

R E P O R T

OF THE

PROPERTY LAW AND EQUITY REFORM COMMITTEE

ON

THE DECISION IN FRAZER v. WALKER

WELLINGTON, NEW ZEALAND
JUNE 1977

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TO: The Minister of Justice

INTRODUCTION

TERMS OF REFERENCE

1. The Committee has been asked to consider the implications of the advice of the Privy Council in Frazer v. Walker [1967] 1 AC 569; [1967] NZLR 1069. In the Committee's view, this case again draws attention to three important questions in relation to the Land Transfer Act 1952 (which will be referred to throughout this report as "the Act"):

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

2. Before stating its opinions on these issues, however, the Committee wishes to take this opportunity of recording

its view that the time has come to carry out a complete revision of the Act. It is now over 100 years since the Torrens system of registration of title to land was introduced into New Zealand by the Land Transfer Act 1870. (The Land Registry Act 1860 was not a Torrens statute properly so called.) After a century of experience with the Torrens system it ought to be within the bounds of possibility to devise a system which more nearly approaches perfection. Unfortunately, this has not been achieved. Running repairs have been made to the Land Transfer legislation over the past years, and many worthwhile modifications have been made to help to bring the Act into line with twentieth century requirements. None the less, the Act remains long and complex, much that is in it is essentially of an administrative nature that could be consigned to regulations or merely dealt with by administrative direction, much of its language is archaic, and its relationship with the Property Law Act 1952 is not always harmonious.

3. This being the Committee's view it noted with particular interest the following passage in a submission presented by the Secretary for Justice:

"The department notes that in the preface to the second edition of his book "Land Transfer Act", E.C. Adams observes:

'The desideratum for the future is an early consolidation of the existing statutory law as to registration of title as contained in the Land Transfer Act 1952 and its numerous amendments, together with consolidation of the Property Law Act 1952 and its amendments.'

The department is aware of this need and hopes it can be met in the not too distant future."

As the department is conscious of the need for an early review of the Act, it is not intended here to press the point further. However, lest misunderstanding arise, the Committee wishes to make it clear that it does not consider that it has either the time or the resources to undertake this task itself.

I. EXISTING LAW IN NEW ZEALAND
INDEFEASIBILITY

4. 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 also considerable difference of opinion as to the effect of registering a forged instrument.

5. 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] NZLR 1174 was rightly decided by the majority of the Court of Appeal, and that they laid down the rule ([1967] 1 AC 569 at 584; [1967] NZLR 1069 at 1078) that:

"... the ratio of the decision [in Boyd's case] applies as regards titles derived from registration of void instruments generally. In respect of 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] AC 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."

6. As the law stands now, 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:

- (a) To such powers of correction as the Registrar may have (there is room for doubt as to the scope of these powers);
- (b) 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 this claim, 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 -
- (c) To the exception stated in Gibbs v. Messer.

THE LAW IN SOME AUSTRALIAN JURISDICTIONS

7. After the somewhat unsatisfactory decision of the High Court in Clements v. Ellis (1934) 51 CLR 217 (the High Court was equally divided) in favour of deferred indefeasibility, the State of Victoria enacted legislation to provide that on rectification of the register to cancel the effect of a forged instrument the person 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.).

8. Frazer v. Walker has been followed four times in New South Wales: Mayer v. Coe (1968) 88 WN (Pt. 1) (N.S.W.) 549; [1968] 2 NSW R 747 (See Douglas Whalan, "Yet Another Torrens System Forgery" [1969] NZLJ 583); Ratcliffe v. Waters (1969) 89 WN (Pt. 1) (N.S.W.) 497; [1969] 2 NSW 146; Jonray (Sydney) Pty Ltd v. Partridge Bros. Pty Ltd (1969) 89 WN (Pt. 1) (N.S.W.) 568; [1969] 1 NSW 621; Schultz v. Corwill Properties Pty Ltd (1969) 90 WN (Pt. 1) (N.S.W.) 529; [1969] 2 NSW 576. It has also been followed by a Full Court (of 7 Judges) of the High Court in Breskvar v. Wall (1971) 126 CLR 376.

IMMEDIATE OR DEFERRED INDEFEASIBILITY

9. 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 forger, but subject to the exception of the principle in Gibbs v. Messer referred to in paragraph 6 above. 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 NZLR 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 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] AC 101 at 106; (1925) NZPCC 267 at 272.

10. The meaning of the term "fraud" was settled by the Privy Council in Assets Co. Ltd v. Mere Roihi [1905] AC 176 at 210; (1905) NZPCC 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 fraud 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 shown 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 properly be acted upon."

11. 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.

12. 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] AC 248 Lord Watson, delivering the advice 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 vendor'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).

13. 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.

14. 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 ALJ 159.

15. 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.

16. The most recent discussions of the two doctrines are: Warrington Taylor, "Scotching Frazer v. Walker" (1970) 44 ALJ 248-260, and G.W. Hinde, "Indefeasibility of Title since Frazer v. Walker", The New Zealand Torrens System Centennial Essays (1971) pp. 33-78. (References to the periodical literature are collected in footnote 89 on p.70.)

17. 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 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 stands now 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 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 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).

18. Thus, 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 adequate). 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] NZLR 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] NZLR 1174).

19. The Proposed 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 (relief in cases of mistake as to boundaries or identity of land). Detailed guidelines could be set out in any amending legislation containing 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.

20. It would be essential 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 purchaser 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.

THE COMMITTEE'S CONCLUSION

21. On 1 March 1971 the Committee issued a working paper in which it was primarily concerned to set out and examine critically the competing principles of immediate indefeasibility and deferred indefeasibility with a view to recommending either the retention of the former or the adoption of the latter. The Committee stated that it was divided on the intrinsic merit of the two alternatives, but that, in accordance with the principle of law reform that there must be a compelling reason for changing an established rule of law, it had reached the tentative conclusion that the present law as expounded in Frazer v. Walker did not call for any alteration. Comments and suggestions were invited on this basis.

22. In the event, the Committee received 13 submissions on this working paper. Most favoured the retention of the principle of immediate indefeasibility, and those who prefer the principle of deferred indefeasibility recognise that no great hardship would arise from the retention of immediate indefeasibility, provided adequate provision is made for proper compensation of dispossessed owners.

23. After a careful consideration of all the comments sent to it, the Committee found itself of the opinion that no compelling case had been established for changing the law relating to indefeasibility of title as stated in Frazer v. Walker. This should remain, subject to the abrogation of the decision in Gibbs v. Messer, and subject to introducing legislation to give effect to the solution set forth in paragraph 19. The Committee recommends accordingly.

II. COMPENSATION

24. In a later working paper the Committee set out as its basic premise the view that the present provisions relating to compensation are in need of reconsideration, and suggested that in deciding what amendments are desirable the following matters should be studied:

- (a) the date at which the property should be valued;
- (b) the quantum of compensation to be awarded;
- (c) whether interest on that amount should be payable;
- (d) whether compensation should be reduced where contributory negligence is established;
- (e) whether the Crown should have a right of recoupment against the person causing the loss.

Comments were invited and following their consideration the Committee came to the following conclusions which were set out in a further working paper which drew one comment only from a practitioner who felt that the rate of interest allowed was inadequate.

PAYMENT OF COMPENSATION

25. Before going into detail the Committee records its view that it is generally undesirable for the assessment of compensation to be determined by the Court in every case. In its view it would be preferable wherever possible to provide for payment of compensation to be made by the Registrar-General of Land without recourse to the Court. However, unless the Registrar-General is to forsake his administrative role for a judicial one, which we do not recommend, such an approach would require a clear and simple method of calculating the amount of compensation to be paid

in any particular case. There must, in short, be no room for argument.

It is the opinion of the Committee that such a scheme is feasible and a summary of what it has in mind is set out in proposals later in this report.

AN ALTERNATIVE APPROACH

26. An alternative approach was advocated in a number of submissions. It was suggested that instead of laying down a specific formula in the Act, the Court should be given a general discretion to award such compensation as it sees fit in any particular case.

27. The Public Trustee, who supported this approach, suggested that in determining what compensation should be paid, the Court should be required to have regard to the following matters:

- (a) The date on which deprivation occurred;
- (b) The circumstances in which deprivation occurred;
- (c) The date on which the dispossessed owner became, or ought reasonably to have become, aware of the deprivation;
- (d) The value, at each of the dates in (a) and (c) of the land, and of all buildings and other improvements effected thereon by the dispossessed owner, his predecessors in title, and their respective servants, agents, lessees and licensees;
- (e) The conduct of the dispossessed owner and in particular any delay, failure, neglect or omission on his part in the exercise of his rights or remedies after the date of deprivation;

- (f) Such other facts or circumstances as may appear to the Court to be relevant.

28. The Committee considers this approach has much to recommend it if all questions of compensation are to be determined by the Court. It would, however, be undesirable if awards of compensation are to be assessed, at least in the first instance, by the Registrar-General of Land.

DATE AT WHICH PROPERTY SHOULD BE VALUED

29. In the first working paper dealing with this subject the Committee set out three possibilities:

- (a) The date at which the deprivation occurred, i.e. the date on which the instrument which deprived the dispossessed owner of his estate or interest was registered.
- (b) The date on which the dispossessed owner became aware of the deprivation; or
- (c) The date on which the dispossessed owner ought reasonably to have become aware of the deprivation.

30. It rejected the second possibility because it does not provide for the case where the dispossessed owner ought reasonably to have become aware of the deprivation at an earlier date. It expressed the view that it would be contrary to the principles of equity to allow an owner to gain some advantage merely by biding his time. It was recognised that this objection would be met by the third possibility, but this approach was finally rejected because of the difficult questions of fact inherent in it.

31. In some of the submissions to us the point was made - and its validity is conceded - that "difficult questions of fact" should not prevent justice being done, and that the Courts are daily concerned with the solution of such

questions with the end of achieving justice in view. It was agreed that if the quantum of compensation is to be determined by the Court the objection to the third possibility falls to the ground, but as we have already stated we do not consider that an application to the Court is generally desirable.

The Committee, therefore, re-affirms its original view that the relevant date should be the date of deprivation.

INTEREST ON COMPENSATION

32. Those who wrote to the Committee were in general agreement that the dispossessed owner should be entitled to a reasonable rate of interest down to the date of actual payment.

33. The Committee sees this interest as compensation for loss of enjoyment of the property, and it should therefore be payable from the date of deprivation. Looked at in this light it is axiomatic that moneys actually received in respect of the property after the date of the deprivation should be brought into account and set against the amount of interest to be paid.

THE EFFECT OF NEGLIGENCE

34. The Committee's original view was that the principle of contributory negligence should be retained and this found support in the submissions which were received. However, since the Torrens system has operated in New Zealand there have been only ten cases reported in the law reports in New Zealand under the compensation provisions of the various Land Transfer Acts. The Registrar-General of Land informed the Committee that of these cases only one occurred in the last 55 years, that being Frazer v. Walker. Accordingly, any provision for contributory negligence would unnecessarily complicate the proposals for compensation.

35. It was, therefore, concluded that contributory negligence should not operate to reduce a claim for compensation.

RIGHT OF RECOUPMENT BY THE CROWN

36. The Committee affirmed its tentative view that the Crown should have the right to recoup the whole or part of the compensation actually paid, from a person who was wholly or partially responsible for the fraud.

THE COMMITTEE'S PROPOSAL

37. As stated above, the Committee considers that as a general rule compensation should be payable by the Crown without recourse to the Courts. Nevertheless, it is recognised that a fixed formula for calculating compensation could cause injustice in a particular case.

38. The Committee, therefore, proposes a two-tiered approach:

- (a) In any case where the Registrar-General of Land is satisfied that a deprivation within the scope of the Act has occurred, he should be required to offer compensation as follows:
 - (i) a sum equal to the value of the property at the time of the deprivation; and
 - (ii) interest at the rate currently prescribed by or under s.87 of the Judicature Act 1908 on that sum from the date of deprivation to the date of actual payment, less any sums received by the dispossessed owner in respect of the property after the date of deprivation.

This will mean that the only question to be determined by the Registrar-General of Land would

be whether a deprivation had occurred. He would not be concerned with considerations of fault, or other matters. The compensation payable would be determined in accordance with (i) and (ii) and would not be negotiable.

- (b) In any case where the dispossessed owner considers that compensation in accordance with (a) above would be inadequate to compensate him fully for the loss he has suffered by reason of some special circumstances, he should have the right to apply to the Court for a greater award. But where such a claim is made the Crown should have the right to appear and be heard.

In the cases before the Court it would seem to be desirable to give the Court a wide discretion, but the guidelines set out in paragraph 27 supra, would be helpful. To discourage "gold-digging" applications to the Court the Court should be expressly empowered to award less than the applicant would have received had he accepted the Registrar-General of Land's offer.

It seems to the Committee that this dual approach would provide for certainty, cheapness, and administrative simplicity in the majority of cases, while at the same time providing for the genuine hard case.

III. THE REGISTRAR'S POWERS OF CORRECTION

39. The relevant sections of the Land Transfer Act 1952 dealing with the Registrar's powers of correction are ss. 80, 81 and 85. Section 80 provides 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."

40. The Privy Council stated in Frazer v. Walker [1967] 1 AC 569 at 581; [1967] NZLR 1069 at 1076, "Section 80 is little more than a 'slip' section and not of substantive importance..." Its effect appears to be merely to enable the Registrar to correct clerical errors and the like occurring in the Registry Office. It does not appear to give rise to any difficulty and no change in this section is recommended.

41. Section 85 provides as follows:

"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 of 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."

This section enables the Court, on the determination of proceedings affecting an estate or interest in land, to give the Registrar appropriate directions to amend the register and directs the Registrar to make the amendments accordingly. The Privy Council pointed out in Frazer v. Walker (ibid) that

"the power of the Court is circumscribed in such a way that the effect of the section is that the power of the Court to cancel or correct does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act." That is, the power arises when the Court makes a finding in favour of a party against the registered proprietor in one or other of the cases in which exceptions to indefeasibility are admitted. This section does not, in the Committee's view, create any particular difficulty or uncertainty and no change in its terms is recommended.

42. Section 81 provides as follows:

"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."

On the face of it this section gives what the Privy Council described as "significant and extensive" powers to the Registrar, these powers not being limited to exceptions to indefeasibility provided for in ss. 62 and 63 of the Act. This has made it possible for a commentator to suggest that the powers of the Registrar appear to be more extensive than those of the Court (see McMorland [1968] NZLJ 140) though it seems very unlikely that this was the intention of the Act. The section, moreover, appears to give the Registrar the power to determine not merely cases of misdescription of land or boundaries or errors in entries in the register, but also cases involving fraud. The Registrar, however, is not equipped to determine alleged or disputed cases of fraud and in practice would not undertake to make determinations of fact or law in such cases.

43. On the basis that questions involving fraud or other exceptions to indefeasibility would, and should, be dealt with by the Court, the apparent vesting in the Registrar by s.81 of power to correct on the basis of fraud should, in the Committee's view be removed. The two main reasons are that

- (1) the Registrar is not equipped to determine issues involving fraud or wrongdoing, and
- (2) in practice no Registrar would attempt to act in such a situation without the facts having been determined by the Court.

Such determination by the Court would be within its powers as expressed in s.85. Under that section, as has been pointed out above, the Court may give the Registrar appropriate directions as to correcting the register and the only additional power which appears to be necessary to give effect to an order of the Court is the power for the Registrar to call in certificates of title or other documents to enable them to be amended. It may well be, indeed, that the original intention of s.81 was no more than to give the Registrar appropriate powers to carry an order of the Court into effect. Whether or not that was the original intention, the Committee considers that s.81 should be amended to make it clear that this is its sole effect. This could be done by amending the section as follows:

"81. Surrender of instrument obtained through fraud, etc. - The Registrar may require any person to whom any grant, certificates, or other instrument has been issued, or by whom it has been retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require, in any case where -

- (a) It appears to his satisfaction that the grant, certificate of title, or instrument has been issued in error, or contains any misdescription of land or boundaries, or that any entry or endorsement or material omission thereon has been made in error provided the parties concerned consent thereto; or,

- (b) The Court has determined that the grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained."

The effect of such a change would be:

- (1) that the Registrar would have the power to correct clerical errors under s.80, and,
- (2) there would be appropriate machinery to give effect to any judgment of the Court involving a modification of the register or entries in it.

The proposed amendment would, in the Committee's view, clarify the present doubts concerning the Registrar's powers while at the same time endorsing what is the present practice of Registrars throughout New Zealand in refusing to exercise the apparently wide powers under s.81 in any doubtful case.

For the Committee

Charles Hutchinson
Chairman, June 1977

MEMBERS:

Mr C.P. Hutchinson, M.B.E., Q.C. (Chairman)
Dr G.P. Barton
Mr R.G.F. Barker
Mr G. Cain
Mr J.G. Hamilton
Professor G.W. Hinde
Mr L.H. McClelland
Mr K.U. McKay
Professor P.B.A. Sim
Mr W.M. Taylor
Mr N.N. Nawalowalo (Secretary)