L. O. GROSSMAN (PLAINTIFF) ..... APPELLANT;

AND

L. E. BARRETT AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

1925

*Nov. 16.
*Dec. 10.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale of goods—Thing lost or stolen—Second-hand automobile—Purchaser —Good faith—Arts. 1487, 1488, 1489, 1490, 2268 C.C.

The purchaser of a thing lost or stolen is in "good faith" within the meaning of art. 1489 C.C., if he honestly believes that the vendor is the owner of the thing lost or stolen. It is not necessary that his good faith be "*une bonne foi éclatante*," or that his error be an invincible one.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

J. de G. Audette for the appellant.

A. Geoffrion K.C. and *F. Fauteux* for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—The respondents are the Prudential Coal Company, Ltd., a company carrying on a coal business in Montreal, and L. E. Barrett, its president and manager. The appellant, owner of a Packard single-six sedan automobile, stolen from him in Syracuse, N.Y., in November, 1923, brought this action accompanied by a seizure in revendication of this car on the 12th of January, 1924, against the respondents in whose possession the car was found in Montreal. The plea of the respondents is that on the 20th December, 1923, they purchased the car in good faith from the Robinson Motor Car Company, Limited, and Hector Meunier, carrying on business in Montreal as dealers in automobiles, who were traders dealing in similar articles, and who bought the car at a public sale. They also set up that the car in question cannot be revendicated without reimbursing to them the price they paid, which price is not stated in the plea. They further alleged that the car was insured and that the insurance

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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money had been paid to the appellant, who ceased to have any right of action, but this allegation was struck out on an inscription in law. They asked for the dismissal of the action.

No question was raised whether such a plea is the appropriate answer to an action by the owner of a thing stolen to recover its possession. As between the owner and the possessor, in the absence of prescription which of course would transform possession into ownership, the right of the former necessarily prevails over the possession of the latter, and there is, as a rule, no defence to his action. While sale, as to a determinate object, is translatory of ownership, a sale by a non-owner is without effect, saving the right of the buyer to claim damages if he was ignorant of the lack of title of the seller. This is the general rule stated by art. 1487 C.C., which says that the sale of a thing which does not belong to the seller is null. To this rule there are three exceptions mentioned in arts. 1488, 1489 and 1490 C.C. We are here concerned only with art. 1489 C.C. which is as follows:

1489.—If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.

This article must be read with the third and fourth paragraphs of Art. 2268 C.C. which deals with prescription of corporeal movables:

This prescription is not, however, necessary to prevent revendication, if the thing have been bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, nor in commercial matters generally; saving the exception contained in the following paragraph.

Nevertheless, so long as prescription has not been acquired, the thing lost or stolen may be revendicated, although it have been bought in good faith in the cases of the preceding paragraph; but the revendication in such cases can only take place upon reimbursing the purchaser for the price which he has paid.

The advantage of possession is that it throws on the claimant the onus of proving ownership and the defects in the possession or title of the possessor. When ownership is proved, any title short of prescription acquired by the possessor of a thing lost or stolen will not avail to prevent revendication, but if the possessor bought the thing in good faith in a fair or market, or at a public sale, or from a

trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price he paid for it. As a further observation to complete this statement of the law, I may add, although nothing turns on it in this case, that a title acquired under a sale by authority of law is a complete bar to an action in revendication, even when the thing sold was lost or stolen (art. 1490 C.C.)

There is no possible doubt here that the automobile belonged to the appellant and was stolen from him. The respondents therefore must shew that they come within the exception of art. 1489 C.C. or, to the same effect, of the third and fourth paragraphs of art. 2268 C.C. If they do, the appellant's right of revendication is not defeated, but is subject to the condition that he must, before obtaining possession of the car, reimburse to the respondents the price they paid for it.

I will treat the respondents as having the same interest, for Barrett purchased the car for the Prudential Coal Company, Ltd. He bought it from the Robinson Motor Car Company, Ltd.

Two questions of fact remain to be discussed.

1. Was the Robinson Motor Car Company a dealer in similar articles, namely second hand, or as they are generally called, used cars?

2. Did the respondents purchase this car in good faith?

Before dealing with these two questions, it is proper to say that the learned trial judge found against the allegation of the respondents' plea that the Robinson Motor Car Company bought this car at a public sale, expressly holding that the plea in that respect was unfounded. He further stated that the pretended auction sale by U. H. Dandurand, Limited, which the respondents' witnesses Falcon and Reid swore took place on the 18th of December, 1923, appeared to have been a fictitious sale. In so holding, the learned judge necessarily discredited the testimony of both Falcon and Reid, the former the president, and the latter the salesman of the Robinson Motor Car Company. I would not interfere with this finding of fact. There is ample ground for disbelieving what Falcon and Reid said as to the alleged auction sale. An independent witness, Gilbride, employed with the Packard Motor Company, Ltd., in Montreal, testified that Falcon brought the car to

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that company's office with a Montreal lawyer, Mr. Paul Mercier, and a friend of the latter from St. Henry, who desired to be advised whether he could safely purchase the car. The company's employee Jones discovered that the numbers of the car had been changed, and, as a result of their investigation, they came to the conclusion that the car had been stolen from Syracuse, New York. They have in their office a record of stolen cars, and they wired to Syracuse giving information of the fact. He added that Mr. Mercier advised his friend not to buy the car. He was not asked the date of this visit, but he says that a couple of weeks afterwards, Corporal Anderson of the Royal Mounted Police brought the car which had been seized to their store. It is rather unfortunate that neither Mr. Mercier, nor his friend, nor Corporal Anderson were called at the trial.

As further discrediting the testimony of Falcon and Reid as to the pretended auction sale, there is the fact that they swear that they showed the car to Barrett only after the auction sale, the date of which is given as the 18th of December, 1923, while Barrett testifies that he bought the car (the date of the sale to Barrett is December 20, but apparently the contract was prepared on December 18), ten days after he saw it for the first time. He says that the employees of the Robinson Motor Car Company, he mentions Reid, made practically daily visits to him with the car, and one evening they took his wife, his sister and himself for a little drive of about five miles. It is impossible to reconcile what Barrett says with the testimony of Falcon and Reid, and it is quite evident that the learned trial judge did not believe the latter as to the alleged auction sale.

I will now take up the two questions of fact on which the decision of this case depends.

1. Was the Robinson Motor Car Company, Ltd., a dealer in similar articles, namely used cars?

This company was incorporated in March, 1921, under a Dominion charter, with authority, *inter alia*, to deal in automobiles. Its capital was $50,000. The original incorporators are not now interested in the company. Falcon says that he bought the company, meaning probably that he acquired control, in January, 1923. He invested

$22,000 in the company, $10,000 in cash and the balance in automobiles. He, one Geo. McGown and one Lucien Mignault, the secretary-treasurer, are the shareholders and also the directors, Falcon being the president and no doubt the ruling spirit in the company. Falcon says that besides his investment, $2,000 was put into the company by others. In July, 1923, the company hired from Morgan Realties, Ltd., a building and a garage in the rear on St. Alexander street, near Ste. Catherine street. In the same month, it obtained a license from the province of Quebec to keep a garage not in the premises on St. Alexander street, but at no. 221 Ontario street west. It filed certain statements of its business up to December, 1923, showing an operating deficit. A page of its cash book was copied into the record but is of no use, for it has no dates opposite the entries which are of mere sums of money.

As to the business carried on by the company in December, 1923, we have only the statements of Falcon, Reid and Lucien Mignault. It does not however appear to be seriously contended that the company did not carry on the business of selling used cars, but the appellant endeavoured to prove that the cars it dealt in were stolen cars. In that regard, the proof is not conclusive, although it shews that suspicions were entertained as to the honesty of the business.

In the absence of a finding of the learned trial judge, based on his appreciation of the trustworthiness of these witnesses, that the Robinson Motor Company was not a dealer in used cars within the meaning of art. 1489 C.C. I think we must assume, as was held by the Court of King's Bench, that the purchase of the car in question was made from a trader dealing in similar articles.

2. But was this purchase made in good faith?

I accept the definition of good faith adopted by the learned trial judge: *bonae fidei emptor esse videtur qui ignorat rem alienam esse.* Barrett, in answer to questions put to him by counsel for the appellant, swore that he was perfectly satisfied and that he had no doubt that the Robinson Motor Car Company were *bona fide* dealers. It was open to the learned trial judge to refuse to believe Barrett, and had he based his decision that Barrett was in bad faith

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on his disbelief of this testimony, it might have been difficult to set it aside.

The learned judge however gave reasons derived from the circumstances of the sale for inferring that Barrett was not a purchaser in good faith. These reasons must be carefully scrutinized, the more so as the Court of King's Bench came to the opposite conclusion upon consideration of the same circumstances.

Barrett explains that he had a new Hudson touring car, 1923 model, which had cost him $2,300. He desired to exchange this car for a closed automobile. His nephew, one Smetzer, was employed by the Robinson Motor Car Company, and through him he was brought into connection with that company. The latter offered him successively a Paige car and a Cadillac car which did not suit. They then showed him this Packard Sedan car, and, after having tried it for some ten days, he decided to make the exchange. He says that Reid told him that the Robinson Motor Car Company had obtained this car from responsible dealers in New York, which Reid denies, but I prefer to accept Barrett's statement because Reid does not seem very reliable. There was some bargaining as to the sum which the Robinson Motor Car Company would allow him for the Hudson car and the amount he would have to pay in order to complete the exchange. Finally it was agreed that the Hudson car would be taken at $1,500 and that Barrett would pay in addition $1,600, in all $3,100, which with the sales tax and some accessories formed a total purchase price of $3,185. The amount payable in cash was settled by giving twelve notes for $148.75 each.

Barrett had the shrewdness to make an inquiry of Bradstreets as to the financial standing of the Robinson Company and also to require a guarantee that the car was free from all incumbrances, duty, etc., and that, in the event of any claims from Government or insurance companies, the Robinson Motor Car Company would refund the full purchase price of $3,100. That he was wise in requiring this guarantee was shewn by the event, for some days after the sale the car was seized by Corporal Anderson of the Mounted Police, on behalf of the Canadian Government, for customs duty due on the entry of the car from the

United States. Barrett went to see Falcon in connection with this seizure, and Falcon testifies that he paid the duty, a sum exceeding one thousand dollars. At all events, the car was returned to Barrett. It was on this occasion that Corporal Anderson brought the car to the Packard Motor Car Company's office in Montreal, as already mentioned.

Coming now to the reasons of the learned trial judge for inferring that Barrett purchased the car in bad faith, they are, as briefly as can be stated, the following, which I give under the letters used by the trial judge:—

(*a*) Smetzer, Barrett's nephew, was the latter's agent, and his knowledge of the fraud should be imputed to Barrett. Smetzer was not called on behalf of the respondents.

(*b*) Barrett inquired from Bradstreets as to the solvency of the Robinson Motor Car Company and did not take the trouble to ascertain from the Montreal agents of the Packard Motor Car Company whether they knew where the Robinson Motor Car Company had obtained the car.

(*c*) Barrett did not notice the initials on the car doors or the filing of the numbers of the car, although they were fairly evident.

(*d*) No explanation is given why the amount of the sale was raised from $3,000 to $3,100 and of the change of the date of the contract from December 18 to December 20, the former being the date of the guarantee.

(*e*) The sale was not made at the vendor's place of business, but at the purchaser's office, and Barrett knew that one Hector Meunier had an interest in the car.

(*f* and *g*) Barrett insisted on the vendor giving him the guarantee mentioned above and, as such guarantee cannot be treated as

> the legal warranty against eviction which is of the nature of the contract of sale,

it is an indication that Barrett was doubtful as to the origin of the car and wanted this additional assurance.

(*h*) Barrett bought for $3,100, part of which was represented by an old car, a motor car worth from $3,800 to $4,200.

With all possible deference, I think that the only reasons that need be discussed are those indicated under letters (*c*), (*e*) and (*f* and *g*). As to the others, they appear devoid of any significance. Smetzer was not Barrett's agent. Unless it be assumed that Barrett's suspicions had

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been aroused, it was not an indication of bad faith not to inquire as to the origin of the car at the Packard Motor Car Company's office, although Barrett would have been saved much annoyance had he done so. There was some bargaining about the price to be paid and the raising of the price from $3,000 to $3,100 is without importance. The car exchanged was not an old car and there is not, under the evidence, such a disproportion between the price paid and the value of the car as to warrant a conclusion that the buyer must have suspected that the car had been obtained by criminal means.

Now as to reason (*c*), Barrett says that he did not see the initials on the doors of the car, and he may be readily believed when he states that he did not observe that the car numbers had been filed or effaced. He was getting a second hand car, and, had he seen the initials, he might well have supposed that the owner did not wish to scratch them out and spoil the appearance of the car. Nothing here is inconsistent with good faith or an indication that the car had been stolen.

Reason (*e*) might have some significance, were it not well known how eager agents are to run after purchasers who, left to themselves, would never go to the dealer's place of business. Moreover, in this case, Barrett, having expressed to his nephew, an employee of the Robinson Motor Car Company, his desire to exchange his open car for a closed one, the visit of Reid to Barrett is explained. The important point was whether or not Barrett purchased the car from a trader dealing in similar articles. If so, the place where the bargain was made is immaterial.

Reasons (*f* and *g*) refer to the special guarantee which Barrett demanded before committing himself to the purchase of the car. Reid told him the car had come from New York and that the customs duties had been paid. It was purely a business precaution to require a guarantee against a claim by the custom authorities. There is perhaps more significance in the guarantee demanded against a claim by an insurance company, but standing alone, if Barrett's story be believed—and that is really the test—it does not import bad faith on Barrett's part, for it does not necessarily mean that Barrett suspected that the car had been stolen.

With great respect, I cannot help thinking that the learned trial judge placed the duty of a purchaser of a second hand car on much too high a plane. Good faith does not need to be *une bonne foi éclatante,* it suffices that it be an honest belief that the vendor is the owner of the thing sold. Nor if there be an error on the part of the purchaser is it necessary that the error be an invincible one. I do not think the authorities cited by the learned judge should be given that effect, for it would not be justified by the language of the code.

Barrett's story, which I have given in full, is a perfectly consistent one. The learned trial judge has not said that he did not believe it, but has indicated reasons why he inferred that Barrett was in bad faith. Under these circumstances, I do not think that this court should reject Barrett's testimony.

I have not adverted to the fact that the name of Hector Meunier was inserted in the contract as seller of the car. The circumstances under which this was done are fully explained. Meunier obtained the discounting of the notes given in payment by Barrett. It was at the latter's request that Meunier signed the contract. The intervention of Meunier, whether or not he was a dealer in used cars, has no other significance.

I think therefore that the respondents are entitled to the protection of art. 1489 C.C., having bought the car in good faith from a trader dealing in similar articles. This means that the appellant cannot reclaim it without reimbursing to the respondents the price they paid for it. He has not offered to do so, but the whole question submitted by his counsel at the hearing was whether the respondents were entitled to reimbursement. He fails in this and therefore his appeal must be dismissed. As an act of indulgence, however, and to avoid any difficulty in the future, we think that the dismissal of the appellant's action should be without prejudice to his right to revendicate the car on reimbursing the price paid by the respondents.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Audette & Garneau.*
Solicitors for the respondent: *Fauteux & Fauteux.*