36/90

SUPREME COURT OF VICTORIA

KEARNEY v CITY SAAB and HARRIS

Gobbo J

20 August, 12 September 1990

CIVIL PROCEEDINGS – LIEN – DAMAGED MOTOR VEHICLE REPAIRED – VEHICLE REMOVED FROM REPAIRER'S POSSESSION – RECOVERED BY POLICE – APPLICATION BY REPAIRER FOR RETURN OF VEHICLE – WHETHER LIEN REQUIRES POSSESSION – WHETHER REPAIRER ENTITLED TO POSSESSION – WHETHER PERSON OTHER THAN POLICE OFFICER MAY MAKE APPLICATION: *POLICE REGULATION ACT* 1958, S125.

After K. had loaned his motor car to M., it was damaged in an accident whereupon M. took the car to Saab for repairs which were carried out in due course. When the vehicle was removed from Saab's premises and returned to K., the repairer reported the vehicle as being stolen which later came into the possession of H., a police officer. Subsequently, Saab successfully applied pursuant to s125 of the *Police Regulation Act* 1958 for a court order reclaiming possession of the vehicle. Upon order nisi to review—

HELD: Order absolute. Vehicle ordered to be returned to owner.
1. A lien is a personal right of detention and therefore requires possession. As the repairer had not regained possession of the vehicle at the time of making the application, the magistrate was in error in proceeding upon the basis that the repairer had a possessory lien entitling the repairer to possession. Accordingly, as there was no reason why the owner's right to possession had to yield to the repairer who had no possessory lien at the relevant time, it was appropriate to order that the vehicle be returned to the owner.

2. It is doubtful whether a magistrate has power under s125 of the *Police Regulation Act* 1958 to entertain an application to claim goods by a person other than a police officer.

GOBBO J: **[1]** This is the return of an order nisi granted at the instance of the applicant Joseph Kearney, calling on the respondents Barrie Emerton, on behalf of City Saab, and Darren Grant Harris, a police officer, to show cause why an order made pursuant to s125 of the *Police Regulation Act* 1958 (Victoria) in the Magistrates' Court at Melbourne on 19 April, 1990 should not be reviewed and set aside.

The background to this matter may be summarised as follows. In about June or July of 1989 the applicant as registered owner lent his Saab motor vehicle to a Mr Markey for his personal use. After an accident involving the same vehicle, Mr Markey booked the damaged car into City Saab on 17 October 1989 for repairs and maintenance. These repairs were carried out over the period from October to November. In early December 1989 the vehicle was removed from the premises of City Saab and returned by Mr Markey to the applicant on or about 6 December. On 15 December, after City Saab had reported it as having been stolen, the second respondent took possession of the vehicle which was then found parked at the rear of a restaurant in Malvern Road. Thereafter, the vehicle was stored at the Carlton Police Station, and on 20 December the first respondent Emerton made an application under s125 of the *Police Regulation Act* 1958 to reclaim possession of the vehicle.

At a hearing on 19 April 1990 at the Melbourne Magistrates' Court, the Magistrate granted the application and ordered that the second respondent deliver the motor **[2]** vehicle to the first respondent. Since then, the vehicle has been stored at the premises of City Saab. The learned Magistrate found it reasonable to infer on the facts that Mr Markey had removed the vehicle from the premises of City Saab. It was conceded before the Magistrate that had the applicant been directly responsible for the removal of the vehicle, the original lien held by the first respondent would not have been extinguished. The learned Magistrate found that as the vehicle had been stolen from his possession the respondent repairer had not relinquished the original lien.

The grounds on which the order nisi was made by Master Williams on 19 June 1990 were

as follows:

> (1) The Magistrate was in error in holding that the first respondent acquired a lien over the motor vehicle as there was no evidence that Mr Markey was authorised by the applicant to request the first respondent to repair it;
>
> (2) If the first respondent had acquired a lien over the motor vehicle, the Magistrate was in error in not holding that in the circumstances the lien was lost once it was taken by Mr Markey and delivered to the applicant.
>
> (3) The Magistrate was in error in holding that the first respondent acquired a lien over the motor vehicle as the claim for a lien was based on both maintenance and repair of the motor vehicle and the two bases of claim were not severed;

It was put by Counsel for the applicant that s125 of the *Police Regulation Act* 1958 does not give a Magistrate an unfettered discretion to make any order as he sees fit with respect to whom the goods the subject of the application should be delivered. It was contended that **[3]** such a discretion should be exercised in accordance with the rights of the parties at law and in equity and that, as a matter of construction, the provision does not abrogate the common law rights of the parties.

The third ground can be dealt with immediately. No such argument was advanced to the learned Magistrate and the case was conducted on the basis that there had been a valid lien created when the vehicle was repaired and that the real question was whether that lien was still in operation and such as to justify an order in favour of the respondent repairer. It is therefore not open to the applicant to pursue this ground. In any event, it was open to the learned Magistrate on the evidence to treat the invoice material before him as making a clear distinction between repair and maintenance. I shall therefore turn to the question of the Magistrate's discretion under s125 of the *Police Regulation* Act 1958.

In my view, this provision does give the Magistrate a discretion at large whereby any order made pursuant to it is not intended to affect the rights and liabilities of the persons either claiming the goods or to whom delivery of the goods is ultimately made. Indeed, the section expressly states that this is so. It therefore follows that any decision involving the exercise of such discretionary judgment could only be reviewable where there has been a clear and manifest error by the original decision-maker, here the Magistrate, either in acting upon a wrong principle, giving weight to irrelevant considerations, failing to give weight or sufficient weight **[4]** to relevant considerations, or making a mistake as to the facts (Per Kitto J *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1956) 94 CLR 621 at 627).

The question here was whether the learned Magistrate proceeded upon a wrong principle. The argument that he did is founded on the proposition that there was no possessory lien at the hearing date. For the first respondent, Mr Emerton of City Saab, two contentions were put in reply. It was argued that there was no error and that there was a regaining of possession sufficient to maintain a possessory lien over the vehicle. Secondly, it was argued that in any event the discretion was so wide that the Magistrate could make the order be made even if there had not been a due regaining of possession.

I turn therefore to the first issue, namely whether the first respondent had originally acquired a lien over the motor vehicle and, if so, whether that lien was lost once the vehicle was taken by a third party and returned to the applicant. It is a well established principle that a person to whom the owner has lent goods cannot, without the express or implied authority of the owner, create a lien on them for repairs or otherwise which would be effective against the owner. See *Fisher v Automobile Finance Co of Australia* [1928] VicLawRp 73; [1928] VLR 496; *Lombard Australia Ltd v Wells Park Motors Pty Ltd* [1960] VicRp 106; [1960] VR 693. In such a situation the workman would be obliged to deliver them up **[5]** to the owner on demand (*McDonald v Stirskey* (1879) 12 NSR 520 (Canada)).

The case before the learned Magistrate appears to have proceeded on the basis that Markey had authority to have the vehicle repaired. Even if this not be so, the evidence was such as to entitle the Magistrate to proceed on the basis that the applicant owner had clothed Markey with implied

authority. The applicant deposed in his affidavit on 18 September 1990 that he was aware that the motor vehicle had been in an accident and that repairs were being done, though he did not know by precisely which repairers. There was no suggestion of Markey doing anything contrary to his bailment in having the car repaired. There was sufficient evidence therefore to sustain an implied authority in Markey to instruct the first respondent to undertake the necessary repairs. It follows that from the time that the first respondent took possession of the vehicle until the time of its wrongful removal, the first respondent was entitled to hold the vehicle under a lien against the applicant.

On this assumption, it then remains to decide whether the lien was extinguished by the wrongful removal of the vehicle from the premises of City Saab in early December 1989. It is a well accepted principle that a lien is a personal right of detention and therefore requires possession (*Attorney-General (NSW) v Hill and Halls Ltd* [1923] HCA 22; (1923) 32 CLR 112). There is authority, however for the proposition that a lien is not destroyed if a third party takes the article without the permission of the lienee (*In re Carter* (1885) LJ Ch 230 (NS)). Where the **[6]** lienee has been induced by a trick or other deceit or by misrepresentation or fraud to part with the article, or if the goods have been taken from him wrongfully or illegally, he will not be deemed in law to have parted with it and his lien will still be effective (*Mason v Morley* [1865] EngR 367; 55 ER 719; (1865) 34 Beav 475; [1865] EngR 368; 55 ER 717; (1865) 34 Beav 471; (1865) 11 Jur NS 459). In such cases regaining possession of the article by the lienee, even by stratagem, will revive the lien (*Briston (Earl) v Wilsmore* [1823] EngR 477; 107 ER 190; (1823) 1 B & C 514; [1823] 1 LJ KB 178). Various authorities were put in support of that principle, including the case of *Hawse v Crowe* [1826] Ry & M 414), where it was held that a lien could be revived when possession of goods had been regained which had been originally obtained in consideration of cheques that were subsequently dishonoured. The essential ingredient of these cases was that the lienee was in possession of the goods; he was not seeking to recover possession. The cases support the principle that a possessory lien may in certain circumstances sustain an interruption in possession.

While it is clear that a lienee may revive a lien by retaking without force an article that had been regained by fraud or by force, it is less clear whether a claim for possession against an owner can be made where the lienee has not personally regained possession of the article. In the present case, when the first respondent made the application for repossession of the motor vehicle under s125 of the *Police Regulation Act*, the vehicle had not been re-possessed by City Saab but by the second respondent police officer. In those circumstances, where re-possession of the goods has been gained not by the lienee **[7]** but by a third party, it is very doubtful whether the lienee can apply to the court to regain possession and thereby revive his original lien.

In *Jeffcott & Anor v Andrew Motors Ltd* (1960) NZLR 721, a decision of the New Zealand Court of Appeal, Hutchison J said at p732 that since a lien was by nature a shield and not a sword, giving the lienee a defence and not a right of action, it was not appropriate for the court to make a declaration upholding the existence of lien and the entitlement to possession of an article the subject of a lien where the lienee had failed to regain possession of the article.

In the present case, it may be that had the respondent directly re-possessed the vehicle from either Markey or the owner, the lien would have revived. However, the motor vehicle came into the possession of the second respondent. The respondent repairer was not in possession of the vehicle when the application under s125 of the *Police Regulation Act* was made. His right to secure an order upholding his claim to possession rests on the possessory lien but he neither had possession at the relevant time nor had he regained such possession. In these circumstances it was not open to the learned Magistrate to proceed upon the basis that the respondent repairer had a possessory lien entitling him to possession. It follows that the discretion was exercised upon a wrong principle and should be set aside.

It was argued that nonetheless the discretion given to the Magistrate by the Statute was so wide as to sustain the order that the vehicle be returned to the **[8]** repairer, even if the latter did not have an operative possessory lien. In my view this argument must fail. Though the discretion is a very wide one, it must be exercised in accordance with the law. I am unable to see why the owner's right to possession had to yield to the repairer who had no possessory lien at the relevant time. It follows that the order nisi should be made absolute. The parties were agreed that if I so found, it was appropriate for me to order that the vehicle be returned to the applicant, without

having to remit the matter to the Magistrates' Court for this purpose.

The final matter that needs to be noted is the doubt as to whether there was jurisdiction to entertain this form of application by the applicant repairer at all. The *Police Regulation Act* empowers applications by police officers. This application was not made by the police officer in question. No point was taken as to this before the Magistrate or in this Court but it needs to be noted when there are further applications made under s125 of that Act.

APPEARANCES: For the applicant Kearney: Mr M Shand, counsel. Masons Solicitors. For the first respondent City Saab: Mr B Gillies, counsel. Cooper Korbl & Co, solicitors. For the second respondent Harris: Victorian Government Solicitor.
