TORRENS SYSTEM—POWER OF REGISTRAR TO CORRECT ERRORS—LIMITATION OF ACTIONS—*KAUP AND KAUP* v. *IMPERIAL OIL LTD.*

The Torrens system of land registration became a part of the Australian law in 1858 with the enactment of the *Real Property Act of South Australia*. It was designed to provide reliability, simplicity, cheapness, speed and suitability to the previously complex conveyancing procedure.[1] The basis of this new system was that each parcel of land was to be registered at a state operated land titles office and all transactions made with respect to that land were to be memorialized on the certificate of title. Registration was essential to the validity of the transaction. It soon becomes apparent that the register, as it reflects all proceeding transactions, is a most important record. Indeed, Edwards J., in discussing the New Zealand Torrens system stated:

> "The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."[2]

This observation was the foundation of the absolute theory of indefeasibility, though today this theory is tempered by the existence of statutory exceptions. These are set out in section 65 (1) of *The Land Titles Act*.

As a certificate of title is not absolutely indefeasible there exists in the Registrar a power to correct errors which have been made. This power is the subject matter of section 185 of the Act. Through it the Registrar is entitled to "cancel, correct or complete the register" but only "so far as practicable without prejudicing rights conferred for value."

The question posed by the recent decision in *Kaup and Kaup* v. *Imperial Oil Ltd.*[4] was whether or not the Registrar was bound by *The Limitation of Actions Act*[5] to exercise his power of correction within ten years of the error. The interesting thing about this case was that the defendant also pleaded *The Limitation of Actions Act* and contended that the plaintiffs were bound to bring their action to expunge the Registrar's correction and reinstate their title to mines and minerals before the expiration of ten years from the date of the correction. This latter issue also arose in the leading case of *Turta* v. *C.P.R. and Imperial Oil*,[6] a case which warrants considerable investigation in this discussion.

An analysis of the facts in the *Kaup* case will help to clarify the two issues of interest to us. In 1919 John La Fleur, as executor of the estate of Alexander La Fleur, was registered owner of the lands described in certificate of title 243-4-46. This title was subject to a reservation of all coal to the C.P.R. During that year, John La Fleur transferred the lands "reserving therefrom all mines and minerals" to Urbanie Kaup. In respect of this transfer, certificate of title 244-H-46 issued in the name of Mrs. Kaup but in error, the title failed to reserve the mines and minerals as had been set out. This error occurred in 1919.

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[1] Ivan C. Head (1957) 35 C.B.R. 1.
[2] *Fels* v. *Knowles* (1907) 26 CZLR 604 at p. 620.
[3] R.S.A. 1955 Ch. 170.
[4] (1961) 35 W.W.R. 433.
[5] R.S.A. 1955 Ch. 177 s. 18.
[6] (1952) 5 W.W.R. (NS) 529.
(1954) S.C.R. 427.

In 1924 Urbanie transferred all her estate and interest in the lands to herself and her husband. Mr. Morrow, counsel for the Kaup's conceded that this was a voluntary transfer, the only consideration from Fred Kaup being "one dollar and natural love and affection". The prime issue on appeal was whether or not the fact of a voluntary transfer would preclude the Registrar from correcting his error. The majority has held that the Registrar was authorized to make the correction as by doing so he was not prejudicing rights which had been conferred for value. This conclusion was supported by Martland, J. in the Supreme Court of Canada and I proceed on the assumption that it is a correct statement of the law.

The Registrar's error was discovered in 1943 and the correction was made. The Kaup title was cancelled as to mines and minerals and the La Fleur title was re-instated. This took place twenty-four years after the error had been recorded. Another seventeen years elapsed before the Kaups commenced their action to expunge and reverse the correction of 1943.

Specifically, the issues raised relating to limitation periods were:

1. In light of section 19 and section 44 of *The Limitation of Actions Act*, is the Registrar bound to make a correction within ten years of the date of the error?
2. Must the Kaups bring their action to expunge the 1943 correction within ten years of the date of the correction?

The initial problem is thoroughly discussed by Smith C.J.A., in dissent. It involves a characterization of the interests held by a person who becomes registered owner of mines and minerals in error. If such a person acquires "any share or any freehold or leasehold estate or any interest in any of them"[7] through registration, then should the Registrar deprive him of this interest by a correction it is submitted that he must be bound by section 19 of *The Limitation of Actions Act*. It states:

> "18. No Person shall take proceedings to recover land except,
> (a) within ten years next after the right to do so first accrued to such person."[8]

What, then is the interest held by a person who, through error, is the registered owner of mines and minerals? A survey of authorities shows that judicial opinion on this point is varied. A leading writer on the Torrens system, James Edward Hogg, suggests that a person who gets on the register as the owner of an estate through error, holds the legal estate to that property in trust for the rightful owner. He says:

> "According to the more limited view, which is principally illustrated in the New Zealand decisions, there is no distinction in cases of registration on the faith of an invalid title, between a proprietor who has got on the register by fraud, and one who has got there innocently; the principle is that he is merely a trustee for the rightful owner and that this trust should be enforced unless the rights of another bona fide registered proprietor intervened. This principle though not within the actual words of any one enactment, is really implicit in the provisions of the Statutes enabling rightful owners to recover the land or damages from proprietors wrongly registered and not being bona-fide purchasers."[9]

According to this theory, which is unsupported by Canadian case law, Mrs. Kaup would, as a result of the error in 1919, hold the *legal estate* to mines and minerals in trust for the La Fleurs.

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[7]Definition of "land" in section 2(e) of *The Limitation of Actions Act* (*supra*).
[8]R.S.A. 1955 Ch. 177 s. 18.
[9]Hogg: The Australian Torrens System (1905) at p. 825.

Hogg himself retreats from this position though. He suggests that rather than refer to legal and equitable estates we should say that registration confers a new statutory estate which he calls the registered estate. He then goes on to point out that any certificate of title, no matter how improperly it came upon the register, is capable of becoming a good root of title in the hands of a bona-fida purchaser. Application of this reasoning suggests that in 1919 Mrs. Kaup acquired the *registered estate* to the mines and minerals, and could as a result pass good title to a bona-fide purchaser for value.

A further theory is suggested by the recent British Columbia Court of Appeal decision in *In re Heller*.[10] The Court held that where a person obtains a registered title through a procedural error, he gets an *indefeasible* title even as against the person deprived by the error. This is an extreme application of the absolute indefeasibility theory of registration.

Without reaching a conclusion as to whether Mrs. Kaup acquired the legal estate, the registered estate or an indefeasible title to the mines and minerals it appears that she did get some interest which she did not hold prior to 1919. Before that date she could not pass good title to a bona-fide purchaser for value, but after that date she could. This is evidence enough of the acquisition of some interest in the mines and minerals, and it is submitted that this interest, no matter how slight, is sufficient to satisfy the very wide definition of "land" in *The Limitation of Actions Act*. As the correction in 1943 transferred this interest back to the La Fleurs it effected a recovery of land and section 18 of *The Limitation of Actions Act* would apply to make the correction invalid.

On similar reasoning Smith C.J.A. concluded that the courts would have been "powerless to restore the mines and minerals" to the La Fleurs in 1943 as their title was extinguished by that time. Relying upon section 44 of *The Limitation of Actions Act* to extend application of this limitation to the Registrar, he concluded that the Registrar,

> "could not make corrections so as to deprive the Kaups of the mines and minerals other than coal and revest them in the La Fleur estate whose right and title had become extinguished because of the expiration of the limitation period.[11]

In result, this argument would mean that any correction of an error made by the Registrar more than ten years from the date of the error would be invalid. In the Kaup case the parties would revert to their 1919 positions and Mrs. Kaup would acquire indefeasible title to mines and minerals merely through passage of time.

What are the practical effects of such a conclusion? Greater reliance could now be placed on the register. A title in existence for a term of ten years could no longer be extinguished for any reason. Equity has long recognized the doctrine of laches and has applied it to prevent hardships resulting from the delay in performance of legal rights or duties. There seems to be no valid objection to the imposition of a time limitation on the Registrar's power of correction and such a step is, to my way of thinking, warranted by the law.

In 1956 The Benchers Committee reported to the Law Society of Alberta,

10(1961) 26 DLR (2d) 154.
11(1961) 35 W.W.R. 433 at p. 438.

> "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 imposition of a time limit for correction of errors."[12]

It is submitted that through the judgment of Smith C.J.A. in the Kaup case it has been indicated that the Committee was not justified in reaching the above conclusion.

Consideration of the second issue raised earlier involves the preliminary assumption that we would not have disposed of the case on the first ground. Must an action to expunge a Registrar's correction be made within ten years of the correction? This issue was raised by the Turta case and was dealt with exhaustively at trial by Egbert J. The Kaup and Turta cases are referred to as actions for declaration of title. Our problem is whether an action for declaration of title is an action to recover land. R and J. in the Turta case said:

> "In the circumstances there has been no legal or physical disturbance of that possession; at the most certain entries have been made on the certificate claiming rights which do not exist. The action is not then, one to recover land but to have those entries expunged and for a declaration of the plaintiff's interest."[13]

In the same case we get a contrary statement on this issue from Estey J. which was supported by Kerwin and Taschereau JJ.

> "It will, therefore, be observed that in this action both the ownership and the possession of the petroleum in the said quarter section was in issue. This is therefore, an action for the recovery of land and is brought within the period of ten years permitted by sec. 18 of the said Statute of Limitations.[14]

How are we to resolve this conflicting dicta? It is submitted that through the trial judgment of Egbert J. in Turta we have an excellent review of authorities to effect this purpose, and reliance upon it would lead to the conclusion that the Kaup action was one to recover land.

The problem does not end here, though, as two years later this same issue came before Egbert J. in *Morris* v. *Public Trustee*.[15] One would have thought that Egbert J. would follow his decision in the Turta case as it had been accepted by three members of the Supreme Court of Canada but such was not the case. Instead, he followed Rand J., and said,

> "since the alterations were unauthorized and, therefore, null and void, they cannot form the basis of a defence based on the Statute of Limitations. The statute simply did not begin to run at that time because there was nothing in existence to make it start to run."[16]

The effect of Rand J.'s judgment then began to 'snowball.' It was relied upon in *Clark Estate* v. *Burton Estate*[17] by Macdonald J.A. in reaching his conclusion that the Limitation of Actions Act would not apply to a reference made by the registrar to the court pursuant to the provisions of the *Land Titles Act*.

The majority in the Kaup case then applied Rand J.'s dicta and the decision in *Clark* v. *Burton* in reaching its conclusion that the plaintiffs were not barred by the *Limitation of Actions Act*. It is respectfully submitted that the ratio of *Clark* v. *Burton* was not as wide as Johnson J.A. has suggested. Its application would be restricted to references

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12 Benchers Committee (1956) on the Torrens System.
13 (1954) 12 W.W.R. (NS) 97 at p. 119.
14 *Ibid.* at p. 132.
15 (1958) 26 W.W.R. 471.
16 *Ibid.* at p. 472.
17 (1958-59) 27 W.W.R. 352.

made to the court by the Registrar. My view on this is in accord with that of Smith C.J.A. when he said,

> "Furthermore, I point out that the issue in *Clark (Clark Estate)* v. *Burton (Burton Estate)*, *supra*, arose by means of a reference made by the registrar to the court pursuant to the provisions of *The Land Titles Act*. I share the doubt of Macdonald J A. as to whether *The Limitation of Actions Act* had any application to the reference in that case. But I point out that after a reference in which the court was called upon to decide which of two parties had title to the lands involved, one of those parties might then be in a position to raise the statute against the other notwithstanding the declaration as to title in the reference proceedings. The proceedings in the case at bar do not arise through a reference made by the registrar."[18]

The majority took the opposite line of reasoning though and held that *The Limitation of Actions Act* had no application to the present case. It is submitted that the law supports the minority's conclusion. In the absence of the 'unfortunate' decision in *Morris* v. *Public Trustee*[19] one could be confident that an action for declaration of title would be an action to recover land and if, as here, it arose other than by way of reference from the registrar, that it would be bound by section 18 of *The Limitation of Actions Act*. However, we cannot disregard the Morris case. As a result it appears that if the 1943 correction was invalid the Kaups would have as much time as they wish to expunge it.

If this be the law, is there any justification for the first issue supporting an application of the Act and the second issue denying it? The above discussion has led to the apparent conflicting positions that the Registrar has but ten years to correct an error but that a person has unlimited time to reverse the correction. However, it is possible to reconcile these positions by looking to the effect of an error (or invalid registration) as compared to the effect of an invalid correction.

We have seen that if a person becomes registered owner of an estate through error he acquires some form of interest in land which enables him to pass good title to a bona fida purchaser for value. An invalid registration creates an interest in land. We are told by the courts though, that an invalid correction is a nullity. This was the basis of Egbert J.'s decision in *Morris* v. *Public Trustee*. It is submitted that as an invalid registration creates an interest in land and an invalid correction is a nullity, we should have different results regarding the application of *The Limitation of Actions Act* in respect of each. Where in the former, ownership of an interest in land is altered, the Act should apply and by a parity of reasoning, in the latter case it should not. It is just this distinction which is most basic to the entire discussion that has not been fully appreciated by the courts.

Martland, J.., in the Supreme Court of Canada decision in the Kaup case, agreed with the majority on appeal that in 1919 the Kaups did not get possession of the mines and minerals. An attempt has been made to show that they did acquire an interest in them though it may have been slight. Nevertheless, due to the wide definition of "land" in *The Limitation of Actions Act* which was alluded to earlier, it is suggested that it would be an interest sufficient to be encompassed by the Act, and as a result the Act should have been relied upon in this decision.

WILLIAM WARREN

18 (1961) 35 W.W.R. 433 at p. 43.
19 *Morris* v. *Public Trustee* (supra).