

PROPERTY LAW & EQUITY REFORM COMMITTEE

REFORM OF THE LAND TRANSFER ACT 1952

WORKING PAPER NO. I

PART I : SUBJECT MATTER

The Committee has been directed by the Law Revision Commission to consider the implications of the advice of the Privy Council in Frazer v. Walker [1967] 1 A.C. 569; [1967] N.Z.L.R. 1069. This case again draws attention to three important questions in relation to the Land Transfer Act 1952 (which will be referred to in this working paper as "the Act");

- (1) Is the law in relation to the registration of forged and other void instruments satisfactory as it now stands?
- (2) Are the compensation provisions of the Act adequate?
- (3) Are the Registrar's powers of correction defined in the Act with sufficient clarity?

PART II : EXISTING LAW IN NEW ZEALAND

Until Frazer v. Walker there were two points of view as to the effect of registering a void instrument. The first was that, regardless of fraud on the part of other parties, a newly registered proprietor, if innocent of any fraud himself, did acquire an indefeasible title whether he dealt with the registered proprietor or only with someone posing as the registered proprietor, subject, however, to the Registrar's powers of correction (the "immediate indefeasibility" theory). The second was that a newly registered proprietor did not get an indefeasible title even if he was innocent of fraud if he acquired title under an instrument void at common law, though any bona fide purchaser for value from him would get a good title by virtue of s.183 of the Act (the "deferred indefeasibility" theory).

There was considerable difference of opinion as to the effect of registering a forged instrument.

The Privy Council has decided in favour of immediate indefeasibility. It is not necessary to restate the facts of Frazer v. Walker. It is sufficient to say that their Lordships held that Boyd v. Mayor of Wellington [1924] N.Z.L.R. 1174 was rightly decided by the majority of the Court of Appeal, and that they laid down the rule ([1967] 1 A.C. 569 at 584; [1967] N.Z.L.R. 1069 at 1078) that:

"... the ratio of the decision [in Boyd's case] applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims."

They distinguished Gibbs v. Messer [1891] A.C. 248 on the ground, (ibid.) that:

"The board 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."

As the law now stands, the registration of an instrument which is a forgery, or which is void for any other reason, vests and divests title and protects the newly registered proprietor against adverse claims (unless, of course, the newly registered proprietor has himself been guilty of fraud). This is subject:

- (1) To such powers of correction as the Registrar may have (there is room for doubt as to the scope of these powers); and -
- (2) To the right of any person to bring against a registered proprietor a claim in personam (there is some doubt as to the precise scope of the claim in personam, but it contemplates, for example, the right of a beneficiary to bring an action against a registered proprietor who has himself undertaken to hold the land upon trust for that beneficiary; or the right of a purchaser to bring an action for specific performance against a registered proprietor who has himself contracted to sell the land to that purchaser); and -
- (3) To the exception stated in Gibbs v. Messer.

PART III : LAW OF OTHER JURISDICTIONS

After the decision of the High Court of Australia in Clements v. Ellis [1934] 51 C.L.R. 217 in favour of deferred indefeasibility (the High Court was equally divided), the State of Victoria enacted legislation to provide that on rectification of the register to cancel the effect of a forged instrument the innocent purchaser who suffered loss should have a remedy against the assurance fund: Transfer of Land (Forgeries) Act 1939 (Vic.), now s.110 of the Transfer of Land Act 1958 (Vic.). It seems that there is no such claim under s. 126 of the Real Property Act 1900 (N.S.W.).

Frazer v. Walker has been followed four times in New South Wales: Mayer v. Coe (1968) 88 W.N. (Pt. 1) (N.S.W.) 549; [1968] 2 N.S.W.R. 747 (See Douglas Whalan, "Yet Another Torrens System Forgery" [1969] N.Z.L.J. 583); Ratcliffe v. Walters (1969) 89 W.N. (Pt. 1) (N.S.W.) 497; [1969] 2 N.S.W.R. 146; Jo ray (Sydney) Pty. Ltd. v. Partridge Bros. Pty. Ltd. (1969) 89 W.N. (Pt. 1) (N.S.W.) 568; [1969] 1 N.S.W.R. 621; Schultz v. Corwill Properties Pty. Ltd. (1969) 90 W.N. (Pt. 1) (N.S.W.) 529; [1969] 2 N.S.W.R. 576.

PART IV : IMMEDIATE OR DEFERRED  
INDEFEASIBILITY?

1. Immediate Indefeasibility

Immediate indefeasibility means that an innocent purchaser for value who, without fraud, gets himself registered as proprietor of an estate or interest immediately acquires an indefeasible title even if the instrument under which he became registered is void or voidable, regardless of whether he dealt with the registered proprietor or with a forged, but subject to the exception of the principle of Gibbs v. Messer referred to in paragraph 5 of Part IV of this working paper.

The principle of immediate indefeasibility was expressed by Edwards J., delivering the joint judgment of the majority of the Court of Appeal in Fels v. Knowles (1906) 26 N.Z.L.R. 604 at 620, in these words:

"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 .... 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 of principle was quoted with approval by the Privy Council in Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd. [1926] A.C. 101 at 106; (1925) N.Z.P.C.C. 267 at 272.

The meaning of the term "fraud" in the Act was settled by the Privy Council in Assets Co. Ltd. v. Mere Roihi [1905] A.C. 176 at 210; (1905) N.Z.P.C.C. 275 at 298, where Lord Lindley, delivering the advice of their Lordships, said:

"...[B]y fraud in these Acts [the Land Transfer Act 1870 and the Land Transfer Act 1885] is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value ... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

Immediate indefeasibility means that the quality known as indefeasibility attaches to a title immediately upon the entry in the register of the name of an innocent purchaser.

## 2. Deferred Indefeasibility

Deferred indefeasibility allows one of the main objects of the Land Transfer system to be attained without unduly interfering with the law relating to the validity of transactions inter partes.

In Gibbs v. Messer [1891] A.C. 248 Lord Watson, delivering the judgment of the Privy Council, said (at 254) that the main object of the Torrens system was to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. This was achieved, he said, by providing that every purchaser or mortgagee bona fide for valuable consideration who had registered his transfer or mortgage was protected against any action for damages or possession and against deprivation of his estate or interest on the ground of an infirmity in his vendor's or mortgagor's title (see s. 183 of the Act).

Under the doctrine of deferred indefeasibility, every person dealing with Land Transfer land would know that at the moment when he registered his own transfer or mortgage, his vendor's or mortgagor's title would become indefeasible, so that he would only have to satisfy himself as to the validity of his own dealing. His own registered title would remain open to attack until such time as he transferred it for value to another. Thus the general law relating to the validity of transfers and other transactions would remain largely unaffected.

### 3. An Objection to Each Form of Indefeasibility

As regards immediate indefeasibility, it has been said that, "It is well, however, to shed a tear for the dispossessed registered proprietor and to remember that the indefeasibility of the title thus given ... [is] only achieved at the cost of the 'defeasibility' of the title of the previously registered proprietor": The Conveyancer, "Torrens System - Indefeasibility - Whether 'Immediate' or 'Deferred'" (1969) 43 A.L.J. 159.

John Baalman has remarked that one result of the theory of deferred indefeasibility "would be that no proprietor could ever make the unqualified statement, 'My title is indefeasible'. The best he could say would be, 'My title will have become indefeasible at the instant of time when a transfer to a purchaser is registered'" (The Torrens System in New South Wales (1951), 134). Deferred indefeasibility confers no protection on a proprietor until the moment at which he no longer requires that protection.

The most recent discussions of the two doctrines are: Warrington Taylor, "Scotching Frazer v. Walker" (1970) 44 A.L.J. 248-260, and G.W. Hinde, "Indefeasibility of Title since Frazer v. Walker", The New Zealand Torrens System Centennial Essays (Butterworths, 1971), 33-78.

#### 4. The Problem

It is recognised that the principle of immediate indefeasibility could, in certain circumstances, produce undesirable results.

Two examples of forgery may help to illustrate the difficulties:

(a) Imagine that a man goes for a short trip overseas leaving the certificate of title to his house in apparently safe custody. The title falls into the hands of a fraudulent person who fraudulently arranges a sale of the house to an innocent third party. The fraudulent person forges the transfer to the third party who, acting in good faith throughout, pays his purchase money and registers the forged transfer. As the law now stands the former registered proprietor cannot, by bringing an action against the innocent purchaser, recover possession of the house and have the title corrected. The former registered proprietor's only possible hope of getting his house back is to try to persuade the District Land Registrar to exercise his powers of correction under s. 81 of the Act; and there is very considerable doubt as to whether those powers could be exercised in such circumstances. Apart from that, the former registered proprietor's only remedies are:

- (i) A claim against the fraudulent person (who, in the nature of things, would probably turn out to be a man of straw), or -
- (ii) An action against the Crown under Part XI of the Act.

This result may well be considered unsatisfactory.

(b) Imagine that a man goes to live overseas for a period of years leaving the certificate of title to a building section in apparently safe custody. Once more the title falls into the hands of a fraudulent person who fraudulently arranges a sale of the section to an innocent third party. Again the fraudulent person forges the transfer to the third

party who, acting in good faith throughout, pays his purchase money and registers the forged transfer. The innocent purchaser builds a house on the section and establishes his home there. Many years later the former registered proprietor returns and discovers the fraud. In this situation it may not be considered unjust that the innocent purchaser's title should be indefeasible and that the former registered proprietor should be left to his remedy against the fraudulent person or to his action against the Crown (provided that the compensation paid under Part XI of the Act is adequate).

So, in the case of forged instruments, there may be some cases in which the rule of immediate indefeasibility yields a harsh result, and some cases in which it produces a satisfactory result (or, more accurately, would produce a satisfactory result if the compensation provisions were satisfactory).

Similarly, in the case of instruments which are void for some reason other than forgery, there could be some cases in which the rule of immediate indefeasibility would be satisfactory (e.g. (i) Mardon v. Holloway [1967] N.Z.L.R. 372, and (ii) a transfer by an infant, who falsely represented himself to be of full age, to a bona fide purchaser for value), and other cases in which it would be unsatisfactory (e.g. Boyd v. Mayor of Wellington [1924] N.Z.L.R. 1174).

##### 5. A Possible Solution

The examples given above suggest that it would be difficult, and perhaps impossible, to frame legislation which would produce an acceptable result in every conceivable set of circumstances. Subject to appropriate changes being made in the compensation provisions of the Act, a solution might be to give the Supreme Court a discretion, in cases where any void instrument has been registered, either to order that the former registered proprietor's name should be restored to the register, or to declare that the title of the person who registered the void instrument is indefeasible. At first sight, the idea of giving the Court such a discretion in a matter of title may seem an unacceptable solution. But this has already been done in s. 129A of the Property Law Act 1952, inserted by s. 3 of the Property Law Amendment Act 1963 (relief in cases of mistake as to boundaries or identity of land). Detailed guidelines could be contained in any amending legislation setting out the matters which should be taken into account:

e.g., whether either of the parties has been negligent; whether the land was vacant, or had a house on it; the length of time that the party who registered the void instrument had been in possession; relative hardship; and so on, but without restricting the matters which the court may take into account.

Care would need to be taken to ensure that the anomaly which exists because of the decision in Gibbs v. Messer was removed. In the light of the comments made about that case by the Privy Council in Frazer v. Walker, the position now appears to be that if a forger causes a fictitious name to be put on the register, and then forges a transfer from that fictitious person to a bona fide transferee for value, the instrument does not operate to vest and divest title, with the result that the name of the bona fide transferee can be removed from the register, and that (under the existing provisions) he can apparently get no compensation under the provisions of Part XI of the Act.

#### PART V : THE COMPENSATION PROVISIONS OF THE ACT

It is the intention of the Committee to give detailed consideration to the compensation provisions of the Act when a decision has been made on the question whether the existing principle of immediate indefeasibility is to be confirmed, or rejected in favour of deferred indefeasibility. Whatever decision may be reached on this question, the Committee is unanimously of the opinion that the Act should be amended to enable any innocent purchaser for value who is deprived of any land, or of any estate or interest in land, through the operation of the Act, or whose name is expunged from the register pursuant to any power of correction given to the court or to the Registrar, to recover compensation from the Crown.

#### PART VI : POWERS OF CORRECTION

##### 1. The Existing Powers

Powers of correction are contained in sections 80-85 of the Act. These sections read as follows:

"80. ERRORS IN REGISTER MAY BE CORRECTED - The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.



"81. SURRENDER OF INSTRUMENT OBTAINED THROUGH FRAUD, ETC. - Where it appears to the satisfaction of the Registrar that any certificate of title or other 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, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

"82. PERSON FAILING TO SURRENDER INSTRUMENT MAY BE SUMMONED TO COURT - (1) In case any such person refuses or neglects to comply with that request, or cannot be found, the Registrar may apply to the Supreme Court for an order that the grant, certificate or other instrument be delivered up as aforesaid.

(2) If that person when served with notice of the application neglects or refuses to attend before the Court at the time therein appointed, the Court may issue a warrant authorising and directing the person so notified to be apprehended and brought before the Court for examination.

"83. PERSON REFUSING TO SURRENDER INSTRUMENT MAY BE COMMITTED TO PRISON - Upon the appearance before the Court of any person notified or brought up by virtue of a warrant as aforesaid, the Court may examine that person upon oath; and may order him to deliver up the grant, certificate of title, or other instrument as aforesaid; and upon his refusal or neglect to comply with the order, may commit him to any convenient prison.

"84. ISSUE OF NEW CERTIFICATE OF TITLE, ETC. - In any such case or in case the said person has absconded so that notice of the application cannot be served upon him, the Registrar shall, if the circumstances of the case require it, issue to the proprietor of the land such certificate of title or other instrument as is herein provided to be issued in the case of any grant or certificate of title being lost, mislaid, or destroyed, and shall enter in the register notice of the issuing of that certificate of title or other instrument, and the circumstances under which it was issued, and such other particulars as he deems necessary.

"85. COURT MAY ORDER FORMER CERTIFICATE OF TITLE TO BE CANCELLED - Upon the recovery of any land, estate, or interest by any proceeding in any Court from the person registered as proprietor thereof, the Court may, in any case in which such a proceeding is not expressly barred, direct the Registrar to cancel any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute such certificate of title or entry as the circumstances of the case require, and the Registrar shall give effect to the order accordingly."

Section 80 was described by the Privy Council in Frazer v. Walker as "little more than a 'slip' section and not of substantive importance" ([1967] 1 A.C. 569 at 581; [1967] N.Z.L.R. 1069 at 1076) and accordingly should remain.

Sections 82. 83 and 84 are of a procedural nature.

Section 85 gives the Court power to direct the Registrar to cancel or correct certificates of title or entries on the register. But the power of the Court does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act: Frazer v. Walker [1967] 1 A.C. 569 at 581; [1967] N.Z.L.R. 1069 at 1076.

Section 81 is in a different field, and it is here that the difficulty arises. In Frazer v. Walker [1967] 1 A.C. 569 at 585-586; [1967] N.Z.L.R. 1069 at 1079, the Privy Council had this to say:

"The powers of the registrar under section 81 are significant and extensive: Assets Co. case [[1905] A.C. 176 at 194-195]. They are not coincident with the cases excepted in sections 62 and 63. As well as the case of fraud, where any grant, certificate, instrument, entry of indorsement has been wrongfully obtained or is wrongfully retained, the registrar has power of cancellation and correction. From the argument before their Lordships it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word 'wrongfully'. It is clear, in any event, that section 81 must be read with and subject to section 183 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."

Section 81 was not in issue in Frazer v. Walker, and their Lordships expressly left open the interpretation of the word "wrongfully".

## 2. The Difficulty

The Registrar's powers under s. 81 may be exercised (inter alia) where "any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained." The meaning of "fraudulently" presents comparatively little difficulty. It is well settled that "fraud" in the Act means actual dishonesty of some sort, and that it must be brought home to the person whose registered title is impeached. But the meaning of the word "wrongfully" remains in doubt. John Baalman has said (The Torrens System in New South Wales (1951), 420), referring to a provision in s. 136 of the New South Wales Torrens statute analogous to our s. 81, that -

"... there may be forms of wrongfulness which are not fraudulent, and it is probable that in this context 'wrongfully' is not merely synonymous with 'fraudulently', but that it describes that which is not rightful. It cannot be right for a person to seek registration based on a bad title, even though he honestly believes it to be a good one."

There is some authority for saying that any registration would be wrongfully obtained if it were based on an instrument certified to be "correct for the purposes of the Land Transfer Act" when that instrument was not in fact correct: see District Land Registrar v. Thompson [1922] N.Z.L.R. 627. It is arguable that no void instrument can in fact be correct for the purposes of the Act and that therefore a title obtained by the registration of a void instrument was wrongfully obtained (even if the person who registered it acted in all good faith and innocence), and can therefore be corrected by the Registrar acting under s. 81. See also the arguments put forward by D.W. McMorland, "Registrar's Powers of Correction" [1968] N.Z.L.J. 138. If these arguments are correct (which is doubtful) a strange result follows. A former registered proprietor who has been deprived of his land by the registration of a forged transfer to a bona fide purchaser for value cannot recover the land by bringing an action against the bona fide purchaser for value. But if the former registered proprietor can persuade the Registrar to exercise his powers under s. 81 of the Act, he may be able to have the register corrected in his favour. What he cannot do by action in the Supreme Court he may be able to do by getting the Registrar to exercise a power of correction.

### 3. Existing Doubts Should be Removed

It is submitted that there is sufficient doubt about the scope of the Registrar's powers of correction to warrant the amendment of the Act. These powers should be defined clearly and in detail.

### 4. Some Suggested Principles

It is suggested that the Registrar's power to correct the register should be re-defined to conform to the following principles:

- (a) The Registrar should never be placed in the position of having, in effect, to try a question of title;
- (b) The Registrar should not be put in a position in which he may become involved in disputes between a registered proprietor and an adverse claimant;

(c) The powers should be made completely consistent with the Act's scheme of indefeasibility, so that no person can obtain via the power of correction a remedy which he could not obtain from the Court. This principle could, perhaps, be relaxed to the extent of giving a power of correction where there has been a wrongful act in the process of registration (e.g. where a transferee puts a covenant in a memorandum of transfer without the transferor's consent: De Chateau v. Child [1928] N.Z.L.R. 63), although there are difficulties which would need to be examined.

5. Restrictions on the Power of Correction

It should, it is submitted, be made clear whether s. 183 of the Act is the only restriction on the Registrar's powers of correction (see Frazer v. Walker [1967] 1 A.C. 569 at 585-586; [1967] N.Z.L.R. 1069 at 1079) or whether any "fresh registered interest" (e.g. a voluntary transfer) which has arisen in reliance on the register precludes the exercise of the power of correction (see Mangatainoka 1 BC No. 2 (1913) 33 N.Z.L.R. 23 at 61-62 per Edwards J.). The former alternative accords more closely with the scheme of the Act which, broadly speaking, appears to be to keep a voluntary transferee in the same position qua indefeasibility as his vendor.

6. Clarification of the Court's Power to Order Correction

The Court should, perhaps, be given a wider power to order the correction of the register than that contained in s. 85 of the Act. (Compare Murtagh v. Murtagh [1960] N.Z.L.R. 890 at 899-901 per Macarthur J., with Frazer v. Walker [1967] 1 A.C. 569 at 585-586; [1967] N.Z.L.R. 1069 at 1076.)

PART VII : CONCLUSION

On the question whether indefeasibility should be immediate or deferred the Committee has considered many factors including (1) the desirability of certainty in the law, (2) the need to protect established titles, (3) the need to promote care on the part of the parties to conveyancing transactions, and (4) the social implications of each view. The Committee is divided on the intrinsic merit of the two theories of indefeasibility. But in accordance with the principle of law reform that there must be a compelling reason for changing an established principle, it has reached the tentative

conclusion that the present law in favour of immediate indefeasibility does not call for any alteration, except in regard to the compensation provisions of the Act. There do not seem to be any compelling factors warranting a change which cannot be met by a liberalisation of those provisions.

Submissions:

The suggestions put forward in the present working paper are tentative only. The Committee would be grateful for any suggestions or constructive criticisms. It requests that submissions be sent to -

The Secretary,  
Property Law & Equity Reform Committee,  
Private Bag 1,  
Government Buildings,  
Wellington,

on or before 31 May 1971.