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Contracts—Bailee Liable For Failure To Recover Goods Attached By Erroneous Process

Marion A. Kobes

test. The accused may not assert the privilege against self-incrimination nor the privilege against unwarranted bodily invasion; the present case law removes these. An argument that compelling a choice regarding the test is an unwarranted search and seizure has been answered by including an arrest provision in the statute. Yet, the very cure for this ill recognizes the nature of the procedure as criminal and simply accomplishes the withdrawal of a constitutional right without replacing any comparably effective protection, such as the right to counsel. Perhaps the easiest criticism to be leveled against the Court's decision is that it was unnecessary to serve the purposes of the statute. Regardless of the interposition of counsel, intoxicated drivers will be removed, by the administrative revocation of their license or by criminal conviction, from the highway. The right to counsel will simply make their removal less arbitrary. The decision does evoke a distaste, though, for needlessly summary law enforcement. The sobriety test procedure has but one object, the removal of the intoxicated driver from our highways. There is one principal means by which this is accomplished, revocation of the important privilege of driving. Even in civil revocation the implicit ground for revocation is common to the fault evoking the criminal penalty, presumably the motorist who refuses the test is intoxicated. The sobriety test procedure can at best be called chameleon, but certainly not entirely civil in its nature. From the standpoint of the time when the statutory choice is required, then, the civil characterization of the subsequent revocation proceeding is irrelevant. If the right to counsel is to be fixed according to that point in the procedure at which it is asserted or even according to the nature of the procedure viewed as a whole, the motorist accused of intoxicated driving should be allowed counsel prior to choosing to take or decline a sobriety test.

D. R. K.

CONTRACTS

Bailee Liable for Failure to Recover Goods Attached by Erroneous Process

Plaintiff-seller sued to recover damages sustained as a result of the alleged breach by the defendant-buyer of two agreements, under each of which certain tinplate belonging to the plaintiff was stored in a warehouse of a third party in Naples, Italy. The tinplate had been a part of certain sales by defendant to defendant's customer. After the arrival of the goods in Italy, the customer rejected the goods. Following such rejection the plaintiff-seller and defendant-buyer reached two agreements—the purpose of which was to provide for adjustments satisfactory to the three merchants involved. Each agreement provided for plaintiff-seller to give defendant-buyer certain monetary credits, and for defendant-buyer to make repayment to the customer. Title to the rejected goods reverted to the seller, but the defendant-buyer, who undertook to

resell them for seller, notified the plaintiff that he was holding the material "at your [seller's] risk and await your [seller's] further order." Some discussion to ascertain what "at your risk" meant followed and resulted in plaintiff authorizing the buyer to procure the usual risk of loss insurance. Meanwhile, the tinplate was attached by an Italian official pursuant to a lawsuit brought by the customer against the defendant-buyer for breach of contract damages. Plaintiff-seller appealed from an Appellate Division decision which modified a trial court decision for plaintiff. *Held*: Reversed with two judges dissenting. Because the buyer as bailee had a duty to free plaintiff's property from an attachment issued against the buyer, the defendant was held liable. The Court of Appeals added that the "at your risk" clause and the fact that plaintiff authorized the buyer to procure insurance for the plaintiff did not absolve the defendant from liability. *Tinplate Purchasing Corp. v. Tuteur & Co.*, 10 N.Y.2d 410, 179 N.E.2d 502, 223 N.Y.S.2d 495 (1961).[1]

The general rule in New York is that a bailee may show, as an excuse for failure to redeliver, that the property was taken from his possession under valid process of law.[2] It is the bailee's right and duty, however, to offer resistance to the taking of the property, and, if unsuccessful in this, adopt such measures for reclaiming it as a prudent and intelligent man would employ if it has been demanded and taken under claim of right by another without legal process.[3] Such duty is not discharged merely by making a formal protest against the seizure. The bailee must, within a reasonable time after the seizure of the property, give notice of this fact to the bailor, in order that the latter may have an opportunity to defend his title. Goods deposited with a bailee for safekeeping may be subjected to attachment by creditors of the bailor. However, in the absence of any element of estoppel, bailed property is generally not subject to attachment or levy under process against the *bailee* to satisfy claims of *his* creditors, except to the extent of his own interest, if any, therein.

The Court of Appeals followed the general New York rule by holding that since the title to the goods had reverted to the plaintiff-seller, the customer's warrant of attachment had no legal validity, and the customer was an intruder against whom the defendant-bailee was bound to defend the plaintiff's interests. The fact that the plaintiff-seller authorized the defendant-buyer to procure counsel to defend plaintiff's interest did not constitute a waiver of its rights against the defendant, and the fact that the defendant gave notice to the plaintiff of the attachment did not absolve it of liability to the plaintiff for the value of the goods. The Court of Appeals also concluded that the settlement agreement and the bailment agreement contained no unusual provisions which might be interpreted contrary to general usage as the Appellate Division con-

1. 12 A.D.2d 434, 212 N.Y.S.2d 303 (2d Dep't 1961), affirming 25 Misc. 2d 330, 204 N.Y.S.2d 809 (Sup. Ct. 1960).
2. Roberts v. Stuyvesant Safe Deposit Co., 123 N.Y. 57, 25 N.E. 294 (1890).
3. Id. at 66, 25 N.E. at 296.

cluded.[4] The term "at your risk" although seemingly agreed to by the parties, could not be construed to include defendant's conscious refusal to free plaintiff's property from an attachment issued against the defendant; nor was the plaintiff estopped by his authorizing defendant to employ counsel to protect plaintiff's interests.

The decision is sound and equitable once the court satisfied itself that a bailment for mutual benefit was created by what ensued between the parties. Certainly, a party may not disregard his responsibilities under a contract founded on mutually adequate consideration and escape liability so easily. Indeed, a bailee could not reasonably insist that, although he knew that goods were seized under the belief that they were his, he did not have to do anything except notify the bailor that the goods were seized under erroneous process. The facts especially warrant the holding that a person cannot profit by his "intentional" wrong. It was far more practical for the plaintiff to recover damages in a suit in the United States than to interpose a claim in an Italian court to discharge the property from attachment even though what seemingly results is a forced sale by which the bailee was bound. The buyer still is presumptively capable of recovering from plaintiff the full purchase price and 50% of its lost profits as part of their agreement to rescind the original sale from plaintiff to defendant.

M. A. K.

CONSISTENT ORAL CONDITION PRECEDENT TO WRITTEN MERGER AGREEMENT UNAFFECTED BY PAROL EVIDENCE RULE

Plaintiff agreed with the defendant and others to merge a partnership and various corporations into a single holding company, in order to attain greater strength and more efficient operation. The written merger agreement had as one of its terms the condition that all stock should be subscribed to within five days and accepted within twenty-five days or the obligations of the parties would be terminated. This condition was fulfilled, but the defendant refused to contribute the agreed consideration on which basis the plaintiff alleged a breach of contract and brought suit seeking specific performance and an accounting. The defendant pleaded, as an affirmative defense, the failure of an orally agreed upon condition precedent and offered parol evidence to prove the plea. The oral condition pleaded was that the merger agreement was not to become effective unless the parties were able to raise $672,500 of so-called equity expansion funds. The trial court, admitting the evidence over plaintiff's objection, found as a fact the failure to obtain the funds and entered judgment dismissing the complaint. The intermediate court affirmed without

4. The Appellate Division decided that the arrangement between the parties was to be treated differently than the usual bailment contract because the goods were actually in the customer's possession with plaintiff-seller's knowledge and consent and subject to plaintiff's further orders, and also because the goods were kept there "at your (plaintiff's) risk."