11 pages.

ROYAL COURT
(Samedi Division) 88.

Before: F.C.Hamon Esq., Deputy Bailiff
sitting alone

14th May, 1997

Between	David Mendonca	Plaintiff
And	Jason Le Boutillier	Defendant
And	Michael Cornec	Third Party

Advocate N. Pearmain for the Plaintiff
Advocate D. M. Sowden for the Defendant

JUDGMENT

THE DEPUTY BAILIFF: The facts of this case are very simple. On 1st July, 1994, Michael Daniel Cornec, who then resided in a flat at Grands Vaux but who is now apparently a resident at La Moye Prison entered into a conditional sale agreement with Premier Finance, the registered business name of Equipment Rental Company Limited. The agreement concerned a used Peugeot motor car. Mr. Cornec paid a deposit of £1,345 and was to pay monthly instalments of £135.41 thereafter for 35 months.

There were agreed conditions, one of which reads:

> *"(3) The seller agrees that upon payment of the deferred balance and the final purchase fee as provided in the schedule herein and of all other sums payable to the seller hereafter, the property in the goods shall pass to the buyer provided always that until such time the goods shall remain the sole property of the seller and the buyer shall be a mere baillee thereof."*

On or about 15th March, 1995, Mr. Jason Le Boutillier (the Defendant in this action) purchased the car from Mr. Cornec for £3,000. He received a receipt for the sale, together with the log book. Having no idea that Mr. Cornec did not have title to the car, Mr. Le Boutillier in turn sold it to Mr. David Mendonca (the Plaintiff in this action) on 17th May, 1995. The consideration was £3,200.

On 9th August, 1995, the Plaintiff (in the words of the Order of Justice) was *"obliged to deliver up the said motor vehicle to Equipment Rental Company Limited."*

Since the commencement of the action a third party judgment has been obtained against Mr. Cornec. It is not thought to be of any material value.

The Plaintiff actions the Defendant to pay him £3,200 with interest.

The Defendant asks to be dismissed from the action.

We are to determine whether the Equipment Rental Company retained the ownership of the car in the circumstances of the case.

The Law

Let us begin with the Oeuvres de Pothier (Merlin ed'n: 1830) who in Partie V Chapitre 1 of Tome Premier says at paragraph 326:-

> *"Lorsque le vendeur a vendu et livré la chose sans le consentement du propriétaire, il est évident qu'il n'a pu transférer à l'acheteur un droit de propriété qu'il n'avait pas: Nemo plus juris ad alium transferre potest quam ipse haberet; l.54, ff. de reg. jur. La tradition qui est faite à l'acheteur n'est pas pour cela sans effet. Si elle ne lui transfère pas la propriété, elle lui donne la possession civile de la chose et cette possession civile, lorsqu'elle est accompagnée de bonne foi, donne à l'acheteur, 1o. le droit de percevoir les fruits, sans obligation de les rendre au vrai propriétaire qui, par la suite, revendiquerait la chose: 2o. la possession de bonne foi, après une durée de vingt ans, lorsqu'ils demeurent en différentes provinces, fait acquérir à l'acheteur la propriété de la chose que son vendeur n'avait pu lui transmettre: ce qui s'appelle prescription ou usucapion."*

That is a fair description of Roman law which would have been well known to the Norman and the English legislators who no doubt shared much of their knowledge. It is well set out in Hunter's Introduction to Roman Law (9th Ed'n, 1955) at page 56:

> *"If the person who delivered a thing was really the owner, then the delivery at once operated to give the ownership to the transferee. If he was not the owner, the delivery had not that effect, because no one can transfer to another greater rights than he has himself (nemo plus juris ad alium transferre potest quam ipse haberet)."*

In the "Preface" to his "Remarques et Animadversions sur la Coustume Reformée de Normandie" Jean Poingdestre writes this:-

> *"Il ne faut pas douter que d'entre lesdits Articles ceux qu'on a tiré du Viel Coustumier ou de Sa Glose ne Soient de bon alloy; comme aussy la plus grande partie de ceux qui ont été empruntés de Terrien, auquel les Reformateurs Sont obligés de plusieurs bons Articles. Mais pour ceux qui n'ont autre fondement, Sinon les Ordonnances ou les Arrêts des Cours de Parlement (lequels ne S'accordent pas toujours entre eux mêmes) ou qui ont été ajoustés de la Coustume de Paris, Nous les rejettons a bon droit; Sinon quand ils Sont conform au droit Romain, qui est celuy que tout le monde suit en Matière de contracts, et autres, ou les Coustumes n'ont rien pourveu de plus particulier."*

Jersey is a customary law jurisdiction. It takes its authority in the matter of Contract from Roman law.

In England the Factors Act 1889 and the Sale of Goods Act 1893 were later refined by the Hire Purchase Acts dealing specifically with the problem that faces me today. There is no possibility of gainsaying the words of the author of Goode's Hire Purchase Law and Practice (1970) when he wrote at page 618 that ***"these statutory provisions constitute a substantial inroad into the common law rule "nemo dat quod non habet" which has hitherto been the cornerstone of English hire purchase law."***

There is an immediate threat to the common law argument. It arises perhaps appropriately in the Recueil de Maximes of Charles Sydney Le Gros in his Traité du Droit Coutumier de l'Ile de Jersey (Jersey 1943). It is stated baldly, without any source at page 459. It reads ***"En fait de meubles, possession vaut titre".*** The silence of Le Gros cannot be unintentional. If the maxim really did form part of Jersey law he would surely have discussed it with case material and its root of origin. That gives me a cautionary hesitation.

A note of caution is also called for on more mundane grounds.

In Wood v. Establishment Committee (1989) JLR 213 at 236 we said this:

> *"Maxims are at best dangerous. In Lissenden v. CAV BOSCH Ltd. (1940) 1 All ER at 425 Lord Wright said:*
>
> *"I am induced here to quote the language of Lord Esher MR in Yarmouth v. France at page 653:*
>
> *"I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most*

part so large and general in their language that they always include something which really is not intended to be included in them."

Fortunately, we are moving away from a time in Jersey when maxims were held in sacred law and almost regarded as if they were rules of law to be followed slavishly at all times."

Fortunately, the maxim has been put under the microscope of the learned authors of "The Jersey Law of Property" who say at page 24 matters which do not allow of paraphrase:

"En Fait de Meubles, Possession Vaut Titre

2.6 Le Gros (at 459) cited this phrase in his Receuil de Maximes, appended to his Droit Coutumier. It corresponds to the French Code Civil, Art 2279. But Le Gros did not expand on or discuss it, nor did he cite any authority in support of it. Moreover, the maxim is not found in the old Norman or Jersey writers (e.g. Le Geyt and Poingdestre), nor indeed in Roman law, and it appears that the compilers of the French Code derived the rule, not from any of the pre-Revolutionary French coûtumes or droits écrits, but from the jurisprudence of Le Chatelet de Paris. In other words, it is a late eighteenth century invention.

2.7 the rule as applied in modern French law has two aspects. First an acquirer of a movable in good faith from a non-owner will obtain a good title if he obtains possession of it, unless (in the case of a lost or stolen movable) the true owner brings an action to recover it within three years. Second, the fact of possession gives rise to a rebuttable presumption that the possessor obtained title to it in a regular manner.

2.8 But in Roman law (and, it appears, in Norman customary law), the basic rule was very different: nemo plus juris ad alium transferre potest quam ipse habet, similar to the formulation employed by English jurists, nemo dat quod non habet. Thus according to de Zulueta, The Roman Law of Sale, at 36.

> *"At most the Roman seller will sometimes put the buyer in a better position than he was in himself to acquire title by long possession". (ie because the buyer is in good faith though the seller is not).*

And even the possibility of acquiring title by long possession was not available where the thing had been lost or stolen. On the other hand, although possession was not equivalent to ownership, it was (as in English law) protected in some circumstances by certain "possessory" legal actions: see e.g., Thomas, A Textbook of Roman Law, 1976, 147-150.

2.9 Since, so far as we are aware, the Jersey courts have never had to pronounce upon the matter, it is unclear whether the maxim does indeed form part of Jersey law. Elsewhere in this book, and particularly in relation to propriété foncière, we have referred to provisions in the Code Civil and other French authorities where they are not in conflict with, and may provide a guide to, customary Norman law and therefore Jersey law (see also the reference to Kwanza Hotels v. Sogeo Co Ltd in the Preface). This case is different, because it is clear that the provision in the Code is not derived from the pre-existing customary law. It is therefore submitted that the maxim in Art 2279 is not part of Jersey law."

To understand this argument on the inherent danger of citing maxims without examining their source it is necessary to consider Planiol "Traité Elémentaire du Droit civil", Vol; part 2:

"2459. Impossibilité fréquente de revendiquer les meubles. - En matière mobilière, la revendication est souvent impossible en droit français, à raison de la maxime: "En fait de meubles possession vaut titre" (art. 2279). Cet article est une des dispositions les plus importantes de notre droit, et en même temps une de celles qui en caractérisent le mieux l'esprit quand on le compare au droit romain. De plus, il n'y a peut-être pas, dans toutes nos lois, une disposition qui fasse mieux comprendre la nécessité des études historiques pour l'intelligence du droit moderne."

It was not always so.

"Depuis le xviii siècle, on écarte toute possibilité d'éviction, en décidant que la revendication est perdue pour le propriétaire immédiatement dès que le meuble, objet du dépôt, passe aux mains d'un tiers; le possesseur est à l'abri, "sans qu'il soit besoin de la prescription" comme disait Pothier (Introduction à la coutume d'Orléans, tit. XIV, art. prélim., sect. I, no. 4; édit. Bugnet, tit. I, p. 331)."

It must be stated that Merlin said *"Ce principe était universellement reconnu avant que l'art. 2279 C. civ. l'eût*

consacré" (Questions de droit, v Donation, 6, édit. de 1829, t. VI, p.51).

In the context of what we have to decide it may seem surprising that this Court in Golder v. Société des Magasins Concorde Ltd. (1967) JJ 721 reiterated the fact that the law of Jersey in regard to a sale with intent to defeat a creditor is truly represented by Pothier, Poingdestre and Dalloz but then went to use words which would have found approval in the High Court of England (at page 733).

> *"That, however, does not conclude the matter because the subject matter of the sale, that is to say, the business of the Jersey company is no longer in the disposition of the Guernsey company which has resold it to a bona fide purchaser for value without notice, Le Riches Stores Ltd. whose title cannot be impugned".*

Perhaps the Golder case can be distinguished on its facts as it dealt with a person selling his own property with intent to defeat a creditor. In this case there is a sale of something which was never the property of the third party, nor of the Defendant nor of the Plaintiff unless, in the case of the Plaintiff and the Defendant honest possession gave them title. Because I do not conceive that it did I shall have to say for the purposes of this judgment and in regard to that passage of Golder alone, that I respectfully disagree with it.

In regard to the maxim ***"en fait de meubles possession vaut titre"*** the French code deals with a question of, for example, a museum piece purchased in good faith from a thief by stating that movables in the public domain are "out of commerce" and imprescriptible.

(Advocate Sowden immediately referred me to Selby v. Romeril, (11th August, 1995) Jersey Unreported at page 7 where the Court said:

> *"It is true that Pothier has often been treated by this Court as the surest of guides to the Jersey law of contract. It is also true, however, that Pothier was writing two centuries ago and that our law cannot be regarded as frozen in the aspic of the 18th century. Pothier was one of those authors upon whom the draftsmen of the French Civil Code relied and it is therefore helpful to look at the relevant article of the Code."*

We also looked at the Court of Appeal judgment in Maynard v. The Public Services Committee (11th December, 1996)Jersey Unreported CofA. Advocate Sowden referred us to one passage in

the judgment but I will cite another. At page 6, the Court of Appeal said:

> *"However, care has to be taken in referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy development was naturally affected by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much f the pre-existing laws of the French provinces, but with some material changes. After the Napoleonic Codes came into existence, French law developed independently of developments in Jersey and Guernsey, under the direction or influence of French statutes, French jurisprudential writers, and the case law of the French Courts. Accordingly, no great weight can be placed on French law as it exists today, in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system."*

Here I find myself in some difficulty. It is not possible to ignore the wisdom of the Court of Appeal. One can but conjecture how the Commissioners of the Civil Law would have dealt with the passage when a clear question to Mr. Dupré (1682) received an unequivocal reply in the Report of the Commissioner into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey (London, 1861):

> *"Some of the ordnances by the Kings of France which are since the separation, represent your law better than the Coutumier."*
>
> *"Yes."*

Indeed the conjecture is deepened when in the report itself at page iii. the Commissioners said:

> *"It may be added, that the circumstances of the Jersey lawyers receiving their legal education chiefly in France helps to impart a modern French complexion to the jurisprudence of the island."*

That may indeed be a double-edged sword but I will respectfully adopt the argument of the Court of Appeal by saying that where an English Statute has made a radical change to English common law and its Roman law base then "no great weight" can be placed upon it "in ascertaining what is Jersey law".

A passage from Les Manuscrits de Philippe Le Geyt sur La Constitution, Les Lois et les Usages de Cette Ile (Jersey, 1847) is also instructive where he says at page 391:

> *"Un bien que Titius dèrobe, peut estre ensuite acheté de luy par un autre, en trois différentes manières: par recèlement, par négligence, ou de bonne foy. La vileté du prix, la mauvaise réputation du vendeur ou de l'acheteur, et leur état et condition, sont des circonstances qui peuvent faire présumer le recèlement; et dans une telle présomption l'acheteur perd non seulemont ce qu'il faut qu'il restitue, mais il est aussi puni comme recéleur. Le cas d'acheter par négligence est, si l'on achète d'un passant ou d'un homme inconnu, sans s'informer de son titre ni de sa condition; il faut alors restituer le bien et perdre l'argent qu'on a donné, si le vendeur n'est point capable de le rendre. Lors qu'on achète des livres d'un écolier, ou des armes ou des habits d'un soldat, c'est aujourd'huy plus qu'une simple négligence: car on estime que chacun sçait qu'avec des écoliers ou des soldats un tel commerce est défendu. Pour ce qui est de la bonne foy de l'acheteur, c'est quand il achète d'un homme de bonne réputation; principalement si l'on achète en foire ou marché public. En ce cas, quelques uns veulent que l'acheteur soit remboursé par celuy qui réclame son bien, si le vendeur ne le peut pas faire. Vid. L. 36. C.* de condict. indebit. et la L. 2. C. de furt. Le Docteur Gothofredus est de cette opinion. Le plus commun sentiment est néanmoins que les foires et marchés ne doivent estre libres que, quoad accessum et recessum, non ut mercatores non debent cautè negotiari."*

Here, le Geyt seems to be opposed to sale in market overt.

He goes on to say further:

> *"Hortensius dit que quand un Statut mettroit un tel acheteur à couvert, il ne devroit pas estre pratiqué. Telle est la Coûtume de Normandie, non seulement pour un bien qu'on dérobe, mais pour aucun meuble dont on auroit perdu la possession. Bérault dit qu'on peut dans trente ans poursuivre un meuble comme adiré, et Terrien, que cela se fait si la chose étoit même achetée en plein marché. Il en rapporte un arrest. A Jersey, la poursuite d'un meuble ne dure que dix ans."*

Le Geyt in placing a prescriptive period of ten years after a discussion of the Norman commentators alluding to recovering a moveable which has been stolen or lost and then sold, even in market overt can only be interpreted in my view as leading to the conclusion that Le Geyt was not convinced that a purchaser "de bonne foy" had a good title within the prescription period.

So that on that basis in the present case, the Plaintiff could have enjoyed the use of the car as he was in good faith but he would not obtain title to it unless the period of prescription had run its course. The period of prescription, in my view, would be ten years. In Albright v. Wailes, widow Harrison (1950) 1 JJ 31 this court said at page 32:

> *"In the opinion of the Court the period of prescription applying to a claim such as the claim in this case is less than that maximum period and is the period of ten years stated in Le Geyt's Code, Book III, title 10, Article 9. Le Geyt there says that the period of ten years applies generally to "toutes autres actions purement pour meubles", and those words apply to this present case. This action, in the opinion of the Court, is an "action personnelle mobilière". This description of it seems to be supported by the authority of Pothier, (see the Edition Bugnet 1861 of his works, Volume I, Article 113(b) at page 43, and Article 199 at page 44)."*

Advocate Sowden went on to show how Jersey can use English statutory law to amplify the law in Jersey. But the case with which the Court of Appeal was dealing in Maynard (supra) involved the interpretation of a Statute. The Court of Appeal said at page 13 while examining the case of Cartledge v. Jopling (1963) 1 All ER 341 (HL):

> *"In interpreting Article 2 of the 1960 Law in the context of Jersey common law, it would be open to the Jersey Courts to derive guidance from the views of their Lordships in Cartledge and from the policy underlying the legislative changes in England since 1963".*

Of course, the Court of Appeal went on to examine the way that the judgment has been criticised in other jurisdictions and to counsel that notice might be taken of that criticism but the Court also said (at page 12):

> *"The Jersey law of tort is largely based on the English law of tort, and insofar as it is so based it is necessary for the Courts of Jersey to apply the law of tort as established by the House of Lords, and it is not appropriate for the Courts of Jersey to reconsider the law as so established (see T.A. Picot (CI) Ltd & Anor v. Crills [1995] JLR at pages 46-47 and 64). Insofar as Jersey statutes contain the same wording as the equivalent English statutes, English decisions on statutory interpretation may be persuasive authority as to the meaning of the Jersey statutes. But the Jersey law of prescription does not depend on English law (except perhaps insofar as the words used in Article 2(1) of the*

1960 Law reflect similar wording in section 2 of the English Limitation Act 1939), and therefore it is necessary for the Jersey Courts to reach their own decision as to the content of the Jersey law of prescription."

Advocate Sowden reminds me that if the Hire Purchase Act 1964 applied to the present case both the Plaintiff and the Defendant would have had good title. So also in France under Article 2279 of the Code Civil they would have had good title. They both possessed the car in good faith. Mr. Mendonca, so the argument goes, should not have allowed Equipment Rental to possess the car, he should have retained it and should by action have shown that he was attempting to mitigate his loss. Both Counsel were agreed that Mr. Cornec was a "precarious detainer".

In deference to Counsel I have perhaps extended the researches a little. Is the problem one which would require d'Argenté and Dicey to give a joint opinion? I think not.

In my view, and for the reasons stated, I determine that Equipment Rental Company did retain the ownership of the car and were entitled to retake possession of it.

Authorities

Oeuvres de Pothier (1830 Ed'n) Tome Premier: Partie V: Chapitre 1: para 326.

Hunter's Introduction to Roman Law (9th Ed'n): 1955): p.56.

Poingdestre: Remarques et Animadversions sur la Coustume Reformée de Normandie: Préface.

Factors Act 1889.

Sale of Goods Act 1893.

Hire Purchase Act 1964.

Goode's Hire Purchase Law and Practice (2nd Ed'n 1970): p.618.

Le Gros: "Traité du Droit Coutumier de l'Ile de Jersey (Jersey, 1943): Recueil de Maximes: p.459.

Wood -v- Establishment Committee (1989) JLR 213 at 236.

Matthews and Nicolle: "Jersey Law of Property": p.24.

Planiol: Traité Elémentaire du Droit Civil Vol 1: part 2: paragraph 2459.

Golder -v- Société des Magasins Concorde Ltd. (1967) JJ 721.

Selby -v- Romeril (11th August, 1995) Jersey Unreported.

Maynard -v- Public Services Committee (11th December, 1996) Jersey Unreported CofA.

Report of the Commissioners into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey (London 1861): p iii.

Les Manuscrits de Philippe Le Geyt sur la Constitution, les Lois, et les Usages de cette Ile (Jersey, 1847): p.391.

Albright -v- Wailes (1950) JJ 31.

Codes Dalloz: Code Civil (92 Ed'n): Article 2279.