Supreme Court of Canada
Lanston Monotype Machine Company v. Northern Publishing Co., (1922) 63 SCR 482
Date: 1922-03-29

Lanston Monotype Machine Company (Plaintiff). Appellant;

and

Northern Publishing Company (Defendant) Respondent.

1922: February. 13, 14; 1922: March 29.

Present: Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale of goods—Conditional sale—Subsequent purchaser—"Purchaser in good faith"—"Act respecting lien notes"—R.S. Sask. (1909) c. 14, s. 1.

The appellant company sold to the Phoenix Publishing Company two machines subject to the condition that the title of the property would remain with the appellant until full payment of the purchase price, with the right to re-take possession on default of payment. Later, the Phoenix Company assigned for valuable consideration to A. B. representing the respondent company "all (its) rights, title and interest" in these two machines. The agreement of sale was not registered; but A. B. was aware of the above mentioned conditional sale. Default having been made on the payment of the purchase price, an action was brought by the appellant to recover from the respondent possession of the two machines.

Held, Brodeur and Mignault JJ. dissenting, that A. B. acquired title to the two machines subject to satisfying the appellant's "lien" thereon and was not "a purchaser in good faith" within section 1 of ch. 145 of the Revised Statutes of Saskatchewan, and that the respondent was therefore not entitled to rely on the protection of that section.

Judgment of the Court of Appeal ([1921] 2 W.W.R. 971) reversed, Brodeur and Mignault JJ. dissenting.

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APPEAL from the judgment of the Court of Appeal for Saskatchewan[1], affirming the judgment of Brown C.J. at the trial[2] and dismissing the appellants' action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Shapley and Huycke for the appellant.

Gregory K.C. and Hodges for the respondent.

[1] [1921] 2 W.W.R. 971.
[2] [1920] 3 W.W.R. 892.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I fully concur, I would allow this appeal with costs throughout.

IDINGTON J.—The question raised herein by this appeal is whether or not the respondent can be held to have been a purchaser of the property in question in good faith, for valuable consideration as against the appellant.

The answer depends upon the construction to be given section 2, sub-section (1) of the "Conditional Sales Act" of Saskatchewan, which reads as follows:

> 2 (1) Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished.

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The respondent, through its agent who transacted all the relevant parts of the business of the respondent, had actual notice of the appellant having agreed to sell the machine in question, and accessories thereto, to the Phœnix Publishing Company, Limited, subject to appellant's right to re-take possession on default of payment of the price, or any part thereof, or other breach of the conditions of intended sale.

That company, subject to such conditions, sold the rights it had in the machine to one A.B., who, in turn, sold to the Northern Publishing Company, Limited.

The Phœnix Publishing Company, Limited, having got into financial difficulties in the course of their business as publishers of a newspaper and printing business akin thereto, said A.B., acting as solicitor for others, investigated the financial and other conditions of the company with the object of buying for his clients the entire business and assets of said company. In the course of doing so he was given a list of the machines it was possessed of and of much other property acquired on course of said business.

In that list of machines there were set forth the respective liens, against each, and its accessories, including a lien of $4,500.00 on the machine in question in favour of appellant.

The learned trial judge refers thereto, and to the resultant bargain, as follows:—

> The evidence in this case discloses the fact that when Mr. A. B. first visited Saskatoon in May and consulted with the parties representing the Phœnix Publishing Co. that he was given a statement indicating the liabilities of the Phœnix Publishing Co. and more particularly indicating the parties who had Hens against the plant or any parts of it, including the lien of the plaintiff company. It is also clear from the evidence that at that time the purchase price of $15,000.00 for the plant was named, the price that was subsequently entered in the formal agreement and paid. So that I think it is a fair inference to

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> make that in fixing the price of $15,000.00 for this plant, the vendors, the Phoenix Publishing Co. or the parties representing them, took into consideration all the liens which were detailed in the statement, including the plaintiff's lien. So that to some extent, at least, the lien was a factor in the deal.

Mr. Justice Lamont, in his judgment in the Court of Appeal, says:—

"On June 17th, 1918, A. B., acting for the persons who subsequently became incorporated as the defendant company, purchased certain assets of the Phœnix Publishing Company for $15,000. These assets were valued at $40,000, but against them there were liens amounting to $23,355."

A. B., by way of verifying this basis of the bargain he was trying to make, and did make, searched the office where liens might be registered and found the appellant had not registered any lien.

It seems to me quite clear that when the bargain was made between him and the company on the above basis he was not buying the actual goods of any of those lien holders, free from the several respective liens thereon, but the interest of the company therein subject thereto, and that he thoroughly understood the nature and purpose of the following resolution, and especially the reference therein to liens, passed by the shareholders of the company:—

> Resolved that resolution of the directors with respect to the sale of the plant, equipment, accessories and franchises of the Phœnix Publishing Company, Limited, to A. B. be and is hereby confirmed, provided that the said A. B. make arrangements

re liens held on the plant, including the Hoe press, papers held in trust for the John Martin Paper Company, as shall be satisfactory to the directors, and such arrangements regarding wages and rent, as shall be mutually satisfactory to the employees, the landlord and the directors and that the directors be and are hereby authorized to conclude the sale of the equipment, plant, accessories and franchises, etc., of the company, except current accounts for advertising purposes.

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He was at the meeting "in and out" as he expresses it, and received a copy of that resolution.

Indeed the respondent company was promoted, and its incorporation obtained, by him, and he was one of the provisional directors and later its president, when the deal now in question was carried out.

The special reference to the hen on the Hoe Press, in said resolution, arose by reason of some of those concerned in the Phœnix Company having become personally liable.

The following evidence of Mr. Lynd is illuminating as he was president of the Phœnix Company at the time in question:

Q. Had that been discussed with Mr. A. B. at that time?

A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens.

Q. What arrangements was Mr. A. B. to make regarding the liens?

Mr. Mackenzie: He said there was none arrived at.

A. As I understood it at the time, Mr. A. B. was to make his own arrangements regarding the liens with the exception of the Hoe press, which he actually agreed to take care of.

Q. What do you mean by "his own arrangements?"

A. My understanding of it at that time was if he got the machinery he would pay the liens, or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding.

Q. If he kept the machines he would pay the liens?

A. Or make settlement with the lien holders.

* * *

Q. What were the assets of the Phœnix Publishing Co. at that time?

A. We estimated that the whole thing was worth, outside of the mailing list, which at that time was not worth very much, we estimated the plant to be worth $40,000.

Q. And did the Northern Publishing Co. assume any of the general accounts at all, any of the general liabilities?

A. No, I don't think so. I don't think they assumed any liabilities.

Q. If the assets were worth $40,000, can you tell us why the sale was made for $15,000?

A. The question of liens was taken into consideration, the liens on the plant.

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Q. What liens?

A. As far as the Phœnix Publishing Co. were concerned they took into consideration all the liens that were on the plant at arriving at the figures.

* * *

Q. Mr. A. B. says that the only arrangement was that the directors were to be relieved from liability.

A. I think it went a little further. I think the Hoe press was to be taken care of, so that the directors would be relieved from liability.

Q. And what about the other liens?

A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting, would decide whether they would keep the rest of the plant, because there was some question as to whether they needed it at that time.

His Lordship: There was nothing as to relieving your company from liability?

A. No, my lord. We were not relieved in any way.

Q. Were you as a director, or you, with other directors, asked to recoup the Northern Publishing Co. for any moneys paid on these liens?

A. No. Not so far as I was concerned.

* * *

His Lordship: Would it be correct to put it this way that as far as the liens were concerned, you had given Mr. A. B. full notice of the liens so that there was no come-back to your company?

A. He knew about the liens.

His Lordship: But he was to take his chances—

A. That was my understanding of it. If he wanted the machinery he would take care of the liens, and make settlement in some way, and if not, he would try and arrange to send it back. That was my understanding.

His Lordship: And if he could get the machinery without having to pay for it so much the better?

A. We didn't discuss that. As a matter of fact the Lanston Monotype were about the best creditors the Phœnix Co. ever had, and it was my impression when the Northern Publishing Co. refused to pay they were not quite keeping faith with us.

In the result that followed all the liens except that of the appellant were recognized and dealt with in the spirit which this evidence indicates was expected.

I repeat it seems to me abundantly clear that the purchase by respondent was made on the basis of $40,000 being about the fair value of that being sold, and if all the lien holders could be settled with on a fair basis the purchase price might have been fixed at that sum.

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Evidently some of the properties owned were possibly in value not quite up to the respective amount of the liens thereof. Hence that phase of the bargain was left open and when it came to a formal assignment the consideration was named therein as $15,000.00.

I am quite unable to believe that such sum was intended to cover the actual value of the plant, or any part thereof, subject to liens, as if free from liens; but on the contrary that it was the sum named for the residue of what passed thereby and the possible interest of the Phœnix Company in all the plant covered by liens.

And if so I fail to see wherein this case can fall within any of the several cases relied upon which trace back to the case of *Moffatt* v. *Coulson*[3].

In that case the learned Chief Justice of that court in his opinion laid down as a test the following:

> I think he should be so held for there seems to me no reason to doubt upon the evidence that he paid in good faith, in this sense that he paid a *fair consideration for the horse which is in question* and did not buy him collusively in order to assist the mortgagors in placing him.

[3] [1859] 19 U.C.Q.B. 341.

The words I have italicized in order to call attention to the gist of what was in the mind of the Chief Justice as a test, are not fitted to anything analogous thereto in what we find in above quoted evidence in this case by way of fact to pass upon.

Evidently in that and each of the cases following it and relied upon there was something in way of a basis of valuable consideration in that sense so given, whereas herein if respondent is to have its way it gets a four thousand five hundred dollar machine and its accessories for nothing but the fair value of the chances of defrauding the appellant by invoking the

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words of the statute which do not fit the facts and the law as laid down in the case upon which *Ferrie* v. *Meikle*[4], seems to have been supposed to be founded.

Even if the mode of thought of that far off day in administering the common law is applicable, I hold in this case that on the facts the respondent has failed to establish a case within the meaning thereof and hence the appeal should be allowed.

Indeed all that the assignment by the Phœnix Company pretends to convey is the interest of that company in the goods in question and despite the recital I think, reading the instrument as a whole, that is all that was intended to be conveyed and hence no foundation for respondent's pretensions herein.

This case does not at all need a decision upon the many varying views that may be presented of the above quoted statute for there is not enough of common honesty at the basis of the pretensions set up on the facts to bring the claim so made as within the term "good faith."

I, however, lest from the foregoing I should be thought to be agreeing in the law as presented by the court below, do not hesitate to say that I cannot agree with the view of the law as expressed in the decision of the case of *Ferrie* v. *Meikle*[4].

I am of the opinion that in any jurisdiction where the common law and equity doctrines are to be administered by the same court, and when in case of conflict the equitable doctrines are to prevail, that ever since *Le Neve* v. *Le Neve*[5], the doctrine therein and in the

[4] [1915] 8 Sask. L.R. 161.
[4] [1915] 8 Sask. L.R. 161.
[5] [1748] 3 Atk. 647; 26 E.R. 1172.

numerous decisions since and founded thereon must be applied in construing a statute such as that in question herein.

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Apply that to this and the facts herein, and then the respondent's contention seems hopeless.

I am, however, confining my opinion to the case of actual notice which is not to be confounded with constructive notice.

The discarding of the former seems so like fraud as to be beyond good faith but the application of constructive notice does not seem to me as necessarily so, within the range of the ordinary intelligence of mankind.

Yet I am not to be taken as in any way discarding or treating with contempt the doctrine of constructive notice. I merely desire to indicate that difference between actual and constructive notice which exists or might exist in applying such a statute as that before us.

I think this appeal should be allowed with costs throughout and judgment given as prayed for by the appellant.

DUFF J.—By a contract dated the 11th March, 1915, the appellant company agreed with the Phœnix Publishing Company, Ltd., of Saskatoon

> to sell for the sum of $4,120.80 to the Phœnix Publishing Company, Ltd., * * * two of its casting machines

and certain accessories. The Phœnix Company agreed to buy the property specified, to pay the purchase price in specified instalments for which promissory notes were to be given. The contract further provided that a mortgage should be given to secure the deferred payments and until a mortgage was given, (an event which never happened), or the purchase money was fully paid, the title of the property was

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to remain with the appellant company who, in case of default, was to have the right to take immediate possession. It was further agreed that the Phœnix Company

> shall not assign this contract nor underlet or subhire the said property without the written consent

of the appellant company. On the 17th of June, 1918, the Phœnix Company executed a deed to which the other party was Mr. A. B., by which the company professed to assign "all the right, title and interest" in and to certain goods and chattels including the property which was the subject of the previous purchase from the appellant company. This document contained covenants for the title and covenants for further assurance.

Default was made in respect of the payments of the purchase money due under the contract between the appellant company and the Phœnix Company. The respondent company which had received possession of the goods from the Phœnix Company sets up a title to retain them notwithstanding the terms of the last mentioned contract by reason of the provisions of sec. 1 of ch. 145 of the R. S. Sask. of 1909 as a purchaser of the property "in good faith for valuable consideration."

The Court of Appeal held, being constrained as it thought by a judgment of the full court of Saskatchewan delivered in *Ferrie* v. *Meikle*[6], that the respondent company was a purchaser in good faith within the meaning of the statute and consequently that its rights were not affected by the agreement between the appellant company and the Phœnix Company. The learned judges who concurred in this judgment would

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have been disposed, as appears from the reasons of Mr. Justice Lamont, to take the view that when a purchaser relies upon this provision of the statute it is in every case a question of fact to be decided upon 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. They gave judgment in favour of the respondent company in deference, however, to the opinion expressed in a previous decision that in order to exclude a purchaser from the benefit of the statute it must appear that the sale was a collusive one in the sense that it was simulated with the object of protecting the possessor of the property from proceedings by the holder of the lien. I shall give my reasons presently for thinking that the view upon which I conclude the Court of Appeal would have acted if the question had been *res nova* is preferable to that to which it felt itself constrained to give effect because of the previous decision. Before proceeding to that question it is convenient to point out that there are excellent reasons for rejecting the hypothesis that the gentlemen concerned in the transaction in question were actuated by any dishonest intention— an hypothesis which one is naturally slow to adopt.

[6] 8 Sask. L.R. 161.

I am disposed to take the view that the parties never really intended to do anything more than to place the respondent company in the shoes of the Phœnix Company in relation to its agreement with the appellant company; in other words that the transfer was subject to the appellant company's rights. The bill of sale does in truth, as I have said, contain covenants for title and further assurance; but the learned trial judge has found as a fact that the arrangement between the parties was that the Phœnix

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Company was not to be responsible as upon a warranty of title in the event of the appellant company enforcing its rights. It is quite true that the learned judge also finds that the respondent company was to be under no obligation to indemnify the Phœnix Company in respect of the appellant company's claim. This was probably regarded as a matter of no consequence; the Phœnix Company being destitute of assets, would be a most unlikely object of legal pursuit.

I gather that if the question had arisen as between the parties to the bill of sale the learned trial judge would have rectified the instrument; but that is of no importance because as between the appellant company and the respondent company for the purpose of determining any question arising under the statute touching the respondent company's status as a *bona fide* purchaser we are concerned only with the actual agreement, that is to say, with the intention of the parties and for that purpose we are entitled and bound to look at all the facts including oral expressions as well as writings. I am disposed to think that in essence the transaction was a transfer subject to the appellant company's rights under its agreement; and in that view it is quite clear that the statute has no application, the respondent company being a purchaser only of such rights as the Phœnix Company was entitled to transfer under its agreement with the appellant company, was not a purchaser of the property within the meaning of the statute. As against the appellant company, the Phœnix Company has possession and a right to retain possession until disturbed by the appellant company under the terms of the agreement and the right to acquire a title upon satisfying the conditions of the agreement. It could no doubt and did transfer the actual possession of the

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goods but its right of possession under the agreement(like all other rights under it) it was disabled by the terms of the agreement itself from transferring. The respondent company could not even become a bailee consistently with the provisions of the Phœnix Company's

contract. On this hypothesis then the defence invoked by the respondent company patently fails. The alternative hypothesis is that the respondent company intended to buy and the Phœnix Company intended to sell upon the terms set forth in the bill of sale, that is to say that the parties intended that the respondent company should be placed in possession of the property as owner free from the claim of the appellant company. In considering that hypothesis the finding of the trial judge becomes important that the claim of the appellant company against the Phœnix Company was taken into account in fixing the price. It is important also to note that the effect of the transaction as a whole between the Phœnix Company and the appellant company was to denude the Phœnix Company of its assets. The purpose and intent of the transaction therefore upon this hypothesis was (notwithstanding the fact that the Phœnix Company had no title but only a bare possession coupled with a right of possession which it was not entitled to transfer) for a consideration altogether disproportionate to the value of the property, to place the respondent company in possession as owner. The respondent relied upon the statute no doubt and the judicial interpretation of the statute for protection against the appellant company's claim. Such conduct on part of the Phœnix Company would be an unlawful act in the sense that it would be a breach of contract and also in the sense that it would be a tort; and as the thing was done behind the back of the appellant company it was, if this hypo-

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thesis furnishes the true interpretation of that conduct, a flagrant breach of faith and the participation of the respondent company in these things was essential to effectuate the intention of the parties. It is quite true that the respondent company's agent declares that he had never seen the Phœnix Company's agreement with the appellant company. The fact that he failed to examine the agreement could not lend a more favourable colour to what occurred.

Can it be said that a litigant having purchased goods under such circumstances has brought himself within the statutory description of "purchaser in good faith for valuable consideration"? If these words are to receive the interpretation which would everywhere be ascribed to them according to common usage, the answer is of course in the negative. Is there any good ground then for giving some colour to the meaning of these very plain words which, in such circumstances, would enable a purchaser to establish successfully in a court of law that although he knowingly participated in a dishonest dealing he was still in

respect of that dealing a person who has acted in good faith within the meaning of this enactment?

I think the earlier decision of the Court of Saskatchewan cannot be sustained. It rests upon a Manitoba decision, *Roff v. Krecker*[7], placing a construction upon a certain provision of a Chattel Mortgage Act in force in Manitoba which in turn rested upon two decisions, one a decision of the Upper Canada Court of Queen's Bench, *Moffatt* v. *Colson*[8], the other a decision, or I should rather say some language of Lord Justice James in *Vane* v. *Vane*[9]. With great respect I am unable to agree that either the

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Upper Canada decision or the language of Lord Justice James has any relevancy whatever to the question now before us which concerns the meaning of certain words in a "Conditional Sales Act" in force in Saskatchewan. The courts in both cases and indeed the same may be said of the Manitoba decision as well, were concerned with the construction of language found in contexts entirely different and the two earlier pronouncements upon which the Manitoba court proceeded are explicitly based upon considerations quite foreign to the interpretation of those words in the context in which they now appear. The judgment of Robinson C.J. in *Moffatt* v. *Colson*[10] shews that the purchaser was in fact acting in good faith in the sense that he paid full value for the property he bought; that he had no actual knowledge of the chattel mortgage which the mortgagee was seeking to enforce against him, but only a vague intimation from a third person that the stock he was buying was mortgaged stock; and in fact the description in the mortgage was quite insufficient to indentify the stock purchased as part of the property comprised in it and it was held in these circumstances that the mortagee must fail. The only relevant observation is the observation of the learned Chief Justice that the transaction was a transaction in good faith in the sense that it was not entered into collusively with the object of protecting the mortgagor but that it was a purchase for fair consideration. Virtually in that case it was found that there was in fact no dishonesty on the part of the purchaser. In *Vane* v. *Vane*[11] the question which Lord Justice James was considering at p. 399 in the observations relied upon in the Manitoba decision was the meaning of the phrase *bona fide* in this collocation:

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[7] [1892] 8 Man. R. 230.
[8] 19 U.C.Q.B. 341.
[9] [1872] 8 Ch. App. 383 at p. 399.
[10] 19 U.C.Q.B. 341.
[11] 8 Ch. App. 383.

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> *bona fide* purchaser for valuable consideration who at the time of the purchase did not know and had no reason to believe that such a fraud had been committed,

and his observations have reference solely to that question. They can afford no guidance to the construction of the words we are now called upon to construe.

It may very well be argued that both the Manitoba decisions and the Upper Canada decision can be adduced in support of a contention that for the purpose of applying the phrase purchaser in good faith when found in a modern statute one is not to govern one's self by the rules established in the Court of Chancery in relation to notice and the effect of notice. I do not in the least dissent from that; indeed, I think it is most important in construing modern statutes where questions arise as to the application of such expressions, to remember that good faith is a matter of fact and the existence or non-existence of it must be decided as a question of fact. It should be observed further that the Manitoba decision was a decision upon not a conditional sales Act but upon a statute dealing with a different subject; and it is always dangerous, as Sir George Jessel in *Hack* v. *London Provident Building Society*[12] pointed out, to construe the words of one statute by reference to the interpretation which has been placed upon words bearing a general similarity to them in another statute dealing with a different subject matter. It would, I think, be an insupportable presumption that the legislature of Saskatchewan in enacting the "Conditional Sales Act" was taking into account the judicial deliverances we have just been discussing.

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One further point remains. In 1897 a change took place in the phraseology of the "Conditional Sales Act" of the North West Territories. I think this change is not without significance, I think it lends point to the observation made above with regard to the equitable doctrine of notice. The legislature has substituted the condition of the existence of good faith for the condition of want of notice, but I am unable to see that this alteration throws any light upon the question we are now called upon to decide.

The appeal should be allowed.

ANGLIN J.—With profound respect for the learned trial judge and the Court of Appeal for Saskatchewan, I am disposed to think that when the true nature of the transaction which

[12] [1883] 23 Ch. D. 103, at p. 112.

took place between the Phœnix Publishing Company and A. B., representing the Northern Publishing Co., is appreciated, the latter company is not entitled to the protection of s. 1 of c. 145 of the Revised Statutes of Saskatchewan, 1909, as "a purchaser in good faith for valuable consideration" of the goods in question in this action, against the assertion of a "right of property" therein made by the plaintiff company. The plaintiff's "right of property" is for convenience spoken of in the record as its lien.

That A. B. bought from the Phœnix Publishing Company as a trustee for the persons who were then incorporating the Northern Publishing Company and with the intent of acquiring the property for that company admits of no doubt. The Northern Publishing Company can have no higher right to the protection of the statute invoked than was acquired by A. B.

The learned trial judge found that, while A. B. gave no undertaking to pay off liens on the Phoenix Company's plant (other than that on the Hoe Press)

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he took the plant subject to the chance whether the liens, including that of the plaintiff, (of the claims for which he was fully apprised) would or could be asserted in respect of it and without any right to be protected against them by the Phœnix Company. But in my opinion the evidence goes much farther. From the testimony of Mr. Lynn, the President of the Phœnix Company, who is accredited by the learned trial judge, I extract these passages:

> Q. Was there any arrangement made between the Phœnix Publishing Co. regarding liens on the plant?
>
> A. No. I would not say there was any arrangement made with him, but the question of liens was discussed.
>
> Q. Yes?
>
> A. I know this, that it was mentioned at that time that if Mr. A. B.—if they—if Mr. A. B. didn't want to take the machinery he would not have to pay for it, and there was no real arrangement made only in regard to the Hoe Press. The liens were mentioned all right.
>
> Q. There was a minute of the shareholders. Just read that.
>
> A. I might say prior to this that the directors had already met and gone over it with Mr. A. B., and we called a meeting of the shareholders for the purpose of having our action before the shareholders insisting that this provision should be put in there.
>
> Q. What provision?

A. Provided that the said A. B. make arrangements *re* liens held on the plant, including the Hoe Press, papers held in trust for the John Martin Paper Company, as shall be satisfactory to the directors.

Q. Had that been discussed with Mr. A. B. at that time?

A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens.

Q. What arrangement was Mr. A. B. to make regarding the liens?

Mr. Mackenzie: He said there was none arrived at.

A. As I understood it at the time, Mr. A. B. was to make his own arrangements regarding the liens with the exception of the Hoe Press, which he actually agreed to take care of.

Q. What do you mean by "his own arrangements?"

A. My understanding of it at that time was if he got the machinery he would pay the liens or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding.

Q. If he kept the machines he would pay the liens?

A. Or make settlement with the lien holders.

* * *

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Q. If the assets were worth $40,000, can you tell us why the sale was made for $15,000?

A. The question of liens was taken into consideration, the liens on the plant

Q. What liens?

A. As far as the Phœnix Publishing Company were concerned, they took into consideration all the liens that were on the plant in arriving at the figures.

* * *

Q. And what about the other liens?

A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting would decide, whether they would keep the rest of the plant, because there was some question as to whether they needed it at that time.

His Lordship: There was nothing as to relieving your company from liability?

A. No, my lord. We were not relieved in any way.

* * *

Q. In any event, as far as the liens were concerned, he was to deal with the lien holders and do the best he could?

A. Well, yes.

Q. And you say there was no arrangement outside of the written agreement?

A. Between the Phœnix Publishing Co. and A.B.?

Q. Yes.

A No. No definite arrangement.

Q. No arrangement?

A. No.

His Lordship: Except as to the Hoe machine?

A. Yes. And I may say further, that the shareholders understood that the lien was assumed. Whether Mr. A. B. was there or not I do not know. I know the directors got the impression that any machinery that was kept by the company by him would be taken care of.

Q. That was the expectation?

A. I think it was more than that; That was the understanding we got of it."

In A.B.'s evidence I find this corroboration:—

"Q. You knew when you entered into that agreement you had to pay all these liens in order to get the rest of the plant, didn't you?

A. There was a question if we would need the rest of it.

Q. Then you would not get it?

A. We would not need it.

Q. And the vendors would get back their plant, wouldn't they?

A. I presume so.

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Q. You were buying the whole plant, including the plant subject to liens, for $15,000?

A. We bought everything that was included in that schedule for $15,000, and I was particularly instructed that we were not to assume any of those liens, and I had a partial understanding with regard to the Hoe press.

Q And, notwithstanding that, your company paid liens to the extent of $15,000?

A. It might have been that another plant would be necessary.

Q. Did you ever request the Phœnix Company or did your company request the Phœnix Co. to refund any part of that $15,000?

A. I didn't.

Q. Do you know if your company did? That is, the defendant company?

A. Not that I know of."

Moreover in the bill of sale itself from the Phœnix Company to A. B. although the recital and the covenants are consistent with an absolute sale of the entire plant, the operative words of sale and transfer are restricted to

all the right, title and interest of the bargainor in and to all the goods, etc.

Whatever might be the situation in a controversy between the parties to this bill of sale, I am satisfied that as between the litigants now before us we should ascertain and be guided by the true nature of the transaction between the Phoenix Company and A. B. as disclosed by the whole of the evidence.

While I have little doubt that A. B. when taking the transfer from the Phœnix Company had the intention of cutting out the unrecorded claim of the plaintiff by invoking the statute, I incline to think he failed to put himself in a position to effectuate that purpose.

Had the transaction in fact been an absolute sale of the goods here in question to A. B. I should have felt called upon to consider very seriously whether what he did was not such an attempt to use the

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statute to accomplish a fraud on the plaintiff as this court, which is a court of equity, should strain its resources to frustrate. But the real bargain between A. B. and the Phoenix Company as to the plant in possession of the latter covered by liens (other than the Hoe Press as to which he agreed to protect his vendor) was that he would be at liberty to take it or not, in whole or in part, as he should find expedient; that in respect of whatever he took

he would pay off, or otherwise arrange with, the lien-holders; and that what he did not take in that way, as he himself says, the vendors (*i.e.*, the lien-holders) would get back. That being his position as to the goods now in question he was in my opinion not a purchaser of them in good faith for valuable consideration in any sense which would entitle him to the protection of s. 1 of c. 145 of the Revised Statutes of Saskatchewan.

I would therefore allow this appeal with costs throughout and direct judgment for the plaintiff for possession of the goods described in the statement of claim. There should also be judgment for $5 as nominal damages for wrongful detention thereof unless the plaintiff prefers to take a reference to ascertain what actual damages it has sustained. Should it do so, the costs of the reference and further directions should be reserved to be disposed of by the Supreme Court of Saskatchewan.

BRODEUR J. (dissenting).—If it were not for the decisions which have been quoted, I would have been of the view that the Northern Publishing Company and A. B. could not prevent the Lanston Monotype Company from taking possession of the goods in question.

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But the construction put on the statute by the courts in Ontario, in Manitoba and in England gives to the words "buyer in good faith for valuable consideration" a meaning which precludes me from giving to these words the construction which otherwise I would have put on them. The purchasers knew that the appellant company had a lien on these goods when they bought them from the Phœnix Company. They had notice that the Phœnix Company did not own them. However the jurisprudence seems to be well established that a purchaser in good faith means a real purchaser as distinguished from a collusive one, that the knowledge of an unregistered lien would not constitute the purchaser in bad faith. *Moffatt* v. *Coulson*[13]; *Vane* v. *Vane*[14]; *Roff* v. *Krecher*[15]; *Ferry* v. *Meikle*[16].

I may add that this construction should not affect the well settled doctrine and jurisprudence in Quebec concerning art. 2251 of the Civil Code. *Dessert* v. *Robidoux*[17]; *Les commissaires d'Ecoles de St. Alexis* v. *Price*[18]; *Renouf* v. *Coté*[19].

For these reasons the appeal should be dismissed with costs.

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[13] 19 U.C. Q.B. 341.
[14] 8 Ch. App. 383.
[15] 8 Man. R. 230.
[16] 8 Sask. L.R. 161.
[17] [1890] 16 Q.L.R. 118.
[18] [1895] 1 Rev. de Jur. 122.
[19] [1900] 7 Rev. de Jur. 415.

MIGNAULT J. (dissenting)—The question here is whether a conditional sale of certain chattels with retention of ownership, which was not registered as required by chapter 145 of the Revised Statutes of Saskatchewan, 1909, can be set up against the respondent, the purchaser of these chattels.

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Only a brief reference to the facts is necessary. The appellant, in 1911, sold the chattels in question, a monotype machine and accessories, to one Aiken, publisher of the Phœnix newspaper in Saskatoon. Aiken disposed of these chattels (some of which had been changed by the appellant) to the Phœnix Publishing Company, Limited, which subsequently, in March, 1915, entered into a contract of purchase with the appellant, reserving to the latter the title to the property until the purchase price was fully paid. This contract of conditional sale was never registered.

In May, 1918, some parties interested in the Phœnix newspaper sought to purchase the plant and assets of the Phœnix company, and, at their request, Mr. A. B. went to Saskatoon and negotiated the proposed sale with the directors of the Phœnix Company. He obtained a statement of the assets and liabilities of the company, shewing the Hens affecting its property. There were five Hens, comprising that of the appellant, figured at $4,500. Of these liens, three were registered, those of R. Hoe and Co., (for which certain directors of the Phoenix Company were personally liable), of Canadian Linotype Co. and of Miller and Richard. The lien of Hettle Drennan Co. for $2,800.00 was apparently not registered, but Mr. A. B. says this firm was in possession and had to be settled with to get their goods. The appellant's lien, as I have said, was not registered.

A resolution was adopted by the shareholders of the Phœnix Company authorizing the directors to sell to Mr. A. B. its plant, equipment, accessories and franchises,

> provided that the said A. B. make arrangements *re* Hens held on the plant, including the Hoe Press.

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The sale price was $15,000.00. Later a formal agreement of sale was signed by the parties, no mention being made therein of any hens. It appears to have been understood that Mr. A. B. would look after the claim of R. Hoe and Co. for the Hoe press, and free the directors from any personal liability. As to the other liens, the learned trial judge found, and I fully agree with him after carefully reading the testimony, that, while it seemed to be

understood that A. B. and those for whom he purchased were to take care of the Hoe press lien and to protect the directors against any possible action that might arise out of it, there was no such understanding as to the rest of the liens. The learned trial judge added that the purchasers took the plant and assumed any chance of the possibility of the lien holders asserting their liens.

This purchase was made by Mr. A. B. on behalf of the respondent company which was immediately constituted under the Saskatchewan Company legislation, Mr. A. B. becoming its first president. A formal transfer of the plant was made to it by Mr. A. B. After taking possession, the respondent, beside the purchase price, paid approximatively $15,000.00 in discharging liens on the plant, but the appellant's claim was not settled.

The question now is whether the appellant is entitled to assert its non-registered lien against the respondent. Section 1 of chapter 145, of the revised statutes of Saskatchewan, provides as follows:

> Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions

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> or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished.

By section 2 of the same statute, it is provided that the agreement of sale shall be registered in the office of the registration clerk for chattel mortgages where the buyer or bailee resides within thirty days from the time of actual delivery of the goods.

Under section 1 the question is whether A. B. or the respondent company was a purchaser in good faith for valuable consideration. The learned trial judge, had he not considered himself bound by the authorities to which I will refer, would have thought not, and this view was shared by Mr. Justice Lamont in the Court of Appeal. I do not however think that either the ' learned trial judge or Mr. Justice Lamont considered that Mr. A. B. had acted fraudulently, and from my reading of the evidence I am quite clear that no case of fraud

was made out, and none was alleged, the statement of claim merely asserting unlawful detention. The whole point is whether A. B., having purchased these goods with notice of the appellant's lien, was a purchaser in good faith for valuable consideration, and both courts have considered that nothing in the facts of this case would take the matter out of the operation of the rule laid down in the cases to which I will refer. There is no doubt that A. B. and the respondent gave a valuable consideration for the sale, to wit the $15,000.00 which was paid in cash.

As long ago as 1860, the Ontario Court of Queen's Bench held in *Moffat* v. *Coulson*[20] that a chattel mortgage not containing a sufficient description of

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the goods is void as against subsequent purchasers in good faith, and that notice of such a mortgage to the purchaser will not affect his right. This decision is relied on because, in the Upper Canada statute there under consideration (20 Vict., Can., ch. 3), the words

> subsequent purchasers or mortgagees in good faith for valuable consideration

were defined. Chief Justice Robinson said:

> The only question is whether this defendant should be held to be a subsequent purchaser in good faith, within the meaning of the second section, in which case only would he be entitled to hold against the mortgage, in consequence of the defective description of the horses. I think he should be so held, for there seems to be no reason to doubt upon the evidence that he bought in good faith, in this sense, that he paid a fair consideration for the horse which is in question, and did not buy him collusively, in order to assist the mortgagors in placing him out of the plaintiff's reach. * * * * * * In our registry laws, the words "purchaser for valuable consideration" have never been held by courts of common law to exclude purchasers with notice of the unregistered conveyance.

In Manitoba, in 1892, the Court of Queen's Bench held in *Roff* v. *Krecker*[21] that a second chattel mortgage made in good faith, and for valuable consideration, takes priority over a prior unfiled chattel mortgage, even if the second mortgagee has actual notice of the prior mortgage. The Manitoba statute 48 Vict., ch. 35, amending a prior statute containing the words "without actual notice" which were struck out, used the expression

> purchasers or mortgagees in good faith for valuable consideration.

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[20] 19 U.C.Q.B. 341.
[21] 8 Man. R. 230.

Chief Justice Taylor relied on the English case of *Edwards* v. *Edwards*[22] decided under the English Bills of Sale Act, 17-18 Vict., ch. 36, the first section of which provided that every bill of sale should be

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registered within a certain time, otherwise it should be null and void to all intents and purposes against, among others, sheriff's officers and other persons seizing any property or effects comprised in such bill of sale, in execution of any process. Referring to this case, the learned Chief Justice said:—

> The court there held that the fact that an execution creditor was, at the time his debt was contracted, aware that his debtor had given a bill of sale did not prevent his availing himself of the objection that it had not been registered. *LeNeve* v. *LeNeve*[23] was there cited and relied on, but James L.J., said that he thought it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. Mellish L.J., agreed with him saying "we ought not to put such constructions on modern Acts of Parliament"

Further on the learned Chief Justice said:

> It seems to me that under the authorities, the plaintiff being a purchaser in good faith for valuable consideration, his having had notice of the defendant's prior but unfiled mortgage is not material, and he is entitled to the protection of the statute.

Dubuc J and Killam J. concurred in this view, the latter with some reluctance. He was however impressed by the fact that the words "without actual notice" had been omitted when the statute was amended in 1885. He expressed the hope that the legislature would restore the statute to its previous position as respects this question of notice. This however was not done, as the present Manitoba Bills of Sale and Chattel Mortgage Act, R.S.M., 1913, ch. 17, shews.

We have therefore in two provinces, Ontario and Manitoba, authoritative decisions laying down that notice of a prior bill of sale or chattel mortgage does not prevent the subsequent purchaser for a valuable consideration from being a purchaser in good faith.

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The same construction has been adopted in the province of Saskatchewan. There the court of appeal held in *Ferrie* v. *Meikle*[24] that a purchaser in good faith and for a valuable

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[22] [1876] 2 Ch. D. 291.
[23] 3 Atk. 647.
[24] 8 Sask. L.R. 161.

consideration of chattels comprised in an unregistered lien note obtains a good title thereto, even though he has notice of the existence of the lien note. The court there followed *Moffat* v. *Coulson*[25] and *Roff v. Krecken*[26].

Should we now overrule these decisions which have settled the law in three provinces of the Dominion? For my part, even were I of a contrary opinion, I would feel extreme reluctance to overrule long standing decisions which have emphasized the necessity of registration of chattel mortgages and liens on personal property. To do so would be to disturb rights acquired in the belief that these long unquestioned decisions correctly stated the law.

Moreover we find in Saskatchewan the same development of the statutory law as in Manitoba. Ordinance No. 8 of the Northwest Territories in 1889, concerning receipt-notes, hire-receipts and orders for chattels, rendered the agreement, in the absence of registration, of no effect against any mortgagee or *bona fide* purchaser *without notice.* These words "without notice" were omitted by Ordinance No. 39 of 1897, section 1 of which is in the same terms as section 1 of chapter 145 R.S. Sask. (1909), and it does not seem possibleto disregard, in the construction of the statute as it now reads, the omission of these words in the new enactment.

On this question of statutory construction I have come to the conclusion to accept the interpretation placed on the words

> purchasers or mortgagees in good faith for valuable consideration.

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It is very important that the courts should respond to the efforts made by the legislature to require the registration of bills of sale, chattel mortgages and lien notes. And, for my part, I cannot concur in a construction which would give to notice or knowledge of a prior non-registered lien the same effect, against a purchaser who has on the faith of the registry bought goods and paid therefor, as the registration required by the statute.

It is contended that Mr. A. B. bought merely such rights as the Phœnix Company had in these goods. I think he bought the goods themselves, and the trial judge so held. It follows that the respondent is entitled to rely on the protection of the statute.

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[25] 19 U.C.Q.B. 341.
[26] 8 Man. R. 230.

I would dismiss the appeal with costs.

Appeal allowed with costs.

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