TORRENS SYSTEM—RIGHT OF ASSIGNEE OF FORGED REGISTERED MORTGAGE AGAINST INNOCENT LANDOWNERS—PROCEDURAL DIFFICULTIES IN CLAIMS AGAINST THE LAND TITLES ASSURANCE FUND

One of the least litigated and most uncertain areas of the Torrens system of land registration is that in which a person, who has lost his interest in land by operation of The Land Titles Act,[1] seeks relief against the Land Titles Assurance Fund. A recent case illustrates the problems. A forges B's name to an instrument by which B purportedly mortgages his land to A. After registering the forged mortgage A assigns the mortgage to C, who is a bona fide purchaser for value without notice of the forgery. C registers the assignment and arranges to assign the mortgage to D. D's solicitors search the title to B's land and find the title favorable. On the advice of the solicitors D purchases the mortgage for good value and without notice of A's forgery. D registers the assignment and subsequently serves the innocent owner with notice of the mortgage and assignment and directs B to make payment to him. B fails to acknowledge the mortgage and D launches proceedings for foreclosure claiming solely on the validity of the mortgage as a registered charge enforceable pursuant to the relevant sections of The Land Titles Act.

These were the facts considered recently by the Supreme Court of British Columbia in *Credit Foncier Franco-Canadien* v. *Bennett*.[2] Mr. Justice Ruttan delivered the judgment of the Court which upheld the validity of the forged mortgage in favor of the plaintiff, Credit Froncier Franco-Canadien. The Court in reaching its decision relied solely on The Land Registry Act of British Columbia,[3] "the intention" of which said the Court "is everywhere the same and has been most lucidly explained in a judgment of the Privy Council in *Gibbs* v. *Messer*".[4] The Court also decided that the loss suffered by the defendants, the Bennets, who were the victims of the forgery, was not attributed to their own carelessness, and because they had taken the necessary steps to establish their claim against the assurance fund, they could recover their loss from it.

Thus, because of the activity of the forger, the Court was compelled to choose between two innocent parties. Some members of the press and public were outraged by the choice. Even some lawyers were surprised by the decision. To many it seemed that justice had not prevailed; that the law had championed the cause of a corporation against a hapless home owner.

Perhaps it may be said that because both British Columbia and Alberta have used the Torrens system exclusively for decades anyone familiar with it should not be surprised by the *Bennett* decision. However, the very existence of the *Bennett* case suggests that the point it makes, (that at times the Torrens system of land registration protects a person claiming an interest in land through a forged document to someone whose interest is historically superior), has not been sufficiently

1 R.S.A. 1955, c. 170.
2 (1962) 39 W.W.R. 529, (1962) 34 D.L.R. (2d) 342.
3 R.S.B.C. 1960, c. 208, s. 38(1), s. 41, s. 221.
4 [1891] A.C. 248.

impressed upon some members of the legal profession; and it is evident that the public is unaware of the effect of The Land Titles Act provisions.

Because of the interest created by the *Bennet* case it would seem timely to examine in detail the relevant sections of The Land Titles Act of Alberta which provide compensation out of the assurance fund to persons who by the operation of the Act have been deprived of land or their interest therein, or who sustain loss or damage through an omission, mistake or misfeasance of the Registrar or of any of his officials.

The *Bennett* case was one of first instance in British Columbia, but in Alberta, our Supreme Court has twice dealt in similar circumstances with cases of forged documents. It was about a half-century ago when these decisions were rendered, and it may or may not be significant that the later of the two, *Re Adams* v. *McFarland*,[5] has never been cited subsequently by any court. The earlier decision, *Fialkowski* v. *Fialkowski & Traders Bank*,[6] has been cited only once, in 1941, by a Saskatchewan court.[7] In the *Fialkowski* case the court applied *Gibbs* v. *Messer*[8] to hold that an innocent landowner whose name had been forged on a registered transfer could not recover against a mortgagee who was without knowledge of the forgery. The court did not discuss whether the landowner could recover his loss from the assurance fund. *Re Adams* v. *McFarland*[9] is particularly noteworthy because in that case McFarland's name had been forged on a transfer by which his land was subsequently sold to Adams, the transferee of the forged transfer. Our Supreme Court found the transfer ineffective to pass title, again citing *Gibbs* v. *Messer*[10] as authority.

Although the issue was placed squarely before it in *Re Adams* v. *McFarland*,[11] our Supreme Court found unnecessary to its decision any comment on whether McFarland could have claimed against the assurance fund. The question is still unanswered by the Alberta courts.

There arises the interesting question of whether, in Alberta, persons who find themselves in the position of the Bennetts may recover their loss from the assurance fund in an action brought against the Registrar under sections 165[12] and 168[13] of The Land Titles Act. Primarily it is section 165 that gives such a right of action in cases where the innocent person has been either deprived of his land or interest therein or sustain-

5 (1914) 6 W.W.R. 1076, 20 D.L.R. 293.

6 (1911) 1 W.W.R. 216, 4 Alta. L.R. 10.

7 Followed in *de Lichtbuer* v. *Dupmeier* [1941] 3 W.W.R. 64 (Sask.).

8 *Supra*, n. 4.

9 *Supra*, n. 5.

10 *Supra*, n. 4.

11 *Supra*, n. 5.

12 S. 165. Any person sustaining loss or damage though an omission, mistake or misfeasance of the Registrar or an official in his office in the execution of his duties, and any persons deprived of any land or encumbrance or of an estate or interest therein through the bringing of it under this Act, or by the registration of another person as owner of the land or encumbrance or by an error, omission or misdescription in a certificate of title, and who by the provisions of this Act is barred from bringing an action for the recovery of the land or encumbrance or interest therein, may bring an action against the Registrar of the district in which the land is situate for the recovery of damages.

13 S. 168. In an action for the recovery of loss or damage arising only through an omission, mistake or misfeasance of the Registrar or his officials, the Registrar shall be the sole defendant, but, if the action is brought for loss or damage arising only from the fraud or wrongful act of some person other than the Registrar and his officials, or arising jointly through the fraud or wrongful act of such other person, and the omission, mistake or misfeasance of the Registrar or other official, then the action shall be brought against both the Registrar and the other person.

ed loss or damage through an omission, mistake or misfeasance of the Registrar or of an official in his office. If we are to permit the holder for value of a registered forged mortgage to encumber a title of an innocent landowner, we must provide the landowner an opportunity to recover his loss with as little difficulty as possible. For this purpose an assurance fund is created. One suggestion of the principle in creating such a fund is that:

> This principle of compensating a rightful owner by a money payment instead of allowing him to recover the land commends itself to our sense of natural justice, as contrasted with the principle of English law, which in such case would place the rightful owner in possession, not only of his inheritance in all the land itself, but also of the capital of parties who, innocent of all fraudulent intent, may have invested their fortunes in buildings and other improvements thereon . . .[14]

The reported cases in Alberta upon the construction of the sections in The Land Titles Act dealing with claims against the assurance fund are surprisingly few, and all but one[15] of those which have been decided antedate the existing legislation. With reference to the assurance fund, the scheme of The Land Titles Act has been said to be:[16]

> 1. (a) In certain cases to give to a person deprived of land or any estate or interest therein a right of action for damages against the wrongdoer and *indirectly* against the fund, and
>
> (b) Where such person obtains final judgment against such wrongdoer who proves to be judgment-proof to provide for the payment of the judgment from the fund which in turn is entitled to judgment and execution against such wrongdoer for any moneys so paid.
>
> 2. To give a *direct* remedy against the fund where
>
> (a) Any person has sustained loss or damage caused solely as a result of any omission, mistake or misfeasance of the registrar or any of his officials or clerks.
>
> (b) In case the person primarily liable for damages as indicated under (1) is dead or cannot be found within the jurisdiction. (Italics supplied)

The scheme of our Land Titles Act, however, is not so explicit as that set out above. Certainly before 1935 our courts found the construction of the sections which are equivalent to section 165 most difficult of interpretation. In 1935 the equivalent section was amended[17] by the legislature in an effort to clarify its dubious intent and to give guidance to our courts as to its proper interpretation. Whether or not the amendment has achieved these ends is discussed later. In order to appreciate the difficulties presented by section 165, a brief resume of its history is necessary. Originally the equivalent section was taken from The Territories Real Property Act[18] and placed in The Land Titles Act of 1906.[19] It provided claimants a fund from which they could recover their losses caused by the operation of that Act. The relevant portions of the equivalent section of The Land Titles Act of 1906 provided that:

> Any person sustaining loss or damage through any omission, mistake or misfeasance of the Inspector of land titles offices, or a registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any

14 Thom's Canadian Torrens System 291 (2d ed. 1962).
15 *Essery* v. *Essery & Tatko* v. *Liefke* [1947] 2 W.W.R. 10444.
16 Thom, *op cit. supra* at 297.
17 R.S.A. 1935, c. 15, s. 11.
18 Statutes of Canada, 49 Victoria, (1886) c. 26, s. 108.
19 R.S.A. 1906, c. 24, s. 108.

> certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of the land, may in any case in which remedy by action for the recovery of the land, may in any case in which remedy by action for recovery of damages hereinbefore provided is barred, bring an action against the registrar as nominal defendant, for recovery of damages . . .[20]

These words were incorporated in unaltered form into the 1922 Land Titles Act[21] and remained unchanged until 1935. It was during this period of 29 years that our Supreme Court in interpreting the section placed severe limitations on its flexibility and usefulness. In 1935 the legislature saw that the true purpose of the fund had been hindered by judicial interpretation and it then repealed the section and replaced it with a section[22] that was in every material respect identical to the existing section 165. Thus in a period of 56 years our legislature has only once paid attention to section 165, which is the heart of all of the sections dealing with claims against the assurance fund.

It would have seemed that the scheme of The Land Titles Act[21] was to provide both a direct and an indirect method of recovering from the fund. However the courts of Alberta have given no such interpretation to the original sections. By 1924 it had been decided by our Supreme Court in *Teel* v. *Forbes*[24] that the equivalent section was to be narrowly construed. The majority of the Court held that no recourse to the fund could be had unless the claimant could show that he suffered loss by "deprivation of land". Because of the wording of the section, such a claimant could not, it was decided, claim against the fund where the loss was caused by any omission, mistake or misfeasance of the registrar. The effect of this interpretation was to permit claims to be made indirectly against the fund, only after the claimant had shown that he could not recover his loss against the wrongdoer. In no case, however, was he permitted to claim directly against the fund. The result of this was that if there was no one against whom he could bring an action, he had to suffer the entire loss caused by operation of the system. In *Teel* v. *Forbes*[25] Mr. Justice Stuart stated the dilemma:

> The principle of the Act seems to be that it first provides an action against the person who . . . has benefited by an erroneous registration upon his own application and the remedy against him must either have been expressly barred by the proviso to section 149 or made futile by his death, absence or insolvency, before the assurance fund can be attacked through the Registrar as nominal defendant.
>
> There is nowhere in the Act any right given to proceed against the fund for an error, omission or wrongful refusal of the Registrar merely to accede to a party's own application. In a proper case there might be a right to sue the Registrar personally for his wrongful act or refusal but that is not the nature of the present action.
>
> No doubt the plaintiff comes within this category (viz, a person sustaining loss or damage by any omission, mistake, or misfeasance of the officials in the execution of their respective duties.). But the question is upon what condition the person sustaining loss for that reason can proceed against the assurance fund. Although the section is obscurely worded it seems clear that it is only in a case in which the remedy by action for recovery of damages which has been before

20 *Ibid.*
21 R.S.A. 1922, c. 133, s. 153.
22 R.S.A. 1935, c. 15, s. 11.
23 R.S.A. 1906, c. 24, s. 108; R.S.A. 1922, c. 133, s. 153.
24 [1924] 2 W.W.R. 996.
25 *Id.*, at 997-8.

> given by the statute is barred that recourse can be had to the assurance fund. If no action has been 'hereinbefore provided' at all then there is no such action barred either by the statute or otherwise and the condition is not fulfilled.

Certainly the majority of the Supreme Court erred in placing such a restrictive interpretation on the section. The preferred view is that expressed by Mr. Justice Hyndman in a dissenting opinion in *Teel* v. *Forbes*[26] wherein he repeated with approval the oft-quoted words of Mr. Justice Edwards in *Public Trustee* v. *Registrar-General of Land*.[27]

> The scheme of the Act is to provide a fund for compensating all persons who are deprived of their land by the operation of the Act, and reason and justice require that no qualification should be put upon the right so given which is not in express terms imposed by the statute.

Mr. Justice Hyndman continued:

> Applying this statement of the law to the present case should not the plaintiff herein be compensated for the damage suffered by failure to secure registration of title to land which she legally and properly purchased from the city and paid for and which at the time of the presentation for registration, she was undoubtedly entitled to, and was deprived thereof only by the wrongful act . . . of the Registrar?
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> Before the introduction of the Torrens system no registration was necessary to confer a valid legal estate. It is the 'system' which requires registration and confers the estate, and it was due to this 'system' that she lost the right to become the owner of the land in question. Having been the cause of her damage through no fault of hers, and there being no other person to proceed against, I fail to appreciate any valid reason why in such circumstances the assurance fund should not be liable.[28]

It was finally in *F. C. Richert Co. Ltd.* v. *Registrar of Land Titles*[29] that our Supreme Court clearly stated the problem that its previous interpretations of the section had created. Chief Justice Harvey explained:

> It is unfortunate that the Act does not give full protection against mistakes of the registrar contrary to the general impression that it does and contrary to the apparent spirit of the Act in requiring contributions to establish an assurance fund presumably for just such purpose.[30]
>
> . . . the only right he [the plaintiff in the action] had was that given by the first words of the section, and that, contrary to the general impression, those words conferred no right of action because the conditions upon which the right could arise did not and could not exist, viz., that the previous provisions had conferred on him a right of action for recovery of damages which right of action was barred. No such right of action was conferred by any previous provision. I pointed out that in the Territories Real Property Act, our first Torrens Act, in the corresponding section, in lieu of the words 'action for recovery of damages hereinbefore provided is barred' the words were 'action for recovery of damages *as* hereinbefore provided is barred' and that the section preventing or barring actions against the registrar where he has acted bona fide, now sec. 182, was in the original Act before the section corresponding to sec. 153 but by the change what had previously been 'hereinbefore' had now become 'hereafter.' In *Morris* v. *Bentley* . . . relief had been given against the assurance fund for loss occasioned by an error of the registrar, the adverbial clause, 'as hereinbefore provided' being interpreted as applying to 'is barred,' the barring section as stated being an earlier section. By virtue of the change in the one section and in the position of the other secion no such interpretation was possible in the *Setter* case . . . and the effect was to destroy the remedy theretofore existing with the result that there was in fact no benefit conferred on the person referred to in the opening words of sec. 153.[31]

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26 *Id.*, at 1003.
27 (1899) 17 N.Z.L.R. 577.
28 *Supra*, n. 24, at 1005-6.
29 [1937] 3 W.W.R. 632.
30 *Id.*, at 635.
31 *Id.*, at 634.

After the Chief Justice explained the historic difficulties that were encountered in the early section, Mr. Justice Ford in the same case in somewhat belated, prophetic fashion suggested what remedy would alleviate the difficulty:

> . . . it is now too late to question the views expressed in *Teel* v. *Forbes* . . . the result of which is to leave the provisions of the Act as to claims against the assurance fund without force except where the act of the registrar results in the deprivation of land or of an interest herein. If the matter were res integra I would have though that it would have been possible to give full effect to the first part of the section by . . . transposing the word 'may', placing it where it was intended that it should be, so that in respect of claims other than those arising from 'deprivation of land' the section would read . . . [Mr. Justice Ford suggested that the section be amended to read as our present section 165 reads].[32]

In returning to the case before him, Mr. Justice Ford stated with some helplessness, that:

> . . . the law [is] settled for this province, as laid down by the majority in *Teel* v. *Forbes* . . .[33]

He then concluded with some degree of relief that:

> It is satisfactory to see that the matter seems to have been put right in this province by the amendments made by ch. 15 of the statues of 1935, sec. 11.[34]

The conclusion to be drawn from this investigation of the early sections and cases is that in Alberta prior to 1935 the only persons entitled to satisfaction of claims against the assurance fund were those persons who, deprived of land or an interest therein by operation of The Land Titles Acts,[35] were unable to recover their losses from the wrongdoer. To remedy this restricted interpretation, the equivalent section was amended to provide two approaches to relief from the assurance fund instead of the single approach laid down in *Teel* v. *Forbes*.[36]

Section 165 is in all material respects identical to the amended section. The first part of section 165 states that:

> Any person sustaining *loss or damage* through an omission, mistake or misfeasance of the Registrar or an official in his office in the execution of his duties . . . *may* bring an action against the Registrar of the district in which the land is situate for the recovery of damages. (Italics supplied)

Without doubt this part of the section provides a *direct* remedy to the claimant. The relocation of the word *may* in the section, as had been suggested by Mr. Justice Ford in *F. C. Richert Co. Ltd.* v. *Registrar of Land Titles*,[37] made this possible. No longer must the claimant fulfill a condition precedent, which in the older Acts was impossible to meet, before he can resort to a claim against the fund.

The second part of section 165 was also amended in order to delete ambiguous and superfluous language. This part of the section provides the claimant an *indirect* remedy against the fund. It states that:

> . . . any persons *deprived* of any land or encumbrance or of an estate or interest therein through the bringing of it under this Act, or by the registration of another person as owner of the land or encumbrance or by an error, omission or misdescription in a certificate of title, and who by the provisions of this Act is barred from bringing an action for the recovery of the land or encumbrance or interest therein, *may* bring an action against the Registrar of the district in which the land is situate for the recovery of damages.

32 *Id.*, at 637.
33 *Id.*, at 638.
34 *Id.* at 639.
35 *Supra*, n. 23.
36 *Supra*, n. 24.
37 *Supra*, n. 29.

Although the section obviously contemplates two methods of proceeding against the fund, it does not state which one is to be used in a particular set of circumstances. The first part of the section makes sense if it means *loss or damage* caused *solely* by an omision, mistake or misfeasance of the Registrar or of one of his officials. In such a case the claimant may proceed directly against the fund. Support for this proposition is found in the more clearly worded section in The Land Registry Act of British Columbia[38] which actually employs the use of the word *solely* in the phrase corresponding to the phrase in our section 165. Further support is found in section 168 of The Land Titles Act which uses the word *only* in the phrase, "In an action for the recovery of loss or damage arising *only* through an omission, mistake, or misfeasance . . . ." However, if the person claiming is *deprived* of any land or encumbrance or of an estate or interest therein, he cannot proceed directly against the fund. He must be "barred from bringing an action"[39] or he must show that the person other than the Registrar who is responsible for the deprivation is incapable of recompensing him. Then only may he proceed against the fund.

There yet exists in the construction of section 165 at least another serious difficulty. How does a claimant decide in which cases he may proceed directly against the fund and in which cases he must proceed indirectly? This difficulty is created because, as has been mentioned, the section speaks first of *loss or damage* and then of *deprivation*. This distinction is meaningless for it is difficult to imagine a situation in which a person does not sustain both *loss or damage* and *deprivation*. The only logical explanation is that in the case of *loss or damage* it is solely the Registrar or one of his officials who acted. In the case of *deprivation* some third party with the assistance of the Registrar's office was responsible for the wrongful deprivation.

Perhaps this distinction is merely academic and of no practical importance to the courts; at least no litigation of the matter has occurred. It is contended however, that, because of its real existence, each claimant must decide, before he knows which procedure to follow, if the injury is the result solely of the activities of the Registrar or of one of his officials, or the result of the combined activities of either of them and the third party who registers his interest in the land.

It may be seen that a variety of problems can arise in determining who caused the loss; and undue time and expense might be consumed in pursuing a supposed wrongdoer, who, as it later turns out, is not responsible for the deprivation.

When indirectly attacked, it is not the intent of the fund to relieve a person who is injured by the operation of The Land Titles Act from first pursuing his remedies against the wrongdoer. In *Teel* v. *Forbes* Mr. Justice Beck states this proposition:

> In some instances such a right of action by one claimant against another is, by force of the system, extinguished or to use the expression of the Act 'barred'. If the right of action, existing without regard to the Land Titles Act, is not barred, obviously that right of action still remains and was intended to remain

[38] *Supra*, n. 3.
[39] R.S.A. 1955, c. 170, s. 165.

> as the claimant's only remedy. If the right of action, existing without regard to the Land Titles Act, is barred, in that case, and in that case only, does the Act substitute a right of action against the Registrar as nominal defendant . . . .[40]

The rationale requiring the injured person to first seek relief from the wrongdoer before proceeding against the fund seems to be that to allow compensation out of the fund and to let off the guilty party would be contrary to the spirit of the law that a wrongdoer should not be allowed to escape the consequences of his wrongful act. If the land or interest therein is recoverable by the injured person then of course he properly has no claim against the fund.

To avoid the difficulty of determining when to proceed indirectly against the fund, the preferred procedure is to join in one action the wrongdoer and the Registrar as a nominal defendant. Section 168 of The Land Titles Act contemplates such a procedure and provides that:

> In an action for the recovery of *loss or damage* arising *only* through an *omission, mistake or misfeasance* of the Registrar or his officials, the Registrar shall be the *sole defendant*, but, if the action is brought for *loss or damage* arising only from the *fraud or wrongful act* of some person other than the Registrar and his officials, or arising jointly through the fraud or wrongful act of such other person, *and* the *omission, mistake or misfeasance* of the Registrar or other official, then the action shall be brought against *both* the Registrar and the other person. (Italics supplied)

Section 168 makes clear in which cases the Registrar is to be made the sole defendant and in which cases he and the wrongdoer are both to be made defendants in an action brought by the claimant for *loss or damage*. However, the section fails to state who is to be named a defendant in an action brought by the claimant for *deprivation*. Section 165 expressly provides that if the claimant sustains *deprivation* by any one of the three means stated therein, he may recover from the assurance fund. A question inevitably arises. Does section 168 purposely or unintentionally fail to provide to the claimant who has sustained *deprivation* the same procedure it provides a claimant who has sustained *loss or damage?* The omission must be unintentional because nowhere in the Act is there to be found a section similar to section 168. There are, however, those words in section 165 which provide that a claimant "may bring an action against the Registrar", but those words are applicable to an action for either loss or damage *or* deprivation. With regard to loss or damage section 168 merely provides in which cases the registrar shall be one of the defendants or the sole defendant. In any event, under the section, the claim is brought against the Registrar. Thus no inconsistency exists between the two sections. It is difficult to understand, therefore, the rationale that, on the one hand, requires a claimant *deprived* of land or an interest therein to proceed in separate actions, first against the wrongdoer and then against the registrar; and that, on the other hand, requires a claimant who has sustained *loss or damage* to claim against the Registrar alone or against both the Registrar and the wrongdoer in a single action. Here again the distinction between *deprivation* and *loss or damage* appears without justification. Certainly there is no reason to suppose that a person is injured more by *loss or damage* than by *deprivation* and for that reason his claim is to be more easily and expeditiously settled.

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40 *Supra*, n. 24, at 1000.

The conclusion reached is that an important omission with regard to claims for *deprivation* exists in section 168. Only the legislature can adequately provide a remedy, but in the meantime the courts of Alberta will have to act with conviction and not permit procedural flaws to obstruct valid claims against the assurance fund.

It is without doubt, therefore, that if the circumstances of the *Bennett* case should arise in Alberta, the innocent home owner could recover from the assurance fund an amount sufficient to pay-off the mortgage. In light of the foregoing discussion there is some doubt about what procedure would be pursued by the homeowner. It is likely that he must proceed indirectly against the fund; that is, he must first seek his remedy against the forger before making a claim against the fund for payment of an unsatisfied judgment. In *The Minister of Finance of British Columbia* v. *The King*[41] the Supreme Court of Canada decided that to make the fund *indirectly* liable the claimant(s) would have to satisfy three statutory conditions:

> (1) they were wrongfully deprived of land or of any estate or interest in land in consequence of fraud in the registration of some other person as owner of such land, estate or interest, (2) and that they recovered damages in an action at law brought and prosecuted by them against the person by whose fraud they were deprived of their land or of some estate or interest therein, and (3) that the sheriff has made a return of nulla bona . . .[42]

H. L. Robinson suggests that a fourth statutory condition is to be fulfilled. He states that the deprivation must be of such a nature that:

> . . . it would not have come about had it not been for the statutory warranty of title to the land in the hands of its present owner—'as a result of the operation of this Act' . . .[43]

Teel v. *Forbes* seems to support this conclusion. Mr. Justice Beck stated in that case that the claimant must establish his common law right of action, "having for its effect to declare his title against an adverse claimant. In some instances such a right of action [is] extinguished by the force of the system."[44] The obvious reason for the fourth condition is to protect the fund against myriads of frauds that might be worked against the fund to deplete the fund's resources.

At this point it should be emphasized that in Alberta the Attorney-General's Department has made it a practice not to contest well-founded claims and has been generous in settling claims against the assurance fund. Under section 177 (1) of The Land Titles Act, if the claim against the fund is well founded a person who has been *deprived* of his interest or who has suffered *loss or damage* may request the Attorney-General to issue a certificate to that effect so that the claimant may be paid his claim. This section is admirable in avoiding a number of statutory conditions that must be met by the claimant otherwise before he makes his claim. However there still lurks section 175 (a) (b),[45] the limitation section, which requires that the claimant bring his action within six years of the *deprivation or loss or damage*. It may be asked how many times will the innocent landowner be aware of his injury? Obviously

41 [1935] S.C.R. 278.
42 *Id.*, at 284
43 H. L. Robinson, The Assurance Fund is British Columbia (1952) 30 Can. Bar Rev. 445 at 454.
44 *Supra*, n. 24, at 1000.
45 R.S.A. 1955, c. 170.

the answer is seldom. Certainly the preferred view is to begin the limitation of actions against the fund running only when the landowner knows or should have known of the injury to his interest.

With regard to what damages a claimant may recover from the fund, there seems to be little or no doubt. In *Setter* v. *The Registrar*[46] Mr. Justice Beck stated that:

> . . . I think the intention is that the assurance fund should be liable only for the real ultimate net loss to the person damnified . . .

As to what is "the real ultimate net loss," Mr. Justice Stuart's award of damages in *McRoberts* v. *The Registrar*[47] may be helpful. In an action against the assurance fund the claimant was awarded:

> . . . damages against the registrar as nominal defendant with interest and costs, including costs of the stated case and the trial as provided in the stated case . . .[48]

In conclusion it can be said that the present sections providing remedies against the assurance fund are in much need of amendment and clarification. Generally, with regard to the procedure to the followed by claimants as provided in sections 165 and 168, the period of time in which the claimant must commence his action under section 175 (a) (b), and the general difficulty in prosecuting claims, The Land Titles Act should be revised and simplified. Particularly, distinctions between *indirect* and *direct* actions and *deprivation* of land and *loss or damage* sustained by a person should be abolished.

It has been concluded that, notwithstanding procedural difficulties, the innocent victim of a registered forged mortgage may recover his loss from The Land Titles Assurance Fund. It is hoped that if our courts insist on maintaining the procedural distinctions which have been suggested to exist, that all of the additional costs made necessary in proceeding indirectly against the fund will be paid out of the assurance fund.

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46 7 W.W.R. 901, at 911.
47 7 W.W.R. 301.
48 *Id.*, at 911.