*David Wright**

FORGERY AND THE *REAL PROPERTY ACT* 1886 (SA)

INTRODUCTION

THE law seeks to protect title to property. With regard to personal property this is achieved by application of the principle of nemo dat qui non habet. The protection of title to real property is governed by legislation. Section 69 of the *Real Property Act* 1886 (SA) grants the registered proprietor of Torrens title land an indefeasible title.[1] The principle of indefeasibility of that title is the "foundation of the Torrens system".[2]

The dominant theory of indefeasibility is that it is immediately obtained upon registration.[3] This is the theory which applies in South Australia.[4] The rival theory to immediate indefeasibility is that of deferred indefeasibility.[5] Briefly, the deferred indefeasibility theory contends that a

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* BEc (Syd), LLB (Hons) (Syd), LLM (UBC), Lecturer, Faculty of Law, University of Adelaide. The kind assistance of my colleagues Mr Simon Palk and Professor Tony Moore is gratefully acknowledged. All errors and omissions, however, remain the writer's responsibility.

1 As does its equivalents in all other States. See s42 of the *Real Property Act* 1900 (NSW); s42 of the *Transfer of Land Act* 1958 (Vic); s44 of the*Real Property Act* 1861 (Qld); s68 of the *Transfer of Land Act* 1893 (WA); s40 of the *Land Titles* Act 1980 (Tas).

2 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613.

3 See, for example, *Breskvar v Wall* (1971) 126 CLR 376; *Frazer v Walker* [1967] 1 AC 569; but note *Chasfild Pty Ltd v Taranto* (1991) 1 VR 225.

4 *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425.

5 For a full discussion of these theories and their competition see Bradbrook, MacCallum & Moore, *Australian Real Property Law* (The Law Book Company Ltd, Sydney 1991) paras 5.27-5.32; Stein & Stone *Torrens Title* (Butterworths, Sydney 1991) ch3; Whalan, *The Torrens System in Australia* (Law Book Company Ltd, Sydney 1982) ch23.

registered proprietor would only obtain a good title to the land if he or she is one transaction removed from the "infected" transaction.[6]

The legal system protects title to property only if it has been acquired in certain, approved ways and does not conflict with other specified rights. A title which is acquired by a non-approved method will not be protected by the legal system. Acquisition of title by a non-approved method constitutes the foundation of some of the exceptions to indefeasibility of title. It is possible to state that title to real property is protected unless an exception is applicable. The possible exceptions to immediate indefeasibility fall into four categories, which are:

(1) other registered rights;

(2) rights in personam;

(3) specific exceptions which are listed in the Torrens Legislation itself; and

(4) overriding legislation.

Forgery, not surprisingly, is an example of a non-approved method of acquiring title. It is generally dealt with in the specific exceptions category.[7]

With the exception of South Australia all Australian State jurisdictions deal with forgery under the specific fraud exception.[8] Fraud is constituted by forgery and non-forgery fraud. The operation of the specific fraud

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6 An "infected" transaction is one which is based on a mistake or error which would permit the court to avoid it. It is a transaction where title is obtained by a non-approved method.

7 But see *Mercantile Mutual Life Co v Gosper* (1991) 25 NSWLR 32 which held that the forgery may assist in establishing a personal equity, which in turn can be employed to defeat the title of a registered proprietor. See the discussion of this case by Wikrama-Nayake "Immediate and Deferred Indefeasibility" (1993) 67 *LIJ* 733. The existence of a personal equity is another contention that a registered proprietor who has lost title to the land may suggest in order to be reinstated to the register. *Mercantile* has been applied in *Lissa v Cianci* (Unreported, Supreme Court of New South Wales, Grove J, 5 March 1993).

8 The specific fraud exception is contained in s69I of the *Real Property Act* 1886 (SA); s43 of the *Real Property Act* 1900 (NSW); s43 of the *Transfer of Land Act* 1958 (Vic); s109 of the *Real Property Act* 1861 (Qld), s68 of the *Transfer of Land Act* 1893 (WA); s40(3)(a) of the *Land Titles Act* 1980 (Tas). The Northern Territory has a similar provision to South Australia, see s69II *Real Property Act* 1886 (NT).

exception has resulted in a bona fide registered proprietor who has given value gaining an immediately indefeasible title.[9] This has also been the result in cases where the fraud is constituted by forgery.[10] Forgery is but one form of fraud.[11]

In South Australia forgery is explicitly dealt with by another specific exception. This specific exception is to be found in s69II of the *Real Property Act*. Section 69II is not simply concerned with forgery; it is also relevant to where the registered proprietor has obtained title from a person either under a legal disability or who possesses an insufficient power of attorney. This idiosyncratic feature of the South Australian *Real Property Act* would be of limited interest except for the fact that s69II may be construed in two ways, one of which extends the operation of the largely dormant theory of deferred indefeasibility to titles acquired by forgery.

SECTION 69II

Fundamentally s69II is divisible into two parts. The first states the rule and reads:

> In the case of a certificate or other instrument of title obtained by forgery or by means of an insufficient power of attorney or from a person under some legal disability, in which case the certificate or other instrument of title shall be void

Simply this rule is that if title has *ever* been obtained by forgery, an insufficient power of attorney or from a person under a legal disability then it will be void.[12] Thus the title will be void in perpetuity. This is on the application of the bare rule. To relieve this result reference must be made to the proviso in s69II which forms the second part of s69II. It reads:

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9 See *King v Smail* [1958] VR 273, *Ovenden v Palyaris* (1974) 11 SASR 41; but note *Bogdanovic v Koteff* (1988) 12 NSWLR 472.

10 See, for example, *Mayer v Coe* [1968] 2 NSWLR 747.

11 *R v Ritson* (1869) LR 1 CCR 200 at 203-204; *Brott v The Queen* (1992) 66 ALJR 256 at 257, per Brennan J. In *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) NSW 529 at 537, Street J held that "[i]t follows ... that for the purposes of [s69I] a forgery is a fraud just as is an act falling within the ordinary meaning of that word".

12 The rule makes the title void. This should be contrasted with title which is gained by a non-forgery fraud. The specific fraud exception makes such a title voidable. One area of important difference between a void and a voidable title relates to the creation of subsequent equitable interests. See James, *Stroud's Judicial Dictionary* Vol 5 (Sweet & Maxwell, London 5th ed 1986) at 2802-2807 for the difference between void and voidable.

> Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate or other instrument of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid.

There is no doubt that to come within the proviso the person must have become registered, been bona fide and have given valuable consideration.[13] Equally uncontentious is the proposition that if title has been obtained from a person under a legal disability that the applicable theory is deferred indefeasibility. Legal disability has been defined by O'Loughlin J in the Supreme Court of South Australia in *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd* to include:

> (1) insanity;
>
> (2) infancy;
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> (3) bankruptcy; and
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> (4) a person under an order made pursuant to the *Aged And Infirmed Persons Act* 1940 (SA).[14]

The dispute relating to s69II, and which may mean that a case involving a title based upon a forgery may be decided differently in South Australia than elsewhere in Australia, involves the last seven words of the proviso. Two competing constructions of the proviso have been proposed. The first construction, which will be referred to as the *Wicklow* interpretation, reads the proviso as follows:

> Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate of title was obtained:
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> (a) by any person through whom he claims title from a person under some legal disability; or

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13 Obviously the proviso is of no assistance to a volunteer, such as persons who have obtained their interest under a will.

14 (1987) 45 SASR 247 at 261. This is not an exhaustive list. It is interesting to speculate whether the registered proprietor in *Gibbs v Messer* (1891) AC 248 who was fictitious would thereby be under a legal disability. O'Loughlin J in *Wicklow* suggests no (at 261) but fails to adequately state why not.

(b) by any of the means aforesaid (namely by forgery or by means of an insufficient power of attorney.

The other possible construction of the proviso, hereafter designated as the *Rogers* interpretation, is:

> Provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate of title was obtained by any person through whom he claims title
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> (a) from a person under a legal disability; or
>
> (b) by forgery; or
>
> (c) by means of an insufficient power of attorney.

The consequence of adopting the *Wicklow* interpretation is that immediate indefeasibility applies if title has been gained by relying on a forgery or an insufficient power of attorney, whereas if the title is taken from a person under a legal disability the appropriate theory to apply is deferred indefeasibility. This latter consequence is the same as that reached by the *Rogers* interpretation of the proviso, but the *Rogers* interpretation extends deferred indefeasibility to the other two situations, namely forgery and insufficient power of attorney. To answer the question of which interpretation has achieved ascendancy requires an examination of the decisions involving s69II.

THE CASE LAW

The first case to raise the issue[15] of the construction of s69II's proviso was *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd.*[16] In that case O'Loughlin J of the Supreme Court of South Australia held that the correct construction of the proviso to s69II only rendered title gained from a person under a legal disability susceptible to the deferred indefeasibility theory whilst title obtained by either forgery or insufficient power of attorney was immediately indefeasible upon registration. This case therefore supports the first

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15 It is unfortunate that Legoe J in *Hassett v O'Leary* (1990) 158 LSJS 291 did not entertain the obvious idea that the case may have involved a forgery. He did not, therefore, have to address the issue of the construction of s69II.

16 (1987) 45 SASR 247. For a full description of the facts of this case see the extensive and comprehensive discussion by Moore, "Interpretation of the *Real Property Act*" (1988) 11 *Adel LR* 405.

construction of the proviso mentioned above. However it needs to be noted that this interpretation of the proviso was not essential to his Honour's decision in the case as he found that the instruments in question were neither forgeries nor had they been executed by a person under a legal disability.[17]

Subsequent to *Wicklow* von Doussa J in the Federal Court had the opportunity to examine the proviso to s69II. This opportunity arose in *Rogers v Resi-Statewide Corporation Ltd.*[18] Briefly, the facts of that case were that Mr and Mrs Rogers were the registered proprietors of their matrimonial home. With neither the consent nor knowledge of his wife, Mr Rogers forged Mrs Rogers' signature on a memorandum of mortgage in favour of Resi-Statewide, who was bona fide and had given valuable consideration. The question which confronted the Court was whether upon registration Resi-Statewide received a good title. If the *Wicklow* interpretation was utilised Resi-Statewide would have had an indefeasible title. Counsel for Mrs Rogers submitted that von Doussa J was not bound to follow *Wicklow*. Counsel based this argument on two grounds. First, O'Loughlin J's construction of the proviso did not constitute part of the ratio of *Wicklow*. The Federal Court judge accepted this submission.[19] The second ground, based principally on the work of Professor AP Moore,[20] was that regard to the history of s69II indicated that Parliament intended deferred indefeasibility to apply to all three matters listed in the proviso.[21] After citing *Wacando v Commonwealth*,[22] *FCT v Whitfords Beach Pty Ltd*,[23] and *TCN Channel Nine Ltd v Australian Mutual Provident Society*,[24] to indicate that reference to parliamentary debates and second reading speeches to identify the mischief which an Act is to remedy is permissible, von Doussa J accepted this second submission.[25] Although his Honour recognised that the construction of a

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17 *Wicklow* at 261.

18 (1991) 29 FCR 219. See also Skapinker, "Shaking The Foundations" (1991) 65 *ALJ* 651.

19 *Rogers v Resi-Statewide Corporation Ltd* (1991) 29 FCR 219 at 222.

20 Moore, "Interpretation of the *Real Property Act*"(1988) 11 *Adel LR* 405.

21 Reference should be made to the comments made by the then Attorney-General which are recorded in SA, Parl, *Debates* (1886) at 141-2.

22 (1981) 148 CLR 1 at 25.

23 (1982) 39 ALR 521.

24 (1982) 42 ALR 496.

25 *Rogers* at 224-225. Attention should also be paid to the comments of Sheppard J in *Wright v McLeod* (1983) 51 ALR 483 at 530. It must be appreciated that all the cases referred to by von Doussa J related to federal courts using extrinsic aids to assist interpretation. The position of South Australian courts having recourse to such aids is governed by the *Acts Interpretation Act* (SA) 1915. In *Devine v Solomijczuk* (1983) 32 SASR 538 Mitchell and Zelling JJ held that

South Australian Act by a judge of the Supreme Court of that State is persuasive[26] von Doussa J held that the construction given to the proviso to s69II in *Wicklow* should be rejected.[27]

The next case to be of interest to this question of the interpretation of the proviso to s69II was *Arcadi v Whittem*.[28] This was decided by the Full Court of the Supreme Court of South Australia.[29] An Italian migrant, whose English was poor, had come to rely upon Gagliardi to render assistance, such as reading and translating correspondence as well as accompanying Arcadi to interviews. Over a period of several years Arcadi had come to trust Gagliardi completely and so when Gagliardi suggested that Arcadi set up a family trust he was in agreement. Arcadi was to transfer a property to this trust. After an earlier dealing with this land a person by the name of Whittem had caused a caveat to be lodged against this property. Gagliardi had convinced Arcadi to sign two blank pieces of paper, allegedly to achieve the end of constituting the family trust. These two pieces of paper were then placed with other paper to complete documents relating to the mortgage of land owned by Arcadi. This document was then used by Gagliardi to raise finance by obtaining a mortgage of the land from Whittem. The mortgage was *not* registered because of the presence of a caveat, so s69II was not relevant to decide the action between the mortgagor and mortgagee. But s69II was important in deciding the claim between the mortgagee (Whittem) and his solicitor (Nield). When Whittem's mortgage was lodged the Registrar-General raised a requisition requiring the removal of Whittem's caveat prior to registration of the mortgage. This requisition was issued to Whittem on 17 December 1985. Whittem gave this requisition to his solicitor. Nield took no steps to remove the caveat until

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reports of parliamentary debates were inadmissible for any purpose, whilst Cox J found that such debates would be admitted to discover the mischief that the particular legislation was to remedy. It is of interest to speculate what the decision would be today with regard to s22 of the *Acts Interpretation Act* (SA) 1915, which was amended in 1986 to closely parallel s15AA of the *Acts Interpretation Act* 1901 (Cth). See *Le Cornu Furniture and Carpet Centre Pty Ltd v Parsons* (1990) 54 SASR 108 for a discussion of this section. See also the Second Reading Speech of the 5 March 1986 in the Parliamentary Debates of the First Session of the 46 Parliament.

26 *Rogers* at 225.

27 This interpretation of the proviso meant that in addition to Mrs Rogers retaining title so did her co-owner, Mr Rogers, who had also received the money under the mortgage.

28 (1992) 167 LSJS 217; see also Skapinker, "Shaking the Foundations"(1993) 67 *ALJ* 611.

29 Special leave to appeal to the High Court was refused, see *Nield v Whittem* (1993) 67 ALJR 514.

February 1986. By this time an interim injunction had been obtained forbidding the registration of the mortgage. Whittem was claiming against Nield that his negligence in not removing the caveat promptly allowed time for the injunction to be sought and that the injunction had prevented Whittem from registering his mortgage. Nield's contention to this was that even if there was negligence there was no damage as Whittem could never have acquired an indefeasible title upon registration because of s69II.

It is on this point that the judges of the Supreme Court divided. The leading judgment was delivered by Debelle J, with whom Matheson J agreed. Debelle J examined s69II. His Honour acknowledged the two competing constructions of its proviso and concluded that the *Wicklow* interpretation was to be preferred. Implicitly Debelle J found that the *Rogers* decision was not binding authority upon him.[30] His Honour preferred the *Wicklow* interpretation for the following reasons:

(1) The second reading speech which was so influential upon von Doussa J in *Rogers v Resi-Statewide Corporation Ltd*[31] should not override the plain meaning of the words of s69II. Obviously for Debelle J there was no problem with the interpretation of this section and any resort to external aids was superfluous.[32] Such an approach appears to be taking advantage of the fact that s22 of the *Acts Interpretation Act* 1915 (SA) only applies if a provision is ambiguous on its face. The existence of competing interpretations would suggest that the provision is ambiguous.

(2) The *Wicklow* interpretation of the proviso removes the different consequences between fraud constituted by forgery and non-forgery fraud. Debelle J indicated that this consistency is important as forgery is but an example of fraud and it should not be simply a matter of luck whether an innocent third party receives a good title depending upon what sort of fraud was involved. For his Honour it would seem that such an arbitrary result would smack of an injustice.[33]

(3) The final reason suggested by Debelle J for adopting the *Wicklow* interpretation was that one of the purposes of the *Real Property Act*

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30 This would appear to be an application of the principle stated in *R v Jackson* (1972) 4 SASR 81 that a court is not bound to follow decisions given by courts in other hierarchies, although such decisions are of persuasive authority.

31 (1991) 29 FCR 219.

32 *Arcadi* at 238; but see *Rogers* at 224.

33 *Arcadi* at 238.

> was to make it unnecessary for persons acquiring an interest in Torrens Title land to satisfy themselves of the genuineness of signatures to the transfer.

Importantly, his Honour held that, regardless of which interpretation was adopted, s69II would have had no relevance to this case because the signature here was not a forgery. For Debelle J the variety of forgery which was referred to in the second reading speech was restricted to forgery of the signature on the document.[34] The fraud on these facts consisted of the completion of the document in an unauthorised manner. Whilst his Honour recognised that this may be a forgery at common law[35] this was not forgery for s69II.[36] Thus, Debelle J adopted a very narrow definition of forgery, by which the signature of the registered proprietor must be forged for s69II to be applicable. For his Honour there exists a statutory meaning for forgery which is more confined than the common law understanding of forgery. As these were not the facts which confronted him, Debelle J held that this was a fraud case solely within the ambit of s69I. Hence, all the comments his Honour made in reference to s69II can fairly be classified as obiter.[37]

Olsson J delivered a minority opinion. For him these facts did constitute a forgery. According to Olsson J a forgery is where a document "tells a lie about itself".[38] His Honour was of the view that a forgery can occur when the signature of the registered proprietor is genuine but another's is forged.[39] In this case the signature of the witness was forged. It appears that for Olsson J such a forgery would infringe s69II. Although he did not so state, his Honour was implicitly adopting the common law definition and applying it to the legislation. This can be designated as the broad definition of forgery. On the facts before him Olsson J found that there had been such a forgery and so his remarks pertaining to the construction of s69II were part of the ratio of his Honour's decision. Olsson J reviewed the two

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34 At 238, and 240.

35 At 239. See Blackstone, *Commentaries* Vol 4 (1769) p245; *Brott v R* (1992) 66 ALJR 256 for a discussion of the meaning of forgery at common law.

36 At 239, where Debelle J relies upon the second reading speech to reach this conclusion.

37 But see *Eslea Holdings Ltd (formerly Ipec Holdings Ltd) v Butts* (1986) 6 NSWLR 175 at 186 for a statement that some obiter, such as from the High Court, is very close to being binding. See generally Cross & Harris, *Precedent In English Law* (Clarendon Press, Oxford, 4th ed 1991)

38 At 225. See also *R v Dodge* [1972] 1 QB 416 at 419, per Phillimore J.

39 At 225. See also *Brott v R* (1992) 66 ALJR 256 at 260, per Deane J, at 263-264, per McHugh J.

competing construction's of s69II and came to the conclusion that the *Rogers* interpretation was correct. His Honour came to this result because:

(1) the second reading speech clearly indicated that with regard to forgery deferred indefeasibility was to operate;[40] and

(2) the fact that s69 obviously deals with forgery separately to fraud and therefore it is quite appropriate for different results to be reached.[41]

Thus the decision of *Arcadi* poses interesting questions of what constitutes binding precedent. The discussion of the majority regarding the correct interpretation of s69II was clearly obiter, whilst the comments of Olsson J relating to s69II are equally clearly ratio but they formed part of his minority judgment. The highest at which either judgments may be put is that of persuasive authority. It is for this reason that the most recent decision on point is of importance.

Recently, Judge Burley, a Master of the Supreme Court of South Australia, reviewed these authorities in *Tsirikolias v Oakes*.[42] The facts were that Tsirikolias and Machariras were the registered proprietors of the land in issue. Mr and Mrs Oakes took a mortgage over this land. It was not in dispute that the plaintiff's signature on the memorandum of mortgage was forged. The question which needed resolution was whether the Oakes had an indefeasible title. This involved the interpretation of the proviso to s69II. After reviewing all the case law on point and the application of the doctrine of *stare decisis*, Judge Burley concluded that he should adopt the *Wicklow* interpretation.[43]

To take stock of the varying judicial constructions of the proviso it is obvious that there is a mess of obiter and ratio originating from minority judgments and other non-binding sources. It is necessary to investigate the advantages of each construction to suggest which is appropriate to adopt. But before this it is necessary to note how other States, which do not possess an equivalent to s69II, have recently been dealing with forged land documents.

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40 At 229.
41 At 229.
42 Unreported, 15 March 1993.
43 At p8 of the transcript.

In *Chasfild Pty Ltd v Taranto*,[44] Gray J of the Victorian Supreme Court set aside a forged mortgage, holding that the innocent mortgagee was not protected by the registration of the forged document. Gray J distinguished *Breskvar v Wall*[45] on the ground that the Queensland statute which the High Court there dealt with differed from the Victorian legislation before his Honour. For Gray J, s44(1) of the *Transfer of Land Act*, which was relevant to fraud, overrode the indefeasibility provision contained in s42. His Honour suggested that the purpose of s44(1) was to confirm the deferred indefeasibility approach. On Gray J's reading of the legislation deferred indefeasibility applies in Victoria in all cases of forged instruments. *Chasfild* has received widespread academic criticism[46] and has not been followed.[47]

New South Wales has adopted a different solution to the problem. This was advocated in *Mercantile Mutual v Gosper*[48] which involved a forged increase in a mortgage and this forgery was registered by the mortgagee, Mercantile Mutual. The question posed to the New South Wales Court of Appeal was whether the innocent Mrs Gosper was bound by this increase. Kirby P and Mahoney JA held, with Meagher JA dissenting, that Mrs Gosper was not bound by the variation because she possessed a "personal equity" against Mercantile Mutual. For Kirby P, Mrs Gosper had a right in personam against Mercantile Mutual and this right persisted after the forgery. This was the equity of rectification. The variation and its registration did not affect Mrs Gosper. Mahoney JA adopted a more sophisticated approach to the construction of the personal equity held by Mrs Gosper. His Honour suggested that prima facie the person affected by the forged document is entitled to have the effect reversed and the forged document put aside.[49] Mahoney JA tantalisingly suggested that this prima facie right may be based on the law of unjust enrichment or restitution, but his Honour did not pursue the idea.

Returning to the concept of the personal equity, Mahoney JA suggested that it may arise even when the registered proprietor did not commit the acts that generated the personal equity. The mere fact of the forgery of the instrument does not establish a personal equity. More than simple forgery

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44 (1991) 1 VR 225.
45 (1971) 126 CLR 376.
46 For example, Bradbrook, MacCullum & Moore, *Australian Real Property Law* pp145-146.
47 *Vassos v State Bank of South Australia* (1992) V Conv R para 54-443.
48 (1991) 25 NSWLR 32.
49 At 44.

is required. In this case the additional ingredient was that Mercantile Mutual produced the certificate of title for the registration of the forged variation when it had no permission to do this. For Mahoney JA this use of the certificate of title generated the personal equity.

However, the limitations upon this approach must be recognised. These limitations are well shown in the recent decision of the New South Wales Court of Appeal in *Grgic v Australian and New Zealand Bank.*[50] The facts of the case were complicated. In brief, relatives of the registered proprietor of the property impersonated him by an elaborate deception played upon the bank and they forged the registered proprietor's signature to a mortgage of the property. The execution of this mortgage was witnessed by officers of the bank. These bank officers had been deceived by the relatives. This mortgage was registered. The question which came before the Court was whether the registered proprietor was bound by this mortgage. The registered proprietor suggested two reasons why he was not bound by the mortgage. The first was that the evidence revealed that there had been fraud on the part of the bank and the second reason was that the registered proprietor had a personal equity which entitled him to have the mortgage set aside. The Court of Appeal found that neither reason had been made out and held that the registered proprietor was bound by the mortgage.[51]

The ground for the Court rejecting the first reason was that "fraud" means only actual fraud and only limited forms of equitable fraud. The court found that there was not the relevant fraud in this case. Actually, it held that there was no fraud in this case as at all times the bank officers believed that they were dealing with the true owner of the property. As such the bank committed no actual or equitable fraud.

The reason why the Court found that there was no personal equity raised in the plaintiff was that the finding of a personal equity only encompasses known legal or equitable causes of action. This was what was held in *Garofano v Reliance Finance.*[52] Upon analysis, none of the possible legal or equitable heads of actions could be made out in Grgic. And the consequence of this was that there was no personal equity in the registered proprietor. This decision reaffirmed the traditional and narrow approach to the notion of the personal equity and so limits its possible application to cases of forgery.

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50 (1994) NSW Conv R 55-698. See also "The Conveyancer" (1994) 68 *ALJ* 593.
51 per Powell JA, with whom Meagher and Handley JJA agreed.
52 (1992) NSW Conv R para 55-640.

ARGUMENTS FAVOURING THE *WICKLOW* INTERPRETATION

It is possible to distil the arguments in the case law to five points. However their distinctiveness may be illusory and the divisions of each are fluid.

Immediate Indefeasibility

Immediate indefeasibility is the guiding principle of the Torrens Title system.[53] Therefore the interpretation of the proviso which gives greatest effect to immediate indefeasibility should be adopted. The interpretation which does this is that advocated in *Wicklow*, as it deals with title gained by a forgery or an insufficient power of attorney in this way. However this argument contains its own answer. Frequently proponents of immediate indefeasibility present the theory as some monolithic, rigid doctrine which permits no variation even where the strict application of immediate indefeasibility would be productive of injustice. In *Mercantile Mutual v Gosper* Kirby P explicitly recognised the importance of the immediate indefeasibility theory but took a less than rigid approach to it by finding that it did not protect the registered variation of the mortgage. It is best to view immediate indefeasibility as simply the guiding principle of the Torrens system, and as such this principle can be respectfully ignored in order to achieve justice.

National Uniformity

Connected to this first point is the "national uniformity" argument.[54] This contends that a similar result should be achieved in all States when dealing with Torrens Title land questions. As South Australia is the only State which deals with forgery, insufficient power of attorney and legal disability separately from fraud, every attempt should be made to have uniform consequences and so the proviso should be read to produce this result. Effectively this advocates the denial of the existence of s69II. Additionally, cases such as *Mercantile Mutual v Gosper* indicate that other States are achieving the same result but by slightly different means.

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53 See, for example, *Breskvar v Wall* (1971) 126 CLR 376; *Frazer v Walker* [1967] 1 AC 569; *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425.

54 This argument is advocated by Butt, "A Uniform Torrens Title Code?" (1991) 65 *ALJ* 348. See also Neave, "Towards a Uniform Torrens System: Principles and Pragmatism" (1993) 1 *APLJ* 135; Kerr, "Property Law - Uniformity of Laws: Towards a National Property Practice" (1993) 1 *APLJ* 145.

Inter-Specific Exceptions Consistency

Related to the first two points is the suggestion that it makes sense to interpret the various specific exceptions in consistent fashions. This argument is best referred to as "the inter-specific exceptions consistency" approach. Such an argument suggests that the way all specific exceptions are interpreted should be uniform and that as the interpretation of the main specific exception, namely the fraud exception, is well known then all other specific exceptions need to be interpreted in a like manner. Of course this argument posits a monolithic and rigid overarching approach to the Torrens system, which has been rejected above. Further it seems to suggest a reading down of any words in the legislation which may conflict with the guiding principle. The advantage of such an approach is not readily apparent.

General Business Practices

Another argument favouring the *Wicklow* interpretation is that it accords with general business practices, in that most businesses do not undertake checks to guarantee that there has been no forgery or insufficient power of attorney. But it is open to question whether it is a sound argument against the introduction of some conveyancing duty that presently there is no conveyancing duty. However this argument implicitly recognises two things. The first is that a person prepared to commit a forgery would have little hesitation to presenting some co-conspirator as the registered proprietor to satisfy any demand generated by the conveyancing duty. Secondly, it acknowledges the difficulty inherent in detecting a forgery.

Plain Meaning

Finally is is argued that the meaning of the proviso is plain and that the *Wicklow* interpretation gives effect to the correct meaning.[55] However, the very reason why there are two competing constructions to the proviso is that the meaning is not clear.

ARGUMENTS FAVOURING THE *ROGERS* INTERPRETATION

To counter these points it is possible to articulate several which support the competing construction.

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55 *Arcadi v Whittem* (1992) 167 LSJS 217 at 238, per Debelle J.

Intra-Specific Exception Consistency

An argument in favour of the *Wicklow* interpretation is that immediate indefeasibility is the general theory that has been held to apply to registered title. However, this does not deal with the fact that Parliament has obviously seperated three ways of acquiring title from all the means of gaining title and that a strong argument can be mounted to the effect that it is more sensible to treat all three in like manner.[56] This is the "intra-specific exception consistency" approach. As it is conceded by all that title obtained from a person under a legal disability is governed by the deferred indefeasibility approach then consistency would demand that the other two categories, namely forgery and insufficient power of attorney, should also be dealt with by this theory.[57] This argument is strengthened by the fact that Parliament obviously knew how to create an immediately indefeasible title, as this is embodied in s69I, and chose a different course in s69II. If the "intra-specific exception consistency" interpretation is not adopted then s69II becomes effectively otiose as immediate indefeasibility would cover forgery and insufficient power of attorney regardless of whether s69I or s69II was utilised. This would mean that only a document relying upon a legal disability would be susceptible to the application of deferred indefeasibility. This in turn would mean that legal disability would be a legal curiosity as the only known instance of the application of deferred indefeasibility.

Duties of the New Registered Proprietor

It has been suggested that the *Rogers* interpretation imposes limited and reasonable conveyancing duties upon the new registered proprietor to discover whether the person from whom title is being received is under a legal disability, if the power of attorney permits its possessor to undertake these steps and to verify the alleged signature of the registered proprietor. Such duties focus attention onto the transaction. It is arguable that this removes concentration from the title, which is the focal point of the Torrens system, a system primarily concerned with the security of title. In this way the *Rogers* interpretation may be perceived as indirectly undermining the fundamental point of the Torrens title system. However this contention that the security of title is the central point of the Torrens system again threatens to forgo justice for some inflexible tenet protecting the security of title. Security of title may be best understood as a facet of the doctrine of immediate indefeasibility and as such it is only a guiding principle and when

56 *Arcadi* at 229, per Olsson J.
57 *Rogers v Resi-Statewide* (1991) 29 FCR 219 at 225, per Von Doussa J..

appropriate and with due reference to this principle it should not be allowed to prevent a just result being reached.

Parliamentary Intention

Further, it has been suggested that the *Rogers* interpretation accords with the intention of Parliament.[58] This point is of fundamental significance. *Rogers* found this to be the reason for extending the theory of deferred indefeasibility to all three matters covered by s69II.[59] This, of course, begs the question of whether it is appropriate to rely upon such material, which is often quite old and out-dated, to resolve such disputes.

Mortgages

It would appear that the *Rogers* interpretation is more equitable in the context of mortgages. The original registered proprietor will often have some emotional association with the land (for example, it may well be their matrimonial home) and the taker of the forged mortgage will frequently be a commercial entity for whom recourse to monetary compensation under s203 *Real Property Act* 1886 (SA) is quite appropriate and so the deferred indefeasibility achieves this just result.[60]

CONCLUSIONS

It is apparent that the cases involving s69II have adopted both of the two competing interpretations of the proviso to this section. Equally obvious is that the case law is not decisive of this issue. At this point an examination of the alleged advantages of each interpretation is necessary to discover which approach should be adopted.

After investigating the two conflicting interpretations it is possible to state some preliminary conclusions. On balance a modified *Rogers* interpretation should be adopted. The *Rogers* construction of the proviso to s69II is both historically accurate and reflects the reality that in South Australia forgery and fraud are treated differently in the *Real Property Act*. The modification to the pure *Rogers* interpretation is that the definition of forgery must be narrower that the common law meaning of the word. This would minimise

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58 Moore, "Interpretation of the *Real Property Act*" (1988) 11 *Adel LR* 405. Section 22(1) of the Acts Interpretation Act (SA) (1915) requires a Court to search for the object or purpose of a section.

59 See also *Arcadi* per Olsson J.

60 This is the argument made by Edwards in "Immediate Indefeasibility and Forgery" (1993) 67 *LIJ* 730.

the lottery aspect of deciding which sort of fraud is involved (that is, non-forgery fraud or forgery constituted fraud) and be faithful to the historical rationale for the introduction of s69II. The narrow definition suggested by the majority in *Arcadi v Whittem* is appropriate to achieve this goal. It is recognised that this interpretation does introduce some minor conveyancing duties but these duties are no more than should be adopted by all prudent conveyancers. As a final virtue the modified *Rogers* interpretation goes some distance towards reconciling the divergent case law and provides a synthesis of these decisions. This suggests that the deferred indefeasibility theory may have a limited renaissance South Australia.

All this attention to which interpretation to adopt focuses only upon what should be the guiding principle in cases involving s69II. Largely this ignores the fact that the courts have been grappling with such problems to achieve a fair result. After reviewing the authorities it becomes evident that the courts have been adopting implicitly something similar to the three stage test articulated below to resolve any dispute involving ownership of Torrens Title land:

(1) A determination of the relevant guiding principle. In all States but South Australia when forgery, insufficient power of attorney or legal disability is involved, this guiding principle is immediate indefeasibility. In South Australia if forgery, insufficient power of attorney or legal disability is pivotal to the case then the guiding principle is deferred indefeasibility;[61]

(2) A simple prima facie application of the relevant guiding principle; and

(3) An examination of the behaviour of all the parties to the dispute to determine whether the equities of all concerned require the guiding principle to be displaced.[62]

This three stage test achieves both sufficient security of title and fairness.[63] As such, it is an appropriate test for the courts to adopt explicitly as a relatively straightforward method of determining disputes between parties when forgery is involved.

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61 This has been the substance of this article.

62 *Bahr v Nicolay* (1988) 164 CLR 604; *Mercantile Mutual v Gosper* (1991) 25 NSWLR 32; *Daniell v Paradiso* (1991) 55 SASR 359 are all consistent with this approach.

63 Security of title is the foundation of the Torrens Title system.