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Jan. 23

FRED KAUP and JOHN KAUP (*Plaintiffs*) ..... APPELLANTS;

AND

IMPERIAL OIL LIMITED, MARIE ANNE EDWARDS, (formerly Marie Anne LaFleur), JULES ALBERT LAFLEUR, ROSE ANNA LANDRY, (formerly Rose Anna LaFleur), YVONNE AMANDA NOYES, (formerly Yvonne Amanda LaFleur), ALICE CLARA ST. LOUIS, (formerly Alice Clara LaFleur), THE REGISTRAR OF THE NORTH ALBERTA LAND REGISTRATION DISTRICT and JULES ALBERT LAFLEUR, (Representative of the Estate of Alexander LaFleur) (deceased). (*Defendants*). RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Transfer of land with reservation of mines and minerals—Reservation omitted from transferee's title by reason of registrar's error—Subsequent transfer to volunteer with similar omission in both transfer and new certificate of title—Corrections subsequently made to certificates of title—Issue as to title to the mines and minerals—The Land Titles Act, 1906 (Alta.), c. 24, ss. 23, 41, 42, 44, 46, 104, 106, 114(2) and (3), 135; R.S.A. 1922, c. 133, ss. 50, 51, 56, 58, 148, 150, 160, 175—Inapplicability of The Limitation of Actions Act, 1935 (Alta.), c. 8.

In 1919, JL, as executor of the estate of AL, became the registered owner of certain land. A transfer was registered from JL to UK of this land "reserving therefrom all mines and minerals". By an error of the registrar, the certificate of title issued to UK omitted the reservation of mines and minerals and contained only a reservation of coal in favour of the Canadian Pacific Railway Co. In 1924, UK executed a transfer, without consideration, to herself and her husband FK. Both the transfer and the new certificate of title contained a reservation as to coal but no reservation in respect of other mines and minerals. Corrections were subsequently made to the three certificates of title. That of JL, which had been stamped as "cancelled" following the transfer to UK, had the cancellation stamp crossed out and the notation on the certificate stating that it had been cancelled in full was later altered to read "in full EX M & M". The remaining certificates were altered to include the reservation of mines and minerals. The issue in the appeal was as to the title to the mines and minerals, other than coal, in the land. The trial judge and the majority of the Appellate Division of the Supreme Court of Alberta held that they were the property of the estate of AL. The respondent company was the lessee of petroleum and natural gas and related hydro-carbons in the land, by virtue of leases made in its favour by the successors in title of AL.

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

Held: The appeal should be dismissed.

The submission that ss. 23, 41 and 46 of *The Land Titles Act,* 1906 (Alta.), c. 8, and the equivalent sections of R.S.A. 1922, c. 133, have the mandatory effect that, upon the registration of any transfer there is automatically created the estate or interest, defined in such transfer, in favour of the transferee, irrespective of whether or not the transferor had any legal estate or interest which he was entitled to transfer, was rejected. The power and duty of a Court to rectify the register where a wrongdoer has become registered as owner of land also apply to a case in which registration of title has been obtained by a volunteer, who registers a transfer from a transferor who had no legal right to give it, provided that the rights of third parties are not implicated. Here the AL estate was the registered owner of the mines and minerals in question and had never, by transfer or otherwise, divested itself of those mines and minerals. *Assets Company, Ltd. v. Mere Roihi,* [1905] A.C. 176, distinguished; *Loke Yew v. Port Swettenham Rubber Co., Ltd.,* [1913] A.C. 491; *Imperial Bank of Canada v. Esakin,* [1924] 2 W.W.R. 33, approved.

Sections 42, 44 and 104 of the 1906 Act are not to be construed as meaning that, once a certificate of title has issued, the title of the registered owner is thereafter to be deemed as conclusive and to be subject to attack only in case of fraud, misdescription or the existence of a prior certificate of title. The conclusiveness of a certificate of title, referred to in s. 44 (s. 58 of the 1922 Act), must be considered in the context of the scheme of the Act as a whole and in particular in relation to ss. 106, 114(2) and (3) and 135 (equivalent ss. 150, 160 and 175 of the 1922 Act). In the light of these sections the conclusiveness referred to in s. 44 is for the benefit of the *bona fide* purchaser for valuable consideration only. Here it was conceded that no consideration was given for the transfer which was made by UK to herself and her husband. *Sutherland v. Rural Municipality of Spruce Grove No. 519,* [1919] 1 W.W.R. 274; *Minchau v. Busse,* [1940] 2 D.L.R. 282, referred to; *C.P.R. and Imperial Oil Ltd. v. Turta,* [1954] S.C.R. 427, distinguished. *The Land Titles Act* altered the common law rule that no man can convey a better title than he possesses only to the extent that it established certain special rights for the benefit of the *bona fide* purchaser for value. Accordingly, the registration of a transfer from UK, who had no title to any minerals, to herself and her husband, made without consideration, did not confer any title to mines and minerals in the transferees.

It could not be successfully contended that the rights of the AL Estate to mines and minerals had been extinguished under the provisions of *The Limitation of Actions Act,* 1935 (Alta.), c. 8. If the appellants acquired no interest in the mines and minerals, as a result of the erroneous registration of the two transfers, as against the AL Estate, then there could be no basis for contending that the appellants ever had possession of them. *C.P.R. and Imperial Oil Ltd. v. Turta, supra,* applied.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming, by a majority, a judgment of Primrose J. Appeal dismissed.

[1] (1961), 35 W.W.R. 433, 29 D.L.R. (2d) 38.

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W. G. Morrow, Q.C., for the plaintiffs, appellants.

J. H. Laycraft, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—On July 15, 1919, John Lafleur, of St. Albert, Alberta, the executor of the estate of Alexander Lafleur, deceased, became registered, in the North Alberta Land Registration District, as the owner of the North half of Section 9, Township 55, Range 25, West of the 4th Meridian, containing 320 acres more or less, excepting thereout 6 2/100 acres more or less for the right-of-way of the Edmonton and Slave Lake Railway, the land thereby described containing 313 98/100 acres more or less, reserving unto the Canadian Pacific Railway Company all coal on or under the said land.

On the same day a transfer was registered from John Lafleur to Urbanie Kaup, of Morinville, Alberta, of this half section, "reserving therefrom all mines and minerals".

Notwithstanding this reservation of all mines and minerals in the transfer, a certificate of title was issued in the name of Urbanie Kaup in exactly the same terms as the certificate of title of John Lafleur, containing only a reservation of coal in favour of the Canadian Pacific Railway Company.

The land, the subject-matter of the transfer, had been purchased from John Lafleur by Fred Kaup, the husband of Urbanie Kaup, and by her, but the former had elected to have the title registered in his wife's name, he already being the registered owner of another quarter section of land. The purchase price of the land was $11,000, of which $8,000 was secured by a mortgage from Urbanie Kaup to John Lafleur, in which the description of the mortgaged land contained the reservation of "all mines and minerals".

In December 1924, after Kaup and his wife had decided that the title to the land should be registered in both names, Urbanie Kaup transferred the land to Fred Kaup and Urbanie Kaup for $1 and in consideration of natural love and affection. A new certificate of title was issued on December 20, 1924, in the names of both of them. Both the transfer and the new certificate of title, following the description of the land as it had appeared in Urbanie Kaup's certificate of title, contained a reservation of all coal to the

Canadian Pacific Railway Company, but no reservation in respect of other mines and minerals. It is conceded by the appellants that the transfer leading to this title was made without consideration.

Fred Kaup farmed the land until about 1938 or 1940, when he retired to Vancouver, after which the land was farmed by his son John. Urbanie Kaup died in 1953 and John Kaup is a beneficiary of her estate.

Corrections were subsequently made to the three certificates of title, previously mentioned, by officials of the North Alberta Land Registration District. That of John Lafleur, which had been stamped as "cancelled" following the transfer to Urbanie Kaup, had the cancellation stamp crossed out. The notation on the certificate, stating that it had been cancelled in full, was altered so as to read "in full Ex M & M", so as to indicate that the title to the mines and minerals was not cancelled. According to the evidence, this latter change appears to have occurred some 20 or 25 years after the initial notation on the certificate of title had been made.

The reservations which had appeared on the certificate of title of Urbanie Kaup and on that of Fred Kaup and Urbanie Kaup were altered so as to reserve, in addition to coal, all other mines and minerals. The correction on Urbanie Kaup's certificate of title appears to have been made on February 18, 1948, and that on the certificate of title of Fred Kaup and Urbanie Kaup on June 3, 1943.

The issue in this appeal is as to the title to the mines and minerals, other than coal, in this land. The learned trial judge and the majority of the Appellate Division of the Supreme Court of Alberta have held that they were the property of the Lafleur Estate. The respondent Imperial Oil Limited is a lessee of petroleum and natural gas and related hydro-carbons in this land, by virtue of five leases made in its favour by the successors in title of Alexander Lafleur, executed in the year 1957.

The appellants concede that Urbanie Kaup acquired no title to mines and minerals by virtue of the registration of the transfer from John Lafleur to her. Notwithstanding this, they do contend that the subsequent transfer by her to Fred Kaup and herself, which purported to transfer mines and minerals other than coal, did result, upon its registration, in the acquisition of a title to such mines and minerals

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in their names. It is further contended that, even if such title was not an absolute one, but was defeasible at the instance of the Lafleur Estate, yet any right of that estate to mines and minerals was extinguished by virtue of the provisions of *The Limitation of Actions Act,* 1935 (Alta.), c. 8.

The respondents, in addition to disputing these contentions, submitted that the corrections to the three certificates of title were properly authorized under the provisions of *The Land Titles Act,* were effective, and that once corrected the effect was as if the error on the title had not been made.

The appellants' argument that the registration of the transfer from Urbanie Kaup to Fred Kaup and herself conveyed mines and minerals, other than coal, to the transferees, is based upon certain sections of *The Land Titles Act,* 1906 (Alta.), c. 24. That Act was in force at the time of the transfer from John Lafleur to Urbanie Kaup, although it had been repealed and replaced by c. 133, R.S.A. 1922, at the time of the registration of the transfer from Urbanie Kaup to Fred Kaup and herself. The provisions of the latter statute are substantially similar in effect. As the sections cited in argument and in the judgment in the Court below are from the 1906 Act, it is convenient to refer to those provisions here. The sections in question are as follows:

> 23. Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered, every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.
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> 41. After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money; but upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.
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> 46. After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein or to render the land liable as security for the payment of money as against any *bona fide* transferee of the land under this Act unless such instrument is executed

in accordance with the provisions of this Act and is duly registered thereunder; and the registrar shall have power to decide whether any instrument which is presented to him for registration is substantially in conformity with the proper form in the schedule to this Act or not and to reject any instrument which he may decide to be unfit for registration.

The relevant equivalent sections of *The Land Titles Act*, R.S.A. 1922, c. 133, are ss. 50 and 51, which provide as follows:

50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

51. So soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

The proposition submitted by the appellants is that these sections have the mandatory effect that, upon the registration of any transfer, there is automatically created the estate or interest, defined in such transfer, in favour of the transferee, irrespective of whether or not the transferor had any legal estate or interest which he was entitled to transfer. This result flows, it is said, irrespective of whether the transferee was a *bona fide* purchaser for value or not.

It is then argued that, the transferee having acquired the legal title, ss. 42, 44 and subss. (*d*), (*e*) and (*f*) of s. 104 of the 1906 Act come into play to protect his interest and that, in consequence, Fred and Urbanie Kaup could only be deprived of title to the mines and minerals, if at all, on one of the grounds defined in those provisions. Those sections read as follows:

42. The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

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(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

* * *

44. Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land; and for the purpose of this section that person shall be deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

* * *

104. No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner, under this Act in respect thereof, except in any of the following cases, that is to say:

* * *

(*d*) The case of a person deprived of any land by fraud as against the owner of such land through fraud, or as against a person deriving title otherwise than as a transferee *bona fide* for value, from or through such owner through fraud;

(*e*) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land;

(*f*) The case of an owner claiming under an instrument of title prior in date of registration under this Act, or under the provisions of any law heretofore in force in any case in which two or more grants, or two or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect to the same land.

The section of the 1922 Act which is the equivalent of s. 42 of the 1906 Act is s. 56, which provides as follows:

56. (1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud wherein he has participated or colluded, hold the same subject (in addition to the incidents implied by virtue of this Act) to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other incumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

Section 58 of the 1922 Act uses the same wording as s. 44 of the 1906 Act and s. 148 of the 1922 Act uses the same wording as s. 104 of the 1906 Act.

The appellants cite the decision of this Court in *C.P.R. and Imperial Oil Ltd. v. Turta*[1], as authority for the proposition that there has been no fraud, no misdescription and no prior certificate of title on the facts of the present case.

The whole of the argument rests on the primary proposition that registration of a transfer, in itself, vests in the transferee a title which is indefeasible, save on those grounds specifically stated in ss. 42, 44 and 104 of the 1906 Act. I do not accept the appellants' interpretation of the meaning of ss. 23, 41 and 46 of the 1906 Act. I do not construe those provisions as doing more than to state what is a basic principle of *The Land Titles Act* system that it is only the registration of an instrument under that Act, and not its execution and delivery, which can be effective to convey a legal interest under the statute. I do not consider that the wording of these sections is sufficient to alter the common law rule that no man can convey a better title than he possesses. That this rule was altered by the provisions of *The Land Titles Act* is undoubted, but, in my opinion, that result was achieved, not by the effect of the sections presently under consideration, but because of the special position which was given to the *bona fide* purchaser for value under other sections of the Act, to which I will refer later.

Reference was made, in argument, to the decision of the Privy Council in *Assets Company, Limited v. Mere Roihi*[2]. This decision dealt with three appeals from New Zealand, each involving the same appellant, which was the registered owner in possession of three parcels of land, the ownership of which was claimed by the various respondents in the three cases. The history of the circumstances leading up to the registration of the three titles is very complicated and differed in each case. The appellant's titles were attacked by the respondents on the grounds of fraud and also on

[1] [1954] S.C.R. 427, 3 D.L.R. 1. [2] [1905] A.C. 176, 92 L.T. 397.

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the ground that such registration was invalid by reason of the invalidity of certain orders of the Native Land Court, a tribunal established by New Zealand legislation, on which warrants of the Governor, having the effect of Crown grants, were issued. In two of the cases the appellant was the registered purchaser, in good faith, of an improperly registered title. The third case differed from the other two in that the appellant, in that case, was the first owner to obtain registration on the permanent register. In all three cases the appellant had given consideration and the Privy Council negatived any fraud on the part of the appellant in relation to any of the three transactions.

The Privy Council decided in favour of the appellant. The decision is summarized in the headnote, as follows:

> By the Land Transfer Acts of 1870 and 1885 the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Acts, is actual, not constructive fraud, brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

It was further held that

> as the registration had been obtained in each case *bona fide* the effect thereof was conclusive to confer on the appellants a title unimpeachable by the respondents.

While there are dicta in the reasons given which might appear to support the position now taken in the present appeal by the appellants, notably the statement at p. 191, referring to the provisions of the New Zealand Act regarding the Assurance Fund:

> This provision, taken in connection with those already referred to, went far to shew that except in the excepted cases the registered certificate was to be conclusive, and that the remedy of persons wrongfully deprived of their property was to obtain damages from the wrong-doer,

the case itself does not, in my view, support the appellants' proposition. I do not think that it goes further than what is said of it by Baalman, in his "Commentary on the Torrens System in New South Wales", at p. 133:

> It was settled by the Privy Council in *Assets Co. v. Mere Roihi,* that the quality known as indefeasibility attaches to a title immediately upon the entry, in the register-book, of the name of an innocent purchaser. That case dealt both with an original applicant and with a derivative purchaser, and it applied equally to both.

The case certainly does not support the proposition that a registered owner of land, whose title has wrongfully been affected through an error of the Registrar, cannot obtain rectification of that error as against the person who became registered owner as a result of the error, or as against one who acquires title from him as a volunteer.

I find support for my view in the later decision of the Privy Council in *Loke Yew v. Port Swettenham Rubber Company, Limited*[1]. That case involved the issue of the title to land which had been registered in the name of the respondent company pursuant to a transfer to it from the prior registered owner. Prior to the making of such transfer, the company had knowledge of an unregistered interest, as to a portion of the land, in the appellant Loke Yew. In order to induce the prior registered owner to transfer the whole of the land to it, the company had, in writing stated: "As regards Loke Yew's interest I shall have to make my own arrangements."

The respondent company relied on a statutory provision, similar in effect to s. 44 of the 1906 Act, whereby the duplicate certificate of title was made conclusive evidence of absolute and indefeasible ownership, subject only to certain exceptions, including fraud.

The Privy Council did find that there had been fraud in this case, so as to come within the exception in that section, but it went on to add further reasons in the following statement, at p. 504:

> The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception of s. 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a Court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified.

In this passage, reference is made to the position of a wrongdoer who becomes registered as the owner of land. In my opinion, the same reasoning, as to the power and duty of a Court to rectify the register, can and should also be

[1] [1913] A.C. 491, 82 L.J.P.C. 89.

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applied to a case in which registration of title has been obtained by a volunteer, who registers a transfer from a transferor who had no legal right to give it, provided that the rights of third parties are not implicated. While there is no suggestion of wrongdoing in the present case, yet it should be remembered that, whereas, in the *Loke Yew* case, the transferor was the registered owner of the land, who had the legal power to transfer it, in the present case the transferor had no interest of any kind in the minerals to convey.

The power of the Court to order a rectification of the register is set out in s. 116 of the 1906 Act, which provides as follows:

> 116. 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.

The same provision was incorporated in the later *Land Titles Acts* and presently appears as s. 188(1) in c. 170, R.S.A. 1955.

Referring to the passage, above quoted, from the *Loke Yew* case, Lamont J.A., in *Imperial Bank of Canada v. Esakin*[1], has this to say:

> Sec. 7, referred to by his Lordship, provided the title of the person named in the certificate of title should be absolute and indefeasible, except in cases of fraud, misrepresentation or adverse possession, and it was upon this section that the arguments for the plaintiffs were based. Notwithstanding the clear language of the section, the above-quoted passage, in my opinion, clearly indicates that, even if the Court had not found fraud on the part of the plaintiffs, it would "for other reasons" have set aside the plaintiffs' title to the Loke Yew lands for which they have given no consideration, and these "other reasons," as I interpret the judgment, were, that, as between the registered owner who is a volunteer and a person rightfully entitled to the land, the Court would hold the registered owner to be a trustee for the rightful owner and would rectify the title, by cancelling that of the registered owner and causing a new certificate to be issued to the person really entitled.

With this statement I agree. In the present case, unlike the *Loke Yew* case, it is not necessary to invoke the principle of trusteeship because, while Loke Yew's interest had, at all times, been an unregistered one, in the present case

[1] [1924] 2 W.W.R. 33 at 38.

the Lafleur Estate was the registered owner of the mines and minerals in question and had never, by transfer or otherwise, divested itself of those mines and minerals.

I turn now to ss. 42, 44 and 104 of the 1906 Act, previously cited. Section 42 declares the rights of an owner of land, under the Act, for which a certificate of title has been granted. Section 44 declares the evidentiary value of a certificate of title in legal proceedings and s. 104 defines those cases in which an action of ejectment, or for the recovery of land, may lie as against the owner. Are these sections to be construed as meaning that, once a certificate of title has issued, the title of the registered owner is thereafter to be deemed as conclusive and to be subject to attack only in the case of fraud, misdescription or the existence of a prior certificate of title? I think not, and in this respect I agree with the views expressed by Harvey C.J.A., in *Sutherland v. Rural Municipality of Spruce Grove No. 519*[1]. In that case the defendant municipality took forfeiture proceedings for tax enforcement in respect of certain lands registered in the name of Sutherland, obtained an adjudication which was registered and subsequently acquired certificates of title to the land in its name. The plaintiff Sutherland sued, asking for an order cancelling the certificates of title in the name of the municipality and vesting the land in himself and other parties interested, on the ground that the proceedings taken by the municipality leading to its obtaining its certificates of title had been illegal. The defendant contended that its certificates of title were an absolute bar to the plaintiff's action and, in particular, relied upon s. 104 of *The Land Titles Act* of 1906. After referring to the provisions of that section, Harvey C.J.A. went on to say:

> Is this an action for the recovery of land within the meaning of the section? I think not. It is to be noted that when it was begun the plaintiff supposed he was the registered owner, but even then he makes no claim for recovery of the land, but only for its discharge from taxes. Later, when it is found that the certificates of title have been issued to the defendants, he asks for their cancellation. If the certificate of title is to be a bar to any action to set it aside we would have a somewhat anomalous situation. Any one who had become registered as owner through any error in the office or otherwise, or in any of many other ways which occur to me, would thereby become entitled to hold land to which he has no right.

[1] [1919] 1 W.W.R. 274 at 276.

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In my opinion, the conclusiveness of a certificate of title, referred to in s. 44 of the 1906 Act, must be considered in the context of the scheme of the Act as a whole and, in particular, in relation to ss. 106, 114(2) and (3) and 135 of that Act. Those sections provide as follows:

106. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered as owner, any purchaser or mortgagee *bona fide* for valuable consideration of land under this Act on the plea that his transferor or mortgagor has been registered as owner through fraud or error or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription, as mentioned in section one hundred and four.

* * *

114. (2) If it appears to the satisfaction of the registrar that any duplicate certificate of title or other instrument has been issued in error or contains any misdescription, or that any entry or indorsement has been made in error on any certificate of title or other instrument, or that any such certificate, instrument, entry or indorsement was fraudulently or wrongfully obtained, he may, whether such certificate or instrument is in his custody or has been produced to him in answer to a demand, so far as practicable without prejudicing rights conferred for value, cancel or correct any error in such certificate of title or other instrument, or in any entry made thereon or in any memorial, certificate, exemplification or copy of any instrument made in or issued from the land titles office, and may supply entries to be made:

Provided always that in the correction of any such error he shall not erase or render illegible the original words, and he shall affix the date upon which such correction was made or entry supplied.

(3) Every certificate of title so corrected, and every entry so corrected or supplied, shall have the like validity and effect as if such error had not been made or such entry omitted.

* * *

135. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease, from the owner of any land for which a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The equivalent sections of the 1922 Act are 150, 160 and 175.

When regard is had to these sections it appears that the conclusiveness referred to in s. 44 is for the benefit of the *bona fide* purchaser for valuable consideration only. This

view was stated in this Court by Crocket J. in *Minchau v. Busse*[1], where he says, referring to the opinion of the dissenting judges in the Court below:

> I agree with the view expressed by Mr. Justice Clarke and Mr. Justice Ford in the reasons for their dissenting opinion, as delivered by the latter, that the sections of the *Land Titles Act* as to the conclusiveness of the certificate of title are for the benefit of those who *bona fide* acquire title on the faith of the register and that in the present instance Busse did not so acquire his title.

I do not find anything in the case of *C.P.R. and Imperial Oil Ltd. v. Turta, supra,* which is contrary to this view. The decision in that case rested solely upon the ground that Turta was a *bona fide* purchaser for value of the minerals there in question and that, because of that fact, his position could only be attacked on one or more of the three grounds previously mentioned. It emphasizes the special position enjoyed, under the Act, by the *bona fide* purchaser for value. In the present case, admittedly, the appellants are not in that position, it having been conceded that no consideration was given for the transfer which was made by Mrs. Kaup to herself and her husband.

I do not find in the *Turta* case any suggestion that Turta's position would have been the same had he not been a *bona fide* purchaser for value. The decision is based upon the fact that he was. Estey J. (at p. 443), with whom Kerwin J., as he then was, and Taschereau and Fauteux JJ. agreed, cited, with approval, the view of the Act expounded by Harvey C.J.A. in *Dobek v. Jennings*[2], as follows:

> The principle of the Act is that a person may ascertain the state of the title by a reference to the records of the land titles office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a *bona-fide* purchaser subject only to what appears on the register and the reservations and exceptions of Sec. 58 (i.e. Sec. 44 of the 1906 Act).

He also cited the well known statement of Lord Watson in *Gibbs v. Messer*[3]:

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

[1] [1940] 2 D.L.R. 282 at 306.
[2] [1928] 1 W.W.R. 348 at 351.
[3] [1891] A.C. 248 at 254.

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Martland J.

The sections of the Act dealing with the position of the *bona fide* purchaser for value, which I have mentioned, support these views as to the purpose and intent of the Act. The fact that these provisions were incorporated in the statute negatives the suggestion that the Act further curtails the old common law rule that no man can convey a better title than he possesses, so as to enable a transferor, having no title at all, to vest in a volunteer a legal title valid as against the true owner. In my opinion, *The Land Titles Act* altered that rule only to the extent that it established certain special rights for the benefit of the *bona fide* purchaser for value. Accordingly, the registration of a transfer from Urbanie Kaup, who had no title to any minerals, to herself and her husband, made without consideration, did not confer any title to mines and minerals in the transferees.

Having reached this conclusion, I do not see how the provisions of *The Limitation of Actions Act* can be successfully invoked by the appellants to contend that the rights of the Lafleur Estate to mines and minerals had been extinguished. The position is that the appellants never, at any time, acquired a title to mines and minerals which was valid as against the Lafleur Estate. If the appellants acquired no interest in those mines and minerals, as a result of the erroneous registration of the two transfers, as against the Lafleur Estate, then there can be no basis for contending that the appellants ever had possession of them. There is no evidence which would support the claim that they exercised open, notorious and exclusive possession of them. On the contrary, Fred Kaup, in his evidence, when referring to the purchase of the land from John Lafleur, said: "There was nothing else discussed. Mineral rights—them days we didn't know what mineral rights was." There is no evidence of any attempt by the appellants to exercise control over, or to deal with the mineral rights. They merely farmed the surface of the land. On the contrary, the respondents paid the mineral taxes in respect of those minerals.

Under these circumstances I think the views expressed by Rand J. in this Court, in the *Turta* case at p. 456, properly should be applied:

> The remaining question is whether the action is barred by the *Limitation of Actions Act*, c. 133, R.S.A. 1942. On the view which I have taken that the petroleum rights were acquired by Turta and the Pacific Company deprived of them, the possession, in the absence of physical workings and

so far as such incorporeal rights can be the subject of possession, must be taken to be an incident of ownership. 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 the land but to have those entries expunged and for a declaration of the plaintiff's interest. Since there has been no trespass and since the steps taken have, at the most, raised only a cloud upon the title, the question is whether an owner can be deprived of his land by the mere assertion on the register of unfounded claims. I know of no provision of law which, by the passage of time, raises any right based on that mode of protesting an interest; it would be a novel form of prescription which the law does not recognize. Its true interpretation is that of a continuing assertion against which proceedings of the nature here can be taken at any time, and no question of limitation arises.

The opinion of the minority judges in the Appellate Division of the Supreme Court of Alberta is clearly based on the proposition that, following the registration of the transfer to Fred Kaup and Urbanie Kaup, they thereby acquired a legal interest in the mines and minerals, other than coal, and that during the period from the issuance of their title until June 3, 1943, when the corrections were made, there had been no severance of the title to mines and minerals, other than coal, from the surface of the land. With respect, for the reasons already outlined, I do not accept this premise and without that premise the reasoning of the minority judgment cannot properly be applied.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

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