#78 4/27/73

Memorandum 73-42

Subject: Study 78 - Property Left on Leased Premises When Lease Terminated

You will recall that the Commission directed that a top priority be given to the study relating to the disposition of property left on leased premises when the lease is terminated. The staff was directed to put this topic on the agenda as soon as the consultant produced the background study.

Professor Friedenthal has prepared the attached study. He undertook the study with the understanding that it would not take the form of a law review article; instead, it was to take substantially the same form as Professor Warren's study on wage garnishment (primarily a statute with Comments).

You should read the entire study. At the meeting, we plan to go through the proposed legislation section by section.

Respectfully submitted,

John H. DeMoully
Executive Secretary

DISPOSITION OF PROPERTY LEFT BY TENANT AFTER TERMINATION OF TENANCY

Jack H. Friedenthal*

I. Nature of the Problem

A. In General

After termination of a tenancy, the landlord or his agent enters the premises to prepare for a new tenant frequently to find that the prior tenant has left behind some items of personal property.[1] More often than not, the items left on the premises appear to be little more than junk although on occasion they may seem to have some resale value on the open market. In some situations, the goods appear valuable only to the departed tenant as, for example, when the property consists of personal papers, prescription medicines, or family photographs.

In the large majority of situations, the landlord, after futile attempts to find the departed tenant and have him remove the goods, only wishes to dispose of the property in a speedy, inexpensive manner, which will not result in any risk of future liability for conversion. In a few cases, where the goods have commercial value, and the tenant left owing money to the landlord, the latter may seek to appropriate the goods to his own use in payment of the tenant's obligations. In this regard, it should be noted that under Section 1951.2 of the Civil Code a tenancy terminates when the tenant abandons his leasehold interest. It is quite common for a tenant

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* The author wishes to acknowledge the contribution of Ms. Kathy Thomas, a 1972 graduate of the Stanford Law School, who did much of the basic research upon which this study is based.

1. Throughout the study, statements are made regarding the general nature of the problem, the usual value of goods involved, and the normal attitudes and acts of landlords and tenants. Specific authorities are not cited for these assertions. Some are self-evident, others have been verified in numerous conversations with persons who have first-hand knowledge of landlord-tenant problems.

who is behind in rental payments to abandon the leasehold and leave behind furniture and other personal items.

B. Practical and Theoretical Considerations

A landlord is in business, whether he rents only the other side of the duplex apartment in which he lives or a commercial building with many thousands of square feet. Therefore, he deplores the nuisance and cost of dealing with goods left behind. Occupancy by a new tenant may be delayed, storage may be expensive, particularly if outside commercial facilities must be arranged, and there is always the danger of a lawsuit by an owner whose goods are lost, destroyed, or damaged. A public sale of the goods involves some investment of time plus the cost for publication of notice. Even if the property is thrown away, there may be some expense for removal when large items are involved. Since in most cases the goods have little or no commercial value, the landlord himself will ultimately be stuck with all of the bills.

From the point of view of a former tenant who either cannot be located or who, after being contacted, fails to remove his property, there is rarely any concern regarding the disposition of his goods. Only on the rarest of occasions will such a tenant appear on the scene to claim his property, but the fear of such a situation causes landlords considerable consternation in the absence of a law clearly delineating their rights and obligations. Unfortunately, no such law exists in California. There are a number of specific provisions covering some, but hardly all, situations where goods are left behind and, taken as a whole together with applicable rules of common law, they present a confusing, if not inconsistent, tangle of regulations which tend to exacerbate, rather than allay, the landlords' fears.

The primary question that must be answered before drafting a statute governing the disposition of property left behind after a tenancy has terminated is the extent to which the tenant or the landlord should bear the costs and any risks that may be involved. One possibility is to decide that the landlord, as a businessman, should be totally responsible. If goods are left behind, he should keep them safe for the owner, who may or may not be the tenant and, if the landlord disposes of them, he does so at his peril, at least until the statute of limitations for conversion lapses. There would be several difficulties with such a rule. First, it would subject the landlord to the whims of former tenants without sufficient economic or social justification; the landlord is not a warehouseman and should not be required to become one involuntarily and without specific compensation. Second, it would be economically wasteful. A landlord should not be required to store worthless goods; yet that would certainly be the result in most cases. The costs of such unnecessary storage would be passed off in many cases in the form of higher rent, especially since the landlord will know that in the vast number of cases these costs will never be recouped. Third, the rule could work a serious and undue hardship on a landlord who operates only one or two small rental units. Such a landlord often cannot pass off expenses in the form of higher rent since he operates in a different market structure than does a landlord with many units. If the small operator is unlucky enough to be burdened with substantial personal property left by one or two ex-tenants in a single year, he could suffer serious financial loss. Such a landlord is less likely to have space available for on-site storage; hence, he is more likely to have to buy space or to throw the goods away and take a chance on a subsequent lawsuit. Finally, the landlord is in an inferior position to the tenant in determining who actually owns the property and whether it is or is not valuable, especially with regard to an item having no value on the open

market, such as a family heirloom. The landlord would face an insurmountable obstacle in determining whether to store or discard such items.

A second possibility is to place the responsibility for the goods solely on the tenant, thus permitting the landlord to appropriate or throw away anything left on the premises without incurring any obligation to the tenant or other owner whatsoever. This rule, too, has its drawbacks. First, it may be economically wasteful if items of substantial value are junked. Second, it would provide an undeserved windfall for the landlord who keeps such items for himself. Third, tenants do leave items behind, especially lost items, in circumstances where the cost of handling to the landlord who finds them, at least for a short period, is overbalanced by the value to the owner. Surely, the landlord should have some duty to notify an owner whose whereabouts are known that he is about to lose his goods.

The third, and obviously most satisfactory, possibility is to distribute the burdens between the parties, minimizing the landlord's costs by affording only basic protection to the tenant. The regulations must be geared to the vast majority of situations where the tenant has left the goods behind because he does not care about them and not to the odd case where the tenant returns to make a claim for them.

II. The Current Law Regarding Disposition of Lost or Abandoned Property

A. In General

Unless a landlord is covered by one of the specific statutes governing disposition of property in particular situations, he will find no law governing what he can do with the property, only what he cannot do. If he throws away the tenant's property or destroys it or appropriates it to his own use, the landlord will be liable for conversion unless he can show that the tenant

actually intended to, and did, abandon the property. It is not enough that the landlord reasonably believed the property was abandoned.[2] The risk may be greater than the landlord realizes because the measure of damages is not the resale value of the goods but their value to the owner.[3] Nevertheless, in the vast majority of cases, the property will have little or no resale value and the landlord will junk it, hoping that it was in fact abandoned. The landlord will take this risk because he has no realistic alternative. He may store the goods in a warehouse, but initially he will have to bear the costs of such storage, knowing the chance for recoupment from the owner is remote.[4] He may sue the owner for trespass,[5] but, even if the owner can be found and served, the expenses of litigation are not likely to be justified by the judgment even in those cases where it is collectible. And in the meantime, the landlord still has to deal with the property.

If the rental agreement contains a specific clause permitting the landlord to dispose of the property, he may feel somewhat more secure in junking it. However, in most cases where the tenant leaves property behind, there is only a month-to-month tenancy based on an oral agreement. And even if such a written clause exists, there will be doubt as to its validity.[6] Self-help measures written into a lease prepared by the landlord, which permit him to interfere with the tenant's leasehold and personalty without a prior court order, are likely to be held ~~unconstitutional~~ unconscionable.

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2. See Note, The Unclaimed Personal Property Problem: A Legislative Proposal, 19 Stan. L. Rev. 619-620 (1967), and cases cited therein.

3. See id. at 620.

4. See id. at 621.

5. See id. at 621-622.

6. See Jordan v. Talbot, 55 Cal.2d 597, 604-605, 361 P.2d 20, , 12 Cal. Rptr. 488, (1961)(dictum).

Even legislative remedies, such as foreclosure of a landlord's lien, attachment, and replevin, are now held invalid if allowed on an ex parte basis prior to a hearing on the merits.[7]

B. Current Statutory Provisions

At present, there are a number of statutes governing lost or abandoned property in specific situations. They are arbitrary in their coverage and inconsistent in their requirements. As a whole, they do not provide an overall solution to the problems in a majority of cases.

The statute with the widest coverage is Section 1862[8] of the Civil Code

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7. See Fuentes v. Shevin, 407 U.S. 67 (1972); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

8. Section 1862 provides:

> 1862. Whenever any trunk, carpetbag, valise, box, bundle, baggage or other personal property has heretofore come, or shall hereafter come into the possession of the keeper of any hotel, inn, or any boarding or lodging house, furnished apartment house or bungalow court and has remained or shall remain unclaimed for the period of six months, such keeper may proceed to sell the same at public auction, and out of the proceeds of such sale may retain the charges for storage, if any, and the expenses of advertising and sale thereof;
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> But no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a newspaper published in or nearest the city, town, village, or place in which said hotel, inn, boarding or lodging house, furnished apartment house or bungalow court is situated. Said notice shall be published once a week, for four successive weeks, in some newspaper, daily or weekly, of general circulation, and shall contain a description of each trunk, carpetbag, valise, box, bundle, baggage, or other personal property as near as may be; the name of the owner, if known; the name and address of such keeper; the address of the place where such trunk, carpetbag, valise, box, bundle, baggage, or other personal property is stored; and the time and place of sale;
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> And the expenses incurred for advertising shall be a lien upon such property in a ratable proportion, according to the value of such piece of property, or thing, or article sold;
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> And in case any balance arising from such sale shall not be claimed by the rightful owner within one week from the day of sale, the same shall be paid into the treasury of the county in which such sale took place; and if the same be not claimed by the owner thereof, or his legal representatives, within one year thereafter, the same shall be paid into the general fund of said county.

which imposes three basic requirements for the disposition of unclaimed goods left in furnished lodgings (including furnished apartments):

(1) The goods must be unclaimed for six months.

(2) The landlord may then advertise the goods for sale by publication once a week for four consecutive weeks. The notice must contain a detailed description of each item and must give the name of the owner, if known.

(3) The items may then be sold publicly.

The scope and details of Section 1862 raise a number of important questions. First, and most important, is whether there should exist a specific provision for furnished apartments and no comparable provision for unfurnished apartments or commercial facilities. The most plausible justification for different treatment is that items left behind in furnished apartments are likely to be limited in size, number, and value. Such a distinction is irrelevant, however, since landlords in possession of bulky items or items of value are as much, if not more, in need of a disposition procedure as are those who hold smaller or less valuable items. Moreover, one cannot generalize as to the size or value of items left on unfurnished premises. It should be noted that Code of Civil Procedure Section 1174[9]

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9. Section 1174 provides:

> 1174. If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement if the notice required by Section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited.
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> The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff

provides a method for disposal of goods left by a tenant who has been ousted

by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded either damages and rent found due or punitive damages in an amount which does not exceed three times the amount of damages and rent found due. The trier of fact shall determine whether damages and rent found due or punitive damages shall be awarded, and judgment shall be entered accordingly.

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

A plaintiff, having obtained a writ of restitution of the premises pursuant to an action for unlawful detainer, shall be entitled to have the premises restored to him by officers charged with the enforcement of such writs. Promptly upon payment of reasonable costs of service, the enforcing officer shall serve or post a copy of the writ in the same manner as upon levy of writ of attachment pursuant to subdivision 1 of Section 542 of this code. In addition, where the copy is posted on the property, another copy of the writ shall thereafter be mailed to the defendant at his business or residence address last known to the plaintiff or his attorney or, if no such address is known, at the premises. If the tenant does not vacate the premises within five days from the date of service, or, if the copy of the writ is posted, within five days from the date of mailing of the additional notice, the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof. It shall be the duty of the party delivering the writ to the officer for execution to furnish the information required by the officer to comply with this section.

All goods, chattels or personal property of the tenant remaining on the premises at the time of its restitution to the plaintiff shall be stored by the plaintiff in a place of safekeeping for a period of 30 days and may be redeemed by the tenant upon payment of reasonable costs incurred by the plaintiff in providing such storage and the judgment rendered in favor of plaintiff, including costs. Plaintiff may, if he so elects, store

pursuant to a wrongful detainer judgment, whether the premises are furnished or unfurnished, commercial or residential.

In 1961, Section 1862 was amended to delete the word "furnished," thus making it applicable to all apartment owners. In 1965, however, the word "furnished" was restored. The original change obviously was designed to solve problems of unfurnished apartment owners which exist today. The subsequent alteration apparently resulted from the fact that the requirements of the statute put the landlord in a worse, rather than a better, position primarily because of the six-month holding period. Without the statute, the landlord was often willing to take a chance by throwing away what appeared to be worthless goods without incurring the costs of storage. Under the statute, the landlord who failed to keep or store the items for six months not only would be made to look bad in an ordinary action for conversion but might conceivably be held liable for punitive damages as a result of his willful violation of the statutory requirements.

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such goods, chattels or personal property of the tenant on the premises, and the costs of storage in such case shall be the fair rental value of the premises for the term of storage. An inventory shall be made of all goods, chattels or personal property left on the premises prior to its removal and storage or storage on the premises. Such inventory shall either be made by the enforcing officer or shall be verified in writing by him. The enforcing officer shall be entitled to his costs in preparing or verifying such inventory.

In the event the property so held is not removed within 30 days, such property shall be deemed abandoned and may be sold at a public sale by competitive bidding, to be held at the place where the property is stored, after notice of the time and place of such sale has been given at least five days before the date of such sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Notice of the public sale may not be given more than five days prior to the expiration of the 30 days during which the property is to be held in storage. All money realized from the sale of such personal property shall be used to pay the costs of the plaintiff in storing and selling such property, and any balance thereof shall be applied in payment of plaintiff's judgment, including costs. Any remaining balance shall be returned to the defendant.

The six-month waiting period appears unreasonably long for items left either in furnished or unfurnished premises. Perhaps it made more sense in 1876 when the statute was first enacted, but modern communication facilities eliminate the necessity of such a long wait, particularly when the costs of storage are unlikely to be recovered. Other provisions permitting disposition of unclaimed property all have lesser waiting periods: goods left by a tenant ousted after successful prosecution of an unlawful detainer action need be held only for 30 days;[10] goods committed to a warehouseman, common carrier, or innkeeper for transportation or safekeeping need only be held 60 days before they can be sold;[11] lost property turned over to the local police may be disposed of after 90 days.[12]

The notification provisions of Section 1862 also are subject to question. First, the statute contains no provision for notification other than by publication. Surely, if the owner's whereabouts are known to the landlord, direct notification is proper to protect the interests of the tenant and should be required. If the owner cannot be contacted, however, there seems little justification for requiring four separate publications of the notice of sale. Only one publication is required by other provisions governing lost or abandoned property.[13] From a practical point of view, the expenses of multiple publication cannot be justified by the expected results.

Sections 2080-2080.9 of the Civil Code, dealing with lost property over $10 in value, take an entirely different approach than does Section 1862. The only obligations of a finder who takes possession of lost property are

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10. See Code Civ. Proc. § 1174, set out in note 9 supra.

11. Civil Code § 2081.1.

12. Civil Code § 2080.3.

13. Civil Code § 2080.3; Code Civ. Proc. § 1174, set out in note 9 supra.

to notify the owner, if he is known, and to turn the property over to the police if the owner is not known or does not claim the goods. The burden then falls on the police to hold the goods, make proper notification, and dispose of the items. These provisions specifically exclude abandoned property; otherwise, they could provide the final answer to the problem of how to dispose of items left behind by a former tenant. The reason that abandoned property is not included is that police departments have neither the room nor the personnel to receive, guard, and care for large items of furniture, trunks, and the like. Lost property consists generally of small items which can more easily be stored. Even under current law, police have problems in finding storage for bicycles and similar items turned over to them for disposition. It should be noted that, in 1967, when the wrongful detainer act was amended to add provisions dealing with goods left behind by an ousted tenant, the original provision required the county to remove, store, and sell the goods. In 1968, this provision was changed to place these burdens on the landlord. The cost to the county of storing property left by tenants proved prohibitive and wasteful, especially since so many of the items were of little value and were never claimed.

The lost property provisions would seem to apply to goods left on rental premises unknowingly and unintentionally.[14] Sometimes, it is obvious that an item was lost as, for example, when a ring is located under a rug or in a heating duct. Other times, however, the matter is not so clear as, for example, when a ring is found in a drawer of an abandoned desk. The landlord, then, is left to determine as best he can the reason why the owner failed to remove his property. There is, of course, a strong incentive for the landlord to find that the property was "lost" in order that the burden of dispo-

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14. See People v. Stay, 19 Cal. App.3d 166, 96 Cal. Rptr. 651 (1971).

sition can be shifted to the local police. However, if the police believe that the property was knowingly left behind, they may refuse to accept it.

Insofar as operators of furnished apartments are concerned, the lost property laws appear inconsistent with the provisions of Section 1862. If property was obviously lost in a furnished apartment, it is not clear which set of regulations apply. If the landlord follows Section 1862 to the letter and does not directly notify the owner whose whereabouts are known or could be ascertained, the landlord may be guilty of theft because such notice is required under criminal provisions relating to lost property.[15] If the owner cannot be found and the landlord turns the property over to the police, who dispose of it after 90 days, the landlord may be charged with conversion on the ground he failed to store it for six months. It seems obvious that a coherent statute is needed so that landlords may know what they are expected to do with the goods.

Before composing such an omnibus statute, however, consideration must be given to a subtle problem arising from the fact that a landlord will not often know with certainty who owns various items of property left behind in an apartment. Such items may have been borrowed or rented, or they may have been lost by a casual visitor, or even left by an earlier tenant. Section 1862 clearly encompasses all such items by using the word "owner," rather than "tenant," and by covering all items "which come into the possession" of the landlord. However, Section 1174, the unlawful detainer provision, talks only of "personal property of the tenant."[16] Presumably, a landlord who follows the procedural details of Section 1174 to the letter in selling

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15. Penal Code § 485. See also People v. Stay, 19 Cal. App.3d 166, 96 Cal. Rptr. 651 (1971).

16. See the text of Section 1174, set out in note 9 supra.

goods left on the premises may nevertheless be sued for conversion by a third person who proves that he, rather than the tenant, owned the goods. With respect to items lost by non-tenants, the import of the lost property law must again be considered. If individuals who lose property justifiably rely on the duty of a finder to turn such property over to the police, any statute which permits a different disposition of property found by a landlord may not only be unfair but invalid as a denial of equal protection of the laws or a deprivation of property without due process of law. The latter is a particular danger if notification is directed only to the ex-tenant.

The final problem raised by the statutes is how the goods, or the proceeds of sale, are to be distributed if the owner does not appear. Currently, under Section 1862, the landlord may retain the costs of storage, advertising, and sale. Within one week from the date of sale, he must pay any excess amount into the county treasury. The money is held for one year and, if not claimed, is paid into the general fund of the county. The landlord is not permitted to keep any of the proceeds to offset rent or other amounts owed him by the tenant.

There are several statutory provisions which do permit a landlord to assert a lien on a tenant's goods for unpaid rent, meals, or other services even if the property is still in the tenant's possession. The first of these provisions, Civil Code Section 1861, covers hotels, motels, inns, and boarding houses and permits the landlord to enter the rental premises to take possession of the property and, after giving notice, to sell it and apply the proceeds to the tenant's debt if the debt remains unpaid for 60 days. This provision is patently unconstitutional under modern doctrine regarding pretrial remedies and has been so held by a three-judge federal district court

in Klim v. Jones.[18] It was held that the statute not only deprived tenants of property without due process of law by permitting goods to be taken by the landlord without any court hearing on the merits of the alleged debt, but it also violated the due process and, by implication, the equal protection clauses of the Constitution by allowing the landlord, in effect, to levy on goods that are otherwise exempted from execution.[19] This latter point has been underscored by the recent California appellate court decision in Gray v. Whitmore[20] which struck down that portion of the unlawful detainer statute allowing the landlord to retain out of the proceeds of the sale of tenant's goods amounts equal to the unpaid balance of his judgment in the unlawful detainer suit. Even though the tenant's obligation in Gray was established by judgment, thus eliminating the first objection upheld in Klim, the Gray court, in accordance with the second point in Klim, found no justification for permitting the landlord to keep the proceeds from the sale of items such as tenant's household furniture when other judgment creditors are prohibited from levying on such items by statute.

The California Legislature obviously had these constitutional questions in mind when it amended Civil Code Section 1861a which provides landlords of apartments, both furnished and unfurnished, with a lien similar to that allowed in Section 1861. However, under Section 1861a as amended, the lien applies only to goods which are subject to execution and cannot be enforced until a final judgment in favor of the landlord has been entered.

Whatever the validity of the current lien provisions, it is clear that a statute designed to allow a landlord, without going to court, to dispose of goods left after a tenancy has terminated cannot constitutionally permit the landlord to retain the goods or the proceeds as an offset to debts owed him

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18. 315 F. Supp. 109, 118-124 (N.D. Cal. 1970).

19. Id. at 123-124.

20. 17 Cal. App.3d 1, 94 Cal. Rptr. 904 (1971).

by the tenant. It is important to note, however, that the court in Gray v. Whitmore specifically upheld the landlord's right to retain the reasonable costs of the storage and sale of the goods themselves.[21]

The decisions in Gray and Klim open to question the validity of Civil Code Section 2080.3, providing that, in the absence of an ordinance giving the proceeds to the county,[22] if the owner fails within the prescribed period and after publication of notice to claim lost property deposited with the police, then upon payment of the costs of publication title vests in the finder. This provision, unlike those involved in Gray and Klim, does not operate to satisfy a judgment and is therefore not akin to an execution on exempt property. But, if Section 2080.3 is valid, it gives rise to an anomalous situation, for, if the landlord in Gray had decided that some of the property was lost, he could ultimately have been held to own it without any offset to his judgment against the tenant. And it would appear to follow that title to any unclaimed proceeds from a landlord's sale of the personal property, after having been held for an appropriate length of time, could be held to vest in the landlord as long as such proceeds did not operate to cancel the owner's outstanding obligations to the landlord. Thus, we would have a rare constitutional right, one which would leave the person to be protected worse off than if the protection did not exist. The absurdity of the situation calls for a reexamination of both the Klim and Gray decisions which erroneously equate execution on property in the hands of a debtor with disposition of property which the debtor, after due notice, has failed to claim.

Given the fact that Gray and Klim appear to state the law in California, however, the question is whether, in spite of the anomaly, the proceeds ultimately should go to the landlord. There are several factors favoring such a

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21. 17 Cal. App.3d at 23-25, 94 Cal. Rptr. at .

22. See Civil Code § 2080.4.

disposition. The landlord has suffered the aggravation of worrying about and handling the property; the unclaimed proceeds could be looked upon as justified compensation for such unliquidated expenses. Moreover, one could argue that an owner of goods who leaves them on rented premises and makes no claim thereafter should be presumed to have intended the goods to be a gift to the landlord. On the other hand, landlords should have every incentive to find the owner of such goods. Landlords who have a selfish interest in an owner's abandonment may hedge in their efforts to locate the owner. The situation differs from a lost property case in that there the police have an independent obligation to find the owner; it is not left solely to the finder who may ultimately benefit if the owner fails to appear. Furthermore, it will only be an accident if any proceeds over and above the costs of storage and sale are reasonably related to the landlord's unliquidated costs of handling the property. Only if such proceeds could be set off against the owner's debts would disposition to the landlord make sense. Given current case law, the most that can be done to assist both the landlord and the owner in setting off the value of the property against debts owed the landlord is already contained in the previously discussed Civil Code Section 1861a, which provides a landlord who has obtained a judgment against a tenant with a lien on goods not exempt from execution.

It is, of course, not enough merely to decide that the proceeds, if unclaimed, will not ultimately be paid to the landlord; some specific disposition must be provided if the landlord is not to face years of uncertainty. For example, under the unlawful detainer law, the proceeds of sale neither belong to the landlord nor are paid to the county. The statute simply provides that the landlord hold them for the tenant. How long they must be held is unclear--perhaps for seven years until the escheat law comes into effect.

Even then, there is some uncertainty because the applicable provision, Code of Civil Procedure Section 1520, permits escheat of property held or owing in the ordinary course of the holder's business. Arguably, a sale of a tenant's abandoned goods is not within the ordinary course of a landlord's business. Such uncertainty is intolerable. The only solution which appears sensible is to require the landlord to turn the proceeds over to the county which must hold them for the owner for a finite period, after which the county becomes the owner.

C. Determining the Date of Termination of an Abandoned Leasehold

All of the prior discussion assumes that there is a specific date when the tenancy terminates and that thereafter, upon entry into the premises, the landlord discovers personal property left by the tenant. In many situations, however, the tenant disappears prior to the normal date of termination, leaving his goods behind. Under Civil Code Section 1951.2, which became effective in 1971, once a tenant abandons the leasehold, his tenancy terminates and the landlord has a duty to try to relet the premises so as to mitigate the tenant's obligations for rent under the lease. However, the statute provides no method for determining when an abandonment has occurred and the common law concepts are deceptively simple and unsatisfactory from a practical perspective. According to the cases, an abandonment takes place when the tenant "offers" to abandon by intending to renounce all future interest in his lease and by performing some act to effectuate this intent and when the landlord accepts the "offer."[23] This formulation is unsatisfactory to tenants who wish to mitigate their liability under the lease since the landlord can thwart the purpose of Section

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23. Wiese v. Steinauer, 201 Cal. App.2d 651, 20 Cal. Rptr. 295 (1962); Anheuser-Busch Brewing Ass'n v. American Products Co., 59 Cal. App. 718, 211 P. 817 (1922). See also Gerhard v. Stephens, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

1951.2 simply by refusing to "accept" the premises. Furthermore, the case law fails to solve the problems of landlords who wish to re-rent as soon as possible; the landlord can never be certain that a tenant really intended to abandon the lease, and mere nonuse of the premises, no matter how long, will not alone be sufficient evidence of such intention.[24] Even if the landlord, upon thorough investigation, reasonably believes that the tenant has formed the requisite intent, the tenant may at some unexpected point reappear, claiming that he had been ill or otherwise unavoidably detained away from the premises and that he had never intended to abandon his leasehold or his goods. The landlord's problems are enhanced by the fact that, in a subsequent suit, he, not the tenant, will bear the burden of proof on the abandonment issue.[25] Therefore, it would seem highly desirable, not only with respect to disposition of a tenant's personalty, but also with regard to the landlord's right and duty to re-rent, to amend Section 1951.2 specifically to set forth guidelines for determining precisely when a leasehold has been abandoned and, hence, terminated.

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24. Restatement of Property § 504, comment (d). See also Gerhard v. Stephens, supra note 23.

25. Pepperdine v. Keys, 198 Cal.2d 25, 31, 17 Cal. Rptr. 709, (1961), and see cases cited in note 23 supra.

A PROPOSED ARTICLE GOVERNING DISPOSITION

OF UNCLAIMED GOODS AFTER

TERMINATION OF TENANCY

§ 1862. Definitions as used in this article

1862. (a) "Landlord" means any operator, keeper, lessor, or sublessor of any furnished or unfurnished hotel, motel, inn, boarding house, lodging house, apartment house, apartment, cottage, bungalow court, or commercial facility.

(b) "Tenant" means any paying guest, lessee, or sublessee of any facility operated by a landlord.

(c) "Owner" means any person having any right, title, or interest in an item of personal property.

(d) "Premises" means the real property rented or leased by landlord to tenant, including any common areas.

(e) "Item of personal property" means any individual piece of personal property or any trunk, valise, box, or other container which because it is locked or tied deters immediate access to the contents thereof.

Comment. Subdivisions (a) and (b) define "landlord" and "tenant" broadly so as to extend coverage of the article to all types of rental property, whether commercial or residential, furnished or unfurnished. All landlords, regardless of the nature of the facilities, need a procedure by which they can dispose of goods left behind after termination of tenancy. At present, Civil Code Section 1862, which would be replaced, provides relief only for those who own or manage furnished, residential facilities. Other landlords have no statutory coverage except in unlawful detainer cases under Code of Civil Procedure Section 1174.

This article does not apply to unlawful detainer situations. See proposed Section 1862.2.

Subdivision (c) defines "owner" to include not only a tenant, but other persons as well. A landlord should be permitted to dispose of goods left behind even though, as is often the case, he does not know for certain whether the goods belonged to the former tenant or to someone else. The unlawful detainer statute, Code of Civil Procedure Section 1174, provides for disposition of goods owned by a tenant only. A landlord who follows the provisions of that section still risks an action for conversion by a third person who claims ownership.

Subdivision (d) defines premises to include common areas such as storage rooms or garages where personal property may be left when the tenant leaves.

Subdivision (e) provides that a locked or tied container need not be opened by a landlord who wishes to dispose of it. The privacy of the owner is thus preserved until disposition. Section 1862 of the Civil Code currently permits disposition of a container without opening it even if the container is not secured. The obligation to look into unlocked or untied containers is not onerous and will permit the landlord to make a realistic evaluation of the goods, which is helpful in protecting interests of the owner as well as of the landlord.

§ 1862.1. Lease provisions nullified

1862.1. Notwithstanding any provision in a rental agreement between landlord and tenant, the tenant shall have the right during the tenancy and upon termination thereof to remove tenant's personal property from the premises, whether or not tenant is indebted to the landlord.

Comment. This provision is specifically designed to protect tenants from onerous contract provisions which can be used to deprive them of their goods without a court determination, often in contradiction to statutes which exempt certain personal property from levy and execution. It is unlikely, in most situations, that such self-help clauses would be enforced by California courts (see Jordan v. Talbot, 55 Cal.2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961)), but few tenants have the time, money, and will to engage in a court contest. The proposed Section 1862.1 will deter landlords from including or relying on such provisions in their rental agreements. Landlords will be further deterred from abusing tenant's rights in their personal property by the fact that deliberate violations of the proposed section could lead to punitive as well as compensatory damages.

Note that the proposed section does not prohibit the landlord from enforcing valid liens granted by statute. See Civil Code § 1861a; Study p. __.

§ 1862.2. General requirements for preservation of property

1862.2. (a) If, after termination of tenancy and surrender or abandonment of the premises by tenant, the landlord finds that there remains on the premises items of personal property of which landlord is not an owner, landlord shall dispose of such property as follows:

(1) If an item of property reasonably appears to have been lost, it shall be disposed of pursuant to Article 1 (commencing with Section) of Chapter 4, Title 6 of the Civil Code.

(2) If the appropriate police or sheriff's department refuses to accept property under paragraph (1), it shall be deemed not to have been lost.

(b) All items of personal property other than those subject to paragraph (1) of subdivision (a) shall be stored by the landlord in a place of safekeeping until owner pays landlord the reasonable costs of storage and takes possession of such items of property or until such property is disposed of pursuant to Section 1862.3 or 1862.4.

Comment. Subdivision (a) of the section limits the scope of this article to situations where (1) the tenancy has been terminated; (2) the tenant has voluntarily left the premises; and (3) the landlord makes no claim on the goods. The requirement that the tenancy be terminated seems obvious; a landlord has no need nor right to dispose of tenant's goods while the tenancy continues. A problem does arise in deciding when a tenancy has been terminated by abandonment since the present law gives inadequate guidelines. See Study . Proposed Section 1951.3 is designed to remedy this situation. The requirement that the tenant have voluntarily left the premises is simply to avoid conflict with the statutory provision dealing with wrongful detainer; see

Code of Civil Procedure Section 1174, which provides a detailed method for disposing of goods left by an ousted tenant. The requirement that the landlord does not have an ownership interest in the goods is necessary to avoid any conflict with landlord's claim that the property was his in the first place or that it was a gift from the tenant or that he has a valid statutory lien on the item. If the landlord proceeds under this article with regard to any items, he necessarily gives up any claim of ownership of such items.

Subdivision (a)(1) provides that items of property lost on the premises shall be treated like any other lost items pursuant to the Lost Property Laws (Civil Code §§ 208-) which have specific provisions for notification and disposition. See Study, p. __. All owners who lose property should be able to rely on the Lost Property Laws, thus maximizing chances for retrieval.

Subdivision (a)(2) eliminates any uncertainty which would arise if the police or sheriff's department disagreed with a landlord as to whether an item of property was lost or was knowingly left behind.

Subdivision (b) sets forth a general obligation of the landlord, thus leaving no situation uncovered.

§ 1862.3. Disposition of goods valued at less than $100

1862.3. If landlord reasonably believes that the total resale value of the items of personal property subject to subdivision (b) of Section 1862.1 does not exceed $100, such property may be disposed of as follows:

(a) Landlord shall notify the tenant and any other person landlord reasonably believes is the owner of any item of such personal property. Such notice shall contain:

(1) A general description of each item of the personal property, the name of the tenant, the address of the premises, and the address where each item is currently stored.

(2) A statement of the landlord's belief that the total resale value of all such items does not exceed $100.

(3) The name of each person, other than the tenant, who landlord reasonably believes is an owner of any item of the property, specifying such items.

(4) A statement that, unless the owner pays landlord the reasonable costs of storage of an item and takes possession thereof within 15 days from the date notice was delivered or mailed, such owner may lose all right, title, and interest in such item.

(b) If owner does not pay landlord the reasonable costs of storage and take possession of an item of property within 15 days from the date notice pursuant to subdivision (a) was delivered or deposited in the mails, the landlord may dispose of such item of property in any manner.

(c) The landlord shall not be held liable in any action with regard to the disposition of an item of property brought by an owner to whom notice was sent pursuant to subdivision (a).

(d) In any action with regard to the disposition of an item of property brought by an owner to whom notice was not sent pursuant to subdivision (a), landlord shall not be held liable unless owner proves either (1) that landlord was unreasonable in declaring the value of the total property not to exceed $100 or (2) that, prior to disposing of the goods, landlord knew or should have known that such owner had an interest in the item of property and also that the landlord knew or should have known upon reasonable investigation the address of such owner's residence or place of business.

Comment. This section permits summary disposition of property appearing to be worth less than $100. The costs of storage and sale of goods worth less than $100 are too high to require a formal disposition. The $100 figure is arbitrary as any figure would be. Any such amount must be high enough to be useful in the many situations where goods of little value are left behind; the landlord must not fear his evaluation will be held unreasonable. At the same time, the figure must not be so high as to provide a windfall. Given the costs of storage and of sale, plus the inconvenience to the landlord, the $100 figure seems justifiable. Note that the $100 amount applies to the total value of all property subject to proposed Section 1862.2(b). If the total exceeds $100, justification for a summary procedure disappears and the landlord may only proceed under proposed Section 1862.4.

Subdivision (a) sets forth the requirements of notice to be given to the tenant and, if known, to any other person who owns any item of property.

Subdivision (b) provides that, unless the owner appears within 15 days, the landlord may dispose of the property in any manner. The 15-day period is deliberately short to protect the landlord's interests in removing property of little or no value. It is unfair to require the landlord to endure any

greater costs and inconvenience particularly since, in the vast majority of cases, the owner does not care about the property and will never claim it.

Subdivision (c) provides that a person to whom proper notice was sent may not later make a claim against the landlord regarding his disposition of the property. The requirements of notice under proposed Section 1862.5 give maximum protection to the tenant without unduly burdening the landlord.

Subdivision (d) covers the situation where the landlord is unaware of who owns the goods. In such case, the landlord should not be liable if he has acted in good faith, and the burden is placed on the owner to prove bad faith in order to assure landlords that they will not be subject to the risks of litigation by following the procedures set out in the statute. The requirement that the landlord have made a good faith determination as to the value of the goods is to protect unknown owners from being deprived unfairly of substantial sums. Any landlord who is in doubt as to value may follow the procedure set forth in Section 1862.4 which protects the owner's economic interests.

§ 1862.4. General provisions for disposition

1862.4. Landlord may dispose of any item of personal property subject to subdivision (b) of Section 1862.1 as follows:

(a) Landlord shall notify the tenant and any other person landlord reasonably believes is the owner of such item. Such notice shall contain:

(1) A general description of the item of personal property, the name of the tenant, the address of the premises, and the address where such item is currently stored.

(2) The name of each person, other than the tenant, who landlord reasonably believes is an owner of the item.

(3) A statement that, unless the owner pays landlord the reasonable cost of storage of such item and takes possession thereof within 15 days from the date notice was delivered or mailed, such item may be sold at public sale, and the proceeds, less the landlord's reasonable costs for sale, advertising, and storage, turned over to the county treasurer in the county where the sale took place and that the owner shall have one year from the date of sale in which to claim such proceeds from the county.

(b) If owner does not pay landlord the reasonable costs of storage and take possession of an item of property within 15 days from the date notice pursuant to subdivision (a) was delivered or deposited in the mails, the item may be sold at public sale by competitive bidding to be held at the place the property is stored after notice of the time and place of such sale has been given at least five days before the date of such sale by publication once in newspaper of general circulation published in the county where the sale is to be held. Notice of the public sale cannot be given more than five days prior to the expiration of the 15 days after the service or mailing of notice under

subdivision (a). Money realized from the sale of an item of property shall be used to pay the reasonable costs of the landlord in storing and selling such item. If a number of items are stored, advertised, or sold together, the costs shall be apportioned according to the reasonable resale value of each item. Any balance of the sale price shall be held by landlord for seven days and, if not claimed by the owner, shall be paid into the treasury of the county in which such sale took place. The owner of any item shall have one year from the date of sale to claim such balance. In case of multiple claims, the decision of the county as to the ownership of any such proceeds shall be final.

(c) If an item of property is disposed of in accordance with the provisions of subdivision (b) and the owner was notified pursuant to subdivision (a), the landlord is not liable to the owner with respect to such property.

(d) If an item of property is disposed of in accordance with the provisions of subdivision (b) but no notice was sent to the owner pursuant to subdivision (a), the landlord is not liable unless the owner proves that, prior to disposing of the goods, landlord knew or should have known that such owner had an interest in the item of property and also that landlord knew or should have known upon reasonable investigation the address of such owner's residence or place of business.

Comment. Section 1862.4 is the basic provision governing disposition of property and is an alternative to Section 1862.3 even in situations where the items do not appear to exceed $100 in resale value.

Subdivision (a) provides for a notice containing full particulars regarding the disposition allowed.

Subdivision (b) provides for sale of the property if it remains unclaimed for 15 days after notification, which is the crucial provision of the entire proposed law. The underlying assumption is that a person who leaves behind goods (other than those which are lost) which he does not claim after due notice are goods which he does not want, at least in specie. Therefore, his interests can adequately be protected, without undue burden on the landlord, by allowing the goods to be sold immediately. The proceeds, in excess of the landlord's costs for storage and sale, are then turned over to the county from which the owner has one year to claim them. Although one might prefer a system whereby the landlord could use such excess proceeds to offset debts owed him by the owner, such disposition would appear to constitute a violation of the owner's rights to due process and equal protection. Gray v. Whitmore, 17 Cal. App.3d 1, Cal. Rptr. (19); see Study, p. . The last sentence of the section is designed to protect the county in the event of multiple, conflicting claims as to the ownership of the proceeds.

Subdivisions (c) and (d) provide that a landlord who in good faith follows the provisions of subdivisions (a) and (b) shall not be held liable to the owner. Under subdivision (d), the burden of showing bad faith is placed on the owner. One of the major purposes of the entire legislation is to permit landlords to dispose of goods in a realistic manner without fear of future litigation. See Study, p. __. Whatever provisions are adopted, they must have this safeguard.

§ 1862.5. Notice; methods

1862.5. Notice under Sections 1862.3(a) and 1862.4(a) shall be in writing and shall be effective:

(a) Upon delivery of a copy thereof to the person to be notified, or

(b) By depositing a copy of the notice in the mail, addressed to the person to be notified at such person's last known address. If the landlord has substantial reason to believe that the tenant is temporarily located at another address, notice by mail shall be effective only upon deposit in the mail of an additional copy of the notice addressed to the tenant at such temporary location. Whenever mailed notice is sent to an address out of the state, notice shall be effective only when sent by airmail.

Comment. Section 1862.5 is designed to maximize the chance that the person to be notified will in fact receive such notification.

§ 1951.3. Methods of declaring abandonment

1951.3. (a)(1) If a lessor of real property reasonably believes that the property has not been occupied for a period of 20 consecutive days during which rent is due and unpaid, and the lessor has no substantial reason to believe that the lessee has not abandoned the premises, then the lessor may notify the lessee in writing, stating as follows:

(i) that the lessor believes the property to have been abandoned

(ii) that, unless the lessee contacts the landlord within 15 days from the date notice was personally delivered to lessee or deposited in the mail, the property will be deemed abandoned and the lease terminated.

(2) If, by the end of 15 days from the date notice was delivered or mailed, the lessee has not contacted the landlord and manifested his intention not to abandon the property, the property shall be deemed abandoned within the meaning of Section 1951.2.

(3) Thereafter, in any action brought by lessee, lessor shall not be held liable for treating the property as abandoned and the lease as terminated unless lessee proves that the lessor had substantial reason to believe that lessee did not intend to abandon the property or that lessor willfully failed to notify the lessee as required in subdivision (a)(5).

(4) The fact that lessor knew that lessee left items of personal property on the leasehold premises shall not, of itself, justify a finding that lessor was unreasonable in believing the real property to have been abandoned.

(5) Notification under subdivision (a)(1) above shall be effective when the notice is delivered in person to the lessee or when deposited in the mail addressed to lessee at his last known residence or place of business. If notification is by mail, it shall be effective only when an additional copy

of the notice is deposited in the mail, addressed to lessee at the place, if any, where lessor has substantial reason to believe the lessee is temporarily located.

(b) Property shall be deemed abandoned within the meaning of Section 1951.2:

(1) Upon delivery by the lessee to the lessor of a written statement that lessee has abandoned the premises, or

(2) Fifteen days after lessee has deposited in the mail a written notice addressed to lessor at his last known place of business, stating the lessee has abandoned the premises.

(c) Nothing in subdivision (a) or (b) above shall preclude lessor or lessee from otherwise proving that the property had been abandoned within the meaning of Section 1951.2.

Comment. Section 1951.3 is designed to eliminate the uncertainty as to when a tenancy is to be held abandoned within the meaning of Civil Code Section 1951.2. Under the latter provision, once an abandonment occurs, the tenancy is terminated and the lessor has a duty to minimize the lessee's damages by making reasonable efforts to rerent the premises. The time of abandonment is also important under proposed Sections 1862.2-1862.4 which set forth the lessor's rights and duties as to property remaining on the premises after termination.

Unfortunately, however, Section 1951.2 does not specify when an abandonment occurs. Under common law rules, abandonment occurs when the lessor accepts the lessee's offer to end the tenancy. The lessee must in fact have intended to abandon the property. Appearances of abandonment are not sufficient, and the lessor must accept the premises or the abandonment is not effective.

See Wiese v. Steinauer, 201 Cal. App.2d 651, 20 Cal. Rptr. 295 (1962); Anheuser-Busch Brewing Ass'n v. American Products Co., 59 Cal. App. 718, 211 P. 817 (1922). See also Gerhard v. Stephens, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968). These rules are insufficient in most cases to guide the parties although, if they do have a clear understanding about the matter, the common law rule should apply and hence is preserved in subdivision (c).

Subdivision (a) generally provides a means by which the landlord can safely decide the abandonment has taken place so that he may dispose of any goods remaining on the premises and otherwise prepare for a new tenant.

Subdivision (a)(1) provides for notification to a tenant who appears to have abandoned the property. A number of safeguards are provided to insure that a determination of abandonment is not prematurely made. Not only must landlord reasonably believe that abandonment has taken place but the premises must have appeared to be unoccupied for 20 consecutive days for which no rent has been paid.

These requirements, together with the provisions for notice in subdivision (a)(5), reasonably assure that a tenant will not be deprived of a leasehold interest which he did not intend to abandon. The 20-day period is deliberately chosen to assure that, for the normal tenancy calling for monthly payments, at least two due dates must pass before abandonment can be declared since the tenant has an additional 15 days under subdivision (a)(2) during which to contact the landlord and demonstrate his intention to retain the leasehold. If the landlord wishes faster action, he may, of course, resort to an action in unlawful detainer under Code of Civil Procedure Section 1174.

Subdivision (a)(2) provides that the tenant must claim his leasehold within 15 days of notification or the leasehold is decreed abandoned. Given the safeguards set forth in subdivision (a)(1), the 15-day period is reasonable. A landlord should not be required to wait any longer before abandoned property is restored to his possession.

Subdivision (a)(3) provides that the landlord who in good faith follows the procedures in subdivisions (a)(1) and (a)(5) cannot be held liable to a tenant who later appears to challenge the abandonment. The burden of proving bad faith falls upon the tenant, thus safeguarding landlords from substantial fear of litigation. Under common law rules, abandonment depends upon the manifested intentions of the parties to the lease. Even though from all appearances a leasehold seems abandoned, a lessor, who has not had contact with the lessee, can never be certain that the lessee will not suddenly appear and claim that he was on vacation or in the hospital and had never intended to, or manifested an intention to, abandon his interests. This section eliminates this uncertainty.

Subdivision (a)(4) is designed to eliminate a possible problem with regard to what facts may overcome a lessor's reasonable belief that a tenancy is abandoned. Obviously, since many lessees who abandon their leasehold interests leave personal property behind, the mere fact that the lessor knows that the lessee has done so should not, by itself, be held to establish that the lessor has not acted in good faith. The lessor cannot refuse to accept the tenant's "offer to abandon" as apparently he can do under the common law. Subdivision (a)(5) specifies how notification is to be made. The requirements are designed to insure that the lessee will in fact get notice if his whereabouts are known.

Subdivision (b) provides a method by which the lessee can declare his leasehold abandoned in order to terminate the lease and require the lessor under Section 1951.2 to take steps to mitigate the lessee's obligations.