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NOTES

THE INADEQUATE PROTECTION AFFORDED AN ABSENT TENANT'S PROPERTY DURING AN EVICTION

I. INTRODUCTION

During landlord-tenant evictions, the disposition of an evicted tenant's property can be extremely problematic. The tenant, whose property is subject to removal and storage by others, remains a highly vulnerable potential victim because of inadequate safeguards provided by the law governing this area. Under current Massachusetts law, the constable who executes the procedure is not responsible for the actions of those who move and store the property. Although a wary tenant can take precautionary steps to protect her property during this procedure she needs more protection if she happens to be absent during an eviction proceeding. This Note argues that because the constable is in the best position to protect the absent tenant's property, he should be required to ensure that the moving and storage company (which the constable hires himself) is licensed under state regulations. Further, he should be required to record an inventory of all removed property.

Part I of this Note illustrates some common problems evicted tenants face in recovering their property, and shows the urgency of the problem as the rate of evictions in Suffolk County soars to record levels. Part II gives an historical overview of the evolution of current eviction, moving, and storing procedure, focusing on the particular roles of the constable and the mover/warehouseman. Part III examines the moving and storage business in Massachusetts, paying particular attention to the regulations governing those businesses. Part IV argues that current rules, regulations, and statutes governing the moving and storage business fail to adequately protect the absent tenant's property. Part V focuses on the constable's duty when undertaking an eviction. Finally, this Note argues that the constable, who is in the best position to protect the absent tenant, should be obligated to take reasonable precautions, which amount to only a minimal burden on the constable.

A. Problem Illustration

A Boston tenant is out of town when her landlord initiates summary process proceedings and obtains a judgment for possession.¹ The landlord hires a constable

¹ See MASS. GEN. LAWS ch. 239 § 3 (1990).

to execute the judgment. The constable arrives at the apartment and finds that although the tenant is not there, all of her furniture and other property remain. The constable then hires a moving and storage company to collect and store this property.² Without the tenant, only the constable and the employees of the moving and storage company are present to return the apartment to the landlord. The moving and storage company packs the tenant's goods, moves them to a warehouse, and stores them.³

The tenant returns to Boston the day after the eviction. She has no record of the removed property, who took it, or where it is now located.⁴ The landlord gives her the name of the constable and the constable gives her the name of the moving and storage company.⁵ She contacts the company and demands her property. When it is finally returned, the tenant finds that her new television is missing. The moving and storage company shows her the inventory list filled out by its employees at the time of the eviction; there is no mention of the television. The old receipt for the television, and any pictures or other paperwork that could prove the television's existence are also missing.

B. The Growing Number of Potential Victims

Nationwide, evictions are increasing because "the strong economy has caused rents to soar, putting housing out of reach for the poorest Americans."⁶ "[B]etween 1995 and 1997, rents increased faster than income for the 20 percent of American households with the lowest incomes."⁷ Currently,

the lack of affordable housing has lead to high rent burdens (rents which absorb a high proportion of income), overcrowding, and substandard housing. These phenomena, in turn, have not only forced many people to become homeless; they have put a large and growing number of people at risk of becoming homeless.⁸

² See MASS. GEN. LAWS ch. 239 § 4 (1990).

³ See *id.*

⁴ See Robert F. Fitzpatrick, Jr., *The Development of Massachusetts Law Governing the Disposition of Evicted Tenants' Property*, 25 SUFFOLK U. L. REV. 1109, 1110-11 (1991) ("The moving company does not advise the tenant of the warehouse location, provide the tenant a receipt describing the goods moved into storage, advise the tenant that the goods are being stored subject to a lien, or otherwise inform the tenant of the terms of the storage").

⁵ See Paul Hemp, *The Case of the Missing Plaintiffs*, THE BOSTON GLOBE, Oct. 13, 1992, at 44 ("Out of town at the time, [the tenant] didn't even know where her belongings were until [a neighbor who saw the eviction] told her a moving truck. . . had taken them").

⁶ NCH Fact Sheet #1, available at <http://www.nch.ari.net/causes.html> (last modified Feb. 1999).

⁷ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Waiting in Vain: An Update on America's Housing Crisis* (1999).

⁸ NCH Fact Sheet #1, *supra* note 6.

Following the national trend, tenant evictions in Boston have also soared.⁹ Boston public officials place the blame on the red-hot economy and greedy landlords.¹⁰ In 1995, Massachusetts voters eliminated rent control, causing the number of evictions to jump seventeen percent from the previous year, and exacerbating the eviction problem.¹¹

Evictions reached a record-breaking high in 1997, with 7,120 summary process actions making their way to the Suffolk County Housing Court.¹² This trend shows no signs of slowing as 6,568 eviction cases have already appeared in the Housing Court.¹³

Boston's homeless population is increasing with the rate of evictions.¹⁴ It would be no surprise for a Brighton tenant to experience a rent increase from \$550 to \$1,200 per month.¹⁵ With rents increasing so quickly and significantly, all types of citizens are left homeless.

Boston's growing population of evicted tenants is quite diversified. "[A]t least half of those facing evictions in Boston are senior citizens."¹⁶ Many are families "who had members who had jobs, but just couldn't afford their apartments anymore."¹⁷ When families experience enormous rent increases, are evicted from their apartments, and have nowhere but a public shelter to go to, the fate of their personal property- furniture, clothing, pictures-is determined by a constable and a moving and storage company.

II. THE EVICTION AND STORAGE PROCEDURE

As Boston's poorest citizens are forcibly removed from their apartments and make their way to homeless shelters, most must leave their personal belongings behind. The current procedure for dealing with an evicted tenant's belongings developed over the course of the twentieth century.¹⁸

A. *The Curb-Side Drop*

By 1870l, the courts had firmly established that the constable, in returning possession to the landlord, was required to remove both the tenant and her personal

⁹ See Kay Lazar, *Seniors Swell the Ranks of the Homeless*, THE BOSTON HERALD, Nov. 14, 1999, at 16.

¹⁰ See David Weber, *Out in the Cold*, THE BOSTON HERALD, Dec. 17, 1999, at 36.

¹¹ See Lazar, *supra* note 9.

¹² See *id.*

¹³ See *id.*

¹⁴ See Weber, *supra* note 10.

¹⁵ See Lazar, *supra* note 9, at 17.

¹⁶ *Id.* at 16.

¹⁷ Weber, *supra* note 10, at 36.

¹⁸ For a detailed overview of the evolution of this procedure, see Fitzpatrick, *supra* note 4.

property.¹⁹ Prior to current procedures requiring storage of tenant's property, the landlord, upon execution of a judgment for possession, could simply instruct the constable to set the evicted tenant's property out on the sidewalk.²⁰ This was called a curbside drop. Evicted tenants whose property was left on the curb had no recourse if their property was damaged by weather or stolen by passers-by.²¹

In *Clarke v. Keliher*, the tenant was out of town on business during a landlord's eviction, but his wife and children were at home in their apartment to receive written notice of the eviction.²² The landlord removed all of the furniture and personal belongings from the building to the sidewalk while the wife and children were running errands.²³ Although the tenant's property was consequently rain-damaged, the court held that this was an acceptable disposition of the tenant's property.²⁴ The court's decision turned on the fact that since the tenant's wife had notice that the eviction was taking place, and was not physically available to protect the goods, the landlord was not liable for the ensuing damage.²⁵

As the turn of the century approached, Boston's increasing population and pedestrian traffic caused courts to find that the curbside drop procedure created hazards on public walkways.²⁶ In 1899, the Supreme Judicial Court made clear in *Commonwealth v. Lennon*²⁷ that the practice of barricading busy city sidewalks with piles of furniture was not in the public interest.

In *Lennon*, a plaintiff/tenant brought a conversion claim against a constable who levied upon a writ of eviction and removed all of the plaintiff's property onto the sidewalk.²⁸ The court ruled against the plaintiff on the conversion claim yet found the constable liable for creating a public nuisance.²⁹ The court suggested that the constable should have stored the property at the tenant's expense instead.³⁰

Finnigan v. Hadley,³¹ a 1934 case that turned on the issue of notice to the absent tenant, cited both *Keliher* and *Lennon*. In *Hadley*, the landlord executed an eviction, however, the tenant was out of town during the eviction, and he had no notice of its occurrence.³² The landlord decided to store the tenant's property rather than leave it on the curb.³³ Upon returning to Boston, the tenant brought a

¹⁹ *Fiske v. Chamberlin*, 103 Mass. 495 (1870).

²⁰ *See id.*

²¹ *See Clark v. Keliher*, 107 Mass. 4406 (1871).

²² *See id.*

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See Fitzpatrick, supra* note 4, at 1118.

²⁷ 52 N.E. 521 (1899).

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ 190 N.E. 528 (1934).

³² *See id.*

³³ *See id.*

conversion claim against the landlord.³⁴ In ruling against the tenant's conversion claim and noting the landlord's prudence, the court stated that the tenant's property "could hardly have been thus left without strong likelihood of theft of easily portable articles and mischief and injury to more ponderous pieces of furniture."³⁵ While the thrust of the court's reasoning centered on the issues of public convenience, nuisance, and an exploding urban environment, the court explained that protection of the absent tenant's property from theft and damage was one of the reasons for preferring storage.³⁶

B. *The Storage Statute*

In 1899, the Massachusetts legislature responded to cases like *Lennon* and *Hadley* by enacting Massachusetts General Law, chapter 239, section 4, which describes the procedure for dealing with an evicted tenant's property.³⁷ Because liability may attach to the landlord's curbside drop, the storage statute allows landlord to store an evicted tenant's property.³⁸ In transporting and storing the property, the storage statute attempted to make it the tenant's responsibility to pay for the cost of storage.³⁹ In order to protect the warehouseman, the statute provides that whoever stores the evicted tenant's property is entitled to the benefit of a lien against such property.⁴⁰ Ideally, the statute relieves the landlord from creating a public nuisance with the curbside drop, protects the tenant's property from theft and damage, and protects the warehouseman's interest in receiving payment for his services.⁴¹

³⁴ See *id.*

³⁵ See *id.* at 529.

³⁶ See *id.*

³⁷ If an officer, serving on execution issued on a judgment for the plaintiff for possession of land or tenements, removes personal property, belonging to a person other than the plaintiff, from the land or tenements and places it upon the sidewalk, street or way on which the land or tenements abut, he may forthwith, and before the expiration of the time limited in any ordinance or by-law for the removal of obstructions in the street, remove such property and cause it to be stored for the benefit of the owners thereof. Whoever accepts the same on storage from such officer shall have a lien thereon for reasonable storage fees and for reasonable expenses of removing it to the place of storage, but such lien shall not be enforced by sale of the property until it has been kept in storage for at least six months. If the owner of such property is present and claims it when it is so removed from the land or tenements, the officer shall not remove and store it, and his act of placing it upon the sidewalk or street shall be deemed the act of the owner, who alone shall be held to answer therefor.

MASS. GEN. LAWS ch. 239 § 4 (1990).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

C. The Current Problem

In Massachusetts, the procedure that governs the disposition of an evicted tenant's property when the tenant is not able to remove her property herself on eviction day is as follows. First, the landlord must obtain a judgment for possession from the Housing Court.⁴² Then, the landlord must hire a constable to levy upon the judgment and return the landlord to possession of the apartment.⁴³ The law requires the constable to give notice to the tenant 48 hours before the eviction.⁴⁴ The notice must state the date and time of the eviction.⁴⁵

On the day of the eviction, the constable is required to remove the tenant and all of the tenant's property from the premises.⁴⁶ To remove the tenant's property (provided that the property still remains in the apartment on eviction day), the constable may hire a moving and storage company to effect its removal.⁴⁷

The moving and storage company arrives at the apartment and demands at least three months' storage fees from the landlord.⁴⁸ Then the company packs and removes the property from the apartment. The storage statute does not require the moving and storage company to fill out a bill of lading or an inventory of any pieces of property packed for removal and storage.⁴⁹ Even if the company makes an inventory, there is no requirement to give a copy of that inventory to the landlord or constable.⁵⁰ Once the moving and storage company removes the property, it transports the property to a warehouse and stores it for the tenant.⁵¹

Because the landlord pays for the first three months of storage, the tenant may claim her property at any time before those three months have passed.⁵² The tenant must pay for storage fees accrued after those three months.⁵³ If the tenant does not claim her property or pay past or future storage fees within six months of the eviction, the statute allows a lien to be placed upon the property to cover storage costs.⁵⁴

⁴² See MASS. GEN. LAWS ch. 239 § 3 (1990) (plaintiff shall have judgment for repossession and costs).

⁴³ See Fitzgerald, *supra* note 4, at 1110.

⁴⁴ See MASS. GEN. LAWS ch. 239 § 3 (1990).

⁴⁵ See *id.*

⁴⁶ See Fiske, 103 Mass. at 496.

⁴⁷ See MASS. GEN. LAWS ch. 239 § 4 (1990).

⁴⁸ See Fitzpatrick, *supra* note 4, at 1110.

⁴⁹ See MASS. GEN. LAWS ch. 239 § 4 (1990) (however, this note argues that Massachusetts' Commercial Code's insurance requirements could be interpreted to require a moving and storage company to make and issue an inventory when removing an evicted tenant's property).

⁵⁰ See *id.*

⁵¹ See MASS. GEN. LAWS ch. 239 § 4 (1990).

⁵² See Fitzpatrick, *supra* note 4, at 1126.

⁵³ See *id.*

⁵⁴ See MASS. GEN. LAWS ch. 239 § 4 (1990).

III. THE MOVING AND STORAGE BUSINESS

In Massachusetts, both the moving and storage businesses are regulated by state administrative agencies. The moving business is regulated by the Massachusetts Department of Telecommunications and Energy (DTE). The storage business is regulated by the Massachusetts Department of Public Safety (DPS). Although one business may carry on both a moving and storage operation, the business must be authorized by each agency. This section discusses the statutes and regulations under which both businesses operate. It also discusses the inadequacy of these rules and how these businesses may manipulate those rules to the disadvantage of the tenant/customer.

A. *The Moving Company*

The Transportation Division of the Department of Telecommunications and Energy licenses and regulates moving businesses in Massachusetts.⁵⁵ The DTE consists of a Director, Assistant Director, Hearing Officer, Tariff Analyst, Staff Attorney, and a secretary.⁵⁶ These six people license and regulate over 700 moving businesses in the city of Boston.⁵⁷

The DTE will issue a license to a reputable moving business only after (1) a representative of the business submits to a hearing under oath, (2) the business files a tariff report stating its rates and prices, and (3) the business shows proof of being covered by \$10,000 worth of cargo insurance.⁵⁸ If the DTE deems the business fit, it will issue a certificate number (license) and the business may operate.⁵⁹

The DTE then issues an identification sticker to be applied to the windshield of each of the vehicles used by the business.⁶⁰ These stickers are issued once a year.⁶¹ The business must re-apply each year by showing proof that each vehicle used by the business is covered by cargo insurance.⁶² If the DTE does not receive renewal applications from a currently licensed mover, the DTE may call the business in for a hearing.⁶³ This license, however, does not authorize the mover to store any property. If a moving company wants to expand into the storage business, the mover must apply for a warehouse permit.⁶⁴

⁵⁵ See MASS. GEN. LAWS ch. 159A (1990).

⁵⁶ Interview with Bill Clements, Tariff Analyst for the Transportation Div. of the Commonwealth of Massachusetts Dept. of Telecomm.'s and Energy, in Boston, MA. (Jan. 22, 2000).

⁵⁷ See *id.*

⁵⁸ TRANSPORTATION DIV., DEPT. OF TELECOMM.'S AND ENERGY PAMPHLET, INSTRUCTIONS FOR NEW CARRIER APPLICANTS.

⁵⁹ See Interview with Bill Clements, *supra* note 56.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See MASS. GEN. LAWS ch. 105 § 1 (1990).

A mover's unsatisfied customers may lodge a complaint with the DTE.⁶⁵ The DTE then places a copy of each complaint received in the business' file, and this information is freely given to the public and is available over the telephone.⁶⁶ The DTE has the authority to call the customer and the mover to a hearing; for instance, if the mover charged the customer a rate different from those stated on its tariff statement, the DTE would make the mover pay restitution.⁶⁷ For issues concerning damage to goods, however, the DTE has no authority to grant relief.⁶⁸ Thus, the DTE keeps a file on all moving companies operating in Massachusetts, and anyone may inquire about a particular mover with a telephone call to the DTE.⁶⁹

B. *The Storage Company*

The public warehouse business is also a regulated industry in Massachusetts.⁷⁰ It is unlawful to operate a warehouse in Boston (or anywhere in Massachusetts) without first obtaining a public warehouse license from the Massachusetts DPS.⁷¹ To obtain a license from the DPS, the candidate must submit an application specifying the premises to be used for storage purposes.⁷² The DPS then inspect the facility to ensure its suitability.⁷³ Subsequently, the candidate must file a \$5,000 bond with the Treasury Department.⁷⁴ Lastly, the candidate must give notice of his intention to operate the warehouse by publishing such notice in two consecutive issues of a newspaper in the town where the warehouse is to be located.⁷⁵ The publishing requirement gives notice to local authorities of the candidate's intention to operate a warehouse in their town.⁷⁶ According to the Housing Court, "this statutory scheme is designed to protect the public from substandard warehouses and unsuitable warehouse operators."⁷⁷

The DPS keeps an open file on all warehouses permitted to operate in the state.⁷⁸ All written complaints sent to the DPS regarding a warehouse or warehousemen are placed in the respective file.⁷⁹ This information is also free to the public, and can

⁶⁵ See interview with Bill Clements, *supra* note 56.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See MASS. GEN. LAWS ch. 105 § 1 (1990).

⁷¹ See *id.*

⁷² See *id.*

⁷³ Interview with William N. Souris, Director of Special Licensing, The Commonwealth of Massachusetts Dept. of Public Safety, in Boston, MA (Feb. 20, 2000).

⁷⁴ See MASS. GEN. LAWS ch. 105 § 1 (1990).

⁷⁵ See *id.*

⁷⁶ See Interview with William N. Souris, *supra* note 73.

⁷⁷ See *Ivey v. Robinson*, No. 04380, Housing Court of the City of Boston (1977).

⁷⁸ See Interview with William N. Souris, *supra* note 73.

⁷⁹ See *id.*

be obtained by contacting the DPS.⁸⁰

IV. THE INHERENT PROBLEMS

A. *The Tenant is Unaware of Location of Property*

The problems begin for the absent tenant upon her return to Boston. She finds that she has been evicted; yet, she has no information about what happened to her property.⁸¹ She does not know who removed it, where it is located, or even how to retrieve it.⁸² There is no statute, regulation or established procedure that requires any party involved in the eviction to notify the tenant of the whereabouts of her property.⁸³

Robert Fitzpatrick suggests that the pre-eviction requirement of notice should inform the tenant that if her property is not removed by eviction day, it will be moved and stored at her expense.⁸⁴ This Note argues further, however, that the constable should also state the name of the moving and storage company that will be used to effect the removal and storage on the 48-hour notice.⁸⁵ At the very least, the constable should be required to file the name and location of the bailor of the tenant's property with the housing court that issued the judgment for repossession. Either alternative would solve the immediate problem of the tenant's inability to locate her property after the eviction.

B. *The Statutory Lien is Sufficient*

In practice, the statutory lien does not work according to this model when faced with the realities of the financial situation of evicted tenants.⁸⁶ Evicted tenants rarely have any property that could satisfy storage and moving costs after enforcement of the lien.⁸⁷ Furthermore, if evicted tenants have no money to pay their rent, they likely do not have money to pay storage costs in order to get their property back (assuming the value of the goods justifies paying the storage fees).⁸⁸ Warehousemen, therefore, will usually not rely solely on the protections offered by

⁸⁰ See *id.*

⁸¹ See MASS. GEN. LAWS ch. 239 § 4 (1990).

⁸² See Hemp, *supra* note 5.

⁸³ See *id.*

⁸⁴ See Fitzpatrick, *supra* note 4, at 1130.

⁸⁵ See MASS. GEN. LAWS ch. 239 § 3 (1990).

⁸⁶ See Fitzpatrick, *supra* note 4, at 1129-30.

⁸⁷ See *id.* at 1125 (asserting that evicted tenants are frequently part of an economically under-privileged class, unable to afford new shelter for themselves or storage for their possessions).

⁸⁸ See Hemp, *supra* note 5, at 44 (quoting one warehouseman saying "the goods [bailed pursuant to an eviction] are garbage. These [evicted tenants] are not exactly from Wellesley or Natick.").

the lien when picking up property during an eviction.⁸⁹ Essentially, the lien is worthless if the property is worthless.

Additionally, statute requires the warehouseman to hold the evicted tenant's property for at least six months before executing the lien.⁹⁰ This means that the warehouseman must absorb the cost of storing the property for three additional months. It should be noted that the poorest individuals and families must wait up to 33 months to be considered for HUD housing assistance.⁹¹ Therefore, these evicted families may have to keep their household goods stored for over two years before they can find assistance.

C. The Auction to Enforce the Lien

Another common problem is that the tenant may never be notified that her property is going to be auctioned.⁹² The only address the warehouseman has after eviction is the address where the eviction took place.⁹³ Evicted tenants often fail to file a forwarding address with the post office, allowing them to receive notices of the auctions (assuming, of course, that the evicted tenant found another place to live and is not living on the street).⁹⁴ In a situation where the evicted tenant does have property of value, the warehouseman may sell such property at unreasonably low prices simply to satisfy storage costs.⁹⁵

D. The Absent Tenant Cannot Request Insurance

Generally, a bailee is under no duty to insure household property.⁹⁶

⁸⁹ See MASS. GEN. LAWS ch. 239 § 4 (1990).

⁹⁰ See *id.*

⁹¹ See NCH Fact Sheet #1, *supra* note 6.

The limited level of housing assistance means that most poor families and individuals seeking housing assistance are placed on long waiting lists. From 1996 to 1998, the time households spent on waiting lists for HUD housing assistance grew dramatically. For the largest public housing authorities, a family's average time on a waiting list rose from 22 to 33 months from 1996-1998-a 50% increase (U.S. Department of Housing and Urban Development, 1999). The average waiting period for a Section 8 rental assistance voucher rose from 26 months to 28 months between 1996 and 1998. Excessive waiting lists for public housing mean that people must remain in shelters or inadequate housing arrangements longer.

Id.

⁹² See Hemp, *supra* note 5.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.* (reporting that one evicted tenant's property, including two televisions, a washing machine, a couch and love seat, a reclining chair, a bed with headboard and footboard, eight chairs, six tables, a chest, and a 10-speed bicycle, were auctioned off for only \$100).

⁹⁶ See 28 A.L.R. 3d 513 § 3.

Massachusetts's law, however, requires the bailee to offer insurance to the bailor.⁹⁷ Insurance notification comes in the form of fine print on a warehouse receipt.⁹⁸ This requirement offers little protection to the absent tenant who never sees the receipt. In response, Massachusetts should enact a statute requiring insurance in cases where the tenant is not available to request it. Such statutory provisions have withstood attack on constitutional grounds.⁹⁹

The notice requirement of the insurance option opens the door for possible legal argument. Massachusetts General Law chapter 105, section 4 should be interpreted as requiring the warehouseman to make and issue an inventory to the evicted tenant. The plain language of the statute state that warehousemen must notify all of their customers that they have the right to request insurance.¹⁰⁰ The statute also specifically designates the notice's placement upon the warehouse receipt.¹⁰¹ Therefore, the statute itself assumes that the warehouseman will make and issue an inventory to the owner of the property.

E. *The Inventory*

The Uniform Commercial Code (UCC) allows a state to determine whether the burden of proving negligence of the bailee shall be placed upon the claimant, or the burden of proving non-negligence shall be placed upon the bailee.¹⁰²

It is a well-settled general rule that a bailee is not, in the absence of statute, instructions from the bailor, a special contract, a usage of the trade, or a habit of dealing between the parties, in the ordinary case under any duty to insure the property entrusted to his care for the benefit of the bailor, and in the event of its loss or destruction, he is not liable to the bailor for having failed to procure insurance. . . . Thus, it has been said that while a warehouseman or bailee may be liable for negligence in a proper case, he is not required to insure property for the benefit of the owner, and his obligations to take insurance in one of contract between him and the bailor.

Id.

⁹⁷ See MASS. GEN. LAWS ch. 105 § 4 (1990).

A licensed warehouseman shall, upon written request by a party placing property with him on storage, cause such property to be insured for whom it may concern. . . . Any warehouse receipt delivered to a depositor of family, personal or household goods shall come contain the following notice conspicuously printed in at least eight point type: 'The property which you are putting in storage is not covered by insurance against fire or theft. You may contact the warehouseman for instructions on placing insurance coverage for fire and theft on the deposited property'.

Id.

⁹⁸ See *id.*

⁹⁹ See *Brass v. North Dakota*, 153 U.S. 391 (1894) (holding a North Dakota statute requiring bailees of grain to insure such grain is constitutional).

¹⁰⁰ See MASS. GEN. LAWS ch. 105 § 4 (1990).

¹⁰¹ See *id.*

¹⁰² See U.C.C. § 7-403(1) (2000).

Massachusetts places the latter burden of proof on the bailee.¹⁰³

The bailor, however, must first prove the existence of the bailment.¹⁰⁴ In the problem illustration of our absent tenant, no one is present during the eviction to ensure the making of an accurate inventory. The existence of an inventory may satisfy the first element in a negligent bailment case: proving the existence of the bailed property. Without an inventory, an absent tenant has nothing but her own testimony to prove the existence of the alleged missed property.

V. THE CONSTABLE'S DUTY TO THE ABSENT TENANT

The Massachusetts Appellate Courts have not established a constable's duty of care when removing and storing goods pursuant to an eviction writ.¹⁰⁵ The courts, however, have established a constable's duty of care in executing a writ of attachment.¹⁰⁶ A constable owes a duty of ordinary care and diligence "as a prudent business man would bestow upon his own property" when handling property entrusted to his care pursuant to a writ of attachment.¹⁰⁷

A. Duty to Hire Only Authorized Moves and Storers

In *Ivey v. Robinson*, a 1977 Housing Court decision, the court stated that a constable's execution of a writ of attachment bears little distinction from executing an eviction writ.¹⁰⁸ Therefore, the court reasoned, the same duty of care should apply.¹⁰⁹

In *Ivey*, the plaintiff/tenant was evicted from her apartment.¹¹⁰ A constable hired an unlicensed and unbonded moving and storage company "who he knew other constables were using."¹¹¹ The plaintiff's property was subsequently damaged

¹⁰³ See *Knowles v. Gilchrist Co.*, 289 N.E.2d 879 (1972).

[W]e hold that once the bailor proves delivery of the property to the bailee in good condition and the failure to redeliver upon timely demand, the burden of proof is irrevocably fixed upon the bailee to prove by a fair preponderance of the evidence that he has exercised due care to prevent the property's loss or destruction. Our holding extends to all bailment for hire cases, whether brought in tort or contract, in which the bailee has exclusive control over the property at the time it was destroyed or damaged.

Id.

¹⁰⁴ See *id.* ("the bailor [must] prove [] delivery of the property to the bailee in good conditions").

¹⁰⁵ See *Ivey v. Robinson*, No. 04380, Housing Court of the City of Boston (1977).

¹⁰⁶ See *Parrot v. Dearborn*, 104 Mass. 104 (1870).

¹⁰⁷ *Id.* at 106.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ *Id.* at 3.

while in the exclusive care of this company.¹¹² The company was later found to have been operating without a license or bond.¹¹³

The *Ivey* court found that making a telephone inquiry to the DPS and the DTE to ensure that the moving and storage company was duly licensed and bonded to operate in the state was only a minimum burden on the constable.¹¹⁴ The fact that other constables were using the same company did not excuse this constable's failure to hire a properly licensed and bonded company.¹¹⁵

B. Duty to Prepare Inventory

When a tenant's property is left in the hands of a moving company or warehouseman, it may be just as vulnerable to theft and destruction as if it were left out on the sidewalk. The constable could protect the tenant's property by supervising the process and making his own inventory of the items removed. However, the constable is under no statutory duty to do so.

For example, a typical inventory entry completed by the moving company might read 'box of CD's (compact disks)'. When a tenant appears to reclaim her property at the warehouse, she may find that half of her CD's are missing. A vague inventory entry is therefore no help in establishing that any CD's are actually missing. The plaintiff is without means to prove the existence of the bailment in the first place.

This Note follows the *Ivey* court's reasoning and proposes a cause of action in common law tort for tenants who have lost property pursuant to an eviction. The plaintiff's claim against a constable is based on the grounds that the constable owes a duty to the tenant to inventory the tenant's property before it is removed and stored in accordance with an eviction writ. This duty comes from the duty a constable owes to inventory goods when levying upon a writ of attachment.

The storage statute, however, "does not require the warehouseman to inventory goods prior to storage or to provide a receipt to the tenant-bailor."¹¹⁶ Under the Massachusetts Commercial Code, the issuance of a warehouse receipt is optional, as per the warehouseman's discretion.¹¹⁷ As Fitzpatrick points out, "storage of evicted tenants' property is a statutorily imposed contract, not a consensual transaction. . . ."¹¹⁸ Therefore, the unique nature of the transaction "necessitates mandatory issuance [of a warehouse receipt]."¹¹⁹ In the case of the absent tenant, a reliance on the inventory "may be the only way [she] can locate, redeem, and

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ Fitzpatrick, *supra* note 4, at 1131.

¹¹⁷ See U.C.C. § 7-403 (1) (2000).

¹¹⁸ Fitzpatrick, *supra* note 4, at 1133.

¹¹⁹ *Id.* at 1132.

protect the stored possessions.”¹²⁰

In executing a writ of attachment, “as a general rule the levying officer should, or must make an inventory and appraisal of the property attached.”¹²¹ In fact, in some jurisdictions, “the officer is required to make the inventory. . . with the assistance of a specified number of credible and disinterested householders who must be first sworn in by the officer.”¹²² The inventory protects all parties, including the levying officer.¹²³ In fact, most moving and storage companies will make an inventory during removal of the tenant’s goods. The problem lies not in inventory issuance, but in its accuracy.

The inventory made during a constable’s levy on a writ of attachment should describe the property on which the levy was made, and disclose its location.¹²⁴ Should a constable fail in this duty, no lien is acquired as to any property other than that described in the inventory, and failure of the inventory to designate or describe the attached property will render the attachment inoperative.¹²⁵

It is a statutory requirement for Massachusetts’s constables to file an inventory when executing a writ of attachment.¹²⁶ When the constable takes a person’s property into possession, common law imposes a duty to exercise due care upon the constable.¹²⁷ Arguably, the statute assumes that due care requires the making of the inventory. Massachusetts’s law holds that if the constable is negligent in this duty of ordinary care when executing a writ of attachment, he is liable to the owner of the attached property.¹²⁸

When effectuating the removal and storage of an evicted tenant’s property, the plain language of the storage statute states that the constable owes the tenant a duty of care.¹²⁹ This duty of care is ordinary care and diligence in handling property entrusted to the constable.¹³⁰ In a writ of attachment, this duty assumes the making of an inventory.¹³¹ Therefore, one could argue that the duty of ordinary care imposed on a constable when removing and storing the evicted tenant’s property also requires the constable to make an inventory “for the benefit of the owner, the property thereof.”¹³²

The common law in other jurisdictions holds that the duty to file the inventory protects all persons in the transaction. By Judge King’s analogy in *Ivey*, an

¹²⁰ *Id.* at 1133.

¹²¹ 7 C.J.S. § 188(a) (1985).

¹²² *Id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See* MASS. GEN. LAWS ch. 223 § 63 (1990).

¹²⁷ *See Parrot*, 104 Mass. at 107.

¹²⁸ *See id.*

¹²⁹ *See* MASS. GEN. LAWS ch. 229 § 4 (stating that the constable moves and stores the property “for the benefit of the owner thereof”) *Id.*

¹³⁰ *See Parrot*, 104 Mass. at 107.

¹³¹ *See* MASS. GEN. LAWS ch. 223 § 63 (1990).

¹³² *See* MASS. GEN. LAWS ch. 239 § 4 (1990).

inventory in the eviction context would protect all parties involved in the transaction-the tenant, the landlord, the constable, and the moving company.¹³³ In fact, the constable-a disinterested court official-is in the best position to protect all parties involved.

VI. CONCLUSION

An absent tenant is vulnerable during an eviction procedure. While tenants who are present during the eviction have the opportunity to safeguard their property (for example, by taking pictures or ensuring a detailed inventory), absent tenants are placed at the mercy of the constable and the moving and storage company.

Special considerations must be afforded to a tenant when compelling circumstances prevent her from being present at an eviction. A judicially imposed duty on the constable to make a detailed inventory will protect an absent tenant from theft, damage, and loss of personal property.

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¹³³ See *Ivey v. Robinson*, No. 04380, Housing Court of the City of Boston (1977).