INDEFEASIBILITY RE-EXAMINED

FRAZER v. WALKER AND SOME OF ITS CONSEQUENCES*

In the last decade there have been a number of developments and reforms in both the theory and practice of property law in Western Australia. The introduction of strata titles, the Property Law legislation of 1969, both a consolidating and a reforming measure, the new procedures introduced by the Land Titles Office, and planning and zoning are those which most readily come to mind. Each of these reforms has been the subject of a paper or discussion at recent Summer Schools.

These developments in property law, however, have all been introduced by statutory changes. In the non-statute area over the same period, without doubt the most significant development has been the resolution of the controversy that has raged for more than seventy years over the precise nature of the indefeasibility accorded to a registered proprietor under the Torrens system of land titles. Although this has been a question that has arisen from time to time in a variety of forms since the inception of the Torrens system in Australia it was not until 1967 in the appeal to the Privy Council, from the decision of the New Zealand Court of Appeal in *Frazer v. Walker*,[1] that this controversy was concluded. It is this question that I have chosen as the topic of this paper today.

Without reiterating unnecessarily what has been adequately canvassed elsewhere,[2] the trend of judicial reasoning on the question of whether indefeasibility was immediate or deferred can be divided into certain periods.

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* A paper given at the 1971 Law Summer School held at the University of Western Australia.

1 [1967] 1 A.C. 569.

2 See, for example, Woodman, *The Torrens System in New South Wales*, (1970) 44 A.L.J. 96; Harrison, *Indefeasibility of Torrens Title*, (1954) 2 U. OF QUEENSLAND L.J. 206; Baalman, *Approach to the Torrens System*, (1956-58) 2 SYD. L. REV. 87.

PRE GIBBS v. MESSER

Prior to the decision of the Privy Council in *Gibbs v. Messer*[3] there had been some discussion in a number of cases on the question of the effect of registration of an instrument and the consequent issue of a certificate of title, or the endorsement thereon of an interest in the land. This was a question fundamental to the Torrens system and one which highlighted the difference between this system and old system conveyancing (and in fact the existing English system of registered conveyancing). Primarily, the question was, apart from the circumstance of the transaction falling within one of the exceptions contained within the paramountcy section,[4] did registration cure pre-existing defects in the title, including a forgery of the instrument which upon registration resulted in the creation of a new interest in the land?

The earlier cases, as one would expect, arose in the context of bringing land under the Act, but the principle at issue was, nevertheless, the same. In the early case of *Bonin v. Andrews*[5] the plaintiff was seised of an estate in fee simple in certain land. One Calley, after litigation, applied to bring the land under the Act and eventually was issued with a certificate of title. It was alleged, but not proved, that his title was vitiated by fraud. The title eventually passed to Curtis. The plaintiff's action was against the Registrar to recover compensation from the assurance fund for being deprived of his land through the bringing of the land under the Act[6] and the question was when did this deprivation occur? If it was when Calley obtained his certificate of title the plaintiff could not succeed, as he would have been barred by the limitation period of six years for the bringing of an action against the assurance fund.[7] If it was when Curtis acquired title the plaintiff was within time and would succeed. The Court, after referring to the section providing that the certificate of title is conclusive evidence of the proprietor's interest in the land,[8] and the

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3 [1891] A.C. 248.

4 In W.A. s. 68. As this paper was written for a Western Australian audience, as far as possible all references to sections of the Torrens statutes of the various States and New Zealand which are referred to in the cases have been transposed to their equivalents in the Western Australian Transfer of Land Act 1893-1969. The sections most frequently referred to in this paper are reproduced in the Schedule.

5 (1878) 12 S.A.L.R. 153.

6 s. 201.

7 s. 211.

8 s. 63.

section prohibiting actions of ejectment against a registered proprietor,[9] found the date of deprivation of the plaintiff's interest in the land was the date when Calley became the registered proprietor and not when the subsequent transfer to Curtis took place.

In another early case, *Baily v. Cribb,*[10] the defendant forged the signature of the plaintiff on a transfer to himself of land owned by the plaintiff, and subsequently transferred the land on to a third person, McDonald, who purchased without notice of the forgery. In proceedings taken by the plaintiff it was held that McDonald obtained a good title on the basis of the protection given to him by sections 199 and 202. This was clearly a case of deferred indefeasibility as far as the validity of McDonald's title was concerned, but in the course of the judgment Harding J., when comparing the English registration system and old system conveyancing with the Torrens system, made observations which, although *obiter,* clearly indicated that the effect of the indefeasibility sections was to make indefeasibility immediate upon registration and not deferred. He said:[11]

> The forged deed under the old system of conveyancing and the forged transfer in the form prescribed by the Real Property Act of 1861 before registration would have the same effect—that is to say they would both be nullities. But under the Real Property Act of 1861 section 43,[12] upon the registration the estate intended to thereby be conveyed passes, so that the passing of the legal estate depends upon the act of registration, and although the transfer would be void, yet when registered, the act of registration being done by another hand, the legal estate passes by virtue of the Act. The transfer being registered, by section 44,[13] the estate of the registered proprietor becomes paramount, except in the case of fraud; and by section 109[14] the transferee, except in the cases of fraud is not affected by actual or constructive notice of interests other than those notified in the registry book. Thus in my opinion the estate passes to the transferee, although the transfer may be such a one as in this case.[15]

Although this appeared to be a clear and unhesitating statement on indefeasibility, nevertheless, there must have been some doubt on its correctness. When another forgery situation appeared in the Victorian

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9 s. 199.
10 (1884) 2 QUEENSLAND L.J. 42.
11 Id. at 44.
12 W.A. s. 58.
13 W.A. s. 68.
14 W.A. s. 134.
15 (1884) 2 QUEENSLAND L.J. 42, 44.

case of *O'Connor v. O'Connor*[16] the trial judge awaited the decision of the Full Court of the same State in *Messer v. Gibbs*,[17] which he then followed, and on which decision commented that it was 'not inconsistent with any previous decisions, and at most established the law on a point which might previously have been possibly regarded as somewhat doubtful'.[18]

The well-known facts of *Messer v. Gibbs* were that Messer left her certificate of title with a solicitor Cresswell. While Messer was overseas Cresswell forged a transfer to a fictitious person named Cameron and registered it. Subsequently he raised £3000 from the McIntyres and registered a mortgage, also forged, on the title from Cameron to McIntyre. Cresswell then absconded. The Full Court of Victoria found that the McIntyres obtained an indefeasible interest in the land. It was prepared to regard the non-existent Cameron and Cresswell as the same person for the purposes of the dealings with the land, in the sense that for all practical purposes Cresswell had assumed the name of Cameron. He had signed the instruments and so 'he should be regarded as the proprietor of the land with whom [the McIntyres] dealt on the faith of the certificate evidencing his title'.[19]

Webb J. in *O'Connor v. O'Connor*,[20] where one joint owner forged the signature of the other to a mortgage which was subsequently registered, regarded the question as settled by *Messer v. Gibbs* and considered that all he had to do was to apply the principles there established, namely,

> that a registered proprietor under the Transfer of Land Statute, being a purchaser for value, and without notice of the forgery acquires, by virtue of the Act, an indefeasible title to the estate or interest of which he is registered even though such registration may have been effected by means of a forged instrument.[21]

At this stage one would have thought that the question was settled, but instead, with the decision of the Privy Council on appeal in *Gibbs v. Messer*,[22] began the period of great uncertainty.

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16 (1887) 9 A.L.T. 117.
17 (1887) 9 A.L.T. 106.
18 (1887) 9 A.L.T. 117, 118.
19 (1887) 9 A.L.T. 106, 107.
20 (1887) 9 A.L.T. 117.
21 Ibid.
22 [1891] A.C. 248.

GIBBS v. MESSER TO FRAZER v. WALKER

The facts of *Gibbs v. Messer* need no reiteration, but the dispute as to the *ratio* of the decision is worth outlining. Two passages from the judgment are cited here to indicate the basis upon which the controversy was founded. At one point Lord Watson, who delivered the opinion of the Privy Council, said:

> The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire 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.[23]

And further on he added:

> 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 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.[24]

From these passages in particular, it has been strongly argued that the *ratio* of *Gibbs v. Messer* was that the mortgage was a nullity because it was forged and that the broad principle on which the case was decided was that a genuine instrument executed by the registered proprietor was necessary to pass an interest in the land.[25] However, once a further transaction was registered that transferee obtained a

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[23] Id. at 255.

[24] Id. at 257.

[25] See Harrison, *Indefeasibility of Torrens Title,* (1954) 2 U. OF QUEENSLAND L.J. 206.

good title. This was shortly the theory of deferred indefeasibility. This theory gained a considerable measure of judicial support. In *Boyd v. Mayor of Wellington*[26] the question was whether a void resumption of land resulted in the defendant obtaining an indefeasible title. The majority[27] of the Court held that it did, but the minority, in particular Salmond J., held that it did not. The question to him was, shortly, did registration operate *inter partes* to validate a void instrument or did it not. He could find nothing in the Act or the policy underlying it which justified a conclusion that a prior registered proprietor whose title had been lost or was incumbered by an invalid instrument was left with no remedy except against the assurance fund. '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'.[28]

In the later Australian case of *Clements v. Ellis*,[29] it was this judgment of Salmond J. which greatly influenced Dixon J. in supporting the theory of deferred indefeasibility—as well as the decision in *Gibbs v. Messer*. In *Clements v. Ellis* Dixon J. held that where a purchaser dealt with an agent of the vendor for an unencumbered title and the agent forged the discharge of the mortgage, the purchaser did not in fact acquire an unencumbered title. This was for the reason given by Salmond J. in *Boyd's* case, and also because the purchaser had not dealt with the registered proprietor. With this decision, although for different reasons, McTiernan J. agreed, whereas Evatt and Rich JJ. did not. In their view, as the purchaser had not been guilty of fraud, section 68 gave him full protection and he acquired title unencumbered by the mortgage. The High Court being evenly divided, the decision of the trial judge, who had also been influenced by the minority in *Boyd's* case, prevailed. As Baalman commented, the decision of Dixon J. 'profoundly disturbed the equanimity (if they had any) of students of the Torrens System'.[30] Later again the reasoning in these cases resulted in the majority of the Full Court of New South Wales finding (in *Caldwell v. Rural Bank*[31]) that an invalid resumption did not confer an indefeasible title.

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26 [1924] N.Z.G.L.R. 489.
27 Stout C.J., Sim and Adams JJ.
28 [1924] N.Z.G.L.R. 489, 506.
29 (1934) 51 C.L.R. 217.
30 TORRENS SYSTEM IN N.S.W., 135.
31 (1951) 69 W.N. (N.S.W.) 24.

One difference of opinion in *Clements v. Ellis* between Dixon and McTiernan JJ. on the one hand, and Rich and Evatt JJ. on the other, was that, in the view of the former, at the moment of the presentation of the transfer for registration, the transferee had been dealing with the registered proprietor of an estate which the register showed to have been encumbered by the outstanding mortgage. The latter, however, considered that at the moment of transfer the register showed an unencumbered title in fee simple even though this had come about by the virtually simultaneous registration of the forged discharge of the mortgage together with the succeeding transfer.

In Western Australia this part of the decision was overcome by an amendment to section 134, enacted in 1950, exonerating a person who becomes the registered proprietor from making inquiries as to the circumstances under which any encumbrance was discharged or removed from the register book at any time prior to or *simultaneously* with the registration of a transfer. This aspect of the case, however, did not detract from the general statements regarding indefeasibility.

One further case can be mentioned in which the views of Dixon J. in *Clements v. Ellis* and Salmond J. in *Boyd's* case prevailed. In *Coras v. Webb & Hoare*[32] the question was whether a mortgage given by an infant registered proprietor which had been repudiated during minority or soon after reaching majority, and was therefore void, resulted in the registered mortgagee losing his interest in the land. Philp J. decided that the privilege of the infant prevailed. However, in a suit by the infant for rectification the court was able to insist on the infant doing equity by making certain payments to the mortgagee.[33]

While this interpretation of indefeasibility was being developed, and was subsequently being acted upon as the preferred view,[34] there was, however, a strong body of opinion developing which maintained that it was incorrect. That opinion maintained that indefeasibility was immediate upon registration and that the title of a registered proprietor could primarily only be defeated if it could be brought within one of the exceptions to section 68.

In *Fels v. Knowles*[35] it was said:

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32 [1942] St. R. Qd. 66.

33 As was done in Hall v. Loder, (1885) 7 L.R. (N.S.W.) (Eq.) 44.

34 In 1968 Street J. observed: 'The view has long been held in New South Wales that a forged memorandum of mortgage or a forged memorandum of transfer will not, on registration confer as against the true owner a valid charge over or interest in his land'. See Mayer v. Coe, (1968) 88 W.N. (N.S.W.) 549.

35 (1906) 26 N.Z.L.R. 604, 620 (Court of Appeal).

> The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute ["by statute" would be more correct]. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered.

This statement was adopted in subsequent cases and formed the basis of the theory of immediate indefeasibility. It was adopted by the Privy Council in *Waimiha Sawmilling Co. v. Waione Timber Co.*[36] and was cited by Evatt J. in *Clements v. Ellis.* Then in *Percy v. Youngman,*[37] where an infant transferor repudiated the sale after registration of the transfer, it was held that:

> The rule of law that an infant who contracts is entitled to avoid the contract before attaining, or within a reasonable time of attaining her majority, does not prevail when such contract has been followed by a transfer duly registered under the Transfer of Land Act 1928 by one who had no knowledge of the fact of infancy and who has been granted a Certificate of Title free from incumbrances.[38]

In addition, of course, there was the Privy Council decision in the case of *Assets Co. v. Mere Roihi,*[39] and the majority judgment in *Boyd's* case. In the former, the Privy Council was dealing with initial registration under the Act which it was alleged was invalid due to invalidity of orders of a Native Land Court which were a necessary prerequisite in the case of the land concerned. The Board in upholding the new titles went on to say 'the sections making registered certificates conclusive evidence of title are too clear to be got over'.

Although other passages of the judgment in this case have given rise to controversy,[40] nevertheless the judgment in *Assets Co.* influenced the majority in *Boyd's* case.[41]

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36 [1926] A.C. 101, 106.

37 [1941] V.L.R. 275.

38 Taking with knowledge could, depending upon the circumstances, amount to fraud.

39 [1905] A.C. 176.

40 See, e.g., Harrison, *op. cit.* n. 2 above.

41 See also Davies v. Ryan, [1951] V.L.R. 283.

This background illustrating the inconclusive position of indefeasibility could not be left without reference to the Privy Council decision, on appeal from Canada, in *Creelman v. Hudson Bay Co.*[42] There a purchaser from a company, which held a certificate of title to land, challenged the company's title because its holding of the land was *ultra vires* its act of incorporation. The Board's opinion was that

> the certificate of title . . . is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.[43]

The purchaser was therefore not entitled to escape his obligations under the contract by seeking to show that the company had no title to the land.

The main points that had been made in the debate on the nature of indefeasibility could be summarised as follows:

(a) Whatever views were held as to the quality of the title acquired by a transferee whose name gets on the register as a result of a void instrument, it was clearly generally accepted by all that the registration of a further instrument from such transferee was effective to create a valid interest in the land despite the prior defect. This was the only possible interpretation of the effect of section 202. It was recognised in *Gibbs v. Messer* in the following words:

> The object [of the Act] is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title . . . 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. . . .[44]

(b) The differing views as to the nature of the indefeasibility conferred by the Torrens statutes seemed to stem from emphasis being placed on different sections in construing the Acts. One view, as expressed by Lord Watson in *Gibbs v. Messer,* was that

> the provisions of this Act seem to be perfectly consistent, if you assume what appears to me, at present, to be the mean-

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42 [1920] A.C. 194.
43 Id. at 197.
44 [1891] A.C. 248, 254.

> ing of the Legislature, that down to this point they are dealing with nothing except genuine instruments.[45]

On the other hand Baalman[46] argued strongly that insufficient attention had been given to section 58 which as he put it 'devalues common law instruments and imports magic to the Registrar's seal'. He continued:

> Without grasping the full significance of this section it is difficult to understand the Torrens philosophy that the register is everything. . . . It is the action of a government official in placing a memorial of registration on the folium of the register-book rather than a revalued instrument, which effects the change of ownership and makes the register "everything".

In addition, controversy surrounded the interpretation of the evidence section (section 63). The question here was whether it was a major source of indefeasibility or whether it meant nothing more than that title could be proved by producing a duplicate certificate rather than the register itself.

(c) On the question of legislative policy the view has been expressed that the theory of either immediate or deferred indefeasibility would have been adequate to implement the policy of 'facilitating transfers of land'. This view maintains that it is not unreasonable for a transferee to obtain a vulnerable title provided that a purchaser from him acting bona fide will not also obtain a title that is open to attack. If this subsequent purchaser is relieved from the necessity of considering anything but the propriety of his own transactions then the Act has achieved its main purpose which is to overcome the defects of the system of dependent titles. With this proposition one would be inclined to agree provided there are adequate safeguards to ensure that an innocent person deprived of his title by the operation of the Act will be compensated. As will be seen later, one of the effects of the resolution of the controversy in favour of immediate indefeasibility is that a person who as a result loses title, may also fail to qualify for compensation from the fund.

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45 Cited by Dixon J. in Clements v. Ellis, (1934) 51 C.L.R. 217, 240. See also Harrison, *op. cit.* n. 2 above.

46 *Op. cit.* n. 2 above.

FRAZER v. WALKER

FRAZER v. WALKER—FACTS

It was in the uncertain state of the law left by all these cases that *Frazer v. Walker*[47] came before the Privy Council on appeal from New Zealand. The facts of the case, so far as they are material, were that Frazer and his wife were the registered proprietors as joint tenants of a farm. The wife borrowed £3000 from the second respondent, and gave as security an instrument of mortgage which she signed and on which she forged the husband's signature. This mortgage was registered.

Subsequently, when there had been default in the payment of principal and interest, the second respondent exercised the power of sale and the property was transferred to the first respondent. Eventually, the first respondent brought proceedings against the appellants (husband and wife) for possession of the property. Throughout, both respondents had acted in good faith and without knowledge of the forgery. The husband claimed a declaration that his interest in the land was not affected by the forged mortgage, and that the register should be rectified by restoring both his and his wife's name to it as joint tenants.

The trial judge felt bound by *Boyd's* case, which gave the second respondent an indefeasible title, but in any event held that the first respondent obtained an indefeasible title on the basis of section 202.[48] The Court of Appeal upheld the trial judge on this latter ground, although North P. did express uneasiness at the breadth of the judgment in *Boyd's* case. He was prepared to concede that the 'true view may be that the legal effect of the forgery was not spent but continued to affect the transfer executed by the second respondent'.[49] From this decision an appeal was taken.

The decision of the Privy Council raises a number of questions and it is proposed to examine these questions under various headings.

FRAZER v. WALKER—INDEFEASIBILITY

Although a decision could have been made in favour of the first respondent by applying section 202, without considering whether the second respondent obtained a valid mortgage, nevertheless their Lordships did consider his position. However, they did add at the conclusion of the judgment that the claims of the appellant against the

47 [1967] 1 A.C. 569.
48 [1966] N.Z.L.R. 331.
49 Id. at 350-351.

first respondent would be completely answered by section 202. In holding this they agreed with the New Zealand Court of Appeal that the word "proprietor" in the section was not to be read down to exclude a mortgagee who had a power of sale over the fee simple.[50]

It is that part of the judgment which deals with the position between the appellants and the second respondent which provides the real interest. On this aspect the judgment begins by referring to the relevant sections of the Act and classifying them under five main headings.

First: those sections dealing with the procuring of registration. Some of these have no counterpart in Western Australia, but under this heading the Board made probably its most pertinent comment:

> Registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise. As will appear [later] the inhibiting effect of certain sections [W.A. ss. 68, 199] and the probative effect of others [W.A. s. 63] in no way depend on any fact other than actual registration as proprietor. *It is in fact the registration and not its antecedents which vests and divests title.*[51]

Second: the sections which provide protection to the registered proprietor against claims—[W.A. ss. 68, 199]. Third: the section providing for the conclusiveness of the certificate of title—[W.A. s. 63]. (As Lord Wilberforce commented it is really the sections in categories two and three that confer indefeasibility of title.) Fourth: the sections dealing with correction and calling in of titles—[W.A. ss. 188 (ii), 76]. Fifth: the sections dealing with the position of third parties dealing with a registered proprietor—[W.A. ss. 134, 202].

Then by reference to these sections the Board found that the appellants must fail. Insofar as the appellants' counter-claim was based on the argument that the mortgage was a nullity, it was a claim for recovery of land and was barred by section 199. Insofar as it sought cancellation of the registration of the second respondents as mortgagee it could only be based on section 68 and, not falling within one of the exceptions contained in that section, it must on this ground fail also.

So far the judgment was based solely on the express provisions of the Act. The Board, however, then went on to say that this conclusion was also supported by the authorities. Without any detailed examination of the judgments in these authorities, it simply held that *Boyd's* case was correctly decided, and in as much as that case had interpreted

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50 [1967] 1 A.C. 569, 586. See also definition of "proprietor" in s. 4.

51 Id. at 580. Emphasis added.

the *Assets Co.* case as being a decision in favour of immediate indefeasibility that interpretation was correct. In turn these decisions correctly construed the provisions of the Act earlier examined. This meant that registration alone was sufficient to vest and divest title despite the fact that the instrument being registered was void and, further, that the *ratio* of *Boyd's* case was wide enough to cover instruments which were void for any cause whatsoever, and was not restricted to nullity for forgery alone. Before leaving this aspect of the case the Board did make reference to *Gibbs v. Messer,* upon which the appellants had relied. Its comment on that case was to dismiss it as being a decision confined to its own unusual facts. There, the Board said, it was 'concerned with the position of a bona fide "purchaser" for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor'.[52]

That decision therefore had no application as regards adverse claims made against a registered proprietor such as in *Boyd's* case, the *Assets Co.* case, and the instant case.

Thus finally after just over three-quarters of a century the controversy has ended, at any rate for New Zealand, and it only remains for the High Court to settle the matter for Australia.[53] On this aspect of the judgment, whatever else may be said of it, certainly no criticism would be levelled against it on the ground of brevity, or simplicity. The judgment is primarily based on a short recitation of the relevant sections of the Act with an equally short explanation of how they create a situation of immediate indefeasibility. The discussion of the cases is confined to approximately one page and mainly limited to *Boyd's* case, the *Assets Co.* case, and *Gibbs v. Messer.* The most notable omission is any reference to the judgments in *Clements v. Ellis,* or any other Australian case.[54]

Although *Frazer v. Walker* may have clarified the circumstances in which a registered proprietor's title is immune from attack, and eliminated one occasion, the judgment implicitly or explicitly leaves in its wake a number of problems which are now to be considered.

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52 Id. at 584.

53 On which see below.

54 Perhaps because the appeal came from New Zealand; but in view of the detailed examination of the New Zealand cases in Clements' case it is a surprising omission since both the New Zealand and Australian cases are dealing with the interpretation of statutes which are not only based on similar policy, but are also terminologically similar.

PROBLEMS ARISING FROM FRAZER v. WALKER

INDEFEASIBILITY AND THE COMMISSIONER'S POWERS

In the Western Australian Act the chief provisions conferring on the Commissioner[55] powers which can undermine the indefeasibility conferred by other sections are sections 188(ii), 200, and 76. The power of the Registrar to correct errors or entries in the register book or in duplicate certificates of title or instruments, either upon the direction of the Commissioner (section 188(ii)), or on his own initiative (section 189), were regarded by the Privy Council in *Frazer v. Walker* as 'slip sections' and 'not of substantive importance'.[56] Section 200, which gives a court the power to order the Registrar to cancel an entry on a certificate of title and substitute for it another, is limited to a case where there has been a recovery of an estate or interest in a proceeding at law or in equity in any case in which such proceeding is not 'herein expressly barred'. This the Board said was a clear reference to section 199 which bars proceedings for recovery of land except in six specified cases. The result is that the power to correct entries under this section is limited to the occasions in which the Act permits adverse claims against a registered proprietor.

So far these sections cause no concern. But section 76 is in a very different category and of considerable significance. As with sections 188(ii) and 189 it permits, by administrative action, the correction of an entry on the certificate of title. The section permits the Commissioner, where he is satisfied that a certificate of title, or entry or endorsement thereon, has been issued or made in error or has been fraudulently or wrongfully obtained, to call in the certificate for the purpose of cancellation or correction.

Concerning this power two important questions arise. Firstly, the precise circumstances in which the Commissioner may act under the section and secondly, the temporal limitations on the exercise of the power, a decision having been made that the facts would otherwise permit action to be taken.

On the first of these questions little assistance is given by the Board. Reference is approvingly made to what was said in the *Assets Co.* case —that this power is 'significant and extensive'.

The main grounds under which the Commissioner can act under section 76 are where the endorsement etc. has been made in error, or fraudulently, or has been wrongfully obtained.

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55 In some states these powers are conferred on the Registrar-General.
56 [1967] 1 A.C. 569, 581.

(a) *Error*:

This question has been discussed in a number of cases. In *Re N. Johnson & Real Property Act*[57] an entry that a caveat had lapsed after only seven days, instead of 14 days, thus permitting a transfer to be lodged, resulted in the Registrar cancelling the entry and the transfer. The Court held that the cancellations were valid as the entries had been made erroneously. It would appear also that there is no distinction between errors made by the Registrar and errors made by the parties to the instrument.[58] Thus in a case of a sale from A to B where the transfer incorrectly stated the transferee to be C, the Commissioner could act just as much as if the transfer correctly stated the transferee to be B but by inadvertence the Registrar entered C on the register as transferee.

(b) *Fraud*:

The power to correct in this case causes no concern. Presumably, fraud here will be interpreted to mean the same thing as it has been held to mean where it appears elsewhere in the Act, for example, as in section 68, conduct which amounts to dishonesty, cheating, actual fraud, moral turpitude.[59] In addition, it must be fraud on the part of the current registered proprietor against the holder of a previous registered or unregistered interest. This being the accepted interpretation of fraud for the purposes of section 68, if the interpretation for the purposes of section 76 is the same, the power to correct in such a case does not undermine the indefeasibility established by other sections of the Act.

(c) *Wrongfully obtained*:

Here there is some cause for concern. To the extent that an entry has been made wrongfully, but not in error or as a result of fraud, as defined above, the power of the Commissioner to correct (but subject to review by a court pursuant to sections 76 and 77) does undermine the indefeasibility created by other provisions of the statute. Presumably, because the word "wrongfully" appears as an alternative to "fraudulently", it is to be given a meaning that is not synonymous. All that the Board said in *Frazer v. Walker* was 'it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word "wrongfully" '. At this stage it is impossible

57 (1950) 68 W.N. (N.S.W.) 23.

58 See Ex parte de Lautour, [1904] N.Z.G.L.R. 433; National Trustees v. Hasset, [1907] V.L.R. 404; Elder's Trustee v. Bagot's Executor, [1964] S.A.S.R. 306.

59 Stuart v. Kingston, (1923) 32 C.L.R. 309, 359.

to do more than speculate as to the ultimate interpretation to be placed on "wrongfully obtained".[60] To give the concept the same meaning as fraud but to expand the range of persons who may be guilty of the conduct, that is, to say that it may be fraud perpetrated by someone other than the current registered proprietor, for example, Cresswell in *Gibbs v. Messer,* or Hoytash in *Mayer v. Coe,*[61] would render redundant the whole controversy about indefeasibility and the decision in favour of immediate indefeasibility.

Baalman[62] has suggested that "wrongfully" describes

> that which is not rightful. . . . It cannot be right for a person to seek registration based upon a bad title, even though he honestly believes it to be a good one. Therefore, to do so must be wrong, although it would not be tortious.

He then concludes that whether or not this assumption is correct, it would be an error on the part of the Registrar to register a bad title so that the power in section 76 would in any event be attracted.

With respect, this is difficult to follow. If 'registration based on a bad title' means securing registration of a transfer of land which has been obtained by the transferor as a result of his fraud in the transaction which led to his registration, then this is just the situation which attracts the operation of section 202 and gives to the transferee a good title. If it means registration of a defective instrument however or by whom created, then the criticism that the controversy about the nature of indefeasibility becomes redundant would apply. Whether the registration of a bad instrument is an "error" on the part of the Registrar or anyone else is open to doubt. The Registrar intended to register the particular instrument, on its face quite regular, and it is difficult to see how, on subsequently being shown that the instrument was defective, the Registrar could claim that the original registration was erroneous.[63]

In the New Zealand case of *De Chateau v. Child,*[64] McGregor J. held that registration of a transfer which contained alterations made after its execution without the consent of the purchaser was "wrongfully obtained". This decision was based on the fact that the instrument contained a certificate, required by the New Zealand Act, that it was

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60 See also 40 A.L.J. 373, 374; 41 A.L.J. 26, 27. These notes advert to the question but do not suggest any answers.

61 (1968) 88 W.N. (N.S.W.) 549.

62 TORRENS SYSTEM IN NEW SOUTH WALES, 420.

63 See further on this the interpretation of "erroneous" for the purpose of s. 201 in Mayer v. Coe, discussed below.

64 [1928] N.Z.G.L.R. 73.

correct for the purposes of the Act. No such certificate is required by the Western Australian Act and if such a decision were followed here it would be tantamount to construing "wrongfully" as being fraud by someone other than the registered proprietor.[65] In *Frazer v. Walker* the Board's final words on the interpretation of "wrongfully" were that as no relief was sought under section 76, any pronouncement would be *obiter* and so should be left until the issue directly arose in some other case. At this point one could only suggest that, in line with the general attitude towards indefeasibility, the interpretation ought to be restrictive. The greater the number of inroads into the general principle of indefeasibility, the more the uncertainty that is introduced into the system and the less true becomes the adage "the register is everything". The Commissioner's powers are discretionary and in some earlier cases it was held that the court will not interfere by mandamus.[66] In New Zealand it has been said that the Commissioner should exercise this power only when the law and the facts are demonstrably plain, not when they are complicated and doubtful,[67] as in such cases the rights of the parties should be decided by invoking the ordinary processes of the courts.

Although at first sight it might appear as if it is of little significance whether the Commissioner decides to act under the section, in fact this is not so. If the Commissioner decides to recall a title for rectification, the question of whether he is entitled to correct may ultimately be decided by a court under section 77. This would be where production of the certificate is refused, and if this occurred it is submitted that a court would be required to determine *inter alia* whether an entry has been "wrongfully obtained". If the Commissioner cannot be persuaded to act, it is unlikely that he would be compelled to do so by a court acting pursuant to section 203. Nor would an order directing correction based upon a notion of an entry being "wrongfully obtained" seem to be within the ambit of section 200. To this extent the measure of indefeasibility may be commensurate with the Commissioner's discretion.

As distinct from the question of the extent of the Commissioner's powers under section 76, which since *Frazer v. Walker* has not been

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65 It should be added that the alteration was made by the solicitors for the vendor.

66 E.g., Ex parte Gallagher, (1908) 8 S.R. (N.S.W.) 230—but this may have to be reconsidered in the light of Pirie v. Registrar-General, (1965) 109 C.L.R. 619.

67 See cases referred to in BAALMAN, TORRENS SYSTEM IN NEW SOUTH WALES, 421.

considered by a court and remains largely a matter for speculation, the second question has been considered by a court but, nevertheless, also remains somewhat speculative. In *Frazer v. Walker* the Board commented that whatever may be the interpretation of "wrongfully obtained" in section 76

> [i]t is clear, in any event, that section [76] must be read with and subject to section [202] with the consequence that the exercise of the registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section.[68]

In the subsequent case of *James v. Registrar-General*[69] this very question was the issue before the court. The facts were that an easement of way was created over certain land in a transfer. When later a new certificate of title was issued in respect of the land, the notification on the title indicating that the land was the servient tenement was omitted. The registered proprietor then transferred the land to M company which subsequently sold it to James who became the registered proprietor as a bona fide purchaser without notice of the easement. The Registrar-General subsequently gave James a notice calling in the title for correction under section 76. James did not produce the title. Soon after, her mortgagee produced the title for registration of a mortgage and the Registrar-General took the opportunity of inserting the notification of the easement of way. James issued a summons calling upon the Registrar-General to show cause why an order should not be made directing him to cancel the entry.[70]

The argument for James was apparently that section 76 was not intended to qualify the principle of indefeasibility established by section 68, and that in any event section 202 prohibited a correction at that time. The New South Wales Court of Appeal was divided on the issue. Wallace P. and Jacobs J.A. held that the Registrar was entitled to make the correction, whereas Walsh J.A. held that he was not. Wallace P. decided the issue by pointing to the exception to indefeasibility in section 68 of an 'omitted easement created in or existing upon any land',[71] and holding that a correction under section 76 was not barred by section 202, if it related to one of the exceptions to

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68 [1967] 1 A.C. 569, 585-586. This was more or less the view taken by Edwards J. (a dissenting minority) in the earlier case of In re Mangatainoka, (1912) 32 N.Z.L.R. 198.

69 [1968] 1 N.S.W.R. 310.

70 See s. 203.

71 The exception in Western Australia relates to an easement acquired by 'enjoyment or user or subsisting over or upon or affecting' land.

indefeasibility. He strengthened this point by referring to the exception of a prior certificate in respect of the same land and suggested that it would be absurd to impose the limitation of section 202 on the correction power in such a case. Jacobs J.A. also read down the words of the Privy Council. In his view the Board was referring to the correction power in the context of the interest there being dealt with, namely a mortgage, and not an interest that was an express exception to indefeasibility. The question then became—did the Registrar act properly in supplying the entry relating to the easement? The easement was properly created under the Act. Section 202, despite its apparently absolute terms, does not apply to the exception of wrong description of parcels in section 68, nor could the exception of a prior certificate be effective unless it was outside the ambit of section 202. From these indications Jacobs J.A. agreed with Wallace P. that the exceptions in section 68 were exceptions to indefeasibility generally.

Walsh J.A. dissented from the view of the other two judges. In his view the comments made in the *Assets Co.* case and *Frazer v. Walker* could not be overlooked or distinguished. The general scheme of the Acts, and the particular indefeasibility provisions were such that 'it was not intended that a person, who took for value an interest on the faith of the Register and became registered in respect of it, was to be in any way prejudiced by alterations made by the Registrar-General by administrative action under [section 76]'.[72] He found that the applicant would be so prejudiced if the entry relating to the easement stood, as it would not be possible for her to assert that her title was free from encumbrances. Thus the Registrar in a case such as this was not empowered to alter the register in such a way as to preclude the determination of the existence or otherwise of the easement between the parties concerned in litigation. The title, he contended, should have been left as it was. This would then have left the way open for the proprietor of the "dominant tenement" to take proceedings to establish the existence of the easement, and that James's land was subject to it, on whatever ground she could find to rely on.

Whichever view is preferred in this case, it does illustrate another inroad into indefeasibility. The facts in the *James* case are unlikely to recur frequently, and the problem only arises through some error in the Titles Office. However, despite the absurdity illustrated by Wallace P. if section 76 is limited by section 202, one cannot but be attracted to the general approach of Walsh J.A. With what may be called the

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[72] [1968] 1 N.S.W.R. 310, 317.

hardening attitude towards indefeasibility it seems more consistent to reduce the occasions when the register can be amended to the detriment of a subsequent purchaser for value, and what the judgment of Walsh J.A. does is to eliminate one such avenue of correction, namely by the action of the Registrar. The possibility of a correction by a court will, if Walsh J.A. is correct, still remain under section 200—but this by the establishment in judicial proceedings of an interest in the land which would warrant a correction—not by administrative action by the Registrar.

COMPENSATION:

One of the basic objects of the Torrens System was to ensure that persons who were deprived of their land by the operation of the statute and without any fault on their part would be compensated. As long as a theory of deferred indefeasibility was adhered to, a registered proprietor would not be "deprived" until section 202 had barred an action for rectification. However, once this had occurred, as will be seen later, he could be in difficulties. On the other hand, the Act did not envisage compensating a person who had lost money because of a cancellation of an entry in the register book due to a void instrument. This situation was ultimately rectified in Victoria by the Transfer of Land (Forgeries) Act 1939-1951.[73] Section 2 of that Act provided:

> (a) where any person in good faith claims any estate or interest in land or in any mortgage or charge affecting land by virtue of the registration of any forged instrument or other document or by virtue of the making or cancellation of any entry or memorial in the register book pursuant to any forged instrument or other document; and
> (b) the register book is subsequently rectified so as to cancel or remove the effect of such forged instrument or other document—
>
> such person shall be deemed to have suffered loss by reason of such rectification and shall be entitled to bring an action against the Registrar as nominal defendant for the recovery of damages . . .

So until recently, in some cases where the registered proprietor was deprived of his land he recovered from the assurance fund, but if he recovered the land the person who lost money relying on the forged instrument, in Victoria, recovered compensation. Even in Victoria

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[73] See now s. 110 Transfer of Land Act 1958 (Vic.).

there were gaps. In *Davies v. Ryan*[74] a situation arose in which a purchaser had paid money under a contract of sale and on a subsequent rectification due to an earlier forgery lost both the possibility of acquiring the land and the purchase money paid. Dean J. in the circumstances of the case found that he did not fall within either the compensation provisions of the principle Act or the Transfer of Land (Forgeries) Act. In 1951 this latter Act was amended to cover the situation but in addition the amendment provided for the payment of the sum of £843-11-5 to the purchaser in *Davies v. Ryan* out of the assurance fund by way of compensation.[75]

Since the Privy Council decision in favour of immediate indefeasibility, together with a closer look at the compensation provisions, the position has changed. The alarming picture that now emerges is that an innocent registered proprietor can, as a result of the registration of a void instrument, lose his title but, in addition, he appears to be deprived of access to the fund for compensation. This was precisely what happened in *Mayer v. Coe*.[76] Mrs. Mayer was entitled to be registered as the proprietor of an estate in fee simple of certain land. The duplicate certificate of title and a transfer to herself in registrable form was held by Hoytash, her solicitor. Hoytash borrowed £4,500 from Coe and forged to him a mortgage of the land. Coe acting in good faith then lodged the transfer and the mortgage and both were registered. The facts raised two problems. Being the first Australian case decided after the Privy Council decision in *Frazer v. Walker,* there was firstly, the binding effect of that decision on Australian courts, and State Supreme Courts in particular; and secondly, if that decision was followed, was the deprived proprietor Mrs. Mayer to receive compensation? On the first question in short, Street J. held he was bound by *Frazer v. Walker,*[77] with the result that the mortgage was a valid encumbrance on the title of Mrs. Mayer. Unless she repaid Coe he would be entitled to exercise the remedies of a mortgagee. There was no way in which Mrs. Mayer could procure the cancellation of Coe's mortgage.

The alternative claim was for compensation from the fund, and this required Mrs. Mayer bringing herself within the terms of section 201 of the Act. As can be seen the section, *inter alia,* creates a statutory right to bring an action for damages by a person deprived of an

74 [1951] V.L.R. 283.
75 See (1951-52) 25 A.L.J. 649.
76 (1968) 88 W.N. (N.S.W.) 549.
77 On this question see below.

interest in land against *a person on whose application* an erroneous registration was made, or who acquired title to the interest through fraud, error or misdescription; and if the defendant to such an action is dead, bankrupt, or cannot be found, then the damages and costs can be recovered from the assurance fund. Thus the prerequisite for recovering from the fund was for Mrs. Mayer to show that she qualified to bring the action for damages. Mrs. Mayer was certainly a person deprived of an interest in land, but by the terms of the statute the action had to be against Coe and the question was, had his conduct fallen within that described by the section? There were two possibilities open to Mrs. Mayer: firstly, to establish there had been an erroneous registration on Coe's application; secondly to show that Coe had acquired his interest through fraud. As to the first, without attempting to define what would be an erroneous registration, Street J. held that this was not one. There was no question of Coe's solicitor having made any error. 'He carried out most competently every relevant conveyancing procedure normally regarded as adequate to protect his client's interest, and both he and Mr. Coe acted throughout the whole transaction with complete propriety and good faith'. Nor had the Registrar made any error. In fact the Registrar had done just what had been intended, at any rate by Coe, that is, registered an instrument which on its face was entirely regular. So Mrs. Mayer failed on the first ground.

As to the second possibility, there had clearly been a case of Mrs. Mayer being deprived of her interest by fraud, that is, the fraud of Hoytash, but in line with the decisions on fraud in other parts of the Act the fraud must be the fraud of the registered proprietor whose title is being impeached. There had just as clearly been no fraud by Coe, so on the second ground Mrs. Mayer failed also. Accordingly she was debarred from access to the fund.

This is a decision which must cause some concern. It means, shortly, that because indefeasibility is now immediate, an innocent registered proprietor, particularly in the case of forgery by a third person, but also in other cases of void instruments, can be left in the unenviable position of both losing title to, or an interest in, land and being precluded from compensation from the assurance fund. While a theory of deferred indefeasibility was being adhered to, the registered proprietor in a situation such as in *Mayer v. Coe* would have obtained rectification of the register, in any event until the land had passed on to a bona fide purchaser for value, and the innocent purchaser would have suffered the loss.

As Street J. pointed out, the question that emerged was 'which of the two innocent parties must bear the loss consequent upon Hoytash's fraudulent, if not criminal conduct'. The original philosophy of the Act was that the purchaser lost, but if the original registered proprietor lost he was to be compensated. But now the circumstances in which the original registered proprietor can be compensated have been severely restricted. This is partly if not mainly due to the meaning ascribed to "fraud". As long as fraud in section 201 is restricted to fraud of the current registered proprietor this position will prevail.

From a policy point of view it is difficult to decide which of the two innocent parties should bear the loss. Perhaps it is time to review the assurance provisions in the light of these later developments. If such a review is undertaken surely it would not be out of place to begin with a philosophy that where an innocent party has been deprived of an interest or estate in land under the Act as a result of the fraud of a third party he is entitled to be compensated. Of course, first recourse must be had against the perpetrator of the fraud, but if that proves fruitless, the fund should be available for indemnity.

In addition, why should indemnity be limited to the registered proprietor deprived by fraud? What of a proprietor who is deprived because of a correction pursuant to section 76? It is quite possible that a situation could arise where the original registered proprietor is restored to the register book, because the registration of the second proprietor was "wrongfully obtained", in circumstances in which the second proprietor was innocent but has suffered loss. Should not he also be indemnified? In this respect an adaptation of the provisions of the Victorian Transfer of Land (Forgeries) Act could well be followed.

If such a proposal were adopted it is difficult to judge what the effect might be. The assurance fund it seems is not often called upon,[78] nor are the contributions to it large. Any proposal to liberalise access to the assurance fund would probably entail a reassessment of contributions to it. In the year ending 30th June 1968 over 114,000 docu-

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78 Writing in 1952, Ruoff, (*An Englishman Looks at the Torrens System,* (1952) 26 A.L.J. 194) when noting the infrequency of claims against the funds in the Australian States, points out that they all seemed to be in a state of 'indecent solvency'. The one in Perth was the exception. It then stood at £45,000 and some £40,000 had been paid out in one case. At 30th June 1969 the fund in Perth stood at $231,000. The contributions to it during that financial year amounted to $2757-67, made up by charging 5/24 cent per dollar of the valuation of land brought under the Act during the previous year.

ments were lodged for registration at the Titles Office, and if a small contribution to the fund were collected each time a dealing was lodged for registration it is believed the fund could be kept solvent despite increasing claims.[79]

PERSONAL EQUITIES

In *Frazer v. Walker* the Board, having decided that registration conferred upon the registered proprietor immunity from adverse claims except as provided in sections 68 and 199, went on to say that it wished 'to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or equity for such relief as a court acting in personam may grant'. It then referred to *Boyd's* case and *Tatau-rangi Tairuakena v. Carr*[80] as illustrations, without intending to limit the situations in which these actions may arise, but then concluded on this point by saying that 'the principle must always remain paramount that these actions which fall within the prohibition of sections 68 and 199 may not be maintained'. The reference to *Boyd's* case is presumably a reference to this passage from the judgment of Adam J.:

> The power of the Court to enforce trusts express or implied and performance of contracts upon which title has been obtained or to rectify mistakes in carrying the contract into effect as between the parties to it, has been repeatedly exercised. In the case of a trust, the certificate of title is not affected by its enforcement. In the rectification cases there is privity of contract . . .[81]

Woodman[82] has summarised what to him these comments mean. Firstly, indefeasibility will not permit a registered proprietor to escape the consequences of his own acts. He is subject to any interest he himself creates. Secondly, he is subject to any rights arising out of the transaction by which he became registered, for example, mistake or infancy. Otherwise, if he acts without fraud, and for consideration, he is immune from adverse claims. On this summary two comments could be made. In the second category clearly trusts will be included. If he becomes registered, and from the nature of the transaction resulting in registration it was clear that he took in the character of trustee, the trust will be enforced. Whether infancy will fall within

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79 It is understood that in the past 20 years there have been no more than about three claims against the fund, and each of these was for an amount of less than $500.

80 [1927] N.Z.L.R. 688, 702.

81 [1924] N.Z.G.L.R. 489, 516.

82 *Torrens System in N.S.W.*, (1970) 44 A.L.J. 96, 103.

the category of personal equities may be doubtful as the principle of indefeasibility may override the privilege of the infant.[83]

However one must agree with Woodman that, whatever the nature of the personal equities that would be enforced, the Board was referring to a situation wherein these equities would be enforced against the current registered proprietor. This is a different matter to the intervention of equity to *restrain* registration referred to by Street J. in *Mayer v. Coe,* which exists in addition, but which is not an exception to indefeasibility. The right to obtain an injunction restraining the Registrar from registering an instrument which, upon registration, may defeat an existing interest which has priority, is well established.[84] Street J. considered that there may well have been personal equities open to Mrs. Mayer to prevent registration of the forged mortgage if she had become aware of it.

> Prior to registration of the mortgage Mrs. Mayer's property rights were threatened by a forged memorandum. Equity may well have intervened in personam to prevent that threat materialising into actual damage, and might well have restrained the lodging or the registration of the forged memorandum of mortgage.

However, once registration had been effected, in the judge's view there were no personal equities in the case that the plaintiff could have called in aid.

In the later case of *Ratcliffe v. Watters,*[85] Street J. made it quite clear that the personal equities he was referring to in *Mayer v. Coe* were equities available against the new registered proprietor after registration.

DEALING WITH THE REGISTERED PROPRIETOR

In *Gibbs v. Messer* the Privy Council said:

> the protection which the Statute gives to persons transacting on the faith of the register is, by its terms, limited to those who acually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register. . . .

And further on they added:

> a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with

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83 See Percy v. Youngman, [1941] V.L.R. 275.

84 See KERR, TORRENS SYSTEM, 154, and cases there cited.

85 (1969) 89 W.N. (N.S.W.) 497, 505.

> the person who, according to the register, is the proprietor having title to create the encumbrance.

This *dictum* was obviously based upon a broad interpretation of section 134. However, in the later case of *Clements v. Ellis*, differing views were expressed as to the exact function of section 134. Rich J.[86] took the view that section 134 did not restrict the operation of section 68. But on the other hand, Dixon J.[87] clearly took the view that the requirement of dealing with the registered proprietor contained in section 134, and as explained in *Gibbs v. Messer*, became a necessary prerequisite to enjoying the advantages of an indefeasible title conferred by other sections of the Act. This view of Dixon J. appears subsequently to have become the accepted view. Helmore[88] states that failure to ascertain the existence and identity of the registered proprietor, or the authority of an agent acting for him, renders any title obtained inconclusive. Voumard[89] takes the narrower view that if the instruments have not been executed by the persons who purported to execute them the title obtained will not be indefeasible. Fox,[90] in commenting on *Gibbs v. Messer*, noted that if the accepted interpretation was correct, it would be necessary to read into section 68 two classes of certificates of title—those issued as a result of dealings with the registered proprietor and those which were not, the former being indefeasible while the latter may be defeasible: 'but such a division does not seem to fit in with the general philosophy of the Torrens System'.[91]

The question which now arises, and, it is submitted, one of not inconsiderable importance, is:· does such a general qualification to indefeasibility now exist? In *Frazer v. Walker* itself, the second respondent took a forged mortgage from the wife, who professed to act

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86 (1934) 51 C.L.R. 217, 233.

87 Id. at 241-245.

88 LAW OF REAL PROPERTY, 364.

89 THE SALE OF LAND, 540.

90 TRANSFER OF LAND ACT, 42.

91 It is difficult to reconcile s. 134 with some of the broad statements. S. 134 strictly deals with the investigation of the history of the transferor's title, not the transaction between the transferor and the transferee. If the transferee dealt with the transferor his transaction was not defeasible because the transaction resulting in the registration of the transferor was defeasible. This is very similar to that which is achieved by s. 202 except that by that section there is the added requirement that the transferee must be a bona fide purchaser for valuable consideration. The necessity for s. 202 at all, in the face of immediate indefeasibility, is now a matter for speculation, and accordingly lends support to the view that indefeasibility under the Act was intended to be deferred.

on behalf of herself and her husband (joint tenants of the fee simple), and forged the husband's signature. It was found that the husband had given no authority to the wife to mortgage his interest in the land. The finding on the law that the mortgagee had acquired a valid encumbrance in the circumstances seems to negate a general principle that indefeasibility depends upon dealing with the registered proprietor, or his agent, as nowhere in the report does it appear that the mortgagee dealt with anyone other than the wife.

In dealing with *Gibbs v. Messer* the Board simply said that it was

> then concerned with the position of a bona fide "purchaser" for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor. The decision has in their Lordships' opinion no application as regards adverse claims made against a registered proprietor, such as came before the courts in *Assets Co. Ltd. v. Mere Roihi,* in *Boyd v. Mayor of Wellington* and in *the present case.*[92]

Again, in *Mayer v. Coe,* the mortgagee Coe dealt, not with the registered proprietor, or, to be more correct, the person entitled to be registered, but with a solicitor, Hoytash, who forged the registered proprietor's signature and had no authority whatsoever to borrow money for her or use her title for the purpose of borrowing money. As has been seen, the decision again was to give the mortgagee a valid encumbrance and there was apparently no question of the quality of the interest obtained by the mortgagee being suspect because the dealings had not been with Mrs. Mayer.

It would seem from these two decisions that the general principle hitherto followed that a transferee must ensure he is dealing with the registered proprietor may no longer exist. However, the purchaser's title will still be defeasible if he takes a forged transfer from a non-existent registered proprietor as in *Gibbs v. Messer,* as the Board indicated that, confined to its peculiar facts, that was still a good decision. Where then does this leave the obligation to satisfy oneself as to the identity of the proposed transferor? It would seem now that failure to make such inquiries will only render defeasible a title if it subsequently appears that the registered proprietor was non-existent.[93]

A summary of what appears now to be the position is—

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92 [1967] 1 A.C. 569, 584. Emphasis added.

93 The possibility of this happening may be so remote that it may be a risk most purchasers are prepared to take.

(a) The former view that section 134 superimposes the qualification that, to achieve the measure of indefeasibility given by sections 68 and 199, one must deal with the registered proprietor, is now a doubtful proposition of law.

(b) However, to be absolved from the effect of the doctrine of notice, as provided in the second part of section 134, it probably still is the law that one must deal with the registered proprietor.

(c) The one case where a title, otherwise indefeasible, will be defeated is where the transfer has been taken from a fictitious transferor. This presumably means where the name of the transferor does not coincide with a person who it was, by a prior transaction, intended should become the registered proprietor. Simply because there may be a person who has the same name as the transferor is insufficient—there may have been a person named Hugh Cameron alive when *Gibbs v. Messer* was before the courts.[94]

IS FRAZER v. WALKER BINDING?

In two of three cases before a single judge, all of which were heard by Street J. in New South Wales, and in which *Frazer v. Walker* was directly relevant to the decision, an attempt was made to persuade the court that the Privy Council's decision was not to be followed. In each case the argument failed. In *Mayer v. Coe,* relying mainly on *Morris v. The English, Scottish and Australian Bank,*[95] Street J. concluded that in jurisdictions subject to the ultimate appellate authority of the Privy Council, decisions of that body laying down principles or lines of reasoning applicable within that jurisdiction will be binding on courts of that jurisdiction even though the proceedings before the Privy Council originated from another part of the British Commonwealth. This principle applied not only to decisions based on common law, but also on matters arising under statutes where there was a degree of similarity between the statutes. The judge also observed that the Privy Council's decision was much broader and more far-reaching than was necessary to dispose of the appeal, and it appeared to him that this had been deliberately done to 'set at rest the doubts that had

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94 Presumably this is because of the use of the word "proprietor" in s. 134. If there is no person measuring up to the description the section cannot operate. But see also definition of "proprietor" in s. 4. What is the significance of "owner" in line 1 of the definition? Also to get the protection of s. 202 there must be a proprietor in existence 'through or under whom he claims'.

95 (1957) 97 C.L.R. 624.

for many years plagued this particular branch of real property law in Australia and New Zealand'.[96]

In *Ratcliffe v. Watters*[97] a further attack was made on the ground that the acceptance by a State court of *Frazer v. Walker* may be contrary to the views of Barwick C.J. in *Jacob v. Utah Construction and Engineering Pty. Ltd.*[98] In this last case the Chief Justice said that it was not 'for a Supreme Court of a State to decide that a decision of [the High Court] precisely in point ought now to be decided differently because it appears to be inconsistent with the reasoning of the Judicial Committee in a subsequent case'. He went on to point out that, if a decision of the High Court was to be overruled, then this was to be done by the Privy Council or the High Court itself. It was not to be treated by a Supreme Court as if it were overruled. The matter was different where the High Court's decision was not precisely in point, and comparison had to be made between two lines of reasoning. Street J. did not consider that he was ignoring this stricture. He treated the warning as one against going behind the direct authority of the High Court on the ground merely of reasoning apparently inconsistent therewith. To him both *Clements v. Ellis* and *Frazer v. Walker* raised the same question of law, and each decided it differently. The cases were in irreconcilable conflict. The Privy Council had laid down in general terms the law on indefeasibility and the decision was directly in point. Accordingly, he felt bound to accept and apply the decision. The submission that *Clements v. Ellis* was not referred to in the judgment of the Privy Council, nor expressly overruled, was answered by Street J. pointing out that the case was in argument before the Board which must have had that decision well in mind. Even though *Clements v. Ellis* was not expressly overruled, 'in point of substance by their decision they did overrule it'.

Frazer v. Walker has been followed in the New Zealand case of *Mardon v. Holloway,*[99] and again by Street J. in *Schultz v. Corwill Properties,*[100] and although on the precise point in issue in *James v. Registrar-General*[101] it was distinguished by two of the three judges in the Court of Appeal in New South Wales, it was in that case

96 A reference no doubt to the fact that in Frazer v. Walker a decision could have been based on s. 202 without the necessity of deciding the question of immediate or deferred indefeasibility.
97 (1969) 89 W.N. (N.S.W.) 497.
98 (1966) 116 C.L.R. 200, 207.
99 [1967] N.Z.L.R. 372.
100 [1969] 2 N.S.W.R. 576.
101 [1968] 1 N.S.W.R. 310.

referred to in general with approval. It does remain for the High Court formally to attach its seal of approval to the decision, but in view of the similarity between the Australian and New Zealand Torrens statutes, when the occasion arises it seems hardly likely that it will fail to do so. Although an appeal to the High Court was lodged in *Mayer v. Coe,* it has not been proceeded with.

SOME CONCLUDING REFLECTIONS

In reviewing the impact of the decision in *Frazer v. Walker,* as not infrequently happens when reviewing any decision which effects a fundamental change to a particular branch of the law, one is left with some doubts and feelings of uneasiness. Taking as a starting point the broad objectives of the Torrens System of land titles as being, the simplification of title to land by replacing a system of dependent titles with a system of independent ones; the facilitation of dealing with land; and the securing of a measure of indefeasibility;[102] one could say that whether indefeasibility is immediate or deferred is not a question of much consequence. The first two objectives of the system are satisfied, and as far as the third one is concerned does one more exception matter? None of the Torrens statutes purports to create a title that is absolutely immune from attack and in this sense indefeasibility is relative only. The term conveniently describes the totality of the rights a registered proprietor enjoys over a piece of land in respect of which he is registered. A description of these rights, or an assessment of the strength of his title, must be directly referable to the circumstances and occasions in which he can be deposed from his paramount position. All the Acts admit exceptions to indefeasibility. At one stage the cynic may have been tempted to say, to such an extent are exceptions admitted, both expressly by the terms of the statutes, and by judicial interpretation of the statutes as a whole, that the term "indefeasible" was a misnomer, and that the old system of land titles with the development of being backed by title insurance, ought to be closely studied as an alternative.[103]

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102 See KERR, AUSTRALIAN LAND TITLES SYSTEM, 6-7.

103 The writer has no personal knowledge of the workings of this system, widely adopted in the U.S., but for some materials and references on the controversy as to the relative merits of the two systems see CASNER AND LEACH, CASES AND TEXT ON PROPERTY, 918 ff. The writer's impression is, however, that title insurance only guaranteed the title of the vendor that the purchaser proposed to take. It did not guarantee the *transaction whereby the title passed to him.* This is vastly different from the position under Torrens title with immediate indefeasibility.

Nevertheless, the specific issue raised in *Frazer v. Walker* is, should a further exception to indefeasibility be permitted or should, in the interest of certainty of title as disclosed by the register, the opportunity be taken to reduce or limit the occasions giving rise to vulnerability? To continue to adhere to deferred indefeasibility does give rise to one further possibility of a registered proprietor, who has acted with propriety throughout, being deprived of his title, without, it would seem, the prospect of being compensated for his loss. Clearly, if this theory were to be adhered to, access to the assurance fund should be made available to such proprietor.[104] On the other hand, if certainty is to be the overriding interest, and immediate indefeasibility adhered to, just as clearly should the assurance fund be available to compensate any loss suffered by the deprived proprietor.

Again, in the wake of *Frazer v. Walker* has come the problem of to what extent should a purchaser, if he wishes to enjoy the certainty of title that the Act offers him, be obliged to take some step or steps to protect his own interests. In short, this is the question of whether the proposing purchaser should be obliged to satisfy himself that he is dealing with and taking a transfer (or any other instrument) from the person who is entitled, according to the register, to dispose of the estate or interest in the land.

In cases such as *Frazer v. Walker* and *Mayer v. Coe,* if the purchaser or mortgagee had been obliged to satisfy himself that he was dealing with the proprietor of the land and that such proprietor intended to transfer or encumber his land, the fraud and forgery would have been exposed, with the consequence that probably no dealings would have been registered. It is not perhaps unreasonable to require a person proposing to take a transfer, within practical limits, to ensure that, not only does the signature on the instrument correspond to the name on the certificate of title, but also that the signature on the instrument is that of the person who is shown on the certificate of title. If this is thought to be too onerous a burden,[105] and beyond the equivalent of caring for one's own safety in tort, the onus could be shifted to the transferor by requiring him to have himself and his signature on the instrument positively identified. This would seem to be the thought behind the requirement in New South Wales of having the signature of a transferor attested by a person who can state that

104 See comments above on the Victorian Transfer of Land (Forgeries) Act.

105 Until such time as there is a universal identification system (perhaps 1984) this may well be too onerous. The only possible existing expedient today is to request production of a drivers licence or passport, if there is one.

the transferor 'is personally known to me', which note appears on the instrument. The laxity with which this requirement is observed was a matter of comment in *Ratcliffe v. Watters.*[106] The Registrar-General of New South Wales in explaining this requirement in 1933,[107] when he would have been influenced by the decisions in *Gibbs v. Messer* and *Clements v. Ellis,* said:

> it is pointed out that, while an instrument attested by a Justice of the Peace in the prescribed form will be registered, a person dealing with a registered proprietor is entitled to see that the document which gives effect to the transaction is properly executed as such person would take a forged document at his own risk.
>
> In order to be assured that an instrument is properly executed, it is necessary to ascertain that the registered proprietor is in existence and that the instrument is genuine and that it has actually been executed by the person purporting to have executed it.

Of course this does not now wholly appear to be good law, but it does explain the purpose of the qualification of the attesting witness. If immediate indefeasibility is retained, so that a forged instrument on registration will pass a good title, imposing some obligation on the person signing the transfer to identify himself with the registered proprietor as shown on the title, is by no means a watertight solution. If it is by having the attesting witness certify that the person signing as transferor is known to him, the attesting witness himself could always be party to the fraud and sign a false certificate. Nevertheless, it might go part of the way towards reducing the occasions when innocent proprietors could lose their interest in their land through someone else's fraud.

These problems appear at this early stage in the new era of indefeasibility to be problems that warrant attention. There are no doubt many other areas of land law in which, when the impact of *Frazer v. Walker* is eventually felt, anomalies will appear or injustice be revealed which may require legislative action to remedy.

IAN McCALL

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106 (1969) 89 W.N. (N.S.W.) 497, 501-2.

107 See correspondence in (1953) 26 A.L.J. 533-4.

SCHEDULE
TRANSFER OF LAND ACT 1893-1969
(Western Australia)

SECTION 58 No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or as the case may be the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor and purporting to affect the same estate or interest be at the same time presented to the Registrar for registration he shall register and endorse that instrument which shall be presented by the person producing the duplicate grant or certificate of title.

SECTION 63 No certificate of title issued upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts of law as evidence of the particulars therein set forth and of the entry thereof in the register book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

SECTION 68 Notwithstanding the existence in any other person of any estate or interest whether derived by grant from the Crown or otherwise which but for this Act might be held to be paramount or to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register book constituted by the certificate of title; but absolutely free from all other encumbrances whatsoever except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser. Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof and to any rights subsisting under any adverse possession of such land and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land and to any unpaid rates and to any mining lease or license issued under the provisions of any statute and to any prior unregistered lease or agreement for lease or for letting for a term not exceeding five years to a tenant in actual possession notwithstanding the same respectively may not be specially notified as encumbrances on such certificate or instrument but no option of purchase or renewal in any such lease or agreement shall be valid as against a subsequent registered interest unless such lease or agreement is registered or protected by caveat.

SECTION 76 In case it shall appear to the satisfaction of the Commissioner that any certificate of title or instrument has been issued in error or contains any misdescription of land or of boundaries or that any entry or endorsement has been made in error on any certificate of title or instrument or that any certificate instrument entry or endorsement has been fraudulently or wrongfully obtained or that any certificate or instrument is fraudulently or wrongfully retained he may by writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained to

deliver up the same for the purpose of being cancelled or corrected or given to the proper party as the case may require; and in case such person shall refuse or neglect to comply with such requisition the Registrar on the direction of the Commissioner may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid; and if such person when served with such summons shall neglect or refuse to attend before such Court or a Judge thereof at the time therein appointed it shall be lawful for a Judge to issue a warrant authorising and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination.

SECTION 134 Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer or other instrument from a person who is or becomes the proprietor of any registered land lease mortgage or charge 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 thereof was or becomes registered or required or in any manner concerned to enquire or ascertain the circumstances under or the consideration for which any mortgage or other encumbrance was or is discharged or removed from the register book at any time prior to or simultaneously with the registration of such transfer or other instrument or to see to the application of any purchase or consideration money 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; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

SECTION 188 (ii) He [the Registrar] shall upon the direction of the Commissioner correct errors in the register book or in entries made therein or in duplicate certificates or instruments and may supply entries omitted to be made under the provisions of this Act; but in the correction of any such error he shall not erase or render illegible the original words and shall affix the date on which such correction was made or entry supplied and initial the same; and every error or entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted except as regards any entry made in the register book prior to the actual time of correcting the error or supplying the omitted entry.

SECTION 189 The Registrar may without the direction of the Commissioner correct any patent error appearing on the face of any instrument lodged for registration without such instrument being withdrawn from the office. Provided always that such correction be made in compliance with subsection (ii) of the last preceding section and such correction shall have the same validity and effect as if made under the direction of the Commissioner under the said section.

SECTION 199 Subject to the provisions of section sixty-eight of this Act, no action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act except in any of the following cases (that is to say):—

(i) The case of a mortgagee as against a mortgagor in default.
(ii) The case of an annuitant as against a grantor in default.
(iii) The case of lessor as against a lessee in default.
(iv) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud.
(v) The case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof *bona fide* for value.

(vi) The case of a registered proprietor claiming under a certificate of title prior in date of registration under the provisions of this Act in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land.

And in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding.

SECTION 200 Upon the recovery of any land estate or interest by any proceeding at law or in equity from the person registered as proprietor thereof it shall be lawful for the court or a judge in any case in which such proceeding is not herein expressly barred to direct the Registrar to cancel any certificate of title or instrument or any entry or memorandum in the register book relating to such land estate or interest and to substitute such certificate of title or entry as the circumstances of the case may require; and the Registrar shall give effect to such order.

SECTION 201 Any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing of such land under the operation of this Act or by the registration of any other person as proprietor of such land estate or interest or in consequence of any error or misdescription in any certificate of title or in any entry or memorandum in the register book may bring and prosecute an action at law for the recovery of damages against the person upon whose application such land was brought under the operation of this Act or such erroneous registration was made or who acquired title to the estate or interest through such fraud error or misdescription. Provided always that except in the case of fraud or of error occasioned by any omission misrepresentation or misdescription in the application of such person to bring such land under the operation of this Act or to be registered as proprietor of such land estate or interest or in any instrument signed by him such person shall upon a transfer of such land *bona fide* for value cease to be liable for the payment of any damage beyond the value of the consideration actually received which but for such transfer might have been recovered from him under the provisions herein contained; and in such last-mentioned case and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead or shall have been adjudged bankrupt or cannot be found within the jurisdiction of the Supreme Court then and in any such case such damages with costs of action may be recovered out of the assurance fund by action against the Registrar as nominal defendant. Provided also that in estimating such damages the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded.

SECTION 202 Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or to an action for recovery of damages as aforesaid or for deprivation of the estate or interest in respect to which he is registered as proprietor any purchaser *bona fide* for valuable consideration of land under the operation of this Act on the ground that the proprietor through or under whom he claims 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; 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.

SECTION 203 If upon the application of any owner or proprietor to have land brought under the operation of this Act or to have any dealing or transmission registered or recorded or to have any certificate of title foreclosure order or other document issued or to have any act or duty done or performed which by this Act is required to be done or performed by the Commissioner or Registrar either of them shall refuse so to do or if such owner or proprietor shall be dissatisfied with the direction upon his application given by the

Commissioner it shall be lawful for such owner or proprietor to require the Commissioner or Registrar to set forth in writing under his hand the grounds of his refusal or the grounds upon which such direction was given, and such owner or proprietor may if he think fit at his own costs summon the Commissioner or Registrar as the case may be to appear before the Supreme Court or a Judge to substantiate and uphold the grounds of his refusal or of such direction as aforesaid such summons to be issued under the hand of a Judge and to be served upon the Commissioner or Registrar six clear days at least before the day appointed for hearing the complaint of such owner or proprietor. . . .

SECTION 211 No action for recovery of damages sustained through deprivation of land or of any estate or interest in land shall lie or be sustained against the assurance fund or against the person upon whose application such land was brought under the operation of this Act or against the person who applied to be registered as proprietor in respect to such land unless such action shall be commenced within the period of six years from the date of such deprivation. . . .