

NO. A05-1178

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STATE OF MINNESOTA  
IN SUPREME COURT

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IN THE MATTER OF THE PETITION OF JOSHUA S. COLLIER, IN  
RELATION TO PROPERTY REGISTERED IN CERTIFICATE OF TITLE  
NO. 1596547 FOR AN ORDER DIRECTING ENTRY OF A NEW  
CERTIFICATE AND DECLARATORY RELIEF

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BRIEF OF AMICUS CURIAE  
HENNEPIN COUNTY EXAMINER OF TITLES

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the *amicus curiae* discloses that counsel for a party did not author this brief in whole or in part, and no person or entity, including the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

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## STATEMENT OF THE LEGAL ISSUE

The issue presented by the case is whether a purchaser of registered land who files his deed and receives a certificate of title, holds it free from the lien of an unregistered mortgage previously executed by his grantor in favor of another, even though the purchaser had actual knowledge of the existence of the mortgage at the time of purchase.

The appellate court stated the issue as follows:

Can a purchaser for value of Torrens property be a good-faith purchaser if he has actual notice of the existence of an outstanding, but unregistered, mortgage at the time of the purchase?

According to the appellate court, the answer is, “Yes.” *In re Collier*, 711 N.W.2d 826. The court noted that the unregistered mortgage was a private contract according to Minn. Stat. § 508.48 and ruled that “[a]ctual notice of a private contract is not the type of notice that prevents a purchaser from being a good-faith purchaser.” *Collier* at 831.

The appellate court relied on the following cases and referenced the following statutes:

*In re Juran*, 178 Minn. 55, 226 N.W. 201 (1929)

*Fingerhut Corp. v. Suburban Nat'l Bank*,  
460 N.W.2d 63 (Minn. App. 1990)

*Finnegan v. Gunn*, 207 Minn. 480, 292 N.W. 22 (1940)

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Minn. Stat. § 508.54 (2004)

## STATEMENT OF THE CASE AND FACTS

The case was before the trial court pursuant to motions for summary judgment. The trial court and appellate court both determined that there were no genuine issues of material fact.

The case involves a mortgage executed by the owner of Torrens land, but the sequence of events and some facts are not precisely stated in the appellate court's opinion.<sup>2</sup> For the purposes of this brief it is assumed: (i) that Conley received a deed to Torrens property; (ii) that his deed was filed with the Ramsey County registrar of titles; (iii) that at the time he received his deed, or sometime after, Conley executed a mortgage in favor of Great Northern Mortgage Company; (iv) that at that time, or sometime thereafter, Great Northern Mortgage Company executed an assignment of its mortgage to M & I Bank; (v) that the mortgage and assignment of mortgage were filed with the Ramsey County recorder, but not with the registrar of titles; (vi) that the mortgage was foreclosed by advertisement; and (vii) that all documents related to the foreclosure were filed with the Ramsey County recorder, but not with the registrar of titles.

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<sup>2</sup> The opinion stated: "Joseph Conley purchased the Torrens property at issue in 2000, *subject to a mortgage held by respondent M & I Bank.*" *Collier* at 827 (emphasis added). The brief submitted to the appellate court on behalf of M & I Bank, however, states in its Statement of Facts that "[o]n September 25, 2000, Great Northern Mortgage Company loaned Joseph Conley \$135,000, secured by a mortgage on property described as Lot 2, Stripe's Rearrangement, in St. Paul, Minnesota. Great Northern assigned its rights in the mortgage to Respondent M & I Bank." Neither the opinion nor the brief discloses (a) when Conley received a deed to the property, (b) when Conley's deed was filed, (c) when the mortgage was executed, and (d) who executed the mortgage.

Collier learned of the foreclosure and contacted the Bank with an offer to purchase its interest. After the Bank declined his offer, Collier obtained a deed to the property from Conley for \$5,000 and filed it with the registrar of titles.

Collier commenced the present case by filing a petition in district court.

The trial court ruled that Collier held title subject to the Bank's mortgage, but the appellate court reversed, deciding that Collier's "knowledge" of the unregistered mortgage was not "actual notice."

## ARGUMENT

The purpose of this brief is to urge the Supreme Court to reverse the appellate court decision. The decision incorrectly interprets the Torrens Act<sup>3</sup>, varies from Supreme Court precedent and creates a pure race-to-the-courthouse situation. The ruling impairs the usefulness of the Torrens system and provides opportunities for some persons to take unfair advantage of others.

### A. The Torrens System.

The system of land registration involving certificates of title was first adopted in Australia in 1858 and is commonly called the Torrens system after its author. R.G. Patton, *The Torrens System of Land Title Registration*, 19 Minn. L. Rev. 519 (1935). Minnesota adopted a version of the Torrens system in 1901 for counties having over 75,000 inhabitants and in 1905 for the entire state.<sup>4</sup> A substantial amount of the land in the metropolitan area has been registered; it is estimated that over 40% of land parcels in Hennepin County are registered.

A recognized advantage of the Torrens system over the older recording (Abstract) system is that the burden of title examination is substantially less with respect to Torrens land.<sup>5</sup> Most of the work is done by the registrar of titles who issues a certificate of title in the name of the owner and notes encumbrances on it. The state guarantees the accuracy of the registrar's work. (See Minn. Stat. §§ 508.74 - 508.79.)

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<sup>3</sup> Minn. Stat. chs. 508 and 508A.

<sup>4</sup> 1901 Minn. Laws ch. 237 and 1905 Minn. Laws ch. 305.

<sup>5</sup> See Patton, 19 Minn. L. Rev. at 522, particularly footnote 5.

In order for the Torrens system to work well, it is important that purchasers of registered land have confidence that the certificate of title accurately reflects the status of title, i.e., the current owners and encumbrances. In that regard, the Minnesota Torrens law protects good-faith purchasers from encumbrances and adverse claims not shown on the certificate of title.

On the other hand, if the Torrens law is too strict, inflexible and conclusive it would not be useful and efficient in the real world. In 1935 R. G. Patton<sup>6</sup> commented on the appropriate conclusiveness of a certificate of title in Minnesota:

Though such a certificate is the best evidence of title which has ever been devised and least subject to attack, it would probably work more injury than benefit to have the necessary statutory and constitutional provisions which would make it one hundred per cent conclusive. For all practical purposes, it is conclusive. Though it might be an advantage to some particular person in a very few instances to have it more so, this would not be to the advantage of the public in general.

Patton, 19 Minn. L. Rev. at 528.

A Torrens system works best if recognized principals of equity and notions of justice and good faith are applicable to it. See *Finnegan v. Gunn*, 207 Minn. 480, 292 N.W. 22 (1940).

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<sup>6</sup> R.G. Patton was the Hennepin County examiner of titles from 1932-1947 and the original author of *Patton on Land Titles*.

**B. Purchaser in Good Faith.**

1. The interest of a purchaser of Torrens land is subject to Minn. Stat. § 508.25, which provides:

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title *in good faith* and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar, and also excepting any of the following rights or encumbrances subsisting against it, if any: . . . .” (Emphasis added.)

The provision provides a substantial benefit to the purchaser of registered land. It means that the purchaser is on notice only of the documents and other information noted on the most current certificate of title. The purchaser (or more commonly, the purchaser’s title insurance agent) need not examine prior, cancelled certificates of title nor search for other documents previously filed in the registrar’s office.<sup>7</sup>

2. The present matter, however, does not involve documents evidencing an encumbrance or adverse claim filed in the registrar’s office, but rather documents which were not filed and which, as a consequence, are not noted on the certificate of title. In that context, the meaning of “good faith” in Section 508.25 must be considered.

Minnesota law has imposed a standard of good faith on purchasers of Abstract land since before statehood. Laws 1854, ch. 22, § 1 (now Minn. Stat. § 507.34). The

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<sup>7</sup> An excellent discussion regarding examination of title to Torrens land may be found in *Hersh Properties, LLC v. McDonald’s Corp.*, 588 N.W.2d 728 (Minn. 1999). In response to the court’s opinion, in 2001 subdivision 2a was added to the so-called 40-year law, Minn. Stat. § 541.023, providing that the law does not apply to registered land and ending confusion over that point.

doctrines of actual and constructive notice have been applied in determining a purchaser's good faith, or lack thereof.<sup>8</sup>

In 1931 the Minnesota Supreme Court determined that the Torrens law abrogates the doctrine of constructive notice and, therefore, the mere fact that the property was in the possession of a person who had an unregistered contract for deed did not affect the lien interest of a creditor of the registered owner who subsequently registered his judgment. *In re Juran*, 178 Minn. 55, 226 N.W. 201 (1929).<sup>9</sup> The court went on to make the often quoted statement:

We think however that it [the Torrens Act] does not do away with the effect of actual notice, although it undoubtedly imposes the burden of proving such notice upon the one asserting it.

178 Minn. at 60. In arriving at its decision the Supreme Court referred to the predecessor statute to Minn. Stat. § 508.47, subd. 1, but did not specifically mention Section 508.25.

*Juran* involved two judgments against the registered owner. The first was filed before the judgment creditor knew about an unregistered contract for deed and unregistered deeds, but the second was filed after the creditor's attorney was told about them. The *Juran* court, 178 Minn. at 61, stated:

We reach the conclusion that the rights of appellant [judgment creditor] in the property under the attachment, judgment and execution sale in the first action are prior and

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<sup>8</sup> A comprehensive discussion of Notice Under the Recording Acts may be found in Joyce Palomar, *Patton and Palomar on Land Titles* § 12, at 57 (3rd ed. 2003).

<sup>9</sup> The effect of the court's decision on the specific facts of the case was overturned by the legislature in 1931 by the addition to Section 508.25 of exception clause (6): "the right of any person in possession under deed or contract for deed from the owner of the certificate of title."

superior to any and all rights of the respondents [grantees in the unregistered instruments], but that the rights of appellant under the judgment in the second action are inferior and subordinate to the rights of the respondents.

3. The appellate court in *Collier* referred to the above quoted wording in *Juran* regarding actual notice (noting that “it has been cited repeatedly and has since become the law”), and also referred to Section 508.47, subd. 1, noting that the Bank’s unregistered mortgage was a contract between the parties, but contrary to the holding in *Juran* concluded that “[A]ctual notice of a private contract is not the type of notice that prevents a purchaser from being a good-faith purchaser.” *Collier* at 831.

Is it possible that the interest of a purchaser with knowledge of an unregistered deed is subject to the deed, as *Juran* holds, but that the interest of a purchaser with knowledge of an unregistered mortgage is not subject to the mortgage? Section 508.47, subd. 1 refers to “deed, mortgage, lease, or other voluntary instrument” and makes no distinction among them. All are contracts between the parties until registered. Knowledge of an unregistered mortgage should have the same effect as knowledge of an unregistered deed.

4. The “good faith” wording of Section 508.25 has been part of the law since 1905. 1905 Minn. Laws ch. 305, § 24. The appellate court’s conclusion regarding its meaning, or lack of meaning, would be a surprise to early commentators on the Minnesota Torrens law. For example, eighty-two years ago a Minneapolis attorney conjectured, “In Minnesota, it would seem, a purchaser from a registered owner would not be protected if he had notice, actual or constructive, at the time he made his purchase

that an unregistered interest was outstanding.” Loring M. Staples, *The Conclusiveness of a Torrens Certificate of Title*, 8 Minn. L. Rev. 200, 208 (1924). A few years later the Supreme Court in *Juran*, as noted above, indicated that actual notice (but not constructive notice) applied to a purchaser of registered land.

Under the appellate court’s interpretation of the law, it is difficult to imagine any situation where the “good faith” words of Section 508.25 would apply and, therefore, they would seem they have no meaning or purpose. Contrary to the appellate court’s opinion, actual notice of an unregistered, voluntary conveyance executed by an owner of registered land would seem to be exactly the type of notice that prevents a purchaser from being a good-faith purchaser, as the *Juran* court found.

At the time he obtained his deed, Collier knew that a mortgage document existed, who the parties to the mortgage were, that it had been foreclosed, and that the mortgage and foreclosure documents had been filed in the office of the county recorder. Collier had sufficient knowledge of an unregistered voluntary instrument of conveyance (i.e., the mortgage) to be charged with actual notice of the encumbrance. A correct application of *Juran* and Section 508.25 leads to the conclusion that he was not a good faith purchaser with respect to the interest of the mortgagee.

5. The appellate court cited Sections 508.25 and 508.47, subd. 1, but apparently could not reconcile the sections. The result was that the “good faith” provision of Section 508.25 has no meaning under the appellate court’s holding.

The sections, however, do not stand in opposition to each other. Section 508.47, subd. 1, provides that a voluntary instrument of conveyance does not “bind or affect the

land,” but until registered operates as “a contract between the parties.” Section 508.25, on the other hand, recognizes equitable principals in limiting the benefits of the conclusiveness of a certificate of title to good faith purchasers.

**C. Effect of Elimination of Notice.**

1. The appellate court’s decision does much damage to the usefulness of the Torrens system. The decision, if upheld, would establish a pure “race” situation providing no benefit to good faith purchasers, but encouraging unscrupulous persons to seek opportunities to profit at the expense of others. Such a situation “might be an advantage to some particular person in a very few instances” but “would not be to the advantage of the public in general.” Patton, *supra*.

2. There are business risks associated with the handling of real property transactions. Usually an interval of days occurs between the time documents are signed at the closing and when they are actually submitted to the registrar of titles for recording.<sup>10</sup> Lenders, title insurance companies and others engaged in the business have established practices, such as conducting searches and requiring affidavits from sellers and borrowers, to minimize the risk that an adverse interest may be filed during the interval.<sup>11</sup> Until now persons in the real property business thought they did not have to

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<sup>10</sup> After a typical closing in Hennepin County, documents are given to a messenger service, which first takes them to the Auditor’s office in the Government Center, where deed tax (Minn. Stat. § 287.21) and mortgage registry tax (Minn. Stat. § 287.035) are paid. The documents, along with a certificate of real estate value (Minn. Stat. § 287.241), are then left with the Auditor for certification regarding delinquent taxes (Minn. Stat. § 272.12). The certification process may take several days, following which the documents are picked up by the messenger service and finally delivered to the registrar of titles.

<sup>11</sup> Examples of adverse interests that might be filed during the lag by persons without knowledge of the closing are judgments (Minn. Stat. §§ 549.09 and 508.63) and state tax liens (Minn. Stat. § 270C.63).

worry about someone with knowledge of a closing deliberately racing to the courthouse to gain an advantage. The laws regarding good-faith purchasers and knowledge of unrecorded documents were understood to apply to both Abstract and Torrens properties. If the appellate court's decision in the present matter is upheld, the risks associated with handling Torrens property transactions may become intolerable.

3. The *Juran* ruling retained the concept of actual notice while properly placing the burden of proving notice on the person asserting it. The case has provided sound guidance for the operation of the Torrens system for over 75 years. No reason has been given for discarding or substantially modifying *Juran*.

4. What should a person do if the certificate of title does not accurately reflect the person's interest or its intended relative priority? Minn. Stat. § 508.71, subd. 2 provides the answer:

An interested party may petition the court upon the ground that “. . . (3) any error or omission was made in entering the certificate of title or any memorial thereon, . . . (7) upon any reasonable ground, that any other alteration or adjudication should be made.”

See also, Minn. Gen. R. Prac. 213.

The petitioner may file a certified copy of such petition as a memorial on the affected certificate of title as “notice forever to purchasers and encumbrancers of the pendency of the proceeding.” Minn. Stat. § 508.71, subd. 2. A petitioner would be wise to do so, because an important limitation on the proceeding is that “nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser who

holds a certificate of title for value and in good faith, or the purchaser's heirs or assigns without written consent or the purchaser or heirs or assigns." *Id.*

**D. Analysis of Authority**

1. *Finnegan v. Gunn.*

The appellate court in *Collier* cited *Finnegan v. Gunn*, 207 Minn. 480, 292 N.W. 22 (1940), but incorrectly characterized the case as holding that the owner of an unregistered mortgage was a bona fide purchaser. *Collier* at 830. The *Finnegan* Court, to the contrary, held that the devisee of the mortgagor was *not* a bona fide purchaser. 207 Minn. at 483.

Importantly for the purposes of the present matter, the Supreme Court noted that "Nothing in the Torrens system indicates that the ancient concepts of equity are not applicable under such circumstances." 207 Minn. at 482. Although the facts are quite different from the present matter, the reasoning of the case regarding equities, if applied to the current matter, would call for a reversal of the appellate court's decision.

2. *Fingerhut Corp. v. Suburban Nat'l Bank.*

The facts in *Fingerhut*, 460 N.W.2d 63 (Minn. App. 1990), are substantially and essentially different from the present matter. Unlike *Collier*, *Fingerhut* knew nothing about the Bank's unregistered mortgage when *Fingerhut* filed its notice of lis pendens.

3. *In re Ocwen Financial Services, Inc.*

The appellate court in *Ocwen* declared that "Minnesota is a race-notice state, which means that a purchaser who has actual, implied, or constructive notice of inconsistent outstanding rights of others is not a bona fide purchaser entitled to protection

under Minnesota's Recording Act." 649 N.W.2d 854, 857, *review denied* (Minn. Nov. 19, 2002) (citing *Minnesota Cent. R. Co. v. MCI Telecommunications Corp.*, 595 N.W.2d 533, 537 (Minn. App. 1999), *review denied* (Minn. Sept. 14, 1990)); see *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 383-84 (Minn. 1978). *Anderson* identifies Section 507.34 as "the so-called Recording Act." That section, however, does not apply to land registered under Minn. Stat. ch. 508. (See Section 508.25.)

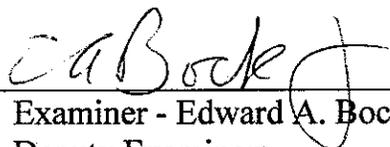
### CONCLUSION

The appellate court's ruling in the present case should be reversed.

A person who has actual knowledge of an existing, unregistered mortgage of registered land at the time the person obtains a deed for the land should be deemed not to be a good faith purchaser with respect to the mortgage.

Respectfully submitted this 19<sup>th</sup> day of July, 2006.

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