CANADIAN PACIFIC RAILWAY CO. LTD. AND IMPERIAL OIL LIMITED *(Defendants)* ..... } APPELLANTS

1954

*Jan. 26-29, *Feb. 1-3 *May 19

AND

ANTON TURTA *(Plaintiff)* ..... RESPONDENT;

AND

WILLIAM SEREDA, MONTREAL TRUST CO. AND NICK TURTA (Third Parties) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Real Property—Land Titles—Omission by error of reservation of petroleum in transfer—Issue of certificate of title to transferee—Unauthorized addition by registrar of "and petroleum" to reservation—Right to petroleum by subsequent purchasers for value—"Wrong description" —"Misdescription"—"Prior certificate of title"—The Land Titles Act, 1906, (Alta.) c. 24.

In 1903 the C.P.R., the owner of a tract of land in what is now the province of Alberta, registered it under The Land Titles Act of the Northwest Territories and obtained a certificate of title, No. 424, certifying it to be the owner thereof in fee simple. By virtue of the *Alberta Act,* 1905 (Can.) c. 3, the certificate continued in effect under the Alberta *Land Titles Act* of 1906, c. 24. In 1908 the C.P.R. transferred from out of the tract the quarter section now in suit to P reserving the coal and petroleum. The registrar of land titles however in issuing a certificate of title to P reserved only the coal and endorsed on certificate No. 424 a memorandum to the effect that it was cancelled as to P's quarter section. In 1910 P transferred the east half to S and in 1911 the west half to the respondent Anton Turta. In 1918 S transferred the east half to Turta and the registrar issued a new certificate to the latter covering the entire quarter section. In all of these transfers and certificates only coal was reserved to the C.P.R. In 1910 certificate 424, because of the many endorsements on it, was, with the consent of the C.P.R., cancelled and a new certificate, as well as a duplicate, issued covering the lands which then remained uncancelled on No. 424. In 1943 the errors were detected by officials in the land titles office and entries were made on the cancelled certificate No. 424 as well as on the duplicate by adding the words "except coal and petroleum" to the memorandum of cancellation originally made, and by adding the words "and petroleum" to the reservations in Turta's certificate and the duplicate then in the office. In 1944 Turta transferred to the respondent Nick Turta the east half of the quarter section and in 1945 the west half to Metro Turta. The new certificates

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

contained a reservation of coal and petroleum to the C.P.R. In 1946 the latter gave an option to lease all petroleum and natural gas underlying the quarter section to Imperial Oil which the latter exercised in 1951. In 1950 the respondents, Montreal Trust Co. and Sereda, entered into an agreement with Anton Turta relative to the petroleum rights and appear as caveators upon the title.

In an action to determine title to the petroleum rights:

Held: (Rinfret C.J., Locke and Cartwright JJ. dissenting) that: 1. The omission to insert the reservation of petroleum in the certificate of title granted Anton Turta did not constitute a misdescription within the meaning of s. 104(*e*) of *The Land Titles Act.*

2. Since certificate of title No. 424 was cancelled prior to any relevant date, there never was a contemporaneous existence of two certificates of title within the meaning of s. 104(*f*).

3. The purported corrections made by the registrar could not be made without prejudicing the rights conferred for value on Anton Turta, and therefore were not authorized by the Act and were of no effect.

4. The action was not barred by the *Limitation of Actions Act,* R.S.A. 1942, c. 133.

Per: Rinfret C.J., dissenting. The omission by the registrar to reserve the petroleum in granting the certificate of title to P was made contrary to the Act and was ultra vires. The certificate was a complete nullity and could never become the root of title to subsequent transferees and since the cancellation of certificate No. 424 was the consequence of the issuance of the certificate to P. it must be set aside for the same reasons. There was misdescription within the meaning of s. 62 of the Act as the property transferred to P was described so as to make it include other land, that is to say the petroleum which falls within the definition of land under s. 2 (*a*).

Per: Locke J., dissenting: To include in the lands described in the certificate of title issued to P the petroleum rights was a misdescription of the lands conveyed by the transfer from the C.P.R. within the meaning of that expression in ss. 44, 104 and elsewhere in the Act. The general statements as to the interpretation of the Victoria *Transfer of Land Statute* of 1866 in *Gibbs* v. *Messer* [1891] A.C. 248 at 254, and by Sir Louis Davies C.J. as to *The Land Titles Act,* 1917, of Saskatchewan in *Union Bank of Canada* v. *Boulter Waugh Ltd.,* 58 Can. S.C.R. 385, cannot be applied without qualification to the Alberta statute. The rights of those deprived of their property by misdescription of land are expressly reserved to them by the latter statute and it cannot be construed to defeat such rights. The rights to the petroleum were adequately excepted from the operation of the transfer to P.

Per: Cartwright J., dissenting: Ss. 25, 42 and 135, if read alone would seem to make the certificate of title of a purchaser in goood faith for value conclusive, but they must be construed with ss. 44, 104 (*e*) and 106 and the last mentioned group must be read with them. When so read the C.P.R.'s claim falls with s. 104 (*e*) and no other provision of the Act requires a restriction or modification of the ordinary meaning of the words used in such clause.

APPEAL by defendants from a judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, C. J. Ford J.A., dissenting, the judgment of Egbert J. (2), declaring plaintiffs' right to petroleum in certain land.

C. F. H. Carson, Q.C., S. J. Helman, Q.C., I. D. Sinclair and *Allan Findlay* for C.P.R.

H. G. Nolan, Q.C. and *J. H. Laycraft* for Imperial Oil.

G. H. Steer, Q.C. and *G. A. C. Steer* for Anton Turta and Montreal Trust Co.

M. E. Manning for Nick Turta.

The CHIEF JUSTICE (dissenting): This case calls for the application of The Alberta *Land Titles Act* of 1906. If the contentions of the respondents were to prevail, as they were upheld by the learned trial judge and the majority of the Appellate Division of the Supreme Court of Alberta, I may say, with respect, that in my opinion, it would create an intolerable situation. Interpreted as suggested by the respondents, the statute would do away with all traditional principles of law and equity. Indeed, I am not sure that it does not boast of such intention, for, in section 135, the very words are used by the legislator whereby it is stated:—

> 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 . . . ". (The capitals are my own).

And, if it were so, I confess that the statute in question would not fill me with enthusiasm.

But, fortunately, I fully share the dissenting opinion of Mr. Justice Clinton J. Ford in the Appellate Division (3). After a most anxious study of the case, like Clinton Ford J.A., I would allow the appeal and dismiss the action and

(1) (1953) 8 W.W.R. (N.S.) 609; [1953] 4 D.L.R. 87.
(2) (1952) 5 W.W.R. (N.S.) 529.
(3) (1953) 8 W.W.R. (N.S.) 609 at 630.

1954

C.P.R. AND IMPERIAL OIL LTD. *v.* TURTA *et al.*

give to the appellant, The Imperial Oil Co. Ltd., the remedy asked for in its counter-claim, and to the appellant, The Canadian Pacific Railway Company, the remedy sought in its third party notice, with costs against the respondents and the third parties who fought the issues.

Rinfret C.J.

Let us face the facts:—On the 19th June, 1908, the Canadian Pacific Railway Co. transferred to one Podgorny the land in issue "reserving all coal and petroleum which may be found to exist within, upon, or under the said land". Upon that transfer the Registrar of Land Titles purported to grant to Podgorny certificate of title No. 182-N-8 to the land described as the "north-west quarter of section 17, township 50, range 26, west of the 4th Meridian, in the said province, containing 160 acres more or less, reserving to the Canadian Pacific Railway Co. all coal on, or under the said land". The reservation so limited is the more extraordinary, because the Registrar evidently relied upon the transfer to specify that the coal was reserved to the Canadian Pacific Rly. Co.; and, for no reason that can be imagined, he did not mention in the certificate of title the petroleum specified in the same reservation.

All courts and all parties in the case have had to admit that the omission of the petroleum was undoubtedly what they call an error, and if it is only an error, it borders on stupidity. In fact, it is stupidity of the most glaring character. I do not call it a simple error. I think either the granting of the certificate to Podgorny cannot be taken as having included the petroleum, or, at all events, if it must be understood to include it, it was done by the stupidity of the Registrar without power, or authority, derived from *The Land Titles Act*. The omission, in my view—if it is to be treated only as an omission—was made contrary to the Act and was *ultra vires*. On the other hand, Podgorny, who took and accepted such a certificate, if he was really under the impression that it gave him title to the petroleum, acted fraudulently. An attempt was made to excuse him on the ground that he was ignorant, but, of course, that can never excuse him if such ignorance is understood to mean that he did not know the law. I am not inquiring whether he had the *mens rea*, which would

have branded him as a criminal, but his action in taking possession of the certificate, under the circumstances, was certainly a fraud according to the civil law, because, whether he ignored the law or not, he could not ignore the reservation of petroleum in the transfer made to him by the Canadian Pacific Railway Co. Assuming that he understood the certificate of title to give him the ownership of the petroleum, to which he had absolutely no right, he then proceeded further to transfer the land, without the reservation of petroleum to The Canadian Pacific Railway Company, in part to one Sitko and in another part to the respondent Anton Turta. In the transfer to Sitko no exception of coal was made, but the certificate issued to the latter reserved unto The Canadian Pacific Railway Co. all coal on or under the said land. In the transfer to Turta even the coal was not excepted, but the certificate of title issued to him contained the reservation "unto the Canadian Pacific Railway Co. all coal on or under the said land". Later the respondent, Anton Turta, acquired land which Podgorny had transferred to Sitko and the reservation of the coal was mentioned in the transfer to him. Then Turta requested that his titles to the east and west halves of the quarter section be consolidated and his application for consolidation described himself as the owner of the east half and the west half of the quarter section without any exception. However, the certificate of title issued to him for the consolidated halves of the quarter section did show Turta "reserving unto The Canadian Pacific Railway Co. all coal".

On January 16, 1943, corrections were made in the Land Titles Office to certain certificates of the quarter section held by Podgorny, Sitko and the respondent Anton Turta. These corrections were made by one, H. T. Logan, a solicitor, who was acting Deputy Registrar at the time. By these corrections petroleum was excepted from the land described in the certificates of Podgorny, Sitko and Anton Turta; and since petroleum had been excepted and reserved to The Canadian Pacific Railway Co. in its original transfer of the quarter section to Podgorny, the corrections brought these certificates into accord with that original transfer.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rinfret C.J.

On April 17, 1944, Anton Turta transferred to Nick Turta, his son, and one of the third party respondents, the east half of the north-west quarter of section 17, "reserving unto The Canadian Pacific Railway Co. all coal and petroleum"; and the certificate of title issued as a consequence to Nick Turta showed him to be the owner of the east half in question "reserving unto The Canadian Pacific Railway Co. all coal and petroleum".

Anton Turta, on the 30th December, 1944, transferred to his son, Metro Turta, and his daughter-in-law, Bessie Turta, the west half of the north-west quarter of section 17, "reserving unto The Canadian Pacific Railway Co. all coal and petroleum". Accordingly, the certificate of title issued to Metro and Bessie Turta showed them to be the owners of the west half of the quarter section "reserving unto The Canadian Pacific Railway Co. all coal and petroleum".

By an encumbrance dated December 30, 1944, Metro and Bessie Turta, describing themselves as the registered owners of the west half of the quarter section "reserving unto The Canadian Pacific Railway Co. all coal and petroleum", encumbered the land as security for the performance by them of the terms of an agreement between them and Anton Turta of the same date. The agreement attached to the encumbrance states that it was executed by Anton Turta, as well as by Metro and Bessie Turta, and in the said agreement the fact that there was "reserved to the Canadian Pacific Railway Co. from the land all coal and petroleum" appears eight times.

By the amended Statement of Claim, Anton Turta claimed a declaration that he is entitled to be registered as owner of all the petroleum in, upon and under the quarter section, and that the substitutions and alterations made to various documents to show the contrary were wrongful.

The learned trial judge held that Anton Turta was entitled to the declaration claimed and found it unnecessary to deal with the claim for title by prescription, which Turta had inserted in his statement of claim. It is significant that the learned trial judge, having found that Anton Turta could not understand English, held as a fact that he acquired the quarter section involved in this action for a farm and that he knew nothing about minerals at the time

and did not discuss them with either Podgorny or Sitko and placed no value on them. He also found that all the corrections of the certificates of title made on January 16, 1943, were a complete nullity. In the learned trial judge's view the Registrar had power, by s. 174 of *The Land Titles Act*, merely to correct clerical errors as between parties to the transaction and did not have power to make the alterations of the instruments in question, thereby prejudicing rights conferred for value. He also held that s. 174 was governed by s. 159 so that if Anton Turta was a bona fide purchaser for value, and there was no misdescription, s. 174 did not confer powers on the Registrar to deprive him of his land. The learned trial judge found that Anton Turta gave valuable consideration for everything comprised in his vendors' certificates, including petroleum, and that he dealt "upon the faith of the register" in the sense that he transacted on the "basis" of the register, although he never saw it. Accordingly, he held that Anton Turta was a bona fide purchaser for valuable consideration; and, by virtue of s. 106 of the 1906 Act, his title was indefeasible unless there was a prior certificate of title or there had been misdescription. He was of the opinion that for the exception of prior certificate the Act contemplates two contemperaneous certificates of title for the same land and that in this case there was never more than one certificate. As to misdescription, His Lordship considered that there must be "other land" to bring the case within s. 104, and that here there was only one parcel involved. He thought that "misdescription" is a narrower term than "error", as used in s. 106, and that this is a case of error.

The Appellate Division (1) affirmed the judgment of the trial judge, Mr. Justice C. J. Ford dissenting. The Chief Justice of Alberta, although he concurred in the judgment of the majority, stated that he did so reluctantly, because, in his opinion, the result of the decision is to take from The Canadian Pacific Railway Co. without its consent and without consideration what may prove to be valuable oil rights and give them to the respondent who never expected to get them.

(1) (1953) 8 W.W.R. (N.S.) 609; [1953] 4 D.L.R. 87.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rinfret C.J.

Parlee J.A., with whom Frank Ford and Macdonald JJA. concurred, found that Anton Turta bought the quarter section as a farm and was not interested in any minerals or aware of any reservation until after the discovery of petroleum in Leduc in 1947. He found that, although the Registrar was in error in granting the certificate to Podgorny, there was no error by the Registrar when certificates were granted to Anton Turta. As to the contention of The Canadian Pacific Railway Co. that it had a prior certificate of title, he held that the certificate of the latter, No. 424, was effectively cancelled and the Act requires two contemporaneous certificates, and that, in any event, such a contention disregards the plain language of s. 106 of the 1906 Act. As to misdescription, he held that since there was involved only one parcel of land throughout, it was a case, not of misdescription, but of error in the Registrar's office. Dealing with the alterations subsequently made in the Registrar's office, Parlee J.A. held there was a nullity; and, in his view, the Registrar had no authority to make corrections which prejudiced rights conferred for value.

As for Mr. Justice C. J. Ford, who dissented, he was of opinion that the Registrar had registered Podgorny as the owner of petroleum under his land, contrary to *The Land Titles Act* of 1906, and, therefore, such title was void. The creation of an unauthorized title did not cancel an existing title and, in his opinion, the purported cancellation of certificate C.P.R. 424 was a nullity. He held, therefore, that The Canadian Pacific Railway Co. has a title prior to Anton Turta's, with the right to recover possession. He also held that Anton Turta's claim for title by prescription, based on actual or constructive possession of minerals under colour of title, failed because the Canadian Pacific Railway Co. had a separate estate in minerals, which could not be defeated by mere non-user. He found it unnecessary to deal with the points raised by The Canadian Pacific Railway Co. and Imperial Oil Co. Ltd. as to *The Limitation of Actions Act* and whether Anton Turta acquiesced in the corrections. He would, therefore, have dismissed the action and have allowed the remedies sought by The Canadian Pacific Railway Co.

With great respect, I am of opinion that sufficient attention has not been given in the Courts below to the definition of the word "land" in section 2(*a*) of the 1906 Act. That section (as re-enacted in 1945, c. 58. s. 1) reads as follows:—

2. In this Act, unless the context otherwise requires,—

(1) "Land" or "Lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, or every nature and description, and every estate of interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted.

It is common ground that petroleum is a mineral, and it is also clear that under the above definition, minerals are "land". In the transfer from The Canadian Pacific Railway Co. to Podgorny, it may be repeated, coal and petroleum were specifically excepted and reserved to The Canadian Pacific Railway Co. The dissenting judge in the Appellate Division refers to the dicta of Blackburne C.J., in *McDonnell* v. *McKinty* (1):—

The excepting of the quarries in the deed of 1738 severed them both as to estate and possession from the estate in possession of the lands; in both respects they became thereon separate and distinct; the grantor's estate and possession of the quarries remained unaffected; and he retained them as he had them; they were never out of him. *Cardigan* v. *Armitage* (2).

The learned judge also referred to *Farquharson* v. *Barnard Argue Roth Stearns Oil & Gas Co.* (3), where Boyd C. expressed a similar view, stating that the possession of the surface owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor, and referred to *Hodgkinson* v. *Fletcher* (4)

The judgment of Blackburne C.J. was approved by the Privy Council in *Agency Co.* v. *Short* (5), in which Lord Macnaghten said:—

We entirely concur in the judgment of Blackburne C.J., in *McDonnell* v. *McKinty,* (6) and the principle on which it is founded.

According to these authorities, therefore, the coal and petroleum excepted and reserved in the transfer to Podgorny were severed from the estate transferred to the latter

(1) (1847) 10 Ir. L.R. 514 at 525. (4) (1781) 3 Doug. K.B. 3; 99 E.R. 523.
(2) 2 B. & C. 197; 107 E.R. 356. (5) (1888) 13 App. Cas. 793 at 799.
(3) (1910) 22 O.L.R. 319 at 326. (6) 10 Ir. L.R. 514.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rinfret C.J.

and they became separate and distinct from the estate. This would seem to indicate that as a result of such a transaction and from then on there should have been in the Registry Office separate records for the land and for the coal and petroleum. As a consequence, at all events, the coal and petroleum could no longer be regarded as being part of the land itself for registration purposes; and it would be arguable that when the certificate of title was issued to Podgorny without mention of petroleum it did not transfer the petroleum to Podgorny, since it was not specifically included and petroleum was correctly treated as being a separate land. I must confess, however, that the judgments below gave no attention to such an argument and they treated the certificate issued to Podgorny as including the petroleum, because the latter was not excepted and reserved in that certificate. But, on that ground, it follows that the issuance of the certificate to Podgorny, if it is to be regarded as having transferred the petroleum to him, was not a mere error, but really a certificate of ownership to a land (petroleum), to which he had no right whatever, to which he was in no way entitled, which was contrary to his transfer from The Canadian Pacific Railway Co., and, therefore, a certificate made not in accordance with The Land Titles Act, altogether outside the power and authority of the Registrar and *ultra vires*.

It is very well to say that the certificate of title is the whole thing under *The Land Titles Act*, or, if you wish, under the so-called Torrens System; but it must necessarily be a certificate which the Registrar has power to issue. The title may be indefeasible, although it admittedly contains errors made by the Registrar; but, in order to receive the protection of the Act, the certificate must have been issued in accordance with that Act. The Act does not protect a certificate issued without power, or authority. It is already bad enough that this Registrar, after having created the mess in which the parties in this case found themselves, is not made responsible for his errors. I would venture to say that he is the only man on earth who is not held responsible under the law for his errors. Indeed, he is invited to make errors, since he is told by the law that that will entail no responsibility on

his part. He is invited to be negligent. However, he can only escape responsibility when he is acting within his powers and, in this case, he was not acting within them when he issued the certificate which is claimed to have covered the petroleum. So far as it may be held that it did, I respectfully am of opinion that it was a complete nullity and could never become the root of a title to subsequent transferees.

The Court is asked to decide that notwithstanding the erroneous and illegal actions of the Registrar in delivering the certificate of title to Podgorny, all those objections are not available to The Canadian Pacific Railway Co. because Podgorny fraudulently transferred the estate, as it appeared in his certificate of title, to Anton Turta and Sitko, on the reasoning that they were bona fide purchasers for valuable consideration. The evidence of Anton Turta discloses that he bought the property to farm and that he put no value on any minerals in his transfer, or his title. In fact, he did not know whether Podgorny's title covered any minerals and in the amount which he paid Podgorny not a single dollar was intended to cover the value of the petroleum. Podgorny did not intend to sell or transfer petroleum and Sitko and Anton Turta did not intend to buy petroleum. As a matter of fact, they did not even suspect the existence of any petroleum. We are now asked to say that under those circumstances they gave valuable consideration for that mineral. I cannot bring myself to believe that someone may be held to have given valuable consideration for a thing he does not intend to buy and the existence of which he does not even suspect.

I also fail to see how a purchaser can be held to have acquired in good faith something which he never intended to purchase and which, as far as he was aware, was non-existent.

Of course, if the reference in so many reported cases to acquiring land "on the faith of the register" was to be applied in the present appeal and considered as meaning that the purchaser should at least consult the register, we have it in the present case that neither Sitko, nor Turta, took the trouble of consulting it. Now it is contended that under this registration system the certificate of title is the

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rinfret C.J.

whole thing and nothing else should be considered. On that ground it is claimed that Podgorny's certificate of title, although admittedly erroneous, must stand and is valid under *The Land Titles Act*. If that be so, I cannot understand why a different interpretation is given to the certificate of title which the third parties got from the Registrar and in which the coal and petroleum were excepted and stated to be reserved for The Canadian Pacific Railway Co. If the initial error made when the certificate to Podgorny was issued is of no account, then why should not the so-called error by the Registrar in making corrections to the title and in issuing certificates of title to third parties be equally considered as decisive? In the case of these third parties, the certificates of title which they received from the Registrar excepted and reserved the coal and petroleum for The Canadian Pacific Railway Co. I cannot understand how under the same statute the initial certificate to Podgorny must be reverently regarded as sacred, notwithstanding the admitted error, and the certificates of the third parties, on the contrary, should be held to contain illegal corrections. There are provisions in the statute authorizing the Registrar to make corrections and the only objections that were made were that they did not follow the procedure outlined in the statute itself. In those cases, I would consider that the corrections were mere irregularities, while the issue to Podgorny of a certificate covering, as is contended, the petroleum was an action which the Registrar had absolutely no power to make. The third parties accepted the certificates which they got and which included the exceptions and reservations in favour of The Canadian Pacific Railway Co. I would not think that they should now be permitted to say that those insertions by the Registrar were inoperative. Anton Turta brought his action after the corrections had been made and after the certificates of title to the third parties had been issued with the exceptions and reservations in favour of The Canadian Pacific Railway Co. His interest in bringing an action of the character which we have before us could very well be disputed, as he had parted with the property. He is apparently bringing the action so as to make good the title which his transferees have accepted. They, and not Anton

Turta, would get the benefit of the decisions of the Courts on that point. The corrections made in 1943 in the Register have at least the value of admissions by the keeper of the register that errors had been made when the certificate was issued to Podgorny.

There are several other questions which were raised in this case and which were not decided adversely to the appellants in the judgments appealed from. If I thought that a decision on those questions was necessary for the conclusion at which I have arrived, I would adopt the reasoning of the dissenting judge in the Appellate Division with regard to them.

Only one word should be added in respect to the cancellation of certificate No. 424 of The Canadian Pacific Railway Co., because it seems to me to follow that if the Registrar had no authority to issue a certificate to Podgorny covering the petroleum, equally he lacked authority to cancel certificate No. 424 in full as he did. That cancellation was the consequence of the issue of the certificate to Podgorny and must be set aside for the same reasons for which, in my opinion, the certificate of title itself should be held to be *ultra vires*. I am unable to read the statute so as to make it validate all that has been done by the Registrar in this matter. I have no doubt The Canadian Pacific Railway Co. could ask the Court for permission to raise those questions against the respondent Anton Turta and the respondent third parties, even though they were held to be bona fide purchasers for valuable consideration, which, as I said above, I do not consider them to be. If, according to the definition of "land" in the statute, the petroleum was a land by itself, separate from the rest of the estate, then this at least is a case of misdescription as required by the statute to enable The Canadian Pacific Railway Co. to dispute the title of the respondents. This case would constitute misdescription within the meaning of s. 62 of *The Land Titles Act*. It is argued that in order to have a case of misdescription there must be "other land involved", but there is other land involved in the premises. The petroleum coming under the definition of land by force of the statute and the insertion of the petroleum in the description of the property in the certificate of Podgorny does involve other land, and I do not see how, in that respect, the decision in

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rinfret C.J.

Hamilton v. *Iredale* (1) can be distinguished. It is cited in the reasons for judgment of Parlee JA. and a portion of the head note reads as follows:

> Wrong description is where an applicant intending to describe Blackacre describes Whiteacre, or so describes Blackacre as to make it include Whiteacre. It is not wrong description where the applicant correctly describes the land he is applying for, though the land is not his. It is then a case of no title . . .

In the present case the property transferred to Podgorny was described so as to make it include another land, that is to say, the petroleum belonging to The Canadian Pacific Railway Co., and such misdescription opens the way to The Canadian Pacific Railway Co. to urge the claim that it now makes.

On the whole, as stated at the beginning of this judgment, and for the above reasons I would allow the appeal, dismiss the action and give the appellants the remedies prayed for by them, with costs throughout.

The judgment of Kerwin, Taschereau, Estey and Fauteux JJ. was delivered by:

ESTEY J.:—The respondent Anton Turta has been, both by the learned trial judge and the majority of the learned judges in the Appellate Division (2), declared to be the owner of the petroleum in the N.W. $\frac{1}{4}$ of Section 17, Township 50, Range 26, W. of the 4th Meridian, Province of Alberta, on the basis that he is an owner thereof to whom a certificate of title was granted March 12, 1918, reserving only the coal to the Canadian Pacific Railway Company. The appellant Canadian Pacific Railway Company contends that, having received this quarter section in a grant from the Crown in 1901 and never having transferred the petroleum, it was and still remains the owner thereof, notwithstanding the issue of the certificate of title to Anton Turta, a purchaser bona fide for valuable consideration.

The C.P.R. acquired the quarter section as part of a grant dated July 13, 1901, brought it under *The Land Titles Act* of the Northwest Territories on March 9, 1903, and as of the same date was granted certificate of title

(1) (1903) 3 (S.R.) N.S.W. 535.
(2) [1953] 8 W.W.R. (N.S.) 609; 4 D.L.R. 87.

No. 424. By virtue of s. 16 of the *Alberta Act* (4 & 5 Edw. VII, c. 3) that statute and the certificate of title No. 424 continued in effect after Alberta became a province.

On June 19, 1908, the C.P.R. transferred this N.W. $\frac{1}{4}$ of 17 to Mike Podgorny, reserving coal and petroleum. When this transfer was registered in the land titles office on July 13, 1908, the registrar, in preparing Mike Podgorny's certificate of title, reserved only the coal to the C.P.R. At the same time the registrar indorsed a memorandum on certificate of title No. 424 to the effect that it was cancelled so far as it affected this N.W. $\frac{1}{4}$ of 17. These errors were not detected at the time, nor, indeed, until 1943, some time after Podgorny had disposed of the quarter section.

On February 2, 1910, Podgorny transferred all his estate and interest in the E. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Andrew Sitko, when a new certificate of title was issued to the latter, reserving the coal, but not the petroleum, to the C.P.R.

On September 2, 1910, apparently because certificate of title No. 424 contained so many indorsements, that certificate was cancelled and a new certificate No. 2687 was issued to the C.P.R. The registrar, at that time, placed an indorsement on certificate No. 424 to the effect that it was cancelled in full.

On November 10, 1911, Podgorny transferred the W. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ to Anton Turta without any reservation, but on May 2, 1912, when this transfer was registered, the registrar, again apparently relying upon the certificate already issued to Podgorny, reserved only the coal to the C.P.R. On February 23, 1918, Sitko transferred the E. $\frac{1}{2}$ to Anton Turta, reserving coal, and on March 12, 1918, this transfer was registered and, at Turta's request, the registrar issued to him one certificate of title covering the entire quarter section, reserving the coal to the C.P.R.

In 1943, in the course of an investigation by the officials in the land titles office, these errors were detected and corrections made upon the original certificate issued to Podgorny and all subsequent certificates of title relative to this quarter section. These corrections, if valid, reserved the petroleum to the C.P.R.—in other words, so far as this

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Estey J.

quarter section was concerned, corrected the error made by the registrar in July, 1908, and showed both coal and petroleum reserved to the C.P.R.

Anton Turta transferred the E. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Nick Turta, to whom certificate of title was issued as of May 21, 1944. Anton Turta also transferred the W. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Metro Turta and the latter's wife Bessie Turta, to whom certificate of title was issued under date of January 3, 1945. In both of these latter certificates the coal was reserved and, by virtue of the corrections made in January, 1943, and above referred to, the petroleum was also reserved to the C.P.R.

The C.P.R., as of August 2, 1946, gave an option to Imperial Oil Limited to lease all petroleum and natural gas underlying this N.W. $\frac{1}{4}$ of 17. Imperial Oil Limited exercised this option and under date of March 6, 1951, became the lessee of the petroleum. The Montreal Trust Company and William Sereda entered into an agreement with Anton Turta relative to the petroleum rights and appear as caveators upon the title.

The immediately preceding paragraphs explain the presence of the parties hereto other than the C.P.R. and Anton Turta. The main issues, however, arise between the C.P.R. and Anton Turta and must be determined upon a consideration of the C.P.R.'s transfer to Podgorny, the effect of the error in the land titles office in granting a certificate of title to Podgorny, the subsequent cancellation thereof and the issue of a new certificate of title to Anton Turta, a purchaser bona fide for valuable consideration.

Anton Turta's certificate of title dated March 12, 1918, was granted under *The Land Titles Act* (S. of Alta. 1906, c. 24) which continued in that province the Torrens system of land registration adopted in the Northwest Territories when in 1886 Parliament enacted the *Territories Real Property Act* (S. of C. 1886, c. 26). As the main issues must here be largely determined upon a construction of certain sections of the 1906 *Land Titles Act*, it will be of assistance, while giving full effect to the language thereof, to keep in mind the intent and purpose of the

Legislature in continuing this system. In the preamble to *The Territories Real Property Act* of 1886 this intent and purpose is expressed as follows:

> Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:

In this Court Sir Louis Davies C.J., in *Union Bank of Canada and Phillips* v. *Boulter Waugh Ltd.*, (1), in referring to the Saskatchewan statute, which is similar to that of Alberta, quoted from a New Zealand case at 387:

> 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. *Fels* v. *Knowles* (2).

Chief Justice Harvey of Alberta gave expression to a similar view:

> 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). It is registration that gives and extinguishes title . . . *Dobek* v. *Jennings* (3).

Lord Watson in *Gibbs* v. *Messer* (4), a case from Australia, stated at p. 254:

> 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 bonâ 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.

The foregoing preamble and quotations, as well as others to similar effect, emphasize that the Torrens system is intended "to give certainty to the title" as it appears in the land titles office. That one who is named as owner in an uncancelled certificate of title possesses an "indefeasible title against all the world", subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office and deal

(1) (1919) 58 Can. S.C.R. 385.
(2) 26 N.Z. Rep. 604 at 620.
(3) (1928) 1 W.W.R. 348 at 351.
(4) [1891] A.C. 248.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Estey J.

with confidence, relying upon the information there disclosed. Moreover, it contemplates that those who acquire a registerable interest in land will, without delay, effect registration thereof and avoid possible prejudice. That such a system may from time to time impose hardships is obvious and, therefore, in addition to preserving actions against the wrongdoer, the legislature has provided an assurance fund out of which, in appropriate cases, compensation may be paid to those who suffer a loss.

The foregoing features of the system are embodied in *The Land Titles Act* of 1906. Under s. 23 a transfer becomes "operative according to the tenor and intent thereof" upon its registration. Section 41 provides that

> upon the registration of any instrument . . . the estate or interest specified therein shall pass . . . subject to the covenants, conditions and contingencies set forth and specified in such instrument . . .

Anton Turta, in contracting with Podgorny and Sitko, the registered owners, was not, as provided in s. 135, "bound or concerned to inquire into or ascertain the circumstances" under which Podgorny obtained his title. Indeed, Turta rests his rights upon the fact that he had, bona fide and for valuable consideration, become the owner of N.W. 17 and having been granted a certificate of title which included the petroleum, he cannot now be deprived thereof. In this connection the provisions of s. 42 are relevant and, in part, read:

> The owner of land for which a certificate of title has been granted shall hold the same subject . . . to such encumbrances . . . 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.

The contention of the C.P.R. is founded largely upon ss. 44, 104(*e*) and 106 and particularly the exceptions thereto.

Section 44 reads:

> 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.

This section makes a certificate of title conclusive evidence in a court of law except in a case of fraud and the two further exceptions therein set out. It is with the latter two we are here mainly concerned and for convenience they may be repeated and lettered (*a*) and (*b*). These are (*a*) "so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title" and (*b*) "as against any person claiming under a prior certificate of title".

These exceptions (*a*) and (*b*) are more particularly provided for in s. 104(*e*) and s. 104(*f*) and it will be convenient to deal first with (*a*).

In s. 106 "any purchaser or mortgagee *bona fide* for valuable consideration" who is a registered owner shall not be subject to an action for recovery of damages or of ejectment, or to deprivation of land, on the ground that his transferor had become registered as owner through fraud or error, or had derived his 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". Section 106 further emphasizes the protection the Act provides to one who bona fide deals with the registered owner. Even if his transferor becomes registered owner thereof through fraud or error, the former is protected "except in the case of misdescription, as mentioned in section one hundred and four". This s. 104 sets forth a general provision that no action of ejectment or other action for recovery of land for which a certificate of title has been granted shall lie or be sustained against the owner unless his case comes within one of the six exceptions there specified. In the exception under clause (*e*) provision is made for "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

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Estey J.

other land or of its boundaries, as against the owner of such other land". This clause contemplates one person claiming land, which has been included in a certificate of title of other land by misdescription of that other land or of its boundaries, against the owner of that other land. In other words, this section contemplates a contest between two parties in respect to a piece of land which has been wrongly included in a certificate along with other land.

Counsel for the appellants contend that as petroleum is a mineral it is land as defined in s. 2(*a*) and that its omission as a reservation by the registrar in the certificate of title issued to Podgorny constitutes misdescription within the meaning of s. 104(*e*) and, therefore, the C.P.R. can claim that petroleum against Anton Turta by virtue of the provisions of s. 106. As the word "misdescription" in s. 106 is as mentioned in s. 104(*e*), this issue turns upon the meaning of the phrase "misdescription of such other land or its boundaries" as it appears in the latter. This clause must be read and construed not only with ss. 44 and 106, but with the other provisions of the statute. In s. 44 the words are "by wrong description of boundaries or parcels" and in s. 104(*e*) "misdescription of such other land or of its boundaries", and it may be added that in s. 121 the words are "misdescription of the boundaries or parcels of any land". In s. 122 the owner of several parcels of land held under separate certificates may have these cancelled and consolidated into one or more, provided "that no one certificate shall include or refer to a greater area than six hundred and forty acres of land". These words "other land", "boundaries" and "parcels" in this context indicate that the legislature had in mind those areas of land defined in the surveys made under the *Dominion Lands Act* of 1883 (46 Vict., c. 17) and *The Alberta Surveys Act,* 1931 (S. of Alta., c. 47), or such modification thereof as may, by *The Land Titles Act,* be permitted.

The relevant language in the transfer to Podgorny, under which the C.P.R. reserved the petroleum and the omission of which reservation from the subsequent certificates it now claims to constitute a misdescription, is as follows:

all their estate and interest in the said parcel of land, excepting and reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal and petroleum which may be found to exist within, upon, or under the said land.

The foregoing does not expressly provide for the right to enter upon, drill for and take possession of the petroleum. Even if, however, it be construed as a *profit à prendre,* when regard is had to the "vagrant and fugitive" nature of petroleum it would seem that the legislature did not intend that its omission by the registrar in a certificate of title would constitute a "misdescription of such other land or its boundaries" within the meaning of s. 104(*e*). That this phrase should receive a limited or restricted construction finds support, not only in the fact that it appears as an exception in s. 104(*e*) and as it is imported into s. 106, but also in the provisions of s. 108. In the latter it is contemplated that a "person deprived of any land . . . by any error, omission or misdescription in any certificate of title . . ." may be barred from recovery of either the land or damages from parties involved and thereafter, and in that event only, may he "bring an action against the registrar as nominal defendant" for damages.

It is contended that the registrar had authority to cancel C.P.R. certificate of title No. 424 and issue a new certificate of title to Podgorny only in so far as the transfer to the latter directed and, as the registrar exceeded those directions, the certificate of title to Podgorny was not a certificate within the meaning of the Act and, therefore, a nullity and, as a consequence, the certificate of title issued to Anton Turta was also a nullity. Ss. 23, 41 and 46 are referred to as supporting the foregoing contention. S. 23 provides that an instrument upon registration "shall become operative according to the tenor and intent thereof". S. 41 provides: "Upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest therein shall pass". S. 46 provides that "After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein . . . unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; . . ."

Nowhere throughout the statute is it provided that failure upon the part of the registrar to comply with these provisions, or that any omission, mistake or misfeasance on his part, in the preparation of a certificate of title, shall

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Estey J.

render that certificate a nullity. That such was not the intention of the legislature is evidenced by the provisions under which a certificate of title may be corrected and damages claimed in the event of omission, mistake or misfeasance on the part of the registrar, his officers or clerks. There are also those provisions which contemplate the correction of the registrar's omissions in a certificate such as that issued to Podgorny while it remained outstanding and those other provisions under which the position is entirely changed when Podgorny's certificate is cancelled and a new certificate of title issued to one in the position of Anton Turta. Once the certificate is issued to Turta it derives its force and validity, not from the transfer of the C.P.R. to Podgorny, but by virtue of the provisions of the statute.

Anton Turta's position is set forth in s. 42 which provides that he holds his certificate of title, apart from the encumbrances, liens, estates or interests noted thereon, absolutely free from all other estates or interests except in two cases—that of fraud and of an owner claiming under a prior certificate of title. The position of a person dealing with Turta is set forth in s. 135, where it is clear that except in the case of fraud a person who contemplates the acquisition of land may rely upon the certificate of title and shall not 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 . . ."

Then as to the contention under what I have referred to as exception (*b*) of s. 44, to the effect that the C.P.R. holds a prior certificate of title dated March 9, 1903, and numbered 424 to that of Anton Turta dated March 12, 1918, and, therefore, by virtue of the provisions of s. 104(*f*) it is still entitled to the petroleum, the difficulty is that certificate of title No. 424 was cancelled prior to any relevant date under this exception. It was cancelled, so far as the N.W. $\frac{1}{4}$ of 17 is concerned, July 13, 1908, when certificate of title was issued to Podgorny. Then again on September 2, 1910, when certificate of title No. 2687 was issued to the C.P.R., which did not include N.W. 17 or any portion thereof, certificate of title No. 424 was cancelled in full. I respectfully agree with the majority of the

learned judges in the Appellate Court that the learned trial judge correctly stated the effect of clause (*f*) when he said that this statutory provision contemplates "the contemporaneous existence of two certificates of title for the same land". The facts of this case, therefore, cannot be brought within the meaning of clause (*f*) inasmuch as at all times relevant hereto the C.P.R. did not possess a certificate of title relative to the petroleum in the N.W. $\frac{1}{4}$ of 17.

In January, 1943, the registrar, in the exercise of the authority that he deemed he possessed by virtue of s. 160(2) of *The Land Titles Act* (R.S. Alta. 1922, c. 133), attempted to correct the certificate of title issued to Podgorny July 13, 1908, by noting thereon a reservation of the petroleum to the C.P.R. At the same time he made a similar notation on the certificates of title issued to Sitko and Anton Turta and, as the property was subject to a mortgage and Turta's duplicate certificate was in his possession, he made a similar notation on that duplicate. The relevant portion of s. 160(2) reads:

> 160(2). If it appears to the satisfaction of the Registrar . . . that any entry or indorsement has been made in error on any certificate of title or other instrument, . . . he may, . . . so far as practicable without prejudicing rights conferred for value, . . . correct any error in such certificate of title or other instrument, or in any entry made thereon . . .

These corrections made by the registrar could not be made without prejudicing the rights of Turta, as these were determined by the certificate of title issued to him, and, therefore, he exceeded his jurisdiction. Whatever the words "so far as practicable" may mean, they do not limit the words immediately following: "without prejudicing rights conferred for value".

In Saskatchewan a similar view was expressed in *Re Land Titles Act* (1). I am, therefore, of the opinion that the corrections made by the registrar were not authorized by *The Land Titles Act* and, therefore, of no effect.

The appellants' submission that, as this action was not brought within a period of six years, it is barred by the provisions of s. 5(1)(*j*) of the Statute of Limitations (R.S. Alta. 1942, c. 133) cannot be maintained. In support of this contention the appellants rely upon observations of Jessel, M.R., in *Gledhill* v. *Hunter* (2), and applied to

(1) (1952) 7 W.W.R. (N.S.) 21. (2) (1880) 14 Ch. D. 492.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Estey J.

provisions of *The Land Titles Act* in Alberta in *Sutherland* v. *Rural Municipality of Spruce Grove* (1); *Pelletier* v. *Municipal District of Opal* (2); in *Re Land Titles Act* (3). In these cases an action for a declaration of title without a claim for possession was held to be not an action for recovery of land. A reference to the pleadings in this case discloses that respondent Anton Turta asks for a declaration that he has "been in lawful possession" of the petroleum. The appellant C.P.R. denies Turta's possession and pleads, *inter alia,* that it has at all material times been both the owner and in possession of the petroleum. Moreover, the appellant Imperial Oil Limited alleges that Turta never was in possession of the petroleum.

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 s. 18 of the said *Statute of Limitations.*

The appeal should be dismissed with costs.

RAND J.:—This appeal raises a question of importance under *The Land Titles Act* of Alberta. In 1908 the Canadian Pacific Railway Company, being then the owner in fee simple, executed a transfer of the northwest quarter of sec. 17, T. 50, R. 26, W. 4th M., to one Podgorny, excepting and reserving unto itself "all coal and petroleum which may be found to exist within, upon or under the said land". The duplicate of certificate of title No. 424 covering that quarter section along with many other sections, for convenience in the land transactions of the Company, was then being kept on deposit in the Land Titles Office at Edmonton. The registration of the transfer resulted in the issue of a new certificate and duplicate in the name of Podgorny, reserving to the Pacific Company "all coal on or under the said land". The new certificate contained a reference to No. 424, and on the latter a memorandum signed by the registrar was endorsed in these words:

> This certificate of title is cancelled as to the northwest quarter 17-50-26-W4th and a new certificate No. 182-N-8 issued this 13th of July, 1908 to M. Podgorny.

(1) [1919] 1 W.W.R. 274. (2) [1925] 1 W.W.R. 973.
(3) (1951) 3 W.W.R. (N.S.) 97.

An identical memorandum was endorsed on the duplicate.

In 1910 Podgorny transferred the east half of the quarter section to one Sitko. In 1911, the west half of the quarter section was transferred to the respondent Anton Turta. In 1918 Sitko transferred the east half of the quarter section to Turta. On the application for this registration, Turta requested his titles to both halves of the quarter section be consolidated into one. This was complied with and a certificate issued accordingly. In all of these transfers and certificates coal was reserved to the Pacific Company.

In 1910 certificate No. 424, because of the many endorsements upon it, and with the consent of the Pacific Company, was cancelled and a new certificate, as well as duplicate, issued covering the lands which then remained uncancelled under No. 424. The new certificate did not include the northwest quarter in question.

In January, 1943, in the course, apparently, of rectifying errors in registrations, entries were made on the cancelled certificate No. 424 as well as on the duplicate by adding the words "except coal and petroleum" to the memorandum of cancellation originally made, and by adding the words "and petroleum" to the reservation in the certificate of Anton Turta and in the duplicate which at the time was deposited in the Land Titles Office because of an existing mortgage.

In 1944 the east half of the quarter section was transferred by Anton Turta to the respondent Nick Turta and the west half to Metro and Bessie Turta. The new certificates contain a reservation of coal and petroleum to the Pacific Company, the form of which appears to have been obtained by the solicitor acting for Anton Turta either from the previous certificate or duplicate which had been changed as mentioned. In 1949 the reference in the reservation to the Pacific Company was struck out of each certificate. Subsequently the Pacific Company purported to give an option and later a lease of petroleum rights over the quarter section to the appellant Imperial Oil Company Limited.

The mechanics of registration can be shortly stated. When a transfer is presented at the registry office it is immediately stamped and an entry made in a daybook of the day, hour and minute of its receipt, thereafter taken to be the time of registration. A memorandum is then

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rand J.

endorsed on the certificate describing the interest conveyed by the transfer and to that extent cancelling the certificate. By that entry the transmission of title is effected. At the same time a like memorandum, under the seal and signature of the registrar, is made on the duplicate which is held by the owner and which must be presented to the registrar before a transfer can be registered. The new certificate and duplicate are then prepared and signed by the registrar, the former constituting a folio in the register and the latter being delivered to the transferee or new owner.

Mr. Carson's contention is that the original error of the registrar was a misdescription which, by the terms of s. 106 of *The Land Titles Act,* can be asserted by the Pacific Company against any subsequent purchaser. "Misdescription" as used in that section, so it is argued, includes an error in copying into the certificate the language of a transfer and remains a fatal defect in every title into which it may successively be introduced.

The general and primary conception underlying the statute, as it is of all legislation establishing what is known as the Torrens system of land titles, is that the existing certificate, bearing the name of a real person, is conclusive evidence of his title in favour of any person dealing with him in good faith and for valuable consideration: *Gibbs* v. *Messer* (1). The preamble to *The Territories Real Property Act,* 1886 (Can.), c. 26 which introduced the Torrens system to the western provinces indicates its objects:—

> Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:

This general principle is subject, of course, to certain qualifications declared in the statute but that it expresses the broad purpose of the system is unquestionable.

S. 106 is in these words:—

> 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 transferror 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.

(1) [1891] A.C. 248.

and s. 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:

* * *

(*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.

What, then, is the scope of "misdescription" within para. (*e*)? I have considerable doubt that the omission from the certificate of the reservation of petroleum can be taken to be a misdescription at all. The registrar's function is not to describe, it is to transcribe or copy what appears on the transfer, and it is on the latter that description, properly so called, appears. The same can be said of an endorsement of a memorandum on the certificate; there are cases in which it would contain a description taken from the transfer. Nor is the word ordinarily applicable to the specification of the content of interests in land as distinguished from the definition of its superficial boundaries. In relation, then, to both the certificate and memorandum the word can be satisfied without extending its meaning to an error or omission such as we have here. But as a different view is taken by other members of the Court, I will assume that we have before us a true case of misdescription and on that footing examine the issue presented.

The argument made involves this, that a person contemplating a purchase of land included in a certificate must not only examine that certificate and make a proper search for the interests to which, by the statute, it is declared to be subject, but must also examine every transfer back to the original grant from the Crown for errors in transcription into the successive certificates. The legislation was designed, obviously, to avoid just such inconvenience and risk, and such a requirement would completely reverse the opinion on which, since its introduction in 1886, conveyancing in the western provinces has proceeded.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Rand J.

Ss. 105 and 108 throw some light on the question:—

105. After a certificate of title has been granted therefor any person deprived of any land in consequence of fraud or by the registration of any other person as owner of such land, or in consequence of any fraud, error, omission or misdescription in any certificate of title, or in any memorandum thereon or upon the duplicate thereof, . . .

Provided always that except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land *bona fide* for value, cease to be liable for the payment of any damages . . .

108. Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of land titles officers, or a registrar, or any of his officers or clerks, . . . and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of the land, may . . . bring an action . . .

The former section covers cases of "fraud, error, omission or misdescription" in either the transfer, the new certificate or a memorandum made on the existing certificate. The section expressly contemplates the case of a person deprived of land in consequence of misdescription, and provision is made for the recovery of damages therefor. S. 108 in which the "error, omission or misdescription" arising in the office of the registrar may be in any certificate or memorandum, likewise includes a misdescription which results in the deprivation of an owner. S. 104(*e*), on the contrary, is directed to cases of misdescription in which an owner is not barred from recovering the land but is limited to those in which his land is included in a certificate of "other land by misdescription of such other land or its boundaries".

By these sections two kinds of misdescription are thus recognized, one which bars the original owner and gives him a right to damages, and the other which leaves his right unaffected even against a bona fide purchaser. The word "deprived" in para. (*e*) cannot be taken in an absolute sense as it would then contradict the effect of the exception; and the rights against individuals and ultimately against the assurance fund given by ss. 105 and 108 are not elective alternatives to a recovery of the land under the exceptions to 104; they assume that that recovery is foreclosed.

Again, neither in the *Territories Real Property Act (supra)* nor in its successor, c. 28, S. of C., 1894, nor in c. 24 of the statutes of Alberta, 1906, was there any obligation on the holder of a grant made prior to January 1st, 1887 to bring his land under the system, and in considering the scope of s. 104(*e*) that situation must be kept in mind. In the case of adjoining land not under the system, the application of the section presents no difficulty. A case would seem to arise also where both parcels are within the statute and the certificate contains an identification of the land followed by misdescription discoverable by reference to the land. And there is finally its application to the certificate in which the misdescription first appears; between transferor and transferee any errors can be corrected.

These considerations are fortified by the fact that the duplicate is intended to furnish the owner with a current record of his title and no transfer can be registered without its delivery for appropriate cancellation. If, in this case, the duplicate had been examined by the Pacific Company, the errors would have been apparent as the scheme of the statute contemplated. The existence of such a protection to the owner is almost conclusive that the provisions of the Act preserving rights against a bona fide purchaser do not extend to a misdescription concealed from him but exposed to the original transferor.

The second contention is that the case comes within para. (*f*) of s. 104 and that the Pacific Company holds a certificate of the petroleum prior in date to that of the respondent Anton Turta. This assumes the cancellation endorsed on certificate No. 424 to have been ineffectual as to the petroleum since it was not authorized by the language of the transfer. But the provisions already quoted make it clear that the omission from the memorandum of cancellation and the new certificate cannot prevail against a subsequent purchaser. That the registrar makes an error is not to the purpose: the statute provides for such occurrences; and it also provides protection against such an error of which the Pacific Company did not avail itself. It is not, then, a case of two competing certificates, whether or not that means certificates in two chains beyond the root title;

1954

C.P.R. AND IMPERIAL OIL LTD. *v.* TURTA *et al.*

Rand J.

there is only one certificate, that issued to Anton Turta, with interests derived through him to the remaining respondents.

The purported corrections made in 1943 by the registrar were, in my opinion, of no effect. Whatever his powers under s. 104 or 160(2) may be, they do not extend to what was then attempted. The language of 160(2), "so far as is practicable without prejudicing rights conferred for value", means no more than that the rights conferred for value are not in any event to be invaded but that the authorized action of the registrar may end before that point is reached. There was such value given here for rights which the alterations could not prejudice.

It was urged by Mr. Nolan that as Anton Turta had purchased the land for farming purposes only he could not be said to be a purchaser for value of the petroleum rights, and *Pleasance* v. *Allen* (1) was cited as an authority against him. In that case there was a succession of sales of an intended parcel of land containing two buildings under a description which encroached $5\frac{1}{2}$ inches on an adjoining building and the existing certificate was amended. This was on the ground of the common mistake in each sale. But there is nothing of that nature here: Podgorny was to convey to Turta every interest in the land then appearing in his certificate, not everything he might have been entitled to if his certificate had been challenged. I assume that neither man had the particular rights in mind at the time of the sale; but if the courts were to be at liberty to embark upon enquiries into what was then the active thoughts of the parties, no title would be secure.

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

(1) (1889) 15 V.L.R. 601.

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.

I would therefore dismiss the appeals with costs.

KELLOCK J.:—According to the transfer of June 19, 1908, the railway company conveyed to Podgorny all the estate and interest of the former in the parcel, excepting and reserving to the railway company, its successors and assigns, "all coal and petroleum which may be found to exist within, upon, or under the said land". This transfer was, according to s. 22 of the statute, to be deemed registered as soon as a memorandum of it had been entered upon the folio in the register constituted by certificate of title No. 424 held by the railway. By s. 2(*n*) "memorandum" is defined to mean "the particulars of any instrument presented for registration".

According to s. 24, the memorandum was required to state "the nature" of the transfer to which it relates and by s. 25, a like memorandum was required to be made upon the duplicate certificate. S. 25 goes on to provide that the memorandum upon the duplicate shall be received in all courts of law as "conclusive evidence" of its contents and that the instrument of which it is a memorandum has been "duly registered under the provisions of this Act".

S. 135 provides that no person proposing to take a transfer from the holder of a certificate of title is "concerned to inquire" into the circumstances in which such owner or any previous owner was registered. One of such "circumstances" would undoubtedly be the actual contents of the transfer giving rise to any particular memorandum

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Kellock J.

endorsed on the certificate of title. Moreover, a transfer forms no part of the register, although the registrar is required by s. 51 to retain it in his office.

It is provided by s. 114(1) that the registrar, on discovering that any duplicate certificate has been issued or any memorandum made in error, may require the holder to produce the same for correction and, in case of refusal, to bring such person before a judge to show cause why such correction should not be made. It is made plain by s-s (2), as added in 1911-12 by c. 4, s. 15 (23), however, that this power may be exercised only where rights conferred for value will not be prejudiced. Accordingly, once Podgorny had conveyed for value, any right of correction on the part of the registrar was gone. I do not consider it necessary, therefore, to refer further to the "corrections" which were attempted to be made to the various instruments. It would, in any event, seem to be a fatal objection to the validity of such corrections that they were not in fact made by the registrar but by some person or persons employed in the Land Titles Office; s. 2(*p*).

The appellants contend, however, that they are entitled to rely upon clauses (*e*) and (*f*) of s. 104, the former relating to "misdescription", the latter to conflicting instruments.

In my view no reliance can be placed, in the present case, upon the provisions of clause (*f*), as I think it clear that in order to come within the language "the case of an owner claiming under an instrument of title" with which the clause begins, it is necessary for such a person to be the holder of a subsisting instrument of title, not one which has been cancelled. On the evidence in the case at bar, which is made conclusive by the statute, certificate 424 was cancelled and the appellants therefore cannot satisfy the language of the clause.

This view is, in my opinion, supported by the provisions of ss. 42 and 44. The exception provided for in each is that of an owner claiming "the same land under a prior certificate". This language clearly contemplates that the claimant is himself either the original grantee of the prior certificate of title or holds a subsisting instrument of title derived through the former.

With respect to "misdescription", clause (*e*) of s. 104(1) is as follows:

> 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;

An owner of land making application to bring it under *The Land Titles Act*, (s. 27), might include in the description of the land, other land belonging to another person which had not been brought under the statute. On receiving a certificate for his own as well as such other land, such certificate holder would be in a position to deal with it in favour of others, thus depriving the original owner of the land by "misdescription".

The language of clause (*e*), taken alone, may, on its face, be capable of extension to circumstances such as exist in the case at bar, namely, that an interest in the land expressly reserved by the transferor in the transfer, is included by error on the part of the registrar in the certificate issued to the transferee, the endorsement upon the certificate and duplicate certificate of the transferor each containing the same error. However, if the language of the clause be extended to such a case, it would seem from s. 106 that no matter how long the chain of transfers from the original transferee, all such persons are liable to attack. Such a construction would run counter to the scheme exemplified by s. 135, that a person dealing with a registered owner is not concerned with anything other than what is disclosed by a registered certificate. In my opinion, "misdescription" of such a character is not within s. 104(1)(*e*). It is made plain by other provisions that the statute contemplates more than one type of misdescription.

It is provided by s. 105 that after a certificate of title has been granted "therefor", any person deprived of any land.

> (*a*) in consequence of any fraud, or
>
> (*b*) by the registration of any other person as owner, or
>
> (*c*) in consequence of any fraud, error, omission or "misdescription" in any certificate of title or in any memorandum thereon or upon the duplicate thereof,

may bring an action for the recovery of damages against the person upon whose application the erroneous application was made or who acquired title to the land in question through such fraud, error, omission or misdescription.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Kellock J.

Under the proviso to the section, however, upon a transfer of the land bona fide for value "such person" ceases to be liable for the payment of any damages except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him.

The proviso proceeds on the assumption that a bona fide purchaser of the land, whose title thereto arose "in consequence of . . . misdescription" in any "certificate of title" or in "any memorandum" thereon or upon any duplicate, is protected. It is for this reason that the former owner "deprived" of the land, is given his remedy in damages. The only possible way of reconciling ss. 105 and 106, therefore, is on the footing that there is a type of "misdescription" covered by the former section other than that described in s. 104(1)(*e*), as to which latter type a transferee for value without notice, however long the chain of title through which he claims, would appear by the provisions of s. 106 of the statute, never to be protected.

Moreover, it is in the contemplation of s. 108 that a person deprived of land by "misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate of title thereof" may be barred from bringing an action of ejectment for the recovery of land. This provision is only to be reconciled with s. 106 upon a similar basis.

In my view, the "misdescription" (if that be the correct term) of which the appellants complain, arising as it did from an error on the part of the registrar, is not of the character dealt with by s. 104(1)(*e*). Accordingly, in the language of s-s (2) of that section, the certificate of title held by Turta is "an absolute bar and estoppel" to any such action as is here in question.

I would therefore dismiss the appeal with costs.

LOCKE J.:—(dissenting) The Canadian Pacific Railway Company (hereinafter referred to as the C.P.R.) became the owner of the North West quarter of Section 17, Township 50, Range 26, west of the 4th Meridian, under a grant by letters patent from the Crown in the right of Canada dated July 13, 1901. In accordance with the provisions of

The Land Titles Act of 1894, this patent was filed in the North Alberta Land Registration District and a certificate of title No. 424 issued on March 9, 1903, in the Company's name certifying that it was the owner of an estate in fee simple in the said land and other named parcels.

Upon the constitution of the Province of Alberta in 1905, the Legislature enacted *The Land Titles Act* as c. 24 of the Statutes of 1906 which substantially re-enacted the provisions of the Dominion Statute of 1894.

The transfer from the C.P.R. to Mike Podgorny dated June 19, 1908, is in the form prescribed by *The Land Titles Act* and was a transfer of the land reserving "all coal and petroleum which may be found to exist within, upon or under the said land". The certificate of title dated July 13, 1908, issued to Podgorny, through an error made in the office of the Registrar reserved only "all coal on or under the said land". At the same time, the certificate of title of the C.P.R. was endorsed with a memorandum that it had been cancelled as to the land in question.

The respondent, Anton Turta, purchased eighty acres of the quarter section in question from Podgorny and the other half from one Sitko (to whom a certificate of title had issued) for valuable consideration: the land was transferred to him in accordance with the requirements of *The Land Titles Act* and certificates of title were issued in his name declaring that he was the owner in fee simple of the land reserving unto the C.P.R. all coal on or under it.

It is not suggested that Anton Turta was aware of the error that had been made in the Registrar's office, nor is it sought to impeach the certificate of title which was issued to him on the ground that he was not a bona fide purchaser for value of these lands. The claim advanced on behalf of the C.P.R. is made possible only by the fact that *The Land Titles Act* of Alberta and its predecessors, *The Land Titles Act* of 1894 and the *Territories Real Property Act* (c. 26, S.C. 1886), differed in a material particular from the Manitoba Real Property Act of 1885, from which most of its terms were taken. The claim of the appellants is that even as against a purchaser for value without notice holding a certificate of title in his name under *The Land Titles Act,* the title declared by it may be impeached if, by

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

misdescription of the land or its boundaries, it includes lands which are the property of the claimant. As petroleum is admittedly a mineral and as under the definition of land contained in *The Land Titles Act* it includes minerals, the appellants say that the lands transferred to Podgorny and subsequently to Anton Turta which, as described, included all minerals other than coal, thus included by misdescription the petroleum which remained the property of the C.P.R.

Before considering the language of the various sections, it should be said that the statement made by Lord Watson in delivering the judgment of the Judicial Committee in *Gibbs* v. *Messer* (1), cannot be accepted without qualification in considering this matter, owing to a material difference between *The Land Titles Act* of Alberta and the *Transfer of Land Statute* of Victoria of 1866 considered in *Gibbs'* case.

The passage from that judgment, referred to by the late Mr. Justice Parlee in delivering the judgment of the majority of the Appellate Division in the present case, reads:—

> The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. 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 bonâ 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.

The section of the *Transfer of Lands Statute* of 1866 is not quoted either in the judgment of the Judicial Committee or in the report of the trial or of the hearing before the full court of Victoria where the case is reported as *Messer* v. *Gibbs* (2). The point in *Gibbs'* case was not, however, a matter of misdescription. The Act of 1866 is not available to me but the *Transfer of Land Act,* 1890 of Victoria which repealed the earlier statute re-enacted as s. 74, s. 49 of the earlier Act. It is this section which declares the indefeasible nature of the title of those holding

(1) [1891] A.C. 248 at 254. (2) (1887) 13 V.L.R. 854.

land under the Act, subject to certain exceptions. One of these is fraud. The relevant language of the section for the present consideration reads:—

> but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant certificate of title or instrument evidencing the title of such proprietor *not being a purchaser for valuable consideration or deriving from or through such a purchaser.*

The *Real Property Act* of 1885 of the Province of Manitoba introduced for the first time the Torrens system into Canada. Section 62 of that Act which declared the indefeasible nature of the title of the holder of a certificate of title, in so far as it dealt with misdescription, followed the Victoria statute and read:—

> subject to the exceptions and reservations mentioned in section 61, except as far as regards any portion of land that may by wrong description of boundaries or parcels be included in such certificate *when the holder of such certificate is neither a purchaser or mortgagee for value, nor the transferee of a purchaser or mortgagee for value.*

The Dominion Act which introduced the Torrens system into the North West Territories, being the *Territories Real Property Act* of 1886 (c. 26) was taken, in a large part verbatim, from the Manitoba Act. However, in this respect there was an alteration. Section 62 of the Dominion Act was copied from that section in the Manitoba Act but the reference to misdescription omitted the words above underlined. Section 44 of *The Land Titles Act* of Alberta of 1906 is the counterpart of s. 62 and does not contain the words protecting the rights of purchasers for value and those who purchased from them, contained both in the Manitoba and the Victorian sections.

In *Union Bank of Canada* v. *Boulter Waugh Ltd.* (1) in which certain of the provisions of *The Land Titles Act* of Saskatchewan of 1917 were considered by this court, Sir Louis Davies C.J. said in part (p. 387):—

> I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles,* (2):
>
> "The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law . . . The cardinal principle of the statute is that the register is

(1) (1919) 58 Can. S.C.R. 385. (2) (1906) 26 N.Z.L.R. 604 at 620.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

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. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."

The Saskatchewan statute under consideration in that case differed from the Manitoba Act in the same respect as does the present Alberta Act in dealing with the matter of misdescription. The *Boulter Waugh* case was not concerned with any question of misdescription in a certificate of title, however, and the question raised in the present case was accordingly not argued. The approval by Sir Louis Davies of the statement that the cardinal principle of the statute is that the register is everything cannot be accepted without reservation in relation to the present question, however accurate it may have been in regard to the New Zealand statute and as it would have been had it referred to the Real Property Act of Manitoba.

The following additional facts are to be considered in the present matter. On September 2, 1910, the Registrar issued to the C.P.R. certificate of title No. 2687 to replace the certificate No. 424 which had been issued on March 9, 1903, and for convenience left in the Land Titles Office. The new certificate contained no reference to the lands which had been sold to Podgorny and there was endorsed upon the earlier certificate a memorandum that it was cancelled in full and a new certificate issued. The only reason for the issue of the new certificate was that the earlier one was so covered with memoranda of transfers and other instruments that there was insufficient room for further similar endorsements. There is no evidence that the C.P.R. requested the issue of the new certificate or that the company took delivery of it, though the evidence of Mr. Kinnaird, a former Deputy Registrar in the Edmonton Land Titles Office, is to the effect that the practice would be to notify the owner when this was done. Presumbaly, though the evidence is silent on the point, the new certificate was left in the registrar's office for the same purpose as the earlier certificate. On January 16, 1943, Mr. H. T. Logan, a lawyer

employed in the Land Titles Office apparently for the purpose of checking the titles to minerals in the district, altered the certificates of title which had been issued to Anton Turta by adding after the description which reserved the coal unto the C.P.R. the words "and petroleum." At the same time, apparently under Mr. Logan's direction, the endorsement of the partial cancellation of certificate No. 424 on the transfer to Podgorny was amended by writing in after the description of the land the words "ex. coal and pet." In addition, the certificate which had been issued to Podgorny on July 13, 1908, was amended by adding the words "and petroleum" to the reservation and similar changes were made in the certificates of title which had been issued after the transfer by the C.P.R. to Podgorny and before the issue of the certificate of title to Anton Turta. When the latter transferred the lands to his children, the transfer reserved to the C.P.R. all coal and petroleum in conformity with his certificate of title, as altered. These latter transfers were made in the year 1944. Neither the C.P.R. nor Anton Turta were aware of the action taken in the Registrar's office of amending these various certificates. There was, in my opinion, no power in Logan under the Act either to make or direct the making of these alterations and the rights of the parties are, therefore, unaffected by them.

In my judgment, the alterations made in *The Land Titles Act* of 1906 by later amendments and the differences which exist between that Act and the Act as it appears as c. 205, R.S.A. 1942, do not affect any question to be decided. I, therefore, propose to quote the Act of 1906 which was in effect at the time of the transfer by the C.P.R. to Podgorny and when Turta obtained title. After the number of each section, the number of its counterpart in the Revised Statutes of 1942 appears for the sake of convenience.

The sections of the Act to be considered in deciding the legal effect of the cancellation of certificate of title No. 424, the error made in issuing Podgorny's certificate of title omitting the reservation of the petroleum and of Anton Turta's purchase of the property for value and obtaining a certificate without knowledge of any infirmity in the title of his transferrors if any such existed, are as follows:—

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

22. (24) Every grant shall be deemed and taken to be registered under the provisions and for the purposes of this Act so soon as the same has been marked by the registrar with the folio and volume on and in which it is embodied in the register, and every other instrument shall be deemed to be registered as soon as a memorandum of it has been entered in the register upon the folio constituted by the existing grant or certificate of title of such land.

25. (27) Whenever a memorandum has been entered in the register the registrar shall make a like memorandum upon the duplicate when the same is presented to him for the purpose, and the registrar shall sign and seal such memorandum, which shall be received in all courts of law as conclusive evidence of its contents and that the instrument of which it is a memorandum has been duly registered under the provisions of this Act.

39. (49) Every certificate of title shall be made on a separate folio of the register, and upon every transfer of ownership the certificate of title of the transferror and the duplicate thereof shall be cancelled and the certificate of title of the transferee shall thereupon be entered upon a new folio in the register; and the registrar shall note upon the folio of the title of the transferror the number of the folio of the transferee's title and upon that of the transferee the number of the folio of the transferror so that reference can be readily made from one to the other as occasion requires.

42. (60) 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.

(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.

43. (61) The land mentioned any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to—

(*a*) Any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

(*b*) All unpaid taxes;

(*c*) Any public highway or right of way or other public easement, howsoever created upon, over or in respect of the land;

(*d*) Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same;

(*e*) Any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner;

(*f*) Any right of expropriation which may by statute or ordinance be vested in any person, body corporate, or His Majesty;

(*g*) Any right of way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

44. (62) 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.

50. (69) If a transfer purports to transfer the transferror's interest in the whole or part of the land mentioned in any certificate of title, the transferror shall deliver up the duplicate certificate of title of the land and the registrar shall make a memorandum thereon and upon the certificate of title in the register cancelling the same, either wholly or partially, according as the transfer purports to transfer the whole or part only of the interest of the transferror in the said land, and setting forth the particulars of the transfer.

51. (71) The registrar, upon cancelling any certificate of title either wholly or partially, pursuant to any transfer, shall grant to the transferee a certificate of title of the land mentioned in the transfer and issue to the transferee a duplicate thereof; and the registrar shall retain every transfer and cancelled duplicate certificate of title; but in the case of a partially cancelled certificate of title the registrar shall return the duplicate to the transferror after the memorandum partially cancelling the same has been made thereon and upon the certificate of title in the register; or may whenever required thereto by the owner of an unsold portion of land in any partially cancelled certificate of title, or where such a course appears to the registrar more expedient, grant to such owner a certificate of title for such portion of which he is the owner, upon the delivery of the partially cancelled duplicate certificate of title to the registrar to be cancelled and retained.

76. (121) Any person registered in place of a deceased owner shall hold the land in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by this Act or by law, and subject to any trusts and equities upon which the deceased owner held the same; but for the purpose of any registered dealings with such land he shall be deemed to be the absolute and beneficial owner thereof.

2. Any person beneficially interested in any such land may apply to a court or judge having jurisdiction to have the same taken out of the hands of the trustee having charge by law of such land and transferred to some other person or persons; and the court or judge, upon reasonable cause being shown, shall name some suitable person or persons as owner of the land; and upon the person or persons so named accepting the ownership and giving approved security for the due fulfilment of the trusts, the court or a judge may order the registrar to cancel the certificate of title to the trustee, and to grant a new certificate of title to the person or persons so named.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

3. The registrar, upon the production of the order, shall cancel the certificate of title to the trustee after making thereon and upon the duplicate thereof a memorandum of the appointment by order of the court or judge of such person or persons as owners, and shall grant a new certificate of title to such new trustee and issue to him a duplicate certificate of title.

104. (171) 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.

106. (159) 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 transferror 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.

108. (157) Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of land titles offices, or a registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of the land, may in any case in which remedy by action for recovery of damages hereinbefore provided is barred, bring an action against the registrar as nominal defendant, for recovery of damages; and if the plaintiff recovers final judgment against such nominal defendant the judge before whom such action is tried shall certify to the fact of such judgment and the amount of the damages and costs recovered and the Provincial Treasurer shall pay the amount thereof to the person entitled on production of an exemplification or certified copy of the judgment rendered and shall charge the same to the account of the said assurance fund:

Provided always that notice in writing of every such action, and the cause thereof, shall be served upon the Attorney General, and also upon the registrar, at least three calendar months before the commencement of such action.

121. (169) The Assurance Fund shall not under any circumstances be liable for compensation for any loss, damage or deprivation occasioned by the breach by any owner of any trust, whether expressed, implied or constructive; nor in any case in which the same land has been included in two or more grants from the Crown; nor shall the Assurance Fund be liable in any case in which loss, damage or deprivation has been occasioned by any land being included in the same certificate of title with

other land, through misdescription of the boundaries or parcels of any land, unless in the case last aforesaid it is proved that the person liable for compensation and damages is dead or has absconded from the Province or has been adjudged insolvent, or the sheriff has certified that he is not able to realize the full amount and costs awarded in any action for such compensation; and the said fund shall be liable for such amounts only as the sheriff fails to recover from the person liable as aforesaid.

135. (189) 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.

It is contended by the appellant that the partial cancellation of certificate of title 424 without reserving the coal and petroleum and the purported cancellation of the entire certificate, at the time certificate 2687 was issued on September 2, 1910, were nullities and that, accordingly, certificates 424 should be deemed as still in effect, in so far as the coal and petroleum in the quarter section is concerned.

As will be seen, the transfer required by the Act is deemed to be registered as soon as a memorandum of it has been entered upon the folio constituted by the existing certificate of title of such land. Section 25 requires the registrar to make a like memorandum upon the duplicate. In this case, the memorandum made stated that the title to the quarter section had been transferred without any reservations while the instrument, the registration of which it evidenced, reserved the coal and petroleum.

Section 50 requires the registrar to cancel the certificate of title partially if the transfer purports to transfer only part of the interest of the transferror in the land and section 51 authorizes the registrar, if requested, to grant a new certificate of such portion of the land as is retained by the transferror.

I find nothing in these sections or elsewhere in the Act vesting in the registrar any authority to cancel a certificate of title *in toto*, except upon the presentation of a transfer executed in accordance with the Act conveying the entire

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

interest of the registered owner. Both the endorsements placed upon certificate of title No. 424 and upon the duplicate certificate were made without authority and the act of issuing to Podgorny a certificate of title for the quarter section, reserving only coal but omitting the reservation of the petroleum, was also unauthorized.

It is, however, in the view that I take of this matter unnecessary to decide whether these unauthorized acts were of no effect, as were the unauthorized acts of Logan and those acting under his direction. It is sufficient for the purpose of this appeal to say that, in any event, the title of the C.P.R. to the petroleum was not thereby extinguished. Whether the legal effect of it, however, is to prevent the owner from asserting his rights against third parties is another question.

It is not an answer to the appellant's claim to say, in the words of Edwards J. in *Fels'* case, that the register is everything. That statement can be made with justification, in my opinion, in regard to the *Real Property Act* of Manitoba but the statutes are in this respect quite different.

Section 44 which declares the certificate of title to be conclusive evidence of the title of the owner, subject to the reservations in s. 43, provides two further exceptions:—

> 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;

The concluding words of this section clearly bring within the exception the rights of those claiming under a prior certificate of title, even though it has been surrendered and a new certificate granted. I have pointed out above the difference between this section and s. 62 of the *Real Property Act* of Manitoba of 1885.

Section 104 (*d*) of the Alberta Act protects the rights of a bona fide transferee for value against the claim of a person deprived of his land by fraud in which the transferee has not participated, in this respect being in the same language as the Manitoba section. Clause (*e*) of s. 104, however (which was s. 103 (*e*) of the *Territories Real*

Property Act) as in the case of s. 44 contains no such protection. The concluding words of s-s. (5) of s. 116 of the Manitoba Act were:—

not being a transferee of such other land or deriving from or through a transferee thereof bona fide for value.

These words were omitted in s. 103 of the *Territories Real Property Act* and s. 44 of the 1906 Act.

It is to be noted in passing that ss. 105 and 107 of the Act of 1906 do not appear in the revision of 1942. In the revision of 1922 (c. 133) these sections appeared as s. 149 and 151 and both were repealed by s. 11 of c. 15 of the Statutes of 1935. The subject matter of the sections is dealt with in s. 157 of the 1942 revision and contains the provision that any person suffering loss or damage by the registration of another person as owner by misdescription in a certificate of title and who, by the provisions of the Act, is barred from bringing an action for the recovery of the land may sue the Registrar to recover damages.

The difference between the Alberta Act and that of Manitoba is again made clear in s. 106. The Alberta section, as will be seen, says that nothing in the Act shall be interpreted as to leave subject to an action for damages or deprivation of land any bona fide purchaser for valuable consideration on the claim that his transferror has been registered as owner through fraud or error, *except in the case of misdescription as mentioned in s. 104*. The section of the *Territories Real Property Act* which is reproduced in s. 106 was taken from s. 118 of the Manitoba Act of 1885, which declared the immunity from action of bona fide purchasers whose title was sought to be impeached by reason of fraud on the part of a predecessor in title, but also of such a purchaser against any claim:—

whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

The subject of misdescription is also dealt with in ss. 108 and 121. It will be seen that the language of the exception with which we are concerned in s. 44 is:—

except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

The wording of clause (*e*) of s. 104 saves the rights 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.

The misdescription referred to in s. 106 is that referred to in s. 104(*e*). In s. 108 the language is:—

> by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof.

Section 121 which declares the immunity of the Assurance Fund in certain circumstances refers to a case in which damage or deprivation has been occasioned:—

> by any land being included in the same certificate of title with other land, through misdescription of the boundaries or parcels of any land.

These sections are to be read together. The duty of the registrar and the only steps authorized by the statute upon the presentation of the transfer from the C.P.R. to Podgorny was to place the memorandum on the original and duplicate certificate of title and to issue a new certificate of title describing the interest conveyed in that transfer. The certificate of title issued purported to state the nature of that interest but described it as being the land reserving only the coal, whereas the interest conveyed reserved also the mineral petroleum. In my opinion, this was a misdescription of the parcel conveyed. To restrict the meaning of the expression "boundaries or parcels" to the boundaries as defined by a reference to a survey, or simply as a particular quarter section, or to the limits of the property as defined in a description by metes and bounds, is, in my opinion, to fail to give any meaning to the word "parcels." That word, as has been shown, was taken from the Manitoba statute where it appears in conjunction with the word "boundaries" and that statute in turn was taken from the Victoria Statute. The inclusion of the word "parcels" in the Alberta Act and in these statutes cannot have been without the intention that it should be assigned a different meaning than "boundaries."

The further question to be decided is as to whether, by reason of the provisions of *The Land Titles Act,* the claim by the C.P.R. to the minerals can be asserted against Anton Turta and his successors in title. At common law, such

claim would be sustained. The claim of the respondents must be supported, if at all, on the ground that being bona fide purchasers for value the statute protects them against the claim. If the statute were similar to the Real Property Act of Manitoba the claim of the Railway Company would, in my opinion, fail. But, as I have pointed out, from the very outset, when the Dominion by the Territories Real Property Act introduced this system of land holding into the Northwest Territories, the rights of those deprived of land by misdescription have been preserved. We cannot concern ourselves with the reason for this departure from what has long since been understood, at least in the Province of Manitoba, as the principle underlying the Torrens system. That is as it was described in the passage from the judgment in *Fels* v. *Knowles,* referred to by Sir Louis Davies in the *Boulter Waugh* case.

There are, it is true, certain sections of the Alberta Statute which, if considered alone and construed literally, would appear to lend some support to the claim of the respondents, that the statement of the law in *Gibbs* v. *Messer* applies without reservation in Alberta. As an illustration of this, s. 25 says that the memorandum endorsed by the registrar on the duplicate certificate of title shall be received in all courts of law as conclusive evidence of its contents and that the instrument of which it is a memorandum has been duly registered. Read alone, divorced from the rest of the Act, this would mean that as a matter of evidence the unauthorized memorandum endorsed on certificate No. 424 that the land without any reservation had been transferred to Podgorny could not be controverted. But this would render meaningless the reservations in ss. 44, 104 and 106, to which I have referred, and cannot accordingly be so construed. Section 25, it may be noted, in this respect reenacted s. 43 of the *Territories Real Property Act* which was taken from s. 35 of the Manitoba Act of 1885. The section may have fitted into an Act where "the register is everything" but it cannot be construed literally in the Alberta Act.

Again some reliance is placed upon s. 135 which says that, except in the case of fraud (presumably to which such person is party or privy), a person proposing to take a transfer from the owner of any land for which a certificate

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Locke J.

of title has been granted shall not be found or concerned to enquire into or ascertain the circumstances in which, or the consideration for which, the owner became registered. This is another section, the predecessor of which was simply taken from s. 141 of the *Real Property Act* of Manitoba. It can be reconciled for obvious reasons with the provisions of the Manitoba Statute and, if it means that a prospective purchaser is not by virtue of s. 47 concerned to enquire whether the title holder holds as trustee for others and, as stated by that section, is to be deemed the absolute and beneficial owner of the land, it can be reconciled with the rest of the Alberta Act. But I think it cannot be so construed as to defeat the rights of those deprived of their property by misdescription which are expressly reserved to them by the sections to which I have referred and of which they could only be deprived by statute.

It has also been contended that the language of s. 108 lends some support to the position of the respondents in that it refers, *inter alia,* to a person deprived of lands "by any error, omission or misdescription in any certificate of title" who, by the provisions of the Act, is barred from bringing an action for ejectment. The history of this section, however, must be considered. It reproduces s. 108 of the *Territories Real Property Act* which was taken from s. 120 of the Manitoba Act of 1885. In the Manitoba Act, where a person deprived of land by misdescription could not recover it from a bona fide purchaser for value, the meaning of s. 120 was manifest. However, while omitting this protection in the *Territories Real Property Act* and in ss. 42, 104 and 106 of the Act of 1906, the reference to misdescription was not deleted. Unless these three sections are to be ignored, the part of s. 108 to which I have referred is meaningless.

I am further of the opinion that the petroleum was adequately excepted from the operation of the transfer to Podgorny by the language of that instrument and the ownership of that mineral remained in the Railway Company.

I would allow this appeal with costs as against the respondent and the third parties in this Court and in the Appellate Division and dismiss the action with costs, and

direct that judgment be entered in favour of the C.P.R. against the third parties in the terms of the prayer for relief in the third party notice, and for Imperial Oil Company Limited upon its counterclaim, with costs.

CARTWRIGHT J.:—(dissenting) The facts and relevant statutory provisions are fully set out in the reasons of my brother Locke.

I understood all counsel to be in agreement that the appeal should be decided on *The Land Titles Act* of Alberta as it appeared in 6 Edw. VII (1906) c. 24, and in any event the subsequent changes do not affect the point which appears to me to be decisive. I shall refer to sections by the numbers which they bore in the 1906 Statute and to the appellant Railway Company as "the C.P.R.".

For the reasons given by my brother Locke I agree with his conclusion that if the facts of this case fall within clause (*e*) of s. 104 of the Act the appeal must succeed, although the respondent Anton Turta is regarded as a purchaser in good faith and for value who purchased relying on the register and without notice of the appellants' claims. While certain sections of the Act such as 25, 42, and 135, if read alone, would seem to make the certificate of title of such a purchaser conclusive, they must be construed with ss. 44, 104 (*e*) and 106 and the last mentioned group of sections must be read as provisos to the group first mentioned and as incorporated with them. I do not understand any of the learned judges in the courts below to differ from this view, and, if authority for it is required, it will be found in the judgment of the Court of Appeal in New South Wales in *Marsden v. McAlister* (1), particularly at page 306 in the judgment of the Chief Justice and at page 307 in the judgment of Sir G. Innes J.

Section 104 provides:—

104. No action or 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:—

* * *

(*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;

(1) (1887) 8 N.S.W.R. 300

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Cartwright J.

Does then the claim of the C.P.R. to the petroleum under the N.W. quarter of section 17 fall within clause (*e*)? In my opinion it does.

It will be observed, (i) that the C.P.R. is a person, at present (if the judgments below stand) deprived of the petroleum and claiming it; (ii) that the petroleum is included in Anton Turta's certificate of title as owner of the quarter-section, and (iii) that the C.P.R.'s claim is against Anton Turta. Up to this point the claim falls within the words of clause (*e*).

The next question to arise is whether the petroleum claimed falls within the words "any land" in the first line of clause (*e*). Petroleum is admittedly a mineral. The relevant words in the transfer to Podgorny are:—"excepting and reserving unto the Canadian Pacific Railway Company all coal and petroleum which may be found to exist within upon or under the said land". Whether the effect of these words was to except the petroleum and so to sever it both as to estate and possession from the estate in possession of the lands described in the transfer or whether, as Mr. Manning argues, their effect is not to except the petroleum but only to reserve a *profit à prendre,* the result appears to me to be the same. If the petroleum is regarded as an excepted mineral it is land under the definition of "land" in section 2 (*a*) of the Act. If, on the other hand, the right to the petroleum is regarded as a *profit à prendre* reserved to the C.P.R. then it is an incorporeal hereditament and again falls within the definition of "land" in section 2 (*a*). I can find nothing in the context to make the definition section inapplicable. I conclude therefore that the petroleum, or the right thereto, does fall within the words "any land".

The next question is whether Anton Turta's certificate of title in which the petroleum is included is a certificate of title "of other land", within the words of clause (*e*). I think that it is. Had there been in existence certificates accurately declaring the true state of the title, Anton Turta would have held a certificate of title to the quarter-section less the petroleum thereunder and the C.P.R. would have held a certificate of title to the petroleum under the quarter-section. Each would have been a certificate of title

to land and each would have excluded the land included in the other. The certificate of Anton Turta should have been and was for land other than the petroleum but, wrongly, in addition thereto included the petroleum.

The next question is whether the land consisting of the petroleum, or the right thereto, was included in Anton Turta's certicate of title "by misdescription of such other land or of its boundaries". It is not suggested that the boundaries of the land included in Turta's certificate are misdescribed; but the words of clause (*e*) contemplate a type of misdescription of land which does not involve any misdescription of its boundaries. The two types of misdescription are stated disjunctively. If one takes the word "misdescription" in its ordinary meaning, which is simply wrong description, it appears to me that when the correct description of the land to which title has been acquired and for which a certificate is to be issued is a certain quarter-section without the petroleum thereunder such land is wrongly described if it is described as being the quarter-section including the petroleum.

All the learned judges in the courts below take the view that to bring a case within the terms of section 104 (*e*) there must be "two or more distinct parcels of land". In my respectful view, assuming the proposed test to be a valid one, there are here two distinct parcels of land, one being the quarter-section less the petroleum thereunder, and the other being the petroleum under the quarter-section.

The case of *Hamilton* v. *Iredale* (1), relied upon in the courts below, is distinguishable on the facts. The dispute in that case was as to the ownership of a certain piece of land to which the plaintiff was able to show a good documentary title commencing with a Crown grant dated October 8, 1799, but for which a certificate of title had been issued to the defendant on February 4, 1868. In the Court of Appeal the case was argued and dealt with on the assumption that the certificate was granted to the defendant on proof of a possessory title dating from 1847 or earlier. The Court of Appeal held that the exception contained in s. 115 (5) of the Act there under consideration

(1) 1903) 3 N.S.W. S.R. 535.

1954

C.P.R. AND IMPERIAL OIL LTD. v. TURTA et al.

Cartwright J.

could have no application to such a state of facts. That section provided that no action of ejectment for the recovery of land should lie or be sustained against the person registered as proprietor thereof, except in certain cases of which s-s. 5 was:—

> 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 registered proprietor of such other land not being a transferee thereof *bona fide* for value.

It would seem obvious that there was no misdescription. The land in question was accurately described. The question was whether the proof of the plaintiff's documentary title could prevail against the defendant's certificate. At page 550 of the report Walker J. says:—"Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B." On the facts of the case at bar these words appear to me to apply to the act of the Registrar when he issued Podgorny's certificate of title. His intention was, presumably, to perform his duty under the Act and to issue to Podgorny a certificate for the land which had been transferred to him, no more and no less. That land was, and should have been described in the certificate as, "the N.W. quarter of Section 17, excepting and reserving unto the Canadian Pacific Railway Company all coal and petroleum which may be found to exist within upon or under the said land". Instead of this correct description the certificate contained the following description:—"The N.W. quarter of section 17 reserving unto the Canadian Pacific Railway all coal on or under the said land." The result is that the Registrar intending to describe the quarter-section less the petroleum and coal described the quarter-section less the coal but including the petroleum. This was, in my opinion, a misdescription.

I conclude, therefore, that on the facts of the case at bar the claim of the C.P.R. to the petroleum in question is a case falling within the words of clause (*e*) of s. 104 and I am unable to find any other provision in the Act which requires a restriction or modification of the ordinary meaning of the words used in such clause.

The conclusion at which I have arrived on the point dealt with above renders it unnecessary for me to consider the ground on which Clinton Ford J.A. would have allowed

the appeal or the other points urged by counsel in support of the appeal. In regard to the submissions of the respondents (i) that Anton Turta obtained title to the petroleum by adverse possession and (ii) that the reservation of the petroleum to the C.P.R. was void as offending against the rule against perpetuities, I agree for the reasons stated by Clinton Ford J.A. that these arguments must be rejected.

I would dispose of the appeal as proposed by my brother Locke.

Appeal dismissed with costs.

Solicitor for the C.P.R.: *R. R. Mitchell.*

Solicitors for Imperial Oil Ltd.: *Nolan, Chambers, Might, Saucier, Peacock & Jones.*

Solicitors for Anton Turta and Montreal Trust Co.: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

Solicitors for Nick Turta and Wm. Sereda: *Manning & Dimos.*