TITLES TO MINERALS IN ALBERTA

The Report of the Benchers' Special Committee, 1956*

At the invitation of the Government of the Province of Alberta a Committee of the Benchers of the Law Society of Alberta was appointed at Convocation of the Law Society held in January, 1955, with duties prescribed as follows:

> To give special study and consideration to the following matters, namely:—
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> 1. The form, content and general principle of legislation which might be enacted with respect to settling the equities of persons in regard to mineral rights arising out of errors respecting ownership of or claims to such mineral rights in the Land Titles Office: and
> 2. The establishment and operation of a Special Assurance Fund for mineral rights;
>
> and generally such other matters pertaining thereto as the Committee might deem necessary or advisable.

The Committee has now completed its studies. These included the soliciting and study of briefs and submissions from members of the Law Society of Alberta, major oil companies, companies owning large tracts of freehold mineral rights, and such other interested parties as the Canadian Petroleum Association and the Registrars of Land Titles in the Province. In addition, research was undertaken in the field of Government owned minerals, and the field of title guarantee insurance including its coverage and costs, and a comparative analysis was made of the major land titles statutes presently in use throughout the British Commonwealth.

The Committee held public hearings in Calgary on May 19th and 20th, 1955, at which time submissions were presented by a large number of interested parties and the opportunity was exercised of questioning closely the proponents of changes in the present Land Titles Act.

The Committee is now prepared to submit its report.

In this report the Committee first proposes to deal in a general way with problems which have arisen with respect to mineral interests resulting from errors in the Land Titles Offices, certain features of the Torrens System and the Alberta Land Titles Act, the Assurance Fund and other real property Statutes and law bearing upon the points involved, and, following such general review, to make recommendations as to means and measures to rectify present weaknesses.

Preceding the main body of the report will be found a summary of the Committee's recommendations.

SUMMARY OF RECOMMENDATIONS

1. The Province of Alberta should retain the Torrens System for registration of titles to minerals, but certain modifications be introduced.

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2. Lands owned by the Crown should be brought under the administration of the Land Titles Act as soon as possible.

3. The provisions respecting correction of errors should be revised.
   In particular
   (a) Registrars should have power to correct errors and rectify titles before rights of third parties have arisen.
   (b) Generally, Registrars should not be empowered to correct errors after rights of third parties have arisen.
   (c) The Courts should have power to correct errors in all cases but this power should be exercised against third parties who have dealt bona fide and for value on the strength of the immediately preceding Certificate of Title and who have their own ownership evidenced by a Certificate of Title only when it would be unjust and inequitable not to do so.
   (d) Bona Fide lessees or encumbrancees should not lose their interest in the land even if it is determined that the lessor or encumbrancer holds title by mistake and will lose it by rectification.

4. (a) The Assurance Fund, an integral feature of the Torrens System, should be retained and bolstered by additional sources of revenue. Only one fund for payment of both mineral and surface claims is required.
   (b) Payments out of the fund for claims with respect to minerals should be based on compensation for:
      (i) Actual cost of mineral right lost,
      (ii) Monies expended in development of minerals insofar as the expenditure enures to the benefit of the land,
      (iii) Damages for actual or prospective loss of profits, but limited to $1,000.00 per acre.

5. Caveators should be required to attach to the Caveat the instrument which it protects or a true copy thereof or, alternatively, to give particulars of the said instrument in the Caveat and then to file the instrument within 60 days following registration of the Caveat. Caveators should be required to make no contribution to the Assurance Fund, but a Caveat should not give rise to any claim against the Fund.

6. Periods of limitation should be clearly defined, be more liberal, and be made uniform with the Limitations of Actions Act.

7. A quieting provision should be inserted in The Land Titles Act to permit, within a fixed period, all persons who have suffered losses from past errors in the Land Titles Offices to claim for compensation therefor. All monies that have, in the past fifty years, been transferred out of the assurance fund into General Revenue should be made available for payment of these claims. If the value of the claims exceeds the sum of monies retransferred, then these should be paid on a pro rata basis.

8. Land Titles Office procedure should be improved as follows:
   (a) Separate titles should be issued for surface and minerals and in all cases where a parcel of land has been divided, thus eliminating titles with partial cancellations endorsed on them.
   (b) The exceptions to indefeasibility should be printed on each Certificate of Title and Duplicate.
   (c) A survey plan of the particular parcels included in the title should be attached to the Duplicate Certificate of Title.
   (d) The present use of the indefinite cancellation stamp in the Land Titles Office should cease.
9. All instruments and documents in the Land Titles Offices should be microfilmed to prevent loss.
10. The present provisions of the Land Titles Act dealing with mineral certificates should be deleted as repugnant to the principles of the Torrens System.

    (N.B.—Except where otherwise stated in the report, any statutory changes made as a result of recommendations contained therein should not have retroactive effect.)
11. The Land Titles Act should be completely redrafted to overcome its many redundancies and anomalies.
12. The salary scale of employees of the Land Titles Offices should be raised sufficiently to induce competent personnel to join the staff and to retain the present trained personnel.

PROBLEMS AND FIELDS INVESTIGATED

1. PROBLEMS ARISING OUT OF ERRORS — THE TURTA CASE

The discovery of rich deposits of oil and gas in Alberta has disclosed many errors made in the Land Titles Offices in the early days of operations. At that time no one was interested in the ownership of petroleum and Land Titles officials and landowners did not take great pains to see that ownership was properly recorded. Consequently the Regsitrars issued many titles in which ownership of mines and minerals was either improperly included or left out.

A mistake of this kind could affect minerals worth millions of dollars. This actually occurred and led to the law suit described as *C.P.R. and Imperial Oil Limited* v. *Turta et al.*[1] The *Turta* case, as it has become known, is the leading case in the field of Land Titles law. To appreciate the problems involved. the facts should be briefly reviewed.

In 1903 the C.P.R. was the registered owner under the Land Titles Act of the North West Territories of a quarter section of land in what is now the Province of Alberta. It obtained Certificate of Title No. 424 certifying it to be the owner of the said quarter section (and other lands therein described) in fee simple.

[1] [1954] S.C.R. 427.

This Certificate remained in effect under the Land Titles Act of the Province of Alberta enacted in 1906. In 1908 the C.P.R. transferred this quarter section to one Podgorny by an instrument of transfer in which it reserved to itself the coal and petroleum.

In issuing the Certificate of Title to Podgorny the Registrar made two errors. First the Podgorny certificate reserved to the C.P.R. only the coal. Second, Certificate No. 424 was endorsed with a memorandum to the effect that is was cancelled in full as to the Podgorny quarter section.

As a result of two subsequent transfers Turta became the registered owner of the quarter section with only the reservation of coal to the C.P.R. noted upon his title. He thus became the registered owner of the oil rights without intending to buy them and without realizing that he had acquired them.

By 1910 the Registrar found that Certificate No. 424 was so covered with endorsements that no room was left for further memoranda or endorsements and so for this reason the Certificate was cancelled. A new certificate and duplicate were issued to the C.P.R. covering the lands still outstanding in No. 424. It is important to note that the cancellation of Certificate No. 424 was evidenced by an endorsement on that certificate.

In 1943 these errors were detected by officials in the Land Titles Office who endeavoured to correct them by notations made upon the original Certificate issued to Podgorny and on all subsequent Certificates of Title relating to this quarter section. These corrections would, if valid, have reserved the petroleum to the C.P.R.; in other words, they would have restored the titles to the state in which they would have been had the errors not occurred.

After petroleum was discovered in the Leduc area in 1947, oil companies desired to drill on this land. The C.P.R., relying on the corrections made by the Registrar which purported to restore the petroleum to that company, leased the petroleum to Imperial Oil Litmited. Turta, on the other hand, took the position that he became owner of the minerals when he bought the land and that the corrections were ineffective. (In 1950 he transferred parts of his land to his sons but these transfers do not affect his mineral or his legal position.) In 1952 he commenced an action in the Supreme Court of Alberta for a declaration that he owned the petroleum. The main issues in this action were these:

(1) Was there "misdescription" in the title issued to Podgorny?

(2) Did the C.P.R. hold a "prior Certificate of Title"?

(3) Were the corrections effective?

If the answer to any of these questions was "yes" then the C.P.R. would win.

However, the trial judge, the majority of the Appellate Division of the Supreme Court of Alberta and a majority of the Supreme Court of Canada answered all of these questions in the negative.

A short explanation or the statutory provisions may help to explain these answers.

(1) *Misdescription*—The 1906 Act makes a title such as Turta's indefeasible except in certain instances, one of which is misdescription. The Supreme Court of Canada held that misdescription applied only to misdescription of boundaries and not to the erroneous inclusion or exclusion of minerals.

(2) *Prior Certificate of Title*—The existence of a prior Certificate of Title is another exception to indefeasibility. The C.P.R. claimed that it held a prior Certificate of Title—Title No. 424. The Supreme Court held that this prior Certificate was cancelled and therefore was not an exception to indefeasibility even though it was cancelled incorrectly.

(3) *Power of Correction*—The Supreme Court held that the provisions in the Act permitting the Registrars to make corrections did not apply so as to affect bona fide third person purchasers for value. Therefore the purported corrections were a nullity.[4] The Act referred to by the Court in this instance was the 1942 Act rather than the 1906 Act inasmuch as the corrections were made in 1943.

In the result, Turta, or those claiming through him, were held to be entitled to the petroleum which the C.P.R. had never transferred or intended to part with. It was stated to this Committee that this petroleum had an approximate value of $5,000,000.00; it was further stated that had the C.P.R. leased such petroleum on its usual one-eighth royalty basis, it was estimated that the royalty would have had a value of $625,000.00 over a period of years.

The above sections of the Land Titles Act as it stood in 1906 are in all material respect the same today. However, in 1949 and 1950 important changes were made to other provisions in the Act. This was prior to the commencement of the Turta case in 1952. The effect of these changes is as follows:

(1) That the time for bringing an action against the Registrar by reason of error, omission or misdescription in the Certificate of Title is limited to six years from the date when the deprivation took place or when the error, omission or misdescription was made by the Registrar[5] and

(2) Where the error relates to mines and minerals the amount of the claim recoverable from the assurance fund is limited to the amount actually paid out for the interest in mines and minerals and a sum not exceeding $5,000.00 for present or prospective losses.[6]

Before these changes, the time for bringing action did not start to run until the error was discovered, and there was no limit on the amount recoverable from the assurance fund. Thus the C.P.R., though it had lost its petroleum, would, prior to the amendments, have been entitled to compensa-

[2]sec. 104, now 171; sec. 705, now 159; sec. 44, now 62.

[3]sec. 104, now 171; sec. 42, now 60; sec. 44, now 62.

[4]sec. 174(1), now 174a and 174b.

[5]Sec. 167.

[6]Sec. 167(a)

tion. In consequence of the amendments the C.P.R. was left without any recourse whatsoever for the loss it had suffered. It was unsuccessful in recovering the interest in the land of which it had been deprived. It was further precluded from the recourse to the assurance fund to compensate it for the loss it had suffered through the error of the Registrar because more than six years had passed since the error occurred. In any event, the amount of $5,000.00 recoverable would hardly have justified the making of a claim. The injustice of such a result must be conceded.

It was pointed out to this Committee in the course of the hearing that there is a sizable number of titles in which errors similar to those in the Turta case have been discovered, but it is still impossible to discover all of the errors which have been made. Years of systematic searching would be required to ascertain the total number of errors which exist; such a task is one of considerable magnitude.

It is generally conceded that the results flowing from the Turta decision and the lack of recourse to the assurance fund may occasion great injustice to owners of minerals who have been deprived of their property through Land Titles Office errors, and it is with a view to seeking some solution to such injustice that your Committee was requested to undertake this task.

Meantime, presumably in the hope that some equitable solution may be found for the present problems, the Legislature has enacted temporary legislation prohibiting "a person who acquired mines and minerals as a result of an error in the Land Titles Office and who did not acquire them bona fide for value without notice of the error" from disposing of those mines and minerals.

[illegible]. THE TORRENS SYSTEM AND THE ALBERTA LAND TITLES ACT

As is well known, the Alberta Act and all similar land titles acts are based on a statute of South Australia (1858) drafted by Sir Robert Torrens which was intended to revolutionize the law of real property by simplifying conveyancing and providing for certainty of Title.

In territories where there had not yet been any great amount of conveyancing and much of the land was still unoccupied, the system had obvious advantages and it was adopted with various modifications in a number of jurisdictions in the British Empire, the more important of which were the states of Australia, New Zealand, the North West Territories and the provinces of Manitoba, Saskatchewan and Alberta.

The shortcomings which Torrens desired to overcome were well set forth in the preamble to the 1858 statute:

> "Whereas the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws . . ."

The object of the statute was to make the conveyancing of title to land as cheap and simple as the transferring of ownership of ships or of shares of stock. In order to accomplish this a system was established under govern-

mental control for registration of title to land. Simplified forms of transfers, leases and mortgages were also provided for. It was intended by Torrens that a layman without the intervention and expense of a skilled conveyancer, would be able to carry out the various transactions relating to real property.

The transfer was the document which conveyed title from vendor to purchaser. When the transfer was registered, the Registrar of the particular Land Office issued a new Certificate of Title to the transferee and cancelled the preceding Title. So it followed that while the request for a transfer was embodied in a form which set out the interest in the land being conveyed, it was the official act of the Registrar in issuing a new Title which effectively completed the transaction. Thus, the State itself undertook that the mandate given to the Registrar by the transfer would be carried out without deviation and the State guaranteed the new Title.

Unfortunately Torrens' hopes have not been fully realized in the actual operation of the system in Alberta and perhaps elsewhere. Although at the present time relatively few errors are being made, many errors have been made in the past with the result that the original owners of valuable minerals rights have been deprived of them without either their consent or through due process of law.

It should be noted that the Torrens System differed radically from either of the two other systems then in use. Under the first and oldest of these systems, the purchaser or mortgagee relied on a chain of documents produced by the vendor and which the purchaser hoped would give him a good title. This system is still employed in England except for parcels of land which have been brough under the Land Registry Act (which is much like the Torrens System). Under the second system documents relating to land are registered in a government office but the Government does not issue a Certificate of Title and does not guarantee that the owner gets a good title. Such is the system in Ontario except where lands have been brought under Ontario's Land Titles Act. (This Act is similar to the English Act, and is based on Torrens' principles.) Both these systems require long and tedious searches of titles, sometimes with questionable results.

The Torrens System provides for accurate survey plans, to be filed in the Land Titles Office, defining with particularity the boundaries of every parcel. The Certificates of Title, when issued by the Registrar, are in turn based upon these plans of survey. This was a pronounced step forward because a search of title could now be confined to the particular parcel set out in the title as referred to in the plan.

Torrens doubtless hoped that the law applicable to earlier systems would be completely replaced and that only registered interests would be recognized. This hope has not been fulfilled in that equitable interests are still recognized. This feature has no particular bearing on this inquiry, however.

Torrens' Act was badly drafted. It has been commented on by Judges and others that the sections of many Torrens statutes are almost incomprehensible and defy interpretation. The original Act was passed, as has been

stated, in South Australia and in its subsequent adoption by other jurisdictions in Canada and Elsewhere the same provisions were taken almost verbatim with no effort being made to clarify the Act. The Alberta Act has been made more confusing by piece-meal additions to it throughout the past half century and is badly in need of a complete revision. Many of the defects of the Act have been glossed by judicial pronouncements and it has been found that it provides a workable scheme which is satisfactory in most transactions, particularly in cases where the title to the surface has not been severed from the title to the minerals.

It should be noted that the English Act and, to a lesser degree, the Ontario statute are exceptional in that they are concise, simple and readily understood. That such statutes do exist should be an incentive to bring the Alberta Land Titles Act up to the same standard.

The features of the Torrens System, in summary, are:

(1) It is a system of State registration of title to land; the State operates the machinery of the Act and issues the titles and makes all entries.

(2) Each parcel is recorded in the register as a unit of property.

(3) Transactions, to be effective, are registered against the title to the land and do not exist merely as instruments executed by interested parties.

(4) The Certificate of Title is intended to be complete, and an accurate mirror of all transactions, and persons dealing with registered proprietors do not have to go behind the register except in search of a few statutory exceptions to indefeasability.

(The above paragraph deals with one of the principles of the Torrens System which is called "the mirror principle" by Theodore B. F. Ruoff, the Assistant Land Registrar at Her Majesty's Land Registry in London, England, in his article "An Englishman Looks at the Torrens System". Mr. Ruoff states that the mirror principle means that the Register Book—and in the Alberta Land Titles system this would mean the Certificate of Title—reflects all facts material to an owner's title to land. Nothing that is incapable of registration and nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate.

Mr. Ruoff also describes the Torrens System by indicating another of its principles as "the curtain principle". By this he means that, so far as a proposing purchaser is concerned, the Register Book is the sole source of information about the legal title so that he need not look behind it.)

(5) The registration of a transaction is essential to its validity as against competing interests.

(6) An assurance fund is provided which, in theory at least, is intended to provide compensation to any person who suffered loss from errors or mistakes of the Registrar.

An often quoted description of the Torrens System is that to be found in the book "Australian Torrens System", a comprehensive survey of the Torrens System in Australia in 1905, written by James Edward Hogg, in which it is stated at page 1:

> By 'Torrens Systems' generally are meant those systems of registration of transactions with interests in land whose declared object . . . is, under government authority to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer. An important feature of the system is an indemnity fund to compensate anyone who may be injured by the operation of the Act.

Mr. T. B. Ruoff, previously mentioned, has described the system when properly operated as having the virtue of being cheap, reliable, expeditious, simple and suitable.

3. THE ASSURANCE FUND

The assurance fund should be an integral part of any Torrens System. Inasmuch as the State operates the system, it follows as an essential feature that if any loss is sustained by reason of the operation of the system the person sustaining such loss shall be compensated by the State, which in turn makes provision for this liability by collecting a fee based upon a percentage of the value of the lands dealt with. In Alberta this fund is known as the Assurance Fund.

The basis of collection varies from jurisdiction to jurisdiction. For example, in Ontario, payment is made only when land is brought under the Act; in England no levy is made inasmuch as payment of claims comes out of the nation's general revenue; in New South Wales payments were suspended when the surplus of the fund became so great that levies were no longer required.

In Alberta the Fund was established and is maintained by a levy upon the registration of a grant or first transfer of land of one-fifth of one percent of the value of the land granted or transferred if the value is $5,000.00 or under, and one-tenth of one percent on the additional value, and upon any subsequent transfer one-fifth of one percent on the increase of value since the granting of the last Certificate if such increase is not more than $5,000.00, and one-tenth of one percent on the excess of the increase over $5,000.00 An Assurance Fund levy of 25c per $1,000.00 or one-fortieth of one percent of the money secured, whichever is the greater, is levied on the amount of money secured by any mortgage or encumbrance placed on land.

Evidence produced at the hearing and information supplied by the Department of the Attorney General of the Province of Alberta shows that a total of $3,815,645.75 has been collected during a period of approximately fifty years in which the Fund has been in operation, while only $72,280.33 has been paid out in the same period. The Land Titles Act provides that when the Fund reaches the sum of $75,000.00, the excess may be transferred into general revenue. In point of fact the sum now in the Fund is $300,000.00. The rest being approximately $3,500,000.00 has been transferred to general revenue.

Under the Act as it originally stood, the right to recover losses from the Assurance Fund was beset by so many conditions that it was almost impossible

to recover. Although the provisions were broadened by the 1935 amendments, a claimant still had formidable difficulties to surmount, made more pronounced by the amendments in 1949 which limited the amount recoverable from the Assurance Fund with respect to claims for mines and minerals to $5,000.00 with respect to general damages. In addition, the tendency of officials seems to have been to resist payment out of the Fund wherever possible. By way of contrast the policy under the English Act very often is to make payments voluntarily. In that country no litigation need be commenced as a condition precedent to recovery, nor is it always necessary to take action against the Registrar. The Deputy Registrar of the English system has stated that his office does not contest all claims. The tendency to resist payment under the Alberta system seems to account in large measure for the "indecently solvent" condition of the Assurance Fund. This phrase "indecently solvent" was coined by John Baalman, author of "The Torrens System in New South Wales", when describing the vast amounts of money in many Torrens System assurance funds. Because of this surplus of monies in the fund over claims for payment out, some Australian jurisdictions have now dispensed with the assurance fund levy payable by persons registering instruments under the Land Titles System in those jurisdictions.

4. COMPLICATIONS ARISING FROM SEVERANCE OF MINES AND MINERALS

It is likely that Torrens did not contemplate the severance of the surface on the one hand from the mines and minerals on the other hand, and it was only intended by him that the land should be dealt with as a complete unit. It will be observed that in "The Australian Torrens System" by Hogg, published in 1905, mines and minerals are not mentioned in the index. Transfer of shares of stock or of ships have no reservations or exceptions which attach to them. Torrens likely felt that land could be dealt with in a similar fashion.

The severance of the mines and minerals from the surface first arose in Alberta by reason of the fact that the Crown reserves (and has done so since 1888) all minerals to itself and only grants patents to the surface except in specific cases where title to minerals such as coal, or gold, were applied for. This practice was adopted by the Hudson's Bay Company and the C.P.R., each of which owned large tracts of land in Western Canada. These companies have sold many parcels in varying forms from time to time but on such sales have reserved to themselves the minerals. The Province of Alberta presently gives no outright transfers of petroleum and natural gas in fee simple, but grants so called leases thereto (which arrangements will be herein referred to as "leases") under the provisions of the Mines and Minerals Act. The C.P.R. also grants leases, as does the Hudson's Bay Company.

In Alberta relatively few transfers of minerals as such are registered in the Land Titles Office. Instead, most oil companies follow the American practice of obtaining from the person who owns the minerals in fee simple a lease of the minerals, usually on the basis of a one-eighth royalty, together with a delay rental. In addition a great variety of transactions or dealings with

the minerals takes place, none of which constitutes an outright transfer of minerals. Examples of these transactions are: royalty trust agreements, farm-out agreements, reservations and licences.

The practice of dealing with mines and minerals or with particular classes thereof apart from the surface, and even apart from other mines and minerals, has multiplied the possibility of errors and omissions. This has seriously complicated the operation of the Land Titles system in this province.

5. PRESENT SEARCHING PRACTICE OF OIL COMPANIES

The Torrens System, because of its 'mirror' and 'curtain' principles already referred to, permits a person interested in the state of title to a parcel of land to quickly 'search' the title by examining only the last issued Certificate of Title. However, according to the evidence presented to this Committee by various persons engaged in acquiring rights to petroleum and natural gas, it has been the custom in the oil industry to make historical searches of titles to minerals going back to the Crown grant. This practice is imperative under the Alberta Land Titles Act because Section 61 thereof makes every title subject to the reservations and exceptions in the original grant from the Crown, and Section 62 makes every title subject to:

(1) Any prior Certificate of Title,

(2) Wrong description of boundaries or parcels.

The oil companies usually obtain leases or one of the variety of other instruments before-mentioned and, although some of these instruments may be themselves registerable, the general practice is to protect them by registering a caveat covering the interest dealt with in the instrument.

6. CAVEATS

The scheme of the Torrens System is to limit registerable documents to a small number that clearly disclose the interest conveyed.

The use of the caveat in the Torrens System of land registration was originally intended as a temporary measure, designed to protect an interest in land until the claimant of that interest was able to register a document such as a transfer of a mortgage to evidence his interest or otherwise establish his claim. In the typical Torrens statute, provision was made for the lodging or filing of the caveat or caution against the registered title. Originally it was not a registrable instrument in itself but was a temporary measure only. In 1915[7], the Appellate Division of the Supreme Court of Alberta held that caveats themselves were registrable and since that time many claimants have chosen to register a caveat instead of the document which the caveat protects. In particular, oil companies generally follow the practice of registering caveats to protect their oil leases instead of registering the leases themselves. This practice has enabled them to obtain priority for their leases without disclosing the consideration or other details thereof.

One consequence of the practice of registering caveats is the impossibility

[7] *Royal Bank of Canada* v. *Banque d'Hochelaga* (1914), 7 W.W.R. 817.

of an outsider to make a complete search of a parcel of land. The caveat is seldom accompanied by the document which gives the claimant his interest and this fact requires inquiries to be made outside the Land Titles Office, the very task which the Torrens System was intended to eliminate.

The caveator, as has been mentioned, makes no contribution to the Assurance Fund when he registers his caveat but he is permitted to claim against the Fund in the event that he is deprived of his interest through an error in the Land Titles Office. Such a situation is inequitable.

The importance of the problems relating to caveats is emphasized by the almost exclusive use of the caveat by the oil industry. Because petroleum and natural gas leases and other interests in minerals are seldom registered otherwise than by caveat, as regards mines and minerals the caveat is the most widely used Land Titles document.

Evidence given to this Committee indicates that the oil companies and others prefer to file caveats than the leases themselves because they do not wish to disclose the consideration they paid.

7. CROWN MINERAL TITLES AND LEASES

Theoretically, all surveyed land in a political jurisdiction employing a Torrens System for registering title to land will be registered under the system. Such is not the case in Alberta, however. In this province, except in instances so comparatively rare as to be practically negligible, titles are not issued to the Crown for mineral rights held by it even in surveyed land. Moreover, much land in Alberta is unsurveyed; and therefore not registered. These rights constitute all mineral interests underlying approximately ninety percent of the land in the province. The practice of the Crown is to issue leases of mineral rights through the Department of Mines and Minerals and to maintain a system in that Department whereby such leases and assignments thereof are recorded. The great bulk of Crown minerals underlie land which has not been brought under the Land Titles Act.

Recent amendments to the Mines and Minerals Act permit the registration with the Department of Mines and Minerals of agreements affecting Crown leases, but there is no provision contained in these amendments as to the effect of such registration or as to priority relative thereto. The only present effect of such registration would seem to be that if a person searched and became aware of the existence of the instrument registered, he would have received notice of it.

This situation of a separate registration system for minerals should be remedied, and suggestions will be made to this end.

RECOMMENDATIONS

As a result of its studies and research this Committee recommends:—

1. RETENTION OF THE TORRENS SYSTEM AS APPLICABLE TO MINERAL TITLES

The briefs which were submitted to this Committee and the evidence which was adduced in support of such briefs, together with the Committee's own research, have satisfied it that the Torrens System should be retained and continue to be applicable to mineral interests brought under the Land Titles Act.

It is the opinion of this Committee that the submissions made to it did not indicate any serious objection to the operation of the Torrens System of titles as such, and the parties who appeared did not, in the main, have serious objections to the theory of the system which has worked reasonably well in this Province over a long period of years.

This Committee feels that the difficulties which have developed are not the result of the system itself, but have in most part arisen as a result of errors and ommissions on the part of the human agents who have operated the system under the Land Titles Act.

Amendments to the Land Titles Act and alterations in the procedure followed thereunder, which will be suggested, may help to reduce the likelihood of error and to provide for more equitable results when such errors do occur.

The Committee therefore feels that the Torrens System should continue to be applicable to mineral titles as well as titles to the surface of the land and that no separate registration system for mineral rights should be established.

It should, however, be emphasized at this point that this Committee's recommendation with respect to retention of the Torrens System is coupled with recommendations which it will make with respect to procedure, rectification of titles, limitations of actions and restoration of rights against the assurance fund, set out later in this report.

2. CROWN LANDS

Suggestions were made to the Committee that Crown lands should be patented and brought within the provisions of the Land Titles Act when petroleum and natural gas or other mineral leases are issued.

The proponents of such a change argued that a more accurate examination could be made of dealings with minerals owned and leased by the Crown if this was done. They contended that the Crown, as land owner, should be in no different position than an individual as land owner, and that if the Torrens System is applicable to minerals then it should be used for all minerals in Alberta and not merely the ten percent not owned by the Crown. It was generally recognized that only such Crown lands as are in serveyed areas could be brought under the Torrens System, which requires surveys for accuracy. It further appeared that Crown lands could only be brought under the Land Titles Act gradually and not all at once. Opponents of this request believe

the Department of Mines and Minerals is accurate in the handling of mineral records and that transactions affecting Crown mineral interests are dealt with much more expeditiously than could be the case at the Land Titles Office.

This Committee is of the opinion that, if the Land Titles Act is properly administered, there should be no reason why minerals cannot be dealt with as efficiently in the Land Titles Office as in the Department of Mines and Minerals. There seems to be no logical rebuttal to the proposal that, if the Torrens System is the best system that can be devised for the registration of titles, it should cover all surveyed lands and not simply those which are not owned by the Crown.

The expense of endeavouring to bring Crown lands under the Land Titles Act at this time and to record the leases, cancellations of leases, reservations, licences and other dealings with Crown lands would be tremendous. A great deal of work would be added to the already overburdened Land Titles staff. Nevertheless the Committee advises that the change is desirable.

In order to accomplish the change as smoothly as possible, the transfer from the Department of Mines and Minerals to the Land Titles Office of all Crown owned minerals should be done gradually. The following procedure is suggested:

First —Transfer all Crown lands in respect of which agreements have been entered heretofore;

Second —Transfer those Crown lands in respect of which agreements are hereafter entered;

Third —Transfer the remainder of the Crown lands as soon as conveniently possible but not delaying such transfer unreasonably.

An interim system of recording dealings other than absolute assignments must be devised. In other words adequate provisions should be made in the Mines and Minerals Act for the registration of instruments affecting Crown lands but not constituting absolute assignments, which were the only documents of which registration was permitted up until the first 1955 Session of the Alberta Legislature. At that Session two important amendments were made to the Mines and Minerals Act. Section 288(a)[8] provided for the registration of documents other than absolute assignments affecting Crown lands. Section 288(b) provided for the registration of security taken under Section 82 of The Bank Act.

It is felt that Section 288(a) in its present form may not be wide enough to permit adequate regulations to be made by the Department of Mines and Minerals defining the effect of registration and the priorities attaching to registered instruments over those which are not recorded. It is suggested that to clarify this situation additional amendments should be made and it is understood that recommendations to this effect have been made to the Department. In the meantime the Department is engaged in the preparation of regulations to govern registration of instruments under Section 288(a) and these regulations will be studied by this Committee when they are issued.

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[8] (Alta.) 1955, c. 37 ss. 18

Any interim system so suggested must, of course, contain rights of registration similar to those under the Land Titles Act so that all lands and dealings therewith are treated uniformly.

3. ENLARGEMENT OF POWERS TO CORRECT ERRORS AND RECTIFY TITLES

All of the statutes which this Committee has considered, including several Torrens statutes as well as the English and Ontario Acts, contain wide powers to rectify titles in case of error in issue, misdescription, entries or endorsements made, orders omitted in error, and the like. The Alberta Land Titles Act, under the heading "Remedial Proceedings" contains several sections setting forth the powers of Courts, Judges and Registrars in correction of errors, cancellation of titles, etc.[9]

No question has been raised with respect to the jurisdiction of the Court in matters of this nature but some objection has been made to powers of correction vested in the Registrar.

This Committee is of the opinion that the limited powers of rectification vested in the Registrar under Section 174(a) of the Land Titles Act should be retained, but that, in the interests of clarity and certainty, the sections dealing with powers of the Registrar might be revised and rearranged. Section 174(a) devotes itself almost entirely to the power of the Registrar to become possessed of a Duplicate Certificate of Title. Only in the last sub-section, subsection (4), does the power of the Registrar to correct the Register appear. Again, it should be noted that the said sub-section (4) states that the Registrar may correct "so far as practicable without prejudicing rights

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[9]Section 174(a) (4)

"In the case of any duplicate certificate or other instrument within the provisions of subsection (1) the Registrar, whether or not the duplicate certificate or other instrument is in his custody or has been produced to him in answer to his written demand, so far as practicable without prejudicing rights conferred for value, may cancel, correct or complete the register, and may wholly or partially cancel any duplicate certificate or other instrument and may correct any error or make any entry or addition in the duplicate certificate or other instruments or in any entry, memorandum or other endorsement thereon or in any memorial, duplicate certificate, exemplification or copy of any instrument made in or issued from the Land Titles Office and may supply entries omitted."

Section 176(1)

"In any proceeding respecting land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the Registrar to cancel, correct, substitute, or issue any duplicate certificate, or make any memorandum or entry thereon or on the certificate of title and otherwise to do every act necessary to give effect to the decree or order.

Section 176(2)

"In particular and without limiting the generality of the foregoing, in any case where a title to land has been issued and the owner has entered into any contract relating to the sales or disposition thereof and where it can be shown to the satisfaction of the judge that,—

(a) the applicant is entitled to a transfer of the land and to be registered as owner thereof, and that the registered owner has no further interest in the land; and
(b) the registered owner is dead and no transfer of the land to the purchaser has been made; or
(c) the registered owner has not been located after a reasonable inquiry and no transfer of land to the purchaser has been made;

upon the giving of such notice to such persons as the judge may require, the judge may by order direct the Registrar to cancel the existing certificate of title and issue a new certificate of title in the name of the purchaser."

conferred for value". The *Turta* case held that this power to correct may never be exercised if it prejudices rights conferred for value.

This Committee strongly urges that the Registrar must have and be permitted to continue the exercise of power of correction of clerical errors which occur from day to day in the Land Titles Office and which do not adversely affect anybody. An appeal to the Courts would then be open to a dissatisfied party. The correction of errors which affect interests or rights of third parties must be left directly to the Court, with the Registrar having no jurisdiction to deal with such matters. To enact this recommendation into legislation, an amendment will be required to Sections 174(a) and 174(b) of the Act.

The Committee proposes to indicate its views on rectification; the subject will be dealt with under the following headings:

(a) Rectification between original parties to error;
(b) Rectification where rights of third parties have intervened;
(c) Exceptions to powers of correction or rectification against third parties:
(d) Protection of lessees and mortgagees where corrections are made.

(a) *Correction of Errors and Rectification of Titles — BEFORE Rights of Third Parties have Arisen*

The Committee is satisfied that under the law of Alberta as it now stands the Supreme Court of Alberta has adequate power to correct errors and rectify titles as between the immediate parties to the transaction.

But it is felt that it would be a mistake to deprive the Registrar of all corrective powers. In other words, if the Registrar improperly cancels a title and then discovers his own error ten minutes later, he should be permitted to correct it. It would be ridiculous if the Registrar was forced to advise the title holder that his estate had been cancelled and that he must apply to a Supreme Court Judge for rectification. Yet this must be the logical extension of any argument to deprive the Registrar of his corrective powers. It could be argued, of course, that a correction such as the one just indicated is not merely clerical but affects the rights and estates of parties and that to empower the Registrar to rectify such error would be unconstitutional; hence the rectification could only be made by a Judge. It is the Committee's opinion, however, that until rights of third parties have arisen, errors can be treated as clerical.

It is also suggested that the power to correct be made a duty to perform instead of a judicial function to be fulfilled. This would place the Registrar on the same basis as many administrative tribunals constitutionally operating within the Province and this might then eliminate the constitutional objection made by Egbert, J. in the *Turta* case.

There are numerous reported cases where rectifications have been made between the original parties to a transaction in which an error has occurred. Even the *Turta* case seems to indicate fairly clearly that under our present Act the mistake could have been corrected as between Podgorny and the C.P.R.

When the inquiry is confined to a situation between one owner and the next succeeding owner and where the rights of the parties are defined by the

documents which have passed between them, it is difficult to see how a new owner could claim compensation against the assurance fund if the rectifications were simply made to put him in the position in which he should have been as a result of the documents passing between the parties.

In summary:—Registrar should correct errors where such arise between original parties to transaction.
—No compensation need be paid to either party under such circumstances.

(b) *Correction of Errors and Rectification of Titles—AFTER Rights of Third Parties have Arisen*

It is generally conceded that the mirror principle is one of the essential features of the Torrens System which means in effect that an existing Certificate of Title must be regarded as faithfully reflecting the effect of the documents which have been recorded preceding its issue.

This Committee feels that this principle should, essentially, be maintained and is therefore of the opinion that the title of third parties should generally be good and not subject to rectification where there is no fraud and where value has been given.

Where the third party did not give value as, for example, where he acquired title by Will or gift, he should be placed in the position of his vendor who gave him his title. In such cases the Registrar could rectify against these volunteers.

However, to this general recommendation there must be exceptions which will be dealt with hereunder. *It should be strongly emphasized that the recommendation that the final title should, in general, prevail, is made on the assumption that a person deprived of his interest will be compensated from the assurance fund.*

(c) *Exceptions to Correction or Rectification against Third Parties*

While the general principle should favour the last title and leave it free from risks of rectification, it is not the intention that all the exceptions to indefeasibility which are presently contained in the Act should be removed.

The exceptions to indefeasibility and conditions or limitations affecting indefeasibility presently contained in the Act may be summarized as follows:

(1) Fraud in which the owner has participated;
(2) Prior Certificate of Title;
(3) Reservations or exceptions in the original grant from the Crown;
(4) Unpaid taxes;
(5) Public highway right-of-way or easement;
(6) Lease less than three years;
(7) Subsisting writs of execution;
(8) Rights of expropriation;
(9) Misdescription.

It is the feeling of this Committee that if the title is in most instances

indefeasible this gives, in a large measure, the reliability that the Torrens System was designed to ensure.

The result of this is that for ordinary purposes a search of an existing Certificate of Title would be all that was necessary but to be without any doubts as to the title an historical search would still have to be made.

Of the exceptions, conditions and limitations above mentioned, all of which are found in the greater number of Torrens Acts, the most important for our consideration are the true exceptions to indefeasibility, being:

(1) Fraud and, possibly, acts by the present title holder contributing to the error;

(2) Misdescription;

(3) Prior Certificate of Title.

The other exceptions, which in England are referred to as "overriding interests" and which exist without special nomenclature in most other statutes, such as exceptions in the original grant from the Crown, unpaid taxes, public highways, rights of expropriation, leases under three years, etc. will have to continue to exist.

No one would argue about such interests as unpaid taxes and public highways. Some might feel that the exceptions in the original grant from the Crown should not be allowed to be raised if a third party holds the land but this Committee is not disposed to quarrel with this overriding principle

Iit is submitted, however, that the number of overriding interests be kept as small as possible. Mr. Baalman states in his book, "Comments on the Torrens System in new South Wales" that in some Australian states the overriding interests have become so numerous, and are found in so many different statutes, that the title holder can never reasonably know what overriding interests exist to which his title may be subject. This is contrary to the principles of the Torrens System.

The principle of overriding interests, however, is not nearly so difficult or so important as the main exception to indefeasibility which were classified in the second group and which will now be dealt with. These are fraud, misdescription and prior certificate. They shall be dealt with in that order.

Fraud

It is felt that no limitation can be placed upon this particular exception from indefeasibility; no one should gain from his own fraud.

Misdescription or Wrong Description

The *Turta* case limits the effect of the word "misdescription" to an error in description of boundaries of lands. This Committee agrees that it remain, so limited, as an exception to indefeasibility. But it is suggested that the Alberta Act be revised to follow the Manitoba Act and others so that this exception of misdescription is available only where there is not a bona fide purchaser for value.

Prior Certificate of Title

The exception to indefeasibility resulting from the existence of a prior uncancelled Certificate of Title seems to offer no difficulty and this Committee recommends its retention.

A special problem does arise, however, when a prior Certificate of Title has been improperly cancelled.

Widely differing representations were made to this Committee as to the consequences which should follow an improper cancellation of a Certificate of Title and as to where the loss should fall in such cases.

On behalf of land owners it has been argued that a Certificate of Title which has been improperly cancelled should prevail over a Certificate of Title subsequently issued. The land owners find it impossible to accept the view that an owner should be deprived of his property by an error in the Land Titles Office for which he cannot, in most instances, be charged with any responsibility. They urge that it should, in most cases, be comparatively easy to arrive at the compensation to be allowed to one who has dealt in mines and minerals on the strength of the latest Certificate of Title, inasmuch as it is usually possible to ascertain what that person has paid for mineral rights and the amount of money he has expended thereon, whereas it may be impossible to ascertain or fix with any degree of certainty the actual value to the former owner of the interest of which he has been deprived.

The landowners admit that the adoption of the principle which they advocate, i.e. improperly cancelled titles cannot form a root to a good title, would cast the onus on a person dealing with lands to search and examine all titles and documents intervening between the latest title holder and the original grantee to ascertain that no previous Certificate of Title has been improperly cancelled, but they suggest that this casts no greater burden on such a person than the one which exists now where it is quite conceivable that a title may have issued to a mineral interest actually reserved to a former owner whose title has not been cancelled.

They contend that it is preferable that the risk of loss should be borne by the person who, by making an historical search and examining preceding documents, could have avoided the loss rather than by a person who may have had no opportunity to correct the error before its consequences became irreparable because he had no knowledge that it had occurred.

Opponents of these rather cogent arguments urge that the *Turta* case has clearly settled the law in favour of the person dealing on the strength of the latest Certificate of Title and that to give effect to changes suggested by the landowners would amount to a drastic alteration of present law. They point out that no such change should be given retrospective or retroactive effect because it may be reasonably assumed that people have already dealt with mineral titles and interests relying on the law as laid down in the *Turta* case. They therefore suggest that any change which this Committee might recommend could at most only affect or apply to improper cancellations of titles which might occur from now on or from the date the change became effective,

and it may be reasonably assumed that errors are much less likely to occur from now one than they have in the past.

It was also strongly urged that, if the landowner's argument that a Certificate of Title cancelled in error be regarded as still subsisting, a further measure of uncertainty would be injected into the Torrens System. This would go far to weaken the general principle that the existing Certificate of Title may be taken to accurately record and reflect transactions prior to its issue; indeed in many cases a lawsuit might be required to determine whether a title had in fact been improperly cancelled.

This Committee was impressed with the merits of both arguments, but, in balance, thinks it preferable to leave this exception substantially where the *Turta* case put it. In other words, notwithstanding that the cancellation of the title resulted from an error, it nevertheless resulted in the extinction of what would otherwise have been a prior Certificate of Title.

However, this Committee is prepared to make some recommendations which may help to ameliorate the results following from the full adoption of this principle.

In a case where an improper cancellation has occurred, the Court may always rectify the situation as between the original parties and before the rights of third parties have intervened. There is some question, however, following the *Turta* case, as to whether or not the Registrar has *any* power of rectification in such cases of improper cencellation. We feel that the Registrar should have such powers of correction and we refer back to our discussion of this question on pages 32 [199] and following of this report.

Thus a serious difficulty occurs only when the rights of third parties have arisen. Under the English Land Registration Act, Courts are given broad powers to rectify the event of error or mistake but provision is made that with certain exceptions the Court may not exercise such powers of rectification where a proprietor is in possession, and it appears that in practice rectification is seldom ordered after title to the property has passed to a third party who has taken possession.

However, it is the Committee's opinion that the principle against allowing rectification where a proprietor has gone into *possession* is hardly applicable to a mineral right unless the same is actually worked. It is difficult to determine when possession is acquired of a mineral. If possession is to be a factor, then some definition of the term should be inserted in the Act.

It is noted that the English Act does contain an exception permitting rectification to be ordered by the Court in any case where it would be unjust and inequitable if rectification were not so ordered.

It is this Committee's view that, where title has passed to a third party who dealt bona fide and for value on the strength of the immediately preceding Certificate of Title, the Court should not, prima facie, deprive the third party of title to the interest acquired but should give effect to the ownership evidenced by his Certificate of Title except in cases where, on the facts as laid before it,

the Court may fairly determine that it would be unjust and inequitable not to order rectification in favour of the original owner.

This Committee would not purport to lay down any principles for the guidance of a Court in deciding whether or not it would be unjust or inequitable not to order rectification, having full confidence in the ability of the Court itself to evolve those principles as cases of rectification came before it, and having regard to the facts and circumstances of those individual cases. In case such a power is exercised, compensation must be available to the person deprived of the land.

(d) *Protection of Lessees and Mortgagees where a Correction is made*

As will appear from the foregoing, cases may arise where a person becomes registered as owner through a mistake so that his title is subject to rectification. However, a third person may have acquired a mortgage or a lease of the property before the error is discovered and corrected. Under the English practice it appears that in such a case the Court is able to order the title to be rectified and, at the same time, to preserve the lease or mortgage. In such a case the original owner gets his land back, but subject to such mortgage or lease with the owner having the right to claim indemnity for nay loss he has suffered as a result of the mortgage or lease being placed on the land.

Indeed this proposition appears to be the law of Alberta at the present time. In *Imperial Oil Ltd.* v. *Conroy et al*[10], Boyd McBride, J. held that where a lessee relies on the register, and the register later proves to be in error and subject to rectification, the person in whose favour the register is rectified must accept his title subject to the lease granted by the erroneous owner. The lease stands.

This Committee agrees with this case and feels that, in general, third parties can usually be protected, presuming an effective assurance fund, without interfering with the rectification and correction principles of the Torrens System.

At the time of the hearings held by this Committee those speakers who dealt with this point seemed to favour a simple provision in the Act that the lease or mortgage remain in effect even though rectification takes place or an error be corrected. Some wish to make a distinction between some leases and others and would give the owner the option of rejecting a lease if drilling had not been actually commenced, but would make it effective if operations on the lands subject to the lease were actually under way or had already taken place. This Committee thinks that this distinction might result in injustices.

This Committee recommends:

(a) That a lease taken in good faith by a person dealing on the strength of the Certificate of Title prior to rectification be held effective, with the rightful owner having a right of recourse to the assurance fund for loss which he may have sustained through this being done, as for example, through bonus payments having been made to the ostensible lessor which cannot be recovered.

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[10](1954) 12 W.W.R. (N.S.) 569.

Alternatively,

(b) That the mortgagee or other encumbrancee be compensated by recourse to the assurance fund if he loses his rights under his mortgage or encumbrance as a result of rectification.

4. ASSURANCE FUND

The existence of an adequate assurance fund is an essential part of a Torrens System of land titles.

In commenting and making recommendations with respect to the assurance fund the Committee strongly emphasizes that all recommendations which have heretofore been made with respect to retention of the Torrens System, rectification of errors, exceptions to indefeasibility, etc. are based upon the right to adequate compensation from an assurance fund.

In some of the briefs and material submitted to this Committee it was suggested that rights of recourse to the assurance fund in cases where mineral titles were affected should be abolished, and that the parties should instead provide themselves with insurance against title defects through the medium of title insurance.

This Committee has accumulated considerable information with regard to the operation of title insurance companies in the United States. As far as is known there is no title guaranty company now operating in the Dominion of Canada.

Information was requested from eight major title insurance companies on insurance of mineral rights. None of the companies contacted showed any desire to do business anywhere in Canada. One company stated that it would not consider doing business in this jurisdiction inasmuch as the company would be at the complete mercy of a typist in the Land Titles Office.

The information obtained by the Committee on title insurance shows:

(1) Title insurance only offers protection against flaws in title which are present *at the time the insurance is written,* and would give no protection against future acts of the Registrar or other persons which result in deprivation.
(2) Title insurance is not presently available in Canada.
(3) The cost of title insurance for minerals rights would be prohibitive.
(4) Title insurance companies do not generally insure titles to mines and minerals where these are severed from the surface, and
(5) The general scheme of operation of a title insurance company is not easily adaptable to the Torrens System.

This Committee therefore feels that title insurance is no substitute for a properly maintained assurance fund.

The records of the assurance fund in Alberta show that payments which have been made into the fund have represented little more than an additional tax on land transactions. Approximately $3,800,000.00 has been paid into the fund, and only about $75,000.00 paid out. The statute provides for transfer out of the fund into general revenue of all monies exceeding the sum of

$75,000.00. The decided cases show that the statutory provisions allowing recourse to the assurance fund, even as widened in 1935, remain hedged about by obstacles and limitations, not the least of which is the limit placed on claims relating to mines and minerals, where one may recover only the cost of the minerals plus damages of only $5,000.00.

This Committee urges that in Alberta, where such tremendous amounts of money accrue yearly to the Government from dispositions of minerals rights. and where, indeed, almost fifty percent of the annual revenue of the Province is derived from these sources, it is an anomaly to circumscribe the assurance fund with such severe restrictions, particularly as applicable to claims relating to mineral rights.

At this point, perhaps, reference should be made to comparable features of other legislation.

The Ontario Act sets up an assurance fund; the Master of Titles fixes the value for assurance fund purposes; the purchase price is the main criterion of value. The fee is payable only when land is brought under the Act and is a fractional amount of the value. Where a claim is made against the fund in respect of mineral property the maximum compensation is eight hundred times the amount which is paid into the fund with respect to that property. This many seem to be an arbitrary figure but is not really so. The assurance fund fee is one four-hundredth of the value of the land, so in effect the maximum compensation is twice the value of the mineral land when it came under the Act.

Some Australian and New Zealand Torrens Systems provide for payment of fees on bringing the land under the Act and on every conveyance of fee simple; the basis of the valuation of a claim through error or correction is not usually specified in the statutes but is the actual value of the estate lost. In New Zealand provision is made for allowance of interest on such value from the date of the loss.

Saskatchewan has limitations on the amounts recoverable from the assurance fund in respect of mineral interests similar to those found in Alberta.

In England no specific charge is made for the indemnity fund. The fund is built up by the payment into the fund at the end of each financial year of such sum as the Lord Chancellor and the Treasury may determine. If at any time the fund is insufficient, the deficiency is to be paid out of the Consolidated Fund, and shall be repaid later out of the indemnity fund.

It seems to be the practice of other Provincial Governments to transfer monies from assurance fund to general revenue of the Province when these monies exceed a certain amount. The Committee agrees that it is perhaps unnecessary that the fund should be set apart and administered as a special fund only available for claims against it, because this might result in an excessive amount being accumulated in the fund which could usefully be employed elsewhere.

This Committee is inclined to approve of the English principle which, if applied to the Alberta Act, would permit transfers of monies in the fund

to general revenue but would leave general revenue available for the satisfaction of claims made against the fund. Perhaps it would be necessary to set up a suitable reserve or contingency account for this purpose, however.

The Committee's recommendations with respect to the assurance fund are as follows:

(a) *Maintain and extend present sources of revenue*

Contributions should be continued to be paid upon the registration of documents. The Committee makes no comments on the rate. However, it is noted that caveators have never paid into the fund and yet, as the Act now stands, it seems clear that they are entitled to obtain indemnity. To cure this anomaly caveators should not be permitted to obtain compensation from the assurance fund; this shall be dealt with later under the main subject heading of "Caveats".

(b) *One assurance fund to which recourse may be had for BOTH mineral and surface claims*

Suggestions have been made that monies paid by surface owners are available to some mineral claimants who have not contributed to the fund. The Committee is inclined towards a single fund rather than separate funds to overcome this problem. It is thought that the problem of persons not contributing to and yet receiving payment from the fund may be solved by the suggestion which shall be made as to caveators later on.

(c) *Basis for payment out of the fund — PAST losses*

The Committee proposes to make suggestions with respect to the basis of payment for losses of mineral rights which have occurred in the past by reason of errors or omissions in the Land Titles Offices under the heading "Settling Inequities Presently Existing", below.

(d) *Basis for payment out of the fund — FUTURE losses*

In general payments should be based on the value of the interests lost. In some cases this may be difficult to determine with certainty but this difficulty seems unavoidable. No necessity is seen for limitation of the amounts of claims against the fund which are based on losses of surface rights, but it is agreed that from a practical standpoint it may be necessary to impose a limit on the amount with respect to mineral losses which may be recovered from the fund.

Such claims should, however, encompass, and compensation be provided, for the following items, namely:

1. The actual cost to the claimant of the mineral right which has been lost (or, if the claimant is a volunteer, the cost to the last preceding purchaser for value).
2. Monies fairly and reasonably expended by the claimant in the development of the minerals prior to their loss and which will enure to the benefit of the person to whom the minerals are awarded or restored, and which are not otherwise recovered or recoverable by the claimant.

3. Damages for actual or prospective loss suffered by mineral owner, based upon the fairly appraised value of the minerals at the time when the action is brought against the assurance fund, with the limitation on the maximum amount which may be recovered of $1,000.00 for each acre of mineral rights involved.

The Government should have a lien on the minerals for monies awarded under item number 2 above to secure the recovery of such monies from the person to whom the minerals are awarded and who has benefitted from the expenditure thereon by the claimant. Such monies should be paid by the said person to the Government in such manner as may be agreed mutually, or in such manner as is fixed by the Court or by arbitration in the absence of mutual agreement.

The apparent owner, acting in good faith and without notice should be under no obligation to account to anyone for profits or depletion occurring prior to the commencement of an action against him by the rightful owner. In other words, if Imperial Oil had commenced drilling operations in good faith and without notice on the Turta land prior to the commencement of the action by Turta, then any production income or profits resulting therefrom would not be payable to Turta. Turta would have had no claim for such profits or for his own loss of prospective profits as a result of the operations up to the time of commencement of his action.

The Committee further recommends that claims should be permitted against the assurance fund to compensate for losses arising out of errors made in official documents such as abstracts or mineral certificates. No compensation is presently provided in such cases.

The Committee is impressed with the operation of the English Land Titles System with respect to claims against the Registrar for errors made in the Land titles Office. In England no Court action need be started against the Registrar as a prerequisite to claiming money from the assurance fund. It is felt that it should not be necessary to sue the Registrar to prove the liability of the assurance fund. Instead, perhaps, a claim could be filed with the Registrar who could either allow or disallow it subject to an appeal to the Court. If the Registrar and the claimant agree on the amount of the award to be made, then the amount should be paid. Otherwise the matter could be referred to the Court.

5. CAVEATS

A section in the original Alberta Land Titles Act inadvertently referred to registration by the way of caveat, and in 1915 a divided Court[11] held that this made the caveat a registrable document with priority from the date of registration. This has been the law in this Province since that date and many valuable claims, particularly in relation to mineral leases, have since been protected by caveats. Hence it is thought that it is too late to put caveats back to their original status, but instead they must continue to be regarded as registrable.

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[11] *Supra*, footnote 7.

An objection which can be raised against the present practice with respect to caveats is that caveators, while enjoying many of the priorities and protections afforded by the Land Titles Act make no contribution whatsoever to the assurance fund.

Another objection is with respect to the registration of caveats in that they create an uncertainty as to the precise nature of the interest which is held by the caveator and which he proposes to protect by registering the caveat in lieu of registering the instrument under which he must establish his claim. As a result, recourse to material outside the Land Titles Office is necessary to ascertain the nature of claims affecting a title; this is contrary to the intention and purpose of the Act.

This Committee therefore makes the following recommendations and suggestions with respect to caveats:

1. A Caveator should be required to attach to his caveat the instrument it protects, or a true copy thereof, or alternatively should be required to give definite particulars in the caveat of the instrument which it protects and to file such instrument, or a true copy thereof, within sixty days after the registration of the caveat failing which the caveat should cease to have any effect; provided that in the event any such instrument has been lost, mislaid, or destroyed, the caveator may cause to be filed within such period of sixty days after the registration of the caveat, and in addition to giving the definite particulars of the said instrument, an affidavit of the caveator or his agent so stating and stating the circumstances of such loss, mislaying, or destruction, and in such event the filing of such affidavit and the supply of the said particulars shall be of the same effect as if the said instrument or a true copy thereof had been filed within the said period.
2. Caveators should be required to make no contribution to the assurance fund.
3. A caveator should have no claim against the assurance fund for losses resulting from errors or omissions of the Registrar whether prior to or after registration of his caveat.
4. No person claiming through, by or under a caveator, or whose chain of title to any interest in the land is incomplete without an unregistered document or instrument in respect of which a caveat has been filed, shall have any right to claim against the assurance fund for loss or derogation of his interest by reason of errors or omissions of the Registrar occurring either prior to or after the acquisition of such interest.

Dissenting Opinion of S. J. Helman, Q.C. re Caveats

Rather than amending the Land Titles Act as above, the Act should incorporate the following suggestions:

Where any instrument is registered which conveys any part of the land, including so called mineral leases or gas and oil leases or profits à prendre,

then upon such registration the transferee or lessee shall become liable to contribute to the assurance fund having regard to the value of the interest conveyed.

To the extent of the cash consideration for which such instrument has been granted, the assurance fund fee payable in respect to the same will be payable forthwith. Any additional value of the interest conveyed is to be determined in some suitable manner after the mineral claim has been worked or oil and/or gas has been obtained on the property which is the subject of the instrument. It is suggested that, six months after commercial production is obtained, the value of the interest acquired be determined either by the Petroleum and Natural Gas Conservation Board or the Department of Mines and Minerals, having regard to the mineral conveyed.

The foregoing shall not apply to an instrument which is *filed* only as part of or attached to a caveat, and not *registered* apart from such caveat.

6. LIMITATIONS OF ACTION

Limitation periods should be clearly defined.

As indicated earlier, the present limitation period applicable to an action against the assurance fund is six years from the time the party was deprived of his interest, whether or not such party became aware of the error which occasioned his loss within the limitation period. As for general actions between one person and another to recover the limitation period is ten years from the date when the cause of action arose.

There seems to be no time limit on the power of the Registrar to correct errors. No reason is seen to make any recommendation as to the imposition of a time limit for correction of errors, but the Committee points out that other rights—for example by adverse possession—may intervene between the error and the rectification. (In such cases the rectification would be subject to such rights.) Neither should there be any change in the period of limitation affecting actions between parties for recovery of possession of land.

However, with respect to claims against the assurance fund very unusual conditions can arise. For example, it is easy to conceive of a case arising where a person's right to claim against the assurance fund has lapsed prior to his discovery of the error.

As an example, A sells to B who sells to C. An error by misdescription arose in B's title and was passed on to C. Therefore A can claim rectification against C and ordinarily C would receive compensation from the assurance fund. However, if A does not learn of the error and does not commence an action for rectification until eight or nine years following the occurrence of the error, bearing in mind that he has ten years in which to bring action against C to recover his land, C's claim against the fund will have been outlawed. In other words, C's right to claim against the fund will have expired in six years from the date of the misdescription; this is prior to his knowledge of his right to claim against the fund. This situation would be clearly inequitable.

This Committee is of the opinion that all the periods of limitation of action relating to land should be uniformly fixed at ten years. Any cause of

action against the fund, should be deemed to arise at the time when the claimant knows of the existence of his claim; this is the policy which is followed in the English Act and was followed in the Alberta Act in general principles prior to the amendments which were effected in 1949.

7. SETTLING INEQUITIES PRESENTLY EXISTING

One of the main problems which this Committee has been asked to deal with is the manner of settlement of inequities presently existing as a result of errors which have occurred in the Land Titles Offices in the past.

In this connection the first point which the Committee had to determine was whether the adjudication upon and settlement of rights between parties in questions arising from such errors should be based upon suggestions made in this report which may lead to new or amended legislation.

This applies particularly to the recommendations with respect to enlargement of the Court's powers to order rectification after third party rights have arisen, and the protection of third party disposees.

This Committee does not think it desirable to affect retroactively, by amendments to the Land Titles Act, proprietary rights already vested under the present statute as interpreted by the Courts. The principle involved is one which has a broad application; whether it is proper by legislative action to divest persons of existing property rights for the benefit of others. It is not recommended that legislation which may be enacted directly affecting property rights as a result of these recommendations should have retrospective effect.

However, it is suggested that the new limitation periods with respect to actions against the assurance fund (time running from the date of discovery) and the increased amount to be recoverable from the assurance fund in respect of a loss of mineral rights have retroactive effect. This is stated because the retroactive legislation was enacted comparatively recently to meet an emergency, and also because this will not operate to deprive persons of existing proprietory rights.

A suggestion has been made that a quieting provision should be introduced into the Land Titles Act which would bar actions respecting title errors in existence at the date of the enactment unless such actions are brought within a fixed period thereafter.

In principle some members of this Committee were disinclined to adopt this suggestion but, from a practical standpoint, there is much to be said in its favour, provided that ample time is allowed for parties to check their titles and to take the steps which may be necessary to rectify them or to assert claims against the fund if errors are discovered.

A substantial period should be allowed for this. The extent of errors which have already been detected was indicated by counsel for the Canadian Pacific Railway when he addressed this Committee. He stated that a relatively small part of his client's holdings had been checked at that time but errors had already been discovered in the titles to forty-one Quarter Sections involving 6,560 acres

This Committee is therefore prepared to recommend that a quieting provision be inserted in the Land Titles Act which will provide that up to, but not after, a certain date action may be brought with respect to losses arising from errors which had occurred prior to such enactment. The date so fixed should not be less than three years after its enactment. It is appreciated that the limitation period may prevent the enforcement of valid claims by persons not made aware of their rights within the time limited, but the period provided will give anyone who is at all alert plenty of time to ascertain whether remedial action is required in his case.

The next point involved is the matter of compensation for losses which result from past error. Here it is necessary to take advantage of suggestions which have the main virtue of practicality rather than that of rendering full justice to those concerned.

In considering these suggestions it must at all times be remembered, first that in the adjudication of claims the Courts will be guided by existing law and not by amendments with retrospective effect and, secondly, that the procedure suggested relates only to claims arising from past errors and not from those which may occur in the future.

The Committee's recommendations with respect to compensation for loss suffered by reason of errors and omissions in the Land Titles Office which have heretofore occurred are as follows:

(i) The Government should calculate the amount which would have been in the assurance fund if transfers had not been made to general revenue. This amount should be set aside and made available, so far as the same may extend, for satisfaction of claims of persons who have suffered losses by reason of errors or omissions in the Land Titles Office occurring prior to the date on which this recommendation is made effective (hereinafter referred to as "the effective date"). The amount of money so determined is hereinafter referred to as "the adjustment fund".

(ii) Recourse to this adjustment fund should be available only to those claimants who lodge claims with the Registrar to recover their losses within three years from the effective date. The Registrar should have the right to settle these matters both as to liability and to amount if the parties agree, or to refer them to the Court if the parties do not agree.

(iii) All such actions should be disposed of as speedily as possible and perhaps, if found necessary, some special procedure could be set up to enable the Courts to deal with them expeditiously and with a minimum of formality and delays.

(iv) Awards should be based on the value of the interest lost as established to the satisfaction of the Registrar or to the Court on reference thereto by the Registrar.

(v) The amounts awarded to each claimant should be recorded with the Registrar and, when all claims have been adjudicated upon, the amount so recorded should be paid from the adjustment fund; provided that if the aggregate of the claims so recorded exceeds the amount of the fund, payments

... be made to each claimant in the proportions which his award bears to the aggregate of all claims so recorded.

(vi) Any claim which is not lodged within three years from the effective date and adjudicated upon within five years from the effective date shall be forever barred from any right of recovery from the adjustment fund.

8. LAND TITLES OFFICE INTERNAL PROCEDURE AND INSTRUMENT FORMS

(a) *Separate Mineral Titles*

A number of the briefs submitted to the Committee have included a suggestion that the possibility of errors might be greatly reduced in the event of separating surface and mineral titles.

It was not suggested that this should be done immediately in the case of all titles, but that such a severance could take place as soon as convenient or upon request, and in any event, upon the occasion when any particular title is dealt with.

In this regard this Committee recommends:

(a) That a system be instituted under which separate titles for minerals and surface will be issued.

(b) That where there is a cancellation of a portion of lands covered by a Certificate of Title, the old title should be cancelled in full and two new titles issued, one for the portion transferred from the old title and one for the portion remaining in the old title.

If these suggestions are adopted, the likelihood of errors in the Land Titles Office will be minimized by reason of the checking and double checking which will be required in the cancelling of the old title and the issuing of two new ones. Evidence from Land Titles Office officials indicated that these recommendations would be effective and not burdensome. These officials state that once the task was completed, dealings with minerals would be facilitated.

(b) *Form of Certificate of Title*

Suggestions were made to this Committee that the original transfer or photostat thereof should be firmly attached to each Certificate of Title so that a purchaser could tell at a glance whether his title agreed in every respect to the transfer under which he acquired the interest in the land. Another suggestion was that each Duplicate Certificate of Title have printed thereon in complete length every exception to indefeasibility as presently set forth in Sections 61 and 62 of the Act. At the moment only Section 61 is set forth and this is in very small type in the corner of the document. This Committee is not disposed to follow the recommendations that the transfer be attached to the Certificate of Title, but feels that it would be useful to have printed on each title and Duplicate of Title in complete length every exception to indefeasibility under Section 62 and all the implied conditions set forth in Section 61, and recommends accordingly.

(c) *Survey Plans*

Where a title covers subdivided land, it is recommended that there should be issued with, and attached to the Duplicate Certificate of Title, a plan of the block containing the land comprised in the title and identifying such land.

(d) *Cancellation Stamp*

The decision in the *Turta* case indicates that if a Certificate of Title is cancelled, whether such cancellation is done properly or improperly, then the title so cancelled cannot form the root of a prior Certificate of Title. While this may be inequitable in certain cases, there is no question but that it conforms to the "certainty" principle of the Torrens System. This Committee has already indicated its approval of this principle.

A practice has arisen, however, whereby the Registrars of Land Titles in Edmonton and Calgary will not exercise their complete authority to cancel a Certificate of Title and issue a new one. Rather instead they are relying on the wording of Section 69 which states that the Registrar shall cancel certificates "according as the transfer purports to transfer the whole or a part only of the interest of the transferor in the land". Thus, to avoid the error of cancelling a title where a cancellation should not have been made, the Registrars purport to cancel only according to the terms of the previous transfer, and place on the old title a stamp reading as follows:

> This Certificate of Title is cancelled in accordance with the transfer, subject to any exceptions and/or reservations therein, and a new Certificate or Title No. issued this .... day of ...., 19.... .
>
> Registrar.

While this stamp may fall within the terms of the statute, it certainly detracts from the Torrens System a large degree of certainty which previously was there. It is now necessary to make an historical search to determine whether or not any specific title was actually properly cancelled because the wording of the cancellation may not follow that of the previous transfer. According to the *Turta* decision, it is not necessary to go behind a cancellation because, whether the cancellation is proper or improper, it is still a cancellation.

The Committee strongly recommends that the use of this stamp be discontinued and that the former practice prevail, subject to the recommendation as to the power of the Registrar to correct errors before third party rights have intervened.

(e) *Memoranda on Title*

Section 27 of the Land Titles Act[12] presently reads as follows:

> Whenever a memorandum has been entered in the register the Registrar shall make a like memorandum upon the duplicate when it is presented to him for the purpose, and the Registrar shall sign the memorandum, which shall be received in all courts of law as conclusive evidence of its contents and of the fact that the instrument of which it is a memorandum has been duly registered under the provisions of this Act:

This Committee recommends that the words "prima facie" should replace the word "conclusive" or, alternatively, that the evidence received shall be clearly of the writing itself and not as to the facts stated therein.

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[12] R.S.A., 1942, c. 205.

Suggestions have been made that the Alberta Land Titles Office overcome one of the drawbacks of the Torrens System and adopt one of the advantages of the Registry System by filing all documents according to legal description of land rather than chronologically according to date of instrument. It was stated that if documents were filed in this manner anyone searching a particular parcel of land will immediately have at hand all documents dealing with it.

Evidence from Alberta Land Titles Office officials indicate that this would be impossible in Alberta where all books have been bound and where each office deals with such large areas of land. The Committee understands that in England each folio of the register is a separate document of a type that easil permits filing in a filing cabinet. The folios are never bound in volumes as they are in Alberta. Thus, if the title is to be searched the entire book of titles is not taken out of use during the perod of time the search occupies, but rather only the single register involved.

The Committee understands that if filing cabinets were used for titles rather than bound volumes it would be more convenient when searches were made. On the other hand, it is of the opinion that the possibility of losing or misfiling would be greatly increased under such a system, and is thus not inclined to recommend any change of this nature. This danger does not exist in England where no public searching of documents is permitted.

In any event, Alberta Land Titles officials state that it would not be possible without drastic revision of the system to file documents by Land description index, and it is not felt that this is necessary.

There is, however, one recommendation which this Committee wishes to make strongly under this heading and that is that all documents registered in the Land Titles Office be microfilmed at, or immediately after, registration. It is felt that this suggestion could be readily implemented without formidable cost, and would follow the lead of many other governmental departments in this regard, and thus avoid a great deal of trouble and embarrassment which results from loss of original documents.

10. THE MINERAL CERTIFICATE PROVISIONS

This Committee recommends that the provisions of the Land Titles Act with respect to mineral certificates be deleted as repugnant to the principles of a Torrens System.

. RE-DRAFTING LAND TITLES ACT

This Committee is of the opinion that, once the Government has decided on the policy to be followed with respect to changes in the Act, the whole Act should be entirely re-drafted from the points of view of clarity and purpose.

At the present time numerous suggestions scattered through the Act deal with the same single topic, and at least one important section refers back to another section which was removed from the Act many years ago.

. is notorious that most Torrens statutes, and Alberta is no exception, .. become incomprehensible. The English Act, and to a lesser degree,

the Ontario statute, are concise and readily understood. That such statutes do exist should be an incentive to bring the Alberta Land Titles Act up to the same standard.

In this regard, it is recommended that some special study be made of the problems arising out of the *Borys*[13] case so as to eliminate the uncertainties presently existing as a result thereof. The decision of that case was to the effect that the intent of documents must be interpreted as of the date of their execution. This, in effect, is a derogation of the "certainty" principles of the Land Titles Act because no person can be clear, by merely examining the last title, as to what the reservations or exceptions mean. Instead, he must make an historical search to determine the date of the documents which gave rise to the reservations or exceptions and then determine what the words used meant at that time.

12. IMPROVEMENT OF FUNCTIONING OF LAND TITLES OFFICE

The Committee is of the opinion that most of the difficulties which have arisen with respect to mineral rights under the Alberta Torrens System have been the result not so much of flaws in the Act but of errors by the human agents who administered the statute.

Prior to 1947 there was relatively little interest in petroleum and natural gas rights. Alterations of titles were made with no realization of the magnitude of the issues which might, and in some cases did, result.

Since 1947 the actual and potential values of mineral rights have been appreciated and the Registrars have, with the staffs available to them, endeavoured to reduce the possibility of errors.

The view of this Committee is that the proper administration of the Land Titles Act is of such importance to the public that the Government should be prepared to spend the funds necessary for the payment of adequate salaries to attract competent personnel to join the staff of the Land Titles Offices and to retain the trained personnel now on the staff.

Basically, the functioning of the Torrens System depends on the efficiency of the people who administer it.

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[13] *Borys v. C.P.R. and Imperial Oil Limited* (1952), 7 W.W.R. (N.S.) 546.