1925
*Feb. 13.
*March 27.

THE CANADIAN BANK OF COMMERCE (CLAIMANT) ..... APPELLANT;

AND

JOHN MUNRO (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Chattel mortgage—Failure to renew—Goods sold by mortgagor—Existence of mortgage known by purchaser—Good faith—Bills of Sale Act, R.S.A. (1922) c. 151, s. 19.

The appellant was a mortgagee of goods but failed to file a renewal statement within the time required. The respondent purchased the goods from the mortgagor, paying full value. He knew that the mortgage

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

(1) 22 L.C.J. 265. (2) 8 L.N. 143.

was unpaid but considered he was entitled as a matter of law to rely upon the mortgagee's failure to file renewal, which fact he had ascertained by having caused a search to be made at the registry office. No collusion on respondent's part to protect the mortgagor was found.

Held, reversing the judgment of the Appellate Division ([1925] 1 W.W.R. 1), Idington and Mignault JJ. dissenting, that the respondent was not a "purchaser * * * in good faith" within the meaning of s. 19 of the Bills of Sale Act.

Per Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.—A purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third person, cannot be said, either legally or morally, to be a purchaser "in good faith" and therefore cannot maintain his claim to the goods as against such third person.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Simmons J. at the trial (2) and dismissing the appellant's motion for an order allowing the removal and sale of certain chattels seized under a chattel mortgage, the respondent claiming the chattels as purchaser for value from the mortgagor.

Bennett K.C. for the appellant.

McGillivray K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The appellant bank held a chattel mortgage, bearing date of the 20th of April, 1921, from one Cline. There was due upon it for principal and interest, on the 29th of August, 1924, $4,602.17. Default was made in April, 1924, in filing a renewal of this mortgage as prescribed by s. 19 of the Bills of Sale Act (R.S.A. 1922, c. 151), with the consequence that, while it remained effective *inter partes,* the mortgage

ceased to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration.

Cline sold the mortgaged goods to the respondent Munro by bill of sale for $2,000 on the 31st of May, 1924, and received payment in full by cheque on the 4th of June, 1924. This bill of sale was recorded as prescribed by the statute.

(1) [1925] 1 W.W.R. 1. (2) [1924] 3 W.W.R. 229.

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On the 30th of August, 1924, the goods were seized by a sheriff's bailiff acting under a distress warrant issued by the appellant. This seizure is contested and the issue to be determined is whether the respondent was a purchaser of the goods "in good faith for valuable consideration."

The learned trial judge found that the price paid by Munro to Cline represented the full value of the goods. That finding, accepted on appeal, is not now challenged. The sale, therefore, was not simulated and Munro was a purchaser "for valuable consideration."

The learned judge was unable

> to say that Munro entered into the bargain with Cline collusively with the object of protecting the mortgagor.

But it was clearly found that, when he purchased, Munro knew of the mortgagee's claim and appreciated the fact that his purchase, if upheld against the mortgagee, would deprive it of its security on the chattels for the debt owing to it. While there is no "specific finding" by the trial judge that Munro knew or believed that Cline intended dishonestly to appropriate the purchase money and not to pay it, or any part of it, to the bank, he makes this significant statement:

> It is suggested that he (Munro) was entitled to assume that the purchaser (sic)—obviously the vendor is meant—would use the money to pay off the liability to the bank. It is a fact, however, that he went to the bank with Cline, immediately after the sale, cashed the cheque for $2,000 given for the goods and that the same was drawn in currency by Cline.

The only fair inference from this statement seems to be that the learned judge was satisfied that Munro, when carrying out the transaction, was fully alive to the fact that "the obvious result would be to defeat the claim of the bank."

On the other hand, it would seem to have been assumed that Munro believed that the statute would protect the title he acquired from Cline against the claim of the mortgagee. Having searched the record and found that the mortgage had not been renewed, to use his own words, he "took the chance." Was he a purchaser in good faith?

The Appellate Division of the Supreme Court of Alberta (Stuart J. dissenting), reversing the judgment of Simmons C.J., has held that he was. The ground for that judgment appears to be that if the purchase is real, i.e., not simulated, and if the motive of the purchaser is to acquire the pro-

perty sold and is not to aid the vendor to defeat the claim of the mortgagee, he meets the exigency of the phrase " in good faith," although he has full knowledge that his vendor has no title or right to sell the goods, that the title is in the mortgagee, and that the mortgage debt is unpaid and believes that his purchase will defeat the mortgagee's claim and destroy his title.

With great respect, we cannot accept that view of the law.

The sole authority cited for the majority judgment of the Appellate Division is *Sydie* v. *Saskatchewan Land Co.* (1), considered and distinguished in *Ross* v. *Stovall* (2). Counsel for respondent supported the judgment, however, by reference to *Moffatt* v. *Coulson* (3); *Vane* v. *Vane* (4); *Roff* v. *Krecker* (5); *Ferrie* v. *Meikle* (6), and *Assets Company Limited* v. *Mere Roihi* (7). It is, perhaps, desirable that these cases should be examined.

Sydie v. Saskatchewan Land Co. (1) and *Ross* v. *Stovall* (2) were cases under the Land Titles Act of Alberta (c. 24, 1906), which absolutely protects certificates of title (s. 44) and dealings with registered owners (s. 135), except in cases of fraud, and provides that

> knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud (s. 135).

The court took the view that in the former case there was, in the latter case there was not, " actual fraud " on the part of the transferee. Obviously decisions based on a statute which admits only fraud as a ground of relief and declares that proof of actual knowledge of an adverse interest " shall not of itself be imputed as fraud," afford little assistance in determining how far, without such a statutory exclusion, that knowledge would affect a purchaser's good faith. In passing it may be observed that knowledge that the owner had agreed to sell to another person and that by taking a transfer of the property he would deprive that other person of his right, was held in the *Sydie Case* (1) to be fraud. It may be that the case at bar falls within this authority. In the *Ross Case* (2) the transferee honestly believed that his agreement for the purchase was prior to that of the

(1) [1913] 6 Alta. L.R. 388.
(2) [1919] 14 Alta. L.R. 334.
(3) [1860] 19 U.C.Q.B. 341.
(4) [1873] 8 Ch. App. 383 at p. 399.
(5) [1892] 8 Man. R. 230.
(6) [1915] 8 Sask. L.R. 161.
(7) [1905] A.C. 176.

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plaintiff of which he had knowledge when he took his transfer. Nothing more need be said of these Alberta decisions. But the statute on which they rest shows that the Alberta Legislature regarded mere knowledge of an adverse interest as something from which fraud might be inferred and excluded that inference in unmistakeable terms when it meant that it should not be drawn.

In *Moffatt* v. *Coulson* (1) the purchaser was not informed by the vendor of the existence of the chattel mortgage and, although a witness deposed that the purchaser had told him he knew of it when he bought, he added that he believed that, either by reason of expiration of the mortgage or by arrangement with the mortgagee, the vendor had a right to dispose of his property. Actual knowledge of an unpaid existing mortgage and intent that by purchasing from a vendor who had no right to sell he should defeat the mortgagee's title was, therefore, lacking. In the course of his judgment Robinson C.J., undoubtedly uses language which imports that in his opinion notice (presumably actual notice) of the adverse title of the mortgagee would not affect the good faith of the purchaser. But such observations were *obiter*. Knowledge by the purchaser that an unsatisfied adverse interest was outstanding in the mortgagee was not shown. Moreover, the Chief Justice apparently held the view that the chattel mortgage had not passed the property in question to the mortgagee because the description of the goods was insufficient. *Edwards* v. *English* (2), cited by Mr. Justice McLean is not in point. The claimant there was an execution creditor as to whom the statute imposed no requirement of good faith. *Edwards* v. *Edwards* (3), was also the case of a seizure under execution. McLean J. also rested his judgment on the plaintiff mortgagee's lack of title.

The observations of James L.J., in *Vane* v. *Vane* (4), at p. 399, afford little or no assistance. It was held in that case that a person whose agent bought with knowledge of a fraud was not a

bona fide purchaser for value who at the time of the purchase did not know or had no reason to believe that any such fraud had been committed (s. 26).

(1) 19 U.C.Q.B. 341.
(2) [1857] 7 E. & B. 564.
(3) [1876] 2 Ch. D. 291.
(4) 8 Ch. App. 399.

James L.J. expressed the view that in this context the words "*bona fide*" meant a real purchaser and not merely a donee taking under the guise of a purchase; these words

were not meant to include and cover all, and more than all, that is afterwards expressed in the remainder of the proviso.

There is no difficulty in regarding the words "*bona fide*" used as an adjectival phrase preceding the word purchaser, especially when accompanied by such a context, as meaning merely "real" or "actual" as distinguished from "feigned" or "simulated." Thus a "*bona fide* traveller" means merely a traveller. *Atkinson* v. *Sellers* (1). But it is something quite different to place a like limitation on the purport of the words "in good faith" in the Chattel Mortgage Act, following the word purchaser and unaccompanied by any such context as James L.J., had before him. On *Moffatt* v. *Coulson* (2), and *Vane* v. *Vane* (3), rest very largely the decisions in *Roff* v. *Krecker* (4) and *Ferrie* v. *Meikle* (5).

In *Roff* v. *Krecker* (4) the Manitoba Court of Queen's Bench (Taylor C.J., Dubuc and Killam JJ.) purporting to overrule *King* v. *Kuhn* (6), likewise a decision of the full court (Wallbridge C.J., Taylor and Killam JJ.) held that

a second mortgage made in good faith and for valuable consideration has priority over a prior unregistered chattel mortgage of which the second mortgagee had actual notice and that where a mortgage is taken for valuable consideration and not for a collusive purpose the mortgagee is "in good faith" within the meaning of the Chattel Mortgage Act (Con. Stat. Man., 1880, c. 49, 48 Vic., c. 35) although he has notice of a prior unfiled mortgage.

King v. *Kuhn* (6) was a case of failure to refile, with a statement of the debt, as prescribed by the Chattel Mortgage Act, Con. Stat. Man., 1880, c. 49. The Manitoba court unanimously held that a purchaser who had actual knowledge of the unrenewed mortgage was not "in good faith," citing the well-known passage from *LeNeve* v. *LeNeve* (7),

the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser—not that he is not a purchaser for valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate.

(1) [1858] 28 L.J.M.C. 13.
(2) [1860] 19 U.C.Q.B. 341.
(3) 8 Ch. App. 399.
(4) 8 Man. R. 230.
(5) 8 Sask. L.R. 161.
(6) [1887] 4 Man. R. 413.
(7) 1 Amb. 436.

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Roff v. *Krecker* (1) was a case of competing chattel mortgages, the prior in time being unregistered. Much weight was attached in the judgments to the fact that the words "without actual notice" found in both sections of the Con. Statute of 1880 (c. 49) had been dropped in 1885 from the section of the Act dealing with chattel mortgages, whereas they were retained (whether intentionally or inadvertently does not appear) in the section dealing with Bills of Sale. This was apparently regarded by the court as tantamount to a legislative declaration that in the case of an unregistered chattel mortgage actual notice by a subsequent mortgagee or purchaser of the prior right it conferred was immaterial. After indicating this view Taylor C.J. proceeded on the authority of *Moffatt* v. *Coulson* (2), *Tidey* v. *Craib* (3), presently to be noted, and *Vane* v. *Vane* (4), to hold the title of the second mortgagee to be unaffected by his notice of the prior encumbrance. It may be observed that the notice in this case was probably only to an agent and that personal knowledge by the second mortgagee was not established.

Both Dubuc and Killam JJ. stated that if they felt at liberty to dispose of the case as *res integra* on general principles and apart from the language of former statutes and the history of the law they would have held the second mortgage not in good faith. After expressing a view as to the effect of the deletion of the words "without actual notice" similar to that of Taylor C.J., Dubuc J., citing *Moffatt* v. *Coulson* (2), *Tidey* v. *Craib* (3), and *Marthinson* v. *Patterson* (5), concludes that notice of the prior unregistered mortgage did not affect the good faith of the second mortgagee.

Marthinson v. *Patterson* (5), a decision of the Queen's Bench Divisional Court (*vide* p. 728 in *fine*) was reversed on appeal (6). The question now before us is not there disposed of, although notice of a prior unregistered mortgage was treated as immaterial by Burton and Maclennan JJ.A. Osler J.A., however, refers without disapproval to

(1) 8 Man. R. 230.
(2) 19 U.C.Q.B. 341.
(3) 4 O.R. 696.
(4) 8 Ch. App. 399.
(5) [1891] 20 O.R. 720.
(6) [1891] 19 Ont. A.R. 188.

the view of Esten V.C., in *Fisken* v. *Rutherford* (1), that actual notice of an unregistered incumbrance binds a subsequent mortgagee or purchaser. The same learned judge (Osler J.A.) delivering the judgment of the court (Burton C.J.O., Osler, Maclennan, Moss and Lister JJ.A.) in *Winn* v. *Snider* (2), at least impliedly indicates his opinion that proof of actual notice of a prior purchase might be fatal to a subsequent purchaser's claim that he had bought in good faith.

Killam J. in *Roff* v. *Krecker* (3) came reluctantly to the conclusion that the second mortgagee was "in good faith" within the meaning of the Manitoba statute. The only authorities he cites are *Vane* v. *Vane* (4) and *Moffatt* v. *Coulson* (5). He regarded the course of the Manitoba legislation—the fact that the statute originally (1874, 38 Vic., c. 17) did not contain the words "without actual notice," their insertion in the Consolidated Statute of 1880, both in s. 3, dealing with Bills of Sale, and in s. 2, dealing with chattel mortgages, but not in the renewal provision (s. 8), and their deletion in 1885 from the chattel mortgage section, but not from the bills of sale section—as sufficiently indicating an intention that actual notice of an unregistered chattel mortgage should not affect the good faith of a subsequent mortgagee or purchaser, though it would be otherwise in regard to actual notice of an unregistered bill of sale. It should also be noted that towards the close of his judgment Killam J. seems to express the view that, inasmuch as the mortgagor still had an equity of redemption upon which the second mortgage might be considered a real and valid charge, in the absence of any suggestion of an object or desire to defeat the prior mortgage, except in so far as that might lawfully and properly be done, there was good faith on the part of the second mortgagee.

There has been no such insertion and deletion of the words "without actual notice" in the legislation of the North West Territories and of the province of Alberta regarding bills of sale and chattel mortgages. These words do not appear ever to have had a place in this legislation:

(1) [1860] 8 Gr. 9, 25-7.
(2) [1899] 26 Ont. A.R. 384, at p. 389.
(3) 8 Man. R. 230.
(4) 8 Ch. App. 399.
(5) 19 U.C.Q.B. 341.

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vide 0. 5, 1881, N.W.T. ss. 3, 5, 9; 0. 7, 1887, N.W.T., ss. 5, 7, 11; Rev. O., N.W.T., 1888, c. 47, ss. 5, 7, 11; 0. 18, 1889, N.W.T., ss. 5, 7, 11; Con. 0., N.W.T., 1898, c. 42, ss. 6, 9, 17, 19; Con. 0., N.W.T., 1905, c. 43, ss. 9, 17, 19; R.S. Alta., 1922, c. 151, ss. 6, 9 (3), 18, 19. We are not presently concerned with the Conditional Sales Act referred to by counsel for the respondent.

Ferrie v. *Meikle* (1), seems to have been decided on the authority of *Roff* v. *Krecker* (2). It was a decision upon unregistered lien notes, not upon a chattel mortgage, and was governed by the Conditional Sales Act, R.S.S. 1909, c. 145, s. 1. It is, perhaps, unnecessary to express an opinion on the correctness of this decision. We would, however, require to give it very careful consideration before accepting it. It may be noted that the original N.W.T. Ordinance (no. 8 of 1889) avoided unregistered hire receipts, etc., as against "any mortgagee or *bona fide* purchaser without notice." These terms were changed in 1897 (O. No. 39). The statute now reads (R.S. Sask. 1920, c. 201, s. 1)

> as against any purchaser or mortgagee * * * in good faith for valuable consideration.

Referring to this change, Mr. Justice Duff, in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (3), says at p. 498,

> the legislation has substituted the condition of the existence of good faith for the condition of the want of notice.

The learned judges of the Court of Appeal in Saskatchewan in the *Lanston Case* (4) would seem to have taken

> the view that when a purchaser relies upon these provisions of the statute it is in every case a question of fact to be decided under the circumstances in evidence whether or not the purchaser did in fact act in good faith, and that if he failed to establish honesty in fact then his plea under the statute must fail,

Vide Lanston Case (5).

Assets Co. Ltd. v. *Mere Roihi* (6) is not in point. Effect was there given to a statute making a registered title conclusive, except in a case of fraud.

In *Morrow* v. *Rorke* (7) the absence of the words "in good faith" from s. 9 of the Chattel Mortgage Act (C.S. U.C. c. 45) was the ground on which a purchaser for valu-

(1) 8 Sask. L.R. 161.
(2) 8 Man. R. 230.
(3) 63 Can. S.C.R. 482.
(4) [1921] 14 Sask. L.R. 371.
(5) 63 Can. S.C.R. 482, at p. 492.
492.
(6) [1905] A.C. 176.
(7) [1876] 39 U.C.Q.B. 500.

able consideration of goods, which, after registration of the chattel mortgage, had been removed into another county, was found entitled to hold them free from the mortgage of which he had notice.

In *Tidey* v. *Craib* (1), Ferguson J., a very careful judge of undoubted ability, held an unregistered chattel mortgage void as against subsequent mortgagees who had knowledge of it when they took their security.

We find it impossible to accept the view that a purchaser who knows that goods which he is buying belong to a third person and that his vendor has neither title to them nor right to sell them, but, on the contrary, is bound as between himself and such third person to protect the right and title thereto of the latter, and who also knows that any right or title he may acquire by his purchase must be in defeasance of that of such third party, can be said, either legally or morally, to be a purchaser "in good faith." He is knowingly taking part in a dishonest dealing. He is assisting his vendor to commit a fraud. He cannot establish in regard to such a dealing that "honesty in fact" which is prescribed by the words "in good faith" Those words import the requisite of honesty in the transaction and not merely that it be real and not feigned or simulated. Munro's *mala fides* in abetting Cline's illegal transfer to him of the bank's property is not purged by any opinion he may have held that the statute would protect the title Cline purported to give him. On the contrary, his belief that the success of Cline's "*machinatio ad circumveniendum*" was thus assured would rather seem to establish complicity in his vendor's attempt to defraud the bank. In so far as the judgments in *Roff* v. *Krecker* (2) and *Tidey* v. *Craib* (1), may be contrary to these views, these decisions must be overruled.

This conclusion is in accord with English and American judicial opinion. As instances, *Jones* v. *Gordon* (3), and *Farmers' Loan and Trust Co.* v. *Hendrickson* (4), may be referred to.

We are, for these reasons, of the opinion that the judgment of the learned trial judge was right and should be

(1) 4 O.R. 696.
(2) 8 Man. R. 230.
(3) [1877] 2 A.C. 616, at pp. 628-9.
(4) [1857] 25 Barb. 484, at p. 488.

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restored. The plaintiff is entitled to its costs in this court and in the Appellate Division.

IDINGTON J. (dissenting).—One Cline, a farmer in the Calgary District of Alberta, having become indebted to the appellant, gave it a chattel mortgage by way of security therefor, on the 20th April, 1921.

The appellant failed entirely to keep same renewed, as required by s. 10 of c. 151 of the Revised Statutes of Alberta, known as the Bills of Sale Act, which provides as follows:—

> Every mortgage filed in pursuance of this Act shall cease to be valid as against the creditors of the persons making the same and as against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless, within thirty days next preceding the expiration of the said term of two years, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district wherein the property is then situate together with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees, as the case may be, stating that such statements are true and that the said mortgage has not been kept on foot for any fraudulent purpose, which statement and affidavit shall be deemed one instrument.
>
> (2) Such statement and affidavit shall be in Form C of Schedule 1 hereto or the like effect.

Thereafter said Cline offered the respondent the goods which had been so mortgaged for sale and they arrived at a bargain by which the said respondent bought same for the sum of $2,000, paid Cline in cash, for which he got a bill of sale under said Act, dated the 31st May, 1924, and that with the necessary affidavits was duly registered in conformity with the requirements of said Act, within the thirty days prescribed thereby.

Thereafter the appellant brought an action against Cline to recover judgment for his indebtedness to it, and upon the recovery thereof, issued execution, and examined Cline, and it ensuing that an issue seems to have been directed to test the validity of the seizure of said goods, made under a distress warrant, issued by the appellant, presumably.

That issue was tried as directed before Chief Justice Simmons, said appellant being the plaintiff therein and respondent the defendant.

The said learned Chief Justice having tried the said issue, by hearing the evidence of respondent and of said Cline, of whom the latter called by the appellant says he had told the respondent that he, Cline, had given a mortgage some three or four years ago to the appellant and that he imagined he told him it was not cleared off but tells nothing of the amount of it. Nothing was said between them about any renewal of said mortgage being filed or not. He testified also that the price of two thousand dollars paid him by respondent for the goods when he give him the bill of sale was the full value of the goods so sold; and further that he, Cline, did not, at the time of selling to respondent, know how much he owed the appellant.

Respondent testified that when negotiating with Cline for the purchase and figuring out that it was good business and hearing from the said Cline that he had given a mortgage to the respondent, he caused a search to be made. That part of his examination-in-chief, reads as follows:—

Q. What led up to your purchase of these chattels?

A. Well Mr. Cline came along and wanted to sell them to me, he was hard up and I figured it was good business so I just bought them.

Q. He mentioned something to you about the bank having a mortgage on these chattels?

A. Yes, he told me that, or had had. And I had it searched.

Q. What did you discover?

A. That the mortgage had run out.

Q. You had it searched?

A. Yes.

Q. And the result of that search was brought to your attention.

A. Yes.

Q. You were told that the mortgage had run out?

A. Yes.

Q. How much money did you pay Mr. Cline?

A. $2,000 by cheque.

Q. Have you your cancelled cheque for the amount, is it here?

A. Yes.

Q. Let us see it.

In cross-examination he was asked quite a number of questions evidently directed to his good faith—such as to whether he had intended farming, and he answered that he had a farm in Manitoba, but in fact he had figured on another farm proposition, but it blew up when the crops went bad; and again as to being indemnified in any way against the $2,000, and he positively denied any such thing and tells further through what channel he made the search and names the office in Calgary, and that it was one he had

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previously done considerable business through, naming the proprietor and assistants there. Whether they were members of the legal profession or ordinary conveyancers is not expressly stated, but I infer from the examination that counsel knew them well and hence did not press for further details as to that.

The respondent is very positive as to the parties he names, or one of them, assuring him that search had been made, and telling him that the property was clear of the mortgage to the appellant, and that it had run out and, thereupon, that he directed the bill of sale in question to be prepared.

Upon the evidence the learned Chief Justice sets forth fully his view of the facts, and in no way suggests any doubt of the veracity of either of the witnesses who had testified.

He expressly finds as to the question of good faith, as follows:—

> I am bound to say I am not able to go so far as to say that Munroe entered into the bargain with Cline collusively with the object of protecting the mortgagor. He paid the full value of the goods; he knew of the mortgagee's claim but he considered he was entitled as a matter of law to rely upon the failure of the mortgagee to register the renewal and that he was under no obligation to concern himself as to whether the bank was paid or not.

The Chief Justice, however, gave judgment for the appellant solely on the basis of respondent having been told of Cline having given a mortgage, even though that had run out as above set forth. He does not seem to have understood, as counsel for appellant herein seems (I respectfully submit) to have understood, the actual grounds upon which *Lanston Monotype Machine Company* v. *Northern Publishing Co. Limited* (1) was decided, but refers to some *obiter dicta* of myself and others in disposing of that case —to which I shall advert presently.

The Appellate Division of the Supreme Court of Alberta allowed the appeal to that court, and unanimously—saving Mr. Justice Stuart who dissented—reversed the said judgment of Chief Justice Simmons.

Hence this appeal herein.

There is an aspect of the law which I am afraid and very sorry to find was overlooked by me in the observations I

(1) 63 Can. S.C.R. 482

made in the *Lanston Monotype Company Case* (1) brought before us by the factum of counsel for respondent, and that is the history of the legislation bearing on the question raised herein and, I submit, accounts for and justifies the ruling in a number of cases decided in the western provinces.

The grounds upon which the majority of this court proceeded in deciding the *Lanston Monotype Case* (1) were clearly and explicitly upon the peculiar terms of the bargain therein in question, and could not fall within the protecting terms of the statute herein in question even if the parties concerned had been honest though counsel sought to bring it thereunder—and the decision of the Saskatchewan Court of Appeal in the case of *Ferrie* v. *Meikle et al* (2) was relied upon.

That led to the *obiter dicta* I have referred to. No one really went into the history of the legislation or presented that in such a way as it has been presented in the course of this appeal, especially in the excellent factum of counsel for the appellant herein.

The legislature of the province of Manitoba, shortly after it was created, passed, in 1880, by c. 49, s. 1, a statute (which I may abbreviate as follows) dealing with mortgages of goods and chattels and not accompanied by immediate and continued change of possession, requiring an affidavit of the mortgagee, as usual in such like enactments, verifying the alleged indebtedness and good faith, and for the express purpose of securing payment of the money and not to the prejudice of creditors. Then by s. 2 thereof it provided as follows:—

> II. In case such mortgage or conveyance and affidavits be not filed as herein provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration without actual notice.

There were later amendments but nothing material to what we are concerned with, until 1885, when there was an amendment (48 Vic., c. 35) in which the words "without actual notice" were left out.

Prior to 1892 there had been decisions of the Manitoba courts holding that the man having "actual notice" was

(1) 63 Can. S.C.R. 482. (2) 8 Sask. L.R. 161.

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not protected, but in that year, after the change leaving out the words "actual notice," the case of *Roff* v. *Krecker* (1) came before the Manitoba Court of Appeal and the appeal was allowed, the court evidently agreeing that effect must be given to such an important amendment. Mr. Justice Killam seemed inclined to think that the enactment as it stood with the words "without actual notice" was the better legislation, but was too good a lawyer to allow himself to be led to discard, or fail to give effect to, the change made by the elimination of these words, and agreed with the other members of the court that, despite the actual notice as in that case there was to the appellant's agent taking the mortgage attacked, the change in language used by the legislature must be observed and acted upon.

There is a curious episode just there for the Manitoba Revised Statutes of 1891, falls back to the use of the words "without actual notice" (of course that could not affect the case before them which had arisen out of transactions which happened a year or more earlier), and when revised in 1902 these words "without actual notice" are dropped out, as appears by 63-64 Vic., 1900-1901, c. 31, s. 5, as follows:—

5. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made in the province of Manitoba, which is not accompanied by immediate delivery and an actual and continual change of possession of the things mortgaged, shall be registered, as by this Act provided, within fifteen days from the execution thereof, together with an affidavit of a subscribing witness thereto of the due execution of such mortgage or conveyance, and with an affidavit of the mortgagee or his agent that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, otherwise such mortgage or conveyance shall be absolutely null and void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for good or valuable consideration.

This short bit of history shews how the question has been threshed out in at least one province.

Are we to set aside, by our confidence in ourselves, the law so declared and acted upon since 1902, and, in such an important province as Manitoba, where people have got accustomed to so acting upon the law?

(1) 8 Man. R. 230.

Indeed I am inclined to think from what the respondent testifies to in his evidence as to owning a farm in Manitoba, that it is quite probable he had lived there, and learned there, as a man of business, that he was quite within his rights in searching the office in Calgary to see if the appellant's mortgage had been renewed, and acting upon the results so found. He did that of his own motion, or that of his adviser, for Cline and he never alluded to it between them.

I am, from the consideration I have given the matter, quite clear that the great majority of those who have to do business of the kind in question, are better served and the general public also, by such an interpretation of the words used, as the court below has given, than by leaving the business to turn upon "actual notice" or "notice" given. Why should people, and above all bankers, who have the facility for keeping before their eyes records of need for filing on such and such a date as required by a renewal, not observe the law in that regard? Why should all the rest of the world be worried by reason of their neglect and the lawyers have a chance to still add to the worries over distinctions between *notice, actual notice* and *constructive notice?*

Then again to call what the respondent did a fraud under such circumstances of the law as declared, not only for so long a time now past in Manitoba, but ever since 1915, at least, in the province of Saskatchewan, seems to me rather a peculiar conclusion. With all due respect I submit that is not what the public are entitled to expect from this court which has to determine such far reaching consequences. For my part I am far more concerned as to that aspect of this case than aught else in it.

The history of the law in question in the North West Territories, out of which Saskatchewan and Alberta were carved, in 1905, is briefly as follows:—

I cannot find any Act of the Council of the North West Territories especially dealing with chattel mortgages earlier than June, 1881. That Act seems clearly to have been founded upon the lines of the statute of Ontario as it appeared in the then last Revision (1877) of the statutes of the province, c. 119; having been in great part copied therefrom.

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Section 4 of the said Ontario statute is as follows:

4. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

And s. 5 of the said Ordinance of June, 1881, is identical in its language and leaves no question to be raised by the use of the word "notice" or "actual notice" such as appeared to disturb the legislators and judges of Manitoba. It does appear, however, in the next Ordnance of a like nature, passed in 1889, being No. VIII of the North West Ordinances, sec. 1, and which is as follows:—

1. From and after the first day of February, A.D. 1890, receipt-notes, hire-receipts, and orders for chattels, given by bailees of chattels subsequent to the said date, where the condition of the bailment is such, that the possession of the chattel should pass without any ownership therein being acquired by the bailee, shall not be entitled to any precedence or priority and shall be of no effect whatsoever as against judgments or attachments, in any court of record or against any mortgagee or *bona fide* purchaser *without notice,* unless the said receipt-note, hire-receipt, or order shall have been within thirty days from the date thereof registered in the office of the registration clerk of the registration district, as defined by c. 47 of the Revised Ordinances, within which the maker of the said receipt-note, hire-receipt, or order is resident, by filing in the office of such registration clerk a copy of the said receipt-note, hire-receipt or order for the chattel or chattels, together with the endorsements thereon, verified by affidavit of the owner or his agent as to its correctness and as to the *bona fides* of the transaction; and for filing the same the said clerk shall be entitled to have and receive at the time of filing a fee of ten cents.

It is to be observed that that contains the words "without notice."

The said ordinance seems to have been blended with chattel mortgages in 1897 by an ordinance no. 39, of that year, which is as follows:—

Section 3. The seller or bailor, his executors, administrators or assigns, or his or their agent, shall within 30 days next preceding the expiration of two years from the date of such registration, file with such registration clerk a renewal statement verified by affidavit shewing the amount still due to him for principal and interest (if any) and of all payments made on account thereof, and whether or to what extent the condition (if any) of the bailment is still unperformed, and thereafter from year to year a similar statement similarly verified within the 30 days next preceding the expiration of the year from the filing of the last renewal statement, and in default of such filing the seller or bailor shall not be permitted to set up any right of property or right of possession in the said goods as against the creditors of the purchaser or bailee, or any purchaser or mortgagee of or from the buyer or bailee in good faith for valuable consideration of the goods.

That seems necessarily to have continued the law in Saskatchewan, save as to minor changes not important in this connection, until changed by its own legislature by an Act respecting Mortgages and Sales of Personal Property, being c. 144 in the legislation of 1909, s. 19 of which is as follows:—

19. Every mortgage or conveyance intended to operate as a mortgage filed in pursuance of this Act shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless within thirty days next preceding the expiration of the said term of two years a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district where the property is then situate with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees duly authorized for that purpose, as the case may be, stating that such statements are true and that the said mortgage or conveyance has not been kept on foot for any fraudulent purpose which statement and affidavit shall be deemed one instrument.

The law so enacted contained no reference to the question of *notice* or *actual notice,* nor were these words resorted to in any future legislation that I can find, so far as Saskatchewan was concerned.

The Act under which *Ferrie* v. *Meikle* (1) above referred to, was decided by the Saskatchewan Court of Appeal, on a statute substantially the same as that first quoted above, as being the Alberta Act which must govern the decision of this case, and, so far as Alberta was concerned there was no resort back to the words *without notice* or *actual notice,* and I can find no substantial difference from the Act I have referred to above, as having been taken from the Ontario Act.

Having as result of most careful search thus demonstrated the history of the legislation in said three prairie provinces, and that there was a most distinct feature of the same kind in discarding in the later legislation the condition or the qualification of *actual notice* or mere *notice* of prior mortgage, and that has been given effect to by each of the appellate courts respectively of each of said provinces.

(1) 8 Sask. L.R. 161.

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Therefore I conclude it is our duty to observe such concurrent jurisprudence. I do not think any number of mere decisions upon other statutes of other countries can be of any avail herein, except to mislead.

If I am correct in my appreciation of the result of tracing the legislation in question and the jurisprudence of the said provinces ensuing upon the changes in said legislation ultimately discarding the question of *actual notice* or *notice* of any prior bill of sale or chattel mortgage as having any bearing upon the question of good faith, or such like question as raised herein by appellant, then I see no useful purpose to be served by such citations as counsel for appellant present in their factum.

I think, however, the opinion of such eminent jurists as Lord Justice James, when speaking in *Vane* v. *Vane* (1), where he points out that a *bona fide* purchaser means that the purchasers should be really purchasers and not merely donees taking gifts under the form of purchases, is entitled to great weight.

The view expressed by the late Mr. Justice Ferguson in the case of *Tidey* v. *Craib* (2), when he discarded the claims set up by counsel in a somewhat similar case to this, upon a similar Act of the Ontario legislature, is well worthy of giving to it great weight.

Other Ontario judges evidently held the same opinion.

In good faith means nothing more than *bona fide* as expressed in many ways in many Acts, and to restrict or enlarge the meaning to be attached thereby and impute fraud when, as the learned trial judge finds, there was none intended, I most respectfully submit, in face of the jurisprudence I have referred to, should not be the attitude assumed towards the grave question raised herein.

The case of *Fernie* v. *Meikle* (3), as well as a decision of Walsh J. preceding this in Alberta and the decision of the Appellate Division in this case have doubtless ere this been relied upon in cases which never reached the appellate courts, much less here, should therefore be followed as well as the case of *Roff* v. *Krecker* (4), above referred to.

(1) 8 Ch. App. 399.
(2) 4 O.R. 701.
(3) 8 Sask. L.R. 161.
(4) 8 Man. R. 230.

Moffatt v. *Coulson* (1), is also an outstanding decision upon an Act similar to this, when stripped of any reference to *actual notice* or *notice* in the statute.

That was a court of common law not afflicted with the equity jurisdiction and therefore expressing that what the statute said must be held to govern.

The decision in the case of *Marthinson* v. *Patterson* (2), raised so many points and involved so many questions that I omitted reading it through before I had written the foregoing, assuming that it might not throw much light upon the question presented to us herein. I find, however, that the evidence clearly disclosed that the second mortgagee there had full knowledge of the existence of a prior mortgage and that if the several courts hearing that case had taken the view of the law that appellant asks this court to take and uphold the learned trial judge, the said several courts hearing that case then could easily have saved themselves a lot of trouble by ruling that such an objection was fatal.

The first court of appeal from the learned trial judge, however, could not, but ruled distinctly that they were bound by the case of *Moffatt* v. *Coulson* (1), to hold otherwise.

That court was composed of the late Chief Justice Armour and the then Mr. Justice Falconbridge, later on promoted to the Chief Justiceship of said court.

True the judgment was reversed in appeal, but again, not on the ground taken by appellant herein that the knowledge by the second mortgagee of the first mortgage was such as to render him fraudulent and not acting in good faith and his security thereby voided. They need not have worried over the manifold intricacies of the case if such had been their view.

I submit, that such being the case, we must assume this as some of them expressly declare against it being a correct view.

We have thus a body of Ontario judges, well conversant with the law, evidently against appellant's contention herein, and, I may be permitted to say, we of Ontario have long been proud of such judges.

(1) 19 U.C.Q.B. 341. (2) 20 O.R. 720.

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The action of Mr. Justice Osler referring to another learned judge who had passed an opinion on facts arising under former legislation, repealed by said 20 Vict., c. 5, is just what a judge might do out of deference to argument of counsel, but Mr. Justice Osler never indorsed such a contention as set up herein.

I was not aware until to-day (when it occurred to me while tracing up the North West legislation, and I then verified it as I point out above) that the Act in question there was taken from Ontario legislation so far back as 1877. I have traced it back beyond that date to the Consolidated Statutes of Upper Canada and that really shews it was presented to the several judicial authorities cited as it remained in the essential feature in question herein to 20 Vict. a period antedating the case of *Moffat* v. *Coulson* (1),

That fact renders the judicial opinions from cases there decided of great weight, and that obviously against appellant's contention.

It certainly is most remarkable that such a contention as set up by appellant upon such phraseology as that used in the legislation in question has not succeeded in being upheld after sixty-five years of opportunity.

Moreover I find that the ultimate judgment of the Ontario Court of Appeal, in *Marthinson* v. *Patterson* (2), when reversing the Divisional Court judgment of Armour C. J. and Falconbridge J. rested their judgment finally upon the fact that the second mortgagee had taken possession of the goods before the first mortgagee interfered and hence as between two manifestly defective for other reasons than knowledge by the second mortgagee of the existence of the first (but including that considered of no consequence) was entitled to succeed and the judgment of Mr. Justice Street was restored.

That reason is open clearly to the respondent herein who had taken possession of the goods in question long before the appellant herein moved, and, as a sequel thereto, issued the distraint warrant above referred to.

It is quite clear that, in *Marthinson* v. *Patterson* (2), the entire number of the judges in Ontario (including the late Mr. Justice Street, one of the best lawyers we ever had in Ontario on the bench) and the said Divisional Court

(1) 19 U.C.Q.B. 341. (2) 20 O.R. 720.

and the Court of Appeal have decidedly refused to accept, in such like circumstances as presented herein, the contention of the present appellant.

The legislation in question therein was substantially the same as we have to pass upon herein and, in the essential features in question, almost the exact wording as taken from that sixty-five year old statute.

The reversal of such jurisprudence would entail the like consequences in Ontario to that I have already pointed out in three of the prairie provinces.

For the foregoing reasons I am of the opinion that this appeal should be dismissed with costs.

MIGNAULT J. (dissenting).—The question with which we are concerned in this case is whether the respondent, when he purchased from one Cline some live-stock and farm machinery, was a purchaser "in good faith for valuable consideration" within the meaning of s. 18 of c. 151 of the Revised Statutes of Alberta, 1922. That the respondent gave valuable consideration, indeed full value, for the goods was found by the learned trial judge and is admitted by the appellant. The only controversy is whether he was also "in good faith."

It would be pretentious, and it might be futile, to attempt dogmatically to define "good faith." Some things are better understood than they can be adequately expressed. There is moreover the added consideration that the question is not one which should be approached in any dogmatic spirit. For our conceptions of good faith are not the *criteria* we should follow, but rather should we seek to discover what was in the mind of the legislature when it protected, against the assertion of a non-registered right, "subsequent purchasers and mortgagees in good faith for valuable consideration."

There is no controversy as to the facts. Cline had previously granted to the appellant a chattel mortgage affecting the goods, and he so informed the respondent. This mortgage had been registered but the appellant had subsequently failed to file a renewal statement in the office of the registration clerk of the district where the property was situate as required by the statute. Under these circumstances, the respondent agreed to purchase the chattels for a price representing their full value, but only after he

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had caused a search to be made at the registry office and had ascertained that no renewal statement had been filed.

From these facts should we conclude that the respondent was a purchaser in good faith, for it is admitted that he was a purchaser for valuable consideration?

The learned Chief Justice of the Trial Division (who tried the case) expressly excluded any fraud on the part of the respondent. He said:—

> I am bound to say I am not able to go so far as to say that Munro entered into the bargain with Cline collusively with the object of protecting the mortgagor. He paid the full value of the goods; he knew of the mortgagee's claim, but he considered he was entitled as a matter of law to rely upon the failure of the mortgagee to register the renewal and that he was under no obligation to concern himself as to whether the bank was paid or not.

He added, however, and on this the appellant relies:

> I am of the opinion that the purchaser here cannot successfully maintain his claim for the goods, when he had reason to believe that the obvious result would be to defeat the claim of the bank if Cline was dishonest.

In terms this is not a finding that the respondent was not a purchaser in good faith, although it may be a possible inference from the remarks of the learned Chief Justice. Certainly all idea of collusion with Cline must be dismissed from our minds for the learned judge himself rejected it.

The Chief Justice relied on the views expressed by the majority of this court in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (1). That case is, however, entirely distinguishable from the one under consideration, the circumstances were different, and there was no determination by the court of the point with which we now have to deal. I may add that I see no reason to depart from the view I personally expressed as to the law, while differing on its application to the facts from the other members of the court, except Mr. Justice Brodeur.

I do not construe the finding of the learned trial judge as meaning more than that Munro, who was aware of the unregistered chattel mortgage, had reason to believe that if Cline did not pay the bank out of the purchase monies, the latter would be unable to assert its mortgage against the goods and its claim would be defeated. This however is the penalty of non-registration or of non-renewal of

(1) 63 Can. S.C.R. 482.

registration where the subsequent purchaser has paid a valuable consideration for the goods and has purchased them in good faith.

If good faith within the meaning of the statute is excluded by knowledge of the non-registered chattel mortgage, however adequate may be the price which the subsequent purchaser has paid, then the statute will apply only where the purchaser was ignorant of the chattel mortgage, and mere notice of the incumbrance will be equivalent to its registration.

I have been unable so to construe this statute. The historical development of the law as to chattel mortgages and liens to which I referred in *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (1), shews that the legislature intended to depart from the equitable doctrines with respect to the effect of notice on rights acquired by subsequent purchasers for valuable consideration. Thus in Ordinance no. 8 of the North West Territories for 1889, the language was "*bona fide* purchaser *without notice.*" This ordinance was repealed by Ordinance no. 39 of 1897, and the words " without notice " were dropped, the expressions used in sections 1 and 3, and which in substance have been repeated in subsequent enactments, being

> any purchaser or mortgagee of or from the buyer or bailee in good faith for valuable consideration.

With regard to land, there is an express provision in the Land Titles Act (R.S.A., 1922, c. 133, s. 175) that

> knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

This enactment *in pari materia* shews what is the policy of the legislature when it requires registration of titles or deeds conferring ownership or creating liens. It is not bad faith, within the intendment of the statute, to rely on such a statute and to purchase goods under its protection. Here it is inconceivable that the respondent would have paid full value for the live-stock and farm machinery had he not considered that he could safely rely on the protection of the statute. I certainly do not wish to say that only persons ignorant of prior unregistered rights can depend on the statute; as a rule they do not require the statute for their protection. And I think the intention clearly was to put an end to the controversies to

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which the equitable doctrines of notice and constructive notice had given rise.

As I observed in the *Lanston Monotype Machine Co. Case* (1) in three provinces, to which should now be added the province of Alberta, the law appears settled in the sense that mere knowledge of a prior unregistered right does not deprive a purchaser of the protection of the statute where an adequate consideration has been paid for the goods, and I would be extremely reluctant to overrule the long standing decisions by which the statutes have been so construed. It is more important that the policy of the law should be carried out, than that a negligent lien owner should be saved from the consequences of his own negligence. I may perhaps add that if I have misconceived the policy of the registration law, the last word rests with the legislature which can place its meaning beyond the possibility of further question.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*
Solicitors for the respondent: *Burns & Mavor.*