CASE COMMENTS AND NOTES

TORRENS LAND SYSTEM—*Turta* v. *C.P.R.*— PRIOR CERTIFICATE OF TITLE

Turta v. *C.P.R.*[1] is a complicated case. Partly obscuring the core of the decision is the vagueness of the *dicta* on some issues, particularly *dicta* of Egbert J. on the plea that the C.P.R. held the petroleum under a prior certificate of title. The essence of his judgment on this point was that there must be concurrently existing certificates in respect of the same land before the plea can succeed.[2] However, some of the reasoning which accompanied this conclusion is open to the interpretation that the plea of a prior certificate of title is never available against *bona fide* purchasers and mortgagees because of the comprehensive protection afforded members of these classes by section 167 of the Land Titles Act.[3]

It is our submission that if this is indeed what Egbert J. intended it is incorrect as being plainly inconsistent with express provisions of the Act. The plea of a prior certificate of title is not barred by section 167 provided that there are in existence concurrent certificates of title for the same land. In such a case, section 167 has no application and the only means of resolving the competing claims is by reference to those provisions of the Act which deal specifically with the plea. These are not at all difficult to reconcile with section 167.

The sections referring to claims under prior certificates of title are sections 63, 65 and 180. The first of these enacts that a registered owner shall hold the land in his certificate of title free of encumbrances "except the estate or interest of an owner claiming the same land under a prior certificate of title . . ." Section 65 then provides that a certificate of title is conclusive evidence of the title of the person named "except as against any person claiming under a prior certificate of title . . . in respect of the same land." Section 180 provides that no action for the recovery of land lies against the registered owner except in the case of, *inter alia,* an owner "claiming under an instrument of title prior in date of registration . . . in any case in which two or more grants, or two or more certificates of title, or a grant and certificate of title, are registered . . . in respect of the same land."

Egbert J., reading all these sections together, found that for a plea of prior certificate of title to suceed, there must be a certificate of prior date co-existing with a certificate of later date.[4] To this point there would be no difficulty. As His Lordship said, section 180 would appear to be the governing provision as it says that *no action lies.* Then it refers to the exception when two or more certificates are registered, clearly contemplating concurrently existing certificates. In view of his finding that the original certificate, CPR 424, no longer existed as it had

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[1] (1952) 5 W.W.R. 529 (Trial), (1953) 8 W.W.R. 609 (App. Div.), (1954) 12 W.W.R. 97 (S.C.C.).

[2] (1952) 5 W.W.R. 529 at 584.

[3] R.S.A. 1970, c. 198.

[4] *Supra,* n. 2.

been cancelled, his judgment on this plea could have stopped there. However, and this gives rise to the difficulty, he continued:[5]

> Moreover, while secs. 42 and 44 [now secs. 63 and 65] are, in my opinion, governed by sec. 104 [now sec. 180], all these sections are in turn governed by sec. 106 [now sec. 167], which clearly appears to be intended to confer a special protection on purchasers and mortgagees *bona fide* for valuable consideration. The opening words of this section, "Nothing in this Act contained shall be so interpreted," make it, to my mind, clear that in the case of such purchases and mortgages this section is the controlling one and that nothing occurring elsewhere in the Act shall be so construed as taking away from them the protection afforded by this section. As I have pointed out, this section contains no mention whatever of claims under prior certificates, and I think *the effect of this section is to make a certificate of title, issued to a purchaser* bona fide *for value, completely indefeasible except in the one case specified in the section,* namely, a case of misdescription as mentioned in sec. 104 [now sec. 180]. (Emphasis added.)

This passage states quite clearly that in all cases a certificate of title is indefeasible as against a *bona fide* purchaser or mortgagee except for misdescription. In other words, Egbert J. is saying that section 167 nullifies those specific references in the Act to the plea of prior certificate of title.

Clinton J. Ford J.A. appears to have so interpreted Egbert J.'s judgment in his dissent in the Appellate Division. Referring to the predecessor to section 167, he said:[6]

> Clearly this is intended to be a covering section, but should it be read as controlling *and negativing* secs. 60, 62 and 171(1)(f) [now secs. 63, 65 and 180(1)(f)] just referred to? It is my opinion that they should be read together, and the word "error" be held not to apply to the case of a prior certificate of title. In an action to recover, the owner under the prior certificate would not rely on a plea of error but on the substantial plea of a prior certificate of title. (Emphasis added.)

It is implicit in these comments that Clinton J. Ford J.A. is dissenting from the view previously quoted from the judgment of Egbert J. He himself went on to determine that the attempted cancellation of CPR 424 was a nullity "leaving it in full force and effect as a prior certificate of title. . . ."[7] By holding that the defence of prior certificate of title succeeded, he not only disagreed with Egbert J.'s conclusion on the "factual" question of whether the certificate had been cancelled or not, but asserted also that a claim based on a prior, but still existing, certificate of title survives registered dealings for value based on a later certificate of title issued for the same land.

This conclusion must mean that section 167 does not negate the express provisions in the Act dealing with prior certificates of title. However, it is not clear that Clinton J. Ford J.A. himself appreciated what, it will be suggested, is the true position. He seems to have reached his conclusion by holding that the word "error" in section 167 does not include the case of a prior certificate of title. This may be so, but the writers argue that it was unnecessary to rely on this to avoid the section.

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[5] *Id.* With the exception of Parlee J.A., who appears to have accepted the view of Egbert J., (1953) 8 W.W.R. 609 at 626, the other justices in both the Appellate Division and the Supreme Court made no reference to this aspect of the plea of prior certificate of title, basing their decision on the need for concurrently existing certificates.

[6] (1953) 8 W.W.R. 609 at 641.

[7] *Id.*

It is submitted that section 167 cannot apply at all as between competing registered owners.[8]

But before turning to a consideration of what is suggested is the true interpretation of the plea of prior certificate of title, it should be noted that the view of Egbert J. has been accepted as correct in *Thom's Canadian Torrens System.* The editor says, citing Egbert J.:[9]

> In the *Turta* case . . . it was held that a claim under 'prior certificate of title' is not available against purchasers and mortgagees *bona fide* for valuable consideration who are specifically protected by the Act.

And again:[10]

> S. 167 gives to a purchaser and mortgagee *bona fide* for valuable consideration *unqualified protection from any action* for recovery of damages or any action of ejectment or any possibility of being deprived of the estate or interest of which he is registered as owner *except in the one case of misdescription.* (Emphasis added.)

Although the writer is here obviously paraphrasing the judgment in the *Turta* case, he states this conclusion as a general proposition on the effect of an overriding provision such as section 167. His misunderstanding of the position is further illustrated by the following statement:[11]

> Dealing with a 'claim under prior title' while ss. 63, 65 and 180(f) make no reference to *bona fide* purchasers, it is submitted that having regard to s. 167 such a claim could only be successful against registered owners not purchasers or mortgagees *bona fide* for valuable consideration.

In these statements, the writer is clearly expressing the view that a claim based on prior certificate of title can, by virtue of section 167, only succeed against a registered volunteer.

What then is the answer to all the confusion inherent in an interpretation of section 167 which virtually negates the plea of a prior certificate of title? Surely an interpretation which leaves substantial parts of three sections of the Act practically meaningless must be wrong. If we accept the view that there must be two existing certificates of title when we are considering the plea of a prior certificate of title, then there is an obvious reason why section 167 makes no reference to the plea. In such a case, we would be confronted with two registered owners, each of whom could equally claim the protection of section 167. It could not operate as it contains no mechanism for dealing with competing claims of more than one presently registered owner, and, therefore, would not apply in such a situation. The competing claims would be determined by reference to those sections which do deal with prior certificates of title. Accordingly, section 167 does not need to provide that a claim under a prior certificate of title is an exception to the

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[8] With respect to Clinton Ford J.A.'s approach in this regard the view taken by J. Baalman in his *Commentary on the Torrens System in New South Wales* should perhaps be noted. At 415, Baalman observes that by section 42 and 124 of the N.S.W. Real Property Act a claimant basing his claim on misdescription is prevented from recovering land from a registered *bona fide* purchaser or mortgagee for value whereas a claimant under a prior certificate of title is not so precluded from asserting his claim. He then goes on to say that the N.S.W. section 135 maintains the distinction as it protects titles only from attacks based on the grounds of fraud and error. However, he observes that the distinction is material "only on the assumption that the inclusion of land in the concurrent titles does not come within the meaning of an error." Sections 63, 180 and 167 in the Alberta Land Titles Act broadly correspond to sections 42, 124 and 135 of the New South Wales Real Property Act. It is true that the Land Titles Act in sections 180 and 167 differs from the New South Wales sections in that they do protect the claimant who has lost by misdescription but the writers submit that this does not affect the substance of their argument.

[9] Di Castri 278 (2d ed. 1962).

[10] *Id.* at 280.

[11] *Id.*

indefeasibility it guarantees. Clearly it contemplates the situation where there is a registered owner whose title is being challenged by a third party, in particular a claimant under a previously registered or caveated interest which in consequence of fraud or error has been removed from the register. It does not contemplate the challenge of a registered owner's interest by another registered owner of the same land.

Of course, this would not be so if the plea of prior certificate of title did not require two currently registered titles. If there were two titles, one registered and one cancelled, Section 167 would govern to protect the person who "is registered as owner." However, this view only reinforces Egbert J.'s first conclusion that there must be concurrent titles. Section 167 governs a competition between a registered certificate and a prior cancelled certificate, but as between competing current certificates, sections 63, 65 and 180 prevail.

If our suggested interpretation of the plea of prior certificate of title is correct, it would be possible to argue that Egbert J. relied upon section 167 in support of his conclusion that there must be concurrently existing certificates of title for the plea of a prior certificate of title to succeed, rather than as negating the plea altogether. It may be suggested that his use of the word "moreover" indicates that this was his meaning although such a view would be hard to reconcile with his unequivocal statement that section 167 gives full protection except in the one case of misdescription. Technically, it could be argued that his comments on this section were *obiter* in any event as he had already concluded on the basis of sections 63, 65 and 180 that there must be two certificates in existence which, on the facts, he found, there were not.[12]

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[12] *Supra*, n. 2 at 585.

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MAXIMS AND SUGGESTIONS FOR CRIMINAL TRIAL JUDGES

> The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted, criminal against the State—a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it in the heart of every man. [Winston Churchill][1]

Many newly-appointed trial Judges experience difficulty and are more than a little apprehensive when faced with their first criminal trials. Some continue to experience difficulty throughout their judicial careers, particularly with respect to sentencing a convicted offender. Most trial Judges can be heard to say that sentencing offenders is the most difficult and delicate task that is entrusted to them. This is under-

[1] Playfair, *The Punitive Obsession* at 20 (1971).