

#39.110

1/2/74

Memorandum 74-1

Subject: Study 39.110 - Innkeeper's and Landlord's Liens

Attached to this memorandum are two copies of a staff draft of a tentative recommendation relating to innkeeper's and landlord's liens. At the November meeting, the Commission decided to consider innkeeper's and landlord's liens separately from the landlord-tenant recommendation. Although the staff was directed to send the lien recommendation out for comment after the November meeting, we thought that, since the preliminary part has been expanded and rewritten, the Commission should see it first. The statute part of the attached tentative recommendation is almost identical to what the Commission has previously considered. Please make your editorial changes on one copy and give it to the staff at the February meeting.

Respectfully submitted,

Stan G. Ulrich  
Legal Counsel

## LETTER OF TRANSMITTAL

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the law relating to attachment, garnishment, execution, repossession of property, civil arrest, confession of judgment procedures, default judgment procedures, and related matters. This tentative recommendation relates to one aspect of the 1972 resolution--innkeeper's and landlord's liens.

This tentative recommendation is being sent to interested persons and organizations for review and comment. Comments received will be considered when the Commission determines the recommendation, if any, it will submit to the Legislature. Comments should be sent to the Commission not later than July 15, 1974. Send comments to California Law Revision Commission, School of Law, Stanford, California 94305.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE

RECOMMENDATION

*relating to*

**TRUSTEE'S AND LANDLORD'S LIENS**

January 1974

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments should be sent to the Commission not later than July 15, 1974.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

#39.110

TENTATIVE RECOMMENDATION

Landlord's Lien

Section 1861a of the Civil Code, enacted originally in 1917, provides a lien for keepers of furnished and unfurnished apartment houses, apartments, cottages, and bungalow courts upon the baggage and other property belonging to their tenants or in their tenants' possession on the premises for amounts due for rent and other charges and for the cost of enforcing the lien.<sup>1</sup> The landlord's lien provision was substantially amended in 1970 to reconcile it with developing standards of due process. Now, the landlord may take possession of the property only on authority of a court order issued after a hearing held on at least 10 days' notice to the tenant where the court finds that the property will probably be destroyed, substantially devalued, or removed from the premises. The lien may be enforced by sale only after final judgment in an action to recover amounts claimed to be due. If the judgment is not paid within 30 days after it becomes final, the landlord may sell the property at public sale.<sup>2</sup> Any funds remaining after the landlord has satisfied his lien and deducted the cost of its enforcement are retained by the landlord for six months, subject to the claim of the tenant. Funds not claimed are turned over to the county. Section 1861a contains a lengthy list of exemptions from the lien and, in addition, also exempts all property which is exempt from attachment or execution.

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1. "Landlord" is used in this discussion in place of "keepers of furnished and unfurnished apartment houses, apartments, cottages, or bungalow courts"; and "tenant" is used in place of "tenants and guests."
  2. Notice of sale is required to be published for four successive weeks in a newspaper of general circulation in the county. See Govt. Code § 6064.

### Innkeeper's Lien

Section 1861 of the Civil Code provides keepers of hotels, motels, inns, boardinghouses, and lodginghouses with a lien upon the baggage and other property under the control of their lodgers for amounts due for rent and other charges and for the costs of enforcing the lien.<sup>3</sup> In contrast to the landlord's lien, the innkeeper's lien has remained substantially unchanged since 1915. Section 1861 provides that, if the amount claimed by the innkeeper to be owing is not paid within 60 days from its due date, the innkeeper, after giving at least 15 days' notice to the lodger, may sell the lodger's baggage and other property and satisfy his lien from the proceeds. Any remaining funds are to be disposed of in the same manner as under Section 1861a. An innkeeper who follows the provisions of Section 1861 is protected from liability in an action by the lodger to recover either his property or damages. The only exemptions from the innkeeper's lien are for musical instruments used by the owner to earn his living and prosthetic or orthopedic appliances used by the lodger.

Section 1861 was held unconstitutional in Klim v. Jones<sup>4</sup> for its failure to provide for a hearing prior to the imposition of the lien.<sup>5</sup> Regardless

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3. "Innkeeper" is used in this discussion in place of "hotel, motel, inn, boardinghouse, and lodginghouse keepers"; and "lodger" is used in place of "guests, boarders, tenants, or lodgers."

4. 315 F. Supp. 109, 118-124 (N.D. Cal. 1970).

5. The court found Section 1861 to be constitutionally infirm under Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), for the following reasons: (1) Its primary impact is on the "financially embarrassed" and those of "extremely limited means." (2) Almost all the lodger's possessions may be denied him. (3) The lien may result in the loss of the lodger's job. (4) The lien results in an economic leverage on the lodger akin to that of wage garnishment. (5) There are almost no exemptions from the lien. Similar liens have been held unconstitutional in New York, Illinois, Texas, Florida, and Nebraska. See respectively, Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), and 468 F.2d 845 (5th Cir. 1972); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972) (three-judge court); Dielan v. Levine, 344 F. Supp. 823 (D. Neb. 1972). For a critique of the reasoning in Klim, Collins, and Hall, see Burke and Reber, State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1, 47-52 (1973).

of its constitutionality, the Commission finds Section 1861 objectionable because it does not exempt the lodger's necessities from the innkeeper's lien, because it does not provide for a judicial finding of the probable validity of the innkeeper's claim before the lien may be imposed and enforced, and because it unnecessarily continues an archaic distinction between more and less transient lodgers.<sup>6</sup>

#### Recommendation

The Commission recommends that Section 1861 (providing an innkeeper's lien) be repealed and that the coverage of Section 1861a (providing a landlord's

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6. The common law lien existed only in favor of innkeepers--those undertaking to serve transient guests--as distinct from boardinghouse and lodginghouse keepers. Hogan, The Innkeeper's Lien at Common Law, 8 Hastings L. J. 33, 36 (1956); J. Beale, Innkeepers and Hotels §§ 32, 34, 251 (1906). However, as originally enacted in California in 1875-76, Section 1861 applied to hotels, inns, boardinghouses, and lodginghouses. In 1917, the enactment of Section 1861a created a lien for furnished apartment houses. In 1933, Section 1861a was extended to furnished bungalow courts, in 1941 to furnished apartments and furnished cottages, and in 1953 to all apartment houses, apartments, cottages, and bungalow courts. In 1965, Section 1861 was extended to furnished apartment houses and furnished apartments while Section 1861a was restricted to unfurnished apartment houses, apartments, cottages, and bungalow courts. Finally, in 1970 both sections were amended so that Section 1861 is applicable to hotels, motels, inns, boardinghouses, and lodginghouses, and Section 1861a is applicable to furnished and unfurnished apartment houses, apartments, cottages, and bungalow courts. In the absence of any apparent reason for maintaining separate statutory treatment for the different classes of houses of public accommodation, the Commission believes all such classes should be treated similarly.

lien) be extended to the persons now governed by Section 1861.<sup>7</sup> Furthermore, the court should be required to find that the plaintiff's claim is probably valid before issuing an order allowing the plaintiff to seize the tenant's or lodger's property.<sup>8</sup>

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7. The Commission has considered and rejected a suggestion that the innkeeper's lien provision of Section 1861 be repealed without extending the coverage of Section 1861a to such persons. This suggestion is premised on the assumption that the common law innkeeper's lien would then be restored to the law of California. See Civil Code § 22.2 (common law of England applicable in California if not inconsistent with state or federal law). Subject to a few exceptions, at common law the innkeeper had a duty to receive and keep safely all travelers and their baggage. J. Beale, *Innkeepers and Hotels* §§ 11-15, 61-71, 91-98, 141-235 (1906); J. Sherry, *The Laws of Innkeepers*, §§ 2:1-2:4, 5:1-5:4, 18:1 (1972); Hogan, *The Innkeeper's Lien at Common Law*, 8 *Hastings L.J.* 33 (1956). Based upon these obligations, the common law protected the innkeeper by providing a lien for the charges owed him by the guest. See J. Beale, *supra*, at § 252; J. Sherry, *supra*, § 28:2; Hogan, *supra*, at 43-47; *Klim v. Jones*, 315 F. Supp. 109, 118-120 (N.D. Cal. 1970). However, such protection seems unnecessary where, as in California, the innkeeper's obligations are less strict than they once were. See Civil Code § 1859. See also *Klim v. Jones*, *supra*, at 120; *Collins v. Vicerooy Hotel Corp.*, 338 F. Supp. 390, 396 (N.D. Ill. 1972).
8. See *Randone v. Appellate Dept.*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). In addition, several technical changes should be made in order to conform the lien provisions to the procedure for disposition of personal property left on the premises. See Recommendations Relating to Landlord-Tenant Relations: Personal Property Left on Premises Vacated by Tenant, 11 Cal. L. Revision Comm'n Reports \_\_\_ (19 ). (1) The notice of sale should be required to be published once rather than four times. (2) The landlord or innkeeper should be required to turn the proceeds of sale over to the county within 30 days after sale rather than within six months. (3) The detailed list of exemptions should be deleted since they largely duplicate exemptions from execution. (4) The incorporation of exemptions from attachment should be deleted as unnecessary.

A separate procedure is provided by Sections 1980-1991 for a landlord who wishes to dispose of personal property remaining on the premises at the termination of a tenancy but who does not wish to assert a lien. See Recommendations Relating to Landlord-Tenant Relations: Personal Property Left on Premises Vacated by Tenant, 11 Cal. L. Revision Comm'n Reports \_\_\_ (19 ).

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 1861a of, and to repeal Section 1861 of, the Civil Code, relating to innkeeper's and landlord's liens.

The people of the State of California do enact as follows:

Civil Code § 1861 (repealed)

Section 1. Section 1861 of the Civil Code is repealed.

~~1861. Hotel, motel, inn, boardinghouse, and lodginghouse keepers shall have a lien upon the baggage and other property belonging to or legally under the control of their guests, boarders, tenants, or lodgers which may be in such hotel, motel, inn, or boarding or lodging house for the proper charges due from such guests, boarders, tenants, or lodgers, for their accommodation, board and lodging and room rent, and such extras as are furnished at their request, and for all money paid for or advanced to such guests, boarders, tenants, or lodgers, and for the costs of enforcing such lien, with the right to the possession of such baggage and other property until such charges and moneys are paid; and unless such charges and moneys shall be paid within 60 days from the time when the same become due, said hotel, motel, inn, boardinghouse or lodginghouse keeper may sell said baggage and property at public auction to the highest bidder, after giving notice of such sale by publication of a notice containing the name of the debtor, the amount due, a brief description of the property to be sold, and the time and place of such sale, pursuant to Section 6004 of the Government Code in the county in which said hotel, motel, inn, boardinghouse or lodginghouse is situated and also by mailing, at least fifteen (15) days before such sale, a copy of such notice addressed to such guest, boarder, tenant, or lodger at his post office address, if known, and if not known, such notice shall be addressed to such guest, boarder, tenant or lodger at the place where such hotel, motel, inn, boardinghouse or lodginghouse is situated; and after satisfying such lien out of the proceeds of such sale together with any reasonable costs that may have been incurred in enforcing said lien, the residue of said proceeds of sale, if any, shall upon demand made within six months after such sale, be paid by said hotel, motel, inn, boardinghouse or lodginghouse keeper to such guest, boarder, tenant, or lodger; and if not demanded within six months from the date of such sale, such residue 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; and such sale shall be a perpetual bar to any action against said hotel, motel, inn, boardinghouse or lodginghouse keeper for the recovery of such baggage or property or of the value thereof, or for any damages~~

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~~growing out of the failure of such guest, boarder, tenant, or lodger to receive such baggage or property; provided, however, that if any baggage or property becoming subject to the lien herein provided for does not belong to the guest, lodger, tenant, or boarder who incurred the charges or indebtedness secured thereby, at the time when such charges or indebtedness was incurred, and if the hotel, motel, inn, boarding or lodging house keeper entitled to such lien receives notice of such fact at any time before the sale of such baggage or property hereunder, then, and in that event, such baggage and property which is subject to said lien and did not belong to said guest, boarder, tenant, or lodger at the time when such charges or indebtedness was incurred shall not be subject to sale in the manner hereinbefore provided, but such baggage and property may be sold in the manner provided by the Code of Civil Procedure for the sale of property under a writ of execution, to satisfy a judgment obtained in any action brought to recover the said charges or indebtedness.~~

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In order to enforce the lien provided for in this section, a motel, hotel, inn, boardinghouse, and lodginghouse keeper shall have the right to enter peaceably the premises used by his guest, boarder, lodger, or tenant in such hotel, motel, inn, boardinghouse, or lodginghouse without liability to such guest, tenant, boarder, or lodger for conversion, trespass, or forcible entry. An entry shall be considered peaceable when accomplished with a key or passkey or through an unlocked door during the hours between sunrise and sunset.

This section does not apply to:

1. Any musical instrument of any kind or description which is used by the owner thereof to earn all or a part of his living.
- ~~2. Any prosthetic or orthopedic appliance personally used by a guest, boarder, tenant, or lodger.~~

Comment. Section 1861 is superseded by Section 1861a as amended.

See Section 1861a and Comment. Section 1861 was held unconstitutional in Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). See also Gray v. Whitmore, 17 Cal. App.3d 1, 94 Cal. Rptr. 904 (1971).

Civil Code § 1861a (amended)

Sec. 2. Section 1861a of the Civil Code is amended to read:

1861a. (a) Keepers of furnished and unfurnished apartment houses, apartments, cottages, ~~or~~ bungalow courts, hotels, motels, inns, boardinghouses, and lodginghouses shall have a lien upon the baggage and other property of value belonging to their tenants or guests, and upon all the right, title and interest of their tenants or guests in and to all property in the possession of such tenants or guests which may be ~~in-such-apartment-house, apartment, cottage, or-bungalow-court~~ on such premises, for the proper charges due from such tenants or guests, for their accommodation, rent, services, meals, and such extras as are furnished at their request, and for all moneys expended for them, at their request, and for the costs of enforcing such lien.

(b) Such lien may be enforced only after final judgment in an action brought to recover such charges or moneys. During the pendency of the proceeding, the plaintiff may take possession of such baggage and property upon an order issued by the court, where it appears to the satisfaction of the court from an affidavit filed by or on behalf of the plaintiff that the plaintiff's claim is probably valid and that the baggage or property is about to be destroyed, substantially devalued, or removed from the premises. Ten days written notice of the hearing on the motion for such order shall be served on the defendant and shall inform the defendant that he may file affidavits on his behalf and present testimony in his behalf and that if he fails to appear the plaintiff will apply to the court for such order. The plaintiff shall file an undertaking with good and sufficient sureties, to be approved by the court, in such sum as may be fixed by the court. Upon such order, the plaintiff

§ 1861a

shall have the right to enter peaceably the ~~unfurnished-apartment-house,-apart-~~  
~~ment,-cottage,-or-bungalow-court~~ premises used by his guest or tenant without  
liability to such guest or tenant, including any possible claim of liability  
for conversion, trespass, or forcible entry. The plaintiff shall have the  
same duties and liabilities as a depository for hire as to property which he  
takes into his possession. An entry shall be considered peaceable when  
accomplished with a key or passkey or through an unlocked door during the hours  
between sunrise and sunset.

(c) Unless the judgment shall be paid within 30 days from the date when  
it becomes final, the plaintiff may sell the baggage and property, at public  
auction to the highest bidder, after giving notice of such sale by publication  
of a notice containing the name of the debtor, the amount due, a brief descrip-  
tion of the property to be sold, and the time and place of such sale, pursuant  
to Section ~~6064~~ 6061 of the Government Code in the county in which said  
~~apartment-house,-apartment,-cottage,-or-bungalow-court-is~~ the premises are situated,  
and after by mailing, at least 15 days prior to the date of sale, a copy of  
such notice addressed to such tenant or guest at his residence or other known  
address, and if not known, such notice shall be addressed to such tenant or  
guest at the place where ~~such-apartment-house,-apartment,-cottage,-or-bungalow~~  
~~court-is~~ the premises are situated; and, after satisfying such lien out of the pro-  
ceeds of such sale, together with any reasonable costs, that may have been  
incurred in enforcing said lien, the residue of said the proceeds of sale, if  
any, which has not been claimed by such tenant or guest shall, ~~upon-demand-made~~  
~~within-six-months-after-such-sale,-be-paid-to-such-tenant-or-guest,-and-if-not~~  
~~demanded~~ within six-months 30 days from the date of such sale, ~~said-residue,~~

~~if any, 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 representative within one year thereafter, by making application to the treasurer or other official designated by the county, it shall be paid into the general fund of the county; and such sale shall be a perpetual bar to any action against said keeper for the recovery of such baggage or property, or of the value thereof, or for any damages, growing out of the failure of such tenant or guest to receive such baggage or property.

(d) When the baggage and property are not in the possession of the keeper as provided herein, such the lien provided for in this section shall be enforced only by writ of execution.

~~This section does not apply to:~~

(a) ~~--Any musical instrument of any kind or description which is used by the owner thereof to earn all or a part of his living.~~

(b) ~~--Any prosthetic or orthopedic appliance, or any medicine, drug, or medical equipment or health apparatus, personally used by a tenant or guest, or a member of his family who is residing with him.~~

(c) ~~--Table and kitchen furniture, including one refrigerator, washing machine, sewing machine, stove; bedroom furniture, one overstuffed chair, one davenport, one dining table and chairs, and also all tools, instruments, clothing and books used by the tenant or guest in gaining a livelihood; beds, bedding and bedsteads, oil paintings and drawings drawn or painted by any member of the family of the tenant or guest, and any family portraits and their necessary frames.~~

(d) ~~--All other household, table or kitchen furniture not expressly mentioned in paragraph (c), including but not limited to radios, television sets, phonographs, records, motor vehicles that may be stored on the premises except~~

§ 1861a

~~se-much-of-any-such-articles-as-may-be-reasonably-sufficient-to-satisfy-the  
lien-provided-for-by-this-section;-and-provided-further,-that-such-lien~~

(e) The lien provided by this section shall be secondary to the claim of any prior bona fide holder of a chattel mortgage on and the rights of a conditional seller of such articles, other than the tenant or guest.

(f) Any property which is exempt from attachment or execution under the provisions of the Code of Civil Procedure shall is not be subject to the lien provided for in this section.

Comment. Section 1861a has been amended to extend its provisions to keepers of hotels, motels, inns, boardinghouses, and lodgings. Former Section 1861 provided a lien for such keepers, but this lien was held unconstitutional in Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) since there was no provision for a hearing prior to imposition of the lien. See also Gray v. Whitmore, 17 Cal. App.3d 1, 94 Cal. Rptr. 904 (1971). The amendment of Section 1861a standardizes the provisions for all keepers whether they are innkeepers, motel keepers, or apartment keepers. A provision requiring the court to determine the probable validity of the plaintiff's claim has been added to satisfy constitutional objections. Cf. Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). The duplicative listing of exemptions from execution has been eliminated as unnecessary since the last sentence of Section 1861a incorporates all exemptions from attachment and execution. See Code Civ. Proc. §§ 537.3 and 690.1-690.29. The former requirement that the plaintiff publish notice four times has been reduced to one publication;

and the requirement of former law that the plaintiff hold the residue of the proceeds from sale for six months has been changed to require the plaintiff to turn over the remaining proceeds to the county within 30 days. These changes substantially conform Section 1861a to the provisions of Section 1988. See Recommendations Relating to Landlord-Tenant Relations: Personal Property Left on Premises Vacated by Tenant, 11 Cal. L. Revision Comm'n Reports \_\_\_ (19 ).