The *In personam* Exceptions to the Principle of Indefeasibility

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It has been pointed out by J. E. Hogg[1] that an "indefeasible title means a complete answer to all adverse claims on mere production of the register". Furthermore, in the early case of *Fels* v. *Knowles*[2] Edwards J. said: "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 registration of the title under which he takes from the registered proprietor has an indefeasible title *against all the world.*"

The principles of indefeasibility under the Land Transfer legislation in New Zealand have been interpreted in a line of cases commencing with *Assets Co. Ltd* v. *Mere Roihi*[3]. Judicial thought on indefeasibility was developed in *Boyd* v. *Mayor of Wellington*[4] and *Waimiha Sawmill Co. Ltd* v. *Waione Timber Co. Ltd.*[5] Finally, the recent case of *Frazer* v. *Walker & Radomski*[6] appears to have established the interpretation of indefeasibility as laid down in *Assets Co* case, the *locus classicus* of New Zealand land law.

It is not intended in this article to become involved in discussions on the interpretation of the indefeasibility principle. However, the writer accepts the view that the decision in *Frazer* v. *Walker* has gone a long

1 *Registration of Tile to Land throughout the Empire* (1920) p. 94.

2 (1906) 26 N.Z.L.R. 604, 620 (emphasis added).

3 [1905] A.C. 176; N.Z.P.C.C. 275.

4 [1924] N.Z.L.R. 1174.

5 [1926] A.C. 101.

6 [1967] 1 A.C. 569; [1967] N.Z.L.R. 1069.

way towards clarifying this area of the law.[7] In doing so, the Privy Council pointed to two methods of impeaching the title of the registered proprietor. One concerns the power of the Registrar to correct entries under ss.80 and 81[8] while the other concerns adverse claims *in personam.*

With reference to this second method their Lordships said at p. 1078 of *Frazer* v. *Walker*:

> "First, in following and approving in this respect the two decisions in *Assets Co. Ltd* v. *Mere Roihi* supra; and *Boyd* v. *Wellington Corpn.* supra, their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers on a registered proprietor a title to the interest in respect of which he is registered which is (under s.62 and s.63) immune from adverse claims, other than those specifically excepted. In doing so they wish 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 in equity, for such relief as a court acting in personam may grant. That this is so has frequently and rightly, been recognized in the courts of New Zealand and Australia (see, for example, *Boyd* v. *Wellington Corpn.* (supra at p. 1223), per Adams J., and *Tataurangi Tairuakena* v. *Mua Carr* [1927] N.Z.L.R. 688 at p. 702, per Skerrett, C. J.).
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> Their lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of s.62 and s.63 may not be maintained."

This appears to be a clear qualification to the principle of immediate indefeasibility and to the words of Hogg quoted above. The Courts have thus not allowed the doctrine of indefeasibility to deprive them of their jurisdiction in Equity to decree specific performance of enforceable contracts entered into by registered proprietors or to enforce trusts created by them. Clearly, registered proprietors cannot avoid the "conscientious obligations entered into by them".[9]

Certain confusion may appear to arise from the dictum cited above, in that their Lordships outline no limits, nor in any way attempt to define the scope of these claims *in personam.* A qualification to the principle of immediate indefeasibility having been indicated, it seems

[7] The question of indefeasibility was especially vital in the area of void and voidable instruments. The academic debate between supporters of "immediate" indefeasibility and those supporting "deferred" indefeasibility would now appear to have been brought to an end. These two theories have been discussed by G. W. Hindle in *The Future of the Torrens System in N.Z. (A. G. Davis Essays in Law)* p. 108 *et seq.* While it is possible to admit that their Lordships decision in *Frazer* v. *Walker* may reveal certain anomalies in the Land Transfer Act (as pointed out by J. J. Slade [1968] N.Z.L.J. 56 and I. R. Ross and N. C. Anderson, [1967] Auckland University Law Review p. 83 *et seq.*) it is submitted that the "fallacious interpretation" is here to stay. For further discussion on 'immediate' and 'deferred' indefeasibility see (1967) 41 A.L.J. 26.

[8] [1967] I.A.C. at 585; [1967] N.Z.L.R. at 1079.

[9] *Barry* v. *Heider* (1914) 19 C.L.R. 197, 216.

apposite that an attempt should be made to outline the limits to this "qualification", for if this remedy were permitted to extend too far the whole principle of the Land Transfer system might be destroyed.

To this end it is proposed to look at certain of the decided cases starting with *Boyd* v. *Mayor of Wellington.*[10] Adams J., stated[11] in this case:

> "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; no consideration has passed in respect of the interest which was wrongfully retained, and I see no reason to doubt that the power to order rectification may be put upon the ground of an implied trust."

In making the above statement, Adams J., was outlining his views on the doctrine of indefeasibility. He mentioned the qualification of the Registrar's powers and went on to indicate this further qualification. *Boyd's case*[12] did not concern a claim *in personam*; thus the words of Adams J. are clearly *obiter dicta.* However, it is submitted that they were a clear indication that *in personam* remedies would be recognised and furthermore that such remedies were by no means unlimited.

The passage referred to in *Tataurangi Tairuakena* v. *Mua Carr*,[13] is a dictum of Sir Charles Skerrett C.J., who, in delivering the judgment of the Court of Appeal, said:

> "The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trust created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest."

Here again it is evident that a qualification to the indefeasibility principle is indicated. What are the limits to this qualification? It is proposed to look at both the New Zealand and Australian cases in an attempt to fix the true limits.

The New Zealand Cases

It is apparent from the above cited dicta that there are two classes of case within this qualification: First, there are cases where there is privity of contract and a fiduciary relationship based thereon; and secondly, the cases where there is a fiduciary relationship with no contractual basis. If a registered proprietor has entered into an agreement for sale and purchase for the sale of land, it is clear that he cannot plead indefeasibility of title as a defence to an action for specific performance. Furthermore, where a registered proprietor holds land as a trustee under a will, it is equally clear that he could not plead an indefeasible title as against the *cestui que trust* under the will. There

[10] [1924] N.Z.L.R. 1174.
[11] *ibid.*, p. 1223.
[12] *Supra.*
[13] [1927] N.Z.L.R. 688, 702.

will be, however, less obvious examples of privity of contract between the parties or of trusts express, or implied, "against the registered proprietor, and the cases will be examined" in order to find out the circumstances under which *in personam* remedies will lie against the registered proprietor (even though he is in good faith) in favour of the other party.

A. *Privity of Contract Cases*

The earliest New Zealand authority is *Paoro Torotoro* v. *Sutton*[14] where a certificate of title was set up by an afterplea as an answer to the plaintiff's claim. The claim was for rectification of a mortgage deed and conveyance on the ground that the plaintiffs executed them under mistake, and the defendants obtained execution thereof by fraud. There was a demurrer to the plea and the demurrer was upheld.

It was stated by Prendergast, C.J., at p. 65.

> "I do not think that the effect of a certificate of title under the Land Transfer Act is, as between immediate parties to a contract to alter their rights against and liabilities to each other. If the facts in the plaintiffs' declaration are admitted, the plaintiffs would at any rate have a right to have the deed cancelled if the position of the parties had not been altered—and in equity in the meantime the defendant would hold the legal estate as *quasi*—trustee for the plaintiffs. Now, there is nothing in the Land Transfer Act which, as between the trustee and the *cestui que trust*, puts an end to the trust. The trust is not noticed in the Register; but the *cestui que trust* may always in this Court enforce his rights against the trustee, although the trustee may have acquired a certificate of title."

From this dictum, it appears essential to a claim *in personam* in this class of case that there must be a contract upon which the immediate parties can base their rights. That this is so is apparent from the case of *Jonas* v. *Jones*.[15] There A agreed to sell to B and C separate parcels of land held under the Land Transfer Act. By an innocent mistake of all the parties the land agreed to be sold to B was transferred to C and that agreed to be sold to C was transferred to B. When the mistake was discovered, C took possession of the land contained in his transfer whereupon B brought an action claiming that C might be ordered to execute a transfer to recitfy the mistake. It was held that this was an action coming within the protective provisions of the Land Transfer Act 1870—s.129(1) (now s.63(1)) and that as there was no fraud the plaintiff must fail. Furthermore, as the action was within s. 129(1), the general equitable jurisdiction of the Court could not be invoked.

It has been submitted by E. C. Adams[16] that *Jonas* v. *Jones* was wrongly decided, in that it was undoubtedly a plain case of mutual mistake. With respect, it is submitted that the reason for not invoking an equitable remedy was that there was no privity of contract between the

[14] 1 N.Z. Jur. (N.S.) S.C. 57.
[15] (1882) N.Z.L.R. 2 S.C.15.
[16] See *Land Transfer Act* (1958) p. 147.

parties. Clearly no prior arrangement between the parties in respect of the later transaction existed and the defendant was entitled legally to assert the indefeasibility of his title.[17]

That this is the more correct view is apparent from the case of *Watson* v. *Cullen*.[18] Although the case of *Jonas* v. *Jones*[19] is not mentioned in the judgment, the report states:[20]

> "At the close of the plaintiff's case, counsel for the defendants moved for a non-suit on the ground that the decision in *Jonas* v. *Jones* applied, the property being under the Land Transfer Act. After argument the learned judge held that the case was distinguishable from *Jonas* v. *Jones* as there appeared to be no privity between the parties in that case, and if it was not distinguishable he should not be prepared to follow it".

It is submitted that *Jonas* v. *Jones* is in fact distinguishable. In *Watson* v. *Cullen* there was a contract between the parties, a contract in which they were never *ad idem*. Williams J. held that though each party was mistaken, the mistake was not mutual and thus A was not entitled to rectification, but to rescission.

In *Taitapu Gold Estates Ltd* v. *Prouse*[21] a remedy *in personam* was granted on the basis of a contract between the parties. The plaintiffs agreed to sell to the defendants certain parcels of land, reserving, however, the right to minerals below the surface of the land. By an oversight the minerals were not excepted from the transfer, and on discovering the omission the plaintiffs requested the defendants to join in a rectification of the transfer and the certificate. The defendants denied there was any mistake and claimed that having acquired without fraud a certificate of title free from exceptions or reservations they were entitled to retain it.

It was held that the plaintiffs were entitled to have the mistake rectified by a retransfer of the minerals from the defendant. Following *Paoro Torotoro* v. *Sutton*[22] and *Loke Yew* v. *Port Swettenham Rubber Co.*[23] Hosking J., said at p. 831:

> "In the present case the plaintiffs rely on something more than an alleged ownership arising independently of the defendants. The plaintiffs rely on the contracts to which the defendants were parties and on the facts which followed upon the contracts. In my opinion, by reason of the contracts and the facts, the defendants became and are constructive trustees of the minerals for the plaintiffs."

17 For a similar view see Wills [1963] N.Z.L.J. 269 at p. 285.
18 (1887) N.Z.L.R. 5S.C. 17.
19 *Supra.*
20 At page 20 of the report.
21 [1916] N.Z.L.R. 825.
22 *Supra.*
23 [1913] A.C. 491.

Outlining this qualification to the indefeasibility principle Hosking J. added:[24]

> "It in no way conflicts with the conclusiveness of the Land Transfer Act that the Court enforces contracts which the registered proprietor has entered into affecting the land of which he is registered proprietor. The specific enforcement of contracts for the sale of land under the Act is a matter of frequent occurrence as is also the enforcement of trusts."

Furthermore, Hosking J. was not prepared to limit the application of this *in personam* remedy to contracts arising at any special point of time. He said:[24]

> "Nor does it appear to me that the case is altered if the contract which is to affect the land is entered into before the contractor is registered, or if the trust which is to affect it arises upon the basis of some contract or confidential relation antecedent to the registration."

The *Taitapu Gold Estates* case was expressly approved in *Mereana Perepe* v. *Anderson*[25] where Fair J., stated:

> "Another exception to the rule as to the conclusiveness of registration is where there has been mutual mistake by the parties as to the terms of the document registered."

The principle from the *Gold Estates* case was again followed in *Shepheard* v. *Graham*[26]. There a property which in the agreement for sale and purchase was described as a "house and section situated at No. 70 Idris Road" was erroneously transferred by omitting a portion of the land, though the purchaser occupied the whole of the land and believed that he had taken title to what he occupied. After eight years a second transferee brought an action against the original vendor's executor for rectification of the contract and specific performance. It was held that there was a mutual mistake in the first transfer which should be put right. Fleming J., pointed out at p. 660 that:

> "[T]his is not the case of a *bona fide* purchaser for value, and without notice. The first defendant takes by succession under his late mother's will. He could take no more than she could give. At the time of her death she held the legal title to the piece of land in dispute, but as she had sold it to Lady Clifford and received the consideration under the contract she held this land merely as trustee for Lady Clifford or her assignee. The first defendant acquired the legal title subject to the same trust. Besides, he had full notice of the facts, having acted as his mother's agent throughout."

The judge declared that the defendant held the land in question in trust for the plaintiff and ordered him to transfer the same to the plaintiff.

The question now arises whether this case should be strictly labelled a "privity of contract" case. If Lady Clifford had been suing the defendant, Mrs Graham's executor, all would have been well; there would have been privity of contract between the parties and the contract could have been rectified. But in fact it was a subsequent transferee, Shepheard, who was seeking rectification of both contracts.

24 At p. 833.
25 [1936] N.Z.L.R. 47, 50.
26 [1947] N.Z.L.R. 654.

The Court held that lack of privity between Shepheard and Graham was no bar to the granting of relief. Fleming J., then proceeded to say that Lady Clifford or her assignee was beneficially entitled to the land held in trust by Graham. This would seem to be far from granting rectification based on the two contracts. It is submitted that because there was no privity between Shepheard and Graham the Court could not grant the equitable remedy of rectification based on the contracts. This is evidenced by the fact that the Court was forced to imply a trustee relationship to which Shepheard subsequently became a party, in the capacity of Lady Clifford's assignee.

It appears that the Court has telescoped the legal reasoning in this case, and in doing so it has failed to provide a logical answer to this very complicated situation. Indeed it is a case which smacks of contract: the remedy sought is contract-based, the parties are connected by contracts, but Shepheard and Graham are not privy to the same contract and this has forced the Court to give a remedy which may in fact be based on implied trusteeship without any relation to privity of contract. This would appear to be the reasoning behind the court's reference to two cases, *Craddock Bros.* v. *Hunt*[27] and *Leuty* v. *Hillas*[28]. It is suggested that the Court may have used the prior agreements or arrangements between the various parties upon which to build a trust relationship and that this case is not a privity of contract case in any real sense. It may indeed more properly belong to the class of "trustee" cases discussed below.

Shepheard v. *Graham*[29] was expressly followed in *Dean* v. *Johnson.*[30] In this case the respondent had become the registered holder of a residence—site licence in respect of a "section 238" Waihi. The circumstances under which the respondent had secured registration were held by Stanton J. to be on all fours with *Shepheard*'s case. Following this case and *United States* v. *Motor Truck Ltd.*,[31] the learned judge held that the common mistake should be rectified by an *in personam* remedy.

In *Zachariah* v. *Morrow & Wilson*[32] the parties were mistaken as to their correct boundaries. The plaintiff, Zachariah, claimed that his agreement and transfer should be rectified to include a 10 perch strip owned by a Dr Wilson. Zachariah had been in possession of Lot 98 plus this 10 perch strip of Lot 99. The defendant, Mrs Morrow, had formerly owned Lots 98 and 99 and had transferred Lot 98 to Zachariah and Lot 99 to one Renner. This latter lot had since passed to Dr Wilson, who was the registered proprietor.

[27] [1923] 2 Ch. 136.
[28] (1858) 2 De G. & J. 110; 44 E.R. 929.
[29] *supra.*
[30] [1953] N.Z.L.R. 656.
[31] [1924] A.C. 196.
[32] (1915) 34 N.Z.L.R. 885.

On the facts, this case is clearly distinguishable from *Shepheard* v. *Graham*[33] where the original transferor was deemed to be a trustee for a second transferee. Clearly, any trust involving the 10 perch strip enforceable against Mrs Morrow would have been ended by the transfer to Renner of Lot 99. Thus Cooper J. could base his judgment primarily on the indefeasibility of a Land Transfer title. However, he pointed out that the plaintiff's written contract defined his purchase to be of Lot 98 contained in the certificate of title. Zachariah's possession of the 10 perch strip was not referable to any written contract but to a verbal statement (which was incorrect) made by Mrs Morrow that the boundary was the fence.

In non-suiting the plaintiff, Cooper J. stated that it was to a large extent the plaintiff's fault—though due to unintentional neglect—that he was in this unhappy position. If the error had been promptly discovered Mrs Morrow would still have had the title and the matter could have been set right. As it was, Mrs Morrow had long since parted with the land and Dr Wilson had an indefeasible title to the whole of Lot 99.

This point raises an interesting problem concerning the application of the equitable remedy. Following the well-known maxim of equity "vigilantibus non dormientibus aequitas subvenit", it is apparent that Mr Zachariah would have been without remedy on this account too. This conclusion is supported by the case of *Jackson* v. *Ogilvy*[34] where Mr McLachlan S.M. pointed out that a plaintiff who had full opportunity for investigation, and who should have known exactly what he was acquiring by the purchase of "Lot 3" would gain no salvation from the law, even as modified by the courts of Equity if "he has not helped himself or acted promptly."

These two cases discussed above exemplify situations in which an *in personam* remedy will not lie. It is clear that in the group of cases labelled "contract" cases, two factors appear to be essential before the plaintiff will be able to rely on an *in personam* remedy.

First, there must be a binding contract involving privity of contract between the parties. Secondly, the plaintiff's conduct must be such that he is not barred from his equitable remedy by the rules of Equity.

It should be noted that in most "contract" cases, it appears that the legal relationship between the parties may be expressed in terms of trusteeship as well as of contract. In other words the Courts appear to build a fiduciary relationship on to the contract, and from this latter relationship stems the equitable *in personam* remedy.

[33] *Supra.*

[34] (1954) 8 M.C.D. 294.

The dicta in both *Paoro Torotoro* v. *Sutton*[35] and *Shepheard* v. *Graham*[36] lend weight to this observation. This theme will be elaborated later in the article.

B. *The Trustee Cases*

The leading New Zealand case here is *Tataurangi Tairuakena* v. *Mua Carr*.[37] This case and others to be mentioned show that the Courts will exercise their equitable jurisdiction to enforce trusts by treating the registered proprietor as a trustee. In some cases there may be an actual trust[38] or there may be an implied or constructive trust arising from some fiduciary relationship.[39]

Although s.128 of the Land Transfer Act says that no notice of any trust will be recorded in the register and if recorded will not be recognised under the provisions of the Act, this does not prevent the Courts from exercising their equitable jurisdiction. Even in this "branch" of the exception to the indefeasibility principle it is possible to notice in most cases the existence of some agreement or arrangement either between the parties or in respect of the rights of the parties, made prior to the registration which is the subject of challenge, and subject to which agreement or arrangement the registration has been affected.[40] It is submitted that this factor may be partly to blame for any confusion which has arisen in the cases between contract-based and purely equity-based claims for *in personam* remedies.

In *Tataurangi Tairaukena* v. *Mua Carr*[41] there was a lease from a Maori Land corporation to a member of its committee. The committee held the block of land as tenants in common. The lease was commercially fair and the lessee was not fraudulent. The Court of Appeal held that although the lease had been confirmed by the Maori Land Board and registered under the Land Transfer Act, the lessee had not acquired an indefeasible title, because he held the land in a fiduciary capacity as a member of the committee.

Sir Charles Skerrett C.J. recognised this as an inroad to the indefeasibility principle and said that the registered proprietor would hold subject "to obligations under trust created by him or arising out of fiduciary relations which spring from his own acts. . . ."

[35] *Supra.*

[36] [1947] N.Z.L.R. 654.

[37] [1927] N.Z.L.R. 688.

[38] See *Kissick* v. *Black* (1892) 10 N.Z.L.R. 519.

[39] As in the *Mua Carr* case *supra.*

[40] For a similar view see Wills, [1963] N.Z.L.J. 269, at p. 284.

[41] *Supra.*

In an early case, *Kissick* v. *Black*,[42] it was held that notwithstanding the indefeasibility provisions of the Land Transfer Act 1885, the Supreme Court, as a Court of Equity, would enforce a trust against the holder of the legal estate in land under a certificate of title where the facts warranted the interference of a Court of Equity.

This case is an example of an express trust and it was pointed out that where an executor or administrator becomes registered proprietor of land by transmission, he takes and holds the land subject to the same equities and obligations as did the person whose representative he is (see s.123(2) of the Land Transfer Act 1952 for the statutory formulation of this principle). Thus the case is clearly an equity-based claim, under which the Court granted an *in personam* remedy on a counter-claim by ordering the plaintiff to execute a transfer to the defendant free of encumbrances.

The element of "agreement" or "arrangement" is especially noticeable in cases where the Court has found a constructive trust. In *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.*[43] such a trust was invoked. The registered proprietor of certain land was approached by the defendant company to sell the land to it. Part of the land was held by the plaintiff Loke Yew under a customary native land lease, recognised and respected by the registered proprietor, one Eusope, but not noted on the title. The registered proprietor vendor, finally agreed to sell all the land to the defendant company on an assurance being given by the company that Loke Yew's rights would be safeguarded. When the company had secured registration, it ignored Loke Yew's rights and when an action was brought by Loke Yew himself, the Privy Council held that the defendant was a trustee for Loke Yew.

There was of course no privity of contract as between Loke Yew and the company, so a contract-based claim was out of the question. However, the Court acting in equity said at p. 504 that:

> "So long as the rights of parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register is all the more imperative because of the absoluteness of the effect of the registration if the register could not be rectified."

This case may not strictly fall within the class of cases involving trustee relationships (i.e. as being an exception to indefeasibility), as this case where the registered proprietor is *not* in good faith, is covered by the Land Transfer Act itself dealing with fraud. However, it provides a clear example of the Court acting *in personam* on an equity-based claim even though the catalyst in the action would be the fraud by the company. The Company was required by the Court to register the land in Loke Yew's name as he was the sole beneficial owner.

42 (1892) 10 N.Z.L.R. 519.

43 [1913] A.C. 491.

This case was followed in New Zealand in *Dillicar* v. *West*.[44] The Court of Appeal adopted a dictum of Lord Moulton in *Loke Yew's* case:[45]

> "It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do:"

The Court of Appeal granted relief by ordering the appellant to do whatever was necessary to give effect to the rights of the respondents.

Since *Frazer* v. *Walker*,[46] it is clear that the Courts in granting a remedy to the plaintiff in appropriate circumstances must act *in personam* against the defendant. In the case of *Hara Hoani Karepa* v. *Saunders*[47] it appears that the Court did not follow this procedure. There the defendants had succeeded in procuring a title to a certain piece of land by relying on a particular interpretation of a transfer involved in the transaction. This interpretation had been supported by the District Land Registrar who issued a Certificate of Title to the defendant. It was held by the Court that on the correct interpretation of the transfer the defendant was not entitled to that particular piece of land. The Court went on to hold that although the transferees had got onto the register without fraud, he had not got an indefeasible title but was in the position of constructive trustee for the plaintiffs.

However, instead of giving an *in personam* remedy and ordering the trust to be fulfilled it appears that the Court was acting *in rem* in granting a declaration that the registration of the defendant Saunders as proprietor was without lawful authority and should be cancelled. It is submitted that in the light of *Frazer* v. *Walker* the correct course would have been to grant an *in personam* remedy, by ordering the retransfer of the piece of land affected by the error.

It is apposite at this stage to indicate that mere assertion of a right *in rem* that would have existed at common law will *not* provide the basis for constructive trusteeship. Clearly claims *in personam* are a qualification to the immediate indefeasibility principle, and if a constructive trusteeship could be based on the mere assertion of a right *in rem* the principle of indefeasibility would become eroded by the exceptions.

It is thus true to say that the indefeasibility principle cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been termed constructive or equitable notice. The obligations to be enforced must have been entered into by the registered proprietor.

[44] [1921] N.Z.L.R. 617

[45] [1913] A.C. 491, 505.

[46] *Supra.*

[47] [1930] N.Z.L.R. 242.

In *Assets Co.* case[48] their Lordships stated:

> "Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true: for although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the *cestui que trust* is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a *cestui que trust* is to destroy all the benefit of registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is in their Lordships' opinion, to do the very thing which registration is designed to prevent."

To take *Frazer* v. *Walker* as an example: there, the defrauded husband who at common law would have had a right *in rem* against both the mortgagee and the transferee under the exercise of power of sale, could not set up a constructive trust and recover his land. This principle was emphasised in the *Taitapu Gold Estates Ltd* case[49] where the Court said that the plaintiffs could "rely on something more than alleged ownership arising independently of the defendants. The plaintiffs rely on contracts to which the defendants were parties . . ." [50]

The principle that there must be no "fictional" trust would appear to be a basic limitation to this "branch" of the qualification. There must be either an express trust or an agreement or arrangement between the parties on which a constructive trust can be based or from which a fiduciary relationship can be inferred, before an *in personam* remedy will lie against the registered proprietor in this class of case.

C. *The Australian Cases*

It is stated by Kerr[51] that:

> "The provisions of the Torrens Statutes as to indefeasibility of title . . . do not refer to interests created by the registered proprietor himself, . . . The statutory protection has no reference to contracts entered into by the registered proprietor himself, nor to his relations with *cestuis que trustent* on whose behalf he became registered or on behalf of whom he has, since registration impressed the land with a trust."

Some of the Torrens Statutes actually contain an express enactment[52] to this effect but it is submitted by Kerr that the principle obtains in respect of all. The earliest case on the point was *Lange* v. *Ruwoldt*[53] where it was held that an agreement concerning land under the Real Property Act had no binding effect on the land and was only a personal

[48] [1905] A.C. 176, 205; N.Z.P.C.C. 275, 293.
[49] *Supra.*
[50] *ibid.*, 831.
[51] See *Principles of the Australian Land Titles (Torrens) System* (1927) p. 183.
[52] For example see s.71 of the South Australian Act which provides that the "indefeasibility provisions are not to affect:
iv. The rights of a person with whom the registered proprietor shall have made a contract for the sale of land or for any other dealing therewith
v. The rights of a cestui que trust where the registered proprietor is a trustee whether the trust shall be express, implied or constructive."
[53] (1872) 6 S.A.L.R. 75; 7 S.A.L.R. 1.

obligation, which could not be enforced as it was merely an amplification of the word "trust". Gwynne J., said at p. 79:

> "The leading principle of this new system is *registration of title* and the whole of its machinery is subservient to that end."

However, this case was overruled by *Cuthbertson* v. *Swan*[54] where it was held that trust interests were recognised throughout the Torrens Statutes, and that consequently an executory contract for the sale of land under the system could be ordered to be specifically performed by the registered proprietor. In following *Maddison* v. *McCarthy*[55] and *Robertson* v. *Keith*[56] the Court said that the Real Property Act did not protect registered proprietors from being compelled by Courts of Equity to fulfil their contracts and "that a certificate of title under the Act does not, as between the immediate parties to a contract, alter their rights and liabilities to each other and that a *cestui que trust* can in equity enforce his rights against his trustee notwithstanding he may have acquired a certificate of title."[57]

In a later case *Groongal Pastoral Co. Ltd* v. *Falkiner*[58] the High Court (Isaacs A.C.J., Gavan Duffy and Starke JJ.) pointed out that:

> "The Real Property Act 1900 is an Act the purpose of which is to simplify and facilitate dealings with land, including its mortgage to secure repayment of debts. But, except so far as may be inconsistent with its provisions, it does not interfere with the ordinary operation of contractual or other personal relations or the effect of instruments at law or equity."

In *Barry* v. *Heider*[59] Issacs J. indicated that although the Land Transfer acts aimed at giving greater certainty to the titles of registered proprietors, yet they did not in any way destroy the fundamental doctrines by which the Courts of Equity have enforced as against registered proprietors "conscientious obligations entered into by them". The learned judge added at p. 216 that:

> "The Land Transfer Act does not touch the form of contracts. A proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of law and equity, except as expressly or by necessary implication modified by the Act."

It would appear from the above cited dicta that the Australian Courts will recognise *in personam* remedies in both "classes" of the qualification to the indefeasibility principle—

(a) where there is a contract between the parties.

(b) where there is a trust or fiduciary relationship.

The fact that this inroad to the indefeasibility principle has in some States, such as South Australia, been reduced to a statutory rule indicates that it is clearly accepted that registered proprietors cannot

[54] (1876–7) 11 S.A.L.R. 102.
[55] (1865) 2 W.W. & A.B. Eq., 151 (V.R.).
[56] (1870) 1 V.R. 11.
[57] (1876–7) 11 S.A.L.R. 102, 109.
[58] (1924) 35 C.L.R. 157, 163.
[59] (1914) 19 C.L.R. 197, 213.

shelter behind the register, in circumstances in which it would be inequitable for them to do so. However, the statutory rule does not elucidate on the exact limits of these adverse claims *in personam*. This it is submitted, can only be done with reference to the decided case.

Conclusion

From the outline of the New Zealand and Australian cases given above, it is evident that the limits of the registered proprietor from adverse claims *in personam* have not been clearly defined. This may indicate that the full extent of the remedy has not yet been explored and that the judges have been anxious to infuse this area of the law with judicial flexibility. Certainly, basic elements must be present before the *in personam* remedy will lie, (e.g. privity of contract or a genuine trust relationship) but this is far from indicating the exact nature of these two qualifications to the indefeasibility principle.

This article has outlined most of the decided cases where an *in personam* remedy has been granted and the limits to the remedy contained therein. For categorisation purposes the cases were divided into the now familiar two classes. The difficulty is that throughout the whole area of this qualification to indefeasibility certain contractual notions appear to be interwoven, together with certain equitable notions. As pointed out earlier[60] in cases where an *in personam* remedy arises from a contract, the relationship of the parties can be expressed in equitable terms. Then again in *Shepheard* v. *Graham*[61] there is some doubt as to whether the relationship should be expressed in contractual or equitable terms.

A close examination of the dicta in these two cases leads the writer to the conclusion that there is perhaps a common equitable basis for both the "contract" and the "trust" type cases. In the contract cases the fiduciary relationship will arise as a result of the contract, while in the second type an actual contract and privity will not be a necessary element.

This conclusion necessitates an explanation of the dictum of Lord Wilberforce in *Frazer* v. *Walker*[62] where he outlines "the right of a plaintiff to bring against a registered proprietor a claim *in personam* founded in law or in equity, for such relief as a Court acting *in personam* may grant". What is the real meaning of "founded in law or in equity"? If these words merely mean "contract-based" and "equity-based", this article will have gone some distance in defining the scope of the dictum.

[60] See the dictum of Prendergast C. J., in *Paoro Torotoro* v. *Sutton* quoted above.

[61] [1947] N.Z.L.R. 654.

[62] [1967] 1 A.C. 569, 585; [1967] N.Z.L.R. 1069, 1078.

It is submitted that any other interpretation incorporating, say, a damages claim in negligence or some obscure legal *in personam* remedy, does not come easily from Lord Wilberforce's words.

It is clear however, that the scope of these remedies has not been fully explored. Now that the problems relating to indefeasibility have been resolved, more attention can be given to this area of the law. Certainly these *in personam* claims should not be allowed to become a major inroad to the indefeasibility principle. Yet on the other hand, their usefulness as a minor qualification to indefeasibility should not be overlooked. In short, judicial comment is eagerly awaited which will define fully the scope of, and the limitations to, adverse claims in relation to actions *in personam.*