LXJO JOHNSON, W.M. Frazer v. Walker revisited — Green & McCahill Contractors Ltd. v. Minister of Works.

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FRAZER v WALKER REVISITED - GREEN & McCAHILL CONTRACTORS LIMITED v MINISTER OF WORKS.

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INTRODUCTION

In a paper presented to the 1963 Triennial Conference of the New Zealand Law Society E.P. Wills[1] discussed the then long standing controversy on indefeasibility of title. Did the registration of a void instrument confer the benefit of immediate indefeasibility upon the person in whose favour, without fraud on his part, the instrument was registered? Or was indefeasibility deferred until registration in favour of a bona fide purchaser from him? Wills accepted the majority view in Boyd v Mayor of Wellington[2] as stating the law but noted the trend after a relaxation of this "strict" view.[3]

F.M. Brookfield[4] in a paper presented to the 1975 conference remarks, with reference to the Wills paper, that the long controversy has been ended by the decision of the Privy Council in Frazer v Walker[5] in favour of immediate indefeasibility. Hence the commentator on the Torrens system need no longer consider that controversy in detail.

The conclusion following from Frazer v Walker was that registration validated a void instrument whether it was void for forgery or for any other reason.[6] Thus the spectre of controversy was thought finally to have been laid to rest. However in 1973 came the judgement of Wilson J. in Green and Mc Cahill Contractors Ltd. v Minister of Works[7] upheld in the Court of Appeal[8] in 1974.

1. THE FACTS OF THE CASE

a) By a proclamation made on the 31st of August, 1960 pursuant to the Public Works Act 1928; 74 acres of land in the borough of Mount Wellington, Auckland, owned by Green and Mc Cahill Contractors Ltd. were taken for better utilisation in the borough with effect from 12th September, 1960. The claimant company was subsequently awarded and paid $141,000 compensation.

b) At the time the land was taken it was subject to a building line restriction and a right of way over part. By mistake these encumbrances were not referred to in the proclamation taking the land, with the result that they were discharged upon registration of the proclamation under the Land Transfer Act 1952.

c) To restore the encumbrances a second proclamation made pursuant to section 27 of the Public Works Act was issued on 9th March 1970 purporting to revalue the earlier proclamation and retaking the land subject to encumbrances, the power to take and the power to revoke being conferred by two separate sections in the Act.

d) This second proclamation constituted a fresh taking of the land. The land was notionally revested between the revocation of the earlier proclamation and the retaking of the land. Thus the claimant argued for a fresh award of compensation according to the value of the land at the effective date mentioned in the second proclamation.

e) Wilson J., in the Supreme Court having regard to section 27 (1) of the Public Works Act concluded that the proclamation of March 9th was invalid. The power of revocation conferred by the subsection was expressly limited, as to the time when it might be exercised to the period after the initial proclamation had been made and before the payment or award of any compensation.

f) If the proclamation purporting to revoke the earlier proclamation did not fulfil the conditions of section 27 (1) then on the wording of the section, subsection (3) has no application. The result is that the earlier proclamation remained in full force and effect. Upon reaching this conclusion Wilson J. turned to consider the claimant's argument that registration had validated the second proclamation thereby, at least notionally, revesting the land in its original owner.

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2. INDEFEASIBILITY OF TITLE; WILSON J.

Green and Mc Cahill Contractors v Minister of Works turned on the proposition that registration had validated the second proclamation of March 9th, 1970, thus revesting the land at least notionally in the claimant so that the proclamation constituted a "retaking" for the purposes of compensation.

Council for the claimant relied upon three cases to establish this proposition; Public Trustee v Registrar General of Land;[9] Boyd's case and Frazer v Walker. Per Wilson J.[10]

"What these cases decided was that section 62 means what it purports to mean, namely, that, subject to the exceptions mentioned in the section itself the register is conclusive as to the legal title to the estates and interests shown thereon, to the intent that people may deal with them on that footing with complete confidence and not withstanding any defect in the right of the registered proprietor to be so registered, so long as the defect does not come within the exceptions referred to in the section. But registration goes no further than that. It confers no right other than what is usually referred to as indefeasibility of title."

A. Rights In Personam

Wilson J. maintained that registration did not give rights, apart from those pertaining to a registered proprietor as such, under the void proclamation.[11] In doing so His Honour alluded to the proposition that a registered proprietor may be subject to rights in personam which deprive him of any real beneficial enjoyment.[12] It thus followed that;

"...the mere fact that the claimant may (for a fraction of time) have been re-registered as proprietor of the fee simple to the land did not require the court to close its eyes to the fact that the proclamation was void."[13]

Seemingly Wilson J. raised an implied trust with the claimant as trustee, for the notional period that the land was revested.

"Within its terms registration gives a good legal title to the interest in the land. Such a title may be a mere shell as in the case of a bare trustee, or the proprietor may be subject to rights in personam which deprive him of any real beneficial enjoyment."[14]

He then referred to the Privy Council's statement in Frazer v Walker to the effect that;[15]

"First in following and approving in this respect the two decisions in Assets Co. Ltd. v Mere Roihi, and Boyd v Mayor, etc., of Wellington, their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952 confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under ss. 62 and 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 recognised in the Courts of New Zealand and of Australia."

B. Critisism

It is established that the registered proprietor is bound by such obligations arising under contracts and trusts as he himself has created or undertaken. This is all the Privy Council had in mind in Frazer v Walker shown by the reference to Boyd v Mayor of Wellington and Tataurangi Tairuakena v Mua Carr.

With respect it is suggested that Wilson J. failed to see the distinction with reference to the case he was deciding, or attempted to extend the notion of in personam remedies in this context beyond reasonable bounds.[16]

C. Deferred Indefeasibility ?

Wilson J. appears to assume that the State only guarantees the existing name on the register, pursuant to the registration of a void instrument, as a valid root of title and nothing else. His Honour maintained[17] that registration conferred upon the claimant only the status of registered proprietor (legal title.)

Deferred indefeasibility means that, even in the absence of fraud, the title of a registered proprietor who has acquired his estate or interest by the registration of a void or voidable instrument remains open to attack in respect of any vitiating element in the instrument or transaction by which title was acquired.[18]

"... the mere fact that the claimant may (for a fraction of time) have been registered as proprietor of the fee simple to the land does not require the Court to close its eyes to the fact that the proclamation was void. This claim is not one for compensation for being deprived of the status of registered proprietor of the land. The claimant seeks compensation under the Public Works Act 1928 for the taking of its interest in the land by the proclamation of 9th March, 1970. That proclamation, being void, confers no right to make such a claim."[19]

It is submitted that Wilson J. accepted the deferred indefeasibility concept. The controversy surrounding the effect of registration may not be ended, despite Brookfield's comments to the contrary. The decision of Frazer v Walker has been criticised in New Zealand by sections of the legal profession and by the public press.[20]

D. A Basis For Argument

An enlightening point is made by Sackville[21] when he remarks that a new system based on general law concepts attracts, not unnaturally in a profession

that has traditionally emphasised the value of precedent and stable principles an approach calculated to minimise the displacement of old rules and concepts.[22]

A favoured argument of those supporting the deferred theory involves the apparent legislative intention behind the Torrens statutes.[23]

Section 183 of the 1952 Act protects a purchaser against deprivation of his estate on the grounds that the person from whom he acquired his title had a title which was void, thus suggesting that titles registered in the absence of fraud may be set aside.

It is thus argued that the legislature in granting indefeasibility to a registered title was contemplating that registration would be effected pursuant to the lodgement of genuine instruments and the Act construed consistantly with the general principle of Common Law that forged instruments are ineffective; the old conveyancing rules.

The argument suggests a fundamental question. Does the Torrens System mark a fresh point of departure rather than a mere addition to, and qualification of the principles of the Common Law?[24]

The Torrens System is a system of registration of title to land and not simply one of registration of instruments from which title to land was derived (as the deed system was.)[25] Thus, it is argued, the Torrens System may be regarded as a distinct legal code and not merely superimposed upon the old deed system. There is no necessity for the Land Transfer Act 1952 to be construed consistantly with the old Common Law conveyancing rules.[26]

3. JUSTICE

Green and Mc Cahill Contractors Ltd. had been paid compensation for the taking of the land by proclamation effective from 12th September, 1960. The company was now claiming additional compensation assessed on the basis of 1970 land values. Clearly, as the claimant

had suffered no damage or injurious effect from what was merely an administrative mistake, it would be "unjust" in the sense of ordinary reasoning, equating justice with fairness,[27] for compensation to be paid. Yet this would seem the result urged by immediate indefeasibility.

However legal rules and concepts depend for their usefulness on their indefinitness and flexibility. Thus a title registered under the Land Transfer Act is not secure against all claims and is not "indefeasible" in the strict sense.[28]

4. ALTERNATIVES

It is suggested that the immediate indefeasibility concept could have been given desirable flexibility in Green and Mc Cahill Contractors v Minister of Works had that concept been accepted by Wilson J. (His Honour maintaining that the proclamation remained void inter partes thus conferring no interest on the claimant.)

A. The Registrar's Power Of Correction

In Frazer v Walker their Lordships stated that the powers of the Registrar under section 81 are significant and extensive, they are not co-incident with the cases excepted in sections 62 and 63 of the Act.[29] At least one commentator has argued[30] that where the registration may properly be said to be wrongful, although the title is indefeasible under sections 62 and 63, the Registrar has power to override the indefeasibility conferred and correct the register.

Green and Mc Cahill Contractors Ltd. may have obtained an interest immediately upon registration of the proclamation. Yet could it be argued, that registration of the proclamation was "wrongfully" obtained by the authority and any benefit "wrongfully" retained by the claimant, (leaving open the broad question whether an entry in the register obtained by the registration of a void instrument by a bona fide

purchaser for value acting without knowledge of the vitiating element in his instrument can be cancelled by the Registrar under section 81.[31])

a) The words "fraudulently or wrongfully obtained" in section 81 mean obtained by fraudulent or wrongful means in the procurement of the registration and do not refer to fraud antecedent to the application for registration.[32] "Wrongfully" thus has a wider meaning than "fraudulently."[33] In D.L.R. v Thompson[34] the entry upon the register of a void instrument was obtained without fraud, but was obtained wrongfully because the Registrar was induced to register the transfer by the certificate endorsed on it pursuant to section 164, that it was correct for the purposes of the Act.

b) In De Chateau v Child and Others[35] the transfer was not endorsed thereon a proper certificate as provided by section 164 of the Act. Non compliance with the terms of the section resulted in the registration being wrongfully obtained.

c) Wrongful retention occurs when a person seeks to profit from an accidental and inadvertent blunder without right.[36] Since errors inter partes may be corrected, to seek to profit by this type of error, as well as one made in the Registrar's office, would be fraudulent or wrongful retention.[37] It is suggested that "wrongful retention" occurs before the mistake is discovered before the party seeking to profit from his position, thus he has a bona fide belief in the state of affairs said to be existing. Seeking advantage after discovery of a mistake would be fraud; Jonas v Jones.[38]

d) The word "wrongfully" seems a general declaration of unlawlessness which does not create an offence.[39] The appropriate principle to be applied is that the registered proprietor can not depend on the

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protection given by the Land Transfer Act if registration has not been procured according to its terms;[40] regarding the importance of section 164 and its relation to the general object intended to be secured by the Act.[41]

B. An Overriding Statute

Green and Mc Cahill Contractors Ltd. v Minister of Works might have been viewed as a case involving another statute overriding the provisions of the Land Transfer Act. Thus the claimant company would have obtained an indefeasible title to an interest by the registration of the void proclamation, yet effect given to the provisions of section 27 of the Public Works Act notwithstanding the indefeasible title.[42]

Such an argument would also be applicable to Boyd v Mayor of Wellington. It will be noted however that the Public Works Act preceded the Land Transfer Acts in both Boyd's case and the instant case, and so this argument is subject to the objection that if there is an inconsistency between one statute and a later statute the later statute prevails.

It is submitted that the Public Works Act might be regarded as a specific statutory scheme, noting the provisions giving rise to the instant case; the Land Transfer Act a general code. Keith[43] alludes to the uncertainty resulting from conflict between a general code and a specific statute. If the general statute is preferred on the basis that it comes later in time, then a specific statutory scheme which may have been carefully worked out will be nullified, an obviously unsatisfactory result.[44]

C. Ultra Vires Administrative Action

An interesting point is raised by R. Sackville.[45] He argues that Boyd v Mayor of Wellington produces an unsatisfactory result in that registration may be held to validate unlawful action taken in the purported

exercise of statutory authority.

There is a distinction between claiming under an instrument obtained and registered in good faith and under normal conveyancing procedure but later found to have been forged and claiming under a proclamation obtained and registered in good faith but void because some statutory condition precedent has not been complied with.[46] The undesirability of retrospectively validating ultra vires legislative instruments is apparent. It is wrong to permit an authority, which exceeds the terms of the powers given to it, to retain the fruits of that excess.[47]

Possibly registration of an ultra vires instrument might invoke the Registrar's powers of correction under section 81 of the Act. Could it be said that in such circumstances the statutory power has been exercised negligently so making the registered title "wrongfully" obtained?[48] There are however problems with this view. Where the relationship between the Crown or its servants and the person injured is one which has no counterpart outside government, compulsary land acquisition being a uniquely governmental activity, the application of the law of negligence may have to be worked out afresh. To make the Crown liable vicariously for torts committed by a servant acting under direct statutory authority requires an even greater development in the theory of vicarious liability than has hither to occurred.[49]

In legal systems "more developed" than our own the remedy of damages is available for loss caused by invalid administrative decisions.[50] However in view of the earlier discussion relating to the Registrar's power of correction there seems no need to import the concept of negligence at all. The effect of the authorities referred to is that registration is wrongfully obtained if an instrument is certified to be what it is not, regardless of how this came about.

It is submitted that frank recognition of the ultra vires exception would be preferable even though

impracticable because of the apparent judicial unwillingness to accept "degrees of voidness" as having differing results.[51]

5. IN THE COURT OF APPEAL

The decision of the Court of Appeal in Green and Mc Cahill Contractors Ltd., as it is reproduced in the New Zealand Law Reports,[52] gives no indication of how the Court reached their conclusion supporting Wilson J. Indeed a copy of the actual judgement, delivered on March 7th, 1974 by McCarthy P., conflicts with the finding of Wilson J. on the indefeasibility question, though the result of the case remained the same.

Lord Denning[53] points out that the law has two great objects to preserve order, and to do justice; and the two do not always coincide. Those whose training lies towards order put certainty before justice, whereas those whose training lies towards redress of grievances, put justice before certainty. The right solution lies in keeping the proper balance between the two.

These propositions might be borne in mind when considering the reasoning of the Court of Appeal which is summarised thus:

a) The Court was prepared to assume "without so deciding" that the revocation of the earlier proclamation and the retaking of the land were to be seen as two separate acts. There appears no basis for their doing so, except that the respective powers were contained in separate sections of the Public Works Act.

b) The revocation of the earlier proclamation would be validated by the registration of the void proclamation of March 9th, 1970. Thus registration validated a void instrument inter partes (immediate indefeasibility) in conflict with the views of Wilson J.

c) Yet there was an immediate loss of the interest, vested in the claimant, by reason of the second part of the void proclamation (retaking the land) when it was registered.

d) Council for the claimant contended that as a result of section 27 (2) and 27 (3) of the Public Works Act the Court had to regard the situation as if the first proclamation had not been issued and the claimant had therefore remained the owner and registered proprietor of the land continuously up to the time of the second taking. This contention was rejected on the basis that the purported exercise of the revoking power was ultra vires. Subsections (2) and (3) could only apply if there was a valid exercise of the revoking power conferred by subsection (1) of the section.
This much is agreed, if the second proclamation was void. But it appears inconsistent with the finding that registration of the second proclamation had validated it pursuant to the immediate indefeasibility concept which the Court was bound to accept on the authorities.

e) The most that council could contend for was a brief notional ownership which was regarded, without reasons, as insufficient and valueless to found a claim for compensation.
Seemingly the case could have been left on that basis but the Court felt the necessity to add some justification to the final point.

f) Even if the interest, revested notionally in the claimant, was of some value its loss did not come within section 42 (1) of the Public Works Act on which the claim for compensation rested. It was recognised by the Court that a person had a claim if; (i) he had an estate or interest

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in land taken under the Act (ii) was injuriously affected by the taking of the land, or (iii) suffered damage from the exercise of any of the powers given by the section.
But again the Court applied the presumption that the proclamation was void, and any subsequent purported taking of the land by the Crown inoperative. Seemingly the judges accepted the ratio of Boyd's case, affirmed in Frazer v Walker and then refused to apply it or at least conveniently ignored it to produce what they considered a satisfactory result.
It is conceded that the claimant had suffered no damage and had not been injuriously affected by the issue of the second proclamation, but such were separate requirements of section 42 (1), noting the use of the word "or" and should not have affected the question pertaining to the deprivation of an interest or estate; (remember that the learned members of the Court of Appeal were now arguing on the basis that the notional interest was of some value.)

g) The Court concluded their judgement by stating that for reasons which were "really the same" as those given by Wilson J., in the judgement appealed from, the claimant was not entitled to found and pursue a claim under section 42 (1) of the Public Works Act, (as much as can be gained from the Law Reports.)
It is a mistake to expect a chain of deduction or demonstrative reasoning in a judicial decision. Rather the process is one of a succession of cumulative reasons which severally co-operate in favour of saying what the court desires to urge.[54] What makes the Court of Appeal decision in Green and Mc Cahill Contractors Ltd.; unsatisfactory, it is submitted, is that the

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judges are seemingly trying to do "justice" without giving adequate reasons for their conclusions.

6. SUPPORT FOR WILSON J. ?

The Court of Appeal did not allude to the views of Wilson J. regarding the general effect of registration under the Land Transfer Act 1952. The decision is based on the simple finding that the notional revesting was insufficient to found a claim for compensation. Throughout the course of their judgement the Court of Appeal proceeded on the basis that the second proclamation remained void despite registration. One must assume, however, that the Court accepted the immediate indefeasibility concept at least in principle. Per McCarthy P.[55]
"... the fact that the revocation was ultra vires would not prevent its becoming effective on registration to reinstate the appellant (claimant) as holder of an indefeasible title as registered proprietor of the fee simple Boyd v Mayor of Wellington approved by the Privy Council in Frazer v Walker. But likewise that invalidity would not prevent the immediate loss of that interest by reason of the second part of the proclamation when it was registered."

Thus support for Mr. Justice Wilson's propositions will have to come from sources other than the Court of Appeal judgement.

Historically the great weight of authority in Canada has favoured the deferred indefeasibility theory.[56] Yet the authority of the Privy Council does not reach to Canada, thus support for Wilson J. must come from New Zealand or Australia, where most of the Torrens system cases have their origin.

Travinto Nominees Pty. Ltd. v Vlattas[57] was a case departing from the general trend of Australian authority since Frazer v Walker.[58] In that case a registered lease of hairdressing premises contained

a covernant for renewal of the lease at the option of the tenant. The approval of the Industrial Commission of New South Wales had not been obtained for the lease or option, as required by section 88 B of the Industrial Arbitration Act, 1940 as amended, which applied, inter alia, to leases of hairdressing premises. Under section 88 B (3) (b) of the Act all contracts entered into without the approval of the Industrial Commission were declared void.

It was held in the New South Wales Supreme Court; the Court of Appeal and the High Court of Australia that the lease and renewal remained void despite registration.

It has been suggested that Travinto Nominees Pty. Ltd. v Vlattas is very difficult to reconcile with Boyd's case and even more difficult to square with the views of the High Court in Breskvar v Wall[59] that registration of a transfer expressly declared void by a statute is nevertheless effective to confer a good title on the transferee.[60]

This view creates unnecessary "difficulties" since the High Court when deciding Travinto Nominees Pty. Ltd. v Vlattas went out of it's way to distinguish Breskvar v Wall and seemingly succeeded in doing so. Applying the principle that if there is an inconsistency between one statute and a later statute, the later statute prevails Gibbs J. went on to hold;[61]

"The provisions of section 88 B on their proper interpretation operate to avoid a lease, to which they apply, whether or not the lease is registered under the Real Property Act. Effect must be given to the section notwithstanding that under the Real Property Act the title of the rigerested lessee is indefeasible.

There is a clear distinction between the present case and Breskvar v Wall, supra, in which this Court considered the position of a person who obtained registration by means of a transfer which, by reason of the provisions of section 53 (5) of The Stamp Act of 1894 (Q.), a statute passed later than The Real

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Property Acts (Q.), was absolutely void and inoperative. In that case the fact of registration vested the title in the transferee and it did not matter that the title was derived from a void instrument. The question whether section 53 (5) of The Stamp Act should be regarded as effecting an implied repeal protanto or an implied amendment of any provisions of The Real Property Acts was mentioned by Walsh J., at pp. 78-79, who answered that question in the negative. The two statutes there could stand together; The Stamp Act avoided the transfer but The Real Property Acts had the result that registration of the void transfer was effective to vest the title in the registered proprietor. In the present case the Industrial Arbitration Act renders void the lease itself and not merely some document or transaction from which the title of the lessee was derived. If the Real Property Act were held to have the effect of validating the lease, its provisions would be irreconcilable with those of section 88 B which declares the lease to be void."

Thus it is argued that Travinto Nominees; may be explained as a instance of an invalidating statute overriding the inconsistant provision of the Torrens statute[62] analogous to Miller v Minister of Mines.[63]

If this view is unacceptable then the suggested alternative is that the registration of the memorandum of lease does not ensure the validity of every term and condition of the lease or the enforceability of every covenant it contains.[64]

Thus the case might be limited to its particular facts and policy considerations.[65]

7. CONCLUSION

Legal rulings not being statements of fact or logical inference but a choice between alternatives, can not be treated as in themselves true or false. Yet they can be regarded as right or wrong, good or

bad in the sense that they either are or are not based upon cumulative reasons which are found acceptable. Reference to the respective merits of the parties in Green and Mc Cahill Contractors Ltd. v Minister of Works suggests a reasonable result from this criteria. The claimant, it will be remembered, was arguing for a fresh award of compensation based on a notional revesting of the land by virtue of registration of the second proclamation. Thus the claimant would receive an award assessed on 1970 land values, simply because of an administrative mistake which had in no way adversely affected the company.

A distinction can be drawn between descriptive and prescriptive rules of practice. Frazer v Walker takes the nature of precedent beyond the merely descriptive so that the rules laid down in that case become prescriptive of judicial behaviour.

Though legal rules and concepts depend for their usefulness on their very indefiniteness and flexibility, uncertainty is undesirable. What makes Green and Mc Cahill Contractors, a "bad" decision is an apparent unwillingness to decide the case within the conceptual framework of immediate indefeasibility and its exceptions. The decision gives uncertain application to the reasoning in Frazer v Walker and possibly fresh ammunition to the proponents of the deferred indefeasibility theory, illustrating the point that judicial activity is not necessarily to be regarded as indicative of progress in the refinement of legal institutions.

NOTES:

1. "Just How Indefeasible is Your Land Transfer Title?" [1963] N.Z.L.J. 269.
2. [1924] N.Z.L.R. 1174.
3. After discussion of the Wills paper Mr. Ziman moved that the Conference urge that legislation negating the rule laid down in Boyd v Mayor of Wellington, be enacted. The motion was seconded but lost on the voices.
4. "Problems and Development Since Frazer v Walker"; unpublished at the time of writing.
5. [1967] N.Z.L.R. 1069.
6. Gibbs v Messer [1891] A.C. 248 might be regarded as an anomaly resulting from an unjustifiable reluctance on the part of the Privy Council to override it in Frazer v Walker.
   Per Lord Wilberforce, delivering the judgement of their Lordships;
   > "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 distiction drawn between such a case and that of a bona fide purchaser from a real person."

   The decision remaining to render invalid an instrument executed in favour of a fictitious person; also an instrument "executed" by a fictitious person in favour of a bona fide real person and registered by the latter.
7. [1974] 1 N.Z.L.R. 251.
8. [1974] 1 N.Z.L.R. 661.
9. (1899) 17 N.Z.L.R. 577.
10. [1974] 1 N.Z.L.R. 251, 255 lines 35-40.
11. Supra n10 line 50.
12. [1974] 1 N.Z.L.R. 251, 255-256.

The Torrens system was not created for the benefit of owners of equitable interests. The aim of simplification would be undermined if the substantive registration of equitable interests were to be allowed. But they can not be ignored, and caveats were invented to enable them to be temporarily protected.
Thus the proprietor and persons dealing with him must be concerned, with the existence of certain equities. The owner's certificate of title omits caveats, the register book does not however.

13. [1974] 1 N.Z.L.R. 251, 256 lines 20-25.

14. Supra n10 line 50.

15. [1967] N.Z.L.R. 1069, 1078.

16. Per Lord Lindley delivering the judgement of the Privy Council in Assets Co. v Mere Roihi [1905] A.C. 176, 204-205.

> "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 alleged 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 benefit from 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."

(Though a resulting trust would seemingly not be precluded; see Blackburn v Blackburn (1907) 26 N.Z.L.R. 1163.)

17. [1974] 1 N.Z.L.R. 251, 255 lines 45-50.

18. See Hinde; "The New Zealand Torrens System Centennial Essays." p.41.

19. [1974] 1 N.Z.L.R. 251, 256 lines 24-28.

20. See generally "Scotching Frazer v Walker." 44 A.L.J. 248; W. Taylor.

21. "The Torrens System - Some Thoughts on Indefeasibility and Priorities." 47 A.L.J. 526.

22. The South Australian legal profession of the latter 1850's was solidly united against Torrens. An example is the attitude of Mr. Justice Gwynne;

> "The Real Property Act as it stands at present is a scandal on the legislation of the Colony."

(See his judgement in Biggs v Mc Ellister (1880) (14 S.A.L.R. 86.); see generally "The Story behind the Torrens System." 23 A.L.J. 489; P.M. Fox.

23. An arguement raised by W. Taylor; "Scotching Frazer v Walker." 44 A.L.J. 248; and R.A. Woodman; "The Torrens System in New South Wales - One Hundred Years of Indefeasibility." (1970) 44 A.L.J. 96.

24. See Lloyd; "Introduction to Jurisprudence." (3rd ed.) pp. 733-743 for a discussion of statutory construction.

25. R.B. White; "The Elements of a Torrens Title." (1973) X1 A.L.R. 392, 399 - argues, in support of deferred indefeasibility, that those who suggest that in a Torrens system the "register is everything" may have omitted a salient fact; viz that in Torren's mind and statute it was not. Rather it was only a part of the system. However Torrens, discussing in 1863 the application of his system of conveyancing to Ireland, equated registration to a grant direct from the Crown. ("The Torrens System of Conveyancing by Registration of Titles as in operation in Australia and applicable to Ireland."; Transactions of the National Association for the Promotion of Social Science (1863) vol 180 at pp. 187-188).

26. Taylor; 44 A.L.J. 248, 251 asserts that Frazer v Walker has taken the protection of the purchaser to such an extreme that the ownership of property is entirely at

The mercy of a small sheet of paper, the Certificate of Title which has become a quasi-negotiable instrument. Yet (i) a person who creates a situation where another is able to have access to the duplicate certificate of title can not be said to have taken reasonable care of his own interests.
(ii) To ask that the attesting witness have some knowledge as to the identity of the person who executes the document does not seem impracticable (see 26 A.L.J. 534, correspondence of the Registrar General of Sydney.) Ratcliffe v Watters (1969) 89 W.N. (Pt.1) N.S.W. 497; noted 44 A.L.J. 231 is yet another case of forgery to come before the courts, notwithstanding the requirement that an attesting witness know the party executing. Street J. pointed out the element of looseness in the identification of transferors which had developed in conveyancing practice. One can only hope that the comment of Jeremy Pope, Evening Post, 20th April, 1975; following the presentation of the Brookfield paper to the 1975 Law Society Conference, to the effect that conveyancers will be more careful in this respect, is the case with New Zealand practitioners (it appears that only one forgery in relation to documents registered at H.M. Land Registery has ever been successful - see 44 A.L.J. 262.)

27. See re Freeman (1927) 1 CH. 479, 487; Lord Hanworth M.R. Also Lloyd; "Introduction to Jurisprudence" p. 731.

28. A summary of the exceptions to indefeasibility is provided by Hinde; "Torrens System Centennial Essays" pp. 38-39.

29. [1967] N.Z.L.R. 1069, 1079.

30. D.W. McMorland; "Registrar's Powers of Correction" [1968] N.Z.L.J. 138, 140.

31. See Hinde; Centennial Essays. p.59.

32. Re Mangatainoka 1 Bc. No.2 (1913) 33 N.Z.L.R. 23, 62 per Edwards J.

33. As suggested by Hinde; Centennial Essays. p.56.

34. [1922] N.Z.L.R. 627.

35. [1928] G.L.R. 73.

36. Supra n32.

37. As suggested by McMorland; [1968] N.Z.L.J. 138, 141.

38. (1883) N.Z.L.R. 2 S.C. 15.

39. See "The Complexity of Statutes" [1974] M.L.R. (V.37 No. 5) 497; W.A. Wilson.

40. An analogous situation is seen in the approach of Canadian courts to "no certiorari" clauses in legislation. If a tribunal acts in such a manner that the court is able to say that it is acting without jurisdiction then it is not acting within the statute and is not entitled to the protection therein; see 30 Can. Bar. Rev. 69.

41. See De Smith "Judicial Review of Administrative Action" (3rd ed.) p.123 for a discussion of the effect of non-compliance with statutory rules.

42. See, for example Travinto Nominees Pty. Ltd. v Vlattas 47 A.L.J.R. 279; Gibbs J. at 292.

43. "A Code of Procedure for Administrative Tribunals ?" Legal Research Foundation Pamphlet (8) p.49.

44. The paper "Administrative Law - The Vanishing Sphinx" presented to the 1975 Law Society Conference by Mr. Justice Cooke, indicates that such a result would not be given cognizance by the courts.

45. 47 A.L.J. 526, 532.

46. This distinction drawn by Brookfield may be difficult to maintain in view of the attitude expressed by Barwick C.J. in Breskvar v Wall (1971) 46 A.L.J.R. 68, 70. A registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

47. Whalan; Centennial Essays p.277, argues that nothing in the principal protective provision should prevent a deprived proprietor from having his estate or interest restored to the register when it has been taken from him unlawfully in the purported exercise of a statutory power. Thus indefeasibility in the Boyd v Mayor of Wellington situation is deferred.

48. As suggested by Brookfield; though he does not pursue the point.

49. As stated by Hogg; "Legal Liability of the Crown" p.107.

50. See the judgement of Lord Wilberforce in Hoffmann - La Roche v Secretary of State for Trade and Industry [1974] 2 ALL. E.R. 1128, 1148.

51. In both "immediate"; Breskvar v Wall (1971) 46 A.L.J.R. 68, and "deferred" indefeasibility cases; Caldwell v Rural Bank of N.S.W. (1953) 53 S.R. (N.S.W.) 415, Owen J. at 423.

52. [1974] 1 N.Z.L.R. 661; C.A. 95/73.

53. "The Need for a New Equity" (1952) 5 Current Legal Problems 1.

54. See Lloyd; "Introduction to Jurisprudence" pp.729-733.

55. C.A. 95/73 page 6 of the report.

56. See R.B. White; "The Elements of a Torrens Title" (1973) Xl A.L.R. 392, 408.

57. 47 A.L.J.R. 279.

58. See Sackville 47 A.L.J. 526, 529.

59. 46 A.L.J.R. 68.

60. As suggested by Sackville; 47 A.L.J. 526, 529.

61. 47 A.L.J.R. 279, 292.

62. As does Brookfield.

63. [1959] N.Z.L.R. 220.

64. Brookfield points out that the lesson of Travinto Nominees Pty. Ltd. v Vlattas for New Zealand practitioners is that they can no longer rely on Pearson v Aotea Maori Land Board [1945] N.Z.L.R. 542 and accept without scrutiny a right of renewal in a registered lease.

65. Per Barwick C.J., 47 A.L.J.R. 279, 285;

> "Though as a term "indefeasibility" is convenient enough, it must always be remembered that it is the title to and possession of the land or of the interest in the land of which there is a registered proprietor which is rendered secure by the registration. In the case of a leasehold it may be and frequently is the case that the extent of the leasehold interest is not merely described by reference to a term of years but must of necessity be determined by reference to the operation and effect of those terms and conditions of the lease which affect or qualify the interest in the land which the lease purports to create. It may be noted that the Real Property Act recognizes that there may be terms and conditions in the memorandum of lease, see the Real Property Act, s. 53 (3). These considerations seem to me to result in the conclusion that registration of the memorandum of lease does not ensure the validity of every term and condition of the lease or indeed of the enforceability of every covenant it contains. In my opinion, it must depend on the nature of the covenant and its relation to the limitation of the interest created in the land by the memorandum of lease itself. For example, a collateral covenant tying the lessee to the lessor in respect of some matter of trade does not obtain any validity or consequence simply because the memorandum of lease is registered. The validity or enforceability of such a covenant will remain a question under the general law. The

same, in my opinion, is true of the option to renew the lease. It does not mark out the extent of the term created by the lease. Yet it is an agreement to grant a new lease contingently on the exercise of the option and the observance during its term of the covenants of the lease. Whether such an agreement creates an immediate though defeasible equitable interest must ultimately depend on the specific enforceability of that agreement."

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Due	Borrower's Name
31/8	G. Tunnytin
27/10	D. Rutherford
28/10	D. Rutherford.
29/10	D. Rutherford
30/10	A. Smither
31.10	M. Matson
5/10	"
8.10	Brun
12/8.	
13.8	
9/8	
8/7	

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