THE TRANSFER OF LAND ACT AND FORGERY.

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TITLE to land which is outside the operation of the Transfer of Land Act cannot be lost or acquired by or through a forged deed. The grantee under a forged deed acquires nothing and, on the principle *nemo dat qui non habet,* cannot give title to another. The position is different under the Transfer of Land Act. Prior to the recent decision in *Clements v. Ellis*[1] the following propositions relating to forged instruments affecting land under this Act were clearly settled.

1. "No title is acquired by the registration of a forged instrument." The doctrine of immediate indefeasibility of title on registration—which appears to have been the basis of such cases as *Hassett v. Colonial Bank of Australasia*[2] and *Major v. Donald*[3] was definitely rejected in *Gibbs v. Messer.*[4] The statute was designed to protect dealings with registered proprietors, not forgers. It is genuine instruments executed by registered proprietors, and not forged instruments, which become indefeasible in registration.

2. "Where a person has, by means of a forged instrument, once been entered on the register as Registered Proprietor, he can, despite the defeasibility of his own title, give an indefeasible title to a person who subsequently deals with him *bona fide.*"

Thus one may lose and another gain title in consequence of forgery. This result follows from the central object of the Act, which is to relieve purchasers from the necessity of making the lengthy investigations into title required under the general law. This object is achieved by constituting a Register of land titles, and making this Register, with certain exceptions, conclusive as to the titles of the registered proprietors appearing therein. Purchasers are invited to act "on the faith of" or "in reliance upon" the Register, and those dealing *bona fide* with registered proprietors acquire a title which is indefeasible whatever defects may exist in the title of such proprietors. If a purchaser were concerned to inquire whether his vendor or some predecessor in title had become registered as proprietor through a forged instrument, the Act would fail in its main function. See sec. 247, *Gibbs v. Messer.*[5]

The effect of the forgery in *Clements v. Ellis*[6] could not be determined by the application of either of the above propositions, and the solution of the problem raised required a consideration of the basic principles of the Statute. In essentials the facts were these: Holmes, the registered proprietor of certain land, contracted with Clements to sell and transfer the same to him free from encumbrances. At the

1. 51 C.L.R. 217.
2. 7 V.L.R. (L.) 380.
3. 13 V.L.R. 255.
4. [1891] A.C. 248.
5. [1891] A.C. 248.
6. 51 C.L.R. 217.

date of the contract the Register showed that Ellis was the registered proprietor of a mortgage over the land. Subsequently, and while the mortgage was still on the Register, Clements paid over the purchase money in full, on the footing that from the proceeds the mortgage would be discharged by Holmes, and that he would obtain a registerable transfer free from encumbrances. Subsequently Holmes executed a transfer free from encumbrances to Clements, and this transfer, together with a discharge of mortgage, were simultaneously lodged for registration. Presumably—although McTiernan J. does not concede this—the discharge was registered first, so as to give Holmes a clean title, and then the transfer free from encumbrances was registered. A certificate of title free from encumbrances was issued to Clements. Unfortunately, the discharge of mortgage had been forged by an agent, Beamsley. The question was whether the mortgagee was entitled to have his mortgage restored to the Register, or whether the purchaser had acquired an indefeasible title to the land free from incumbrances.

On these facts it is clear that Clements could not be said to have acted on the faith of the Register so far as the discharge of mortgage was concerned. That discharge was not registered until after Clements had obtained his transfer and lodged it for registration. It was substantially on this ground that Dixon and McTiernan JJ. held that Clements' title was not indefeasible. As Dixon J. said, "Upon the true interpretation of the Transfer of Land Act. . . .to obtain that protection (viz., indefeasibility) it is necessary to deal with a person who is then actually registered as the proprietor of the estate or interest intended to be acquired." His Honour based his conclusions primarily on his interpretation of Sec. 179, which provides "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land . . . shall be required or in any manner concerned to enquire and ascertain the circumstances under . . . which such proprietor . . . was registered." That section, he declared, expressed the conditions which give indefeasibility—to get an indefeasible title to an estate or interest you must deal with the registered proprietor of such estate or interest. The conditions of "dealing with" he said "plainly referred to the transaction between the parties preceding lodgment for registration." As Clements did not deal with a registered proprietor of the fee simple free from encumbrances, he did not acquire an indefeasible title to such an estate.

On the other hand, the above facts disclose that Clements was a *bona fide* purchaser, that he became registered as proprietor of the land free from encumbrances, that such registration was procured by a genuine instrument of transfer, executed by a person who was at the time of the registration of such instrument the registered proprietor in fee simple free from encumbrances. On these facts Rich and Evatt JJ. considered that Clements obtained an indefeasible title. They reached this conclusion by giving full effect to the well-

known Sections 67 and 72 without regard to Section 179. They held that the conditions of indefeasibility are to be found in Sections 67 and 72, and not in Section 179. As there is nothing in Sections 67 and 72 confining the protection of the Statute to the purchaser who deals with a vendor, who at the time of dealing is registered as proprietor, it becomes an immaterial circumstance whether the vendor is registered before negotiations commence, during negotiations or after the negotiations have been completed so long as he is registered before the purchaser.

In this division of opinion in the High Court it is submitted that the views expressed by Dixon and McTiernan JJ. are to be preferred. These views do give a satisfactory explanation of the words in Section 179 quoted above, which, on the contrary view, appear to the writer to be practically meaningless. Further, these views appear to be more in accord with the purposes and objects of the Statute as enunciated by the Privy Council. In the judgment in the leading case of *Gibbs v. Messer*[7] these objects are succinctly expressed. See at page 254: "The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the Register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases in *bona fide* and for value from a registered proprietor, and enters his deed of transfer or mortgage on the Register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title." And at page 255: "The protection which the statute gives to persons transacting on the faith of the Register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the Register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the Register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration."

I have had the advantage of reading a shorthand report of the re-argument of the case of *Gibbs v. Messer* before the Privy Council, and find that during argument certain important observations as to the scheme and objects of the Statute fell from their Lordships. As these do not appear in the Law Reports, and as they elucidate the somewhat cryptic passages in the judgment, a selection from them may prove of interest as well as of value.

During argument Lord Herschell said: "The scheme seems to be this, as I gather it, that you shall only be obliged to look at the Register. I am dealing now with a person going to purchase. If you get from the person who is on the Register as proprietor a title, whatever his title was or any prior title to his, you get a good title, but then it seems an essential part of that that you shall get your

7. [1891] A.C. 248.

title from a person who is on the Register." And then later: "The Act as I understand assumes that in many cases, although a certificate has been given you may go behind it and set it aside unless there has intervened someone who has gained a right without notice on the faith of the registration." And then later: "The principle I suggest is this, that it is intended to make the Register conclusive, so that a man may be perfectly safe in dealing with that registered proprietor, but it is not intended to deprive him of the necessity of seeing that he is dealing with him."

During argument Lord Watson said, "I agree with Webb J. (the trial judge) where he says that the obvious intention of the Act was to give to a person *bona fide* taking on the faith of the Act absolute security. I think that was the intention." His observations on the section now corresponding to Section 179 are interesting. "I think the section is important . . . because it appears to me to indicate what in other clauses I am inclined to think is the scheme of the Act, namely, to protect no dealings except dealings with the registered proprietor."

Judged in the light of these statements as to the objects of the Act the result arrived at by Dixon and McTiernan JJ. in *Clements v. Ellis*[8] appears to the writer to be the more satisfying. The Statute certifies to the truth of the Register to *bona fide* purchasers, but leaves it to them to see to it that they get in the estate purchased from those on the Register. Two courses were open to Clements—the one to insist on the production of a registered discharge of mortgage before or at the time of settlement; in that case he would have been within the protection of Section 179, having "dealt with" Holmes as registered proprietor free from encumbrances. The alternative was to take the risk of getting a valid discharge from the mortgagee. He did not adopt the former, but took the risk involved in the latter, and so could not bring himself within the protection of the Statute.

As the trial judge, Lowe J., had decided that the mortgage should be restored to the Register, the result of the equal division of opinion in the High Court in *Clements v. Ellis*[8] was to leave that decision standing. By reason of this division of opinion, however, the case is not an authority binding the High Court[9], so that that Court is free to determine the matter on principle should a similar case come before it again.

8. 51 C.L.R. 217.
9. See *Tasmania v. Victoria* 52 C.L.R., at pp. 173 and 183-5.