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The Landlord's Lien in Colorado

George Holden

Lewis Eagan

THE LANDLORD'S LIEN IN COLORADO

GEORGE HOLDEN AND LEWIS EAGAN*

Mr. X, his wife and three children stepped out one afternoon for the purpose of doing some shopping. Upon their return, Mr. X found himself and family locked out of their apartment. Mr. X, thereupon, went to the landlord who not only refused to allow them to enter, but refused to permit Mr. X to remove even a few clothes for the children until Mr. X had paid some eighteen dollars of back rent. Whereupon, Mr. X withdrew, in great indignation, to the offices of the Denver Legal Aid Society—he was more than confident that his legal rights had been abrogated, and that the Legal Aid counsel would certainly assert those rights to the utter and lasting confusion of the offending landlord.[1]

The reader might imagine the complete consternation of Mr. X when he found that he had neither right nor remedy against the landlord. Mr. X had not before been aware of the existence of that piece of legislation known as the "Landlord Lien Statute" . . .

The plight of Mr. X is not unusual; in fact, the files of the Denver Legal Aid Society are filled with such instances since the enactment of the aforementioned statute, which reads as follows:[2]

> . . . The keeper of any hotel, tavern, or boarding house, or any person who rents furnished or unfurnished rooms or any owner or operator of any apartment house consisting of rooms or suites of rooms rented, furnished for the housekeeping purposes of the tenant shall have a lien upon all the personal property of any kind then being upon the rental premises belonging to his or her patrons, boarders, guests or tenants, for such boarding, lodging or rent, and for all costs incurred in enforcing such lien; provided, that the provisions of this section shall not apply to stolen stock. The lien hereby given shall secure obligations contracted for rent due in advance for thirty days in like manner with obligations for the past use and occupation.

It is herein contended that this statute, as it is now being used, and insofar as it creates a lien separate and distinct from the traditional hotel and innkeepers' lien, expresses an undesirable policy in that it is unnecessarily harsh and places the landlord in a preferred position over any other creditors, a position to which he is not necessarily entitled. No reference is herein intended to the hotel and innkeepers' lien. The latter lien has long been inherent in the common law for good and sufficient reasons.

The Legal Aid Society of Denver has found that the hardship resulting from the now existing state of the law, under the aforesaid statute, is out of all proportion to the landlord's need for protection. The following sums were chosen at random by the Legal

* Students, University of Denver College of Law.

[1] These facts are based on actual cases in the files of the Legal Aid Society of Denver.

[2] COLO. STAT. ANN., c. 101, § 1 (1935).

Aid Society as representative of the sums for which tenants are generally excluded from their apartments:

$ 6.50	$14.00	$12.00	$40.00
18.00	9.00	1.75	3.75
27.68	15.00	5.00	9.24
6.80	5.00	25.00	21.00
2.14	1.50	30.00	74.00

From the above figures, it is clearly apparent that the present state of the law is very undesirable. Unfortunately, the Colorado Supreme Court has had no opportunity to clarify the law, nor does it seem likely that the statute will be judicially interpreted. The poverty of the very people most likely to be affected prevents any of them from taking a case through an expensive appeal to a final determination on its merits. Therefore, from a practical point of view it appears that the undesirable aspects of this law can be removed by legislative enactment alone.

An analysis of section one of the statute, supra, reveals no express provision whereby a landlord has a legal right to exclude a tenant without notice and by a summary proceeding. The procedural section of the statute speaks as of a time after the tenant has been excluded and property has been seized.[3] However, landlords have heretofore read into the section giving the lien, the right to exclude, and have thereafter proceeded under the remedial section in a purely summary manner. As of the date of this writing, the law has placed no impediment in the way of such arbitrary action.

It is not herein advocated that the present lien should be entirely abolished. A reasonable and equitable lien statute is of great advantage to the tenant in that such lien helps him get credit and thus permits him to rent property when he could not otherwise rent at all. Of course, such a lien is equally beneficial to the landlord.

Absence of Exemption Clause Objectionable

One of the gravest objections to the present statute is the absence of an exemption clause. The absence of such a clause, together with the decision in the case of *Noxon v. Glaze*,[4] seems to render the present law contrary to the Constitution of Colorado. The *Noxon* case held that inasmuch as the exemption statute[5] provides only for exemptions in instances of attachment, levy of execution, and distress for rent, and since the landlord lien is neither an attachment nor a levy of execution, and since there is no such remedy as distress for rent in Colorado, the landlord lien is not subject to the operation of the exemption statute.

[3] Colo. Stat. Ann., c. 101, § 3 (1935).
[4] 11 Colo. App. 503 (1898).
[5] Colo. Stat. Ann., c. 93, § 13-22 (1935).

The writers feel that the opinion in the *Noxon* case is not very well reasoned. The wording of the exemption statute clearly indicates that the state legislature intended to include all the then anticipated situations in which an exemption would be proper. Therefore, the *Noxon* case draws too broad a distinction between the remedy of distress for rent and the statutory lien. In distress for rent, there is an existing right which ripens into a lien upon the exercise thereof, that is to say, upon the seizure of the tenant's property. In the Landlord's Lien Act, the statute seems to give a lien immediately upon the occupancy of the rental premises by the tenant. Such, however, cannot be true for there may be no present obligation upon which a lien can rest. There is, as in distress for rent, an inchoate right in the landlord which springs into being upon its assertion by the lienor. Clearly then, the statutory lien is in its very nature a lien which arises out of distraint.

The chief difference between the two forms of relief is that one arose from the common law and the other by legislative act. Such a distinction between them, to the extent of denying the applicability of the exemption laws to the statutory right, seems to be unwarranted and should not be allowed to stand.

A further criticism of the present statute is the preferential position in which the landlord is placed in regard to other creditors of the tenant. For example, a tenant may owe a substantial sum for food, clothing, and hospital and doctor's bills. Yet, the landlord may seize and retain, without recourse, all of the personal property of any kind on the rental premises belonging to the tenant to secure a purely nominal sum.

QUESTIONABLE CONSTITUTIONALITY OF STATUTE

The Colorado constitutional provision[6] for exemption laws also presents a question. Is the provision mandatory or is it discretionary? We need not determine this, for the provision unquestionably sets out a public policy, and the Landlord Lien Statute, in it's present form, is an abuse of legislative power contrary to the public policy so set out in the constitution. The test was clearly enunciated by Lurton, Circuit Judge, in the case of *Jones v. Great Southern Fireproof Hotel Co.*[7] The learned judge, in discussing the problem before him said:

> . . . if, however, this legislation is mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land.

A statute which permits a tenant to be locked out and prohibits him from even entering to recover adequate clothing for his children cannot have the authorization of principles of private

[6] COLO. CONST., Art XVIII, § 1. "The general assembly shall pass liberal homestead and exemption laws."
[7] 86 F. 370 (1898).

right nor the sanction of natural justice. It may be conceded that the General Assembly has the power to protect, by statute, the right of a landlord to his rent. However, the means by which that objective is reached under the Landlord Lien Statute are unreasonable, and the objective itself, although perhaps legal, is not equitable and is, therefore, undesirable.

THE LANDLORD'S LIEN IN OTHER STATES

The problem resulting from the fact situation outlined in the example case prompted an extensive investigation of the statutes of the several states. The results of this investigation may prove to be worthy of consideration. The laws of the various states in reference to a landlord's rights against his tenant for overdue rent fall into three generic groups.

Most States Have Only Innkeeper's Lien

The first is that group of states that either have no statutory landlord's lien for rent or those which only have an ordinary innkeeper's lien, confining said lien to the property of a guest of a hotel, inn, boarding house, or rooming house. Such liens have no application to the property of apartment house tenants, or to the property of a tenant who occupies the premises as a home, as distinguished from the transient type of tenant who normally is the guest of hotels, inns, boarding houses, and rooming houses. There are 33 states [8] included in this classification. This means that approximately 70 per cent of all the states do not provide the apartment house landlord with a statutory lien for rent. The reason that the innkeeper's lien is recognized in such states is the peculiar relationship existing between the innkeeper and his guests. The case of *Horace Waters and Co. v. Gerard* [9] sets out this relationship and its attendant rights and obligations as follows:

> When the relationship of innkeeper and guest is established, the innkeeper is bound to receive the guest and cannot inquire into the guest's character and ability to pay the rent contracted for . . . and it may be added that he is liable to his guest for the safekeeping of all property brought upon the premises . . . corresponding to the *extraordinary liabilities* which the law imposes on the innkeeper is the *extraordinary privilege* of a lien upon the effects of guests for the amount of the reasonable charges for the guests' entertainment. [Emphasis ours].

The landlord of an apartment house who rents on a long term basis is not subject to the extraordinary liabilities set out in the quotation above. He may carefully choose his tenant and require references which will establish such tenant's desirability and financial qualifications. He is not liable to the tenant for the safe-

[8] Arkansas, California, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

[9] 189 N. Y. 302, 82 N. E. 143 (1907).

keeping of the tenant's effects as in the case of the innkeeper-guest relationship. To give such a lien to a landlord is to award an extraordinary privilege without imposition of the extraordinary liability which existed at common law. As previously indicated, approximately 70 per cent of the state legislative assemblies have not awarded such a privilege to date.

Some States Have Landlord's Lien With Exemptions

The second class of states consists of those which have given the landlord of an apartment house a lien on the personal property of the tenant, but which do allow certain items of personal property to be exempt from subjection to such lien. There are 11 states [10] having such statutes, and the specific items of exemptions vary to a great extent. For example, Florida allows exemption of all beds, wearing apparel, and $1,000 worth of additional personal property of the head of the family. It is apparent that Florida's statute is very liberal as far as the tenant is concerned. The state of Oregon has a statute making all of the personal property of the tenant, except wearing apparel, subject to the landlord's lien for rent. The Oregon statute gives little relief to the tenant since every item of personal property owned by the tenant except wearing apparel is subject to said lien.

The other states in this group allow exemptions which are less liberal than the Florida statute but not as harsh as the Oregon statute. The statutes of these states have set out certain standard exemptions of personal property. Among these exemptions are: the working tools of the tenant's trade, wearing apparel, food on hand, private papers, pictures, keepsakes, books, and other private property which have intrinsic value to the tenant alone. Those statutes that do not specifically set out these general exemptions in the context provide that all property exempt under the states' exemption statute is also exempt from coverage by the landlord lien statute. The state of Washington expressly excludes landlord's liens on the personal property of tenants of dwelling houses, apartment houses, or other places used exclusively as a home.

Liens With No Exemptions

The third category is that group of states which have a landlord lien statute extending to the personal property of a tenant of an apartment house, but which do not allow exemptions of any kind. By virtue of these statutes, everything that the tenant owns may be subject to the landlord's lien. Only four states fall within this group. Those four states are Nevada, Nebraska, Alabama and Colorado. One of these states, Alabama, has judicially interpreted its statute as follows:[11]

[10] Arizona, District of Columbia, Florida, Iowa, Louisana, New Mexico, South Carolina, Utah, Texas, and Oregon.

[11] Banks v. Windham, 7 Ala. App. 616, 62 So. 297 (1913).

> The defendants, although they might have a valid debt against the plaintiff and a lien on the furniture for unpaid rent, would not have the right, against the plaintiff's [tenant's] objection and without her consent, to take possession of the property without aid of legal process.

In the above case the landlord's seizure of the plaintiff's furniture was held to be a conversion of the property. Such an action on the part of the landlord would have been proper under the Colorado statute as it exists, because the enforcing statute [12] only requires certain proceedings to occur before sale and does not provide for any legal process prior to actually locking out the tenant and taking over the tenant's property. The fact that legal process prior to locking out the tenant is not resorted to in Colorado is clearly exemplified by the many instances of such arbitrary actions on record at the Legal Aid Society of Denver.

Undoubtedly it is more than mere coincidence that fewer than 10 per cent of the states have statutes which weigh the equities so heavily in favor of the landlord of premises rented as an apartment or home. It is unfortunate that Colorado is one of four such states.

Exemptions Are Needed in Colorado

It is the writers' contention that a statute which enables a landlord arbitrarily to lock out a tenant without resort to a legal proceeding of any kind is unduly oppressive and inconsistent with a person's constitutional right not be deprived of his property without due process of law. The permissible means of detaining a tenant's property under the Colorado statute seem unreasonable and contrary to notions of natural justice.

We do not urge that a landlord of an apartment should not have a lien upon the tenant's personal property. We merely urge that our statute should be rectified in such a manner to provide certain reasonable exemptions. For example, the working tools of a man's trade, if withheld, will be of only slight benefit to the landlord in an effort to satisfy his claim. Nor, does the landlord achieve any justifiable end, when he withholds his tenant's personal papers, etc., which have no marketable value as security for the rent that is due. What good can come from allowing a landlord to seize the uniform of a waitress whose ability to earn a living depends upon the wearing and furnishing of such uniform? This may seem to be a remote situation; neverthless, just such a case is on record at the Denver Legal Aid Society.

In addition to the above stated reasonable exemptions, we further contend that a statutory provision should be set up by which a tenant might receive due notice of the attachment of the lien, as well as the benefit of legal process prior to actual seizure of his property by the lock-out method or otherwise.

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[12] Colo. Stat. Ann., c. 101, § 3 (1935).