THE TORRENS SYSTEM IN ALBERTA:
A DREAM IN OPERATION

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I. Introductory

The province of Alberta employs, as do numerous other jurisdictions throughout the British Commonwealth, the Torrens system of registration of title to land. This system is presumably retained by the legislature of Alberta because it is best suited to the requirements of a land-registry system. Sir Robert Torrens, who conceived and drafted the original scheme now bearing his name, once listed several attributes which he stated should be present in any system.¹ These features, now generally recognized as the aims of all reformers in the field, are reliability, simplicity, cheapness, speed and suitability. The landowners and the members of the legal profession of this province are so convinced of the merits of the Torrens system (and presumably of the presence of those features) that any suggestion to replace it would be met by solid opposition.

This seemingly incontrovertible faith in the system would be easily understood if the five aims just listed had been consistently achieved in Alberta. There is little doubt, however, that they have not. Indeed, in many cases, particularly when mines and minerals form part of the land, only cheapness of operation can be said to

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¹Torrens, Speeches, 1858-9.
be evident. Following on the heels of the *Turta* case,\(^2\) in which the Canadian Pacific Railway Company was, without recourse or indemnity, deprived of land of a value in excess of five million dollars, and the Torrens system was shown once again to be unreliable from an owner's viewpoint, the virtues of simplicity, speed and suitability have in some measure disappeared. The previous simple and speedy Torrens system practice of determining the validity of a vendor's profession of ownership by merely examining the last issued certificate of title has given way to a careful, tedious and time-consuming historical search of every instrument and certificate in the chain of title from the original grant from the Crown down to the present owner. This type of search is equally as burdensome as a similar search under a deed-registry system of land tenure, where all documents relating to the title to a parcel of property are registered and where each document in the "chain" must be examined to determine the validity of the current owner's claim to title. The feature of suitability has also lost ground. The fear of possible claims against the assurance fund has caused the Alberta government to institute measures to delay transactions which deal with minerals. As a result, fast-moving "land-plays", common features of oil exploration and production, are often made impossible.

As evident as these shortcomings may be, they have not been sufficient to convince the legal departments of many oil companies in this province, or even the C.P.R., that the Torrens system is inherently wrong. Rather, when these companies were given an opportunity in 1955 to express their opinions about the Alberta Land Titles Act to a special committee of the Benchers of the Law Society of Alberta, none suggested that the system be replaced, though the C.P.R. did advocate certain changes it felt would improve the act and expressed its dislike of the assurance-fund provisions.\(^3\)

A person not acquainted with the Torrens principles might well wonder what magic spell is cast by a system that can at once so diminish an owner's security of title as to permit him to lose land worth many millions of dollars and yet elicit from him no attack on the essentials of the system. Support of the Torrens system comes not only from native Albertans but, it is likely fair to say, even more strongly from persons who have had experience

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\(^3\) *The Law Society of Alberta Bencher Special Committee on Mines and Minerals—public hearings, Calgary, May 19-20, 1955.*
in dealing with land under the more conventional systems. Outstanding opposition to the introduction into Alberta of any principles of a deed-registry system has been voiced by men who have practised law in jurisdictions where deed-registry systems are employed.

In order to understand this intensity of feeling, the history and the features of the Torrens system must be spelled out.

(i) Origin of the system

A present-day observer cannot but smile when he reads the preamble to the 1858 Real Property Act of South Australia. This statute was the first enactment into law of Sir Robert Torrens’ theories on land tenure. The preamble reads:

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

The implication contained in the preamble is that the new system was designed to prevent loss on the part of landholders. It may well have been so designed, but if so its operation in Alberta has certainly fallen short of the goal. It could be argued that the shortcomings are not inherent but are due to innovations that the Alberta legislature, in company with other law-making bodies elsewhere, has seen fit to tack on the original Torrens statute.

Robert Torrens introduced his theories to the Legislative Council of South Australia in the form of a private member’s bill. He was, at the time of its introduction, Collector of Customs at Port Adelaide, and his duties gave him a good opportunity to become familiar with the Merchant Shipping Act of South Australia. This act, with its provisions for the orderly transaction of sales of merchant ships, was conceded by Torrens to have formed the model for his land-registry system. With great boldness Torrens argued, and convinced the provincial legislature of the soundness of his arguments, that the accepted scheme of land registration should be discarded and replaced by a standardized, simple procedure that would permit a speedy yet reliable system of regis-

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4 An Act to simplify the Laws relating to the Transfer and Encumbrance of Freehold and other Interests in Land (1858), 21 Vict., No. 15.
5 (1854), 17 & 18 Vict., c. 104.
6 Torrens published an essay a year later in which he expressly disclaimed any indebtedness to the findings of the English commission of 1857, which were remarkably similar to his theories, and preceded them: Essay on Conveyancing in South Australia by Registration of Title (Adelaide, 1859).
tration of ownership and transfer of rights to land. His views on the evils of the land law of the mid-nineteenth century are recited in the preamble to his 1858 act just quoted.

Torrens' repugnancy to old land-registry systems soon reached the shores of Canada. In 1883 a Canadian Land Law Amendment Association was organized to publicize the advantages of a Torrens system. The president of the association, J. Herbert Mason, stated on December 1st, 1883: 7

... I have been led to inquire why it is that real estate is burdened with a method of transfer so costly, dilatory, cumbersome, and uncertain, as compared with other kinds of property. ... In default of other reason, in view of the antiquity of the system, and the immense amount of learned labour bestowed upon it, the conclusion generally accepted was that it must be one of the natural and unavoidable evils of life that had to be patiently endured; as inevitable as the flow of time, or the tides, or the payment of taxes.

(ii) Features of the system

The first Torrens statute voiced the essential principles that Robert Torrens conceived as being the answer to the needs of his day. These basic principles are today in force in a number of jurisdictions. Proof of their validity, in theory at least, is that in the past one hundred years no substantial change has been made in the South Australian act. The object of the 1858 statute was to make the conveyancing of title to land as cheap and simple as the transfer of ownership of ships. In order to accomplish this, a system was established under governmental control for registration of title to the land itself rather than registration of documents or deeds. Simplified forms of transfers, leases and mortgages were provided for. It was the intention of Torrens that if necessary a layman, without the intervention of a skilled conveyancer or solicitor, could himself carry out land transactions.

The difference between this radically new registration of title and the systems then in effect can readily be appreciated. Under the ordinary deed system, a person dealing with land relied on an examination of the chain of documents produced by the vendor in order to establish that the vendor had a good title to the land. The cumbersome task of examining and evaluating the instruments, and the very apparent risk of an important instrument not being produced, made this system a hazardous one for prospective purchasers or mortgagees. The second system then in use, and still favoured in many areas of the world, was also a deed system but

The Torrens System in Alberta

one under which it was required that all documents relating to land must be registered in a government office. Such a system eliminated the second hazard of the ordinary deed system, in that no document is of any effect unless it is registered in a specified place.

The features, in theory, of the Torrens system are:

1. It is a system of state registration of title to land; the state, within certain limitations, guarantees the title and operates the system’s machinery.

2. Transactions must all be registered against the title in the state-operated land titles office, and they are not valid in the form of mere instruments executed by the parties as against other competing registered interests.

3. The certificate of title is intended to be a complete and accurate reflection of the result of all preceding transactions affecting the property. Persons dealing with a registered proprietor do not therefore have to look elsewhere than the certificate, except to search a few statutory exceptions to indefeasibility.

4. An assurance fund is usually provided, which, according to the original theory of Torrens, was intended to provide compensation to those persons who suffer loss by reason of errors or omissions of the registrar or misfeasance in the operation of the system.

5. Each parcel of land is recorded in the register at the land titles office as a unit of property. The land is surveyed and accurate boundary and parcel descriptions are available that facilitate the recording of land dispositions.

It is thus apparent that the certificate of title, or the register as it is sometimes called, is indeed “almost everything” for the registration of an instrument, and the issue of a new certificate of title at once homologates the disposition and cures all anterior defects of title, subject only to a few statutory exceptions. A purchaser, by relying on the register’s assurance that the vendor has a marketable title, need not be concerned by any competing persons who themselves claim ownership. If the purchaser gives good consideration to his vendor, his title becomes good against all the world, with the exception only of the encumbrances noted on the register and, of course, the few statutory exceptions to indefeasibility. These exceptions are important enough to justify individual treatment later.

The Privy Council first had an opportunity to view the Torrens system in Gibbs v. Messer et al. In its judgment in that case it stated:

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9 Ibid., p. 254.
The object [of the Act] 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 simplicity of transferring title to land under a Torrens system permits extreme rapidity in selling realty. It is not at all unusual in Alberta for two parties to conclude the legal requirements of the sale of land within one hour following agreement on the terms of the sale. The prescribed transfer form can be completed in this province by a solicitor within a matter of minutes. The parties then attend the land titles office, where a search of the vendor's title to the property in question can be concluded almost at a glance, since the purchaser need read only a single concise certificate of title. If this certificate indicates that the vendor is indeed the owner of what he is purporting to sell, and the registrar advises the purchaser that there are no other dispositions of the property then being processed through the land titles office, but which have not reached the stage of being printed on the title, then the purchaser registers his transfer and pays over to the vendor the purchase price. A certificate of title printed in the name of the purchaser will in due course be issued by the land titles office; "in due course" usually means in Alberta from five days to two weeks.

These two features of indefeasibility and simplicity are the most distinctive characteristics of a Torrens system. The system, when operated in accordance with the designer's intentions, should facilitate the conveyancing of title and at the same time provide certainty of ownership. The presence of an assurance fund is a guarantee that the malfunctioning of the system will not cause injury.10

(iii) Early application of the system

It is not accidental that Australia, New Zealand and the western Canadian provinces of Alberta and Saskatchewan adopted the new system of land registration. For they had not by 1858 become attached to and ensnared in the old system to a degree that made it impossible to advance to a more modern concept.

10 One of the earliest descriptions of the Torrens system was written by James Edward Hogg in 1905 and can be found in his book, The Australian Torrens System, p. I.
South Australia had been in existence only twenty-two years and was still in a formative stage; Alberta and Saskatchewan were of course unknown as such and were able, as the North-West Territories, to start almost from the beginning in 1886 with the Torrens system.

The courts of Western Canada had little opportunity to adjudicate upon the system or its operations for some years and little judicial comment is to be found on it before the Turta case. This is in contrast to Australia, where judicial criticism of the operation of the system commenced almost immediately it was introduced. The Supreme Court of Canada first dealt with the fundamental Torrens principles of the Alberta Land Titles Act, for example, in the Turta case in 1954. There, Rinfret C.J., in his dissenting opinion, indicated his dislike for the Alberta Land Titles Act, the Torrens system and the theory that registration cures previous defects in title caused by errors on the part of the registrar. The then Chief Justice said:

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.\(^{11}\)

Again:

If the contentions of the respondents [Turta] 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: '. . . any rule of law or equity to the contrary notwithstanding'. And, if it were so, I confess that the statute in question would not fill me with enthusiasm.\(^{12}\)

At a much earlier date dislike for the Torrens system had been voiced even more candidly by members of the judiciary in Australia. Gwynne J. on several occasions expressed his opinion. In 1873, for example, speaking before a South Australian Commission on the Real Property Act, he stated:\(^{13}\)

\(^{12}\) Ibid., p. 429. An important principle of the Torrens system is that it is not capable of registering an equitable interest as such; indeed it was purposely so designed.
\(^{13}\) South Australia Commission of 1873, p. 13.
I would continue this simple system (if anything so crude, so ill-conceived, clumsily executed and unscientific can be called a system) and accept it with all its sins against the science of jurisprudence, contenting ourselves with the reflection that it is cheap, and simple and sufficient for the general purposes of the colonists. In my opinion the Real Property Act as it stands at present is a scandal on the legislation of the colony... 

This antagonism in Australia was by no means confined to the bench: the legal profession apparently also opposed the system, since solicitors were reluctant to bring land under the act. The government of South Australia was forced to pass legislation in 1860\(^{14}\) providing for the naming of “fit and proper persons to be land brokers for transacting business under the provisions of this Act”. These land brokers, entitled to engage for a fee in the conveyancing of real property, still exist.

The history of the Torrens system reveals much opposition to its introduction. Nor has this opposition completely disappeared even yet. The operation of the system in the United States at the present time is opposed by vested interests and conflicts with the 14th Amendment to the Constitution. This amendment provides that no state shall “deprive any person of life, liberty or property, without due process of law”. The provisions of the Torrens system, as the Turta case showed, can have the effect of taking property away from an owner, and when this has happened in the United States the 14th Amendment has been successfully pleaded. The result is a finding opposite to the Turta decision and contrary to the Torrens principles as most Albertans have always understood them.

Even yet, then, the Torrens system is not universally acclaimed. Persons accustomed to it, however, consider any return to the old system as a retrogression almost equal to throwing away the benefits of the internal combustion engine. And in England, where a system similar to the Torrens system is now in use in many areas, satisfaction seems to be widespread.

II. Conclusiveness of the Register

(i) The theory

If a state certifies the title to real property, it is evident that the state is holding out the title as accurate and reliable, subject only to certain statutory exceptions. A prospective purchaser should be entitled to rely on this guarantee and not need to look further than the information contained on the last issued certificate of

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\(^{14}\) Real Property Act, 1860.
title. For this certificate purports to show the up-to-date condition of the title. The documents that chronologically precede the certificate need be of no interest to the purchaser. This means that the “chain” of title is of no real significance; because the final certificate is conclusive, the links in the chain leading up to it can be either very weak or non-existent and still have no effect on the indefeasibility of the current or “top” title as it is often called. The net result of all preceding transactions is presented in the current title, making it unnecessary to look behind it.

These principles of the Torrens system are described by the Assistant Land Registrar at Her Majesty's Land Registry in London, England, Mr. T. B. F. Ruoff, as the “Mirror Principle” and the “Curtain Principle”. By the mirror principle Mr. Ruoff means that “the register book reflects all facts material to an owner’s title to land. Nothing that is incapable of registration and nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate.” The curtain principle “emphasizes that so far as a proposing purchaser is concerned, the register book is the sole source of information about the legal title so that he neither need nor may look behind it”. These two principles, when put into operation, permit the twin aims of indefeasibility of title and facility of transfer to be attained.

To say nothing more about the Torrens system than this would undoubtedly convert to it many new followers. The principles are, however, subject to many exceptions to indefeasibility and mechanical weaknesses that considerably restrict the effectiveness of the system. These exceptions and weaknesses are easy to identify and to attack but difficult to overcome.

(ii) The theory in practice

Every parcel of land in Alberta was at one time the property of the Crown. A recognition of a feudal tenure still exists in Alberta, where the certificate of title certifies that the owner named is the owner of an estate in fee simple. When the Crown grants the land, the grantee is entitled to make application to a registrar

\[\text{15 Theodore B. F. Ruoff, An Englishman Looks at the Torrens System (1952), 26 Aust. L. J. 118.}\]
\[\text{16 Ibid., p. 118.}\]
\[\text{17 Ibid.}\]
\[\text{18 This reference to a feudal tenure is not usually found in Torrens systems. More often the system purports to certify that an individual is the “absolute” owner of a described parcel of land. For this reason the Torrens system is often described as the closest approach to allodial ownership found in English law.}\]
of land titles to bring the land under the act. It is fair to say that all the land granted by the Crown so far in Alberta has been brought under the act, and certificates of title issued for it. The land is accurately described in the certificate; this description is dependent upon a survey. Inasmuch as all the populated rural areas of Alberta are surveyed in the grid system of sections, townships and ranges common to the larger part of the Great Central Plain area of North America, and all cities are subdivided according to filed plans, there is usually no problem in securing a succinct description.

After the certificate of title has been issued, it is numbered, bound into a volume consisting of certificates issued during the same period, and indexed according to the legal or surveyed description of the land with which it deals so that it may be readily located at a later date. For this purpose the volume remains permanently on file at the land titles office. A duplicate of this certificate, officially called a duplicate certificate of title, and usually referred to as a D.C.T., is handed to the registered owner as evidence of his ownership. It is the certificate and not the duplicate, however, which the Torrens system treats as being the conclusive evidence. The certificate in Alberta corresponds to the "register" in some other jurisdictions.

To prevent double dealing by the owner, the Land Titles Act of Alberta, and of all Torrens jurisdictions, requires that the duplicate certificate be surrendered to the land titles office when the land is either transferred or mortgaged by the owner. In the case of a transfer, the duplicate certificate and the certificate are both cancelled and a replacement of each is issued in the name of the new owner. In the case of a mortgage, the name of the mortgagee, together with the date of the instrument and certain other information, such as the amount of money secured, is endorsed on the duplicate and on the certificate, and the duplicate is retained by the land titles office so as to prevent the mortgagor from dealing with his title except subject to the mortgagee's interest.

Acts by the owner, other than transferring or mortgaging his property, which derogate from his title, can also give rise to memoranda of encumbrance on the title. Notice of such acts must be given to the registrar in the form specified by the statute. The registrar then records upon the certificate, and upon the duplicate if it is in his possession, an endorsement or memorandum of the transaction that thus comes to his attention. Only certain specified

10 The Land Titles Act, R.S.A., 1942, c. 205, ss. 36-45.
documents are registrable and it is these that are recorded. Thus, if the municipality in which the land is situate gives notice of unpaid taxes, or if a mechanics' lien is filed against the property, a memorandum of these charges on the land is made on the certificate.

The most important single document that is registrable against a piece of property in Alberta is a caveat. This document deserves special attention and will be dealt with later.

If the registrar, by error, fails to place on a certificate of title a memorandum of an encumbrance, and a bona-fide purchaser purchases the property for value on the basis of the information contained in the certificate, the purchaser secures title to the land free of the encumbrance. This is the indefeasibility theory. The theory was first propounded by the courts in *Fels v. Knowles*, 20 where it was stated that the new registered owner acquired, upon the registration of his transfer, an indefeasible title against the entire world, notwithstanding that his transfer or his title could have been avoided at the instance of a third person. (The encumbrancer whose interest has been defeated, be he mortgagee or lien claimant or otherwise, then proceeds against the assurance fund, according to the procedure prescribed by the statute, to seek indemnity for his loss.)

It is apparent that the searching of the top title should be a simple procedure. It is also apparent that the registrar is not likely to err in dealing with the great majority of transactions that cross his desk. But, where an error does occur, valuable rights belonging to many persons may well be affected.

And the searching of the top title is not really adequate to protect the searcher, however much Sir Robert Torrens hoped it would be. There are many statutory exceptions to indefeasibility confronting a prospective purchaser in Alberta which he cannot evade and the consequences of which he cannot escape by merely searching the top title. The same thing is true in all Torrens jurisdictions. Baalman dealt with this top title theory, after quoting it, by saying: 21

> In the days of its pristine purity it is probable that the Act achieved that object. But those days were long ago. Many occasions have since arisen, some real, some fancied, to do that very thing which the Act sought to avoid, to go behind the register.

Indeed, with respect to some of these exceptions, the purchaser

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20 (1906), 26 N.Z.L.R. 604.
cannot protect himself except by looking, not only behind the register, but elsewhere than in the land titles office as well. This is significant because one of Torrens' aims was to keep all land transactions inside the land titles office so that a person dealing with land need not look beyond the government-kept records.

These statutory exceptions to indefeasibility are divisible into two categories in Alberta. Two of the exceptions, familiarly known as "misdescription" and "prior certificate", may, together with fraud, be called the true exceptions to indefeasibility, while the balance are less important. These less important, though more numerous, exceptions are given the name "overriding interests" in England; in Alberta they are known as "implied conditions".

Fraud, misdescription and prior certificate are described in sections 60 and 62 of the Alberta Land Titles Act\(^\text{22}\) in language similar to that in numerous other Torrens statutes:

\begin{quote}
60. (1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud wherein he has participated or colluded, hold it 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 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.

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 Her 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 section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the 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 title 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 the certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.
\end{quote}

The statute thus says that every certificate of title is subject to both misdescription and prior certificates of title. This forces

\(^{22}\) R.S.A., 1942, c. 205, and amendments thereto.
the purchaser to conduct a historical search of the title because an examination of the top title cannot possibly reveal whether one of these exceptions exists that will render the purchased title defective. A historical search of a Torrens title is the same as a search of title at a deed registry office, inasmuch as every document dealing with the title is searched. Starting with the top title, the searcher examines the transfer that immediately preceded it, then the certificate of title preceding that, and so on back to the original grant from the Crown.

Only by such a search can it be discovered whether or not two chains of title, and thus two certificates of title, simultaneously exist for the same parcel of land. It is easy to understand how such a situation can arise: the registrar merely follows the directions on John Doe’s transfer and causes a new certificate of title for parcel A to issue in the name of the transferee, Richard Roe; the registrar then neglects to cancel the transferor’s certificate of title. This type of error rarely occurs today, but fifty years ago, when John Doe’s certificate of title likely covered, not only parcel A, but parcels B to Z as well, the registrar could easily overlook the cancellation of one part of the certificate or, more likely, cancel the wrong part. And, if the land was situated in a remote area, neither the transferor nor the transferee would be likely to visit it and construct buildings or do anything that would be notice to the world of a claim of ownership. Richard Roe then conveys parcel A to another purchaser, as he has a right to do. The new transferee may not detect the existence of the two certificates at the land titles office, as it is likely that only Richard Roe’s certificate of title will be found because John Doe’s certificate should have been cancelled and will therefore be presumed to have been cancelled. Half a century later, and after Richard Roe’s successors in title number as many, perhaps, as fifteen or twenty, the present owner may have his land taken from him by John Doe’s successors in title, who clearly own the land because their chain of title contains an uncancelled certificate of title issued before that of Richard Roe.

Misdescription of the boundaries of a parcel can also occur and continue unnoticed through several transactions.

Until the *Turta* case\(^{23}\) fixed the definitions of both “misdescription” and “prior certificate” the terms had been open to two possible meanings. The *Turta* case must therefore be examined at least briefly. But, first, readers might find it convenient to look

\(^{23}\) *Ante*, footnote 2.
at the "less important" exceptions to indefeasibility as listed in section 61, the implied conditions:\textsuperscript{24}

61. (1) The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, be subject to,—

(a) any subsisting reservations or exceptions including royalties contained in the original grant of the land from the Crown;
(b) all unpaid taxes, including irrigation and drainage district rates;
(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 be vested in any person, body corporate, or Her 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.

Section 61(2) states that in certain special circumstances some lands shall be subject to other easements.

Where would a person look to determine whether a parcel of property is bound by these conditions? Certainly he must go outside the land titles office for some of them. He must search the offices of the taxing authority for taxes, question the tenants about leases, and inquire from government departments about unregistered easements and rights-of-way. Even if he fails to get notice of one of the listed conditions, he purchases the property subject to it.

Actually, the trend is to attempt to record in the land titles office, either in the register or in separate books, notice of all the conditions to which the land is actually subject. But this is not everywhere done. According to Baalman,\textsuperscript{25} some Australian states have so many overriding interests, and these are found in so many different statutes, that a title holder can never reasonably be expected to know what interests exist to which his title may be subject. An obligation to repair the chancel of a parish church has nothing in common with the possibility of having one's land flooded for an irrigation project, but both conditions may be attached to the same parcel of property. In Alberta the government has been largely successful in its attempt to have most of these implied conditions registered at the land titles office.

\textsuperscript{24} Ante, footnote 22. \textsuperscript{25} Ante, footnote 21, at pp. 151ff.
In short, the top title is not “everything” or “almost everything”. The only rule-of-thumb to guide a solicitor in Alberta wondering whether he should rely on the top title is the amount of money involved in the transaction. (Solicitors for oil companies have publicly stated that they trust the Torrens system up to X dollars only.) He knows that if the land is in a city the certificate is less likely to contain an error than if the land is rural, and that if the land has only recently been granted from the Crown there is less opportunity for an error than if it has been continuously dealt with for fifty or sixty years. (Here of course “error” means only those errors which give rise to misdescription or prior certificate; other errors are homologated by sale.) But, nevertheless, money is the chief test.

An exception to the conclusiveness of the top certificate of title, one which is found under all systems of land registration, is death. A legal estate cannot be in nubibus and registration of a successor cannot be carried out instantly. The transmission of the deceased’s interest is done by instrument registered at the land titles office.

If the top title is not “everything” and the reflection from the mirror is illusory, then the curtain veiling the preceding transactions must be parted and a purchaser permitted to look behind in search of the true visage of the vendor. The register becomes inconclusive.

(iii) Correction of errors

If the registrar fails to endorse on a certificate of title a memorandum of a mortgage, may he correct his error when it comes to his attention? This is one of the errors not included in the list of exceptions to indefeasibility and a bona-fide purchaser need not worry therefore about its possible existence in his vendor’s title if it is not apparent on the register. (If the error is apparent, then the purchaser has notice and it must be decided by a court whether the notice amounts to fraud.) The purchaser, on registration, acquires a title in the same condition as is exhibited on his vendor’s certificate of title and the subsequent discovery by the registrar of a failure to endorse a memorandum of a mortgage need trouble the purchaser not at all. The registrar cannot, after an intervening registration, correct such an error, for the result would be to detract from the purchaser’s title. And this is what the Alberta act, and most other Torrens statutes, say.

Section 174a(4) of the Alberta act contains words, hidden in a tedious mass of directions to the registrar, permitting the regis-
trar to “cancel, correct or complete the register”, but only “so far as practicable without prejudicing rights conferred for value”. A person not acquainted with the customary prolixity and diffuse-ness of Torrens statutes might readily believe that the legislature was here engaged in a statutory game of needle in the haystack. This qualification placed upon the registrar’s power to correct effectively emasculates the apparent intention of the legislature. Only in the very rare case where valuable rights are not involved can a correction be made.

But what about circumstances that involve exceptions to indefeasibility where errors and corrections become matters of grave concern? What if the registrar discovers an error that gave rise to two certificates of title, existing contemporaneously, to the same parcel of land? May he correct such an error without regard for the consequences, relying on the fact that the situation is a statutory exception to indefeasibility and that he is not really upsetting rights? If he does, is he not putting himself in the position of a judge?

The Supreme Court of Canada dealt with the registrar’s power to correct in the Turta case. The judgments in this case should therefore be looked at for assistance on this point as well as on indefeasibility generally.

(iv) The Turta case

Canadian Pacific Railway Co. Ltd. and Imperial Oil Limited v. Anton Turta et al. is the leading case in the field of Torrens law in Canada. The case deals not only with the exceptions to indefeasibility of prior certificate and misdescription but in addition discusses those provisions of the Alberta Land Titles Act that permit corrections by the registrar of errors he discovers. An appreciation of the facts of the case is necessary to understand the decision of the Supreme Court of Canada.

The C.P.R. was, in 1903, the registered owner under the Land Titles Act of the North-West Territories of a quarter section of land in what is now the province of Alberta. The company had had issued in its name certificate of title No. 424 certifying it to be the owner of the quarter section, together with other lands described, in fee simple. This certificate of title remained in effect under the Land Titles Act of the province of Alberta, which was first enacted in 1906. In 1908 the C.P.R. transferred the quarter section to one Podgorny by an instrument of transfer in which it reserved to itself the coal and the petroleum.

26 Ante, footnote 2. 27 (1906) c. 24.
When the registrar issued a new certificate of title covering the quarter section to Podgorny, he made two errors. First, the new certificate reserved to the C.P.R. only the coal, instead of the coal and the petroleum. Secondly, the old certificate (No. 424) was endorsed with a memorandum to the effect that it was cancelled in full as to the Podgorny quarter section. It made no mention of any reservations.

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

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

In 1943 the errors of the registrar were detected by officials in the land titles office, who endeavoured to correct them by notations made upon the original certificate issued to Podgorny and on all subsequent certificates of title relating to this quarter section. These corrections would, if valid, have restored the petroleum to the C.P.R.; in other words, they would have placed the titles in the same state as if the errors had not occurred.

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

1. Was there “misdescription” in the title issued to Podgorny?
2. Did the C.P.R. hold a “prior certificate of title”?  
3. Were the corrections effective?

If the answer to any of these questions was “yes”, the C.P.R. would win. The trial judge, the majority of the Appellate Division of the
Supreme Court of Alberta and the majority of the Supreme Court of Canada, however, answered all of them in the negative. In order, here were the results:

(1) *Misdescription.* Misdescription is one of the exceptions to an indefeasible title under the Torrens system. The Supreme Court of Canada held, however, that the term "misdescription" applied only to misdescription of boundaries and not to the erroneous inclusion or exclusion of minerals.

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

(3) *Power of correction.* The Supreme Court held that the provisions in the act permitting the registrars to make corrections did not apply so as to effect bona-fide third-person purchasers for value. Therefore the purported corrections were a nullity.

In the result, Turta, or those claiming through him, were held to be entitled to the petroleum that the C.P.R. had never transferred or intended to part with. The C.P.R. publicly stated that this petroleum had an approximate value of $5,000,000 and that, had the C.P.R. leased it on its usual one-eighth royalty basis, the estimated value of the royalty would have been $625,000 over the life of the oil wells drilled on the land.

The C.P.R. in this case had no recourse to the assurance fund. The Alberta act at one time read that any actions against the fund must be instituted within six years from the date the error was discovered and that there was no limit to the amount recoverable from the assurance fund. In 1935, however, an amendment was made to the Alberta Land Titles Act, which provided that an action would have to be commenced within six years of the date when the error took place and in 1949 a further amendment was made limiting the amount recoverable from the assurance fund with respect to claims for mines and minerals to $5,000. Thus the C.P.R. had no recourse for the loss it had suffered. The error had occurred longer than six years ago, and indeed the six-year time limit had expired long before the error was even discovered. In any event, the amount of $5,000 recoverable would hardly have justified the making of a claim.

The *Turta* case lays down no new Torrens principle; it does,
however, illustrate with staggering force the loss that can result to a landowner who has done no wrong, and the conscience of a government that can permit such a loss to occur. For those reasons the case has become a leading one. As Professor Whitmore has commented:\textsuperscript{30}

If the monetary loss to the former owner and the fortuitous gain to the present owner had been of more ordinary dimensions, the facts had not fallen so tantalizingly close to two excepted situations and the subject matter had been of less intimate concern to a major industry, the decision might have been regarded as little short of inevitable.

What does the \textit{Turta} case teach us about the Torrens theory as it is followed in Alberta through the medium of the Land Titles Act of the province? The lesson to be learned is that the aim of facility of transfer has scuttled the aim of security of title. Sir Robert Torrens’ trust in the Merchant Shipping Act and his mania for convenience and simplicity permitted the purchaser of a dinghy to acquire a merchant ship as well—and the ship in this case was a valuable oil tanker. The vendor was left without even a life jacket.

On every pertinent issue the case holds, in effect, that the Land Titles Act sacrifices the certainty and stability of the title of the earlier owner to the object of simplifying proof of title and facilitating dealings with land in such a way that, in the absence of actual fraud on his part, the transferee for value, who registers in the manner prescribed by the act, prevails against an earlier owner of the land even in the absence of any negligence or inequitable conduct on the part of the latter.\textsuperscript{31}

\section*{III. The Assurance Fund}

\textbf{(i) The theory}

Alberta is one of the jurisdictions that adopted the Torrens system at an early date before any other system of land registration had taken hold. As a fortunate consequence, all surveyed land (which, for practical purposes, means all settled land) in Alberta is registered under one system. Citizens, including solicitors, are not troubled by two systems of registration competing one with the other. A landowner is given no alternative of registering his land under any other system than the one the state provides. If, by an error of a government employee in administering the system, a landowner suffers damages, he looks to the government for recompense.

This indemnifying provision of the Alberta Land Titles Act is an essential feature of the Torrens system and is found in the


\textsuperscript{31}\textit{Ibid.} at p. 196.
great majority of Torrens statutes. It is based on the simplest premise, that if the state warrants the title under its own system, then it should recompense the person who suffered by relying on that warranty. The state thus converts the sufferer's legal right into cash and theoretically places him (so far as a monetary payment can do so) in the position he would have been in had the error not occurred.

The state makes provision for this contingent liability it assumes by collecting a fee from persons dealing with land at the land titles offices. The fee is usually a fixed percentage of the value of the land concerned. The fund built up from these fees is called in Alberta, and in a large number of Torrens jurisdictions, the Assurance Fund. The fee charged should of course bear some relation to the risk undertaken by the state and reflect the amount of claims made against the fund in the same fashion as a fire-insurance premium. Thus the fund will not become needlessly large or dangerously small. This assurance fund fee is not to be confused with the registration fees charged on every transaction by the state; these latter bear the cost of operation of the system and are really service fees.

Once a loss occurs as the result of an error, the person damaged makes a claim against the fund for an amount sufficient to recompense him. The determination of the cash value of the loss is not always a simple problem, but it is no more difficult than the determinations of damages that courts are regularly required to make.

(ii) The theory in practice

A claimant against the assurance fund in Alberta soon finds that he has many statutory conditions to meet. The procedure he must follow is first to bring an action in the courts against the registrar. Three months notice of the action must be given to the registrar by the intended plaintiff. The action itself must be brought within six years from the date when the error occurred or cause of action arose. This limitation section of the Alberta act, which is found in many Torrens statutes, is the first hurdle facing the claimant.

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32 R.S.A., 1942, c. 205, s. 153.
33 Mr. T. B. F. Ruoff prefers the word "insurance" to "assurance" because the risk undertaken is possible and not certain. See the Record of the Commonwealth and Empire Law Conference, 1955, p. 332.
34 R.S.A., 1942, c. 205, s. 157.
35 Ibid., s. 163.
36 Ibid., s. 167.
The error may have occurred more than six years before the claimant's knowledge of it, but knowledge is not an ingredient and the section is absolute. The lack of knowledge need not necessarily be the result of a want of diligence on the part of the claimant. It is conceivable that a situation can arise where a claimant is not put in a position to make a claim against the assurance fund until after he is out of time. Consider the case where \( A \) sells to \( B \), who sells to \( C \). An error by misdescription arose in \( B \)'s title (part of \( A \)'s property was registered by error in \( B \)'s name) and was passed on to \( C \). An error of this type is one of the exceptions to indefeasibility and, therefore, \( A \) can claim rectification against \( C \) and recover his property. If \( A \) does not learn of his deprivation for some time, and does not commence his action for rectification for, say, eight or nine years, \( C \)'s action against the assurance fund will have been outlawed. In other words, \( C \)'s right to claim expired six years from the date of the misdescription, which was before any notice to him that he had a claim. This is inequitable.

The C.P.R. lost the Torreta case when it was unable to show that the error which placed the petroleum in the name of Torreta was one of the exceptions to indefeasibility: the petroleum was therefore irrecoverable. In these circumstances, the C.P.R. had a cause of action against the assurance fund arising out of the injury done to it by the registrar's error. But the error occurred in 1908. This meant that, under the present statute, the C.P.R. 's action was outlawed long before the error was discovered.

Even had the C.P.R. been within the statutory time limit, the amount it could recover would scarcely have justified the commencement of an action. The Alberta and Saskatchewan acts were both amended in 1949 to limit the amount recoverable as a result of any error affecting mines and minerals to the amount paid for the minerals plus a maximum of $5,000 for present or prospective losses.\(^{37}\) The C.P.R.'s total prospective loss was estimated by the company to be $625,000. The state was prepared to pay the C.P.R., had it brought its action in time, four-fifths of one per cent of its loss. For this reason the C.P.R. describes the Alberta Torrens system as "confiscatory legislation".\(^{38}\)

This restriction against recovery when mines and minerals are involved is obviously aimed at avoiding the payment of very large claims. Insurance companies restrict their liability in certain cir-

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\(^{37}\) Ibid., now s. 167a(1).

cumstances for the same reason. But an insurance company has not placed itself in the position where it is responsible for the loss as the state has when it institutes a Torrens system of land titles registration.

If the prospective claimant is within the time limitation and if his claim does not deal with mines and minerals, his only worry is whether the assurance fund is possessed of sufficient funds to pay his claim. This is a practical problem faced by all litigants, and not one confined to Torrens system claimants. In some Torrens jurisdictions the low state of the assurance fund is scandalous. In other jurisdictions the fund is so wealthy that an assurance fund fee is nothing more than a tax. Baalman states that the New South Wales fund is in this condition, a condition he describes as "indecently solvent". Alberta comes under the same description. In this province, the government is authorized to transfer sums in excess of $75,000 to general revenue—a not unusual provision—and as a result the province has benefited at the expense of landowners by more than three and one-half million dollars. The fund has collected over $3,800,000 and so far paid out only a little more than $73,000. Obviously the ratio is out of line.

Other states are in similar positions. For example, South Australia has a fund exceeding £300,000, out of which not one penny was paid between 1907 and 1952. It is evident that in many jurisdictions claims are scarcely ever made, and those that are made are seldom successful.

Are these precautions against payment necessary? Must a Torrens state place so many hedging restrictions around the sanctity of its assurance fund as to make recovery of a justified claim a difficult and often impossible task? England thinks not, and England operates a modified Torrens system. There, no court action need be commenced against the registrar; instead only notice of a claim is filed with the registrar. And the time limit does not run from the date of error but only from the date of the discovery of the error, with a saving clause to penalize persons who have been negligent in failing to make themselves aware of the error. The English system, also, places no maximum upon the amount recoverable; the state operates the system there and the state places all its resources behind the system. If the fund is

39 Ante, footnote 21, at p. 56.
40 R.S.A., 1942 c. 205, s. 156(2).
42 Ante, footnote 15, at p. 194.
43 Land Registration Act, 1925, 15 Geo. V, c. 21, s. 83(7) and (8).
44 Ibid., s. 83(11).
at any time insufficient to pay a claim, the Exchequer provides the balance required.\(^{46}\)

The parsimonious attitude displayed by the province of Alberta toward payment of mines and minerals claims is difficult to understand. One of the province’s largest single sources of income is its petroleum resources and yet it does not feel obligated to pay adequate compensation for errors in petroleum titles. It is true that oil companies seldom contribute to the assurance fund, as will be shown later, but owners of mineral rights do contribute and yet have only a nominal claim.

(iii) Scope of the assurance fund

Is the assurance fund in Alberta fulfilling its function? Is it, by its mere existence, meeting the need for a fund that is an integral part of a Torrens system? Even if the limits of liability were removed, would that be enough? Not according to the Deputy Registrar in England, Mr. Ruoff, who states that the insurance principle of a Torrens system is far wider than governments recognize. He has said:\(^{46}\)

\[ \ldots \text{the insurance principle, properly understood and fully carried out, involves far more than that an owner’s title, that is known to be reasonably sound, is guaranteed by the State. In the widest sense it means not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar, or the Commissioner, or other responsible officer, on bringing land under the Act, to cure the title of known defects so far as he possibly can. It implies that the whole business of registration ought to be conducted with such an economy of public manpower, public time and public money that the saving which is achieved far outweighs any payment of compensation for errors or omissions which may become necessary from time to time. This ideal is, of course, only possible if titles office officials are less meticulous in their scrutiny of the work of solicitors. For why should not reliance be placed upon the work prepared by professional men? In commenting thus the writer is aware that in all of the States of the Commonwealth [of Australia] there is a minority of solicitors who fail to maintain the standard of efficiency that may reasonably be expected of a qualified practitioner and also that, so far as applications to bring land under the Act are concerned, the number of solicitors who consider themselves competent to do general law conveyancing grows yearly less.} \]

Applications to bring land under the Alberta act are small in number but will increase as new areas of the province become populated. The trend northward is evident. Ruoff’s comments have application, however, in every operation of the Torrens system.

\(^{46}\)Ibid., s. 85(4). \(^{48}\)ANTE, footnote 15, at p. 195.
The staffs of the land titles offices should rely more on solicitors and by so doing increase the efficiency of the system. Most errors that have been discovered in Alberta are "internal" errors, not ones arising out of a solicitor's carelessness. Another factor affecting efficiency is manpower. If the registrars of the Alberta land titles offices could attract to the task as many trained men as they could use, the efficiency of the administration would likely rise even above the present standard.

IV. Mines and Minerals

(i) The problems

Sir Robert Torrens reasoned that if title to ships could be transferred and registered in a straightforward fashion, then a similar system could be applied to registration of land, and so his land-registry bill was based on a shipping-registry statute. The analogy is not close enough however. Although no difficulty arose where title to a ship was transferred, or where the shipowner borrowed money on the security of his vessel, what would have happened if the owner had transferred title in the ship to another party, but reserved to himself all the title to the ash timbers supporting the aft hold, together with a right of access to enable him to recover and remove the timbers, bearing in mind that there might be no such things as an aft hold or ash timbers? This is exactly what happens in many land transactions in Alberta today, where the owner of a parcel of property sells only the "surface", reserving to himself all the "mines and minerals together with the right to work the same". The landowner is reserving to himself something that may not exist and that indeed may be located not directly under the surface of the parcel of property he has sold but under property some distance away. Oil and gas are fugacious in their nature and travel within the subterranean strata from one end of the pool to the other. Various legal theories exist as to the ownership of fugacious minerals; needless to say, the problem exists under any system, but other, more flexible systems might provide better for this type of contingent ownership.

It is quite reasonable to surmise that Torrens did not contemplate the severance of mines and minerals from the surface. Perhaps he was a student of the *ad coelum* theory, which still retained

47 Merchant Shipping Act of South Australia (1854), 17 & 18 Vict., c. 104.
49 *Cujus est solum, ejus est usque ad coelum et ad inferos*: Co. Litt. 4a;
a measure of popularity in his time. Again he might have designed his system only for surface rights. It is certain that there is no mention of mines and minerals in the early Australian Torrens statutes; neither is the subject indexed in that early compendium of Torrens law, *The Australian Torrens System*, by Hogg.\(^5^0\) At any rate, the practice of reserving certain minerals is one of long standing in Alberta and one of procedural difficulty.\(^5^1\) The Crown in the right of the Dominion commenced reserving the minerals to itself, when making grants, as early as 1888. The Canadian Pacific Railway Company began before 1900 to reserve all coal to itself on the sale of its land. Later the reservation was extended to include both coal and petroleum. The government of the province of Alberta never disposes of the mines and minerals in land sold by it. It is this policy of the government that reaps such rich returns in this oil-plentiful province.

The *Borys* case\(^5^2\) indicated the possible result of a narrowly worded reservation. In that case "petroleum" was held not to include "natural gas" except for special purposes. In consequence the popular petroleum reservation now includes "petroleum, natural gas and related hydrocarbons". The case has added another doubt to the conclusive nature of a certificate of title. It states that the meaning of any particular reservation must be interpreted as of the date of the transfer. Thus two certificates of title may disclose precisely the same wording, but vary greatly as to meaning because one arose out of a 1910 transfer and the other out of a 1950 transfer. Locke J. of the Supreme Court of Canada does not, however, agree with the Privy Council on this point for he has since ruled just the reverse.\(^5^3\)

Theoretically, a landowner who owns the land in fee simple, with a reservation of the petroleum to someone else, should be able to dispose of his entire interest less only, say, the sulphur or the nickel. Again, if mineral reservations are permitted under the act, the landowner should be able to sell all the petroleum contained, for example, in the D-3 zone of the Devonian formation, but retain what is located elsewhere. But, once again, the theory

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\(^5^0\) Hogg, *The Australian Torrens System* (1905).


is not practised, at least in Alberta. The registrars of land titles will not permit the transfer of minerals in horizontal strata. They are also very reluctant to permit the division of ownership of minerals; thus it is impossible for a mineral owner to transfer his coal to A and his oil to B. Neither of these prohibitions has statutory authority; the first stems from the practice that will not permit the division of ownership of horizontal estates above the surface (it is impossible in Alberta to register as such the sale of the fifth floor of a building); the second prohibition is based on the theory that conveyancers may inadvertently convey the same mineral interest to two different purchasers (a reservation of sulphur plus the right to remove it might conceivably overlap with a reservation of hydrocarbons plus the right to remove them because the two substances are found intermixed). But, at the same time, what chance is there of confusion between iron ore and petroleum?

The Torrens system thus in practice abrogates in still another respect the citizen's common-law right freely to alienate his property. Administrators of the system say that the restrictions are necessary because it is not equipped to handle these types of transactions. If they are right, it is an indication of still another shortcoming of the Torrens system.

(ii) One system for the citizen; another for the province

Citizens of Alberta are given no opportunity to register their interest in land under any system except the one the province has selected. At the same time this same province will not permit millions of dollars worth of its own land holdings to be administered under the Torrens system. All mines and minerals owned by the Crown in the right of Alberta are administered by the provincial Department of Mines and Minerals.\textsuperscript{54} Even in surveyed areas, where title to the surface is registered under the Land Titles Act, certificates of title to the mineral rights are almost never issued to the Crown. These Crown mineral rights are widespread; all the minerals underlying approximately nine-tenths of the land in the province are Crown owned.

The practice of the Alberta government is to issue leases of mineral rights through the Department of Mines and Minerals and to maintain a system in that department to record these leases and assignments of them. Oil companies and others who deal with the department in Alberta readily acknowledge that its work is efficient and expeditious. Be that as it may, these virtues are also

\textsuperscript{54} Mines and Minerals Act (1949), c. 66, s. 9(a).
claimed by the Torrens system and there is no reason why, if as its supporters claim the Torrens system is the best registration system so far devised, it should not cover all surveyed lands and not merely interests that are not owned by the Crown. The Crown should not in these circumstances be in any different position than an individual landowner.

The statute authorizing the work of this department is unfortunately narrow in its scope. Department officials have recognized the lack of flexibility and have recently secured the passage of enabling legislation that, when put fully into effect, will considerably broaden the work undertaken.

(iii) The mineral certificate

In 1949, when it became evident that past errors in the land titles office over mines and minerals were soon to erupt into litigation, such as the Turta case, the Alberta legislature quickly amended the Land Titles Act. The Saskatchewan legislature did the same. (Litigation appears to accompany the oil industry; an American title insurance company describes an oil well as “a hole in the ground surrounded by lawsuits”.) These amendments, first of all, limited the amount in mineral claims for which the assurance fund was liable to the moneys actually paid out for the mineral interest, plus the sum of $5,000 for present or prospective loss of profit.\(^{55}\) The amendments next ensured that future claims against the fund would be minimized by providing that the parties to any disposition of mineral interests, as a condition precedent to registration of the disposition, must secure a mineral certificate from the registrar.\(^{56}\) Unless such a certificate is procured, no claim against the assurance fund is permitted arising out of errors or omissions on the part of the registrar. The certificate exhibits the result of a historical search by the registrar into the ownership of the minerals. If the search reveals that the vendor is not the owner, then obviously the sale will not proceed and a probable future claim against the fund is halted.

The mineral certificate is nothing more than a warranty of the accuracy of the certificate of title. Perhaps in due course it will be found necessary to carry this certification of the correctness of the conclusively correct certificate to a third stage. In the meantime the double precaution to preserve the feature of certainty in the

\(^{55}\) Now s. 167a(1) of the Alberta Land Titles Act, R.S.A., 1942, c. 205. Now s. 195(1) of the Saskatchewan Land Titles Act, R.S.S., 1953, c. 108.

\(^{56}\) Now s. 167a(2), (3), (4), (5) and (6) of the Alberta Land Titles Act. Now s. 195(2), (3), (4), (5) and (6) of the Saskatchewan Land Titles Act.
Torrens system has completely removed, at least in Alberta, the feature of facility of transfer. Minerals registered under the Land Titles Act cannot be sold, leased or assigned and the transaction registered until the parties have received from the registrar a mineral certificate. The registrar may not issue such a certificate until he has first carefully searched the chain of title to the minerals in question. This search is a time consuming procedure and the registrar's staff is limited in numbers. The natural result is delay. At the time of writing, the interval between the ordering and the issuing of a mineral certificate at the Land Titles Office for the South Alberta Land Registration District is a minimum of one week. At the North Alberta office, which covers the larger oil-bearing areas, the delay is at least three weeks. These delays can result in major land plays being lost. It is not unfair to say that the land titles system is so cumbersome in this respect that the oil industry can carry on only with the help of the caveat, which is to be discussed now.

The mineral certificate is an excellent example of the incompatibility of the two foremost Torrens principles—certainty of title and facility of transfer. It is still another of the reasons why oil companies rely so heavily on the use of caveats. A petroleum and natural gas lease can be registered by way of caveat and thus avoid the mineral certificate requirements. By so doing, all rights against the assurance fund are of course waived, but, inasmuch as the recoverable claim against the fund is so small, oil companies prefer not to recognize it's existence. The universal practice in the oil industry is to rely on historical searches made by company employees and then to register interests in land by way of caveat to avoid both the mineral certificate provisions and the assurance fund levy. No assurance fund fees are charged on the registration of a caveat, but by one of those strange paradoxes of the Torrens system in Alberta the caveator can recover (if his claim is not for minerals) from the assurance fund if he suffers through an error of the registrar. A caveator is thus placed in the same favourable position as a contributor to the assurance fund.

V. Caveats

The position of the caveat in the Alberta Torrens system is enigmatic. The caveat was originally intended to be a temporary instrument, designed to protect an interest in land until the claimant of the interest was able to register a document, such as a transfer or a mortgage, to evidence his interest, or otherwise establish his
claim. The caveat in Alberta is now registrable and permanent. This permanence has permitted the registration by way of caveat of many types of instruments that are not themselves registrable. Thus, one more of Torrens’ aims, to restrict registrable documents to a small number that clearly disclose the interest conveyed, has been abandoned.

In the original Torrens statutes, the caveat was not a “registrable” instrument, but was only filed or lodged. The effect of filing a caveat under these acts was quite clear. Nobody, subsequent in time, took “notice” of the caveat, nor was the subsequent interest “subject to” the interest of the caveator. Rather the caveat acted as an absolute prohibition on all dealings affecting the interests against which the caveat was filed. A moratorium on land dealings came into effect as soon as a caveat was filed, and lasted for a limited period of from fourteen days to three months. During this time the caveator had an opportunity to prove or enforce his interest. He was given an opportunity of establishing his claim without being faced with the possibility of a fresh registration under the Torrens system, which ordinarily does not recognize equitable or non-registered claims such as his.

The gradual trend away from this position commenced with the North-West Territories Real Property Act of 1886, on which was patterned the later Alberta and Saskatchewan Land Titles Acts. The statute of 1886 limited the operation of the caveat to three months; during this time registrations were not held up but were simply made “subject to the claim of the caveator”. Thus, registrations could continue, but the caveator preserved the right to establish his claim on the basis of conditions as they were when the caveat was filed.

The temporary function of the caveat gradually changed to a more permanent one. The North-West Territories statute gave discretion to judges to extend the time during which a caveat was kept alive. Next, a provision was incorporated in the Alberta Land Titles Act that a caveat was effective until terminated by notice given by someone claiming an interest in the land affected by the caveat.

During these several transitional stages, the effect of the caveat had not changed, only the period of its operation. Until 1906, the caveator was still required to establish that, in equity, he had an

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57 An Act further to amend the law respecting the North-West Territories (1886), 49 Vict., c. 25, s. 100 (Dom.).
58 (1906) c. 24, s. 89.
interest in the land at the time of filing his caveat. The Alberta legislature has not kept pace with its own intentions and as a result the present Alberta act inconsistently refers to "filing", "lodging" and "registering" caveats. A new reference to caveats that came into the Alberta act in 1906 is "registration by way of caveat", which occurs in the present section 145:

Registration by way of caveat, whether by the Registrar or by any caveator, shall have the same effect as to priority as the registration of any instrument under this Act, . . .

This section introduced into the law a radically new conception of the caveat. The effect of the section was commented on in an article in the Canadian Bar Review over thirty years ago. The author at that time stated: 59

It cannot be denied that this section has introduced a new and, it is submitted, a confusing element into the determination of the question as to just what result a caveat does produce. Its very terminology is foreign to the spirit and letter of the Acts. There is no such thing as 'registration' by way of caveat. Registration under the Acts is accorded only to instruments in the form and executed in the manner required by the Acts. This was part of the very essence of the legislation, to secure simplicity by limiting the number and variety of instruments which would be registered. The registrar decides when an instrument is fit for registration, and when registered the instrument is embodied in the register and creates the interest mentioned therein. The flimsy grounds set out in caveats filed are common knowledge. Can it possibly be that the caveator thereby, over the head of the registrar and the provisions of the statute, secures to himself the 'creation or transfer' of the interest claimed? To ask the question would appear to answer it in the negative. Registration is the essential process and can only be obtained after the registrar has satisfied himself that the instrument is in proper form and that all the requirements of the law have been complied with. Registration of the caveat we might understand, but registration 'by way of' caveat—that is registration of some instrument by registering a caveat alleging a claim under it—is puzzling.

However, it may be answered, the point need not be laboured, as the section deals only with priorities and therefore in any event it is only with respect to priority that such registration is equivalent to registration of an instrument. The latter part of the section, it will be urged, emphasizes this. It provides for the subsequent lifting out, as it were, of the caveat and the substitution in its place of the instrument under which the caveator made his claim, provided that such instrument be one that may be registered. The cases where this is possible obviously form only a portion, and that a small one, of those in which caveats are filed.

This question of whether caveats determine only priorities or whether they create substantive rights did arise in the Supreme Court of Alberta in Re Royal Bank of Canada and La Banque d’Hochelaga. The case concerned a contest between two banks that were each equitable mortgagees. The Royal Bank held a mortgage by way of a deposit of a duplicate certificate of title and La Banque d’Hochelaga held a mortgage of the same land under an executed instrument of mortgage, dated after the deposit of the D.C.T., but prepared in the form authorized by the Land Titles Act. La Banque d’Hochelaga was unable to register its mortgage at the land titles office because the duplicate certificate of title was with the Royal Bank. It therefore filed a caveat instead; the Royal Bank did not.

Stuart J. (dissenting) took the view that the historical and logical meaning of a caveat was that it was nothing more than a warning or a notice and that it could create no new rights. It only prevented rights arising in others after the date of the filing of the caveat: it was “intended strictly to preserve the status quo ante, to keep things exactly as they are and no more”. He concluded that, inasmuch as the claims of both banks were equitable, the first in time prevailed and therefore the Royal Bank was entitled to succeed. Mr. Justice Stuart’s decision was that the words “registration by way of caveat” meant nothing more than “registration of a caveat”. If the meaning were otherwise, it would be unnecessary to register instruments such as mortgages altogether. He stated:

If a mortgagee can keep this mortgage in his pocket and merely file a caveat, which will give him all the advantages of filing his mortgage, not only with respect to subsequent transactions, but with regard to all prior unregistered instruments or securities, then it simply amounts to this that the registration based on a mortgage of a caveat is equivalent to registration of the mortgage and the latter ceremony is entirely unnecessary. Neither certificate nor mortgage need be produced and yet a caveat based on the latter is to be given all the legal effect, even as regards prior rights of the registration of the mortgage although s. 41 of the Act says that ‘no instrument until registered shall have the effect of passing any estate or interest’.

The majority of the court, however, held that by the words “registration by way of caveat” an interest could be conferred that takes priority over a prior equitable unregistered interest. The court discussed its own previous decision in Stephens v. Bannan

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60 (1914), 7 W.W.R. 817; (1914-1915), 8 A.L.R. 125.
61 (1914), 7 W.W.R. 817, at p. 820.
62 Ibid., at p. 819.
63 Ibid., at pp. 819-820.
and Gray,64 in which it had decided that the person who first lodges the caveat secures priority. In that case, however, the person who first filed the caveat was also the first in time and in equity; therefore no contest arose as existed in the Hochelaga case.

Simmons J. in the Hochelaga case discussed whether a caveat could thus protect an interest created by a document unregistrable under the act.65 In this case, the interest being protected arose out of a mortgage that was registrable, and therefore the point was academic. The question is of much interest in Alberta at the present time, however, for it is doubtful whether a petroleum and natural gas lease is registrable. This is the document almost invariably registered by way of caveat, the oil company caveators relying on the protection they hope a caveat gives to a document that is not registrable as such.

The practice therefore of registering by way of caveat has continued through the years and become exceedingly popular. To register by way of caveat is often much simpler than preparing proper Torrens documents, and not nearly so revealing. Oil companies almost never register oil leases as such; they prefer to use the caveat, which permits them to secure priority for their leases without disclosing the consideration or other details. This practice of registering by way of caveat makes it impossible for an outsider to make a complete search of a parcel of land. A caveat is rarely accompanied by the document that gives to the caveator his interest, and this makes it necessary to make inquiries outside the land titles office, one of the fundamental deficiencies of a deed system that the Torrens system was designed to overcome.

Solicitors to the petroleum industry are giving serious consideration to the practice of filing briefly worded caveats, however, following the decision of the Supreme Court of Canada in Ruptash and Lumsden v. Zawick.66 This case states that a caveat protects only those interests in an agreement that are actually set forth in the caveat. Cartwright J., delivering the judgment of the court, stated:67

The purpose of filing a caveat is to give notice of what is claimed by the caveator against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such party sees fit to file a caveat claiming one only of such rights it appears to me that any person proposing to deal with the land is

64 (1913), 5 W.W.R. 201; (1912-1913), 6 A.L.R. 418.
65 (1914), 7 W.W.R. at p. 828.
entitled to assume that the claim expressed is the only one made. *Expressio unius est exclusio alterius.*

A complicated agreement such as a petroleum and natural gas lease requires, therefore, a very lengthy and complicated caveat. It is likely easier, and certainly safer, to append the agreement to the caveat.

Another feature of the caveat practice in Alberta is the lack of any requirement for caveators to pay an assurance fund levy. As mentioned earlier, caveators, notwithstanding their failure to contribute to the fund, are nevertheless permitted, inequitably, to claim against the fund if they are deprived of their interest through an error in the land titles office.

As a result of the non-disclosure and non-contributing (to the assurance fund) aspects of the caveat, it is used extensively by the oil industry. Because petroleum and natural gas leases and other interests in minerals are seldom registered otherwise than by caveat, the caveat, in the case of mines and minerals, is the most widely used land titles document.

VI. Conclusion—Suitability

A discussion of a Torrens system in practice should contain some conclusion on its merit. The worth of any land-registry system was said by Torrens, as was explained at the beginning of this article, to depend on the inclusion of five ingredients—reliability, simplicity, cheapness, speed, and suitability. The last is without doubt the most important. No matter how reliable or simple or economical or speedy a system is, it has little value if it is not suited to the needs of the community. This fact should be kept in mind when evaluating the Torrens system as it is practised in Alberta. For here many of Torrens' theories have not been respected: they have been altered or deleted. A theorist might take issue with these variations, but the final conclusion, in practice, must depend on whether the system as operated in Alberta is doing a worthwhile job, as good or a better job than any other system could do having regard to the local conditions.

Doubts whether the Torrens system is the best for Alberta came to a head shortly after the decision of the Supreme Court in the *Turta* case. Indeed it was questioned whether the system is safe for landowners. Householders realized that they could lose title to their homes. The C.P.R. became apprehensive about its other

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68 Ante, footnote 1. 69 Ante, footnote 2.
mineral holdings and discovered errors by January 1955 in 41 quarter sections of land, involving some 6,560 acres.\textsuperscript{70} The feeling was widespread that the Alberta Land Titles Act is indeed, as the C.P.R. claimed, a form of "confiscatory legislation."\textsuperscript{71} Gradually, however, as solicitors realized that errors seldom occur in the land titles offices over surface dealings, and that the restrictions on claims against the assurance fund are severe only in connection with mineral claims, the excitement over the Turta case and its ramifications died down. Only owners of quantities of valuable mineral rights, such as the C.P.R. and the Hudson’s Bay Company, remained critical of a system that had been proved unfair to mineral owners. At the request of the C.P.R., the government of the province of Alberta invited a committee of the Benchers of the Law Society of Alberta to examine the operations of the Torrens system in the province. The duties of the committee were:

To give special study and consideration to the following matters, namely:

1. The form, content and general principle of legislation which might be enacted with respect to settling the equities of persons in regard to mineral rights arising out of errors respecting ownership of or claims to such mineral rights in the Land Titles Office; and

2. The establishment and operation of a special assurance fund for mineral rights;

and generally such other matters pertaining thereto as the Committee might deem necessary or advisable.

The committee held public hearings in Calgary\textsuperscript{72} at which submissions were presented by a large number of major oil companies—which, usually, are mineral lessees—and also by owners of mineral rights. Considerable study had already been given to the Torrens system by the spokesmen for the companies represented, many of whom had had experience in jurisdictions with deed-registration systems. No one advocated that the Torrens system be replaced. The most radical change suggested came from the C.P.R., which asked that, in the event of error, the land always be returned to the registered owner and the person relying on the register be permitted to claim against the assurance fund.\textsuperscript{73} This suggestion would reverse the present practice and would, in the event of another Turta case, restore the petroleum to the C.P.R. while giving Turta a right to claim against the fund. The C.P.R. contended that this would be a more equitable division of the loss. It is indeed the manner in which Torrens systems are forced to operate in the

\textsuperscript{70} Ante, footnote 38, at Vol. 1, p. 5.
\textsuperscript{71} Ibid., Vol. 1, p. 12.
\textsuperscript{72} May 19th-20th, 1955.
\textsuperscript{73} Ante, footnote 38, at Vol. 1, pp. 23-24.
United States under the 14th Amendment. The result is what might be called a modified Torrens system.

The oil companies all championed the Torrens system. They admitted that they did not rely on the assurance fund, that they did not like the mineral certificate, that they registered interests only by way of caveat, and that they seldom relied on the top title, but instead made historical searches. But they still preferred what was left of the Torrens system to a deed-registry system. The oil companies did not appear to be worried about the failure of Alberta to honour Torrens’ theories, because they considered the Land Titles Act of this province less objectionable than the deed-registry systems of other jurisdictions.

The support of oil companies must be viewed in perspective, however, for, as has been shown, the practice in Alberta with respect to caveats is peculiarly favourable to lessees of mineral rights, such as oil companies. Again, oil companies, as mineral lessees, are not concerned in most cases whether the owner of the minerals loses his title and someone replaces him. The law in Alberta seems to be well settled that if a lessee acquires a lease from the registered owner while relying on the register, and the register later proves to be in error and subject to rectification, the person in whose favour the register is rectified must accept his title subject to the lease granted by the erroneous owner.74 Thus the lease stands and the lessee is affected only to the extent that he now makes his royalty cheques payable to a different lessor.

The report of the special committee of the Law Society has now been presented to the Alberta government, but as yet the findings and recommendations have not been published. The only information available on the committee’s work is the evidence presented at the public hearing.

Notwithstanding the apparent preference by oil companies for the Torrens system, the question may be asked whether it is operating to the best advantage of all Albertans, having regard to the conditions in the province. Is it doing its job? There are many arguments to suggest that the answer to this question should be no. These arguments are set out in abbreviated form here:

(a) The system shows a tendency to be rigid and not adaptable to new situations. Instead, the facts have to bend to accommodate the system. This lack of flexibility has been discussed with respect

to the failure of the administrators of the Alberta act to permit registration of horizontal as well as vertical parcels of land.

(b) The government from the beginning has been operating the assurance fund as a source of public revenue. Contributions to the fund are little more than a form of taxation on the landowners of the province.

(c) The legislature has shown no willingness in the past fifty years to streamline or modernize the drafting of the statute. The wording was borrowed wholesale from Australasia and in some cases the effect is unintelligible. For example, secton 159 of the Alberta act contains the words "as aforesaid". These words refer to a section formerly preceding section 159, but deleted from the act over twenty years ago! Surely this shows that the statute is not getting the consideration it deserves from the legislature. Professor Whitmore said on this point, when commenting on the 1906 act, of which a large part is still found in the present statute:

The act was far from clear. It was replete with ellipses and tacit assumptions. Some of its provisions were barely intelligible, let alone consistent with others. When a statute of the vintage of 1886 or 1906 is examined in the light of the knowledge and experience available in 1954 it is almost bound to disclose uncertainty, ambiguity and inconsistency.

(d) No effort has been made by the legislature to incorporate into the statute commonsense suggestions that would improve the operation of the system. For example, an antiquated scheme of placing memoranda on certificates of title still is in use. When a notation of a mechanics' lien, for example, is placed on a title it remains there forever. When the lien is discharged another memorandum, so stating, is added. On a single certificate of title representing a large parcel of property, the certificate often becomes so covered with charges and discharges, caveats and releases, partial severances and reservations that it is almost impossible to relate one to another. Often an hour is spent comparing discharge memoranda against charging memoranda to see which, if any, is still subsisting. No wonder errors occur. This is how the error in the Turta case arose. Of all this, Ruoff said:

If, in order to understand a title, it is necessary for a searcher to examine a dozen endorsements, to interpret them in turn, and discover which of them are current, only to be thrown back on filed instruments for details of the information he seeks, what essential difference in principle is there between this process and examining derivative and

\textsuperscript{76} Formerly s. 105 of the 1906 act, deleted by S.A. 1935, c. 15, s. 11.  
\textsuperscript{77} \textit{Ante}, footnote 30, at p. 211.  
\textsuperscript{78} \textit{Ante}, footnote 15, at p. 162.
retrospective titles extending over a long series of years, which Torrens himself so deplored?

Rather than change, the legislators seem to take the position that the original theories and practices must be preserved at all costs, for their own sake, and never abandoned in favour of reality except in moments of crisis.

(e) The legislature has adopted the expedient of making violent changes in the act in moments of panic. Thus the $5,000 limit. Thus the mineral certificate. Thus the limitations sections. It might well have been shown, on careful examination, that none of these measures was necessary. All were designed to protect the financial position of the province at the expense of the individual citizen. Yet it is the province that has profited by more than three and one-half million dollars from the system.

Once again, the observations of Ruoff on this point of inconsistent legislation bear careful consideration: 78

... the measure of the danger of these several kinds of intrusions into the principles of the Torrens system is not necessarily to be found in any actual damage caused. It consists in a loss of faith in the literal efficacy of the register and, unhappily, each fresh breach made by a heedless or a ruthless Legislature facilitates the making of future breaches.

In conclusion it is suggested that a studied, intelligent re-enactment of the Land Titles Act of Alberta could preserve those features of value which were first pressed by Sir Robert Torrens so many years ago, and as well introduce into the system the refinements necessary for Alberta in its present-day economy. Many of Torrens' original theories have proved impractical over the years. Nevertheless the Land Titles Act of the province has gained widespread popularity, and this through a period when it has been almost ignored by the legislature. The obvious advantages of a Torrens system should be retained; the obvious deficiencies should be remedied promptly to the extent possible. Such a task in such an important field as land registration should not be too onerous to lay at the door of the Alberta legislature. 79

78 Ibid., at p. 121.
79 I wish to express my appreciation to W. F. Bowker, Q.C., Dean of the Faculty of Law, University of Alberta, and to S. J. Helman, Q.C., for their kindness in reading the transcript of this paper and for their many valuable suggestions.