North Dakota Law Review

Volume 33 | Number 1 Article 10

1957

Criminal Law - National Motor Vehicle Theft Act - Construction of Stolen

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intoxication may be averred in order to nullify the contract varies.[5] A North Dakota statute requires that a contract must be rescinded promptly upon discovery of facts giving rise to a right of recission.[6] Failure to disaffirm within a "reasonable" time after acquiring such knowledge is deemed an election to affirm it.[7] What constitutes a "reasonable" time is not definite but depends upon the facts of the particular case.[8] The North Dakota Supreme Court has suggested that the morning after the contract was entered into is a reasonable time,[9] while a period of seven years was considered too long.[10] A party was held not guilty of laches when he failed to rescind almost a year after discovery of fraud and when no rights of third parties intervened and he had received no consideration.[11]

There is a presumption that a signed contract is valid.[12] This requires the party asserting intoxication as a defense to assume the responsibility and burden of proving it.[13] There must be clear and convincing proof of excessive intoxication before the court will sustain this defense.[14] The degree of intoxication is a question of fact,[15] and the evidence is usually established by the testimony of witnesses, but their testimony is subject to the final determination by the jury.[16]

The holding in the principal case conforms to the general rule that there must be concrete and conclusive proof of excessive intoxication. The mere fact that the party attempting to rescind was known to have been a habitual drunkard will not give rise to a right to rescind,[17] unless he was excessively intoxicated at the execution of the contract.[18] In the instant case the Administratrix failed to establish such proof and was required to execute the deed as a contractual obligation of the deceased.[19]

RONALD SPLITT.

CRIMINAL LAW — NATIONAL MOTOR VEHICLE THEFT ACT — CONSTRUCTION OF "STOLEN." — Appellant was convicted under the Dyer Act for having appropriated to his own use and driven across a state line, an automobile bailed to him by the conditional vendee for the purpose of returning it to the conditional vendor. The conviction was affirmed on appeal by the United States Circuit Court of Appeals which *held* that the word "stolen" as used in

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5. Mann Chevrolet Co. v. Associates' Inv. Co., 125 F.2d 778 (8th Cir. 1942) (dictum).

6. N. D. Rev. Code § 9-0904 (1) (1943).

7. Frankish v. Fed. Mortg. Co., 30 Cal. App.2d 700, 87 P.2d 90 (1939); Hauge v. Bye, 51 N. D. 848, 201 N.W. 159 (1924); Spoonheim v. Spoonheim, 14 N. D. 380, 104 N.W. 845 (1905).

8. Mann Chevrolet Co. v. Associates' Inv. Co., 125 F.2d 778 (8th Cir. 1942).

9. Hauge v. Bye, 51 N. D. 848, 201 N.W. 159 (1924).

10. Spoonheim v. Spoonheim, 14 N. D. 380, 104 N.W. 845 (1905).

11. Deasy v. Taylor, 39 Cal. App. 235, 178 Pac. 538 (1919).

12. Bradley v. Industrial Commission, 51 Ariz. 291, 76 P.2d 745 (1938); Indemnity Ins. Co. v. Macatee Ins. Co., 129 Tex. 166, 101 S.W.2d 553 (1397). See also Crutcher Laboratory v. Crutcher, 288 Ky. 709, 157 S.W.2d 314, 319 (1942).

13. Lyon v. Jackson, 132 N.E.2d 779 (Ohio 1955). See also Brugman v. Brugman, 93 Neb. 408, 140 N.W. 781 (1913).

14. Emerson v. Shirley, 188 La. 196, 175 So. 909 (1937); *In re* Null's Estate, 302 Pa. 64, 153 Atl. 137 (1930).

15. Taylor v. Koenigstein, 128 Neb. 809, 260 N.W. 544 (1935).

16. Cardinal v. Cardinal, 131 S.W.2d 1005 (Tex. Civ. App. 1939); Jones v. Selman, 109 S.W.2d 1003 (Tex. Civ. App. 1937).

17. Snead v. Scott, 182 Ala. 97, 62 So. 36 (1913).

18. Taylor v. Koenigstein, 128 Neb. 809, 260 N.W. 544 (1935).

19. Francis v. Ferguson, 246 N. Y. 516, 159 N.E. 416 (1927); *In re* Fullmer, 319 Pa. 192, 197 Atl. 545 (1935); *In re* Murphy, 191 Wash. 180, 71 P.2d 6 (1937).

the National Motor Vehicle Theft Act,[1] describes the conduct of one who converts a bailed chattel to his own use. *Smith v. United States,* 233 F.2d 744 (9th Cir. 1956).

Some courts hold that § 2312 of the "Dyer Act," is to be strictly construed as common law larcency,[2] that is, "a felonious taking and carrying away of personal goods of another, with intent to convert to the taker's use."[3] They have held the defendant not guilty under § 2312 where the automobile was obtained by passing worthless checks,[4] by fraudulent pretenses,[5] or where the car was rented.[6] They predicate their decisions upon the doctrine that criminal statutes are to be strictly construed against the imposition of criminality; so that the defendent is not guilty of larceny where he obtained the automobile lawfully in the first instance.[7]

Other courts have said that the meaning of § 2312 is extensive enough to cover all wrongful and unlawful taking of property, including embezzlement.[8] These courts have held that where the automobile was obtained lawfully by rent,[9] by bailment,[10] or by borrowing,[11] and was unlawfully retained, the defendant was guilty under § 2312 in spite of the absence of felonious intent at the taking.

Congress in enacting the "Dyer Act", was concerned with the large scale theft of automobiles, and the frustration of state law enforcement agencies which occurred when the automobiles were transported across state borders. There appears to be nothing in the debate on the bill inconsistent with the idea that the word "stolen" is meant to include the crime of embezzlement.[12] It is interesting to note also that the common law definitions of the word "stolen" do not exclude embezzlement. Funk and Wagnall defines "steal" as "to take that to which one has no right, especially that which belongs to another, without permission or authority. . ."[13] while Webster takes the view that the word "steal" is general for pilfer, filch, or embezzle.[14]

Justice Cardozo stated the problem well: "The distinctions between larceny and embezzlement, now largely obsolete, did not ever correspond to any essential difference in the character of the acts or their effect on the victim. The crimes are one today in the common speech of men as they are in moral

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1. 62 Stat. 806 (1948), 18 U. S. C. § 2312 (Supp. V, 1952) amending 41 Stat. 324 (1919). Whoever transports in interstate commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

2. Hand v. United States, 227 F.2d 794 (10th Cir. 1955); Murphy v. United States, 206 F.2d 571 (5th Cir. 1953); Ackerson v. United States, 185 F.2d 485 (8th Cir. 1950); Hite v. United States, 168 F.2d 973 (10th Cir. 1948).

3. Black, Law Dictionary (4th ed. 1951).

4. See Murphy v. United States, 206 F.2d 571 (5th Cir. 1953).

5. See Hand v. United States, 227 F.2d 794 (10th Cir. 1955); Hite v. United States, 168, F.2d 973 (10th Cir. 1948).

6. See United States v. Kratz, 97 F. Supp. 999 (D. Neb. 1951).

7. Murphy v. United States, 206 F.2d 751, 753 (5th Cir. 1953) (dictum).

8. Wilson v. United States, 214 F.2d 313 (6th Cir. 1954); United States v. Adcock, 49 F. Supp. 351 (W. D. Ky. 1943); Breece v. United States, 218 F.2d 819 (6th Cir. 1954) (dictum); Collier v. United States, 190 F.2d 473, 477 (6th Cir. 1951) (dictum); United States v. Sicurella, 187 F.2d 533, 534 (2d Cir. 1951) (dictum); Davilman v. United States, 180 F.2d 284, 285 (6th Cir. 1950) (dictum).

9. See Davilman v. United States, 180 F.2d 284 (6th Cir. 1954).

10. See Breece v. United States, 218 F.2d 819 (6th Cir. 1954).

11. See Stewart v. United States, 151 F.2d 386 (8th Cir. 1945); United States v. Adcock, 49 F. Supp. 351 (W. D. Ky. 1943).

12. See 58 Cong. Record 5470-5478, 6433-6435 (1919).

13. Funk and Wagnall, New Standard Dictionary of the English Language (1952).

14. Webster, New International Dictionary (2d ed. 1953).

quality."[15] Whether or not such a conclusion is true, it is certain that the effects of embezzlement and larceny are identical in so far as the lawful owner of property is concerned; in either case, he has been deprived of his property.

To avoid the confusing distinctions between guilty intent at the taking and after-acquired guilty intent, New York in 1942 recodified into a single theft statute all crimes of a theft nature without reference to the time of forming the guilty intent.[16] While New York's solution to the problem appears to be the most simple, the decision in the instant case appears to be equally effective.

JOHN A. DOERR.

EQUITY — INJUNCTIONS — EQUITABLE RELIEF NOT AVAILABLE FOR VIOLATION OF CIVIL RIGHTS STATUTE. — Plaintff, a negro woman, brought an action against the operator of a privately owned amusement park to enjoin him from refusing her admittance to the park because of her race. An Ohio statute provides that the proprietor of a place of amusement who denies to a citizen, except for reasons applicable to all, the full enjoyment of the facilities shall be subject to fine and imprisonment, or in the alternative to the payment of damages.[1] The Ohio Supreme Court, two justices dissenting, *held* that the remedy provided by the statute was exclusive and an additional remedy by way of injunction was not available. *Fletcher v. Coney Island,* 165 Ohio St. 150, 134 N.E.2d 371 (1956).

The holding in the principal case is based on the rule that where a statute creates a new right the remedy provided is exclusive. The common law recognizes an exception to this rule where the remedy provided is inadequate, and allows an injunction as an ancillary remedy unless excluded expressly or by necessary implication.[2] Some American jurisdictions have allowed the remedy which would best protect the plaintiff's right irrespective of the fact that the statute did not expressly grant such remedy.[3]

One writer has said that the statutory grant of a right should be considered as distinct from the remedy provided.[4] If this were not true, the possibility

15. Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 363, 146 N.E. 432, 433. (1925).

16. See N. Y. Consolidated Law Service, Penal Law, § 1290 (1951).

1. Ohio Rev. Code Ann. § 2901.35 (Baldwin 1953) "No proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store or other place for the sale of merchandise, or any other place of public accommodation or amusement, shall deny to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, and no person shall aid or incite the denial thereof. Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars or imprisoned not less than thirty nor more than ninety days or both, and shall pay not less than fifty nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court in the county where the violation was committed."

Id., § 2901.36 "Either a judgment in favor of the person aggrieved, or the punishment of the offender upon an indictment under section 2901.35 of the revised code, *is a bar to further prosecution for a violation of such section.*" (Italics added).

2. Cooper v. Whittingham, 49 L. J. 752 (Ch. 1880).

3. See Amos v. Prom, 117 F. Supp. 615 (N. D. Iowa 1954); Powell v. Utz, 87 F. Supp. 811 (E. D. Wash. 1949); Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 180 P.2d 321 (1947); Humburd v. Crawford, 128 Iowa 743, 105 N.W. 330 (1905); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 214 N.W. 241 (1927); Grannon v. Westchester Racing Assn., 16 App. Div. 8, 44 N. Y. Supp. 790 (App. Div. 1897), *rev'd on other grounds,* 153 N. Y. 489, 47 N.E. 869 (1897); Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955); Randall v. Cowlitz Amusement Inc., 194 Wash. 82, 76 P.2d 1017 (1938).

4. 1 Lewis, Sutherland on Statutory Construction, 549 (2d ed. 1904).