INDEFEASIBILITY OF TORRENS TITLE.*

In construing a Torrens Act it is wise to avoid approaching it with a preconception of its general effect, e.g. that the Act confers an indefeasible title, or a "parliamentary title", or a title distinct from that derived under general principles of common law. Read subject to a preconception the protecting provisions are likely to be construed too broadly and the exceptions to them too narrowly. The better plan is to take the Act section by section (not forgetting of course that it must be read as a whole) and to see how far each section, examined without preconceptions, but in the light of other sections, alters the general law. In this way the scheme and general purpose of the Act will be built up from the actual provisions of the Act. Too often, it is suggested, interpretation begins with a preconceived scheme into which particular provisions are fitted, whereas the scheme should take its shape from the provisions.

After some preliminary provisions each Act begins with a procedure for bringing under the Act land not yet subject to it. When the appropriate officer is satisfied as to the title of an applicant he is required to issue to him a certificate of title.

* In this article the term "the Act" is used as a collective title for the legislation in each State by which the general Torrens system is established. In some States there is one Act, in others two or more, which have been amended from time to time. In addition there are Acts dealing with special matters such as Commonwealth titles and administrative details. The general Acts are listed below: amending Acts are not listed where the principal Act has been printed with the amendments incorporated in it.

New South Wales:

The Real Property Act, 1900 (Public Acts 1824-1937, Vol. 8, p. 620).

Victoria:

The Transfer of Land Act 1928 (Public Acts (1929), Vol. 5, p. 951).
The Transfer of Land Act 1941 (1941 Vol., p. 25).
The Transfer of Land (Forgeries) Act 1939 (1939 Vol., p. 250).
The Transfer of Land (Forgeries) Act 1951 (1951 Vol., p. 75).

Queensland:

The Real Property Act of 1861 (Public Acts 1828-1936, Vol. 8, p. 63).
The Real Property Act of 1877 (Public Acts 1828-1936, Vol. 8, p. 257).
The Real Property Acts Amendment Act of 1942 (1942-1943 Vol., p. 252).
The Real Property Acts Amendment Act of 1952 (1952 Vol., p. 376).

Tasmania:

The Real Property Acts, 1862, 1863, 1878, 1886, 1893 (Public Acts 1826-1936, Vol. 5, p. 1002).
The Real Property Act 1947 (1947 Vol., p. 394)
The Highways Act 1951 (1951 Vol., p. 222).

South Australia:

The Real Property Act, 1886 (Public Acts 1837-1936, Vol. 7, p. 59).
The Real Property Act Amendment Act, 1939 (1939 Vol., p. 213).
The Real Property (Registration of Titles) Act, 1945 (1945 Vol., p. 13).
The Real Property Act Amendment Act, 1945 (1945 Vol., p. 181).

Western Australia:

The Transfer of Land Act, 1893-1950 (Reprinted Acts, Vol. 5).

Without further provision the certificate would be merely one man's opinion as to the applicant's title; and so in the early Acts, at this stage, comes a declaration as to the effect of a certificate of title. In the later Acts provision for registering dealings comes first and then this declaration. In declaring the effect of a certificate either of two alternatives could have been adopted. It could have been provided that any person declared in a certificate to be entitled to any interest in land became by such declaration so entitled. This would have substituted for the common law title of the applicant a new statutory title, or if the applicant had no common law title would have given him a statutory title prevailing over the common law title of some other person. In fact, however, the provision made is that the certificate shall be conclusive evidence that the person named as having an interest is entitled to the interest. This section, which will be referred to as the evidence section, thus does not purport to create a new title, but merely, in form at least, makes the certificate of title evidence of title, and, read by itself, shuts out other evidence. The implication is that the basis of title is something other than the certificate; so that exceptions to the conclusiveness of the certificate can be more readily recognised than if the certificate was the origin of title.

Although the terms of the evidence section (N.S.W.40, V.67, Q.33, T.33, S.A.80, W.A.63) are absolute except in South Australia, in fact the section is subject to important exceptions. As was said by Dixon J. in *Clements v. Ellis* (51 C.L.R. 217, 239) it "cannot be understood as more than a general statement to be read subject to other provisions", or, as it was put in *Marsden v. M'Alister* (8 N.S.W.L.R. (L.) 300, 307), the paramountcy section (N.S.W.42, V.72, Q.44, T.40, S.A.69, W.A.68) must be read as a proviso to the evidence section. This is only one of many badly drafted provisions in the Acts; and indeed the proper construction of the Acts must take into account the fact that they are in many instances badly drafted.

The evidence section, of course, works in favour not only of the fee simple or other owner to whom the certificate is issued, but also of any other person who is recorded on the certificate as holding an interest, e.g. a term of years or a mortgage, and who is thus the registered proprietor of that interest. The certificate of title is just as much evidence of title to that interest as it is of title to the principal estate for which the certificate was issued.

The paramountcy section, although one of the most important in the Act, is not so much concerned with declaring the title of a proprietor to an interest for which he is registered, as with

indicating how he stands in relation to the interests of other persons. It provides that, with certain exceptions, the registered proprietor shall hold subject to interests registered and free of interests not registered. This of course must mean, not that he holds subject to all the interests that are registered, but that he holds subject to such of the interests registered as bind him according to ordinary principles of law. For example, if A is shown as proprietor in fee simple, B as having a term of seven years, and C as having a mortgage subsequent to B's lease, B will not hold subject to C's mortgage, but C will hold subject to B's lease. But if an interest covered by the section is not registered, any registered proprietor holds free of it (subject to the exceptions set out) whatever might be the position under the general law.

The question arises, however, whether the interests covered by this section include all interests, or only legal as opposed to equitable interests, or only interests required to be registered as opposed to interests that may arise without registration.

Before this question is considered, however, it will be as well to look briefly at the other sections which give protection to a registered proprietor, for the light they throw on the effect of the paramountcy section. At a later stage they will be examined in more detail.

Other Protecting Sections.

In the Queensland Act s. 45 includes the provision that an instrument endorsed with a memorandum showing that it has been registered shall be received in all courts as conclusive evidence of the particulars contained in the instrument; but in other Acts the provision (N.S.W.38, V.59, T.38, S.A.52, W.A.57) is merely that a certificate of registration endorsed on the instrument shall be conclusive evidence that the instrument has been registered.

A section which may be called the notice section (N.S.W.43, V.179, Q.109, T.114, S.A.186, W.A.134) provides that a person dealing with a registered proprietor shall not, except in case of fraud, be affected by actual or constructive notice of any trust or unregistered interest. This provision does not affect unregistered legal interests, since the doctrine of notice relates only to equities: under the general law a transferee takes subject to prior legal interests independently of notice. As to equitable interests, under the general law a person taking a legal interest takes subject to the same equities as were enforceable against his transferor unless he is a bona fide purchaser for value without notice. If he is a volunteer or does not take bona fide, he is bound irrespective of

notice; if he is a bona fide purchaser for value, notice is necessary to make the equity enforceable against him. Under the Act, notice is immaterial. This leaves the volunteer or the mala fide taker subject to a prior equity even without notice; but it frees the bona fide purchaser for value from liability to the equity even if he has notice.

Complementary to the paramountcy section is the provision (N.S.W.124, V.244, Q.123, T.124, W.A.199) that no action of ejectment shall lie against a registered proprietor except in the case of a lessee or encumbrancer in default and the cases (fraud, wrong description, etc.) which are exceptions to the paramountcy section. The provision seems to be unnecessary, and is omitted from the South Australian Act; but it does confirm the earlier provision in so far as interests giving possession of the land are concerned. It seems to be defective, however, in that it bars an action by an unregistered lessee who has been turned out by his lessor, and leaves a doubt as to the power of a registered lessee to bring an action in the same circumstances.

More important is the provision (N.S.W.135, V.247, Q.126, T.126, S.A.207, W.A.202) that nothing in the Act is to be so interpreted as to subject to an action of ejectment, or action for damages or deprivation of estate or interest, any purchaser bona fide for value on the ground that the proprietor through whom he claims was registered through fraud or error. (The Queensland section is wider and covers any grounds.) The notice section protects only against equities, but this section protects the transferee against unregistered legal claims which were enforceable against the transferor because they came within exceptions to the paramountcy section.

We may now proceed to a fuller examination of the effect of these and other provisions on the position of a person registered as proprietor of an interest. The first question to be considered is that raised earlier, whether the interests covered by the paramountcy section include all interests, or only legal as opposed to equitable interests, or only interests required to be registered as opposed to interests that cannot or need not be registered.

The Paramountcy Section.

Firstly the position as to equities must be noted. The Acts themselves recognise that trusts may exist (N.S.W.82, V.55, Q.77, T.66, S.A.162, W.A.55), the caveat system protects rights which under the general law are enforceable as equities, and it has again and again been held in judgments of the highest authority that other equities as well as trusts are enforceable against a registered

proprietor. On the other hand, it is specially provided (N.S.W.82, V.55, Q.79, T.66, S.A.162, W.A.55) that trusts are not to be entered in the register book. If trusts at least (whatever may be the position as to other equities) are recognised, but it is expressly provided that they may not be registered, and at the same time the Act provides that a registered proprietor holds free of interests not registered, we have provisions which it is impossible to reconcile except on the basis that the paramountcy section does not refer to trusts. Then, unless it is held, contrary to all authority and also to express provision in Queensland (Act of 1877, s.51) and South Australia (s.249), that other equities are abolished, the paramountcy section must be treated as referring only to legal interests. This is supported also by its context. It comes after provisions relating to the registration of legal estates and interests; and it is a natural corollary to these provisions that the Act should then declare that a registered proprietor holds subject to such of these interests as are registered and free from those that are not. Treated as a corollary to these provisions it would indeed seem naturally to refer not to all legal interests that might exist, but only to those legal interests for the registration of which the Act makes provision.

This approach solves a difficulty that arose under the earlier versions of some of the Acts. They made provision for leases exceeding three years, but said nothing of short terms or periodic tenancies. If the paramountcy section had applied to all interests not registered a short term lessee could not have enforced his unregistered interest even against a registered proprietor who himself had made the lease. (*Quaere* whether refusal by a proprietor to recognise an interest created by himself can be treated as fraud.) But if the section were construed as applying only to registrable interests there was nothing to prevent the general law from applying in this case.

However a different solution from this was adopted by the New South Wales Full Court in *Josephson v. Mason* (12 N.S.W.S.R. 249) decided before par. (d) was added to s. 42 of the New South Wales Act. Cullen C.J. held that the lessor was estopped from denying the interest he had granted. Sly J., however, and Ferguson J. also, though less explicitly, held that the paramountcy section refers only to interests in existence when the holder got his certificate, not to interests created subsequently by himself. A similar explanation was put forward earlier in *Cuthbertson v. Swan* (11 S.A.L.R. 102) to account for the enforceability of equities. As between the lessee and the proprietor who granted the lease, this construction has the same effect as

the one put forward by the writer. But as between a voluntary transferee and the lessee there is a difference. On the *Josephson v. Mason* principle, the voluntary transferee would take free of the unregistered lease, while on the writer's submission the lease would be valid against him also.

Consideration of some other features of the legislation suggests that an even more limited construction of the section might be justified. Most of the Acts make no provision as to easements arising by implication or prescription. It seems hardly likely that the legislature intended to abolish this branch of the general law, and yet the paramountcy section, as usually interpreted, stands in the way of recognising them. Again, though the Acts now have express provision one way or the other about the acquisition of title by adverse possession, there are some which once did not. Yet the Privy Council held in *Belize Estate and Produce Co. v. Quilter* ([1897] A.C. 367) that where not excluded the Statute of Limitations applies, and that a legal title may be acquired without registration. Similarly, interests created by other statutes have been held enforceable although not registered, as in *Mate v. Nugent* (7 N.S.W.S.C.R. 314) (title of conditional purchaser under Crown Lands legislation). These cases raise no difficulty, and are consistent with the paramountcy provision, if that provision is construed as extending only to interests for which the Act provides a mode of creation necessarily involving registration. The Act, it is suggested, leaves a proprietor free of an unregistered legal interest only if it is an interest which, according to other provisions of the Act, should have been registered to be effective. The prima facie meaning of the paramountcy section has to be cut down to a large extent, so as to exclude equities, and, originally in New South Wales and Queensland, short term tenancies. This being so, perhaps it can be cut down a little more so as to make it consistent with the omissions as well as with the express provisions in the Act.

It must be admitted, however, that the view put forward is not the one that has generally been expressed in reference to the scope of the paramountcy section. This section has often been invoked to support freedom from all unregistered interests, including equities, either alone or in conjunction with the notice section; see for example *Butler v. Fairclough* (23 C.L.R. 78, 90), *Templeton v. Leviathan Pty. Ltd.* (30 C.L.R. 34, 70), *Wicks v. Bennett* (30 C.L.R. 80, 89, 95), *Stuart v. Kingston* (32 C.L.R. 309, 329). But these are cases of bona fide transferees for value, who are fully protected from equities by the notice section without

the help of the paramountcy section; and where it is the proprietor himself who created the equity asserted against him, so that the notice section does not apply, he will appeal in vain to the paramountcy section. These general statements, therefore, can hardly be treated as having binding authority. As to unregistered legal interests, it is to be noted that in all States the interest of the short term tenant is now provided for, either specially or by protection given to all tenants in possession. Title by adverse possession also is now expressly dealt with in all the States. But the problem as to easements by implied or presumed grant still remains in most States, and is satisfactorily solved by the construction suggested.

The alternative theory put forward in *Cuthbertson v. Swan* and *Josephson v. Mason,* that the paramountcy section applies only to interests in existence before the proprietor became registered and not to interests which he himself has created, allows the enforcement of equities in most cases where they are enforceable under the general law, and as to legal interests to some extent meets the problem of the unregistered tenancy and easements arising by implied grant or prescription. But it breaks down in one important case. It would free a proprietor from all equities created before he became registered, and so would protect not only the bona fide purchaser for value but also the volunteer; and in particular it would make it dangerous to appoint a new trustee of land, for fraud would have to be proved against him to hold him to the trust.

The Queensland and South Australian legislation, it is to be noted, specifically provides that equities are to be enforceable, except against bona fide purchasers for value duly registered, in the same manner as under the general law. In addition, the South Australian Act (s.71) provides that nothing in ss. 69 and 70 (the paramountcy provision) is to be construed so as to affect rights under a contract for the sale or other dealing with the land, or the rights of a cestui que trust. The way to construe the sections so as not to affect these equities would appear to be to construe them as applying only to legal interests.

Exceptions to the Paramountcy Provision.

Whether or not the application of the paramountcy section is limited to interests which can arise only by registration, there are important exceptions to the general provision that a registered proprietor takes free of interests not registered.

These concern—

(i) Fraud;

(ii) Erroneous description of the land;

(iii) Prior and competing certificates of title;

(iv) Unregistered easements;

(v) Unregistered tenancies.

In Victoria, South Australia, and Western Australia, there are further exceptions, such as reservations in the grant and rates and statutory charges.

Thus if X induces a registered proprietor, A, who thinks he is signing as a witness, to sign a document which is a transfer from him to X, and X registers the transfer, he cannot rely on the paramountcy section against A. Similarly if A sells land to X, and by some error the certificate covers five acres whereas the instrument dealt with only four acres, X cannot insist on retaining the acre not intended to be transferred.

The question arises: What is the nature of A's right to the land wrongly registered as being held by X? The paramountcy section does not expressly give the answer, but other sections do so clearly enough. A later section (N.S.W.124, V.244, Q.123, T.124, W.A.199) provides that no action of ejectment shall lie against a registered proprietor except in certain cases, including the cases of fraud, prior certificate, and wrong description of the land. It is not positively provided that in the excepted cases an action of ejectment will lie, but this is clearly contemplated; and when this provision was first made an action of ejectment lay only in respect of a legal estate. This is a clear indication that the exceptions in the paramountcy section were regarded by the legislature as leaving, in these cases, a legal title in a person not registered. (Note also the implication from N.S.W.135, V.247, Q.126, T.126, S.A.207, W.A.202.) That is to say, in the illustration given above, A, although removed from the register, retains his legal estate, and X, although registered, has no estate at all. See *Marsden v. M'Alister* (8 N.S.W.L.R. (L.) 300, 307) and *Rourke v. Schweikert* (9 N.S.W.L.R. (L.) 152).

Fraud.

The Acts do not define what constitutes fraud, though most of them contain a provision that notice of a trust or unregistered interest is not of itself to be imputed as fraud (N.S.W.43, V.179 T.114, S.A.186 (see also s.72), W.A.134). The question of what constitutes fraud has been considered in a large number of cases, and the matter will not be pursued here.

A further question concerns the stage at which fraud must occur in the history of a title for the case to be a case of fraud

within the meaning of those words in the paramountcy section. The section does not in terms restrict the fraud to fraud by the person currently registered; and if it had been intended so to restrict it, it is surprising that the legislature did not use some such phrase as "except in case of fraud by such proprietor". The fraud may be fraud in the process of obtaining registration, which was committed by the applicant or his agent or to which he or his agent was accessory. But the question arises whether it may also be fraud to which he was not a party, but which led up to registration.

In the case of initial registration, it would seem to be only fraud occurring in the course of the application that will affect the validity of the title that is registered. Suppose for example that X has an Old System title to land, that S, being in possession of his title deeds, forges a conveyance to A, and that A then brings the land under the Act. Here there is fraud which leads up to A's becoming registered, but, it is submitted, it is not such fraud as will invalidate A's title. The very purpose of the evidence section and the paramountcy section, taken in conjunction with the provisions for bringing land under the Act, is to give a valid title to a successful applicant for registration even though he was not previously entitled. And if an honest mistake as to title without fraud on anyone's part does not vitiate a registered title, there seems to be no good reason why an honest mistake resulting from someone else's fraud should be treated differently. It seems more reasonable to construe the words "in case of fraud" as relating only to fraud in the application. For an example of a fraudulent application, registration under which did not deprive an unregistered true owner of his legal title, see *Brady v. Brady* (8 S.A.L.R. 219).

The position of a person who becomes registered in place of a previous registered proprietor is not necessarily the same. If the title of a registered proprietor is invalid because of his own fraud, so that on ordinary legal principles he could not pass a title to a transferee, it is not clear that the paramountcy section in itself has any different result. The transferee from him has a title good "except in case of fraud", but this may well be treated as a case of fraud; for here there is a registered title which very directly has its origin in fraud, whereas in the case of initial registration the registration of the innocent applicant does not follow directly and as it were mechanically from the fraud, but depends on the decision of the examining officer. Evidently the legislature did not consider that the paramountcy section protected the transferee (which it would have done if

the fraud there mentioned had to be fraud on the part of the person registered), for there are subsequent provisions quite inconsistent with this idea. There is the section (N.S.W.124, V.244, Q.123, T.124, W.A.199) dealing with ejectment against a registered proprietor, which recognises, but does not positively provide, that ejectment may be brought against a person deriving otherwise than as a transferee bona fide for value from or through a person registered through fraud. If a voluntary transferee from a person registered through fraud was not within the exception of fraud in the paramountcy section, that section would confirm his title and there could be no question of ejectment against him. The section which protects the bona fide purchaser for value (N.S.W.135, V.247, Q.126, T.126, W.A.202) favours the same construction, for by restricting protection to this class of transferee it shows that other transferees may be unprotected although not personally guilty of fraud. The result is that it cannot be said that fraud in the paramountcy section means only fraud brought home to the person registered. The exception can cover other cases. The above remarks do not apply to the South Australian Act, where the position is made clear, in the same sense, by the paramountcy section itself (s.69).

In *Assets Co. v. Mere Roihi* ([1905] A.C. 176) it was said that "the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming a title certified under the *Native Land Acts,* must be brought home to the person whose registered title is impeached or to his agents" (p. 210). This *dictum,* in the context where it occurs, is liable to give the impression that the Privy Council were by it indicating the scope of the exception of fraud in the paramountcy section, and were saying that for the purposes of this exception fraud must be brought home to the person registered. But examined carefully it will be seen to say no more than has been said above, for it is specifically restricted to the case of the purchaser for value. There may however have been some confusion. The sections of the New Zealand Act just previously referred to in the judgment (like the corresponding Australian sections) say nothing about "fraud which must be proved in order to invalidate the title of a registered purchaser for value". The paramountcy section contains the exception of fraud, but except in South Australia this exception does not mention purchasers for value. The later sections deal with purchasers for value, but in connection with them speak of bona fides, not fraud; and, as will

be suggested later, lack of bona fides may be proved without fraud necessarily being proved.

A third question relates to the effect of fraud once it has been established. The paramountcy section does not say that in case of fraud a registered proprietor has no title. It says nothing positive, and contains merely the negative provision that the general rule laid down in the section does not apply where there is fraud. The result, it is suggested, is that where fraud is proved against a proprietor, his position is what it would be under the general law.

Now under the general law a person who by fraud procures a conveyance to himself may or may not acquire the legal title, according to the circumstances; and the position will be the same if the land is under the Act. If the fraud is such as to make the instrument of conveyance void *ab initio,* no title passes. This will be the case where the fraud consists of forgery, or where the circumstances make a plea of *non est factum* available. For example, if X gets A, a registered proprietor, to sign a transfer in which he is described as transferor whereas he thinks he is signing as a witness, and in the circumstances the court holds that A is not bound by his act, registration by X will not give him the legal title. In this case A will be able, as legal owner, to recover the land by action of ejectment, and thereupon have his name restored to the register.

But if on the other hand A executes a genuine transfer to X, but is induced to do so by a fraudulent representation by X, the legal title will pass to X, and A will have merely an action for damages at law, or an equitable claim to a reconveyance by X. A case illustrating this point in a rather obscure way is *Frawley v. Ewing* (1883) (9 V.L.R. 197). The plaintiff alleged trespass to his land and carrying away his goods. The defendant's plea was that neither the land nor fixtures thereto were the plaintiff's. By his replication the plaintiff alleged that he had held a certificate of title to the land and was induced by the fraud of the defendant to sign a transfer to the defendant, which was registered. The defendant demurred, and the demurrer was upheld on the ground that the replication was bad as involving a departure in pleading. By the replication it was implied that a title had passed to the defendant, contrary to the allegation in the declaration. As Holroyd J. said: "It admits a transfer good until displaced."

Wrong Description.

Lack of space prevents detailed discussion of this and some other exceptions to indefeasibility. Apart from cases of initial

registration, the governing principle, it is suggested, is that a description in a certificate of title is wrong only if (i) the entry in the register departs from the description in the instrument on the basis of which the entry was made, or (ii) the description in the certificate, although following the instrument, extends to land not covered by the certificate of the proprietor who executed the instrument. In a case of subdivision it is not a wrong description if the certificate correctly follows the instrument, but by mistake the instrument did not follow the terms of the prior contract between the parties.

Prior Certificate.

Two main principles are suggested.

(i) Priority means priority as between the first certificates issued upon independent applications to bring the one parcel of land under the Act, so that a subsequent certificate has the order of priority that belonged to the certificate which it represents.

(ii) A prior certificate open to challenge on the ground of fraud or wrong description will not prevail against a subsequent certificate not open to challenge.

Omitted Easements.

In New South Wales, Queensland, Tasmania, and South Australia a registered proprietor's freedom from unregistered interests does not extend to the case of the omission or misdescription of easements. The natural construction to put on the word "omission" is that it refers to non-registration where there should have been registration; and that the cases contemplated by the legislature were cases where on the first bringing of land under the Act an existing easement was not registered. Misdescription is perhaps similarly limited to initial registration. The words could however also extend to the case where on transfer a previously registered easement is by error omitted or misdescribed.

It is submitted, nevertheless, that on the construction of the paramountcy section put forward earlier, easements may arise by implied grant and be enforceable although not registered. *Jobson v. Nankervis* (44 N.S.W.S.R. 277) and the New Zealand cases there cited do not stand in the way of this view, apart from *Mackechnie v. Bell* (28 N.Z.L.R. 348), for they are cases not of implied grant but of attempts at express grant ineffectual because there was no registrable instrument. *Mackechnie v. Bell* comes nearer to being a case of implied grant, but it was decided on the authority of earlier cases, as though they were similar, when in fact they were cases of ineffectual express grant.

Unregistered Tenancies.

The position varies in the different States and in each case now depends on express provision in the Act, though in New South Wales (s.42(d)) and Western Australia (s.68) the express provision relates only to tenancies created before a transfer to the current registered proprietor. The draftsman evidently had an eye to the decision in *Josephson v. Mason.*

Errors.

In all the Acts power is given to the Registrar to correct errors in certificates of title, or in the register book, or in entries made therein, and to supply entries omitted to be made (N.S.W.12(d), V.233(b), Q.11(4), T.11(iv), S.A.230(4), W.A.188(ii)). A question arises as to what is an error for the purpose of this provision. Without pursuing the matter in detail, or discussing the authorities, it may be suggested that the errors referred to here are errors made by the Registrar or his officers in the course of writing certificates or making entries on them. That is to say, it is his own errors he can correct, not the errors of other people. For example, if the description of the boundaries of land in a certificate varies from the description in the application for initial registration or in the instrument of transfer, as the case may be, there is an error which the Registrar can correct. But if the error was made by a party or parties in the application or the instrument of transfer, which the certificate correctly copies, there is not an error within the meaning of this provision. Again, if the Registrar registers a document of a type not made registrable under the Act (e.g. a purported transfer or lease, valid under the general law but not in statutory form) or ineffectual for its purpose even under the general law (e.g. a document purporting to create an easement but not under seal and not in statutory form) this again will be an error that can be corrected. Similarly, registration of a forged instrument would appear to be an error which the Registrar could correct on becoming satisfied that it was a forgery. On the other hand, if a public body purports to resume land and the appropriate document is registered, and it then clearly appears that the resumption was ultra vires, this error, being made by the public body and not by the Registrar, is not an error which he can correct. As to this last matter the opposite view is expressed by Roper C.J. in Eq. in *Caldwell v. Rural Bank of New South Wales* (69 N.S.W.W.N. 246, 254) and by Salmond J. in *Boyd v. Mayor etc. of Wellington* ([1924] N.Z.L.R. 1174, 1215). But a power to correct errors in this sort of case assumes a power in the

Registrar to decide questions of law and fact which may well be difficult and important; and it is not clear that the legislature intended to confer such a judicial power on the Registrar.

The case of an error that may be corrected is another exception to the conclusiveness of the register, for to the extent of the error a person registered cannot rely on his registration.

Registration of Void Instrument.

Judicial opinion has been sharply divided on the question whether registration under a void instrument gives an indefeasible title. An instrument may be void by reason of forgery, or because the party who executed it was under a mistake as to its nature, or because it was not within the capacity or power or authority of the party executing it. In some such cases (e.g. forgery or lack of capacity) the Registrar may be in a position to refuse registration; but in others (e.g. mistake as to the nature of the document) he may have no chance of questioning it, and in others again (e.g. ultra vires governmental acquisition) it may be improper for him to examine the validity of the governmental act. The question is whether in these cases a void instrument accepted by the Registrar is just as effectual as a valid one.

In a few early cases the view was adopted that, subject to exceptions specified by the Act, registration gives an indefeasible title even though the instrument registered was a forgery. This view was expressed *obiter* in *Bailey v. Cribb* (1884) (2 Q.L.J. 42); and in *O'Connor v. O'Connor* (1887) (9 A.L.T. 117), decided between the Full Court and the Privy Council decisions in *Gibbs v. Messer,* mortgagees registered under an instrument in which one joint proprietor forged the signature of the other were held to be entitled.

Since *Gibbs v. Messer* ([1891] A.C. 248), however, it has been generally accepted that a person registered under a forged instrument is liable to have the entry in his favour removed from the register. In this case, a solicitor Creswell, who had custody of Mrs. Messer's documents of title, forged and registered a transfer to a fictitious person Hugh Cameron. He then executed a mortgage purporting to be signed by Cameron, and misappropriated the moneys lent. Two questions arose, firstly, whether Mrs. Messer could be re-registered as proprietor; secondly, whether on re-registration she took subject to the mortgage.

The first question raised no difficulty, for it was clearly impossible to leave on the register the name of a fictitious person. But the ground given by the Privy Council should be noted: "It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of

the true owner Mrs. Messer, who has been thereby defrauded, to have her name restored to the register" (p. 253). The mention of fraud suggests that the Privy Council viewed this as being a case of fraud, and so as being within the exception of fraud in the paramountcy section. However this is not clear, and the main basis may have been the non-existence of Cameron. But the decision on this part of the case may also have rested, or at any rate may be supported, on the principle laid down in dealing with the second and main question, that the registration of a forged instrument does not pass a title.

The second question was discussed in more detail. Lord Watson, who delivered the judgment of the Privy Council, did not examine in detail the relevant provisions of the Victorian Act, but laid down certain propositions indicating their effect.

"In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Creswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation at the instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Creswell's fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee" (pp. 254, 255).

A later passage makes clear the basis on which the Privy Council considered that Mrs. Messer would have been entitled to have her name restored to the register. "Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed." This shows that, in the opinion of the Privy Council, a person registered by means of a forged instrument is not liable to attack only on the basis of fraud, but on the basis that the instrument is a nullity. This is supported by dicta uttered during argument and quoted by Dixon J. in *Clements v. Ellis* (51 C.L.R. 217, 240). Lord Herschell, discussing the evidence section, said that while the state of the register might be conclusive so long as it stood, that was not a reason why there should not be power to rectify it and set it right. Lord Watson said: "The provisions of this Act seem to be perfectly consistent, if you assume what appears to me, at present, to be the meaning of the legislature, that down to this point they are dealing with nothing except genuine instruments."

In *Assets Co. v. Mere Roihi* ([1905] A.C. 176) there is a reference to *Gibbs v. Messer* which by some people appears to

be regarded as detracting from the authority of that case. "It was urged by counsel that the decision of this Board in *Gibbs v. Messer* shows that it is not in all cases essential to bring fraud home to the registered owner. This is true; but the case is not really in point. As already explained, in *Gibbs v. Messer* two bona fide purchasers were on the register, and the case turned on the non-existence of any real person to accept a transfer and get registered himself, and then to make a transfer to some one else. Moreover, forgery is more than fraud, and gives rise to considerations peculiar to itself" (p. 211). At first sight this passage suggests that *Gibbs v. Messer* was a decision resting on peculiar circumstances—and Baalman (Torrens System in New South Wales, p. 161) even reads it as suggesting that *Gibbs v. Messer* was a peculiar decision. But the reference to forgery as giving rise to considerations peculiar to itself must be read with regard to the context. The respondents' case in *Assets Co. v. Mere Roihi* was based, in part, on fraud by persons other than the appellants (see p. 211). Apparently it was argued that fraud invalidating a certificate need not be fraud brought home to the registered proprietor, and *Gibbs v. Messer* was cited in support. In meeting this argument the judgment admitted that, as in *Gibbs v. Messer,* a certificate may be invalidated without there being fraud brought home to a purchaser for value, but denied that this could be on account merely of fraud by someone else. It was because in that case there was something other than fraud, viz. forgery. It is true that forgery was said to raise questions peculiar to itself; and as compared with fraud so it does. But there is no need to read the passage as declaring that there can be no other basis of invalidity. If however it should be so read, then it is only *obiter*, and if inconsistent with any part of the *ratio decidendi* in *Gibbs v. Messer* can hardly be regarded as overruling it.

This brings us to the question of the principle on which *Gibbs v. Messer* was decided. In view of the language used in the judgment it seems hardly to be the case that the decision rested on nothing more than "the non-existence of any real person to accept a transfer and get registered himself, and then to make a transfer to someone else". It was not a decision confined to special facts, and resting on a rule invented to meet no more than those special facts. This is shown by the following passages in the judgment.

"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" ([1891] A.C. at p. 255). Here is a general statement that a forged instrument gives no title to a real person who becomes registered under it.

"The real character of the criminal acts perpetrated by Creswell differs in no respect from what it would have been had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance" (p. 257). This passage shows that the Privy Council did not regard the non-existence of Cameron as being the essential basis of their decision. The essential feature of the mortgage to the McIntyres was that it was a forgery.

"Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences."

This last passage broadens the *ratio decidendi* still further. The mortgage was invalid because the instrument registered was a nullity—a nullity because it was forged. This is a much broader principle of decision than the mere non-existence of the registered proprietor; and nullity is broader than forgery. If a registered title is invalid because the instrument is a nullity, other grounds of nullity are let in as well as forgery.

In view of these passages, it is submitted, *Gibbs v. Messer* cannot be dismissed as a very special case the decision in which is limited to the non-existence of the proprietor supposed to have executed a transfer or mortgage. A brief and obscurely worded reference to it in a later case, concerned with a different class of facts, cannot be treated as overruling the clearly expressed principle on which the case was actually decided, viz. that the

mortgage in question was invalid because the instrument registered was a nullity, being a forgery.

This exception to indefeasibility, of course, is not one of those expressly recognised by the Act. It rests on a judicial construction of the Act as a whole, it being assumed that the legislature, in granting indefeasibility to a registered title obtained by the registration of an instrument, was contemplating only genuine instruments. It involves construing the Act consistently with a general principle of common law that forged documents can have no effect, on the assumption that if the legislature had intended to depart from this hitherto fundamental principle it would have expressed its intention more clearly than it has done.

This implied exception being admitted in one case of nullity it is difficult to see how it can be rejected in other cases of nullity. On this point however there has been considerable difference of judicial opinion.

In *Boyd v. Mayor etc. of Wellington* ([1924] N.Z.L.R. 1174) a proclamation was made purporting to vest the plaintiff's land in the Wellington Corporation. The proclamation was registered, so that the Corporation appeared as the registered proprietor of the land. The validity of the proclamation was challenged, and the question was considered, assuming the proclamation to be void, whether the register could be rectified by restoring the plaintiff's name as proprietor. By a majority of three to two the New Zealand Court of Appeal held that the registered title of the Corporation was indefeasible.

The majority regarded *Assets Co. v. Mere Roihi* as deciding that in the absence of fraud, and where there is no forgery as in *Gibbs v. Messer,* the fact of registration is conclusive. The minority took the view that *Assets Co. v. Mere Roihi* was not concerned with the sort of question that arose in this case, and that this case was governed by *Gibbs v. Messer,* there being no difference between instruments void for forgery and those void for any other reason. Salmond J. summed up his view in the following words: "The registered title of A cannot pass to B except by the registration against A's title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration."

In *Clements v. Ellis* (51 C.L.R. 217) which involved the forged discharge of a mortgage, so that an innocent transferee became registered free of the mortgage, Dixon J. accepted the view of the minority in *Boyd's Case* as to the broad application of the

principle of *Gibbs v. Messer*. In *Coras v. Webb* ([1942] St.R.Qd. 66) Philp J., accepting the same view, held that a mortgage by an infant could be avoided and removed from the register; but in *Percy v. Youngman* ([1941] V.L.R. 275) Martin J. took the opposite view, holding that a registered transfer by an infant could not be avoided. Note also the opinion expressed by Harding J., *obiter*, in *Gilbert v. Bourne* (6 Q.L.J. 270) that a transfer signed in blank is void and does not by registration pass a title. The recent decision of the New South Wales Full Court in *Caldwell v. Rural Bank of New South Wales* (69 N.S.W.W.N. 246) tilts the balance of authority in favour of the broader principle of nullity.

This case was very similar to *Boyd v. Mayor etc. of Wellington*. The Rural Bank desired to acquire land owned by the plaintiff, and the procedure followed involved a notification in the Gazette, purporting to be made under statutory authority, declaring that the land was resumed and was vested in the Minister for Public Works. In accordance with s.196A(3) of the *Conveyancing Act* 1919-1932 a notice of resumption was sent to the Registrar-General, and he, in accordance with s.46A of the Real Property Act, made an entry in the register to the effect that the land had become vested in the Minister. There were to be further steps by which the title would pass to the Bank. The report does not indicate exactly what order the plaintiff sought, but it is clear that he sought to have the entry removed and to be restored to the register as registered proprietor. The defendants demurred, but the exact terms of the demurrer are also not indicated in the report.

The Full Court held that the resumption was not within the terms of the relevant legislation and so was invalid; and the question then was whether this was immaterial once the Minister became registered. There was also a question whether the entry in the register operated, accoding to the provisions of the Real Property Act, to register the Minister as proprietor.

For the purpose of his decision Owen J. assumed, without deciding, that the Minister had been registered as proprietor. He discussed the conflict of opinion indicated above, and adopted the view of Dixon J. in *Clements v. Ellis* and the minority in *Boyd's Case*. He therefore decided the demurrer against the defendants.

Roper C.J. in Eq. also decided against the defendants, but on different grounds. In the first place he held that the Minister was not a registered proprietor, because the notice of resumption was not an instrument affecting land, whereas by s. 35 a person

becomes a registered proprietor by registration of an instrument affecting land.

Secondly, assuming that the Minister was a registered proprietor, there were two grounds for giving relief to the plaintiff. One was that the entry in the register was made in error, because the notice sent to the Registrar-General was not a notice of resumption as no resumption had validly been effected. Under s. 12(d) the Registrar-General had power to correct the error. The other ground was that the plaintiff had a personal equity against the Minister. If the Minister had the estate, it was an estate acquired by a mistake and he was a bare trustee for the plaintiff. If he did not have the estate, he had by a mistake placed a blot on the plaintiff's title which he should have had removed.

Street C.J. agreed that the plaintiff should succeed, but gave no reasons, merely saying that he had read the other judgments and desired to add nothing himself.

The cases considered above are substantial authority for the principle that a void instrument passes no title to the person who becomes registered under it; and this is certainly the case where the instrument is a forgery: *Gibbs v. Messer.* In such a case the court will order the register to be rectified.

A forged instrument may also operate in another way, by removing from the register an interest that should remain there; for example, when a forged surrender of a lease or a forged discharge of a mortgage is registered. Until further dealings occur, the situation in this case is essentially the same as where the interest remains on the register but a new proprietor is substituted for a proprietor who should have remained registered. The essential thing is that a proprietor's name is wrongly taken off the register; and whether a new proprietor is substituted or the interest itself disappears from the register is immaterial.

Application of Exceptions to Indefeasibility.

The exceptions to indefeasibility have been noted, and the meaning of the exceptions discussed in greater or lesser detail. But, as we have seen, the Act makes it clear that these exceptions do not apply in all cases. The various cases will now be examined in more detail.

Original Registered Proprietor.

A person registered as a proprietor when land is first brought under the Act clearly holds subject to all unregistered legal estates existing before he became registered and covered by the exceptions listed above.

Proprietor Creating Interest.

A registered proprietor who himself creates a legal interest which under the provisions of the Act is capable of existing without being registered holds subject to that interest; e.g. unregistered tenancies recognised by the Act or not invalidated by it. He also, it is submitted, holds subject to easements which on general law principles would arise against him under the doctrine of implied grant. Apart from interests arising under the statutes of limitation and other overriding statutes, these would appear to be the only legal interests capable of creation without registration. Otherwise interests can be created only by the execution of an instrument, and the instrument is ineffectual to pass a legal title until it is registered.

Voluntary Transferee.

Where a proprietor holds subject to unregistered legal interests, and he transfers or creates a new interest in favour of a volunteer, the voluntary transferee is subject to the same unregistered interests. There is nothing in the paramountcy section or in any other section of the Act to free him from such interests.

The Purchaser for Value.

In New South Wales, Victoria, and Western Australia, the exception of wrong description in the paramountcy section is expressly made by that section itself not to extend to the purchaser for value (not the *bona fide* purchaser for value). In South Australia it is the *bona fide* purchaser for value who is thus excepted. However, in the New South Wales, Victorian, and Western Australian Acts, as in other Acts, the main provision protecting purchasers for value (N.S.W.135, V.247, Q.126, T.126, S.A.207, W.A.202) extends only to the *bona fide* purchaser; and on a view of the Act as a whole it seems unlikely that the legislature intended to give protection to a purchaser for value taking *mala fide*. In South Australia the exception of fraud also in the paramountcy section is made by that section not to extend to the *bona fide* purchaser for value. Otherwise the exceptions in the paramountcy section are not thus limited, and consequently any protection to the purchaser for value must be sought elsewhere.

In considering the effect of the main provisions protecting the bona fide purchaser for value it is useful to keep two types of case in mind. One is the case where V is wrongly registered (e.g. by a forged transfer, or by error) when A should have continued to be registered, and V transfers to a bona fide purchaser for value (using this term to cover not only a transfer of the whole of V's supposed interest, but also the creation of a

mortgage, lease, or other subordinate interest). The other is the case where V is properly registered for an estate or interest, but should hold subject to a subordinate interest in A which has been wrongly removed from the register, and P, a bona fide purchaser for value, gets a clear title from V. For example, V may hold subject to a mortgage to A. V provides his solicitor with money to pay off the mortgage, but the solicitor misappropriates the money, and, having access to the documents of title, forges and registers a discharge of the mortgage. V then transfers to P who becomes registered with a clear title.

The question will be whether the protecting provisions cover both these types of cases.

The section which deals most specifically with the purchaser for value is N.S.W.135, V.247, Q.126, T.126, S.A.207, W.A.202. But in considering it the effect of certain other sections should be kept in mind.

Except in Queensland the notice section (N.S.W.43, V.179, T.114, S.A.186, W.A.134) provides that no person contracting or dealing with or taking or proposing to take a transfer from a registered proprietor shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor was registered, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding. The Queensland section (s.109) merely provides that a transferee is not to be affected by notice. Except in South Australia this provision is qualified by the words "except in case of fraud". The last part of the section, providing that a transferee etc. is not to be affected by notice, can only affect the enforcement of equities, for the enforceability of legal interests in no way depends on notice. (This provision, it is submitted, does not require a purchaser for value of a legal interest to be treated as taking bona fide in circumstances where otherwise notice would affect his bona fides.) The earlier part of the section does not appear, in itself, to have any concrete effect. It does indeed imply that A, dealing with X, takes free of claims against X which do not appear on the register. That is to say, the exceptions to indefeasibility of title do not apply as against a transferee in respect of pre-existing unregistered interests. But although this general idea appears by implication, the actual terms of the provision are hardly positive enough, standing alone, to amount to an enactment of such a rule.

Moreover, the idea is expressed in terms too broad to be fully consistent with other provisions of the Act. Volunteers are not clearly excluded, but in other sections a clear distinction is drawn between the volunteer and the purchaser for value. Furthermore there is the exception of the case of fraud. In so far as this relates to the conduct of the transferee it implies that where his conduct falls short of fraud he is not concerned with the circumstances in which his transferor became registered. But where more specific provision is made it is only the bona fide purchaser who is protected; and there may be lack of bona fides which falls short of fraud: *Hay v. Solling* (16 N.S.W.L.R. (L.) 60). If on the other hand the exception of fraud here extends to fraud by which the transferor became registered, a purchaser must always in fact make inquiries, in case there is such fraud. On the whole, the section seems to be expressed with such a lack of precision that, apart from the provision as to notice, it cannot be treated as having any specific enacting effect. At most it indicates a line of approach to be followed in construing other provisions.

The ejectment section (N.S.W.124, V.244, Q.123, T.124, W.A.199) by implication recognises that an action of ejectment may be brought to enforce an unregistered interest coming within the exceptions to the paramountcy provision. But in cases of fraud and wrong description (in Queensland fraud only) the bona fide purchaser for value is excepted. Therefore he can rely on the register. But so far as this section goes it is only in cases of fraud and wrong description, and in respect of corporeal interests in possession (for which ejectment is a remedy), that the protection is given.

A section which may be called the damages section (N.S.W.126, V.246, Q.126, T.125, S.A.203, W.A.201) provides that a person deprived of land in circumstances set out may bring an action for damages against the person by whose act the deprivation occurred. The wording varies somewhat in the different Acts but the provision appears to cover all cases in which a person entitled to a legal interest loses it through the operation of the indefeasibility provisions; and it gives him a remedy against the person by whose registration his interest was defeated. For example, the Victorian Act (s.246) mentions deprivation by (i) fraud, (ii) bringing land under the Act, (iii) registration of another person as proprietor, (iv) error or misdescription in any certificate of title or in any entry or memorial in the register. Thus it is contemplated that a person may be deprived of an interest in all these ways. If previously registered he

may be deprived either by being deregistered or by having a lesser interest registered (such as a mortgage) to which he takes subject: see *Cox v. Bourne* (8 Q.L.J. 66), *Finucane v. Registrar of Titles* ([1902] St.R.Qd. 75, 94). But if, although deregistered, he can still assert his title, or if he can have a subordinate adverse interest removed from the register, he is pro tanto not deprived. See the cases just cited and *Gibbs v. Messer* ([1891] A.C. 248).

We come now to the section which by direct provision gives protection to the bona fide purchaser for value. At first sight the provision may appear to be the same in most of the Acts, but on careful examination it will be seen that there are important differences.

In New South Wales (s.135) it is provided that nothing in the Act shall be so interpreted as to leave subject to action for recovery of damages as aforesaid (i.e. the statutory action for damages considered above), or to action of ejectment, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration on the plea that his vendor or mortgagor may have been registered as proprietor or procured the registration of the transfer to such purchaser or mortgagee through fraud or error or may have derived from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever. The Tasmanian section (s.126) is similar except that it omits procuring registration through fraud or error and taking from or through a proprietor registered through fraud or error.

This section, it is to be noticed, protects the bona fide purchaser not only from action of ejectment or for damages, but also against deprivation of interest, whether by action or otherwise. However, according to the terms of the section the only deprivation disallowed is deprivation on the ground that the vendor was registered through fraud or error. Where V through fraud or error has been registered in place of A, the case is clearly covered by the section. But if V is quite properly registered as proprietor in fee simple, but should hold subject to a mortgage to A which has been wrongly removed from the register, it is not so clear that V is registered through fraud or error. His registration as proprietor in fee simple is perfectly valid. All that can be said is that his position has been improved by the fact that another person has been deregistered through fraud or error. On this construction the section would not free P from liability to partial

deprivation of interest by the restoration of A's mortgage to the register.

But a strict construction such as this would defeat the intention of the Act. The other provisions discussed above contemplate a general protection to the bona fide purchaser for value; and the failure to cover clearly the case where a subordinate interest has been wrongly removed seems to be due rather to failure to foresee that type of case than to intention to exclude it. It would therefore seem to be permissible to put a liberal interpretation on the words "registered as proprietor through fraud or error", and to treat them as referring not merely to the proprietor's own estate or interest, but to his whole position as shown by the register. If the state of the register is such that he appears to hold free of a mortgage to which in fact he ought to be subject, he is registered as proprietor free of encumbrance through fraud or error.

On this construction the section appears to give a complete protection to the bona fide purchaser for value. The barring of an action for damages and an action of ejectment gives only a limited protection, but the barring of deprivation of interest seems to apply to all cases that may arise. Suppose for example that V is quite properly registered as proprietor in fee simple, but that by error (as distinct from fraud) an incumbrance in favour of A has been taken off the register. If V transfers to P, a bona fide purchaser for value, the registrar will not be able to correct the error of taking A off the register, for this will involve a deprivation of interest to P. Suppose again that V has a certificate under the Tasmanian Act which by wrong description covers land which properly belongs to A. V sells to P who later finds A in possession of this land. The protecting section (s.126) does not specifically give a right of action to P against A, and the Tasmanian paramountcy section, read by itself, would allow A to plead wrong description if P sued on the strength of his certificate. But to allow A to plead this exception would leave P subject to deprivation of an interest in respect to which he is registered; and therefore by s.126 A cannot plead this exception and P can rely on his certificate as providing conclusive evidence of his title. Similarly, an action to rectify the register by restoring a mortgage removed by a forged discharge would not lie against a bona fide purchaser, because this would involve a partial deprivation of interest. Thus the New South Wales and Tasmanian provisions would appear to give a clear protection to the bona fide purchaser in all cases—that is to say, all cases in the one chain of registered title, as distinct from the case where

two certificates of title have been issued for the same parcel of land.

The Victorian and Western Australian sections, on the other hand, do not so readily lend themselves to a construction giving full protection to the bona fide purchaser for value. The difference results from using a different preposition before the word "deprivation". These two Acts say "or for deprivation of interest" instead of "or to deprivation of interest", with the result that what is barred is not deprivation of interest generally, but an action against the purchaser for deprivation of interest. On a strict construction the section only bars an action against the bona fide purchaser for value. For example, it does not in terms prevent the registrar from correcting an error even after transfer to a bona fide purchaser for value. Again, suppose V becomes registered by a forged transfer, thus displacing a true owner A, and transfers to a bona fide purchaser P. If P obtains possession he is not liable to an action of ejectment or action for damages by A; but if on the other hand A is in possession, and P sues to obtain possession, A is not in terms barred by the section from pleading the exception of fraud in the paramountcy section. (*Quaere* whether he comes within the exception "subject to . . . any rights subsisting under any adverse possession of such land").

But under the Victorian and Western Australian Acts also a strict construction such as this would defeat the general intention shown by the Act. In the case of these Acts also it appears that the draftsman failed to foresee all the possible cases, and that this, rather than intention, is the reason why he failed to bar all the proceedings and defences that might adversely affect the bona fide purchaser for value. Accordingly it would seem to be within the limits of proper construction to give effect to the general intention of the Act as regards the omitted cases. If a mortgage is removed from the register through fraud so that a bona fide transferee gets a clear title, it may reasonably be held that, in view of the general intention of the Act, the Registrar should not correct the register on the ground of error (acceptance of a forged document). Similarly, where the vendor was registered through fraud, and the true owner is still in possession, it may well be held that the Act read as a whole indicates an intention that he should not be allowed to plead the exception of fraud and resist an action of ejectment, but must be content with his remedy of action for damages.

In the South Australian Act the position of the bona fide purchaser for value is covered in a different way. Section 69 provides that the title of every registered proprietor shall, subject

to interests registered, be absolute and indefeasible, subject only to the qualifications set out. Amongst the qualifications are fraud, certificate or other instrument of title obtained by forgery, insufficient power of attorney, and disability; but as to all of these it is provided that the title of the bona fide purchaser for value is not to be affected. As to the other exceptions to indefeasibility, set out in paragraphs IV to X, and covering omitted easements, prior certificate, adverse possession, short tenancies, and several others, it seems clear that these apply to the bona fide purchaser for value as well as to other registered proprietors.

The later section protecting the bona fide purchaser (s. 207) is similar in effect to the Tasmanian provision already considered. So far as it extends to fraud and wrong description of the land it merely duplicates what is already provided, more fully, in s. 69. However, registration of the transferor by error other than wrong description is not covered by s. 69, but is covered by s. 207. Between them the two sections appear to cover adequately all cases in which protection was intended.

The Queensland provisions also differ considerably from the provision made in the other States. In the first place the paramountcy section itself (s. 44) does not except the bona fide purchaser from the qualifications to indefeasibility, so that his protection must be sought elsewhere. Again, the notice section (s. 109) deals only with notice, and says nothing about a purchaser not being bound to inquire into the circumstances in which his vendor became registered. The damages section (s. 126, first paragraph) gives a remedy in damages to a person deprived of an interest in consequence of (i) fraud, (ii) the issue of a certificate of title to any other person, (iii) any entry in the register, (iv) any error or omission in any certificate of title or in any entry in the register. The inclusion of the item "any entry in the register book" makes this provision wider than the provision in other States, since it covers an entry which puts an end to an existing registered interest as well as one transferring an interest or creating a new interest; and it covers an entry made by error as well as an error in an entry. The person against whom the action is brought is "the person who derived benefit by such fraud" etc. Thus the section contemplates that there may be deprivation in a wide variety of ways.

Section 126 provides that nothing in the Act shall be interpreted to subject to any action of ejectment or for recovery of damages any purchaser or mortgagee bona fide for valuable consideration although his vendor or mortgagor may have been registered as proprietor through fraud or error or may have

derived from or through a person registered as proprietor through fraud or error whether by wrong description of land or of its boundaries or otherwise.

This provision, it will be noticed, differs from the provision in other Acts in several important particulars. In the first place the action for damages that is barred is not merely the statutory action, but any action of damages, e.g. an action for damages for trespass brought by a deregistered true owner. Secondly, the provision says nothing about deprivation of interest, so that it is only actions of ejectment and for damages that are expressly barred. There is no express barring of a suit for rectification of the register, and the section does not in terms bar an unregistered claimant in possession from pleading the exceptions in the paramountcy section against the purchaser. Thirdly, the grounds on which actions are barred are not limited to the grounds of fraud or error. This section says "although" where in other Acts the section says "on the ground that"; so that the mention of specific grounds merely removes doubts that otherwise might exist and does not have a limiting effect.

Construed strictly the Queensland provision bars only two kinds of proceeding against a bona fide purchaser for value, an action of ejectment and an action for damages. It does not in terms bar an action for rectification of the register, or the correction of errors by the Registrar. Furthermore it does not assist the registered purchaser if he wishes to proceed against an adverse claimant in possession or exercising an alleged right.

Here again, however, the limits to the protection specifically given appear to be unintentional and inconsistent with the general intention indicated by other provisions of the Act, especially the provision giving an action for damages (which in the Queensland Act is contained in the same section and to which the protecting provision is a proviso). Therefore, on the basis of the general intention disclosed it seems to be a legitimate construction of the paramountcy provision that the exceptions to indefeasibility were not intended to apply in the case of a *bona fide* purchaser for value. This is supported by a passage in *Finucane v. Registrar of Titles* ([1902] St.R.Qd. 75, 93) which includes the words: "There is no express prohibition of an action to set aside a mortgage, but, having regard to the whole scheme of the Act, and remembering that one of the rights of a mortgagee is to take possession on default, it seems clear that the title of a registered mortgagee bona fide for value cannot be impeached".

There remains for consideration the type of case illustrated by the following facts. V is registered subject to an encumbrance

in favour of M and V contracts to sell to P free of encumbrance. V's agent forges a discharge of the encumbrance, and this forged instrument is lodged either with the transfer, or, if earlier, at a time when the contract is complete, so that P does not contract on the basis that V holds free of encumbrance. The instruments are registered and the register shows first the discharge and then the transfer. Essentially, these were the facts in *Clements v. Ellis* (51 C.L.R. 217).

The question raised by these facts is whether M can have his encumbrance restored to the register and enforce it against P. On the analysis of the Act put forward above he cannot do so. The discharge of encumbrance having been registered before the transfer,* V was at least momentarily registered free of mortgage, and so was registered through fraud. But P has the protection of the section which provides that a bona fide purchaser for value is not to be subject to action for deprivation of interest on the ground that his vendor was registered through fraud (N.S.W.135, V.247, T.126, S.A.207, W.A.202). Or to put the matter more generally, the Act shows a general intention to give protection to the bona fide purchaser for value, and on this ground P is protected. This of course is on the assumption that the discharge of encumbrance did not operate directly as a transfer or release in favour of P. A bona fide purchaser is not invulnerable if he takes under a void instrument; and in this case if the discharge operated equally with the transfer as an instrument executed in favour of P, P would be open to attack. In fact, however, it is submitted, the discharge in this case operates as between M and V.

In *Clements v. Ellis,* however, the section just cited (V.247) was ignored, and in an equally divided court two judges relied on the paramountcy section and two on an inference from the notice section. Rich J. and Evatt J. decided in favour of P on the ground that he was protected by the paramountcy section. Dixon J. and McTiernan J. decided in favour of M. Their view was that, by an implication from the notice section (N.S.W.43, V.179, T.114, S.A.186, W.A.134), a purchaser is protected only if he deals on the faith of the register, and that in this case P did not deal on the faith of the register. Lack of space prevents full discussion of this view, but it is submitted, firstly, that this section, which is merely to the effect that a person dealing with a registered proprietor need not inquire how he became registered

* In *Clements v. Ellis,* on similar facts, this was the view of Rich J. and Evatt J., and apparently also of Dixon J. But McTiernan J. treated the two instruments as having been registered simultaneously.

(the purpose of which is protective), does not contain any implication strong enough to limit the scope of other more precise protecting sections. Secondly, it is submitted that P in the example above (and Clements in *Clements v. Ellis*) did not deal otherwise than on the faith of the register. The register is concerned with title, and to deal otherwise than on the faith of the register must mean to deal with a party on the basis that the register does not show the true position. P did not expect to get a title otherwise than in accordance with the register. He expected the register to be in, or to be put into, such a state that he would get an unencumbered fee simple by the registration of an instrument of transfer. And at the moment when the transfer to him operated the register was in fact in the state in which he expected it to be. Care must be taken not to establish a proposition in one sense and then apply it in another sense. Yet this is what occurs, it is submitted, if it is said, where a purchaser expects an encumbrance to be removed before the transfer to him, that he does not deal on the faith of the register. Reliance on some preliminary dealing being effected in order to alter the register does not mean lack of reliance on the register as the basis of title. Even where from the beginning the registered proprietor's title is unencumbered a purchaser does not rely only on the register; he also relies on the validity of the instrument of transfer that he receives. And he does not rely any the less on the register because in such a case as this the dealing calls for two instruments and not merely one.*

In relation to the Queensland Act much of the basis for the view of Dixon J. and McTiernan J. is lacking, for the Queensland Act does not contain the provision that a person dealing with the registered proprietor is not concerned to inquire how the proprietor was registered, but merely the provision that a transferee is not affected by notice of unregistered interests. On the other hand it also lacks the provision specifically protecting the bona fide purchaser from deprivation of interest. However if, as submitted above, the Act should be construed as giving general protection to the bona fide purchaser for value, P in this case is not liable to have the register rectified against him.

It will be observed that in the argument put forward above P is not treated, as he was treated by Rich J. and Evatt J. in *Clements v. Ellis*, as coming within the protection of the para-

* In *Clements v. Ellis* the trial judge ordered the mortgage to be restored to the Register, so that it became enforceable against the purchaser Clements. The High Court beinng equally divided this order stood. By Act No. 4689 (1939) provision was made for a claim against the Assurance Fund in cases of rectification after reliance on the registration of a forged instrument, and a special appropriation was made to compensate Clements for his loss.

mountcy section. This is on the view that the exception of the case of fraud in the paramountcy section extends to persons registered in consequence of fraud even though it is the fraud of a predecessor, and that the exception ceases to apply on transfer to a bona fide purchaser for value only because of the later section. It appears to have been assumed in *Clements v. Ellis* that this exception applies only against a proprietor who is himself guilty of fraud, and this no doubt explains why the Victorian s.247 was disregarded in this case.

Meaning of bona fides and purchase.—To obtain protection against a third party who could have asserted an unregistered title against the transferor, a transferee must show (a) that he took bona fide, (b) that he was a purchaser of what he claims adversely to the third party.

A person may be held to take without bona fides even though the circumstances do not make him guilty of fraud. If a prior right is only equitable, and a transferee acquires a subsequent legal interest with notice, he may take free of the equity under the notice section because notice in itself does not show fraud. But where the prior interest is a legal interest, something less than fraud is sufficient to prevent it from being overridden by the subsequent legal title. For example, if, as in *Hay v. Solling* (16 N.S.W.L.R. (L.) 60) a person knows, or is aware of a possibility, that a certificate of title by error includes land to which a third party has a claim, it will not necessarily be fraud for him to take a transfer, but he will not be taking bona fide. (But query whether bona fides was the true question in *Hay v. Solling*. When Mrs. French got her new certificate there was no question of wrong description, and unless she was affected by fraud she got a good title, and necessarily passed a good title to Solling.)

The second point is that, although taking his transfer bona fide, a person may in certain circumstances not be a purchaser of land which is included in his certificate but is claimed by a third party. Suppose A has a certificate including land covered by a building to which he is properly entitled, but also including by error a few feet of land properly belonging to X. B agrees to buy from A, expecting to get only the land covered by the building. After he becomes registered he discovers that his certificate covers the extra feet of frontage. In this case there was no lack of bona fides when he took his transfer, but his is not a case that deserves the protection which this section seems to have been designed to afford; and it seems reasonable to put such a construction on this and similar provisions as will make a person a

purchaser only in respect of land he intended to buy, and not in respect of land which he did not intend to buy and was not in fact paying for. A border line case on this point is *West Australian Fresh Food and Ice Co. v. Freecorn* (7 W.A.L.R. 22). A certificate described the frontage of a parcel of land as being 62 feet when it should have been 60 feet. The 60 feet were covered by a building, and the extra two feet were covered by an adjacent building; but a transferee was nevertheless held to be entitled to the two feet. The trial judge and the Full Court held that the transferee intended to buy 62 feet, and was entitled to recover the two feet.

EQUITIES.

Equitable estates and interests may exist in land under a Torrens Act, and general equitable principles apply except in so far as the Act expressly or by implication modifies them.

Doctrine of Notice.—The main provision modifying the general law in relation to equities is the notice section (N.S.W.43, V.179, Q.109, T.114, S.A.186, W.A.134). The section has already been considered in relation to unregistered legal interests; its effect in relation to equities must now be examined. In Queensland the section simply provides that, except in case of fraud, a transferee of land shall not be affected by actual or constructive notice of interests other than those which have been notified or protected by entry in the register book. In the other Acts however the provision is more elaborate, and a comparison with the Queensland section will throw into sharper relief the terms of the section in these other Acts. Under the Queensland section the person to whom the provision applies is a transferee of land, which means a person who by transfer has acquired a legal estate (see s. 3). In the other States the person to whom the provision applies is a "person contracting or dealing with or taking or proposing to take a transfer from the proprietor" of a registered interest. Thus according to the words used the provision operates from the commencement of dealing, not, as in Queensland, only on its completion by registration of a transfer.

In Queensland the provision relates only to the effect of notice, but in the other States it relates to two things, firstly to the inquiries to be made by a prospective taker of an interest, and secondly to the effect of notice. Under the general law a purchaser takes subject to prior legal interests and also subject to equities of which he had actual or constructive notice. A careful purchaser makes inquiries as to subsisting interests, and if a purchaser fails to make the usual inquiries, he is deemed to have notice of, and so takes subject to, any equities that he would

have discovered if he had made those inquiries. The Act frees him from an obligation to make the inquiries, but only in part, viz. in respect of the circumstances under or the consideration for which the proprietor or a previous proprietor became registered. Here we have a declaration that in a dealing under the Act there is no need for the vendor's title to be investigated as there is in a dealing under the general law. In relation to equities the significance of this appears to be that failure to inquire will not fix the purchaser with constructive notice of defects in the vendor's title, arising for example from fraud, or of an express or constructive trust arising at the time of registration.

If this is what the declaration means, what is the result? It is submitted that as far as equities are concerned there is no result. The declaration can only have a result if constructive notice has some result. But this is not so, for the section goes on to say that the same person (i.e. a person contracting etc. with the proprietor) shall not be affected by notice actual or constructive of any trust or unregistered interest.

This second provision contains the effective part of the section. But even this provision does much less than might be expected from all the words used. According to the words, from the very commencement of dealing a person is to be unaffected by notice. Under the general law notice makes no difference until the purchaser has had the legal title conveyed to him: until then he is bound by prior equities simply because they are prior, irrespective of notice. Under the general law, notice becomes significant only when the purchaser has acquired the legal title. If he had no notice of an equity he takes free of it, while if he had notice he takes subject to it. The Act alters this by providing that he shall not be affected by notice, which means that he takes free of an equity even if he has notice of it. But since notice is significant only when the legal title is acquired this section of the Act has no significance except where a transfer or other dealing has been registered. Until registration, a person dealing with the registered proprietor is bound by a prior equity, and the holder of that equity will be able to enforce his interest by lodging a caveat and taking the necessary proceedings to turn his equity into a legal estate. It may further be observed that the application of the caveat provisions would be very greatly restricted if freedom from equities were extended further than is here suggested. The view put forward here is supported by the authorities, though these do not indicate in any detail the process of reasoning by which the result is reached. See *Templeton v. Leviathan Pty. Ltd.* (30 C.L.R. 34, 54, 69), *Lapin v. Abigail* (44

C.L.R. 166, 182, 188, 203), and the earlier cases there cited. In *Lapin v. Abigail,* Gavan Duffy and Starke JJ. (p. 196) accepted the earlier authorities "without much enthusiasm."

In New South Wales, however, this position is modified by s.43A, introduced in 1930. The section provides: "For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under an instrument registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that interest, be deemed to be a legal estate."

To understand the effect of this section it is necessary to advert in more detail to the general law as to the effect of notice. If a person agrees to purchase land, and if at the time when he paid the consideration or part of it he had no notice of a prior equity, he takes free of that equity provided he gets in the legal estate. But until he actually gets a legal conveyance the prior equity ranks ahead of his, and the holder of it may take proceedings to enforce his interest. However, it seems that in the case of a trust, as distinct from other equities, the purchaser will be bound by notice even if he gets it after paying the consideration, so long as he gets it before the legal conveyance is made. Thus except in the case of a trust a purchaser who has acquired the legal estate takes free of an equity if notice of it was received by him only after he paid the consideration money or part of it. For a summary of the effect of the authorities see *Powell v. London and Provincial Bank* ([1893] 1 Ch. 610; aff. [1893] 2 Ch. 555).

Now s. 43A (N.S.W.) provides that for the purpose of protection against notice the estate taken by a person under a registrable instrument (which until registration is an equitable estate) shall be deemed to be a legal estate. That is to say, if the instrument was executed before the taker received notice of the equity, he will take free of the equity. For this purpose, getting an instrument is as good as registration for a legal estate, and it would seem to follow that a caveat lodged after execution of the instrument will not hold up registration. This will not apply, however, where the transferor is a trustee.

It may be observed that strictly speaking what is relevant here is not protection against notice but protection against equities. But the intention is clear, and to effectuate this intention it would seem to be permissible to read "protection against notice" as "protection against the effect of notice", that is to say,

protection against equities which, under the general law, by notice become binding on the purchaser for value.

Inconsistency with Indefeasibility Provisions.—Although ordinarily the provisions of the Act are not inconsistent with the enforcement of equities, there are certain circumstances in which it is clearly the intention of the Act that a registered legal title should give the beneficial interest and so prevent the assertion of an equity which otherwise on ordinary equitable principles would be held to arise.

If a person not in fact entitled brings land under the Act, and becomes registered as proprietor, his registered title will, if he is not affected by fraud, displace the legal title of the previous true owner, and it is clearly the intention of the Act that he should also have the beneficial interest. On ordinary principles of equity, on the other hand, a person who acquires a legal title which another person should have will be treated as a trustee for that other; and on this principle, if A obtained a registered title where X was the true owner, A would be held to be a trustee for X. But this is contrary to the intention of the Act, and therefore the general equitable principle does not apply in this case. This is clearly laid down in *Assets Co. v. Mere Roihi* ([1905] A.C. 176). "Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent" (p. 204).

This is clearly the position in the case of initial registration, and must also apply to the case of the bona fide purchaser for value, who is clearly intended by the Act to take the beneficial interest, and whose title overrides the title of an unregistered party who might have enforced an interest against the vendor registered through fraud or error.

Where on the other hand the protecting provisions of the Act do not apply, i.e. in cases of fraud, error, wrong description, voluntary transfer, or mala fide purchase, the competing interest will continue to be enforceable as a legal interest even though unregistered, so that no occasion for a constructive trust arises.

These principles, however, have not always been applied. In *Karepa v. Saunders* ([1930] N.Z.L.R. 242) joint proprietors sold part of their land, and through a misconstruction of the instrument of transfer the certificate of title issued to the purchaser included more land than it should have. His children, taking by succession, were declared to be constructive trustees for the vendors. This, it is submitted, was a wrong method of dealing with the case. By reason of the exception of wrong description of the land, the certificate was not conclusive as to the excess land, the title to which therefore remained in the vendors. There was consequently no basis for declaring a constructive trust. Apart from this the case would appear to be one merely of competing legal claims, so that in accordance with the principle laid down in *Assets Co. v. Mere Roihi* a trust could not be held to arise.

Similarly in *Caldwell v. Rural Bank of New South Wales* (69 N.S.W.W.N. 246), where registration was obtained under an ultra vires act of resumption, one of the grounds on which Roper C.J. in Eq. decided the case was that the Minister who wrongly became registered proprietor must be treated as a trustee for the true owner. This also, it is submitted, is only a case of rival claims, and this ground of decision is contrary to what was laid down in *Assets Co. v. Mere Roihi.*

However where a case of rival legal claims involves some further element calling for the intervention of equity, a trust or other equity may be enforced against the registered proprietor. Ordinarily, as was pointed out, where the rival claim has not been defeated it persists as a legal claim, and where it has been defeated as a legal claim it cannot be asserted as an equitable claim; but *Finucane v. Registrar of Titles* ([1902] St.R.Qd. 75) is a case where a legal title was destroyed and was replaced by an equity. In that case defective conveyancing coupled with the operation of the Statute of Uses created a state of affairs whereby a trustee held only a legal estate for the life of the daughter of a settlor, in trust for her, and her children held legal remainders in fee simple. By misinterpretation of the deed of settlement the trustee became registered under the Act as tenant in fee simple, and he conveyed for a nominal consideration to the daughter. Thus the daughter held the fee simple when she should have had no greater legal or beneficial interest than a life estate, and the legal estates of her children were defeated as legal estates. Nevertheless, the trustee when he became registered as proprietor did so as trustee for the beneficiaries under the settlement, and the daughter was held to take subject to the same trusts. (For later

proceedings in this case see *Registrar of Titles v. Crowle* (75 C.L.R. 191).)

Apart from these two cases the application of general equitable principles is too well established by such cases as *Barry v. Heider* (19 C.L.R. 197) and *Abigail v. Lapin* ([1934] A.C. 491) to call for anything but the summary at the end of this article. But one special situation that does not arise under the general law may be considered.

If a proprietor has contracted to sell, or mortgage, or lease, or create any other legal interest, an equitable interest arises immediately if the contract is in writing; and a court of equity will, if necessary, order the execution of any instrument required to pass the legal title contracted for. If, however, the parties have also executed the necessary instrument, there is no occasion for an order for specific performance; but whereas under the general law the instrument will pass the legal title, in the case of land under the Act it will not do so until it is registered. The question is whether an equitable interest is to be regarded as arising only under the contract, or whether it can be regarded as arising also under an unregistered instrument. If the contract is in writing the effect of the instrument is immaterial. But if it is oral, and there is no writing until the instrument is executed, the question arises whether the instrument itself creates an equity, or whether it operates as a memorandum of the contract. As to its operating as a memorandum, there is a doubt, because it does not purport to be a note or memorandum of the contract. If the execution of the instrument in itself gives rise to an equity it will be on the broad general principle that a person who can get in the legal title to an interest has a corresponding equitable interest. When there is a contract the right to specific performance creates an equitable interest. Where there is a mortgage by conveyance the right to redeem gives the mortgagor an equitable interest. The common element in these two cases is the right to get in the legal estate. Possession of a registrable instrument under a Torrens Act gives a right to registration, and thereby a right, or at any rate a power, to get in the legal estate. Accordingly the holder of a registrable instrument would appear, until he actually registers, to have an equitable interest.

However the matter is not clearly settled by authority. In *Barry v. Heider* (19 C.L.R. 197) Griffith C.J. seems to have taken it for granted that an instrument which remains unregistered gives rise to an equitable interest. He said (p.208): "It follows that the transfer of 19th October, if valid as between the appellant and Schmidt, would have conferred upon the latter an

equitable claim or right to the land in question recognised by the law". Issacs J., on the other hand, based the existence of an equitable interest on the contract that lay behind the execution of the instrument. The statement of Griffith C.J. was adopted by the Privy Council in *Great West Permanent Loan Co. v. Friesen* ([1925] A.C. at 223). But in neither case was the question raised here considered; and it is not clear whether the instrument was treated as a memorandum of the contract, or as creating an equity simply because it gave the party taking under it the power to get in the legal title.

The distinction is important in the case of a voluntary transfer. Does a voluntary transferee acquire no proprietary interest until registration, or does he hold an equitable interest, out of which he can create equitable interests in favour of other persons? A case that did not exactly involve this question, but came close to it, is *O'Regan v. Commissioner of Stamp Duties* ([1921] St.R.Qd. 283). A father made a gift of land to his children and executed the necessary transfers, which were in effect delivered to the children. The father died more than two years after the execution of the transfers, but less than two years after their registration. Succession duty was payable if there was a disposition of the land within two years of the death. The Full Court held that the disposition occurred on the delivery of the transfers, not on their registration.

This was merely a decision that there was a "disposition" for the purposes of the *Succession Duties Act;* and it does not necessarily follow that the children must be treated as having acquired an equitable estate until registration. However in *In re Sharpe* ([1944] St.R.Qd. 26, 35) Philp J. treated an unregistered voluntary transfer to trustees as being an equitable transfer. Cf. *Holt v. Heatherfield Trust Ltd.* ([1942] 2 K.B. 1), *Re Fry* ([1946] Ch. 312), and *Re Rose* ([1949] Ch. 78).

Summary of Position as to Equities.

The combined effect of the indefeasibility provisions of the Act and the provisions relating to equitable interests may be summed up as follows:

1. *On initial registration.*

(a) A proprietor subject to an express trust before registration will remain subject to the trust after the land has been brought under the Act.

(b) Equally, a proprietor subject to implied or constructive trusts before registration (e.g. arising out of a contract of sale) will remain subject to the same trusts after registration. There seems to be no ground for distinguishing such trusts from express

trusts, whether they arose out of the proprietor's own acts, or were binding on him under the doctrine of notice.

(c) The acquisition of a title by registration will not in itself be sufficient to create a trust where there are no special circumstances previously existing (e.g. agency) which impose on the person obtaining registration a special fiduciary character.

(d) A person acquiring a legal title for the first time on registration takes subject to a trust if there are special circumstances imposing on him a fiduciary character.

2. *After registration and before transfer.*

The ordinary rules as to equities apply. Equities will arise against a proprietor by reason of his own acts just as in the case of land under the general law.

3. *On transfer from a registered proprietor.*

(a) A voluntary transferee is bound by all equities enforceable against the transferor.

(b) A purchaser for value is not bound by an equity enforceable against the transferor, whether he had notice of it or not, unless his conduct in securing a transfer involved actual fraud against the holder of the equity.

(c) A transferee taking in a fiduciary capacity (e.g. as agent) takes subject to the equities arising originally against him in accordance with the ordinary rules of equity.

(d) A transferee taking by mistake takes subject to such equities as arise under the ordinary equitable doctrines as to mistake.

(e) A bona fide purchaser for value will not be held to be a trustee for a person whose legal title is defeated by the transfer.

Indefeasibility — Summary.

On the various submissions made earlier in this article, the extent of the indefeasibility conferred by the provisions of the *Torrens Act* may be summed up as follows:—

1. *Interest for which Registered as Proprietor.*

(a) When land is first brought under the Act the person registered has an indefeasible title (i) if the application is genuine and not a forgery, (ii) if the application is not fraudulent, (iii) in so far as there is no wrong description of the land.

If these conditions are fulfilled it is immaterial that the applicant did not have a valid title previously.

(b) A purchaser mortgagee etc. from a registered proprietor (or from a sheriff executing a writ of execution) has an indefeasible title if (i) the instrument by which he acquires is a valid instrument, (ii) he takes *bona fide*. If these conditions are fulfilled it is immaterial that the proprietor from whom he took did

not have a valid title. A person taking by virtue of some overriding power (e.g. governmental power of resumption) has an indefeasible title if the power is validly exercised; but if the proceedings are directed against a registered proprietor who is not the true owner, they may in some cases thereby be invalid.

Substantially, a bona fide applicant securing initial registration and a bona fide purchaser for value are in the same position.

(c) In other cases the position is as under the general law: the person registered gets a valid title only if his predecessor's title and the instrument by which he took were valid.

2. *Other Unregistered Legal Interests.*

(capable of co-existing with registered proprietor's interest).

(a) *On bringing land under the Act.* A proprietor takes free of any such interest except in the following cases:—

(i) Where it was kept off the register by the fraud of the applicant or through error in the Titles Office;

(ii) Where it is within the list of interests specifically saved from being overriden, e.g. short tenancies and easements;

(iii) Where it is an interest enforceable under another overriding statute.

(b) *After dealings under the Act.* A proprietor takes free of any such interests except in the following cases:—

(i) Where the interest, being one that can be created without registration, was created by the proprietor himself, or by a predecessor in title from whom he derives otherwise than as or through a bona fide purchaser for value;

(ii) Where the interest, being one that can arise without registration, is of a class which according to the provisions of the Act or other legislation is enforceable against all proprietors including bona fide purchasers for value; e.g. the interest of a tenant in possession, or a statutory charge.

(iii) Where the interest, having been registered, was removed from the register by fraud or error, and the present proprietor did not become registered after such removal either as or through a bona fide purchaser for value.

3. *Equities.*

A registered proprietor takes free from equities that would be enforceable under the general law—

(i) if the person claiming the equity is no more than a rival claimant to the legal title;

(ii) if the proprietor is a purchaser for value without fraud, and the equity arose originally against a predecessor in title.

Otherwise the ordinary principles of equity apply.

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