLUSION

This note surveys the central issues that relate to a tenant's personalty. Most of the propositions set forth here rest upon decisions from jurisdictions other than Colorado. These cases, while largely of an early vintage and without the binding effect of Colorado holdings, do provide an adequate source of precedent to define this area of landlord-tenant law in Colorado.

The rights and duties of landlords and tenants in tenants' personal property have yet to be clearly defined in Colorado, or, for that matter, in any other jurisdiction. The *Christensen v. Hoover* opinion, as it now stands, does little to clarify this uncertainty. While the opinion suggests more issues than it settles, in all fairness it does serve as a convenient portal to further inquiry by the Colorado Supreme Court. Hopefully the court will take advantage of this opportunity to set some definite guidelines for landlords and tenants.

James E. Gigax