

Proof of Delivery and Unexplained Failure of Warehouse to Return Stored Property Upon Demand Held to Establish Prima Facie Case of Conversion

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Proof of delivery and unexplained failure of warehouse to return stored property upon demand held to establish prima facie case of conversion

A warehouseman¹⁶² who is unable to return bailed property upon proper demand may be held liable for the value of the property on either a negligence¹⁶³ or a conversion theory.¹⁶⁴ Although

¹⁶² A warehouseman is "a person engaged in the business of storing goods for hire." N.Y.U.C.C. § 7-102(1)(h) (McKinney 1964). Prior to the passage of the UCC, the Uniform Warehouse Receipts Act had defined a warehouseman as "a person lawfully engaged in the business of storing goods for profit." Uniform Warehouse Receipts Act, ch. 732, § 58(1), [1907] N.Y. Laws 1721 (current version at N.Y.U.C.C. § 7-102(1)(h) (McKinney 1964)). The dual requirement that a warehouseman be "lawfully engaged" in business "for profit" has been eliminated under the UCC. N.Y.U.C.C. § 7-102, official Comment 2 at 8-9 (McKinney 1964); see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 20-2, at 783 (2d ed. 1980).

¹⁶³ N.Y.U.C.C. § 7-204(1) (McKinney 1964). While commentators disagree over whether the bailee was regarded as an insurer at early common law, compare O. HOLMES, THE COMMON LAW 175 (1923) and F. POLLACK & W. MATTLAND, II THE HISTORY OF ENGLISH LAW 191 (2d ed. 1899) with Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 159 (1897), it is well settled that the liability of a bailee now is grounded in negligence. *Martin Marietta Corp. v. Peter Kiewit Sons' Co.*, 346 F. Supp. 892, 896 (E.D.N.Y. 1972), *aff'd mem.*, 472 F.2d 1404 (2d Cir. 1973); *Buffalo Grain Co. v. Sowerby*, 195 N.Y. 355, 357-58, 88 N.E. 569, 570 (1909); *Clafin v. Meyer*, 75 N.Y. 260, 264 (1878); *Davis v. Lampert Agency, Inc.*, 30 App. Div. 2d 299, 300, 299 N.Y.S.2d 745, 746 (1st Dep't 1968). In the seminal case of *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703), Chief Justice Holt denoted six types of bailments from which the modern system of classification has evolved. See *id.* at 109-13; R. BROWN, THE LAW OF PERSONAL PROPERTY § 11.1, at 253-55 (3d ed. 1975). The modern system classifies bailments into three types with corresponding degrees of care. W. RICHARDSON, LAW OF BAILMENTS § 19, at 13 (1930). If a bailment is for the sole benefit of the bailor then the bailee need only exercise a slight degree of care and will be liable only for gross negligence. *E.g.*, *Jays Creations, Inc. v. Hertz Corp.*, 42 App. Div. 2d 534, 534, 344 N.Y.S.2d 784, 785-86 (1st Dep't 1973); *J.W. Mays, Inc. v. Hertz Corp.*, 15 App. Div. 2d 105, 109-10, 221 N.Y.S.2d 766, 771 (1st Dep't 1961); *St. Paul Fire & Marine Ins. Co. v. E.H. Trice Motor Co.*, 203 App. Div. 218, 220, 196 N.Y.S. 684, 686 (3d Dep't 1922). If, however, a bailment is for the sole benefit of the bailee then he must exercise great care and will be liable for the slightest neglect. *E.g.*, *Moore v. Westervelt*, 27 N.Y. 234, 243 (1863); *Pettinelli Motors, Inc. v. Morreale*, 39 Misc. 2d 813, 815, 242 N.Y.S.2d 78, 80 (Oneida County Ct. 1963). Where the bailment is for the mutual benefit of the parties, the bailee must exercise ordinary care and is answerable only for ordinary negligence. *E.g.*, *Aronette Mfg. Co. v. Capital Piece Dye Works, Inc.*, 6 N.Y.2d 465, 468, 160 N.E.2d 842, 845, 190 N.Y.S.2d 361, 364 (1959); *Jones v. Morgan*, 90 N.Y. 4, 9 (1882); *Castner v. Insurance Co. of N. America*, 40 App. Div. 2d 1, 3, 337 N.Y.S.2d 52, 54 (3d Dep't 1972).

¹⁶⁴ The contemporary law of conversion originated with *Fouldes v. Willoughby*, 151 Eng. Rep. 1153 (Exch. of Pleas 1841), wherein Lord Abinger drew the distinction between a trespassory interference with the possession of a chattel and a conversion which involves the exercise of dominion and control over the chattel. *Id.* at 1155-56; see RESTATEMENT (SECOND) OF TORTS § 222A, Comment a, at 432 (1965). While the failure of a bailee to return stored property upon proper demand is some evidence of conversion, *Congregation Anshe Sefard of Keap St., Inc. v. Title Guarantee & Trust Co.*, 291 N.Y. 35, 38, 50 N.E.2d 534, 534 (1943), a demand and refusal to return the property is not a condition precedent to liability. Mullen

section 7-204 of the Uniform Commercial Code (UCC) allows a warehouseman to limit contractually his liability for negligence,¹⁶⁵ any attempt to limit potential liability for conversion will be deemed ineffective.¹⁶⁶ Under either theory of recovery, however, the bailor bears the ultimate burden of proof.¹⁶⁷ While the estab-

v. J.J. Quinlan & Co., 195 N.Y. 109, 115, 87 N.E. 1078, 1080 (1909). A bailee's "overt and positive act of conversion by an unlawful sale or disposition" vitiates the need for a demand and refusal. *MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co.*, 193 N.Y. 92, 101, 85 N.E. 801, 803 (1908).

To establish a cause of action in conversion, a plaintiff must demonstrate a superior possessory interest in a chattel and an unlawful exercise of dominion or control over it. *AMF, Inc. v. Algo Distribs., Ltd.*, 48 App. Div. 2d 352, 356-57, 369 N.Y.S.2d 460, 464 (2d Dep't 1975); *Independence Discount Corp. v. Bressner*, 47 App. Div. 2d 756, 757, 365 N.Y.S.2d 44, 46 (2d Dep't 1975); see *RESTATEMENT (SECOND) OF TORTS* § 222A (1965). Generally, any unauthorized disposition of the bailed property amounts to a conversion. *Metropolitan Vacuum Cleaner Co. v. Douglas-Guardian Warehouse Corp.*, 208 F. Supp. 195, 198 (S.D.N.Y. 1962); *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 362, 213 N.E.2d 873, 883, 266 N.Y.S.2d 785, 799 (1965). For a general discussion of the tort of conversion, see *Prosser, The Nature of Conversion*, 42 *CORNELL L.Q.* 168 (1957).

¹⁶⁵ N.Y.U.C.C. § 7-204(2) (McKinney 1964) provides in pertinent part:

Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased . . . in which event increased rates may be charged based on such increased valuation No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

Id. It has been held that section 7-204(2) does not permit a warehouseman to disclaim liability for his negligence. *Kimberly-Clark Corp. v. Lake Erie Warehouse*, 49 App. Div. 2d 492, 494-95, 375 N.Y.S.2d 918, 920-21 (4th Dep't 1975), *appeal dismissed*, 39 N.Y.2d 888, 352 N.E.2d 580, 386 N.Y.S.2d 393 (1976). The UCC provision, to the extent that it authorizes a contractual limitation of liability, represents a codification of the common-law rule. See *Abend v. Haberman*, 281 App. Div. 262, 264-65, 119 N.Y.S.2d 488, 491 (1st Dep't 1953); *Rapp v. Washington Storage Warehouse & Van Co.*, 75 Misc. 16, 18, 134 N.Y.S. 855, 856-57 (N.Y.C. City Ct. N.Y. County 1911); *cf. Tewes v. North German Lloyd S.S. Co.*, 186 N.Y. 151, 156, 78 N.E. 864, 866 (1906) (common carriers may limit liability for negligence contractually).

¹⁶⁶ N.Y.U.C.C. § 7-204(2) (McKinney 1964); *accord, Glinsky v. Dunham & Reid, Inc.*, 230 App. Div. 470, 472, 245 N.Y.S. 359, 362 (1st Dep't 1930); *Kaplan Prods. & Textiles, Inc. v. Chelsea Fireproof Storage Warehouse, Inc.*, 9 Misc. 2d 273, 273, 163 N.Y.S.2d 705, 706 (Sup. Ct. App. T. 1st Dep't 1957) (per curiam).

¹⁶⁷ The burden of proving negligence or conversion is on the bailor. *Clafin v. Meyer*, 75 N.Y. 260, 262-64 (1878). Once the bailor has established his prima facie case of negligence by proving delivery and an unexplained failure to return the subject matter of the bailment, see note 168 *infra*, the bailee then bears the burden of furnishing an explanation for the disappearance of the property. *Dalton v. Hamilton Hotel Operating Co.*, 242 N.Y. 481, 488-89, 152 N.E. 268, 270 (1926); *Weinberg v. D-M Restaurant Corp.*, 60 App. Div. 2d 550, 550,

lished rule in New York is that proof of delivery and an unexplained failure to return stored property upon proper demand constitutes a prima facie case of negligence,¹⁶⁸ the rule regarding conversion has been less settled.¹⁶⁹ Recently, in *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*,¹⁷⁰ the Court of Appeals held that proof of delivery and an unexplained failure to return stored property upon demand establishes a prima facie case of conversion.¹⁷¹

In *I.C.C. Metals*, the plaintiff, an international metals trader, delivered a large quantity of an industrial metal to the Municipal Warehouse Company for storage.¹⁷² The warehouse receipts tendered to the plaintiff limited the warehouseman's liability to the sum of \$50 in the event of damage to the bailed property.¹⁷³ The documents further specified, as required by the UCC,¹⁷⁴ that upon

400 N.Y.S.2d 524, 526 (1st Dep't 1977). While some courts have erroneously referred to this as a shift in the burden of proof, e.g., *Wintringham v. Hayes*, 144 N.Y. 1, 5-6, 38 N.E. 999, 1000 (1894); see *Company v. Brayton*, 171 App. Div. 63, 65, 156 N.Y.S. 1010, 1012 (3d Dep't 1916); *Golden v. Romer*, 20 Hun. 438, 440 (Sup. Ct. Gen. T. 3d Dep't 1880), it is now firmly established that the burden of proof is never shifted from the bailor. *Textile Overseas Corp. v. Riveredge Warehouse Corp.*, 275 App. Div. 236, 236-37, 88 N.Y.S.2d 429, 430 (1st Dep't 1949); *Koop v. General Am. Transp. Co.*, 47 N.Y.S.2d 628, 632 (N.Y.C. City Ct. N.Y. County 1944); *W. RICHARDSON*, *supra* note 163, §§ 114-115, at 59-61. One commentator has suggested, however, that bailors frame their cause of action in contract, thereby forcing the bailee to plead and prove the defense of impossibility and its required elements: objective impossibility and freedom from fault. *Broude, The Emerging Pattern of Field Warehouse Litigation: Liability for Unexplained Losses and Nonexistent Goods*, 47 NEB. L. REV. 3, 19 & n.53 (1968). This, it was argued, would have the effect of shifting the burden of proof from the bailor to the bailee. *Id.*

¹⁶⁸ See, e.g., *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 359, 213 N.E.2d 873, 881, 266 N.Y.S.2d 785, 796 (1965); *Stewart v. Stone*, 127 N.Y. 500, 506, 28 N.E. 595, 596 (1891); *Claffin v. Meyer*, 75 N.Y. 260, 262 (1878); *Textile Overseas Corp. v. Riveredge Warehouse Corp.*, 275 App. Div. 236, 236, 88 N.Y.S.2d 429, 430 (1st Dep't 1949); *W. RICHARDSON*, EVIDENCE § 109, at 88 (10th ed. J. Prince 1973).

¹⁶⁹ Compare *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 350, 213 N.E.2d 873, 875, 266 N.Y.S.2d 785, 789 (1965) and *Bank of Oswego v. Doyle*, 91 N.Y. 32, 41 (1883) and *Claffin v. Meyer*, 75 N.Y. 260, 263 (1878) (delivery and unexplained failure to return suffices to establish prima facie case of conversion) with *Central School Dist. No. 3 v. Insurance Co. of N. America*, 43 N.Y.2d 878, 374 N.E.2d 393, 403 N.Y.S.2d 496 (1978) (mem.), *aff'g*, 55 App. Div. 2d 1021, 1022, 391 N.Y.S.2d 492, 495 (4th Dep't 1977) and *Reichman v. Compagnie Generale Transatlantique*, 290 N.Y. 344, 352, 49 N.E.2d 474, 477, *cert. denied*, 320 U.S. 771 (1943) and *Wamsley v. Atlas S.S. Co.*, 168 N.Y. 533, 537-38, 61 N.E. 896, 897-98 (1901) (requires showing of intentional act).

¹⁷⁰ 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 392 (1980), *aff'g*, 67 App. Div. 2d 640, 412 N.Y.S.2d 531 (1st Dep't 1979) (mem.).

¹⁷¹ 50 N.Y.2d at 660, 409 N.E.2d at 851, 431 N.Y.S.2d at 374.

¹⁷² *Id.* at 661, 409 N.E.2d at 851, 431 N.Y.S.2d at 374. According to the stipulation of the parties, the goods were valued at \$100,000. *Id.*

¹⁷³ *Id.* at 661, 409 N.E.2d at 851, 431 N.Y.S.2d at 374-75.

¹⁷⁴ See note 196 *infra*.

written request of the bailor such liability could be increased up to the actual value of the goods, provided that a commensurately higher storage fee was paid.¹⁷⁵ Throughout the term of the bailment, the plaintiff did not attempt to increase the limitation of liability in this manner. When the defendant was inexplicably unable to locate and return the goods upon demand, the plaintiff, apparently seeking to circumvent the contractual liability limitation, commenced a conversion action for the full value of the stored property.¹⁷⁶ Special term granted the plaintiff's motion for summary judgment¹⁷⁷ and the Appellate Division, First Department, unanimously affirmed.¹⁷⁸

On appeal, a divided Court of Appeals affirmed, holding that the plaintiff had made out a prima facie case of conversion.¹⁷⁹ Judge Gabrielli, writing for the majority,¹⁸⁰ initially noted that the defendant's contention that the goods had been stolen was not supported by evidence sufficient to raise a genuine issue of fact.¹⁸¹ Consequently, the Court reasoned that the plaintiff would clearly have been entitled to judgment had its action been brought in negligence.¹⁸² The Court observed that the policy considerations which mandate that a bailee in a negligence action come forward with evidence providing an adequate explanation for the failure to return stored property are equally applicable to conversion actions.¹⁸³ Moreover, the majority asserted that it is as reasonable to

¹⁷⁵ 50 N.Y.2d at 661, 409 N.E.2d at 851, 431 N.Y.S.2d at 375. The warehouse receipts contained limitations of liability which provided in pertinent part:

[T]he total liability of the warehouseman shall not exceed in any event for damage to any or all the items or articles listed on this warehouse receipt the sum of fifty (\$50.00) dollars; provided, however, that such liability may, on written request of the bailor at the time of signing this . . . receipt or within twenty (20) days after receipt of this warehouse receipt, be increased . . . , in which event, increased rates shall be charged based upon such increased valuation

Id. at 661, 409 N.E.2d at 851, 431 N.Y.S.2d at 374-75.

¹⁷⁶ *Id.* at 661, 409 N.E.2d at 852, 431 N.Y.S.2d at 375.

¹⁷⁷ *Id.*

¹⁷⁸ 67 App. Div. 2d 640, 412 N.Y.S.2d 531 (1st Dep't 1979) (mem.), *aff'd*, 50 N.Y.2d 657, 409 N.E.2d 849, 431 N.Y.S.2d 372 (1980).

¹⁷⁹ 50 N.Y.2d at 660, 409 N.E.2d at 851, 431 N.Y.S.2d at 374.

¹⁸⁰ Judge Gabrielli was joined by Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg, and Meyer. Judge Jasen dissented in a separate opinion.

¹⁸¹ 50 N.Y.2d at 664, 409 N.E.2d at 853, 431 N.Y.S.2d at 376.

¹⁸² *Id.* at 664, 409 N.E.2d at 853, 431 N.Y.S.2d at 376-77.

¹⁸³ *Id.* at 667, 409 N.E.2d at 855, 431 N.Y.S.2d at 378-79. The Court explained that the rule mandating that a warehouseman furnish an explanation for its inability to return stored goods is grounded in necessity. *Id.* at 665, 409 N.E.2d at 854, 431 N.Y.S.2d at 377. Ordinarily, the necessary information will be in the exclusive possession of the warehouse-

presume that a warehouseman who cannot adequately account for the loss of stored property has converted the property as it is to assume that he was negligent with respect thereto.¹⁸⁴ A refusal to recognize such a presumption, according to Judge Gabrielli, would increase the likelihood of fraud since a warehouseman who converts bailed property could avail himself of a contractual limitation of liability in a negligence action by claiming ignorance as to the whereabouts of the goods.¹⁸⁵ Emphasizing that it was neither instituting strict liability nor creating a higher standard of care, the Court concluded that in a conversion action, where the bailor had established the fact of bailment and the refusal to redeliver on demand, the bailee was required to provide an adequate explanation for its failure to return stored goods in order to raise an issue of fact and avoid summary judgment.¹⁸⁶

Dissenting, Judge Jasen opined that the majority's holding had eliminated the critical distinction between conversion and negligence by failing to require an evidentiary showing that the warehouseman had intentionally deprived the bailor of his property.¹⁸⁷ While agreeing that the warehouseman is in a superior position to explain the loss of stored goods, the dissent nevertheless argued that reason dictates that the burden of proving conversion, unaided by a presumption, remains on the party asserting it.¹⁸⁸ In cases involving unexplained losses, the dissent suggested that the majority was imposing "full liability" upon any warehouseman who was unable to adequately account for the disappearance of the goods.¹⁸⁹ Recognizing that a bailor may increase the level of a bailee's liability by the payment of a higher storage fee, Judge

man and inaccessible to the bailor. *Id.* Additionally, placing the burden of providing an explanation on the bailor would encourage carelessness and dishonesty on the part of the warehouseman. *Id.* For these reasons, the Court noted, a warehouseman has not been allowed to avoid liability for its negligence by professing ignorance as to the fate of the stored property. *Id.*

¹⁸⁴ *Id.* at 667, 409 N.E.2d at 855, 431 N.Y.S.2d at 378.

¹⁸⁵ *Id.* at 667, 409 N.E.2d at 855, 431 N.Y.S.2d at 379.

¹⁸⁶ *Id.* at 667-68, 409 N.E.2d at 855, 431 N.Y.S.2d at 379. In limiting its holding to those instances in which a warehouseman can not adequately explain its inability to return stored property, the *I.C.C. Metals* Court emphasized that it did not mean to suggest that proof of negligence would support a cause of action in conversion. *Id.* at 665 n.4, 409 N.E.2d at 854 n.4, 431 N.Y.S.2d at 377 n.4. Once a bailee provides a prima facie explanation for its inability to deliver, the bailor must then establish the traditional elements of a conversion cause of action. *Id.*

¹⁸⁷ *Id.* at 669, 409 N.E.2d at 856, 431 N.Y.S.2d at 380 (Jasen, J., dissenting).

¹⁸⁸ *Id.* at 670-71, 409 N.E.2d at 857, 431 N.Y.S.2d at 381 (Jasen, J., dissenting).

¹⁸⁹ *Id.* at 671, 409 N.E.2d at 858, 431 N.Y.S.2d at 381 (Jasen, J., dissenting).

Jasen concluded that the courts should not protect sophisticated businessmen who fail to insulate themselves contractually from potential liability.¹⁹⁰

It is submitted that the *I.C.C. Metals* decision significantly reduces the potential for abuse inherent in bailment situations. By holding that uncontroverted proof of delivery coupled with the unexplained failure to return stored property constitutes a prima facie case of conversion, the Court, in effect, has eliminated any distinction between negligence and conversion actions in this regard.¹⁹¹ Since the possibility now exists that negligent warehousemen may be deemed converters,¹⁹² as a practical matter,

¹⁹⁰ *Id.* at 671-72, 409 N.E.2d at 858, 431 N.Y.S.2d at 381 (Jasen, J., dissenting). See generally note 165 and accompanying text *supra*. Judge Jasen noted that the bailor is not required to declare the value of the stored property. Rather, as in *I.C.C. Metals*, he may choose not to reveal the value of the goods, thus accepting the contractual limitation on damages proffered by the bailee, and consequently incur only a "*de minimus*" bailment fee. 50 N.Y.2d at 671, 409 N.E.2d at 858, 431 N.Y.S.2d at 381 (Jasen, J., dissenting). This, the dissent suggested, results in an inequitable situation when the bailor is subsequently permitted to recover the full value of the lost property notwithstanding that the warehouseman was never advised of its value. *Id.* (Jasen, J., dissenting).

¹⁹¹ In *Magnin v. Dinsmore*, 70 N.Y. 410 (1877), the Court of Appeals suggested that the net effect of any conceptual overlap between the negligence and conversion causes of action would be a prohibition against any limitations of liability:

It would be trifling with contracts deliberately made by shippers, and the decisions of our courts, and saying in effect that they could not, by any contract, limit or restrict their common-law liability to hold that by calling ordinary neglect, from which loss ensues, a "misfeasance" . . . the limitation was nullified, and the full common-law liability established. The act which will deprive the carrier of the benefit of a contract for a limited liability . . . must be an affirmative act of wrong doing, not merely ordinary neglect in the course of the bailment.

Id. at 418. Although other authorities are in accord with respect to the necessity of demonstrating an intentional exercise of dominion and control, see, e.g., W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 15, at 83 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 224, Comments a & b at 437 (1965), the *I.C.C. Metals* decision implicitly overrules those Court of Appeals cases holding that affirmative proof of an intentional act is necessary to establish a prima facie case of conversion. See *Central School Dist. No. 3 v. Insurance Co. of N. America*, 43 N.Y.2d 878, 374 N.E.2d 393, 403 N.Y.2d 496 (1978) (mem.), *aff'g*, 55 App. Div. 2d 1021, 391 N.Y.S.2d 492 (4th Dep't 1977); *Reichman v. Compagnie Generale Transatlantique*, 290 N.Y. 344, 352, 49 N.E.2d 474, 477, *cert. denied*, 320 U.S. 771 (1943); *Wamsley v. Atlas S.S. Co.*, 168 N.Y. 533, 537-38, 61 N.E. 896, 897-98 (1901).

¹⁹² Professors White and Summers have suggested that the Court of Appeals may have inadvertently held a warehouseman absolutely liable prior to *I.C.C. Metals* in *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965). J. WHITE & R. SUMMERS, *supra* note 162, § 20-3, at 789. In *Procter & Gamble*, the defendant-warehouseman was unable to account for the disappearance of vegetable oil which had been stored in his tanks. 16 N.Y.2d at 350-51, 213 N.E.2d at 875-76, 266 N.Y.S.2d at 789-90. Although there was some dispute over whether the oil was actually delivered to the defendant, the Court of Appeals held that "in the absence of any

warehousemen will be compelled to exercise a higher degree of care to avoid being deprived of a contractual limitation of liability for negligence. Similarly, by facilitating the establishment of a cause of action in conversion, the result in *I.C.C. Metals* will deter intentional wrongdoing by unscrupulous bailees who previously could appropriate goods to their own use while secure in the knowledge that, at most, they would be subject to an action in negligence wherein their liability would be limited contractually.

Notwithstanding that the rule of *I.C.C. Metals* will have the beneficial result of deterring bailee misconduct, it is submitted that the rationale offered by the Court is of questionable validity. While the presumption of negligence in bailment situations is logically grounded both on the probability of misfeasance and the bailee's superior access to the necessary information,¹⁹³ it is doubtful whether common experience or logic would support the majority's conclusion that in the face of the bailee's inexplicable inability to redeliver, conversion is as tenable an explanation as is negligence.¹⁹⁴ Moreover, it is suggested that the public policy concern underlying the majority's decision—that warehousemen would be able to avoid much of their potential liability¹⁹⁵—has been ade-

explanation of the disappearance" the defendant is liable in conversion. *Id.* at 350, 213 N.E.2d at 875, 266 N.Y.S.2d at 789.

¹⁹³ C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 343, at 808-09 (2d ed. 1972); see J. WHITE & R. SUMMERS, *supra* note 162, § 20-3, at 789-91; Broude, *supra* note 167, at 20. Dean McCormick asserts that probability is the primary consideration in the creation of a presumption. C. McCORMICK, *supra*, § 343, at 807. He suggests that most presumptions owe their origin to the belief "that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." *Id.*, accord, *Wilkins v. American Export Isbrandtsen Lines, Inc.*, 446 F.2d 480, 484 (2d Cir. 1971), cert. denied, 404 U.S. 1018 (1972); cf. *Tot v. United States*, 319 U.S. 463, 467 (1943) (presumption created by statute in criminal case if there is a "rational connection between facts proved and the facts presumed").

¹⁹⁴ The majority's contention that conversion by the bailee is as probable an occurrence as negligence on his part fails to differentiate between mathematical possibility and evidentiary probability. It is submitted that in an evidentiary sense, two alternative possibilities can never be equally probable since evidentiary probability presumes that one alternative is more probable than not.

¹⁹⁵ See 50 N.Y.2d at 667, 409 N.E.2d at 855, 431 N.Y.S.2d at 378-79. New York courts have traditionally scrutinized clauses purporting to limit liability for negligence. See, e.g., *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 297, 177 N.E.2d 925, 926, 220 N.Y.S.2d 962, 964-65 (1961); *Boll v. Sharp & Dohme, Inc.*, 231 App. Div. 568, 570-71, 121 N.Y.S.2d 20, 22-23 (1st Dep't 1953), *aff'd mem.*, 307 N.Y. 646, 120 N.E.2d 836 (1954); note 165 and accompanying text *supra*. Moreover, in some instances, the legislature has prohibited certain classes of individuals from disclaiming liability for their negligence. See, e.g., GOL §§ 5-321 (lessors), 5-322 (caterers), 5-323 (building service or maintenance contractors), 5-325 (garage and parking lot operators), 5-326 (pool, gymnasium or amusement park operators) (McKin-

quately addressed by section 7-204(2) of the UCC.¹⁹⁶ Accordingly, it would appear inequitable to hold a bailee liable for the entire value of the stored property especially since he may never have been aware of the actual value of the goods. It is submitted, therefore, that a more evenhanded approach towards remedying potentially fraudulent activity in bailment situations is warranted. One possible approach would be to limit statutorily the amount of damages recoverable in either a negligence or conversion action to a value declared at the commencement of the bailment.

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Warrantless search of arrestee's property inaccessible to him at time of search not valid as incident to lawful arrest

The fourth amendment to the Constitution protects an indi-

ney 1978). Two Court of Appeals decisions vividly illustrate the judicial hostility toward attempted limitations of liability. In *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963), the Court addressed the issue of whether a liability limiting provision accompanying film sold by Eastman Kodak was sufficiently unequivocal to effectively limit the company's liability for negligence. *Id.* at 302, 189 N.E.2d at 693-94, 239 N.Y.S.2d at 338. The limitation of liability provided:

This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company. Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind. Since dyes used with color films, like other dyes, may, in time, change, this film will not be replaced for, or otherwise warranted against, any change in color.

Id. at 303, 189 N.E.2d at 694, 239 N.Y.S.2d at 339. Although the plaintiff concededly had notice of the provision, the *Willard Van Dyke* Court held that the agreement to limit liability for negligence was not expressed in sufficiently "clear and unequivocal terms." *Id.* at 305, 189 N.E.2d at 695, 239 N.Y.S.2d at 340. Alternatively, the Court concluded that the plaintiff reasonably could have believed that the provision was inapplicable to the processing of the film because the notice also stated that the cost of processing was not included in the price of the film. *Id.* Similarly, in *Gross v. Sweet*, the Court held that an agreement to "waive any and all claims" against several defendants did not effectively limit liability for negligence because the intention of the parties was not expressed in "unmistakable language." 49 N.Y.2d 102, 107-09, 400 N.E.2d 306, 309-10, 424 N.Y.S.2d 365, 368-69; *cf.* *Klar v. H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 541, 61 N.Y.S.2d 285, 288 (1st Dep't 1946), *aff'd*, 296 N.Y. 1044, 73 N.E.2d 912 (1947) (bailor must have reasonable notice of and assent to terms of exculpatory clause).

¹⁹⁶ Section 7-204 of the UCC requires that warehousemen who attempt to limit liability for negligence must, on the written request of the bailor, afford the bailor the opportunity to increase the level of liability in exchange for the payment of a higher storage fee. N.Y.U.C.C. § 7-204(2) (McKinney 1964).