BRESKVAR V. WALL: THE END OF DEFERRED INDEFEASIBILITY?

BY GIM L. TEH*

[*Mr Teh here outlines the development of two conflicting attitudes to those provisions in Torrens System legislation which concern indefeasibility of title upon registration. An analysis of the case of* Breskvar v. Wall *leads Mr. Teh to conclude that one view of such provisions is now largely untenable. The implications of this conclusion and the problems still unresolved are then examined.*]

INTRODUCTION

This article is an examination of the impact of the recent High Court decision in *Breskvar v. Wall*[1] on the controversy as to what is meant by an indefeasible title. Until *Breskvar v. Wall,* there were two opposing views on the question. One view was that, apart from certain circumstances bringing a transaction within one of the exceptions in the paramountcy provisions[2] in the relevant Torrens statute, the title is indefeasible the moment a transfer becomes registered. This is regardless of whether the transfer is void or defective for any reason.[3] This is the theory of immediate indefeasibility in essence. On the other hand, there were those who advocated the view that, apart from express exceptions in the relevant statute, there are certain situations in which registration would not operate to confer indefeasibility on a registered title. On this latter view, the title becomes indefeasible only upon a subsequent transfer to and registration by a *bona fide* purchaser for value.[4] This view is better known as the theory of deferred indefeasibility and, until *Frazer v. Walker*[5] in New Zealand and *Breskvar v. Wall* in Australia, was thought to be the correct view of an indefeasible title.

* LL.B. (Hons) (Lond.), LL.M. (Monash), of the Inner Temple, Barrister at Law, Lecturer in Law, Monash University, Clayton.

[1] (1972) 46 A.L.J.R. 68.

[2] Sec. 42, Transfer of Land Act 1958.

[3] *Fels v. Knowles* (1906) 26 N.Z.L.R. 604, 620; *Assets Co. Ltd v. Mere Roihi* [1905] A.C. 176, 202; *Waimiha Sawmilling Co. v. Waione Timber Co.* [1926] A.C. 101, 106.

[4] *Gibbs v. Messer* [1891] A.C. 248; *Boyd v. Mayor of Wellington* [1924] N.Z.L.R. 1174 (*per* Salmond J., dissenting); *Clements v. Ellis* (1934) 51 C.L.R. 217 (*per* Dixon J.).

[5] [1967] 1 A.C. 569.

The writer's objective is to raise the question whether, as a result of these two landmark decisions, the theory of deferred indefeasibility may still be tenable. For the present purpose, the Privy Council opinion in *Gibbs v. Messer*[6] will be the starting point for discussion. This is because it is in this opinion that the general principles of the Torrens system of registration were first exhaustively reviewed by a superior court. Besides, this opinion was regarded in later cases as being the genesis of the theory of deferred indefeasibility.[7] What that theory involves as interpreted by subsequent decisions will then be outlined as necessary background to an analysis of the recent High Court decision.

GIBBS v. MESSER[6]

The facts of the case may be summarized as follows: The plaintiff was the registered proprietor of the land in question. She left her duplicate certificate of title with one Cresswell, her solicitor. While she was overseas Cresswell forged a transfer of the title to one 'Hugh Cameron', a fictitious person, and registered it in that name. Cresswell then, purporting to act as Cameron's agent, borrowed a large sum of money on a forged mortgage from the McIntyres, the defendants. A memorial of the mortgage was in due course entered on the folio in Cameron's certificate of title. When the plaintiff discovered the state of affairs on her return, she sought to be reinstated as the registered proprietor free of the defendants' incumbrance. The villain of the piece had, in the meantime, disappeared. Webb J. in the court of first instance held that the McIntyres had a valid incumbrance on the plaintiff's title. The plaintiff was, however, allowed to redeem it, the Registrar being required to pay her costs out of the Assurance Fund. On appeal, the Full Court of the Victorian Supreme Court affirmed his decision.[8] The Registrar then appealed to the Privy Council.

There were two issues before the Privy Council. The first was whether the plaintiff had lost her title to the land when, in consequence of fraud, a fictitious person became registered as the proprietor. The second and more important issue was whether—assuming a negative in the first—she had to take subject to the subsequent incumbrance notified on the title. Lord Watson, delivering the opinion of the Board, had no doubt as to the first question. He said that Hugh Cameron's title could be set aside by the deregistered plaintiff because he was 'a fictitious and non-existing transferee' and could not impede her right to have her name restored on the register.[9] This appears to be on the basis that a fictitious and non-

[6] [1891] A.C. 248.
[7] See generally, I. McCall, 'Indefeasibility Re-examined' (1970) 9 *University of Western Australia Law Review* 324; Taylor, 'Scotching *Frazer v. Walker*' (1970) 44 *Australian Law Journal* 248.
[8] *Sub. nom. Messer v. Gibbs* (1887) 13 V.L.R. 854, 876.
[9] [1891] A.C. 248, 253.

existing person could not be a registered proprietor so that the plaintiff remained a *de jure* proprietor at all material times.[10] On the second and main question, His Lordship held that the plaintiff's title could be re-instated free of the incumbrance. In the Board's opinion the incumbrance was a nullity since Cameron was a non-existent person and could not have executed a mortgage.[11] It seems clear that Lord Watson also gave another reason to support his conclusion, *viz,* that the mortgagees had not transacted with the registered proprietor as was required by the Victorian Torrens statute.[12]

Although Lord Watson's judgment contained no discussion of the relevant provisions of the statute, it laid down a number of valuable propositions formulated from the statute as fundamental principles 'relating to the validity of registered rights'.[13] These propositions constitute the pre-requisites to be satisfied before an applicant is able to obtain an indefeasible title upon registering his transfer. For this reason, these propositions merit close consideration.

With regard to the question whether transferees could get an indefeasible title by the registration of a forged deed, Lord Watson said,[14]

> they cannot by registration of a forged deed acquire a *valid title* in their own person, although *the fact of their being registered* will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

In the final part of his judgment, and in slightly different phraseology His Lordship again observed,[15]

> Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed.

Two general propositions emerge from these passages. The first is that a forged instrument will not be given statutory indefeasibility as between the immediate parties to the transaction even though the instrument is duly registered. This principle applies to all void instruments and is not to be confined to cases involving a forgery. The second is that a *bona fide* purchaser of such a title will gain statutory indefeasibility upon registration notwithstanding the precarious nature of his transferor's title.

[10] See criticisms, Sackville & Neave *Property Law Cases and Materials* (1971) 455. Compare, W. N. Harrison, 'Indefeasibility of Torrens Title' (1952) 2 *University of Queensland Law Review* 206, 221-3.
[11] [1891] A.C. 248, 255.
[12] See *Ibid.* 254-7.
[13] *Ibid.* 254.
[14] *Ibid.* 255 (emphasis added).
[15] *Ibid.* 257-8.

The first proposition, however, requires close scrutiny. Although Lord Watson said that the immediate transferee would not get an 'indefeasible' title if his registration was brought about by a null instrument, it seems clear that His Lordship did not mean that the transferee would be vested with a defeasible title when the instrument was registered. He meant, on the contrary, that a void instrument remained void notwithstanding registration and never vested title in the transferee.[16] Thus in applying this proposition to the case before the Board, His Lordship said that the mortgagees' interest could not be protected by the statute 'because the mortgage which they put upon the register is a nullity',[17] a consequence of Cresswell's forgery. He was thus applying the general law principle that void (as opposed to voidable) transfers will not pass any title at all.

What is implicit from the above is that a proprietor deregistered in consequence of a void transfer will nevertheless remain the registered proprietor *de jure*[18] and will, arguably, enjoy the statutory protection given by the relevant Torrens statute. Thus he may validly transfer his interest in the land to some *bona fide* third party who, upon registration, will acquire a title. It should follow too, moreover, that the immediate transferee shown on the register to be a registered proprietor in fact has no interest at all and can pass none to anyone. This is notwithstanding that the vesting section of the relevant Torrens statute clearly provides that registration—not the instrument of transfer—operates to vest title in him.[19] Both implicit propositions are shown to be inconsistent, however, when Lord Watson's second proposition is taken into account. If, as His Lordship said,[20] a *bona fide* purchaser from *the immediate transferee* obtains an indefeasible title upon registration does it not mean that *he*, not the deregistered proprietor, has title to pass? If His Lordship's first proposition is to the effect that the immediate transferee is not vested with 'a valid title' on account of a preceding void instrument of transfer then he has failed to explain how 'the fact of . . . being registered'[21] enables him to pass a valid title to his purchaser.

It may be that as between the immediate parties to a void transfer no distinction need be drawn between vesting and indefeasibility as two separable consequences of registration. In such a case it makes sense to say that the immediate transferee is not vested with any title at all. Thus

[16] *Ibid.* 255; Harrison, *supra* 220.
[17] *Ibid.* 258.
[18] The term '*de jure* registered proprietor' is a judicial innovation. It is used in the sense that the owner is the registered proprietor in law although not in fact identified as such on the register. This rather peculiar concept is argued and discussed in *Breskvar v. Wall, infra.* Suffice it to say that the Torrens statutes do not suggest such a conception.
[19] Sec. 40, Transfer of Land Act 1958, Sec. 41, Real Property Act 1900-1970 (N.S.W.).
[20] *Ibid.* 257.
[21] *Ibid.* 255.

the same result would have been reached in *Gibbs v. Messer*[6] if the mortgagees' interest had been regarded as vested but defeasible by the deregistered proprietor. The distinction becomes crucial, however, when a *bona fide* third party has purchased the interest from the immediate transferee. As will be seen later, it was not until *Breskvar v. Wall* that the significance of such a distinction became clear.

Further prerequisites to indefeasibility appear from the following passage in Lord Watson's judgment:—[22]

> [t]he main object of the Act . . . is 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. That end is accomplished by providing that everyone who *purchases,* in bona fide and for value, *from a registered proprietor,* and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation at the instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register;

The clear proposition from the above passage is that a registered transferee will not get an indefeasible title unless he has transacted on the faith of the register. This means that he is required to deal with a transferor whose name is shown on the register to be the registered proprietor. Moreover, it is arguable that the above passage suggests that statutory indefeasibility will only be conferred on *bona fide purchasers* for value as opposed to *volunteers.*

It is not clear, whether, on the facts before the Board, His Lordship relied on the void transfer or the failure to transact on the faith of the register, or both factors as being the cause of the mortgagees' failure to obtain an indefeasible interest. The difficulty arises from the passage towards the end of His Lordship's judgment where he said the mortgagees failed to obtain statutory protection[23]

> because the mortgage which they put upon the register is a nullity. The result is unfortunate, but *it is due to* their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty.

[22] *Ibid.* 254-5.
[23] *Ibid.* 258 (emphasis added).

This passage is rather ambiguous in that the failure to transact on the faith of the register could either explain why the mortgage was a nullity or why the mortgagees failed to obtain statutory indefeasibility. The point is significant for if it merely explains why the mortgage was a nullity, it must follow that the failure to transact on the faith of the register will not prevent statutory indefeasibility if there was a valid transfer preceding registration. Transacting on the faith of the register will thus not be a pre-requisite to indefeasibility. Other passages make it abundantly clear, however, that His Lordship regarded transacting on the faith of the register as a condition precedent to statutory indefeasibility.[24]

Lord Watson's observations, therefore, amount to the following propositions relating to the effect of registration:—

1 A registered title is void and will be defeasible by adverse claims if registration is brought about by a void transfer.
2 Notwithstanding that registration is preceded by a valid transfer a registered title will still be defeasible if the transferee fails to transact on the faith of the register.
3 It is consistent with the language used in the entire judgment that the same consequences would arise if he is only a volunteer.
4 The registration of a void instrument will enable the transferee to pass title to a *bona fide* purchaser who will upon registering his instrument, acquire an indefeasible title. The presence of the first two of the above vitiating circumstances relating to his transferor's title will not affect the quality of his title.

The first proposition is diametrically opposed to the immediate indefeasibility theory and is the focal point of much controversy. Except in two leading cases to be discussed later, the second and third propositions have not figured prominently in later cases as being obstacles to statutory indefeasibility. The last proposition has never been in doubt even by those subscribing to the theory of immediate indefeasibility. These four propositions together, however, constitute the entire theory of deferred indefeasibility traceable to the *Gibbs v. Messer* opinion.

FROM GIBBS v. MESSER TO FRAZER v. WALKER

Judicial views were sharply divided in the cases following the *Gibbs v. Messer* opinion. Judges favouring the theory of immediate indefeasibility were agreed that registration would confer an indefeasible title on the registered transferee and cure whatever defect arising from the transfer,[25] On the other hand, judges who preferred the theory of deferred indefeasibility relied at various times on each of the first three propositions established in *Gibbs v. Messer*[6] to deny the quality of indefeasibility to registered transfers. In order that the impact of *Breskvar v. Wall*[1] on the

[24] See *Ibid.* 254.
[25] *Supra* n. 3.

whole theory of deferred indefeasibility may be better evaluated, the leading cases based on this theory will now be examined according to what the judges have regarded as being the reason for defeasibility in the cases before them.

(a) VOID INSTRUMENTS

Most of the cases were concerned with void transfers, the *Gibbs v. Messer*[6] opinion being relied upon as establishing the principle that registration preceded by a void instrument would remain void and ineffective notwithstanding registration and confer no title on the transferee. This was clearly based on the general law distinction between instruments made void because of forgery, illegality, *etc.*, and those rendered merely voidable because of mistake, lack of capacity or because there was some lesser fraud than forgery.

Thus in a 3-2 decision in the New Zealand case of *Boyd v. Mayor, Etc., of Wellington,*[26] Stringer and Salmond JJ., dissentients, were of the opinion that a deregistered proprietor could be reinstated on the register because the registration of a subsequent proprietor was brought about by an invalid transfer instrument.[27] In that case, the plaintiff was the registered proprietor of a certain piece of land in Wellington City. A proclamation was made purporting to vest his land in the defendant Corporation. The proclamation was then registered in the Land Transfer Registry thereby making the Corporation registered proprietors of the plaintiff's land. The plaintiff challenged the validity of the Corporation's title and the main issue which arose was whether—assuming the proclamation was invalid—the Corporation's registered title was defeasible by the plaintiff.

Stringer J. proceeded on the basis that the plaintiff's title was effectively divested from him and vested in the Corporation upon registration. However, on the authority of *Gibbs v. Messer,*[6] the learned judge said that the Corporation's title was defeasible by the plaintiff because the proclamation was invalid.[28] Salmond J., on the other hand, went much further. He was of the opinion that title had never passed to the Corporation since the proclamation was void and, as between the immediate parties, a void transfer would remain void on registration.[29]

The controversial question came before the Australian High Court for the first time in *Clements v. Ellis.*[30] In that case, Holmes, the registered

[26] [1924] N.Z.L.R. 1174. See generally, E. C. Adams, 'The Rule in *Boyd v. Mayor etc. of Wellington.* Indefeasibility of Title Under the Land Transfer Act' (1938) 14 New Zealand Law Journal, 49.

[27] The majority court held that the title became indefeasible upon registration notwithstanding that the instrument of transfer was invalid.

[28] [1924] N.Z.L.R. 1174.

[29] *Ibid.* 1201, 1205.

[30] (1934) 51 C.L.R. 217. See generally, Adams, 'The Torrens System' (1948-50) 1 *University of Western Australia Law Review* 11.

proprietor of an unencumbered piece of land, took a mortgage from Ellis, the plaintiff. The mortgage was duly registered as an incumbrance on Holmes' title. Holmes later contracted to sell the land to Clements, the defendant, on the basis that the incumbrance would be removed from the title. When the defendant handed over the purchase price to Holmes, the latter gave a part of it to one Beamsley who was supposed to use the money to discharge the mortgage. Beamsley, however, forged a discharge of the mortgage and lodged for registration both the false discharge and the transfer to Clements. The fraud was soon discovered and Ellis sought to be restored as an incumbrancer of Clements' registered title.

When the case first appeared at the Supreme Court Lowe J. allowed the incumbrance to be restored on the register.[31] On appeal to the High Court, both Rich and Evatt JJ. were of the opinion that Clements' title should be registered free of the incumbrance. Of the two other members of the court, Dixon J. proceeded on the basis that the discharge of the incumbrance was notified on the register before the transfer was registered.[32] He held that the incumbrance should be restored on the register. This was based partly on the principle that a registered proprietor's title was 'not destroyed' if removed through a void instrument. On the other hand, McTiernan J. said that the discharge of the incumbrance was not notified on the register before or at the time the transfer was registered so that Clements' title never became unencumbered at the material time. His Honour was thus able to arrive at the same conclusion as Dixon J. Even if he had found the facts otherwise, however, a passage in his judgment clearly shows that he shared Dixon J.'s view that a registered proprietor's title is not 'destroyed' if fraudulently removed from the register. The Court thus affirmed Lowe J.'s decision and, by a technical majority, gave firm support to the first aspect of the theory of deferred indefeasibility.

It appears that although both Dixon and McTiernan JJ. used the term 'not destroyed' they did not mean that the deregistered proprietor merely has an equitable interest or an equity to be reinstated on the register.[33] They meant that his title was never effectively divested from him notwithstanding that the void transfer was registered. Both judgments are thus, unlike Salmond J.'s in *Boyd's* case,[26] based on Lord Watson's first proposition in *Gibbs'* case[6] and are open to the same criticism.[34]

Unlike Lord Watson's opinion in *Gibbs'* case,[6] however, Dixon J.'s decision consisted of a detailed exposition of the law in terms of the relevant provisions of the Torrens statute which showed that his support of the theory of deferred indefeasibility was apparently based on a two-

[31] *Ellis v. Clements* (1934) V.L.R. 54.
[32] (1934) 51 C.L.R. 217, 236-7.
[33] See *Latec Investments Ltd v. Hotel Terrigal Pty Ltd* (1965) 113 C.L.R. 265.
[34] *Supra.*

fold argument. First, he took the view that the various sections of the statute were interrelated and should be read together in order to give effect to the intention of the legislature.[35] His Honour cited Sir Horace Davey as saying in *Gibbs'* case[6] that 'everybody admits that it [section 67] must be read together with the other sections of the Act'.[36] Second, His Honour pointed out that relevant provisions of the statute 'do not mean to give an unqualified finality to the certificate [of title] in all circumstances'.[37] As evidence of this, he observed that whilst section 67 of the statute appears to make *all* registered titles absolute it must be read as excepting fraud, an exception found in other sections relating to the effect of registration.[38] As another instance His Honour said that section 72, which confers the quality of indefeasibility on registered titles in wide terms, is in fact subject to the provisions expressly empowering the registrar to cancel or correct titles in cases of error or where titles have been wrongfully or fraudulently obtained.[39] In His Honour's opinion, these and other provisions show that a registered title may be defeasible by such adverse claims notwithstanding the wide language of indefeasibility found in section 72.[40]

His Honour concluded from the above that the statute did not intend to confer the quality of indefeasibility on titles brought to the register by 'improper or unauthorized'[41] instruments of transfer. To fortify this conclusion he referred to an unpublished discussion of the statute by the judges in the Privy Council case of *Gibbs v. Messer*.[6] Of particular significance is the following observation by Lord Watson:[42] 'the provisions of this Act seem to be perfectly consistent, if you assume what appears to me, at present, to be the meaning of the Legislature, that down to this point they are dealing with nothing except *genuine* instruments'. Two points appear from His Honour's examination of the relevant provisions of the statute. First, the statute contemplates that a registered title will not be indefeasible if it is a product of a fraudulent transfer. Second, an apparently indefeasible title may in fact be corrected or cancelled by the registrar if, for instance, there has been a misdescription of the land or its boundaries. Nothing in the provisions examined by him, however, warrants His Honour's view that a registered title is defeasible if brought to the register in consequence of a fraud of which the transferee is innocent. The cases have merely established that the registered title will be defeasible only if fraud is brought home.[43] Moreover, the provisions examined by

[35] (1934) 51 C.L.R. 217, 238.
[36] *Ibid* 240.
[37] *Ibid.* 239.
[38] *Ibid.*
[39] *Ibid.* 239-40.
[40] *Ibid.* 240.
[41] *Ibid.* 241.
[42] *Ibid.* 240-1 (emphasis added).
[43] *Assets Co. Ltd v. Mere Roihi* [1905] A.C. 176; *Loke Yew v. Port Swettenham Rubber Co. Ltd* [1913] A.C. 491.

him do not suggest that invalid instruments of transfer will remain inoperative and will not vest title upon registration. A vital step is thus missing in His Honour's reasoning process when he concluded that his review of these provisions enabled him to support the theory of deferred indefeasibility.

Be that as it may, however, His Honour's judgment remained unassailed until the High Court reconsidered the state of the law in *Breskvar v. Wall.*[1] Up to that time, however, the law in Australia was taken to be laid down in the combined effect of *Gibbs v. Messer*[6] and *Clements v. Ellis.*[44]

(b) DEALING WITH THE REGISTERED PROPRIETOR

As seen above, the *Gibbs v. Messer*[6] opinion emphatically stated as a principle of the Torrens scheme of registration that statutory indefeasibility will only be conferred on a purchaser's registered title if he transacted on the faith of the register, in the sense that he must have dealt with a person shown to be a registered proprietor on the register. If it was ambiguous as to whether the Board relied on the mortgagee's failure to transact on the faith of the register as one ground for the decision in that case, Dixon J. certainly based his judgment in *Clements v. Ellis*[30] on this ground. In his opinion, Clements did not get an indefeasible title because, in His Honour's words,[45]

> upon the true interpretation of the *Transfer of Land Act,* an interpretation settled by authority, to obtain that protection it is necessary to deal with a person who is then actually registered as the proprietor of the estate or interest intended to be acquired.

Dixon J. relied on the *Gibbs v. Messer* opinion for his decision, particularly on the unpublished shorthand report of the judges' discussion of the statute where Lord Watson said,[46]

> [t]he mere fact of registration is not conclusive . . . It is deriving title from a person who is apparent owner while entered on the register, and it is a good title though his ownership might be apparent.

Another passage of the shorthand report that His Honour relied on was in a latter passage where His Lordship said, with reference to section 179 of the statute,[47]

> I think the section is important in another point of view, because it appears to me to indicate what in other clauses I am inclined to think is the scheme of the Statute, namely, to protect no dealings except dealings with the registered proprietor himself.

[44] *Coras v. Webb & Hoare* (1942) 35 St.R.Qd. 66; *Gilbert v. Bourne* (1895) 6 Q.L.J. 270; *Caldwell v. Rural Bank of New South Wales* (1953) 53 S.R. (N.S.W.) 415; *Davies v. Ryan* [1951] V.L.R. 283.
[45] (1934) 51 C.L.R. 217, 237.
[46] *Ibid.* 243.
[47] *Ibid.*

Not unexpectedly, His Honour was of the view that the *Gibbs v. Messer*[6] opinion was based on the failure on the part of the mortgagees in that case to deal with a registered proprietor.[48]

Dixon J., however, did not rely on the authority of *Gibbs v. Messer*[6] alone for his view. He was also of the opinion that the relevant provisions of the statute supported his conclusion. Although the term 'dealing with a registered proprietor' is found in the notice section but not in the key section, His Honour said that the former section imposes conditions precedent on the operation of the latter section, one of which is that the purchaser must have dealt with the registered proprietor.[49] This interpretation of the effect of the notice section is not, however, without difficulties. There are authoritative opinions to the effect that the notice section merely elucidates the key section and that no adverse effects can be drawn from the fact that the elucidation is partial only.[50] Moreover, and following the same school of thought, that section merely says that a transferee will be exempted from the ordinary consequences of notice, *etc.*, at general law if he dealt with a registered proprietor and complied with other provisions in that section.[51] Some damage would be done to that section when it is construed as providing that the only way that a transferee can get an indefeasible title is to deal with a registered proprietor.

A serious practical difficulty also arises from the view that no registered title is indefeasible unless the transferee had dealt with a registered proprietor. A purported transferee may find it rather onerous to have to ascertain whether his purported transferor is the same person as the one shown on the register to be the proprietor.[52] His task is no less arduous in a case where an agent purports to act on behalf of a registered proprietor for he must also ascertain whether or not the agent has the authority to act.[53] It may be asked whether this would not be inconsistent with one of the main objectives of the Torrens system of registration, *viz,* to facilitate transfers.

Two further difficulties were pointed out by Baalman. First, there can be no 'dealing with a registered proprietor' in cases where land at general law is for the first time being brought under the Torrens scheme of registration. Yet there is no doubt that the registered applicant obtains an indefeasible title in the absence of fraud or other invalidating factors.[54] Second, a transferee may obtain a transfer not from the registered proprietor but from the sheriff or from the Public Trustee on a sale for

[48] *Ibid.* 243-4.
[49] *Ibid.* 241-2.
[50] *Templeton v. Leviathan* (1921) 30 C.L.R. 34, 69-70; Baalman, *Commentary on theTorrens System in New South Wales* (1951) 159.
[51] *Supra.*
[52] *Clements v. Ellis* (1934) 51 C.L.R. 217, 271 (*per* Evatt J.).
[53] See *Peterson v. Moloney* (1951) 84 C.L.R. 91.
[54] *Assets Co. v. Mere Roihi* [1905] A.C. 176.

arrears of rates. There may also be other forms of transfer which would not directly involve the registered proprietor and yet the transferee will again undoubtedly obtain an indefeasible title upon registration even though he has not dealt with the registered proprietor.[55] Dixon J., however, foreshadowed these last two difficulties. He thought that there would be no need to deal with a registered proprietor in these cases.[56] The need to deal with a registered proprietor as a condition precedent to an indefeasible title was, therefore, confined to subsequent dealings and the the ordinary cases where the transferor is a registered proprietor.

Be that as it may, commentators[56a] generally accepted Dixon J.'s view as being correct and the proposition was never questioned in later Australian cases until the High Court decision in *Breskvar v. Wall*.[56b] It should be noted, however, that the Appellate Division of the Supreme Court of Alberta in *Essery v. Essery*[57] expressly rejected an argument in that case to the effect that an indefeasible title will only be conferred on a purchaser who has dealt with a registered proprietor. Essery was the registered proprietor of a piece of land under the Torrens statute in Alberta.[58] He transferred the land to Pike who then, before registering his title, transferred it to Sheen who in turn mortgaged it to the Rupert Land Trading Co. These transfers and the mortgage to the Trading Co. were all registered on the same day, Pike's title being registered first and then cancelled in Sheen's favour two minutes later. Unknown to all the transferees, Essery's wife had a judgment against him for arrears of alimony under a separation agreement. Under the Dower Act, R.S.A. 1942, c. 206, this made the transfer to Pike null and void for all purposes. MacDonald J., at the Court of first instance,[59] held that since Pike's title came into existence before the transfer to Sheen was registered, the registration of Sheen's transfer operated to extinguish any claim that the wife might have in regard to the title.[60] This was notwithstanding that Pike was not the registered proprietor at the time of the transfer from Pike to Sheen, and significantly, Sheen had not dealt with the person shown on the register to be the registered proprietor.[61]

[55] Baalman, *op. cit.* 168.

[56] (1934) 51 C.L.R. 217.

[56a] Voumard, *The Sale of Land* (1965) 540; Helmore, *Law of Real Property* (1961) 340. But see, Fox, *Transfer of Land Act* (1957) 42.

[56b] But see *Jonray (Sydney) Pty Ltd v. Partridge Bros. Pty Ltd, Moore and Anor.* [1969] 1 N.S.W.R. 621.

[57] [1948] 1 D.L.R. 405.

[58] Land Titles Act, R.S.A. 1942.

[59] [1947] 4 D.L.R. 612.

[60] The learned judge said 'it is the existence of the Pike title and not its duration as a title that is important' *Ibid.* 623.

[61] It is not sufficiently clear however, whether the learned judge meant that there was no need for a transferee to have actually dealt with a registered proprietor. This is because his judgment is equally consistent with the view that if dealing with a registered proprietor is a prerequisite to obtaining an indefeasible title then the registration of Pike's transfer operated retrospectively to make him a registered proprietor when Sheen took a transfer from him.

In an appeal to the Appellate Division, Harvey C.J.A. gave the following reply to the plaintiff's contention that Sheen and the Trading Co. were required to deal with a registered proprietor before an indefeasible title could arise:[62]

> [t]his seems to assume that it is the physical document of title rather than the records of the Land Titles Office that is the important matter. Those records showed that the registered title was in the name of Essery subject to a mortgage. The production of the transfer from him to the Registrar would result in a certificate of title in Pike's name subject to the mortgage and a transfer from Pike to Sheen would result in a certificate of title in his name but there was a mortgage to be discharged, purchase-price to be paid and advances to be made by the new mortgagee and it was a natural, convenient and apparently common method of real estate transactions that the delivery of the documents and the filing of them and the payment of the moneys should be contemporaneous, and the fact that due to work in the Land Titles Office or for any other reason, the certificates could not be prepared at once is not a matter of substance. The land titles records did disclose that upon the documents being registered the titles would be recorded as was done. The filing of the documents fixes the time of the registration regardless of the time the physical effort required to prepare the evidence in the way of certificate is accomplished.

The learned judge purported to rely on *Gibbs v. Messer*[6] for his decision. However, unlike Dixon J. in *Clements v. Ellis*,[30] he did not think that the transferor had to be actually registered as a proprietor at the time the transaction was made. This approach has its merits for it reflects the fact that the office procedure for registering transfers will not be able to keep pace with the speed with which titles may change hands. It does not, however, take into account the reason why the *Gibbs v. Messer*[6] opinion emphasised the need to transact on the faith of the register.[63]

(c) REGISTERED VOLUNTEERS

The implication in *Gibbs v. Messer*[6] that registered volunteers do not acquire an indefeasible title is in line with some early authorities. In *Crow v. Campbell*,[64] for instance, Molesworth J. required a volunteer to retransfer his registered title to an administratrix for the benefit of certain beneficiaries. In that case, one Mrs Campbell was registered proprietor of two lots of land under the Transfer of Land Act in her capacity as administratrix of her former deceased husband. The main piece of land in question was Lot 7 which her deceased husband held as tenant. Mrs Campbell purchased this lot from the landlord, the transaction being facilitated by a mortgage of both pieces of land. In pursuance of antenuptial agreement with her second husband, the defendant, Lot 7 was transferred to the latter who then became duly registered proprietor of that

[62] [1948] 1 D.L.R. 405, 411.
[63] See [1891] A.C. 248, 254.
[64] (1884) 10 V.L.R. (E.) 186.

lot. Following a quarrel with the defendant, the plaintiffs, beneficiaries under the administration of the deceased estate, claimed Lot 7 from him.

Molesworth J. held that the ante-nuptial agreement contravened the Statute of Frauds and was void and that there was no consideration for the transfer. Although the defendant had no notice that Mrs Campbell held the land only in her capacity as an administratrix, the learned judge said that he should have made enquiries to ascertain how she held the land. He was, in the circumstances, a mere volunteer and as such, in the learned judge's opinion, he would not get the protection of the key section of the statute. This case thus provides some authority for the proposition that the key section of the statute is qualified by the notice section, and that the latter does not exempt a volunteer from the obligation to make enquiries before he accepts a transfer from a registered proprietor. More generally, it provides support for the wider proposition that a registered volunteer gets only a defeasible title.

Molesworth J. again took the same stand in *Colechin v. Wade*.[65] The defendant brought his land in Carlton under the Victorian Transfer of Land Act but had it registered in his infant son's name. About a year later, he contracted to sell the land to the plaintiff. The plaintiff refused to accept the transfer when the defendant purported to execute it in his capacity as the son's guardian. The plaintiff then brought an action for specific performance on the ground that the issue of the certificate of title to the son was voluntary and therefore fraudulent and void as against him under 27 *Eliz. C.* 4 (1585). If the transfer had been made to the son at general law it would have been void under that statute even though the plaintiff had notice when he contracted to purchase the land from the defendant. The fact that the land was brought under the protection of the Transfer of Land Act did not, in Molesworth J.'s opinion, make a difference. As the learned judge said, 'the language of protection to proprietors was intended for real purchasers under the Act and persons dealing with them, not to sons taking presents from their fathers'.[66] In these cases, the registered volunteer has been held to be no more than a person holding the title on a resulting trust for the transferor's creditors.

Crow v. Campbell[64] and *Colechin v. Wade*[65] were respectively concerned with the right of beneficiaries to trace trust property into the hands of a volunteer and transfers in fraud of creditors. That registered volunteers have been discriminated even in other cases may be seen in *Hamilton v. Iredale*,[67] a case concerning the registration of title to land belonging to another party but erroneously described as belonging to the applicant. Walker J. said that if the case were one of 'wrong description' within the

[65] (1878) 3 V.L.R. (E.) 266.
[66] *Ibid.* 269.
[67] (1903) 3 S.R. (N.S.W.) 535.

key section of the relevant Torrens statute in New South Wales the error could be rectified as against the registered proprietor or a *volunteer* claiming under him.[68] He also said that a volunteer claiming under a fraudulent registered proprietor will not be protected by the statute. This latter observation is inconsistent with an earlier decision of Boucaut J. in *Biggs v. McEllister.*[69] That case was mainly concerned with the question whether the circumstances of registering the title of the defendants' predecessor amounted to a fraud within the express exception to indefeasibility. One of the arguments put forward by the defendants was that, even if there was such a fraud, registration of their own inherited title would entitle them to protection from the indefeasibility section in the statute. Boucaut J. rejected this argument and held that the indefeasibility section did not protect their title as they were merely *voluntary* transferees from a title acquired through fraud.

These early cases were reviewed by Adam J. in the modern decision in *King v. Smail,*[70] the facts of which squarely raised the question of whether or not a registered volunteer could take his title free of prior equities affecting his transferor's title. The applicant and her husband were joint proprietors of certain land under the Victorian Transfer of Land Act 1954. The husband transferred his half interest in the land to her by way of a gift. A month after the transfer was lodged for registration he entered into a deed of arrangement with the respondent who acted as trustee for his creditors.[71] Shortly after the applicant had become registered as the sole proprietor of the land, the respondent lodged a caveat claiming an equitable interest in the land. Adam J. was of the opinion that registered volunteers would not be entitled to statutory indefeasibility and held that the respondent could set aside the applicant's registration.

His Honour's conclusion on this question was based both on the early Victorian authorities previously discussed and which he found not to be of satisfactory assistance to the issue before him, and on his interpretation of the relevant provisions of the statute. His Honour's latter approach is illuminating. First, he observed that purchasers are specifically referred to in some sections but not in others. Thus the key section does not distinguish volunteers from purchasers but merely provides that 'the registered proprietor' shall have an absolute title subject only to exceptions specifically mentioned in that section. Nor is such a distinction made in all the other sections dealing with the effect of registration except section 44. That section in effect provides that the registered title of a *bona fide* purchaser for value will remain indefeasible even though his transferor became registered proprietor through fraud, error or misdescription. It implies that

[68] *Ibid.* 550.
[69] (1880) 14 S.A.L.R. 86.
[70] [1958] V.R. 273.
[71] *i.e.* under the Bankruptcy Acts 1924-1965 (Cth).

the title of a registered *volunteer* acquired through similar circumstances will not be given statutory indefeasibility.[72] Although nothing in the statute indicates that the relevant sections should be read together, His Honour was of the opinion that this would be the correct approach. In this respect he was clearly influenced by observations by Dixon J. in *Clements v. Ellis*[30] and the Privy Council in *Gibbs v. Messer*[6] to the effect that the key section should not be read in isolation.[73]

Proceeding on this basis, Adam J. observed that the provisions specifically referring to a purchaser in themselves provide justification for the conclusion that volunteers are excluded from the key section. In particular, he pointed out that the notice section would be conferring an illusory immunity from the consequences of notice if its provisions were applicable to registered volunteers. This is because volunteers were subject to equities affecting their predecessor's title regardless of whether they have notice of such equities. His Honour then concluded that volunteers were excluded from the notice section.[74] This means that the key section excludes volunteers since, on the authority of Dixon and McTiernan JJ. in *Clements v. Ellis*[30] and the Privy Council in *Gibbs v. Messer,*[6] the protection given by that section will not be conferred on any registered transferees who do not come within the notice section.

A criticism that has been made of Adam J.'s opinion in *King v. Smail* is that his interpretation of the provisions of the statute is based on a speculation of the object of the statute and is unwarranted in so far as the key section is clear and unambiguous. As Trueman J.A. said in the Canadian case of *McKinnon v. Smith*[75] with reference to a corresponding provision in the Manitoba Real Property Act:—[76]

> [i]ts terms read as they must be in their literal sense being free from ambiguity, make no distinction between purchasers and volunteers, and do include the latter. It is beside the point and outside the province of the Court to seek to construe the provision by speculating on its object and to consider that because purchasers for value should be given protection while volunteers are not entitled to it, the Legislature did not mean to include the latter. The section is not a provision to protect priorities according to rules of equity except in the case of purchaser for value and in good faith, but to establish the conclusiveness of the register by providing that in no case shall a certificate of title be attached except where the owner has got on the register by fraud. The subject matter of the section is conclusiveness of the the certificate of title, with fraud as the one exception.

Be that as it may, however, Adam J.'s opinion may be supported by reference to policy considerations. As Baalman observed,[77]

[72] See also, sections 52 and 110, Transfer of Land Act 1958.
[73] *Supra* but see, Baalman, *op. cit.* 176-7.
[74] [1958] V.R. 273, 277-8.
[75] [1925] 4 D.L.R. 262.
[76] *Ibid.* 306-7.
[77] Baalman, *The Singapore Torrens System* 86.

> [t]he Torrens System of Land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him.

This consideration could easily be the rationale for excluding registered volunteers from the protection given by the key section of the Torrens statute. Moreover, highly undesirable practices might result if a registered volunteer was given such protection. An embarrassed debtor, for example, may defeat his creditors by merely transferring his registered title to some innocent volunteer. This consideration was taken into account by the Supreme Court in *Biggs v. McEllister*[78] when it gave a wide meaning to the word 'fraud' in a section corresponding to the notice section of the Victorian Torrens statute.

Thus, by the time the Privy Council reconsidered the concept of indefeasibility in *Frazer v. Walker*,[5] cases from *Gibbs v. Messer*[6] have clearly shown that there were at least three material aspects of the theory of deferred indefeasibility. Even though most of these cases were concerned with the immediate effect of registering void instruments, there were clear authoritative opinions that a registered title is still defeasible notwithstanding that registration was preceded by a valid transfer if the registered transferee was a volunteer or if he failed to transact on the faith of the register. The main basis for this view, as seen from the preceding discussion, is that the relevant provisions of the Torrens statute must be read together and, in particular, that the operation of the key section is qualified by the provisions in the notice section. An authoritative pronouncement from the Privy Council opinion in *Frazer v. Walker*[5] was, therefore, of great significance to the state of the law up to 1968 in so far as clarification of these major points was evidently called for.

FRAZER v. WALKER[79]

The material facts of the case may be summarized as follows: Frazer and his wife were joint registered proprietors of a farm in Auckland. The wife borrowed £3,000 from the Radomskis and, as security for the loan, mortgaged the farm to them. She forged her husband's signature to the mortgage which was then duly registered. When the wife failed to repay the loan, the Radomskis, in exercise of their powers of sale, transferred the farm to Walker who then registered the transfer. Walker subsequently brought proceedings for possession of the farm. Both the Radomskis and Walker had acted in good faith at the material time and had no knowledge of the wife's forgery. When Frazer realised what had happened to his title,

[78] (1880) 14 S.A.L.R. 86, 116.
[79] [1967] 1 A.C. 569.

he sought a declaration that his and his wife's name should be restored as registered proprietors free of the forged mortgage. The trial court held that Walker had in the circumstances obtained an indefeasible interest and the Court of Appeal upheld the decision on this ground.[80]

When the case came before the Privy Council the main arguments on behalf of the Frazers were directed at the mortgage registration, it being conceded that their whole case would fall if the appeal failed against the Radomskis.[81] The Board, however, held that the Radomskis' mortgage could not be attacked by the Frazers the moment it was registered. The opinion of the Court, delivered by Lord Wilberforce, contained an expected review of the principles of registration under the Torrens system. Unlike its previous decision in *Gibbs v. Messer*,[6] the relevant provisions of the Torrens statute were discussed in the judgment. However, except for *Gibbs v. Messer*,[6] no Australian case was referred to. The decision has been adequately documented elsewhere[82] and it is proposed to deal only with matters that bear relevance to the preceding discussion.

(a) VOID INSTRUMENTS

With regard to the effect of registering a void instrument of transfer, the Board rejected the contention made on behalf of the Frazers to the effect that the wife's forgery resulted in a nullity and that registration would be ineffective to vest and to divest title. The Board's short reply to this was to emphasise that 'It is in fact the registration and not its antecedents which vests and divests title.'[83] In answer to the further contention that the registered proprietor against adverse claims, the Board said,[84]

> [e]ven if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry . . . registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise.

The rights of a third party had intervened in this case so that it was unnecessary for the Board to express its opinion on the consequences attached to the registration of a void transfer. The Board, however, saw this case as an opportune time to restate its attitude on the matter in the light of the cases that had been decided since its opinion in *Gibbs v. Messer*.[6] After briefly considering the relevant provisions of the New Zealand statute, the Board discussed *Assets Co. Ltd v. Mere Roihi*[43] and the majority opinion in *Boyd v. Mayor of Wellington*[26] and then said:[85]

[80] [1966] N.Z.L.R. 331.
[81] [1967] 1 A.C. 569, 586.
[82] See, *e.g.*, Note Jacobson, 'Indefeasibility of Title'. (1968) 6 *Sydney Law Review* 73; Taylor, 'Scotching *Frazer v. Walker*' (1970) 44 *Australian Law Journal* 248.
[83] [1967] 1 A.C. 569, 580.
[84] *Ibid.* 579-80.
[85] *Ibid.* 584.

> [t]he decision in *Boyd v. Mayor, Etc., of Wellington* . . . has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the *Assests Co.* case, the indefeasibility of the title of registered proprietors derived from void instruments generally.
>
> Their lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act, 1952, which they have examined. They consider that *Boyd's* case was rightly decided and that the ratio of the decision 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.

After this case there was little doubt left, therefore, that the registration of void transfers not only operates to vest and divest a title; it also immediately confers the quality of indefeasibility on the registered proprietors' title. The first and main aspect of the theory of deferred indefeasibility can no longer be maintained in New Zealand after such an unequivocal pronouncement from the Board.

However, whilst this may be true with regard to the law in New Zealand, certain features of the *Frazer v. Walker*[5] opinion raise the question whether it could be regarded as the final declaration of the law on this point in Australia. First, *Gibbs v. Messer*[6] was the only Australian case mentioned in the opinion. The judgments in *Clements v. Ellis*[30] were referred to in the arguments before the Board but not cited in the opinion. This omission is strange since contrary views to those expressed by the Board were maintained in that case and Barwick C.J., a member of the Board, must have been aware that *Clements v. Ellis*[30] is a leading authority in Australia. In the circumstances, therefore, *Clements v. Ellis*[30] remained technically good law in Australia. As Barwick C.J. said in *Jacob v. Utah Construction and Engineering Pty Ltd*,[86]

> it is not . . . for a Supreme Court of a State to decide that a decision of this Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with the reasoning of the Judicial Committee [of the Privy Council] in a subsequent case. If the decision of this Court is to be overruled it must be by the Judicial Committee, or by this Court itself. It cannot be treated by a Supreme Court as if it were overruled.

Second, even on its merits, the Board's opinion in favour of immediate indefeasibility is not entirely satisfactory. Its analysis of the relevant statutory provisions is brief, being in the main a short paraphrase of the provisions with short comments on how they operate. The discussion of cases is limited to three major cases and is equally brief, no reference being made to the views in favour of the opposing theory. Nor does the

[86] (1966) 116 C.L.R. 200, 207. Compare *Mayer v. Coe* [1968] 2 N.S.W.R. 747; *Ratcliffe v. Watters* [1969] 2 N.S.W.R. 146; *Schultz v. Corwill Properties Pty Ltd* [1969] 2 N.S.W.R. 576.

Board rely on any policy consideration to support its preference for the theory of immediate indefeasibility.

(b) DEALING WITH THE REGISTERED PROPRIETOR

With regard to the need to deal with a registered proprietor, the Radomskis had only in fact dealt with Frazer's wife. They relied partly on her forgery so that they could not have dealt with Frazer, the other registered proprietor. The absence of any reference to this aspect of the case may thus be taken to mean that *Frazer v. Walker*,[5] whatever its authority in Australia, has no effect on the question whether indefeasibility will be attached to the title of a transferee who fails to deal with someone shown on the register to be the registered proprietor.

It may be that the Board's specific finding to the effect that the Radomskis' registered incumbrance is valid and indefeasible is an implicit rejection of the view that a dealing with the registered proprietor of the interest in question is a prerequisite for indefeasibility. Some support for this conclusion may be derived from a passage where the Board's earlier decision in *Gibbs v. Messer*[6] was distinguished as being confined to its own peculiar facts and being founded on a distinction between purchasing from a fictitious person and from a real registered proprietor.[87] In the Board's opinion, that decision would have 'no application as regards adverse claims made against a registered proprietor, such as came before the courts in *Assets Co. Ltd. v. Mere Roihi,* in *Boyd v. Mayor Etc., of Wellington* and in the present case'.[88] In other words, the Board in *Frazer v. Walker*[5] appeared to take the view that references to the need to deal with a registered proprietor made in its earlier decision were merely intended to emphasise the futility of transacting with a fictitious registered proprietor.

It is respectfully submitted, however, that this view of *Gibbs v. Messer*[6] is not justified by what was said in that case.[89] Moreover, the need to deal with a registered proprietor as a prerequisite to an indefeasible title was fully analysed and considered in both the Board's opinion in *Gibbs v. Messer*[6] and Dixon J.'s exposition in *Clements v. Ellis*.[30] Something more than a vague inference would be required to uproot the principle they have established.

The Board in *Frazer v. Walker*[5] implied that a registered transferee's title would be defeasible if registration was brought about by a forged transfer from a non-existent registered proprietor and that *Gibbs v. Messer*[6] was still good authority for this proposition. It is respectfully submitted, however, that this attempt to put *Gibbs v. Messer*[6] on the shelf is highly unsatisfactory in so far as it is based on an irrational and

[87] [1967] 1 A.C. 569, 584.
[88] *Ibid.*
[89] *Supra.*

invalid distinction of a transfer, on the one hand, forged by a non-existing person and, on the other forged by a living person. It conceals the fact that there is a forged transfer by a living person in both situations. If a forged transfer will nevertheless operate to vest an indefeasible title in a registered transferee, it is nonsensical to say that a different result is obtained if the forgery is in the name of a non-existing person.[90]

(c) REGISTERED VOLUNTEERS

The position of registered volunteers was not considered by the Board. On the facts of the case before the Board, the Radomskis were not in any sense volunteers so that the question whether the title of a registered volunteer would be indefeasible did not really arise for consideration. The decisions discriminating registered volunteers therefore remained unopposed to the Board's decision in *Frazer v. Walker*.[5]

For the above reasons there is room to contend that *Frazer v. Walker*[5] had not settled the law in favour of the theory of immediate indefeasibility in Australia. In the few cases decided after the Board handed down its opinion in *Frazer v. Walker*,[5] the courts either followed that case or felt reluctant to depart from it because of its authority in the judicial hierarchy.[91] This was a clear indication that, at least so far as the first aspect of the deferred theory was concerned, the Australian courts were prepared to recognize that it had been put to its resting place in practice if not in theory. The two remaining aspects of the theory apparently remained unshaken. The High Court did not have to wait long for an opportunity to review the law. This came up in the case of *Breskvar v. Wall*,[92] some four years after *Frazer v. Walker*[5] was handed down.

BRESKVAR v. WALL[92]

The appellants were joint registered proprietors of certain unencumbered land in a suburb of Brisbane. In return for a loan, they signed a memorandum of transfer of the whole of their land to Petrie, the second respondent. The transferee's name was not inserted in the memorandum at the date of execution, 5 March, 1968. This was a significant fact as the transfer was thereby rendered void and inoperative by section 53 (5) of the Stamp Act 1894 (Qld). In September 1968, the second respondent fraudulently inserted in the transfer his grandson's name, Wall, the first respondent. The memorandum was then duly registered on 15 October 1968. About two weeks later, the second respondent, purporting to act as agent for the first respondent, contracted to sell the land to one Alban Pty Ltd, the third respondent. A memorandum of transfer was then

[90] See also, Sackville & Neave, *Property Law: Case and Materials* (1971) 455.

[91] *Mayer v. Coe* (1968) 88 W.N. (N.S.W.) 549; *Ratcliffe v. Watters* [1969] 2 N.S.W.R. 146; *Schultz v. Corwill Properties Pty Ltd* [1969] 2 N.S.W.R. 576. See *James v. Registrar-General* [1968] 1 N.S.W.R. 310.

[92] (1972) 46 A.L.J.R. 68 Noted, (1972) 46 *Australian Law Journal* 153, 199.

executed on 7 November 1968 in favour of the third respondent which had, at all material times, acted *bona fide* without notice of the fraud. The appellants discovered the state of affairs of their title in December 1968 and immediately lodged a caveat with the Registrar-General. On 9 January 1969, the third respondent lodged their transfer for registration but found that the appellants' caveat prevented it being effected.

The appellants then brought an action in the Supreme Court of Queensland for a cancellation of the first respondent's registration and alteration of the register accordingly and, in the alternative, they sought an order that the first respondent retransfer the land back to them and that their interest should be registered in priority to the interest created in favour of the third respondent. Their contention was that the first transfer was rendered void by Petrie's fraud and by section 53(5) of the Stamp Act 1894 (Qld). In effect, the argument was that Wall never had any title and could pass none to Alban. The first issue, therefore, was whether the appellants, as contended by counsel on their behalf, remained registered proprietors *in law* at all material times. If they were still registered proprietors *in law* then their title would be indefeasible as against Alban's unregistered interest. On the other hand, if the appellants had been divested of their title to the land upon Wall's registration, their interest, whether an equity or an equitable interest, would be a mere unregistered interest competing with Alban's unregistered interest. The second issue would then arise as to whether the appellants' interest would be postponed in priority to Alban's because of their conduct in arming Petrie with the means of placing Wall on the register.

The Supreme Court of Queensland, Hart J., found against the appellants on both questions and ordered them to remove their caveat. The appellants then appealed to the High Court which affirmed the decision of the Court below.

(a) VOID INSTRUMENTS

The High Court unanimously rejected the appellants' first contention and held that they ceased to be the registered proprietors when Wall's name was on the register. The Court relied on *Frazer v. Walker*[5] for the proposition that registration under the Torrens system has a vesting and divesting effect on land titles even though preceded by void transfers. Except for McTiernan J., however, none of the judges discussed the contrary proposition put forward by Salmond J. in *Boyd v. Mayor, Etc. of Wellington*[26] and approved as correct by Dixon J. in *Clements v. Ellis*.[30] It was briefly mentioned by Menzies, Walsh and Gibbs JJ. but they dismissed it by merely saying that the correct principle, in their opinion, was that established by the Board in *Frazer v. Walker*.[5] Barwick C.J. did not refer to it at all but he was prepared to declare that the decision in

Clements v. Ellis was not correctly decided.[93] On the other hand, McTiernan J., after discussing Dixon J.'s decision in *Clements v. Ellis*,[30] reaffirmed his own view in that case, *viz*, that the registered interest in question was 'always apparent on the face of the register' at the material time.[94] Thus, without necessarily disagreeing, he confined Dixon J.'s decision to a case where the interest claimed was on the register at the material time. The present case was distinguished on the ground that Wall, not the appellants, was the only registered proprietor 'at all material times'.[95]

None of the judges were troubled with the nullifying effect of section 53 (5) of the Stamp Act 1894 (Qld). Barwick C.J. said that the Torrens system was 'not a system of registration of title but a system of title by registration'[96] so that the reason for which the instrument of transfer was void was of no consequence. This is analytically correct since the root of title in the Torrens system lies not in the transfer but in registration.[96a] Menzies J. offered a slightly different explanation. He said that the breach of the provision was only in its execution and not in use. As such, he thought that the nullifying effect of the provision would not affect Wall's title.[97] This fascinating distinction, however, robs section 53 (5) of its total efficacy whilst it also overemphasises the nature of a transfer.

Thus, although the judges in the High Court did not enter into a lengthy discussion on the question, they were of the unanimous opinion that registration operated to vest and divest titles even though brought about by void transfers. This is regardless of the cause of the nullity. Therefore, in so far as Dixon J.'s opinion in *Clements v. Ellis*[30] is to the contrary, it is to that extent no longer good law in Australia. This much is clear from the combined effect of *Frazer v. Walker*[5] and *Breskvar v. Wall*.[92]

The court's decision that Wall had been effectively vested with title to the appellants' land might in other circumstances have raised the controversial question whether his title was defeasible by the appellants, seeing as the instrument of transfer was void. In this case, however, the trial court had found as a fact that Petrie was fraudulent 'in that he was attempting to cheat (the appellants) out of the major part of their interest in the land'.[98] More importantly, the court found that Petrie was throughout acting as Wall's agent so that Wall's title was affected by the fraud. This finding meant that Wall's title was, on all the authorities, defeasible

[93] (1972) 46 A.L.J.R. 68, 71.
[94] *Ibid.* 73.
[95] *Ibid.*
[96] *Ibid.* 70.
[96a] See, *e.g.*, section 40, Transfer of Land Act 1958, generally referred to as the vesting section.
[97] (1972) 46 A.L.J.R. 68, 75.
[98] *Ibid.* 72.

by the appellants.[99] The fact situation, therefore, did not require any discussion of the question in controversy. Since a third party, Alban, had acquired a transfer from Wall, and since their transfer remained unregistered, the only important issue was one of priority in the competition between Alban's and the appellant's unregistered interests.

Of the seven judges in the High Court, only Gibbs and Walsh JJ. recognized that it was irrelevant to the issues before the court to consider the controversy as to what is meant by the indefeasibility of title. As Gibbs J. observed,[99a]

> [t]here is no doubt on any view of the law that Wall did not obtain an indefeasible title upon the registration of the transfer to him . . . The present case therefore does not directly give rise to the question whether a person who without fraud but by virtue of a void document becomes registered as proprietor of land under the *Real Property Acts* obtains on registration an indefeasible title.

For this reason, he found it unnecessary to express his view on the controversial question. Walsh J. noted that the Board's opinion in *Frazer v. Walker*[5] was inconsistent with Dixon J.'s decision in *Clements v. Ellis*[30] but he stopped short of expressing his own view on this conflict and gave no opinion as to what he understood to be the preferrable concept of an indefeasible title.[1]

Amongst the remaining judges, Menzies J. took the opportunity to express the following opinion as to the effect of *Frazer v. Walker*[5] on Australian law:[2]

> *Frazer v. Walker* is important here in establishing that, if and to the extent that earlier decisions were to the effect that an indefeasible title cannot be acquired by the registration of a void instrument, they have lost their authority. It must now be recognised that, in the absence of fraud on the part of a transferee, or some other statutory ground of exception, an indefeasible title can be acquired by virtue of a void transfer.

The learned judge thus showed that he supported the theory of immediate indefeasibility in so far as void instruments were concerned. This was notwithstanding that he appreciated that the above observations were *obiter dicta* and recognised that the case before him was distinguishable from *Frazer v. Walker*[5] in that Wall was affected with fraud and the main issue concerned priority as between two conflicting unregistered interests.[3]

Not unexpectedly, Barwick C.J. too voiced his opinion in favour of immediate indefeasibility. The Chief Justice recognized that Wall's title

[99] *Assets Co. Ltd v. Mere Roihi* [1905] A.C. 176; *Loke Yew v. Port Swettenham Rubber Co. Ltd* [1913] A.C. 491. *Latec Investments Ltd v. Hotel Terrigal Pty Ltd* (1965) 113 C.L.R. 265.

[99a] *Ibid.* 81.

[1] *Ibid.* 78.

[2] *Ibid.* 75.

[3] *Ibid.*

came within one of the statutory exceptions to indefeasibility but went on to say that, apart from such and other exceptions provided for in the statute,[4]

> the conclusiveness of the certificate of title is definitive of the title of the registered proprietor. That is to say, in the jargon which has had currency, there is immediate indefeasibility of title by the registration of the proprietor named in the register.

He came to this conclusion after he had outlined the relevant sections of the Torrens statute in Queensland and observed that they clearly made a registered title conclusive as to their particulars. Without discussing established authorities to the contrary, the learned Chief Justice declared that contrary opinions could not now be maintained in the light of *Assets Co. Ltd v. Mere Hoihi*[43] and *Frazer v. Walker*.[5] Thus, by mere *obiter*, both Barwick C.J. and Menzies J. came out in support of the theory of immediate indefeasibility without feeling the need either to give a detailed consideration of the full implications of such a view or to enter into a discussion of the contrary arguments and cases established in the cases since *Gibbs v. Messer*.[6]

McTiernan J.'s decision presents some difficulty. Although the learned judge adopted certain passages from the Board's opinion in *Frazer v. Walker*[5] relating to the indefeasibility of title derived from void transfers, a careful analysis of his decision shows that nothing in His Honour's decision may be taken as a clear support for the immediate theory. The first part of His Honour's decision dealt with the main contention put forward by counsel for the appellants. This was to the effect that, in consequence of the fraud affecting Wall, they (the appellants) always retained the legal title to their land so that Wall never had any title and could have passed nothing to Alban. With regard to this contention, His Honour thought that Wall's title was defeasible because he (Wall) was affected by fraud.[6] His Honour added that this element of fraud was irrelevant to the question whether Wall obtained 'an indefeasible title . . . as regards a third party dealing with (Wall) on the faith of the register'.[7] In other words, he was saying that since Wall appeared on the register, purchasers from him could regard his title as indefeasible.[8] This observation itself is, however, quite irrelevant to the issues before the Court and to the controversy. In any event, when the learned judge referred to 'an indefeasible title' he could only mean that Wall became effectively vested with the appellants' title upon being registered as the registered proprietor and that the fraud did not alter this consequence of registration but only

[4] *Ibid.* 70.
[5] *Ibid.*
[6] *Ibid.* 72.
[7] *Ibid.*
[8] *Ibid.*

rendered Wall's title defeasible by the appellants. *Frazer v. Walker*[5] was relied on for this conclusion.

His Honour went on to indicate the specific passage in the *Frazer v. Walker*[5] opinion upon which he placed reliance. This was the passage where the Board approved of the majority decision in *Boyd v. Mayor of Wellington*[26] and its earlier opinion in *Assets Co. Ltd v. Mere Roihi*[13] in favour of the theory of immediate indefeasibility.[9] In the same passage, the Board emphasised the necessary implication of that theory to the effect that registration operated to vest and divest title. This passage was also relied on to support His Honour's rejection of the appellants' alternative contention put forward by counsel and based on the nullifying provision in the Stamp Act 1894 (Qld). His Honour said that the cited passage 'with respect to the indefeasibility of the title of registered proprietors derived from void instruments' was equally an answer to this alternative contention.[10] It may be that the learned judge's reliance on this passage could possibly be taken as an inferrential adoption of the Board's opinion in support of the theory of immediate indefeasibility. Having regard to the context in which it was cited, however, it seems more likely that he failed to appreciate the distinction between the vesting effect of registration on the one hand, and the quality of a registered title on the other. In any event, nowhere in his judgment did he specifically indicate that he would prefer the theory of immediate indefeasibility.

Windeyer J's. judgment, presented in two paragraphs, is something of a mystery. His Honour said that the Board's opinion in *Frazer v. Walker*[5] 'recognises that the registered proprietor has the legal property in the land, subject only to equities and such interests as the Act expressly preserves'.[11] It is not clear what the learned judge meant in this passage. If he meant that Wall's registered title was defeasible because of the fraud then he has not necessarily shown support for the theory of immediate indefeasibility. On the other hand, if he meant that Wall's title was indefeasible, he ignored a very material fact in the case before him. In either case His Honour cited *Frazer v. Walker*[5] out of context. His judgment, therefore is neither here nor there so far as support for immediate indefeasibility is concerned.

In the result, only two judges, Barwick C.J. and Menzies J., clearly favoured the theory of immediate indefeasibility. Two other judges, Owen J., who did not deliver a judgment, and Windeyer J., who gave a very short judgment, said that they concurred in Barwick C.J.'s decision. As seen above, however, references by the Chief Justice to the theory were mere *obiter* and do not strictly form part of his decision. It is thus not entirely clear whether, in the circumstances, Owen and Windeyer JJ.

[9] *Supra* n. 85.
[10] (1972) 46 A.L.J.R. 68, 73.
[11] *Ibid.* 76.

shared his preference for the theory. Of the remaining three judges, McTiernan J.'s support of the theory is doubtful whilst Walsh and Gibbs JJ. made no reference to it at all. What is significant, however, is that none of the judges were prepared to show any support for the theory of deferred indefeasibility.

(b) DEALING WITH THE REGISTERED PROPRIETOR

Except Barwick C.J., none of the judges referred to Dixon J.'s authoritative exposition in *Clements v. Ellis*[30] in support of the proposition that dealing with a registered proprietor is a condition precedent to indefeasibility of title. This omission was not unexpected since the facts of the case did not require any discussion of that proposition. Barwick C.J., however, took the opportunity to indicate that, in his opinion, a transferee's title was indefeasible from the time he became registered as a proprietor even though he had not dealt with a previous registered proprietor at the time of the transaction.

The learned Chief Justice observed that the respondent in *Clements v. Ellis*[30] was in the position of a fraudulently deregistered proprietor whose claim for reinstatement on the register did not come within any of the statutory exceptions to indefeasibility. He then gave the following reasons why he thought the appellant in that case should have succeeded:[12]

> [a] person in the position of that appellant had no need to call in aid of s. 179 of the *Transfer of Land Act* 1915 of the State of Victoria or its counterpart in the legislation of another 'Torrens' Act. He was a registered proprietor: he was not merely in the situation of a person contracting or dealing with or taking or proposing to take a transfer from a registered proprietor nor did he need to rely on having dealt with a registered proprietor.

Although Barwick C.J. did not expressly identify Dixon J.'s decision, the above passage was clearly a rejection of Dixon J.'s view that a registered transferee needs to deal with a previous registered proprietor before his registered title could attain the quality of indefeasibility. The learned Chief Justice made it clear that, in his opinion, the relevant point of time to consider the quality of a title is from its registration and not the time of the dealing as suggested by Dixon J. He relied on the Board's opinion in *Frazer v. Walker*[5] and *Assets Co Ltd v. Mere Roihi*[43] and 'the provisions of the Victorian Act' to support the above view.[13]

Barwick C.J.'s observations on this point, however, are again merely *obiter*. In any event, they are unaccompanied by any discussion of either Dixon J.'s decision in *Clements v. Ellis*[30] or of the notice section. He said it was 'unnecessary' to discuss that section for the purpose of deciding the case before him.[14] This is a matter for regret since Dixon J.'s decision was

[12] *Ibid.* 70.
[13] *Ibid.*
[14] *Ibid.* 70-1.

based on a detailed consideration of that section. Technically, therefore, Dixon J.'s view is still good law. Whether the courts will now be prepared to accept it is another matter.

(c) REGISTERED VOLUNTEERS

Of the two judges who expressly favoured the theory of immediate indefeasibility, neither of them explicitly made any distinction between purchasers and volunteers or in any way referred to or discriminated against registered volunteers in their adoption of the theory. As seen above, the Board's opinion in *Frazer v. Walker*[5] in support of immediate indefeasibility which Barwick C.J. and Menzies J. said was also a correct statement of the law in Australia, was wide enough to apply equally to registered volunteers. It could thus be said that both *Breskvar v. Wall*[92] and *Frazer v. Walker*[5] provide authority for the view that all transferees, regardless of whether they are *bona fide* purchasers for value or mere volunteers, obtain an indefeasible title upon registration of their transfers.

On the other hand, it could again be argued that something more than such a vague inference would be required before one could confidently ignore the line of established cases in favour of discriminating against registered volunteers. In particular, Adam J.'s learned exposition of this aspect of the theory of deferred indefeasibility in *King v. Smail*[70] cannot be boldly said to have now become outdated law by such inference. Moreover, neither the Board's opinion in *Frazer v. Walker*[5] nor the decisions of Barwick C.J. and Menzies J. in *Breskvar v. Wall*[92] relied on a single section of the relevant Torrens statute as being the key section. In fact both Barwick C.J. in *Breskvar v. Wall*[92] and the Board in *Frazer v. Walker*[5] referred to several sections in the respective Torrens statutes as providing the basis of the theory of immediate indefeasibility. In so far as Adam J.'s decision in *King v. Smail*[70] also based his opinion on a reading of various sections of the Victorian Torrens statute his approach is at least not in conflict with that taken in the two superior courts. It should also be remembered that in neither *Frazer v. Walker*[5] nor *Breskvar v. Wall*[92] was there any detailed exposition of this aspect of the law and, in any event, the point was totally irrelevant in both cases.

CONCLUSIONS

What is clear from the High Court decision in *Breskvar v. Wall*[92] is that all the judges in that court reinforced the *Frazer v. Walker*[5] opinion that registration operates to vest and divest titles whether or not derived from valid transfers. This point was given careful consideration and forms part of the *rationes decidendi* of the case. In so far as previous authorities have been to the contrary they are to that extent no longer good law.

What is also clear from the *Breskvar v. Wall*[92] decision is that a technical majority of the judges in the High Court also expressed support of the *Frazer v. Walker*[5] opinion in favour of the theory of immediate indefeasibility. However, whether this will mean the end of the contrary theory that the registration of void transfers will bring about only a defeasible title may remain a matter of some doubt. This is largely because only two judges expressly supported the *Frazer v. Walker*[5] opinion and, in any event, their observations were made *obiter*. Moreover, authorities to the contrary were not analysed and there was no detailed discussion of the provisions of the Torrens statute relating to the effect of registration. On the other hand, such observations are likely to have a significant impact on the practice of the lower courts. When account is also taken of the *Frazer v. Walker*[5] opinion in this regard, it seems unlikely for a Supreme Court of a State to depart from the general tenor of opinion expressed in the High Court. A Supreme Court will no doubt be mindful that any of its decisions in support of the contrary theory will likely be the subject of appeal to the High Court. When this factor is taken into account it may be that supporters of that theory may now have to resile from a view that has figured so prominently in Australia since the *Gibbs v. Messer*[6] opinion.

It seems likely that the *Breskvar v. Wall*[92] decision has also rendered untenable the view that dealing with a registered proprietor is a condition precedent to indefeasibility. Barwick C.J.'s view may be mere *obiter* but it will probably be regarded by the legal profession as a formal pronouncement by the present High Court that it will not be prepared to accept this aspect of the theory of deferred indefeasibility.[15] This is largely because, ever since Dixon J. highlighted this point in *Clements v. Ellis*,[30] the legal profession has found difficulty in observing it in practice and has, apparently, ignored it altogether.[16] The Chief Justice's opinion will thus be given great weight if a Supreme Court should have occasion to decide this very point in the future.

Finally, Barwick C.J.'s unqualified extension of the concept of immediate indefeasibility to cases where a transferee has not dealt with the registered proprietor may now raise doubt as to whether only defeasible titles will continue to be conferred on registered volunteers. Nothing in *Breskvar v. Wall*[92] touches on this point and the authorities in support of this dis-

[15] The notice section may thus be regarded as an afterthought and meant only to clarify the meaning of fraud in the key section: Baalman, *Commentaries on the Torrens System in New South Wales* (1951) 159. But see McCall, *supra*, 350-1, where the learned writer suggested that a purchaser who fails to deal with the registered proprietor may not be exempted from the effect of notice in which event his title becomes infected with fraud within the exception in the key section.

[16] See P. R. Adams, 'The Torrens System' (1948-50) 1 *University of Western Australia Law Review* 11; McCall, 'Indefeasibility Re-examined' (1970) 9 *University of Western Australia Law Review* 324, 349-51.

crimination remain unassailed. In view of the Chief Justice's strong support for the theory of immediate indefeasibility, however, it may be that these authorities may have to be reviewed. Perhaps it is time for the courts to take a hard look at the question whether there is any real merit in discriminating against registered volunteers.