

COMMUNIS ERROR - THE CONTINUING FALLACYI. R. Ross\* and N. C. Anderson\*\*

The recent decision of the Privy Council in Frazer v. Walker & Radomski (1) will disappoint those who expected it to clarify the present confused state of the law relating to the indefeasibility provisions of the Land Transfer Act 1952. In a brief judgment restricted mainly to the particular facts their Lordships only cursorily examined the effect of the registration of forged documents and of the indefeasibility provisions of the Land Transfer Act 1952. In particular, however, by reaffirming the decision of the New Zealand Court of Appeal in Boyd v. Mayor of Wellington (2) their Lordships have, it is submitted, perpetuated a fallacious interpretation of Assets Co. Ltd. v. Mere Roihi (3), the locus classicus of New Zealand land law.

In Frazer v. Walker the appellant and his wife were registered as joint owners of a small farm property near Papatoetoe. Without the knowledge of the appellant, the wife arranged a mortgage over this property and after executing the mortgage herself forged the signature of her husband. The second respondents, acting in good faith, paid over the mortgage moneys, and registered their mortgage. No payment of principal or interest was made and ultimately the second respondents sold the property to the first respondent in exercise of their power of sale. In an action by the first respondent for possession the appellant counterclaimed on the ground of forgery of his signature to the mortgage for a declaration that his interest in the land had not been affected by the mortgage and that the mortgage was a nullity. He also counterclaimed for an order to cancel the relevant entries or memorials in the Land Transfer Register. In dismissing the appeal the Privy Council refused to reinstate the appellant as registered proprietor.

The Privy Council conceded however that there are two possible interpretations of the Assets Co. case, namely;

- (i) The decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or:
- (ii) The decision established the indefeasibility of title of a subsequent bona fide purchaser from a registered proprietor who acquired his interest under a void instrument.

In the case of Boyd v. Mayor of Wellington the first interpretation was upheld and, according to their Lordships, in Frazer v. Walker rightly so.

\* LL. B. (Hons.)

\*\* LL. B.

(1) [1967] 1 All E.R. 649

(2) [1924] N. Z. L. R. 1174

(3) [1905] A. C. 176.

"... Boyds Case was rightly decided and ... the ratio of the decision applies as regards titles derived from registration of void instruments generally." (4)

A detailed examination, however, of the intricate and obscure facts of Assets Co. Ltd v. Mere Roihi suggests that the Court of Appeal in Boyd's Case opted for the wrong interpretation. In Boyd's Case a majority decision held that even if a Proclamation was void, its registration conferred on the defendant an indefeasible title to the land affected.

"The Board there (in Assets Co. Ltd. v. Mere Roihi) was concerned with three consolidated appeals from the Court of Appeal in New Zealand which had decided in each case in favour of certain aboriginal natives as against the registered proprietors". (5).

It is necessary, in order to appreciate the decision of the Privy Council in Assets Co. Ltd. v. Mere Roihi to examine the dealings relating to each of the three pieces of land. In the first case the Maoris were named as owners of a block of land known as Waingaromia No. 3. The Assets Co. claimed that the Maoris had signed a transfer in favour of one Cooper who mortgaged the land to the firm of Kinross and Graham. Cooper subsequently sold the land to Potter Wilson & Co. executing a transfer which could not, however, be registered as the land was subject to a caveat lodged by the Crown. The land was then vested in the liquidators of the Glasgow Bank by some transaction the nature of which did not appear from the evidence given (6) and by virtue of an Imperial Statute vested in the Assets Co., who obtained provisional registration of a transfer to themselves. The company then obtained registration on the permanent register of Coopers title and a Certificate of Title in his favour. Registration of the Assets Co. title was subsequently completed and a certificate of title issued.

The second block of land known as Waingaromia No. 2 was also transferred by the Maori owners to Cooper who after obtaining provisional registration mortgaged the land to the Glasgow Bank. A transfer of the fee simple to the liquidator of the Glasgow Bank was then entered on the permanent register and the Imperial Glasgow Bank Act vested the land in the Assets Co. who paid valuable consideration.

The third piece of land known as Rangatira No. 2 was leased by the Maori owners to certain sheep farmers who assigned the lease to the firm of Kinross and Graham. That firm subsequently purchased the fee simple which they then

(4) [1967] 1 All E.R. 649, 654.

(5) Ibid., 654.

(6) Mere Roihi v. Assets Co. Ltd (1902) 21 N. Z. L.R. 673, 697.

transferred to the liquidators of the Glasgow Bank. The transfer to the liquidators of the Glasgow Bank and a subsequent transfer to the Assets Co. were registered simultaneously on the permanent register.

It is therefore apparent that in each case the Assets Co. was a subsequent bona fide purchaser for value. (7) As Stringer J. points out in Boyd v. Mayor of Wellington (8), any interpretation of the Assets Co. Case must be construed secundam subjectam materiam. When so construed the Assets Co. Case can be taken as authority only the proposition that a subsequent bona fide purchaser for value obtains the benefits of the indefeasibility provisions of the Land Transfer Act 1952. To take any statements in the Assets Co. case out of context and to adduce them in favour of the proposition of instant indefeasibility is to make the same error as the New Zealand Court of Appeal in Boyd v. Mayor of Wellington. It is unfortunate that the Privy Council in deciding Frazer v. Walker should have set its seal on the Court of Appeal's interpretation.

The Privy Council first examined those sections of the Land Transfer Act 1952 which deal with the procuring of registration. Their Lordships referred to s. 42 which contains a prohibition against registration of any instrument except in the manner provided by the Act and unless the instrument is in accordance with the provisions of the Act. Also referred to were s. 157, which requires every instrument to be signed by the registered proprietor, and s. 164 which prohibits the Registrar from receiving any instrument, such as a charge, unless there is endorsed thereon a certificate that it is correct for the purposes of the Act. The appellant invoked these sections in support of the argument that the forged mortgage was a nullity even after registration. Their Lordships, in rejecting this argument, which they believed would be destructive of the whole system of registration, declared that :-

"Registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise." (9)

It is submitted that their Lordships, in adopting this principle, confused the two distinct concepts of indefeasibility of title and the conclusiveness of the register.

The concept of conclusiveness is one which prevents any collateral investigation

(7) Notwithstanding Dixon J.'s opinion that the Privy Council's decision in the Assets Co. Case was based on the effect of initial registration. Clements v. Ellis (1934) 51 C.L.R. 217, 249.

(8) [1924] N.Z.L.R. 1174, 1195.

(9) [1967] 1 All E.R. 649, 651.

of ownership, but as Dixon J., points out in Clements v. Ellis

" It is not an answer to proceedings directly impugning a transaction the registration of which has been obtained by improper or unauthorised entries." (10)

The doctrine of indefeasibility on the other hand, is one which does prevent the impugning of the registration of a person who has obtained such in reliance upon the doctrine of conclusiveness. The object of the Act is to protect persons obtaining registration through a valid instrument and not to validate transactions which would otherwise be void. It is the reliance upon the doctrine of conclusiveness by a bona fide purchaser which validates a transfer to him from a registered proprietor.

This protection to a third party dealing with the registered proprietor is conferred by s. 183 of the Act which provides that the title of a bona fide purchaser or mortgagee for valuable consideration cannot be impeached on the grounds that his vendor was registered through

" fraud or error or under any void or voidable instrument." (11)

Such a provision, it is suggested, would be redundant if the mere registration of the void or voidable instrument conferred instant indefeasibility on the vendor's title. It would be preferable, therefore, to regard a subsequent bona fide purchase for valuable consideration as a prerequisite of indefeasibility. It is suggested that the Privy Council in deciding Frazer v. Walker should have based its decision on the first respondent's compliance with this prerequisite. In preferring, however, to assume that the first respondent's title was indefeasible because the transfer to him had been rendered unimpeachable by the fact of registration, their Lordships appear to have reached a correct conclusion by incorrect reasoning.

It was acknowledged by their Lordships that the power of the Registrar to correct entries on the Register under s. 81 of the Act are significant and extensive, and are not confined to the exceptions set out in ss. 62 and 63 of the Act. Their Lordships said that as well as in the case of fraud where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained, the Registrar has powers of cancellation and correction.

" ...It appears there is room for some difference of opinion as to what precisely may be comprehended in the word 'wrongfully'." (12)

(10) [1934] , 51 C.L.R. 211, 241.

(11) s. 183, Land Transfer Act 1952 (emphasis added)

(12) [1967] , 1 All E.R. 649, 655.

Their Lordships however did not consider the interpretation of s. 81 relevant to their decision and refrained from pronouncing upon its effect.

It is respectfully suggested, however, that if it was necessary for their Lordships to comment on the interpretation of Boyd's Case then it would be similarly necessary for them to comment upon the interpretation of s. 81, for Boyd's Case was concerned with the effect of a void document and s.81 outlines the circumstances in which such a document may be set aside.

It is submitted that there are other unfortunate omissions in their Lordships' judgment. Although the instant case concerned forgeries, and the Privy Council in the Assets Case had established that

" forgery is more than fraud, and gives rise to considerations peculiar to itself..." (13)

yet the judgment in Frazer v. Walker neither explained nor indeed commented on this difference.

Their Lordships appear to have removed the long-standing distinction between forged instruments and instruments void for other reasons. It is agreed that this distinction was anomalous and not justified by the Act. However, it might have been expected that the forgery cases would have been examined before being abandoned. The decision in Gibbs v. Messer was summarily dismissed as a case concerning "the position of a bona fide 'purchaser' for value from a fictitious person" notwithstanding the declaration by their Lordships in that case that :-

" 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." (14)

Their Lordships' advice in Assets Co. v. Mere Roihi did not overrule this dictum, deciding only (a) that the term "fraud" as used in the Land Transfer Act did not include constructive fraud and (b) that the title of a bona fide purchaser for value from the registered proprietor was unimpeachable. The Privy Council had no need to consider, and, it is submitted, did not consider the dictum cited above. The authority of Gibbs v. Messer therefore remained unimpaired.

It has been held that the certificate of correctness under s. 164 of the Act, of a forged instrument is a wrongful act inducing registration within s.81 of the Act. (15) It is submitted that the certifying correct of a void document must

(13) [1905] A.C. 176, 211.

(14) [1891] A.C. 248, 257-258

(15) District Land Registrar v. Thompson [1922] N.Z.L.R. 627.

also be a wrongful act within s. 81. Their Lordships however felt unable to comment on this section, with the result that a practitioner, when signing an instrument correct for the purposes of the Act, cannot be certain whether he is guaranteeing the validity of the instrument, its correctness as to form, or the authenticity of the signature.

Undoubtedly, further confusion results from their Lordships statement that their decision

" ... 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" (16)

It is suggested that this reasoning might be valid enough in the United Kingdom where the Land Registration Act 1925 does not confer the protection of indefeasibility which is provided in New Zealand by the Land Transfer Act. However, in New Zealand any remedy in personam must be confined to enforcing trusts or to rectifying mistakes in carrying a contract into effect as between the parties to it. (17) To permit this remedy to extend further would be to destroy the whole purpose of the Land Transfer system.

Even the general comments on indefeasibility made by their Lordships would seem insufficient to sustain their adoption of the decision of the Court of Appeal in Boyd v. Mayor of Wellington. It is submitted that the Privy Council should have either restricted its decision to the position of the bona fide purchaser for value, Walker; or, if it intended a review of the scope of the concept of indefeasibility generally, then it should have considered the question fully and in greater detail. In contenting itself with neither of these considerations, and in perpetuating the New Zealand Court of Appeal's fallacious interpretation of Assets Co. Ltd v. Mere Roihi it further confuses the question of indefeasibility under the Land Transfer Act.

It is submitted that the Act contains nothing to support the principle of instant indefeasibility and that the present law validating void transactions inter partes has been evolved by the Courts' misinterpretation of their previous decisions. It is further submitted that the purpose of the Torrens system is to afford protection to persons relying on the register. This principle is not diminished if registration alone is insufficient to validate a void instrument. Further, it would be contrary to general principles of public policy if a man could be deprived of his property through registration of a nullity.

(16) [1967] 1 All E.R. 649, 655.

(17) It is clear that the cases relied upon by the Privy Council do so limit the scope of the remedy in personam. See Boyd v. Mayor of Wellington, [1924] N.Z.L.R. 1174, 1223. and Tataurangi Tairuakena v. Mua Carr [1927] N.Z.L.R. 688, 702.

Such however is the effect of the Privy Council's advice in Frazer v. Walker. The writers accordingly recommend the enactment of legislation, to negative that decision, drafted in the terms of the dissenting judgments of the New Zealand Court of Appeal in Boyd v. Mayor of Wellington.

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