TORRENS SYSTEM—POWER OF REGISTRAR TO CORRECT ERRORS—*HELLER* v. *REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT AND HELLER*.—Among the many problem areas of the Torrens system of land registration, one that has generated much litigation concerns the authority of a registrar to make corrections to a certificate of title. The problem has two aspects:

(a) correction of errors as between parties to the transaction which gave rise to the error, and

(b) correction or errors after rights of third parties have arisen.

This latter category is largely settled by the *Turta* case[1] and, with some variations, by the *Kaup* case.[2] The former situation also appeared to have been determined by default, in that no one seriously questioned the power of the registrar to make corrections as between the immediate parties. Indeed, such power was conceded to the registrar by various cases before proceeding to limit him in other respects.

This complacency has been rudely disturbed, however, by the recent decision of the British Columbia Court of Appeal in *Re Heller*.[3] That court boldly swept aside as *dicta* pronouncements of the Supreme Court of Canada in the *Turta* case on this point and held that the registrar was not empowered to correct errors in a certificate of title as between the immediate parties; or at the least, that he lacked this power when the error was "procedural" in nature.

The case arose in this way: the applicant Heller was registered owner of certain lands and in 1949, fearing the results of a serious operation, he executed, but did not deliver, a conveyance of those lands in favour of his wife. Heller survived the operation but neglected to destroy the transfer. His wife somehow possessed herself of the transfer (in circumstances which it was mutually agreed did not involve fraud) and in 1958 applied to have it registered. The registrar agreeably did so, issuing to Mrs. Heller a new certificate of title. In so doing he was guilty of the error of cancelling Mr. Heller's certificate of title when the duplicate certificate of title was not on file in the Land Titles Office, as required by section 132 of the *Land Registry Act*.[4] Nor did he give notice to Heller as he is required to do under sections 134 and 135.[5]

Upon discovering that he had been displaced as registered owner, Heller applied to the registrar to correct the error under section 255 which empowers the registrar "so far as practicable, without prejudicing rights conferred for value"[6] to correct or cancel errors in the register. The registrar refused, saying "the regrettable error which has been made is one of procedure only and not of title."[7]

Mr. Justice Brown of the British Columbia Supreme Court directed that the correction should be made.[8] His Lordship relied on the *Turta*

1C.P.R. and *Imperial Oil Co. Ltd. v. Turta* [1954] S.C.R. 427.
2*Kaup and Kaup v. Imperial Oil Limited.* (1961) 35 W.W.R. 433. See also: *Assets Co. v. Mere Roihi* (1905) 92 L.T. 397; *Creelman v. Hudson's Bay Co.* 48 D.L.R. 234.
3*Heller v. The Registrar, Vancouver Land Registration District and Heller* (1961) 26 D.L.R. (2d) 154.
4*Land Registry Act*, R.S.B.C. 1948, c. 171.
5*Ibid.*
6*Ibid.*
7(1960) 23 D.L.R. (2d) 201 at p. 202.
8*Ibid.*

case as construing the limitation in the corrective section—"without prejudicing rights conferred for value"—to mean rights arising after the registrar has erred.

The Court of Appeal promptly reversed the lower court on two grounds:[9] (a) that the corrective powers of the registrar under s. 255 must be read in the light of, and subject to, the indefeasibility provisions of the Act, and (b) the registrar's error was "procedural" only, and not an error of title. In dealing with the first point, Mr. Justice Bird stated that he could find nothing in section 255 which indicated an intention in the Legislature to qualify the indefeasibility provisions of the Act.

> "On the contrary, I think the language in . . . the section—i.e.—'the Registrar may, so far as practicable and without prejudicing rights conferred for value . . .' restricts the power given to the Registrar to cancel instruments and registrations by cls. (a), (b), and (c) to the exercise of that power subject to the application of the provisions of the indefeasibility sections and 'so far as practicable, without prejudicing rights conferred for value.'"[10]

If this were true, the indefeasibility provisions could be invoked by a transferee to protect himself from the transferor. In the words of the Court of Appeal,

> ". . . the person named as registered owner of lands described in a certificate of title signed by the Registrar has title to those lands from the moment the signature of the latter is affixed thereto, good against all the world, subject only to the exceptions enumerated in S. 38 . . ."[11]

Yet in the face of this contention lies the *dicta* of several judges in the *Turta* case that, as between the immediate parties, an error is subject to correction and thus the protective cloak of indefeasibility does not extend to them. This raises a somewhat basic question in the Torrens system, namely, against whom will the principle of indefeasibility provide protection?

In a dissenting opinion in the Supreme Court of Canada in the *Turta* case, the Chief Justice went so far as to say that a certificate of title issued in error is "a complete nullity and could never become the root of a title to subsequent transferees",[12] and hence the indefeasibility provisions could never be invoked subsequent to an error. A more moderate approach was taken by the majority of the court. Mr. Justice Estey conceded the existence of provisions in the Act which contemplate the correction of the registrar's omissions in a certificate of title so long as it remains in the hands of the immediate parties.[13] In the same vein, Mr. Justice Kellock said ". . . once Podgorny had conveyed for value, any right of correction on the part of the registrar was gone",[14] indicating a right of correction would exist until that time; Podgorny being a party to the transaction which gave rise to the error.

It is submitted that the view of the latter ought to prevail. To construe the corrective powers of the registrar as being subject to the provisions for indefeasibility is surely to restrict those powers very nearly to the point of non-existence. Little more than spelling errors would be within the purview of the registrar's curative powers, with

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9 (1961) 26 D.L.R. (2d) 154.
10 *Ibid.* at p. 163.
11 *Ibid.* at p. 160.
12 [1954] S.C.R. 427 at p. 437.
13 *Ibid.* at p. 448.
14 *Ibid.* at p. 458.

the result that the section[15] would be denuded of substantially all force and effect with the exception of minor irregularities, these being of no consequence in any case.[16]

A more reasonable reconciliation of the Torrens principle of indefeasibility with the registrar's powers of correction is that the former is intended to provide protection for third parties dealing with a registered owner. They serve to protect a transferee from inheriting the defects in his predecessor's title; but they do not, and should not, protect a transferee from the effect of errors originating in the transaction from which he obtained his title.

As recently observed in the Alberta Court of Appeal, "the power to correct or cancel titles given to the registrar under S. 114 (2) . . . is not consistent with the theory of indefeasibility of title which the appellants advance."[17] This case will be considered later. It is sufficient to point out here that the theory referred to was one of indefeasibility as against all the world. Mr. Justice Crockett in the Supreme Court of Canada in *Minchau* v. *Busse* put the proposition this way:

> ". . . the sections of the Land Titles Act as to the conclusiveness of the certificate of title are for the benefit of those who bona fide acquire title on the faith of the register."[18]

In that case, the Appellate division of the Alberta Supreme Court had held that the title acquired by the mortgagor upon registration of a discharge was indefeasible against all the world which included the mortgagee himself who was attacking the mortgagor's title, and that only actual fraud could defeat a registered title.[19] In reversing this decision, the Supreme Court of Canada implicitly rejected this contention.[20]

The effect of the indefeasibility sections has recently been considered in the Alberta case of *Kaup and Kaup* v. *Imperial Oil Limited*.[21] The LaFleur Estate transferred land, except mines and minerals, to Mrs. Kaup. Due to the registrar's error, Mrs. Kaup's certificate of title contained no reservation of mines and minerals. She then transferred to herself and her husband jointly, as volunteers. Upon discovering his error, the registrar purported to correct it by restoring the LaFleur title as to mines and minerals, while adding a reservation of mines and minerals to the Kaup's title. The case is notable for several reasons, one of which is the statement with reference to the validity of the registrar's corrections. Said Mr. Justice Johnson in upholding the correction:

> "The appellant's counsel concedes that the title obtained by Urbania Kaup—as long as it remained in her name, could have been corrected, either by the registrar under section 114 (2), or by the court in an action by the LaFleur estate. Indeed, no other position could have been taken when the sections of the Act which I have quoted are considered. Section 23 provides that the transfer when registered shall 'transfer . . . the land or estate or interest therein mentioned.' Titles which by section 44 are conclusive evidence that the person

15 In British Columbia, S. 255; in Alberta, S. 185 (4).
16 See Land Titles Act, R.S.A. 1955, C. 170 S. 209 (1).
17 *Kaup and Kaup* v. *Imperial Oil Ltd.* (1961) 35 W.W.R. at p. 451, referring to the equivalent of the present S. 185 (4), Land Titles Act. R.S.A. 1955, C. 170.
18 [1940] 2 D.L.R. 282 at p. 306.
19 [1938] 4 D.L.R. 744.
20 See the Editorial Note, [1940] 2 D.L.R. at p. 283 which, upon examination of both decisions, would appear to be correct.
21 (1961) 35 W.W.R. 433.

named therein is entitled to the lands therein set out are titles 'granted under this Act.' This must mean granted in accordance with the provisions of the Act. Therefore a title to the mines and minerals which has been created not by transfer but by a clerical error in the land titles office cannot be a title that is conclusive under that section."[22]

and later,

"A certificate of title created in error cannot be said to evidence any interest in land although it may be the foundation (as it was in the *Turta* case) upon which a valid title will be created when *followed* by a transfer to a bona fide purchaser for value."[23]

It is submitted that this statement of the limit of the protection afforded by the indefeasibility provisions must be taken to be the law in Alberta in preference to the *Heller* decision. Hence, should the situation arise here, the registrar could correct his errors so long as the certificate of title remained in the name of any of the parties to the transaction which gave rise to the error.

In fairness it must be noted that the British Columbia Court of Appeal did not have the benefit of this opinion in the *Kaup* case. Nevertheless, the same conclusion is reached when one reasons from the general principles of Sir Robert Torrens' system. These were expressed by Lord Watson in the oft-quoted case of *Gibbs* v. *Messer*:

"The object is to save persons dealing with the registered proprietor from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."[24]

Hogg elucidates:

"The principle which appears to underline the decision in a leading case on the scope of the system (*Gibbs* v. *Messer*) is that the system is only intended to confer indefeasible title upon those who deal with a person actually registered, and deal with him on the faith of the register. This principle should logically extend only so far as to protect a person who deals with a proprietor originally registered in spite of his (the proprietor's) title being invalid, and should not protect that proprietor himself when attacked by the person rightfully entitled."[25]

It could not be gainsaid that, had Mrs. Heller conveyed the land to a bona fide purchaser for value who then registered his transfer, the latter would have an indefeasible title, even as against Mr. Heller. But it is quite a different situation that exists before such a third person intervenes. Nowhere did Lord Watson extend the shield of indefeasibility to the transferee as against his transferor. His reference to "the infirmity of his author's title" itself suggests that the purpose of indefeasibility is to preclude the inheritance of errors by one title from its predecessor. No suggestion is made—nor is there any reason why there should be—that the title in which the error originates is, because of itself and in spite of itself, indefeasible.

Baalman points out that the registrar's power of correction

". . . must be reconciled with the principle that at some stage a title founded on error or other imperfection becomes unalterable. To the extent to which the power is exercisable, however, it is a definite exception from absolute indefeasibility."[26]

22*Ibid* at p. 447.
23*Ibid*. Italics mine.
24[1891] A.C. 248 at p. 254.
25*Hogg, The Australian Torrens System* (1905) at p. 825.
26*Baalman*, The Torrens System (1951) at p. 151.

The learned author refers to and apparently approves of, *In re Mangatainoka* where Mr. Justice Edwards characterized the registrar's power to correct errors as limited to cases in which "no fresh registered interest has arisen in reliance upon the register."[27] A majority of the court on that basis held the correction valid. This test clearly permits the exercise of the registrar's power until third persons ("fresh registered interests") intervene; and was referred to in the Saskatchewan Court of Appeal[28] where Chief Justice Martin voiced the opinion that

> "Keeping in mind the scheme of registration intended to be created by the Act, I cannot think that under the provisions of section 70 the Registrar can do more than correct what may be called clerical errors as between parties to the transaction in respect of which the error has been made."[29]

There is no justification, either in precedent or in principle, for the construction placed by Mr. Justice Bird upon the section in British Columbia Land Registry Act investing the registrar with authority to correct errors in this situation. It is clear that the registrar is permitted under the statute to rectify mistakes made in his office until third party rights have intervened. With all due deference, the Court erred in upholding the registrar's contention that he lacked power to correct in the circumstances.

However, Mr. Justice Bird did not rest here. He further remarked that the error of the registrar was "no more than a procedural error".[30] It was on this basis that the learned judge disposed of embarrassing dicta in the *Turta* case, such as that referred to earlier in this comment.

> "The error of the Registrar was not one of title, as in *Turta's* case but involved only the failure arising from an honest mistake on the part of the Registrar to observe a procedural section of the Act—i.e. sec. 156."[31]

The courts have seldom turned their thoughts to the possibility of there being a distinction in the *type* of error which can be corrected by the registrar. This is attributable to the total absence of any such distinction in the statutes. The fact that the registrar made only an "honest mistake" is of no relevance. Such a distinction when attempted by the dissenting judge in *In re Mangatainoka*[32] was summarily dismissed by Baalman in speaking of the power of correction under the New South Wales Real Property Act.

> "Neither sec. 12 (d) nor sec. 136 give any indication of a distinction between the types of errors which the Registrar-General is empowered to correct."[33]

There would appear to be no more validity for such a distinction under the Alberta or British Columbia Torrens statutes.

It must be noted that Mr. Justice Egbert in the *Turta* case[34] referred to "clerical" errors as being within the registrar's healing powers between the immediate parties. Mr. Justice Bird analyzed the error in *Turta* as an "error of title", as distinct from the "procedural error" in the case before him. To alleviate this confusion, there is merit in the suggestion of the Special Committee of the Benchers of the Law Society of Alberta in 1956 that "until rights of third parties have arisen, errors can be

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27 (1914) 33 N.Z.L.R. 23 at p. 61.
28 *In re Land Titles Act* 7 W.W.R. (N.S.) 21 at p. 27.
29 *Ibid.* at p. 26.
30 (1961) 26 D.L.R. (2d) at p. 164.
31 *Ibid.* at p. 166.
32 (1914) 33 N.Z.L.R. 23.
33 Baalman, *supra*, footnote 26, at p. 420.
34 (1952) 5 W.W.R. (N.S.) 529.

treated as clerical."[35] This renders the use of the term "clerical" in the context of errors as between the immediate parties, superfluous, *all* errors being clerical until third party rights for value arise. The next step is for the courts to reject the distinction advanced by Mr. Justice Bird. To make the registrar's power of correction dependent upon the *nature* of the error is to beg the purpose of that very power. The object of correcting an error is to return the parties to the positions they would have held had the error not been made. Thus if the error is such that it alters the relative positions of the parties, then that error ought to be subject to correction by the registrar; excluding always, of course, the situation where rights of third persons for value have arisen. Little can be gained by tracing back the error and attempting to characterize its nature. It is, after all, the *effect* of the error that is the subject of complaint.

When this reasoning is superimposed upon the *Heller* situation, it appears that had the mistake not occurred, and thus had the Registrar called for Mr. Heller's duplicate certificate of title before registering the transfer, the latter, it can be assumed, would have refused and remained the registered owner; subject to any right of action Mrs. Heller might have pursuant to the transfer.

If the mistake is such that it has no effect on the transaction itself, then that error will not defeat the registered title. Reference must be made here to a recent comment on the *Heller* case by Mr. H. Raney.[36] His suggestion that if a "procedural" error can defeat a title, then a transferor might defeat a transferee's title should the latter neglect to pay the proper registration fees cannot prevail if, as suggested above, the *effect* of the error is the test. Mr. Raney's example would fall within that class of errors in matters ancillary to the transaction and which have no effect upon the rights of the parties and are therefore incapable of defeating an otherwise valid title.

There remains the fact that the relevant wording in the Alberta statute is mandatory:

> S. 20 (3) "Until the duplicate certificate of title for the lands affected is produced to him so as to enable him to enter the proper memorandum on the duplicate certificate, unless required to do so by order of a court or a judge, the Registrar *shall not receive or enter* in the day book any instrument . . ."

On the other hand, the phrasing in the British Columbia statute is somewhat less commanding:

> S. 156 ". . . and the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good safe-holding and marketable title, shall, *upon production of the former certificate or duplicate certificate of title*, register the title claimed by the applicant in the register."

Hence it may be argued that production of the duplicate certificate is even more essential to a valid registration in Alberta than in British Columbia. Mr. Justice Wetmore of the Supreme Court of the Northwest Territories, where mortgages were presented for registration without the duplicate certificates of title, referred to section 33 (2) of the Land Titles Act, R.S.C., 1894 which was the forerunner of the above S. 20 (3), and said:

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[35] Unreported.

[36] 38 Can. Bar Rev. 269.

". . . under the provisions of . . . (S. 33 (2)) . . . , the Registrar was not only prohibited from entering either of the mortgages in the day book, but he was prohibited from receiving them, and if they had been brought into his office by some person, instead of having been forwarded by mail, he might very properly have declined to receive them at all; unless the duplicate certificate of title was produced to him."[37]

Thus it may be that in Alberta at least, an error by the registrar such as in the *Heller* case would be regarded more seriously than it was by the British Columbia Court of Appeal.

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[37]Re American Abell Engine and Thresher Co. and Noble, [1906] 3 W.L.R. 324 at p. 325 (N.W.T.).