R.C.
CET.6.6

Judgment 27, 1966

In the Privy Council.

No. 12 of 1966

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

ALAN FREDERICK FRAZER — Appellant

AND

DOUGLAS HAMILTON WALKER — First Respondent

AND

EDWARD RADOMSKI AND NELLIE RADOMSKI — Second Respondents

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In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

ALAN FREDERICK FRAZER — Appellant

AND

DOUGLAS HAMILTON WALKER — First Respondent

AND

EDWARD RADOMSKI AND NELLIE RADOMSKI — Second Respondents

RECORD OF PROCEEDINGS

In the Supreme Court of New Zealand

1. Statement of Claim (by First Respondent)

1. STATEMENT OF CLAIM

The Plaintiff by his Solicitor says as follows:—

1. THAT he is registered as proprietor of an estate in fee simple in that piece of land containing TEN ACRES (10) TWENTY-ONE DECIMAL EIGHT PERCHES (21.8) more or less being portions of Clendon's Grant and being all the land contained in Certificate of Title Limited as to parcels Volume 1377 Folio 23 (North Auckland Registry) (hereinafter referred to as "the said land").

2. THAT under and by virtue of an agreement to lease bearing date the 17th December 1963 and made between the Plaintiff as Lessor of the one part and the Defendant as Lessee of the other part the Plaintiff did agree to let and the Defendant did agree to take the said land at the rental and upon and subject to the terms and conditions contained and implied in the said agreement to lease.

3. THAT the said agreement to lease provides that the Defendant is to pay the Plaintiff by way of rent the sum of THIRTY-FOUR POUNDS THIRTEEN SHILLINGS AND FOURPENCE (£34. 13. 4d) per month in advance and that the first of such monthly payments was to have been made on the 16th December 1963.

4. That the Plaintiff has not received any such payments of rent nor any other monies from the Defendant.

5. THAT the said agreement to lease was terminated by a notice

In the Supreme Court of New Zealand

1. Statement of Claim (by First Respondent) *continued*

bearing date the 20th January 1964 which was served on the Defendant on the 21st January 1964; that such notice expired on the 16th March 1964.

6. THAT the Defendant has failed to quit and deliver up possession of the said land to the Plaintiff.

Wherefore the Plaintiff claims:—

(1) An Order for possession for the said land.

(2) The sum of ONE HUNDRED AND FOUR POUNDS (£104) being the total of rent due under the said agreement to lease on the 16th December 1963, 16th January 1964, and 16th February 1964.

(3) Mesne profits at the rate of £34. 13. 4d from and inclusive of the 16th March 1964, to the date on which vacant possession of the said land shall be given to the Plaintiff.

(4) The costs of and incidental to the Plaintiff.

(5) Such further or other relief as the Honourable Court shall think fit.

(6) Re caveat.

This Statement of Claim is field by Ross George Hamilton Metcalfe, Solicitor for the Plaintiff whose address for service is at the office of Messrs. G. H. & R. G. H. Metcalfe, Solicitors, 802 South British Insurance Building, Shortland Street, Auckland.

2. STATEMENT OF DEFENCE AND COUNTER-CLAIM

In the Supreme Court of New Zealand

2. Statement of Defence and Counter-claim (by Appellant) 15th June, 1964

Monday the 15th day of June 1964

THE DEFENDANT ALAN FREDERICK FRAZER SAYS:—

1. HE admits that the name of the Plaintiff appears on the register of the District Land Registrar at Auckland as registered proprietor of the land described in paragraph 1 of the Statement of Claim herein but denies that the Plaintiff is the true owner of the said land and denies each and every other allegation set forth in the said paragraph.

2. HE denies each and every allegation set forth in paragraph 2 of the Statement of Claim herein.

3. HE denies each and every allegation set forth in paragraph 3 of the Statement of Claim herein.

4. HE denies each and every allegation set forth in paragraph 4 of the Statement of Claim herein.

5. HE denies each and every allegation set forth in paragraph 5 of the Statement of Claim herein.

6. He admits that he has not delivered up possession of the premises to the Plaintiff as alleged in paragraph 6 of the Statement of Claim herein but denies that he is under any obligation to quit and deliver up possession of the same to the Plaintiff.

AND BY WAY OF COUNTER-CLAIM THE SAID ALAN FREDERICK FRAZER SAYS:—

1. FOR some considerable period down to the 16th day of June 1964 was registered as the proprietor in fee simple as joint tenant

with his wife Rhoda Agnes Frazer of a property containing 10 acres 21.8 perches more or less and situated in Kerr's Road, Wiri, and more particularly described as portion of Clendon's Grant and all the land comprised and described in Certificate of Title Volume 1377 Folio 23 Auckland Registry.

2. ON the 16th day of June 1961 a document purporting to be a mortgage of the said land from the registered proprietors thereof was completed in favour of the Second Defendants. The consideration shown in the said mortgage was a principal sum of £3,000. 0. 0. The said document purporting to be a mortgage of the said land was duly entered on the register of the District Land Registrar at Auckland on or about the 21st day of July 1961.

3. THE said Alan Frederick Frazer did not sign the said mortgage and had no knowledge that it was being completed. The signature "A. F. Frazer" upon the said mortgage and the initials "A.F.F." on various parts of the said document were a forgery.

4. IN purported exercise of the powers of sale contained in the said purported mortgage the Second Defendants through the Registrar of the Supreme Court at Auckland offered the said land for sale by auction at which the said Douglas Hamilton Walker was the successful bidder.

5. FOLLOWING the said auction the Second Defendants executed in favour of the said Douglas Hamilton Walker a memorandum of transfer of the said land bearing date the 27th day of November 1962.

6. THE said memorandum of transfer was registered in the register of the District Land Registrar at Auckland on or about the 29th day of November 1962.

7. THE said Douglas Hamilton Walker has commenced action against the said Alan Frederick Frazer for possession of the said property.

8. THE said Alan Frederick Frazer was at all material times and is entitled to the registered interest in the said land which he enjoyed prior to the 16th day of June 1961.

WHEREFORE THE SAID ALAN FREDERICK FRAZER COUNTER-CLAIMS:—

(a) A declaration that his interest in the said land has not been affected by the purported mortgage to the Second Defendants or the sale to the said Douglas Hamilton Walker in purported exercise of the powers of sale therein; and/or

(b) A declaration that the said mortgage was a nullity; and/or

(c) A declaration that he is the beneficial owner of an undivided one-half interest in the said land; and/or

(d) An order directing the District Land Registrar at Auckland to cancel the entries or memorials in the register relating to the said land whereby the Second Defendants were registered as mortgagees and the said Douglas Hamilton Walker was registered as proprietor of the said land and substituting an entry or memorial so as to restore the said land into the name of the said Alan Frederick Frazer and his joint owner.

(e) The costs of and incidental to these proceedings.

In the Supreme Court of New Zealand

2. Statement of Defence and Counter-claim (by Appellant) 15th June, 1964 *continued*

(f) Such further or other relief as to this Honourable Court seems just.

This Statement of Defence and Counter-claim was filed by Stuart Craig Ennor, Solicitor for the said Alan Frederick Frazer, whose address for service is at the offices of Messrs. Glaister Ennor and Kiff, Solicitors, Norwich Union Building, High Street Auckland.

3. STATEMENT OF DEFENCE TO COUNTER-CLAIM

Wednesday the 15th day of July 1964

In the Supreme Court of New Zealand

3. Statement of Defence to Counter-claim (by First Respondent) 15th July, 1964

THE PLAINTIFF DOUGLAS HAMILTON WALKER SAYS:—

1. HE admits the allegation set forth in paragraph 1 of the Statement of Counter-claim herein.

2. THAT with regard to Paragraph 2 of the said Counter-claim the Plaintiff says that on the 16th day of June 1961 a document being a mortgage of the said land from the registered proprietors thereof was completed in favour of the Second Defendants. The consideration shown in the said mortgage was a principal sum of £3,000. 0. 0. The said mortgage document was duly entered on the register of the District Land Registrar at Auckland on or about the 21st day of July 1961.

Save as is hereby expressly admitted the Plaintiff denies each and every the allegations contained in Paragraph 2 of the said Counter-claim.

3. HE denies each and every allegation set forth in paragraph 3 of the Statement of Counter-claim herein.

4. HE admits that in exercise of the power of sale contained in the mortgage which is referred to in the Statement of Counter-claim herein the Second Defendants through the Registrar of the Supreme Court at Auckland offered the land referred to in paragraph 4 of the Statement of Counter-claim herein for sale by auction of which the Plaintiff was the successful bidder **But save as is hereby expressly admitted** the Plaintiff denies each and every the allegations contained in the said Paragraph 4.

5. HE admits the allegations contained in paragraph 5 of the Statement of Counter-claim herein.

6. HE admits the allegations contained in paragraph 6 of the Statement of Counter-claim herein.

7. (a) IN or about the month of December 1962 he commenced an action in the Magistrate's Court at Papakura for possession against the First Defendant and his wife Rhoda Agnes Frazer who was the joint owner with the First Defendant of the said land prior to the Second Defendants exercising their power of sale under the mortgage over the said land as mentioned in paragraph 4 of the Statement of Counter-claim herein in respect of which an Order for possession to take effect on the 15th March 1963 was made in his favour against the First Defendant and his said wife.

(b) THE First Defendant and his said wife made an appeal to the Supreme Court of New Zealand at Auckland against the whole of the judgment given in the Magistrate's Court at Papakura as aforesaid which Appeal was filed in this Court under number M.146/63. The said Appeal was heard and dismissed on the 16th October 1963.

(c) THAT in or about the month of November 1963 he was informed by his own Solicitor, that Mr. R. H. McKay of Auckland Solicitor was then acting for the First Defendant and that the First Defendant alleged that until then the First Defendant had known nothing of the said mortgage, the exercise of the power of sale or all or any of the subsequent proceedings mentioned above and that the First Defendant further alleged that his said wife had forged the First Defendant's signature to the said mortgage.

(d) THAT because of these alleged facts he the Plaintiff offered to make an ex gratia payment of £3,000. 0. 0. to the First Defendant upon and subject to certain conditions which included (inter alia) the First Defendant entering into and executing the agreement to lease which is referred to in the statement of claim herein and the First Defendant renouncing all claims either against the said land or the Plaintiff.

(e) THAT in December 1963 he was informed that Mr. L. I. Murdoch of Messrs. Murdoch, Simpson & Ross, Barristers and Solicitors, Auckland was then acting for the First Defendant and on the 17th day of December 1963 the First Defendant through his Solicitors the said firm of Messrs. Murdoch, Simpson & Ross accepted the said offer by letter bearing date the 17th day of December 1963 with which was enclosed the agreement to lease referred to in the statement of claim filed herein duly signed by the First Defendant.

8. THAT he admits that until execution and/or registration of the Transfer mentioned in Paragraphs 5 and 6 of the said Counter-claim the said Alan Frederick Frazer was entitled to be registered in respect of his interest in the said land jointly with his said wife **But save as is hereby expressly admitted,** he denies each and every the allegations contained in Paragraph 8 of the said Counter-claim.

AND FOR A FURTHER OR ALTERNATIVE DEFENCE the Plaintiff repeats the admissions and denials contained in paragraphs 1-8 hereof and says:—

9. THAT by virtue of the matters referred to in paragraphs 7(a) and 7(b) hereof the claim of the said Alan Frederick Frazer is res judicata. AND FOR A FURTHER OR ALTERNATIVE DEFENCE the Plaintiff repeats the admissions and denials contained in paragraphs 1-9 hereof and says:—

10. THAT by virtue of the matters referred to in paragraphs 7(c) (d) and (e) hereof all matters in dispute between the Plaintiff and the First Defendant were settled.

This Statement of Defence to Counter-claim is filed by Ross George Hamilton, Solicitor for the Plaintiff whose address for service is at the offices of Messrs. G. H. & R. G. H. Metcalfe, Solicitors, 802 South British Insurance Building, Shortland Street, Auckland.

In the Supreme Court of New Zealand

4. Statement of Defence to Counter-claim (by Second Defendants) 20th July, 1964

4. STATEMENT OF DEFENCE TO COUNTER-CLAIM BY SECOND DEFENDANTS

Monday the 20th day of July 1964

THE SECOND DEFENDANTS say:—

1. THEY ADMIT the allegations contained in paragraph 1 of the Statement of Counter-claim filed herein.

2. THAT with regard to paragraph 2 of the said Counter-claim they say that on the 16th day of June 1961 a document being a mortgage of the land described in paragraph 1 of the said Counter-claim from the registered proprietors thereof was completed in their favour. The consideration shown in the said mortgage was a principal sum of Three thousan pounds (£3,000). The said mortgage document was duly entered on the Register of the District Land Registrar at Auckland on or about the 21st day of July 1961 but save as is hereby expressly admitted they deny each and every the allegations contained in the said paragraph 2.

3. THEY DENY each and every the allegations set forth in paragraph 3 of the said Statement of Counter-claim.

4. THAT with respect to the allegations contained in paragraph 4 of the Statement of Counter-claim they admit that in exercise of the Power of Sale contained in the mortgage which is referred to in paragraph 2 hereof they, through the Registrar of the Supreme Court at Auckland, offered the land referred to in paragraph 1 of the Statement of Counter-claim herein for sale by auction at which the Plaintiff herein was the successful bidder but save as is herein expressly admitted they deny each and every the allegations contained in paragraph 4 of the said Statement of Counter-claim.

5. THEY ADMIT the allegations contained in paragraph 5 of the said Statement of Counter-claim.

6. THEY ADMIT the allegations contained in paragraph 6 of the said Statement of Counter-claim.

7. THEY ADMIT the allegations contained in paragraph 7 of the said Statement of Counter-claim and **further say** that an Order for Possession of the land mentioned in Paragraph 1 of the said Statement of Counter-claim was made in favour of the Plaintiff herein against the abovenamed Alan Frederick Frazer and his wife by the Magistrate's Court at Papakura on the 15th day of March 1963. That an appeal against such Order was dismissed by this Honourable Court on the 16th day of October 1963.

8. THEY ADMIT that until execution and/or registration of the transfer mentioned in paragraphs 5 and 6 of the said Counter-claim the said Alan Frederick Frazer was entitled to be registered in respect of his interest in the said land jointly with his said wife but save as is herein expressly admitted he denies each and every the allegations contained in Paragraph 8 of the said Statement of Counter-claim.

This Statement of Defence to Counter-claim by Second Defendants is filed by David Stewart Morris, Solicitor for Second Defendants, whose Address for Service is at the Offices of Messieurs Meredith, Cleal & Co., Solicitors, Yorkshire House, Shortland Street, Auckland C.1.

5. AGREED CHRONOLOGY

1. 16th JUNE 1961. Up to that date Mr. and Mrs. Frazer were registered as proprietors in fee simple as joint tenants of a property in Kerr's Road, Wiri, comprising 10 acres 21.8 perches — all land in Certificate of Title Volume 1377 Folio 23 Auckland Registry.

2. ON 16th JUNE 1961 a mortgage of the land was given in favour of Second Defendants. The principal sum was £3,000 and the mortgage was registered on the 21st JULY 1961 under number 507511.

10 3. MR. FRAZER contends he did not sign the mortgage and had no knowledge it was being completed and that the signature "A. F. Frazer" and initials "A.F.F." on parts of the document were a forgery.

4. THE settlement statement and the proceeds after deduction of mortgagee's costs were banked by Meredith, Cleal & Co. Solicitors for the mortgagees to the credit of S. D. Rice & Sons Solicitors purporting to act for both mortgagors on or about the 21st JUNE 1961.

The document shows that Mr. A. Beims of S. D. Rice & Sons witnessed the mortgagors' signatures.

5. NO payments of interest were made under the mortgage and the
20 mortgagees exercised their Power of Sale as follows:—

(a) Notice under the Property Law Act was duly given and the property was advertised for sale on the 26th October 1962.

6. THE PLAINTIFF was the successful bidder at the auction for a price of £5,000 and following the auction the mortgagees executed a Memorandum of Transfer in Plaintiff's favour and dated the 27th November 1962.

7. THE transfer was duly registered on the 29th NOVEMBER 1962.

8. IN DECEMBER 1962 the Plaintiff commenced an action in the Magistrate's Court at Papakura for possession against the First Defendant
30 and Mrs. Frazer. The summons was served on 20th December 1962. Personal service was effected on Mrs. Frazer but with Mr. Frazer service was effected by nailing the summons on the door of the farm house.

9. ON 15th MARCH 1963 an order for Possession was made by S. Hardy S.M. against Mr. and Mrs. Frazer.

10. An appeal against this Order was lodged such appeal purporting to be by both Mr. and Mrs. Frazer. Such appeal was filed under number M.146/63. Such appeal was dismissed by Mr. Justice Richmond on the 16th OCTOBER 1963.

11. NOVEMBER 1963. Mr. Frazer alleges through his then solicitor
40 Mr. Mackay that he has then just learned of the whole position and alleges forgery of his signature to the mortgage by his wife.

12. BECAUSE of this the Plaintiff then offered to make Mr. Frazer an ex gratia payment of £3,000 upon Mr. Frazer executing the Tenancy Agreement and performing certain conditions including the renouncing of all claims either against the land or the Plaintiff.

13. LETTERS dated the 17th and 18th December 1963 between the then solicitor for Mr. Frazer and the Plaintiff's solicitors set forth the arrangement settling all matters between the parties.

In the Supreme Court of New Zealand

5. Agreed Chronology *continued*

14. THE Tenancy Agreement was duly signed on the 17th DECEMBER 1963 providing for a monthly tenancy at a weekly rental of £8. 0. 0.

15. NO such rental has been paid and the amount owing to the thirtieth day of April 1965 as mesne profits is £570. 13. 4d.

16. NOTICE to Quit was given and expired on 16th March 1964.

17. ON THE 20th MARCH 1964 the solicitors for the Plaintiff wrote to Mr. Frazer rescinding the arrangement as set out in the letter of the 17th December 1963.

18. MRS. FRAZER on the 13th APRIL 1964 pleaded guilty to two charges of forgery and was sentenced in the Magistrate's Court at Auckland to 16 months imprisonment. On appeal, heard on the fifth day of May 1964 the term was reduced by Mr. Justice Woodhouse to one month on each charge to be served concurrently.

19. PROCEEDINGS for possession under the Tenancy Agreement were duly issued and because a Question of Title was involved were removed into this Honourable Court.

In the Supreme Court of New Zealand

6. Notes of Evidence Plaintiff's Evidence Adduced by Consent

6. NOTES OF EVIDENCE TAKEN BEFORE THE HONOURABLE MR. JUSTICE RICHMOND

(By consent Mr. Beattie puts in the following documents as evidence in support of the allegations contained in the original Mag.Ct. statement of claim and also in support of statement of defence by all defendants to statement of Counter-claim.)

Exhibit A. Memos. of Mtge. Reg. No. 507511 reg. 21 July 1961 in L.T.O. Auckland.

Exhibit B. Duplicate C/T. Vol. 1377 Folio 23 Auckland Land Reg. Office, evidencing transfer 680955 in exercising power of sale contained in Mtge. No. 50711 Edward Radomski and Nellie Radomski Douglas Hamilton Walker of Auckland Public Accountant, produced 29/11/1962 at 11.40 o'clock.

Exhibit C. Agreement to Lease dated 17th December 1963 between Douglas Hamilton Walker and Alan Frederick Frazer and signed by those two named persons.

Exhibit D. Notice to Quit dated 20 January 1964 signed by Douglas Hamilton Walker by his authorised agent G. H. Metcalfe.

Exhibit E. N.Z. Post Office Advice of Delivery signed by A. F. Frazer and acknowledged receipt of by him on 21st January 1964.

(The statements of fact appearing in paras 14-19 inclusive of the "Agreed Chronology" supplied to the Court by Mr. Beattie are agreed by all parties to be correct.)

(At this point the statement of claim was amended by consent by adding thereto the following additional claim (6) that caveat A1263 lodged in relation to the said land by the defendant and registered on 10th April 1964 be removed pursuant to S.143 of the Land Transfer Act 1952.)

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Examination

CASE FOR PLAINTIFF ON THE CLAIM

ENNOR (in support of the Counter-claim) calls: 10:55 a.m.

ALAN FREDERICK FRAZER: One of the parties to this action. Reside Kerr's Road, Wiri, on property at issue in this action. Until the

events of 1961 my wife and I were joint owners of that property.

Q. What knowledge did you have of a mortgage of £3,000 given in June 1961 to Mr. and Mrs. Radomski? No knowledge whatsoever. First I knew anything about it was day bailiff called. He called at my place at Wiri.

Q. Give us approx. indication of date? 26th November I think it was, 1964.

Q. 1964 or the year before would it be — not last year. No, 1963.

Q. What was the purpose of the bailiff's visit? He came in and said he wanted possession of property. I was dumbfounded. I thought for a second or two he had come to wrong place.

Q. Did you learn that day of name of Mr. Walker? Yes.

Q. Had you previously heard of his name in relation to your house? No, definitely not.

Q. Did you go anywhere with bailiff that day? Up to Papakura Court to make enquiries.

Q. Was your wife at home when bailiff called? No, she left that morning.

Q. Did she stay away? Yes, approx 3 months.

Q. Did you know where she had gone? No, did not know till about 8 weeks after and she rang home.

Q. Did she ring to you personally? Yes, but I was not in at the time. My daughter-in-law was there. I received her message and wrote letter to her that night. I had to write to Hastings P.O.

Q. Know her actual address? No.

Q. Did you have some correspondence with her? I wrote to her and begged her to come home.

Q. After that did you exchange letters? She wrote one letter to me.

Q. Did she come back to you? Yes, in the finish I went to Hastings to see her. She came home approx. a fortnight after.

Q. Approx. month of her return? February, 1964.

Q. At that time did you have any knowledge of police inquiries concerning alleged forgeries against your wife? Yes.

Q. When did you first learn of police inquiries? I went to the police.

Q. When? It would be January some time when I first went to police after I had been to sign this lease.

Q. After you signed lease you went to the police? Yes.

Q. Your wife, is she still at home? Yes.

Q. I show you Ex.A mortgage purporting to be from A.F.F. Frazer and R. A. Frazer to Mr. and Mrs. Radomski: can you say whose signature is A. F. Frazer on that document? It is definitely mine. None of the initials A.F.F. on that document are mine, definitely.

Q. Signature Mr. Beams — clerk for S. D. Rice & Son, Papakura appears as witness to these signatures? I have not met Mr. Beams.

Q. Been to office of S. D. Rice & Sons? Never.

Q. Did you have any knowledge of any dealings by your wife with solicitors about June 1961? None whatsoever.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Examination *continued*

Q. There was some Magistrate Court proceedings in Papakura — did you ever receive any summons? No.

Q. See anything of any summons attached to door of your house? No.

Q. That was about December 1962: Were you living at this property at that time? Yes I was.

Q. Not away for Xmas holiday or anything like that? No, not to my knowledge.

Q. How large is property? 10 acres. Means of livelihood was milking some cows and had some poultry.

Q. Did you receive any letters or formal notices regarding the defaults under mortgage from Radomski or anything re Walker's rights? No.

Q. What was manner of delivery of mail to your house? At start used to have Rural delivery. Then wife picked it up at Manurewa P.O.

Q. From what time did she pick it up at Manurewa P.O.? Could not honestly say — it was a considerable time before this happened.

Q. How many years have you lived on this property? About 28 years.

Q. Roughly how long were you on R.D.? I should say at least 5.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Cross-Examination

CROSS-EXAMINED MORRIS:

Q. Was this the first property you owned, this property at Wiri? No, I owned a property at Kereone, Morrinsville.

Q. Was that the first property you owned? Yes.

Q. Fo rhow long had you been at Kereone? 14 years.

Q. During that 14 years you and your wife carried on business of farming? Yes.

Q. Kereone property was also in your wife's and your names? No, only in my name.

Q. But your wife assisted you on farm there? Yes.

Q. What type of farming did you carry out there? Dairy farming.

Q. On the Kereone property was there a mortgage? Yes.

Q. That would have been a mortgage executed by you only? Yes.

Q. That mortgage was on property Kereone up till date you disposed of Kereone property? Correct.

Q. You are aware of what is meant by C/T? I think so.

Q. Are you or not aware? Yes.

Q. While you had Kereone property did you ever see C/T? Yes.

Q. But you did not retain it at home or anywhere like that? No, it was held by my mortgagee.

Q. You were aware your title was held by your mortgagee when you owned Kereone property? Yes.

Q. I think when you sold Kereone property you moved straight to Wiri and paid how much for Wiri property? £7,000.

Q. How much had you sold the K property for? 18½ thousand.

Q. How much did you receive net from sale of K ppty? Approx. 9 thousand.

Q. Of which you took 7,000 into Wiri property? Yes.

Q. What did you do with remaining 2,000? Banked it.

Q. Which bank? B.N.Z. Papatoetoe.

Q. During time you were at Wiri, did you remain with that bank as their client? Yes.

Q. You have always had that account with B.N.Z.? Yes, it was there up till 61.

Q. Prior to — Why did you stop dealing with B.N.Z.? Did not stop — just had no more capital.

Q. At the time you came to Wiri, you carried on your farm I think a few cattle? Yes, about 10 cows. On Wiri property.

Q. Apart from ten cows what other livestock did you run? About 500 of poultry.

Q. Any other source of income from that farm? No.

Q. When you moved to Wiri it was 1957? Yes.

Q. When you purchased that property you took no mortgage out on it? No.

Q. I think the Solicitor acting for you on that purchase was Sandford Hamilton? Yes.

Q. There being no mortgage what did you do with certificate of title document — did you get title from Sandford when sale was fixed up? Yes, we had title deeds — my wife and I.

Q. Whereabouts did you put title deeds? My wife told me in finish, when I missed them and asked her where they were, she had put them in the bank she said.

Q. You bought this property 1957? Yes.

Q. How long after did you miss title deeds? Could not honestly say — it was some years.

Q. How many years before bailiff arrived on property that you missed title deeds? Must have been at least 2 years.

Q. How was it on this occasion you happened to notice title deeds were not where supposed to be? I don't actually know. I knew where I always kept them, and on looking through some papers one day I missed them.

Q. Are you the person in charge of such things as title deeds? No, my wife usually done all the business like that.

Q. Refer to Exhibit B C/T: Would it be fair to say that it was your wife's task to look after title deeds? Yes. My wife did most of all money matters.

Q. When you say she did most of all the money matters

(Witness collapses)

COURT ADJOURNED 11.15 a.m.

CASE RESUMED 11.45 a.m.

Q. FRAZER (contg. to Morris): I would like to ask 1-2 questions about bank a/c with B.N.Z. at Manurewa? Papatoetoe.

Q. That account would be opened in 57 or thereabouts? Yes. Yes.

Q. In whose name? My name alone.

Q. Into that bank account when first started went approx. £2,000? Yes.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Cross-Examination *continued*

Q. I think you told us that that bank account came to an end about 1961? Yes.

Q. Were you the only person who had authority to draw cheques on that bank? Yes.

Q. You received statements regularly from the bank I take it? Yes.

Q. I take it that as you received these statements you checked them to see if they were correct? Yes.

Q. Also naturally enough to see what money you had there from time to time? Yes.

Q. What money did you bank into that account 57-61? Nothing else but that was put in at the start.

Q. Apart from money in bank account what other cash did you have? Dairy cheque and poultry cheque.

Q. There were 10 cows on this farm: and you would receive dairy cheque how often? Once a month.

Q. What would you do with that cheque? When we went there the cows were in wife's name — she received cheque. It was hers.

Q. Herd was in wife's name? Yes.

Q. Certainly dairy cheque did not go into the bank? No.

Q. The cheque from the poultry supply, would it come in every month too? Yes, approx. every month.

Q. Was that in wife's name also? Yes.

Q. Know what she did with that cheque? No I don't.

Q. None of the poultry cheques were banked in your account? No.

Q. Are you aware how much these cheques were for she would get from dairy board or . . . ? I had approx. — knew approximately what it would be.

Q. But for anything you wanted, you drew on your bank account? Yes.

Q. Because nothing was going in from you, is it fair to say you gradually deplenished the bank account? Yes.

Q. When you opened bank account you went and saw bank manager? Yes.

Q. Did you discuss with him anything such as bank overdraft or accommodation? No never.

Q. Some time in 1961 your bank account runs out of money in any event? — You are receiving no money? No.

Q. Where did you get the money to buy anything after 1961? Well I don't know that I bought that very much.

Q. In previous 4 years you spent £2,000. I did not spend it. I gave my wife if she wanted a cheque, gave her an open cheque and that is what happen.

BENCH: By open cheque I mean I never filled amount in.

Q. You got bank statements and saw those? Yes. I saw them up till the finish, about 12 months before it was closed I never saw them. During 12 months before money ran out I did not see the bank statement.

COUNSEL: In 1961 you saw the one that said nothing there? No, I went to the bank and found that out myself.

Q. What made you go to the bank? Well, it is when this business came up that is when I went to the bank.

Q. You told us the bank ran out in 1961? Yes.

Q. The first thing you knew of this business I think on your own evidence was about 1963 November? Yes.

Q. When bailiff arrived? Yes.

Q. You said you had been in to see the bank: didn't you go to see them till 1963? I went in to see them when I found out what had happened.

Q. Was that 1963? Yes.

BENCH: I understand you to mean you went to see bank after bailiff had come this time? Yes. It was bailiff coming that made me start making inquiries, yes.

COUNSEL: Are you telling us that you didn't know your bank account was at any stage in the red or non-existent until bailiff arrived? That is so.

Q. In any event up till 1961 according to your evidence your wife had been asking you for periodic cheques? Yes.

Q. Fairly substantial amounts I understand? Well yes I suppose they were.

Q. From about 1961 did she cease to ask you for cheques? I just don't recall.

Q. I would like you to think for a moment please: was it after 1961 your wife ceased to ask you for these cheques? Yes I expect it was.

Q. Well was it? Well it must have been.

Q. Because there was no money after 1961 — is not that correct? Yes.

Q. How do you think the farm carried on for 2 years if you were not giving her this money she had been asking for before? We had money from dairy — we had the boys home and they paid board. There were three — two boys and one girl who paid board.

Q. They had been with you for some time? Yes.

Q. They didn't just start all of a sudden paying you board in 1961? They started to pay board when they went out to work.

Q. Over 4 years 57-61 you spent £2,000 from bank account? Yes.

Q. Average is £500 year? Yes.

Q. You suggest board you received from your children is equivalent of £500 year? No, I am not.

Q. How do you think the farm was running? I think the farm was running . . .

Q. 1961? I fail to see your question there. The farm was running on the stock, what cows brought in.

Q. No sudden increase after 1961 in what cows brought in from what they had previously been bringing in? No.

Q. The poultry sales did not increase after 1961? No.

Q. But suddenly your wife stopped asking for these cheques? Yes.

Q. Are you telling us you did not know that at any stage your property at Wiri was mortgaged? I certainly am.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Cross-Examination *continued*

Q. You are aware now are you not that there was a prior mortgage to this one of Radomski's? I am.

Q. And you are aware in addition to that mortgage there was in fact another loan from someone who did not have a mortgage? I am.

Q. Do you tell us you knew nothing of these things? I certainly did not.

Q. The first mortgage know how your wife managed to raise it? No. Never discussed it. Did not know it was there to discuss.

Q. You found out since? I have.

Q. How do you say she has arranged it now, you must have discussed it? I have not discussed it with her.

Q. When your wife ceased asking you for money in 1961 you went out to work you said? Who did?

Q. Did you not say something about going to work? No.

Q. In any event who purchased the stock? We brought stock with us.

Q. Stock and poultry were in your wife's name? Yes.

Q. Just prior to adjournment you told us your wife handled many of the money matters? Yes she handled all of them.

Q. You were quite happy for her to handle all the finances? I was. I had quite a lot of sickness over the years and been in hospital a lot and she handled the money matters.

Q. Did you discuss what things she was going to do and what you were going to do in relation to financial aspect of running the farm? She did not discuss anything very much.

Q. Did you just leave it to her? Yes.

Q. So far as you were concerned in running the farm, anything she did in running farm was correct? Yes.

CROSS-EXAMINED BEATTIE: You still reside on the farm property? I do.

Q. Do you admit that you signed tenancy agreement? Yes I did.

Q. Do you admit that you paid no rental thereunder? Yes I do.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Re-Examination

RE-EXAMINED ENNOR: Can you tell us approximately what years the various members of your family commenced work? Boy is the oldest. He is about 24 now.

Q. What age did he go to work? About 18 he had a very severe illness.

Q. Next child went to work at what age? Second boy is now 21. He went to work at 18, or 17 rather.

Next child, the girl, aged approx. 20 now, went to work; since she was 18 she has been working.

Q. You indicated to my learned friend Morris anything your wife did in running the farm was O.K. by you? Yes.

Q. What authority if any did your wife have from you to raise loans? She had no authority.

Q. You have obtained from your bank duplicate statement March-September 1961? Yes.

Q. Produced EXHIBIT 1: B.N.Z. Papatoetoe. Showing credit March 16, 1961, £1. 0. 9d. No deposits, charging of fee in March of 10/- and debit of balance of 10/9d. which closed account on 12 September 1961? Yes.

Q. Did you receive any sum June or July 1961 of £3,000 or anywhere near it? No.

In the Supreme Court of New Zealand

6. Defendant's Evidence Alan Frederick Frazer Re-Examination *continued*

JAMES WILLIAM TOOTILL: Detective sgt. stationed at Otahuhu. I investigated complaint against Mrs. Rhoda Agnes Frazer in relation to forgery of mortgage documents. I have seen her at the Court today waiting outside.

Q. When did you commence your investigations? Following complaint by Mr. Frazer on (referring to police file) 20 December 1963.

Q. Where did you see Frazer? He called at Otahuhu Detective Office.

Q. Did you visit the house at Kerr's Road, Wiri, at that stage? Yes.

Q. Was Mrs. Frazer in residence? No.

Q. Did you have to take steps to locate her? Yes.

Q. When and where did you find her? She was found in Hastings on 5 February 1964 at 11 a.m.

Q. Did you personally interview her? Not at that stage.

Q. Interviewed her on some occasion? Yes on 28 February she called at Otahuhu Police Station to see me at about 11.30 a.m. 28 February 1964.

Q. You told her what your inquiry was about? Yes.

Q. What did she say? She said she had forged the two memoranda of mortgages which I had shown her.

BENCH: Incidentally . . .

Q. She said she had forged the two mortgages I showed her and I told her she would be charged with forgery of these documents and uttering them.

Q. Can you give us the text of charges lodged against her? Yes.

Forgery charges "did forge a document, namely a Memorandum of Mortgage relating to the portion of land described as Clendon's Grant described in C/T Vol. 1377 Fol. 23 (Auckland Registry)" 4th December 1958 Papakura.

"Knowing a document to be forged, namely a Memorandum of Mortgage relating to the portion of land described as Clendon's Grant described in C/T Vol. 1377 Fol. 23 (Auckland Registry) did cause James Eric Graham and Edward McMurray to act upon it as if it were genuine."

"Did forge a document, namely a Memorandum of Mortgage relating to the portion of land described as Clendon's Grant described in C/T Vol. 1377 Fol. 23 (Auckland Registry)." 16 June 1961. Papakura.

One of the charges related to mortgage purporting to be given by A. F. Frazer and his wife to Radomskis No. 507511 now shown to me.

In the Supreme Court of New Zealand

6. Defendant's Evidence James William Tootill Examination

CROSS-EXAMINED MORRIS: You told us Mr. Frazer came to see you in December? Yes.

Q. On that date did he inform you of why he had come? Yes.

Q. Did he advise you of any arrangements he had made with Walker between period his wife had left and time of him coming to see you? No.

In the Supreme Court of New Zealand

6. Defendant's Evidence James William Tootill Cross-Examination

In the Supreme Court of New Zealand

6. Defendant's Evidence James William Tootill Cross-Examination *continued*

Q. He did not mention to you that he had arranged with Walker that he was to lay a complaint with police? I can't recall that, no.

Q. I take it that as a result of this complaint and on being informed his wife was missing, you asked him to contact you if she should contact him? Yes.

Q. He has told us today that his wife telephoned him? Yes.

Q. Did he tell you that? Yes.

Q. He has also told us that he wrote to her c/- P.O. at Hastings? Yes.

Q. And that he received a reply from her? Yes.

Q. Do you have that reply on your file? Yes. (reads)

(Produced on basis that in due course order will be made for its return to file.)

EXHIBIT A.1.

Q. That was in reply to a letter he had written to her? That is what Mr. Frazer told me.

Q. As a result of that you located her in Hastings? Yes.

CROSS-EXAMINED BEATTIE: No questions.

In the Supreme Court of New Zealand

6. Defendant's Evidence Hugh Edwin Burdett Examination

RE-EXAMINED ENNOR: Was the letter dated or addressed? No, just the text and signature.

Q. Did you know of any other letter from Mrs. Frazer to Frazer? No.

HUGH EDWIN BURDETT: Bailiff attached to Magistrates' Court at Papakura.

Q. In course of your duties you handled certain matters in relation to Walker and Frazer? Correct.

Q. Did you on one occasion see Frazer with a warrant? Yes.

Q. Give us date of it? (Referring to notes.) Yes, on 25.11.63 25 November 1963.

Q. What was the warrant you then had in your possession? For recovery of land. I went to Kerr's Road, Wiri, and saw Mr. Frazer.

Q. Was Mrs. Frazer at home? No.

Q. Had you seen her concerning the warrant? Yes, on several occasions prior to that date.

Q. Can you say what knowledge if any she had as to date you would be calling to execute warrant? Day I went to execute the warrant Mrs. Frazer came to our office and interviewed Mr. Hunt, the registrar of the Court, and myself and seeing it was being withdrawn prior, we had no option but to execute the warrant there and then. Made arrangements with Mrs. Frazer I would meet her husband and herself at the farm at 1 o'clock in afternoon to execute the warrant.

BENCH: Was this still all on the same day? All on 25th.

COUNSEL: AT what time did you attend at farm? I went to the farm myself at approximately 1.15. Mrs. Frazer was not there.

Q. Did — Was this the first time you had met Mr. Frazer? Yes.

Q. Did you indicate to him what your business was? Yes.

Q. What was his reaction? His reaction to me was a stunned man.

CROSS-EXAMINED MORRIS: No questions.

CROSS-EXAMINED BEATTIE: I have been bailiff at Papakura Magistrates' Court for 2 years.

Q. In that time did you have other summonses to serve on either Mr. or Mrs. Frazer? On Mrs. Frazer but not on Mr. Frazer.

RHODA AGNES FRAZER: Wife of Alan Frederick Frazer, one of the parties in this case.

Q. You were with him one of the registered proprietors until 1961 of the property at Wiri? Yes.

Q. Did you arrange for a loan from Mr. and Mrs. Radomski? Yes.

Q. Did you discus that loan with Frazer? No.

Q. Who acted as your Solicitor? Mr. Rice & Son, Papakura.

Q. Did Frazer share in any instructions to them? No.

Q. Refer to Ex. A: You yourself signed a mortgage to Radomskis? Yes.

Q. In connection with loan £3,000? Yes.

Q. Document Ex. A is the mortgage given to Radomskis. Can you say whose signature is R. A. Frazer on it? Mine.

Q. Can you tell the Court who wrote words A. F. Frazer on that document? I did.

Q. And initials A.F.F.? Yes.

Q. Was Mr. Beams present when you wrote your name? I can't remember whether I wrote it in front of him or before I went in.

Q. Was he there when you wrote A. F. Frazer? No, I did that beforehand.

Q. Where did you actually write the A. F. Frazer? In the car.

Q. Was anybody with you? No, definitely not.

Q. Where was the car at the time? As far as I remember it was in O'Shaunessey Street in Papakura a short distance from Rice's.

Q. Did you have the paper with you? I had collected mortgage papers from Meredith Cleal's myself.

Q. Put both signatures on and took document in to Mr. Beams? Yes, I could have signed my own signature in front of Mr. Beams, I am not sure.

Q. Who received the money which was advanced by it? I did. It was in Frazer's name but he never ever saw it or had any part of it at all.

Q. Were there any notices later sent to you and Mr. Frazer in relation to mortgage and defaults? If there were any that were sent I collected at P.O. myself.

Q. Do you recall that there were in December 1962 some Court proceedings at Papakura for possession? Yes, I recall that.

Q. Did you get a summons? I presume I did. I think so.

Q. Do you know anything about a summons nailed to the door of the house? Yes.

Q. You recall that? Yes.

Q. What happened to that summons? I took it off. My husband was absent at the time.

Q. Was Mr. Hendrikse a solicitor engaged by you? Actually it was Mr. Smith working for Mr. Roche and he left his employ and it was taken over by Mr. Hendrikse.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Examination *continued*

Q. Did Mr. Frazer share in giving any instructions to Hendrickse regarding those proceedings and a later appeal? Mr. Frazer knew nothing whatsoever about it.

Q. Did you yourself know anything concerning an auction of the property? Yes.

Q. Did you go anywhere near auction rooms? Yes, I collected Mr. Gwynne Rice from the Land Registry Office and he went — he was talking to me, and then he met me at the auction sale.

Q. Did your husband go to auction? No, my husband had gone away that morning out to Murapara or Maramarua I think it was with a friend he often goes out there with.

Q. Had you talked about auction with him? No, he knew nothing whatever. Neither did any member of the family.

Q. Was there any money left after auction from sale to Walker over and above mortgage? Yes.

Q. Who received that money? It came addressed to Mr. Frazer and I collected the mail at the P.O. as I always did and I brought it into town. It was 24th December. I brought that cheque into town and cashed it through a firm that I done business with.

Cheque I received is one now shown to me. Exhibit 2. Dated 21st December 1962 from Meredith Cleal to A. F. Frazer or order for £1,044. 4. 10d.

Q. Can you tell us who endorsed the words A. F. Frazer on reverse side of that cheque? I did.

Q. You saw Mr. Burdett leave Court a moment ago? Yes, I had met him before, yes.

Q. When did you go away from Wiri? 25th November. I saw Mr. Burdett and Mr. Hunt approximately 11 o'clock. Previous to that I had been to Mr. Smith and told him what I had done and he said I had better go down to Court and tell them and I went to the Court. I saw Mr. Burdett and Mr. Hunt together there.

Q. When did you actually leave home? I came home and as I had no money, I collected machine, raised some money on machine. That is a sewing machine.

Having got that money I went back as far as where son works at Hellaby's and left car there with a note on it. Then I caught bus to Auckland. I went to Hastings that night.

Q. Had you given your husband any warning of your intention to leave? No.

Q. Did you leave any address so he would know where to contact you? No, in note I left in car for the boy I told him to contact Mr. Smith.

Q. Did he have any address of yours in Hastings? No, I had told him I would get in touch with him.

Q. How did you and husband make contact again? I rang home on 8th January and got my daughter-in-law on 'phone.

Q. Give any address at that stage? I just told her if he wished to contact me to write to me c/- P.O. Hastings. He did write. I produce his

letter. EXHIBIT 3 — in env. address Mrs. R. A. Frazer c/- P.O. Hastings. Letter dated 8. 1. 1964. It is in his handwriting.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Examination *continued*

CASE ADJOURNED 12.40 p.m.

CASE RESUMED 2.15 p.m.

MRS. FRAZER (continuing) (To Ennor): I was producing letter from your husband January 1964 and ask you to read it? May I request Your Honour that this be kept from the papers — it is a letter from my husband to me. (Reads) Exhibit 3 — letter and envelope.

Q. You were in Hastings when you received that letter? Yes.

Q. Refer to Exhibit A.1: Is in my handwriting.

Q. When did you write it? I wrote it in Hastings when my husband came to see me. It was a note. He was so confused. That is reason I wrote the note.

Q. Prior to that note A.1 had you written to your husband? Yes.

Q. Do you know whether any statements from B.N.Z. at Papatoetoe, Frazer's bankers, had been sent to home at Kerr's Road? There had been some but whether he saw any or not, I am not sure.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Cross-Examination

CROSS-EXAMINED SPEIGHT: On that last point, the sequence of things when you had written to him from Hastings, in first place you had merely given him Hastings P.O.? Yes.

Q. Then when he wrote to you saying there was a £3,000 settlement and that sort of thing, did he write to you c/- Hastings P.O.? No, police found where I was working and he rang hotel where I was working and asked if he could come down and see me. That is first letter I received from him, any contact from him whatsoever from time I left home. Exhibit 3. I had rung home and got my daughter-in-law.

BENCH: That was address c/- P.O. Hastings? Yes.

COUNSEL: He told us this morning he informed police where you were? He knew I was in Hastings but did not know where I was working.

Q. When did he come and see you? Approximately beginning February.

Q. Had police seen you at that stage? Yes.

Q. Changing the subject, going back to farm and financial affairs: mortgage you got from Radomski's £3,000 what did you apply it towards? Partly to pay off previous mortgage.

BENCH: How much had that been for? £1,500 approximately. Mr. Rice would have all details.

COUNSEL: Would figure of £1,732. 10s. 0. be figure? Yes.

Q. Repayment of Bailey mortgage? Yes.

Q. Balance above £700? I should think Rice would have all receipts in their office. They paid it all out.

Q. Fleming bill of sale £437 would that be a payment made? That would pay £1,500.

Q. What other debts were outstanding at that time which Rice's would pay from your account? They would have them, they handled it. No money went into the bank from any of the mortgages.

Q. Do you mean by that that the £3,000 from Radomski's was all used in payment of debts? Big per cent of it.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Cross-Examination *continued*

Q. Without giving us all the details, who had incurred those debts? I had.

Q. They were debts for what, what had you bought with money not paid for? Feed for poultry, feed for mare I raced.

Q. Purchases on farm? Not a great deal.

Q. Purchases in household? I would not say there was purchases in household either.

Q. The bill of sale to Flemings, that was bill of sale over what article or stock? Have an idea it was over the car.

Q. Where was car kept, on the farm? Yes.

Q. Had it for how long? Had it approximately since before we came there. Bought from Ebbett Motors, Hamilton.

Q. Had it on Kereone property? Yes.

Q. So you people had had that car for some years? Yes.

Q. That was, I show you copy of Rice's letter (not recorded), that makes 21½ hundred — how was the other £800 used up over and above those two payments? I paid accounts.

Q. With what firms? I would not be able to say all of them but some at Papakura Court. Larger ones.

Q. Can you give indication to what firms you owed these large accounts? Hard to remember now. A long time ago. Records are there.

Q. I show you extracts from Papakura Court judgments against A. F. Frazer and they are such things as Reids Furnishings £137? That was paid just after we came up here. It was furniture.

Q. £200 to Inland Revenue? Yes, that is what I got majority of loan against for, for tax purposes that was.

Q. £143 Wright Stephensons, that was in respect of stock? No, that would be feed. Not stock.

Q. A. S. Patersons? Feed too.

Q. Roley Crowther? Repairs to car after accident.

Q. Would it be — who are W. L. Brown — Would it be fair to say some claims paid were in respect of furniture and tax? Yes.

Q. Perhaps some other things which had been spent on household or farm expenses? Not so much farm, perhaps food. Had to pay cash for groceries. I tried to pay cash I said.

Q. Tracing back to Bailey mortgage which was £1,700 by now, that was mortgage over Wiri property? Yes.

Q. When had that been first incurred, mortgage liability to Bailey? 2-3 years earlier? Could be that.

Q. It had been not for one sum of £1,500 to start with but for smaller sums then further drawings? Yes.

Q. The total drawings £1,500 what had that money been spent on over period you found it necessary to run Bailey mortgage? Wheat for fowl, horse and different things.

Q. When you had come up from Kereone, there had been some money over after the purchase of Wiri property? Yes.

Q. Your husband said that would be about £2,000? Yes.

Q. He said that that had been in bank account of his? Yes.

Q. And that it had been spent over a period of a few years? Yes.

Q. On what things had it been spent? We did quite a lot of painting and putting in new pressure pump, doing quite a lot of repairs to the place.

Q. When it came to paying the accounts, who wrote out cheques? Mr. Frazer. He quite often gave me an open cheque.

Q. You would apply it for whatever was appropriate account? Yes.

Q. He was happy for you to have that part of the matter? Yes, he thought doing things within reason though.

Q. He would in a broad way know what the money was going on? Anything small he would.

Q. What do you mean? Any of the larger amounts I filled in myself he did not know how much I had drawn.

Q. Without knowing amount he would know you were paying for a pump or anything like that? Well he paid for that himself.

Q. In respect of larger items do you say he would not know exact amount you paid out? No.

Q. Would he know what you were paying for, even though not the amount? No, I don't say he would.

Q. Do you say that he entrusted to you the payment out of the large sums without concerning himself as to what it was for? I did not let him know amount I had drawn.

Q. I did not ask about amount — my question was did he know WHAT you would be paying for? No.

Q. Did he entrust you to pay out for large items round the place without concerning himself what purchases were? He would not know there were large items because I collected the accounts. I had the mail.

Q. But they were items which were coming on to the farm? Not necessarily.

Q. Some were you told us? Some.

Q. He must have seen what items did come on farm? Nothing really large that came on other than pump and things like that that he would know.

Q. Then please tell us how you were able to spend £2,000 in that period without him knowing it was going on, unless he was handing over entire running of farm to you? No. that was not the way of it at all.

Q. What was the way of it? I just don't know what you mean.

Q. Mrs. Frazer you have just told me that small items your husband would know £sd. Yes, because he had account and wrote cheque for it. But when he asked me how much money I had drawn, what money was in the bank, I evaded the question.

Q. Of the £2,000 spent from the bank account, how much would be represented by cheques he wrote and how much by ones he entrusted you for? Approximately half and half I would say.

Q. So you tell us he would have written cheques for about £1,000? Yes, over the period the bank account was running.

Q. What sort of things was he paying for with that £1,000? He would be paying things that came up — daughter's wedding.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Cross-Examination *continued*

Q. What others? Food.

Q. Pump? Yes, he paid for pump.

Q. Other things on the farm? Yes.

Q. There were other things for which he gave you a blank cheque and you filled in blank cheque? Yes.

Q. You told me a few moments ago his were for smaller amounts, yours for bigger amounts? Yes.

Q. What then were things you were acquiring yourself? Very hard to remember now.

Q. Try and think — you spent £1,000 of this money — what did you get for it and how did husband not know what you got? Fowls were not paying proposition we had to live off something.

Q. Therefore you had to live on something? Yes.

Q. You mean you were living on £1,000? I was living on our capital.

Q. Although you cannot remember details of what your £1,000 went for — it was to live on? Yes.

BENCH: What about mare I heard about — a race horse? Yes.

COUNSEL: You were running a race horse? Yes. My husband knew I had it. It lived on the property. Registered. I was racing it.

Q. He would be aware of occasions when it started? Yes.

Q. In whose name was it registered? Mine.

Q. Eventually bank account ran out? Yes.

Q. Was it then necessary for you to raise money from other sources? Yes.

Q. Was it then that you started the Bailey mortgage? Yes.

Q. And to start with you got I think £250 or something like that? Yes.

Q. Then got further advances over a period of about 2 years reaching a total of £1,500? Yes.

Q. Had there been another mortgage on this property before that, or was Bailey first? Not to my knowledge.

Q. What did you spend £1,500 on during the year or two that Bailey mortgage was running? Approximately 2 years £450 was paid back, plus interest on that. Plus lawyer's expenses. I presume the rest was spent on food and to keep us going.

Q. Your husband was living on the property throughout? Yes.

Q. Was there a housekeeping allowance £8 at some stage? No.

Q. When you borrowed the money from Radomskis, you were also asking for money in excess of £3,000 for further stock purchases? I was.

Q. But £3,000 was limit of Radomskis? Yes, decided against it.

Q. In whose name is the stock, who owns stock? Mr. Frazer.

Q. How was it acquired? Brought from the other property.

Q. Was there a bill of sale to Wright Stephensons over that stock? Can't remember if there was or not.

Q. I suggest bill of sale over it was eventually paid off after you got to Wiri? After we got to Wiri (yes) no.

Q. Before you got to Wiri there was bill of sale over stock in favour of Wright Stephenson? No.

BENCH: Was such a bill of sale paid off after you got to Wiri? There was no bill of sale on stock when we came to Wiri.

COUNSEL: Was there not bill of sale to Dalgety & Co.? Can't remember any bill of sale to Dalgety & Co. I paid Dalgety's through the factory, East Tamaki factory supply was in my name.

Q. What were Dalgety accounts for? Probably for some purchase of something.

Q. And although it was Frazer's stock you were receiving proceedings of cream cheque? Yes.

Q. When mortgage was called up and property sold, there was a surplus of approximately how much from mortgagee sale? Thousand and something.

Q. You did not yourself personally profit from this transaction, by time you left Auckland you had none of the proceeds? No.

Q. What had you used proceeds of that cheque for? Paid a lot of accounts.

Q. To what people for what sorts of goods? Hard to say now. Asking me to remember a lot.

Q. I would have thought you would have some recollection how you spent £1,000 — can you not remember anything you spent it on? You will find receipts for what I paid myself.

Q. Whom did you owe money for, what sort of things, that needed £1,000? Not all used for that purposes. Used for living purposes. I was also betting.

Q. Did you not pay Bond & Bond a large sum of money? Yes, I paid Bond.

Q. What did you owe them? Final payment on my stove.

Q. Other household articles? I think a mower, nothing else from Bond & Bond. Not other household articles.

Q. When you were eventually located by police you were prosecuted for forgery? Yes.

Q. In Magistrates' Court you were sentenced to 16 months? Yes.

Q. An appeal against that sentence was successful in that it was reduced this Court to 1 month? Yes.

Q. Now when that appeal was being prepared, you had a firm of solicitors acting for you? Yes.

Q. Same solicitors as acted for your husband? No, Nixon appeared for me.

Q. When Nixon appeared on appeal did you come to Court? No. I was in Dunedin, not even in Auckland.

Q. Had you given Nixon some instructions? Not exactly instructions. It was Nixon who took it on. He appeared on my behalf. I did not actually know what was said in Court at all. Just don't know.

Q. Had you spoken to Nixon or alternatively had you written Nixon between Otahuhu Court and appeal to this court? Yes. Up at prison. I had spoken to him at prison in Auckland before I was sent to Dunedin.

Q. When you spoke to him was it planned that an appeal would be put in? Yes.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Cross-Examination *continued*

Q. Did you discuss with him matters which could be put forward on your behalf in support of your appeal? I left it to him, he knew more about it than I did.

Q. He knew more about court procedure. I had probation officer's report and there was certainly nothing left to imagination in it.

Q. I dare say it was you who told Nixon about your affairs? He knew all about my affairs as I understood when probation officer interviewed me she said no one but Magistrate and . . .

BENCH: Mr. Speight assumes at some stage you told Mr. Nixon your story as to why you had done all this and that sort of things? Yes, he knew, exactly same thing as I had told probation officer.

COUNSEL: And Nixon could only have known either from what you had told him yourself or you had told probation officer and he learned from probation officer? Yes.

Q. I am going to put to you the matters put forward to judge here on your appeal — as I understand what was said on your behalf — tell me if you agree to truth of these things so far as they relate to you — see what I am going to do? Yes.

Q. This was done in open court so it was said in public: if it was said on your behalf that your husband loved you very much, would that have been true? Yes.

Q. If it was said on your behalf that he was prepared to stand with you throughout your trouble? Yes.

Q. If it was said you were very devoted each to the other, would that be true? Yes.

Q. If it was said that much of the money had been spent on living expenses running the home, would that be true? Yes.

Q. If it was said that you had largely the management of the farm, would that have been true? Yes.

Q. If it was said that you had had to raise the money, to keep the farm and home going, would that be true? Yes.

Q. If it was said that it was the sort of mortgage that your husband himself would have approved? No, he would never have approved, borrowing money in any connection.

He would never approve.

Q. If Mr. Nixon said that, had he gone beyond what you would have wanted him to say? Yes.

Q. If it was said your husband had benefited from some of the proceeds, would that have been true? No, I would not say he would have benefited from them.

Q. He share in them? He shared in his living.

Q. And in feeding of his stock? It was not so much feed for cows as for poultry. We both owned the poultry.

Q. If it was said that you were the only person who had suffered from the forgery, would that have been true? No, I did not say that, I say my family and my husband have suffered greatly.

Q. If Nixon made the representation that nobody outside you and your husband had suffered would that have been with your authority or not? I do not get idea what you aim at.

Q. I say if Nixon told Court you and husband were only people had suffered and husband had forgiven you? I only presume what Nixon said was we realised all moneys had to be repaid.

Q. Did not your husband leave conduct of farm affairs largely to you? Mainly.

Q. Was it not necessary for you to borrow these sums of money to keep the farm going? Partly.

Q. Are you and your husband still living together on the property? Yes.

Q. And farming it? Yes.

Q. Where was the title, going back a bit now, duplicate copy of title, kept (shown document) you would have got that when you purchased property? Yes, it was in top of the tallboy and was taken to Rice's office by me. I told Frazer I had put it in the bank, and I had not.

Q. Did he ask you what you meant by putting it in bank? I told him it was correct place for it to be.

Q. Ever in your lives raised money from bank on overdraft? When we first started out.

Q. You had been financed by the bank? To a small extent, about £500.

Q. Had you on that occasion given bank security when you raised 500 when first starting out? We both did. Frazer did. Title was in his name.

Q. Did he lo — When you first started out and raised £500 from bank, whenever it was, did you on that occasion lodge your title deeds with bank as security? I don't know anything about it. Nothing to do with me. Approx. 25 years ago at least.

Q. Had you left the transaction in those days to your husband? For that purpose, yes.

Q. During last 4-5 years has your husband ever questioned with you where the money was coming from to pay for any of the things being bought? Yes, he has asked me several times.

Q. What had you told him? I evaded the question and he knew I was betting a good deal, always a good chance of winning the double, he did not know whether I had or not.

Q. So he did not pursue it? No. I kicked up rather a fuss when he did, and just did not tell him.

Q. What did you say to him when he inquired of you? 9-10 times I would walk off.

Q. In other words you gave him to understand it was none of his business you would look after it? Not exactly it was none of his business. I tried to give him impression everything was alright so long as we had sufficient to carry on with.

Q. Sometimes things even got to stage of having power cut off? Yes.

Q. You tell us he still did not get curious as to where this money was coming from? He got very annoyed.

Q. How did you placate his annoyance? Well it would be hard to say.

In the Supreme Court of New Zealand

6. Defendant's Evidence Rhoda Agnes Frazer Cross-Examination *continued*

CROSS-EXAMINED BEATTIE: When the Wiri farm was bought, did you buy stock with it? No, there were a few cows bought with it, that was all, sorry I overlooked that. Did purchase price include farming implements? No, no implements on farm.

Q. House? Yes.

Q. Sheds? Yes.

Q. Cowshed? Yes.

Q. How many stock firms have you dealt with since you have owned Wiri property? Mainly I should think Wright Stephenson's and Dalgety's.

Q. Were those stock accounts both in your name? What do you mean stock accounts (yes) no, sometimes in mine, sometimes in Frazer's.

Q. Would be in either name? Yes.

Q. Certainly Dalgety's was in your name? Yes.

Q. Did you have a separate stock account with Wright Stephenson apart from ordinary trading account with them? No, I don't think so.

Q. Was not stock account with Wright Stephenson in your name also? Could have been. *I mainly got things purchased in my own name.*

Q. Stock account — I refer substantially to sales of cattle and cows, and purchases of cows? That could have been some of the cows sold in Frazer's name; and some in mine occasionally.

Q. At time mortgagee advertised property for sale, various intending purchasers went round the property? No, never one person set foot on that property when I was home at any time. Walker appeared at gate on morning of sale, pouring raining 8.30 a.m. and asked to go over property and I said no. He knew I was hostile because way property was adverted. They had put Papatoetoe and address is Manurewa.

Q. Did Livingstone go over property? Would not even know Livingstone if I saw him standing there. I did not know he was. If he came over property it was without our knowledge. Only person over property was auctioneer. And Mr. and Mrs. Radomski. Frazer ill in bed at the time. He did not come.

Q. Auctioneer knocked at farm house door didn't he? Yes, but I answered door and showed him round to measure up buildings. Frazer was not to know any difference from what it was insurance agent. That is what I told him it was.

Q. Did he show any interest in fact it was insurance agent? He knew insurance checked up every so often.

Q. That demonstrates that he left that sort of thing all to you? He did not leave it to me. I took it on myself to do. He asked me if insurance was paid and I said yes through Rice's office.

CLOSE OF EVIDENCE FOR PLAINTIFF ON COUNTER-CLAIM. 3.7 p.m.

NO EVIDENCE CALLED BY SPEIGHT. IT BEING AGREED that there is no suggestion of fraud against Radomski's, or Mr. Walker, Mr. Speight calls no evidence.

BEATTIE CALLS: 3.15 p.m.

DOUGLAS HAMILTON WALKER: (Affirmation): Public Accountant in practice at Auckland. Plaintiff.

My solicitors in this matter have been R. H. & G. H. Metcalfe.

In the Supreme Court of New Zealand

6. Plaintiff's Evidence Douglas Hamilton Walker

Q. On 17 December 1963 Ex. F received a letter from Murdoch Simpson & Ross then acting for Frazer? Yes.

Ex. G my solicitors on receipt of that letter replied by letter dated 18 December 1963. Ex. G.

Q. Tell His Honour what was reason that you made it a condition that Frazer lay an information against his wife alleging forgery? I made an offer to Radomski out of sympathy for position he was in — sorry, Mr. Frazer — but I was not certain in my own mind that there was no collusion between him and Mrs. Frazer.

Q. Accordingly the conditions that are set forth in 2 documents mentioned and produced were conditions accepted by the parties? Correct.

In the Supreme Court of New Zealand

6. Plaintiff's Evidence Douglas Hamilton Walker Cross-Examination

CROSS-EXAMINED SPEIGHT: From what he told you had he or not at that time gone to police? I did not deal directly with Mr. Frazer. Never seen him before. I understand there was no complaint made at that time.

CROSS-EXAMINED ENNOR: From fact you were prepared to pay further 3,000, may we take it that in your view the value was a great deal more than £5,000 which happened to be auction price? Yes, it was more.

Q. Prepared to give estimate of what in your view it was, in round figures — would it reach 5 figures at time of auction? At time of auction I would have said no.

CLOSE OF EVIDENCE FOR PLAINTIFF.

7. JUDGMENT OF RICHMOND, J.

In the Supreme Court of New Zealand

7. Reasons for Judgment of Richmond, J. 5th May, 1965

HEARING: April 28, 29, 1965.

JUDGMENT: May 5, 1965.

COUNSEL: Beattie, Q.C. and P. B. A. Sim for Mr. D. H. Walker.
S. C. Ennor for Mr. A. F. Frazer.
G. D. Speight & D. S. Morris for Mr. and Mrs. Radomski.

Action and Counter-claim tried before a Judge alone.

I find the facts as follows. In the year 1957 Alan Frederick Frazer and his wife Rhoda Agnes Frazer became registered under the Land Transfer Act as proprietors as joint tenants of an estate in fee simple in a small farm at Kerr's Road near Papatoetoe. On 16 June 1961 Mrs. Frazer signed a Memorandum of Mortgage of the farm in favour of Mr. and Mrs. Radomski (as tenants in common in equal shares). Mrs. Frazer forged Mr. Frazer's signature to his document. In spite of submissions to the contrary by Mr. Morris, I am satisfied that Mrs. Frazer had no authority of any kind from her husband to mortgage his interest in the farm.

Mr. and Mrs. Radomski, acting in good faith, advanced a sum of £3,000 upon the security of the mortgage document, which was itself registered against the title on 21st July 1961.

No payments of interest were made under the mortgage, which contained express provision as to the events upon the occurrence of which the mortgagees might lawfully exercise "the power of sale and incidental powers in that behalf vested in mortgagees by 'The Property Law Act 1952' and

In the Supreme Court of New Zealand

7. Reasons for Judgment of Richmond, J. 5th May, 1965 *continued*

'The Land Transfer Act 1952' or any such powers . . . ". Notice under the Property Law Act was duly given and the property was advertised for sale by auction on 26 October 1962. Mr. Walker was the successful bidder at the auction, and a transfer to Mr. Walker was subsequently executed by Mr. and Mrs. Radomski. This transfer was registered on 29 November 1962.

Mr. Walker issued proceedings for possession in the Magistrate's Court. Without going into detail, I am satisfied that by one means and another Mrs. Frazer kept her husband in complete ignorance of the mortgage transaction, the sale by the mortgagees, and the Magistrate's Court proceedings until November 1963. In that month a bailiff arrived at the property with a warrant for possession.

When Mr. Walker learned of Mr. Frazer's ignorance of all that had occurred, he made an offer of an ex gratia payment on certain conditions, including a condition that Mr. Frazer enter into a tenancy agreement at a weekly rental of £8. 0. 0. This agreement was duly signed on 17 December 1963. No rent was paid, and the tenancy was terminated by notice to quit which expired on 16 March 1964. The entire arrangements for settlement (of which the tenancy agreement formed part) were rescinded on 20 March 1964.

In April 1964 Mr. Walker commenced proceedings in the Magistrate's Court against Mr. Frazer, claiming possession of the farm and judgment for mesne profits. These proceedings were removed into this Court as a question of title is involved. The statement of claim was amended to include a prayer that Caveat A.1263 lodged in relation to the land by Mr. Frazer be removed pursuant to S.143 of the Land Transfer Act 1952. If Mr. Walker has in fact obtained a good title to the farm then £570. 13. 4 is owing for mesne profits.

In July 1964 Mr. Frazer obtained an order of this Court granting leave to file a Counter-claim against Mr. Walker and also against Mr. and Mrs. Radomski. In this Counter-claim Mr. Frazer seeks a declaration that his interest in the land has not been affected by the purported mortgage to Mr. and Mrs. Radomski and the subsequent transactions whereby Mr. Walker became registered on the title.

Mr. Ennor conceded that in the present proceedings he could obtain no relief against Mr. and Mrs. Radomski unless the Court decided that Mr. Walker's title should be set aside as between Mr. Walker and Mr. Frazer. I was given to understand that if Mr. Frazer is unable to succeed in the present proceedings then consideration will be given to a claim under the provisions of the Land Transfer Act relating to guarantee of title.

It is perfectly clear that Mr. and Mrs. Radomski and Mr. Walker acted at all times in good faith and in ignorance of the forgery perpetrated by Mrs. Frazer. No suggestion arises in these circumstances that there has been any "fraud" on their part which would destroy the indefeasibility of their titles.

I had the privilege of listening to careful and lengthy submissions by all counsel. In brief, Mr. Ennor submitted that the case of a forged document is not yet the subject of authoritative decision binding on this

Court, and invited me to hold that neither the registration of the Radomskis as mortgagees nor the later registration of Mr. Walker as owner should be allowed to give effect to a mortgage which was (in its inception) undoubtedly a nullity insofar as Mr. Frazer's interest in the land was concerned. Counsel for the other parties on the other hand, submitted:—

(1) That the Radomskis obtained a good title by registration. It was submitted that there is no difference in principle between a document void for forgery and a document void for any other reason, and that **ex parte Davy** (1888) 6 N.Z.L.R. (C.A.) 760 must be regarded as no longer good law having regard to the decision in **Assets Co. Ltd. v. Mere Roihi** (1905) A.C. 176 as interpreted by the majority of the Court of Appeal in **Boyd v. Mayor etc. of Wellington** (1924) N.Z.L.R. 1174.

It was pointed out that in **Gibbs v. Messer** (1891) A.C. 248 the mortgagee was a non-existent person, whereas Mr. and Mrs. Radomski are, of course, nothing of the kind.

(2) Alternatively, it was submitted that however defective the title of the Radomskis may have been as between themselves and Mr. Frazer, yet their defective title was capable of forming the root of a good title in favour of Mr. Walker, who dealt with them in good faith and for value.

(3) Finally it was pointed out that the transfer (signed by Mr. and Mrs. Radomski) upon the basis of which Mr. Walker obtained registration was not itself a forgery, and even if void was nevertheless indistinguishable in principle from the Proclamation which in **Boyd's case** (supra) was assumed to be void for the purposes of argument by the majority of the Court.

The effect of the three majority judgments of the Court of Appeal in **Boyd's case** appears to me to be accurately stated in the head-note. Any person who without fraud succeeds in procuring himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title although the documents which form the basis of his registration are absolutely inoperative in themselves. Stringer and Salmond, JJ. dissented. The view taken by the majority of the Court of Appeal is clearly binding on this Court. I very much doubt whether nullity due to forgery can be distinguished in principle from nullity due to some other cause. If any such distinction can be made it cannot avail in the present case, for the transfer from Mr. and Mrs. Radomski to Mr. Walker was certainly not a forgery, but at the most was a nullity because executed pursuant to a non-existent power of sale. I am satisfied that the ratio of Boyd's case is applicable in the present case, and that in this Court the Counter-claim must fail and the Claim must succeed.

An interesting example of the application of **Boyd's case** to an unlawful exercise of a power of sale by mortgagees is to be found in **B. v. M.** (1934) N.Z.L.R. S.105.

I hope that the parties will appreciate that I forbear from discussion in greater detail the most interesting submissions which were made to me solely because I feel that to do so would serve no useful purpose. Should Mr. Frazer seek to persuade the Court of Appeal that **Boyd's case** should be overruled (as to which see **Re Manson dec'd.** (1964) N.Z.L.R. 257)

In the Supreme Court of New Zealand

7. Reasons for Judgment of Richmond, J. 5th May, 1965 *continued*

he will undoubtedly be assisted by the judgment of Dixon, J. in **Clements v. Ellis** (1934) 51 C.L.R. 217 (especially at p.258) and also by the judgment of Owen, J. in **Caldwell v. Rural Bank of N.S.W.** 53 S.R. (N.S.W.) 415. If however in some way he can surmount the difficulties presented by **Boyd's case** he will still be faced with the second submission advanced on behalf of the Radomskis and Mr. Walker. In **Gibbs v. Messer** (supra) their Lordships recognised (at p.257) that " . . . 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 . . . ". However, I prefer to leave the matter at that, particularly as the submissions made to me in this connection were not particularly directed to any difference there might be between a purchase of the registered interest of a mortgagee and a purchase from a mortgagee of the fee simple in circumstances where the mortgagee is acting under a power of sale contained in a forged but registered mortgage.

In the result there will be judgment for Mr. and Mrs. Radomski and Mr. Walker, against Mr. Frazer, on the Counter-claim. On the Claim there will be judgment for Mr. Walker against Mr. Frazer:—

(1) For possession of the land described in paragraph 1 of the statement of Claim. Execution is stayed until after 31 May 1965.

(2) For £570. 13. 4.

There will also be an order that Caveat A.1263 lodged in relation to the said land by Mr. Walker be removed.

In this case I propose to exercise my discretion to fix a lump sum in full of all costs. In respect of the Claim and Counter-claim Mr. Walker is allowed a sum of £105. 0. 0. as costs together with witness expenses and disbursements as fixed by the Registrar. In respect of the Counter-claim Mr. and Mrs. Radomski are allowed a sum of £78. 15. 0. as costs, together with disbursements as fixed by the Registrar.

SOLICITORS:

G. H. & R. G. H. Metcalfe, Auckland, for Mr. Walker.
Glaister, Ennor & Kiff, Auckland, for Mr. Frazer.
Meredith, Cleal & Co., Auckland, for Mr. & Mrs. Radomski.

8. JUDGMENT OF NORTH, P.

In the Court of Appeal of New Zealand

8. Reasons for Judgment of North, P. 15th November, 1965

At the stage of this appeal the facts are no longer in dispute. In the year 1959 the appellant and his wife, Rhoda Agnes Frazer, became registered proprietors as joint tenants of an estate in fee simple of a small farm situated at Papatoetoe. In or about June 1961 Mrs. Frazer, behind the back of her husband, arranged to borrow from the second respondents the sum of £3,000 by way of mortgage upon the security of the land in respect of which she and her husband were registered proprietors. To accomplish her object, Mrs. Frazer forged her husband's signature to the memorandum of mortgage. The second respondents, acting in perfect good faith, advanced the money, and the mortgage in their favour was duly registered against the title on 21 July 1961. Defaults in the payment of interest having been made under the mortgage, the second respondents exercised the power of sale vested in them, and on 26 October 1962 the

farm was sold to the first respondent, the transfer being executed by the second respondents as mortgagees. This transfer was registered on 29 November 1962. It was not doubted that, on any view of the case, the mortgage was good in so far as it affected the interest of Mrs. Frazer. The argument of counsel was exclusively concerned with whether it was good in so far as it affected the appellant's interest in the land. My judgment, then, must be understood to refer solely to the position of the appellant.

In the Court below Mr. Ennor, for the appellant, submitted that neither the registration of the mortgage in favour of the second respondents nor the later registration of the transfer to the first respondent should be allowed to give effect to a mortgage which was undoubtedly a nullity so far as the appellant's interest in the land was concerned. Counsel for the two respondents, on the other hand, submitted:

1. That the second respondents, upon registration of their mortgage, immediately acquired an indefeasible title as mortgagees, there being no difference in principle between a document void for forgery and a document void for any other reason;
2. Alternatively, however defective the title of the second respondents may have been as between themselves and the appellant, yet their defective title was capable of forming the root of a good title in favour of the first respondent, who dealt with them in good faith and for value;
3. Finally, the transfer upon the basis of which the first respondent obtained registration, not being itself a forgery, was indistinguishable in principle from the void proclamation in **Boyd v. The Mayor, Etc., of Wellington,** (1924) N.Z.L.R., 1174.

In the Court below, Richmond. J., holding himself bound by the majority decision of this Court in **Boyd v. The Mayor, Etc., of Wellington,** answered the third question in favour of the respondents and did not express a concluded opinion on the first two questions, contenting himself by saying:

> "I very much doubt whether nullity due to forgery can be distinguished in principle from nullity due to some other cause. If any such distinction can be made it cannot avail in the present case for the transfer from Mr. and Mrs. Radomski to Mr. Walker was certainly not a forgery but at the most was a nullity because executed pursuant to a non-existent power of sale. I am satisfied that the ratio of **Boyd's case** is applicable in the present case."

In this Court the appellant was represented by Mr. Temm, who submitted that the line of authority clearly showed that nullity due to forgery was to be distinguished from nullity due to any other cause, and he accordingly submitted:

1. That the second respondents, upon registration of their mortgage, did not acquire an indefeasible title as mortgagees;
2. That the first respondent, although a purchaser bona fide for valuable consideration, was not protected by the provisions of Sections 182

In the Court of Appeal of New Zealand

8. Reasons for Judgment of North, P. 15th November, 1965 *continued*

and 183 of the Land Transfer Act 1952 for the reason that he was a purchaser from the mortgagees and not from the previous owner of the fee simple.

Counsel for the two respondents joined in renewing the submissions that were made on their behalf in the Court below, Mr. Speight and Mr. Morris applying themselves particularly to the first submission, namely that of immediate indefeasibility, and Mr. Beattie and Mr. Sim to the second and third submissions, namely that of subsequent indefeasibility.

This case raises important and fundamental questions regarding the legal position of persons who become the registered proprietors of land, or of an estate or interest in land, without fraud on their part. It calls, therefore, for a close examination of the line of authority on this topic. I begin with the decision of this Court in **ex parte Davy, District Land Registrar, Wellington: In re The Land Transfer Act,** (1888) 6 N.Z.L.R., 760. This was a simple case. One Nis Lund was entitled to a piece of land at Eketahuna, in the Provincial District of Wellington. The land was held under the provisions of the Land Transfer Act 1885, but no certificate of title having been issued the title was registered on the provisional register. Nis Lund held the Land Revenue Receiver's receipt for the purchase money. This receipt was stolen from Nis Lund's house. In November 1887 a person applied to a firm of solicitors for a loan of £100 and, alleging that he was Nis Lund, offered as security a mortgage over the land in question. A memorandum of mortgage under the provisions of the Land Transfer Act 1885 to secure a loan of £100 was prepared on behalf of a client of the firm, and the person who claimed to be Nis Lund forged the latter's name to the memorandum of mortgage and the mortgage was duly certified as "correct for the purposes of the Land Transfer Act" and tendered for registration. It was duly registered by the District Land Registrar. Some time afterwards the forgery was discovered, the forger having in the meantime absconded. The Registrar then called upon the mortgagee, one Ronayne, to deliver up the memorandum of mortgage and the land revenue receipt in order that the endorsements might be cancelled. The notice being disregarded, a summons was issued and by consent removed into the Court of Appeal. Williams, J., who was an acknowledged authority on the Land Transfer Act, delivered a judgment on behalf of himself and Gillies and Ward, JJ., in the course of which he said (p.764):

> "In the present case the instrument being a forgery was absolutely void, and it would require the clearest expression of the intention of the Legislature before we could hold that the person claiming immediately under such an instrument obtained, by virtue of its wrongful registration, an indefeasible title in himself. The 190th section would, no doubt, protect a bona fide purchaser from a person who had been registered under a void instrument. The principle which underlies this section is that the office by the registration has held out to the public that the person registered has a good title, and must, therefore, as against a purchaser from the registered proprietor be estopped from denying the fact . . . That section (now Section 183 of the present Act), however, assumes that so long as the person originally registered under

the void instrument has not alienated, his title can be impeached. The 189th Section (now Section 182) also protects persons dealing with registered proprietors without notice of fraud, but there is nothing in the Act which protects persons who deal with those who falsely represent themselves to be registered proprietors, and are fraudulently induced by them to accept a void instrument."

The next case which requires to be considered is **Gibbs v. Messer,** (1891) A.C., 248 — a decision of the Privy Council. This was an appeal from the Supreme Court of Victoria. The facts in this case were rather more complicated. One Charles James Cresswell, solicitor for Mrs. Messer, who had possession of the title deeds, forged her signature to an instrument of transfer whereby Mrs. Messer purported to transfer certain lands to a person described as "Hugh Cameron". In due course Cresswell procured the registration of this transfer and the issue to Hugh Cameron of two new certificates of title comprising the same land. Hugh Cameron was a fictitious person, and the signature to the transfer of "'Hugh Cameron" was written by Cresswell, who was the present registered proprietor of the lands under the name of Hugh Cameron. By an instrument of mortgage, the lands comprised in the two new certificates of title were mortgaged to two persons named McIntyre to secure the sum of £3,000 alleged to have been lent by them to Hugh Cameron but which was, in fact, received by the defendant Cresswell and applied to his own use. He prepared a mortgage and acted in the matter as agent for the McIntyres, and signed the name "Hugh Cameron" to the mortgage. I think the headnote to the judgment of the Privy Council correctly records the effect of the decision of the Board. It reads:

> "The Victorian 'Transfer of Land Statute' protects those who derive a registered title bona fide and for value from a registered owner. Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim."

Lord Watson delivered the judgment of the Board, in the course of which he said(p.254):

> "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 encumbrance 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; and they cannot by registration of a forged deed acquire a valid title in

In the Court of Appeal of New Zealand

8. Reasons for Judgment of North, P. 15th November, 1965 *continued*

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 . . . (p.257). 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. The McIntyres cannot bring themselves within the protection of the statute, 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. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences."

In 1905 a series of cases touching Native land — for convenience referred to as **Assets Company Ltd. v. Mere Roihi,** (1905) A.C., 176 — came before the Privy Council on appeal from the Court of Appeal of New Zealand. The facts are very complicated and are fully dealt with in the judgment of Salmond, J., in this Court in **Boyd v. The Mayor, Etc., of Wellington,** and I shall not burden my judgment by endeavouring to recapitulate what was there said. For present purposes it is enough to say that in one of the cases the proceedings in the Native Land Court were found to be irregular and that the irregularities were of such a nature as to affect the jurisdiction of the Native Land Court and to render its proceedings and its order of freehold tenure absolutely null and void. Contrary to the view expressed by the Court of Appeal of New Zealand, their Lordships reached the conclusion that "fraud" in the Land Transfer Act 1870 and the subsequent Act of 1885 means actual fraud, that is to say, "dishonesty of some sort, not what is called constructive or equitable fraud". Their Lordships went on to say:

"The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents . . . A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon . . . It was urged by counsel that the decision of this Board in **Gibbs v. Messer** shows that it is not in all cases essential to bring fraud home to the registered owner. This is true; but the case is not really in point. As already explained, in **Gibbs v. Messer** two bona fide purchasers were on the

register, and the case turned on the non-existence of any real person to accept a transfer and get registered himself, and then to make a transfer to someone else. Moreover, forgery is more than fraud, and gives rise to considerations peculiar to itself." (Pp.210, 211.)

I come next to the **District Land Registrar v. Thompson,** (1922) N.Z.L.R., 627. The facts of that case were these. The name of the registered proprietor of certain land under the Land Transfer Acts 1915 was forged by his son, the registered proprietor having been dead for many years. The purchaser in good faith paid his purchase money and received the transfer, which was registered. The forgery having been discovered, a summons wass issued on behalf of the District Land Registrar calling on the purchaser to deliver up the certificate of title in order that the transfer might be cancelled. This case came before Sim, J., who, following **ex parte Davy,** reached the conclusion that the immediate transferee did not acquire an indefeasible title by registration of the forged transfer, and registration having been obtained by a certificate that the transfer was correct for the purposes of the Land Transfer Act —which was not the case — the Registrar was entitled to call in the title and rectify the register. The importance of this case lies in the fact that Sim, J., was faced with the decision of the Privy Council in **Assets Company Ltd. v. Mere Roihi,** and it was strenuously argued that the earlier decision of the Board in **Gibbs v. Messer** could not stand against that case. Sim, J., said (p.630):

> "It was contended, however, by Mr. Gresson that the decision of the Privy Council in **Assets Co. v. Mere Roihi** establishes that Thompson, in the absence of fraud on his part, acquired an indefeasible title by reason of the registration of the transfer. The judgment in that case appears to be, as Mr. Justice Edwards said in **In Re Mangatainoka,** an explicit decision that any person who can, without fraud, as defined by their Lordships, procure himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title, although he is not a purchaser for value from a registered proprietor, or in fact a purchaser at all. There is one passage in the judgment from which it seems that this extends to the case of title acquired by a forged instrument. The passage is at page 210, and is as follows:
>
> > 'A person who presents for registration a document which is forged or has been fraudulently obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.'
>
> There was no question of forgery in that case, but their Lordships, in discussing the case of **Gibbs v. Messer,** in which there was a forgery, say this:
>
> > 'Moreover, forgery is more than fraud, and gives rise to considerations peculiar to itself.'
>
> The exact position with regard to forged instruments is thus left in doubt. The view taken by their Lordships in **Gibbs v. Messer** was that, although a forged transfer might become the root of a valid title in a bona fide purchaser, the immediate transferee did not acquire an indefeasible title by registration. And that was the view which

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the Court of Appeal had taken in **ex parte Davy.** The question which of the two apparently conflicting views is to prevail cannot be definitely settled by anything less than another decision of the Privy Council, and until that has been obtained it is difficult to say which of the two views ought to be acted on. So far, however, as cases like the present are concerned it seems to me that Courts in New Zealand ought to follow the decision of the Court of Appeal in **ex parte Davy** until that decision has been definitely over-ruled."

I come now to consider **Boyd v. The Mayor, Etc., of Wellington** (supra). The facts in that case were these. The plaintiff was the registered proprietor of a piece of land, on which there was a building, in the city of Wellington. A proclamation by the Governor-General that this land had been taken for the purpose of a tramway and that it should vest as from a specified day in the defendant corporation was gazetted and subsequently registered in pursuance of section 24 (3) of the Public Works Act 1908 against the land. The plaintiff contended that, as the land was occupied by a building, the previous consent of the Government in Council or the consent in writing of himself, the owner, was a necessary condition under section 15 (b) of the Public Works Act 1908 of the taking of the land; that neither condition had been complied with and therefore the proclamation was void. The plaintiff therefore claimed a declaration that the proclamation was void, and that he was entitled to have the land title register rectified by the removal therefrom of such registration. The action was removed by consent into the Court of Appeal, and came before Stout, C.J., and Sim, Stringer, Salmond and Adams, JJ. It resulted in a very pronounced difference in judicial opinion, Stout, C.J., and Sim and Adams, JJ., being of opinion that a person who, without fraud, succeeds in procuring himself to be the registered proprietor of land under the Land Transfer Act has an indefeasible title, whether he is a purchaser for value or not and though the documents which formed the basis of his registration are absolutely inoperative in themselves. Stringer and Salmond, JJ., dissenting, were of the opinion that an instrument which is null and void before registration remains so **inter partes** after registration and creates no indefeasible title until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened. The case called for a close consideration of the decisions of the Privy Council in **Assets Company Ltd. v. Mere Roihi** and in **Gibbs v. Messer,** the majority being of opinion that **Gibbs v. Messer** could be distinguished, the minority being of contrary opinion. No good purpose would, in my opinion, be served by examining in detail the reasons for this difference of opinion, and it will be sufficient, I think, for present purposes, for me to examine the five judgments which were delivered solely for the purpose of determining whether Mr. Temm's first submission is made out. Stout, C.J., after examining **Assets Company Ltd. v. Mere Roihi** and **Gibbs v. Messer,** said:

> "It is clear that the case of **Gibbs v. Messer,** therefore, can have no bearing on the decision in this case. Here a title has got on the register in favour of the Corporation. The proclamation may have been made without jurisdiction; still it is a transfer. There has been

no fraudulent transaction, and the registration must, according to the decision of their Lordships of the Privy Council, be deemed conclusive as to the title of the now registered owner — namely, the defendant Corporation."

Sim, J., said:

"Then, it is said that the decision of the Privy Council in **Gibbs v. Messer** is an authority for holding that the proclamation may be attacked in the present case. This decision was considered in **Assets Co. Ltd. v. Mere Roihi.**"

He then went on to point out that in the **Assets case** it was made quite clear that forgery was more than fraud and gave rise to considerations peculiar to itself. Adams, J., after examining **Gibbs v. Messer** and **Assets Company Ltd. v. Mere Roihi,** said the decision in the former case "must therefore be taken as referring to the special circumstances of forgery only". Salmond, J., said (p.1203):

"I am unable to find anything either in the Land Transfer Act itself or in **Gibbs v. Messer** which justifies the drawing of any such distinction between instruments which are not genuine and instruments which are merely not valid."

Stringer, J., too found difficulty in understanding what was meant by the statement in the **Assets Company cases** "that forgery is more than fraud and gives rise to considerations peculiar to itself". He said (p.1200):

"It cannot have been intended to place documents, void because forged, in a special category of their own and distinguishable in their consequences under the Land Transfer Act from other void documents, otherwise it would have been clearly stated how and why it should be so. Personally, I am unable to see how any rational distinction can be drawn between transfers which are void because forged and those which are void for any other reason."

But these were the opinions of the two dissenting Judges, and the majority did recognise that there was a difference between forgery as dealt with in **Gibbs v. Messer** and invalidity as dealt with in the **Assets Company cases.**

I think it is clear that the majority decision in **Boyd v. The Mayor, Etc., of Wellington** has established, in so far as New Zealand is concerned, that a void instrument, upon registration, confers on the person taking the same an indefeasible title. The decision and the dissent, as was pointed out by Dixon, J., in his judgment in **Clements v. Ellis,** (1934) C.L.R. 217, 256, appears to have turned on the differing views held on the **Assets Company cases,** particularly on **Teira Ranginui's case,** the majority taking the view that it meant that a certificate of title was indefeasible unless obtained by fraud notwithstanding that the registration was made without lawful authority, the minority considering that the decision of the Privy Council was confined to bona fide purchasers for value acquiring registration from a registered proprietor. But, in my opinion, nothing was said by the majority which would justify our holding that **Gibbs v. Messer** can no longer be relied on as binding authority for the view that as between

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immediate parties a person who takes from a forger does not acquire on registration an indefeasible interest in the land or the mortgage as the case may be. The ratio of **Gibbs v. Messer,** it appears to me, turns on the fact that, in the case of a forged document, the person taking under it is not dealing with the registered proprietor and, therefore, while the forged instrument may be the root of title in the case of a subsequent bona fide purchaser for value, as between immediate parties it is absolutely of no effect, and consequently the transfer or the mortgage, as the case may be, may in appropriate proceedings be removed from the register. The one difficulty presented by the **Assets Company cases** is the curious statement which appears in the passage I have cited from the judgment of their Lordships and which was referred to by Sim, J., in **District Land Registrar v. Thompson.** This passage, read alone, certainly provides some basis for argument that no distinction is to be drawn between forged instruments and instruments which are invalid for some reason or another. But the judgment of their Lordships in the **Assets Company cases** must be read as a whole, and I think that, so read, their Lordships did recognise that forgery was more than fraud and gave rise to considerations peculiar to itself. It is true, as is pointed out by Baalman in his work on the Torrens system in New South Wales, that those who adhere to the view that a person does not get an indefeasible title on registration unless he has dealt with the registered proprietor are faced with the difficulty of explaining the principle upon which an original applicant, who had no registered proprietor to deal with, gets an indefeasible title in accordance with the judgment of the Privy Council in the **Assets Company cases.** But I think that it is, perhaps, possible to reconcile the two judgments by reading **Gibbs v. Messer** to mean that, if there is a registered proprietor, a person taking either by transfer or mortgage is under a responsibility to deal with him, and if in fact he deals with a forger he does not gain an indefeasible title. In my opinion, then, Mr. Temm was right in his submission that **Boyd v. The Mayor, Etc., of Wellington** is to be distinguished because it dealt with a void proclamation and not with a forged instrument. I agree, then, with respect, with the view expressed by Sim, J., in **District Land Registrar v. Thompson** that this Court must continue to hold itself bound by **ex parte Davy** until further light is thrown on this difficult matter by their Lordships in the Privy Council.

I am conscious that I have not dealt with Mr. Speight's very full and carefully reasoned argument that an examination of the provisions of the Land Transfer Act alone show that the second respondents acquired on registration an indefeasible interest as mortgagees, but in my opinion the short answer is that this matter is no longer **res integra** and I am bound by the line of authority to which I have referred.

I have not attempted to do more than look generally at the Australian cases, as a closer examination would involve a minute comparison of the provisions in the Victorian and New South Wales statutes with those in our own Land Transfer Act; but, as far as I can see, the pattern of the legislation in Australia is similar to our own. It is interesting to note that that they are consistent with the opinion I have endeavoured to express. In **Ellis v. Clements,** (1934) V.L.R. 54, Low, J., relying on **Gibbs v.**

Messer, was of opinion that a forged discharge of a mortgage was a nullity and its registration did not give it any validity in favour of an immediate party. The facts in that case were very complicated, and I do not think it necessary to refer to them; it will be sufficient to say that the reasoning of Low, J., in this respect was not questioned by any of the Judges in the High Court. The division in opinion in that Court turned on other considerations. Again, in **Davies v. Ryan,** (1951) V.L.R. 283, Dean, J., held that a forged transfer was a nullity and did not confer an indefeasible title on the person taking under the forged instrument.

I am of opinion, then, that on the present state of the authorities, the second respondents, upon registration of their mortgage, did not immediately acquire an indefeasible title to their interest as mortgagees in so far as the mortgage affected the position of the appellant.

I pass on then to consider whether the first respondent is nevertheless protected by the provisions of sections 182 and 183 of the Land Transfer Act 1952. Mr. Temm, for the appellant, agreed that, if the second respondents had been registered proprietors of an estate in fee simple under a forged instrument and had later transferred the fee simple to the first respondent, he would have been protected by the provisions of these sections. That this is so was first stated by Williams, J., in **ex parte Davy,** where that learned Judge said:

> "The 190th section (now section 183) would, no doubt protect a bona fide purchaser from a person who had been registered under a void instrument."

To similar effect is the statement of Lord Watson in **Gibbs v. Messer:**

> " . . . 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."

But the point Mr. Temm made was that neither of these two sections could be invoked by the first respondent for the reason that he purchased the fee simple at a mortgagee's sale. He invited us to construe the sections as applying only to transactions where the transferor was the registered proprietor of the very estate or interest transferred; that this was not so here for the second respondents did not transfer their own interest but, in exercise of their power of sale, the interest of the appellant. He argued that neither section covered such a situation. I agree that section 182 presents special difficulty, but I do not think that the first respondent is required to invoke this section. The section reads thus:

> "Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary not-

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withstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

It will be observed that the section is capable of two interpretations. "Estate or interest" is defined to include a mortgage, and "proprietor" is defined to mean "any person seized . . . of any estate or interest in land . . . ". One way of reading the section is to limit its application to a transfer of the interest in respect of which the person giving the transfer is seized. So read, section 182 would protect the first respondent if he had taken a transfer of the mortgage, but not, as here, where he took a transfer of the fee simple. Another way of reading the section is to interpret the word "transfer" to include a transfer of the fee simple itself, thus covering the present case, where the mortgagees, in exercise of their power of sale, transferred the fee simple to the first respondent. I think, on the whole, the second interpretation should be adopted, for otherwise, as Mr. Sim pointed out, "the result would be to create an irrational and impractical distinction between the position of a purchaser in a mortgagee's sale and the position of any other purchaser". This would not be consistent with the scheme of the statute which, as I see it, is to protect all persons contracting on the strength of the Register Book. I think, moreover, that section 105 gives some support to the interpretation of section 182, for that section recognises that a transfer may be executed by a mortgagee and that, upon its registration, it passes "the estate or interest of the mortgagor". But I think section 183 is the decisive section. It reads:

> "Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever."

In my opinion, section 183 applies to protect a purchaser who acquires the fee simple bona fide for valuable consideration, whether or not he purchases from the previous registered owner or from a mortgagee in exercise of his power of sale. I think that the selection of the words "his vendor" decisively points to the fact that the section applies equally in both cases for, as I have earlier pointed out, "proprietor" is a defined term and includes a mortgagee. In my opinion it is not necessary that the interest transferred should be the same interest as that possessed by the transferor. It is sufficient if he is a "proprietor" duly recorded in the Register Book so that the purchaser deals with him on the faith of the register. Mr. Temm, however, submitted that the appellant was the true vendor, for the second respondents, in exercising their power of sale, acted as his agents. In my opinion that is not so. The contention that a mortgagee is a trustee of the power of sale has been decisively rejected — see **Warner**

v. Jacob, (1882) 20 Ch.D. 220, 234, where Kay, J., after a review of the line of authority, said:

> "The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to release his debt. If he exercises bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous unless indeed the price is so wrong as to be itself evidence of fraud."

This statement of the law was accepted by their Lordships in the Privy Council in **Haddington Island Quarry Company Ltd. v. Huson,** (1911) A.C., 722, 729. There is no authority that I am aware of to support Mr. Temm's conclusion. It is one thing to speak in a popular sense of one person being "the agent" of another, but it is another thing altogether to speak of a person being an agent in the legal sense, for that use of the word necessarily involves the acceptance of the legal obligations which attach to agency: **Kennedy v. De Trafford,** (1897) A.C., 180, per Lord Herschell, 188. If a mortgagee is not a trustee of the power of sale for the mortgagor and, on the contrary, has the right to look after himself first, it seems to me quite impossible to justify Mr. Temm's submission that he should nevertheless be regarded as an agent, under a duty to act for the benefit of his principal — see Bowstead, 12th Edn., 79. I am accordingly of opinion that the first respondent, on registration of the transfer, acquired an indefeasible title, not only to Mrs. Frazer's interest in the land but also to the appellant's interest.

The conclusion I have just reached disposes of the appeal; but, before parting with the case, I think I should say a few words with reference to the way the case was dealt with by Richmond, J., in the Court below. He did not refer to any of the sections in the Land Transfer Act, resting his judgment on the majority decision in **Boyd v. The Mayor, Etc., of Wellington.** I conclude, then, that in his opinion it was unnecessary for the first respondent to rely on the provisions of sections 182 and 183 of the Land Transfer Act; that, in accordance with the majority decision in that case, the first respondent was already protected under the provisions of sections 62, 63 and 75 of the Land Transfer Act for the reason that, although the mortgage was a forgery, the transfer executed by the second respondents was but a nullity because executed pursuant to a non-existent power of sale. It must be acknowledged that there are dicta in **Boyd v. The Mayor, Etc., of Wellington** which would seem to justify this conclusion. Sim, J., in referring to the decision of the Privy Council in **Assets Company Ltd. v. Mere Roihi,** said:

> "The judgment in that case is, as Mr. Justice Edwards said in **In re Mangatainoka Block,** an explicit decision that any person who can, without fraud as defined by their Lordships, procure himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title, although he is not a purchaser for value from a registered proprietor, or in fact a purchaser at all."

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I agree with Richmond, J., that it is difficult to distinguish between a void transfer, even although the authority for its execution rested on a forged mortgage, and a void proclamation. Yet there may well be a difference, and the true view may be that the legal effect of the forgery was not spent but continued to affect the transfer executed by the second respondents under their purported power of sale. I say nothing more, because the question does not need to be determined here; but the breadth of the judgment of the majority in **Boyd v. The Mayor, Etc., of Wellington** leaves me uneasy when I compare the views there expressed with the judgment of Dixon, J., in **Clements v. Ellis,** (1934) 51 C.L.R., 217, and particularly of his analysis of **Assets Company Ltd. v. Mere Roihi.** There seems no doubt that Dixon, J., preferred the dissenting judgment of Salmond, J., although he was not prepared to agree with some of the reasons given by the learned Judge in support of his view of the law. It is to be hoped that an occasion may arise where the Privy Council will again consider the whole question of indefeasibility of title as between immediate parties to a void instrument.

For the reasons I have endeavoured to give, I would dismiss the appeal.

The Court being unanimously of that opinion, the appeal is dismissed. The first and second respondents will each have £150. 0. 0. by way of costs, together with all proper disbursements.

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9. Reasons for Judgment of Turner, J. 15th November, 1965

9. JUDGMENT OF TURNER, J.

There is no dispute as to the essential facts, which can in this case be stated in a few words. Appellant and his wife were registered as proprietors of land. His wife executed a mortgage over the land to second respondents, who accepted it **bona fide** and for value, advancing upon its security a sum by way of loan. In fact, though his wife's signature was genuine, appellant's signature was a forgery. He knew nothing about the transaction. The mortgage was registered by second respondents in good faith. Default was made under it. Second respondents, still in good faith, duly exercised their power of sale. First respondent bought the property at the auction. The sale was conducted by the Registrar, but second respondents themselves executed the transfer to first respondent. Needless to say, first respondent took **bona fide** and for value. His transfer was duly registered. After all this, the forgery came for the first time to the notice of the appellant. At this point there were negotiations between the parties which influenced the form in which the proceedings in this case were actually brought; but the sole question to be determined on this appeal, which does not depend at all upon the form of the proceedings, is whether or not at this stage first respondent has an indefeasible title, as against appellant, to the land which he purchased at the auction from the persons registered on the title as mortgagees.

I will begin by setting forth a short summary of the arguments for the parties as they were presented in this Court. It will be seen that I have ignored the complicating factor of the wife's genuine half interest in the property. Everyone agreed that, as far as the wife's half-interest was concerned, the mortgage was perfectly valid, and that the exercise of the

power of sale by the mortgagees was effective on registration of the transfer pursuant to it to pass the wife's interest in the land. The argument ignored this aspect of the facts, and was presented as if the mortgage had been from a single registered proprietor whose signature was forged; and for the sake of simplicity I so deal with the case.

For appellant, Mr. Temm submitted that he was a registered proprietor who had never done anything to deprive himself of his estate. By forging his signature to a mortgage his wife could not give that mortgage validity so as to affect the estate which was his in the land. Even when the forged mortgage was registered, it still remained a nullity **inter partes.** The title could still effectively have been rectified by the Registrar, or, as I later point out, in a suit **inter partes** in which the Registrar was joined. Mr. Temm conceded that the registration of a transfer of the mortgage to a transferee for value without fraud could by virtue of section 183 of the Land Transfer Act 1952 have effectively constituted the transferee the mortgagee of appellant's estate in the land, but he pointed out that this was not a case of a transfer of the mortgage. Section 183, he submitted, did not apply to the transfer of an estate in land by a person not registered as proprietor of that same estate — e.g. a transfer of the fee simple by a mortgagee in exercise of a power of sale. Without the protection of section 183, a transferee of the fee simple was in no better position than his transferor, and the title could still be rectified against him.

For second respondents, Mr. Speight and Mr. Morris submitted, **contra,** that sections 62 and 63 gave a good title to anyone who without fraud on his part procured himself to be placed upon the register; and that upon registration of this mortgage without fraud on the part of the second respondents the latter acquired an indefeasible title as mortgagees long before the ultimate sale to first respondent was even contemplated. On this ground alone they submitted that the appeal must fail. Mr. Beattie and Mr. Sim, for first respondent, adopted Mr. Speight's argument. They submitted as a second argument that section 183 gave first respondent, a **bona fide** purchaser for value, complete protection and it was submitted in this regard that the words "his vendor" in section 183 were apt to include, **inter alios,** a mortgagee selling his security under the power of sale contained in the mortgage. Mr. Beattie added a submission that even without the aid of section 183 the transfer taken by first respondent, even if given in pursuance of a power of sale which as between mortgagor and mortgagee was non existent and void, yet on registration gave first respondent an indefeasible title, invoking the authority of **Boyd v. The Mayor of Wellington** (1924) N.Z.L.R. 1174 in this regard. It was on this last ground that Richmond, J., decided the case in favour of respondents in the Court below.

The argument before us turned, at least to a considerable extent, on the conflict (so far as there may be a conflict) between **Gibbs v. Messer** (1891) 15 App. Cas. 248, and the dissenting judgments of Salmond and Stringer, JJ., in **Boyd v. The Mayor of Wellington (supra)** on the one hand, and **Assets Co. Ltd. v. Mere Roihi and Others** (1905) A.C. 176 and the judgments of the majority of the Court of Appeal in **Boyd v. The**

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Mayor of Wellington (supra) on the other. We were strongly pressed by all Counsel to reconcile these authorities in our judgments, or, if they were found to be irreconcilable, to state authoritatively the principle discernible as emerging from them. As will presently appear, however, I have been able for myself to decide the outcome of this appeal on a consideration of the provisions of section 183 of the Land Transfer Act 1952, and have therefore found it unnecessary to express any final view as to the applicability of **Boyd v. The Mayor of Wellington** to the facts of this case.

> Section 183 of the Land Transfer Act 1952 provides as follows:
> "(1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee **bona fide** for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever."

In the case before us there is of course no suggestion that either first or second respondents acted in any stage other than in complete good faith or that the transaction between them was not for valuable consideration. There can accordingly be no doubt but that if second respondents can be said to be within the term "his vendor" in section 183, then first respondent must have an unassailable title, for this is what he is given by the section notwithstanding that "his vendor" may have become registered as proprietor under a void instrument (as was the case here). But it is argued by Mr. Temm that in the circumstances of this case, though first respondent was a purchaser, and a purchaser **bona fide** and for value, second respondents were not "his vendor". The vendor contemplated by the section, he submitted, must be one seized of the same estate as that to which the ultimate registered proprietor becomes entitled by a **bona fide** purchase for value. But every purchaser must of necessity have a vendor; and if second respondents are not the vendors of this purchaser, who is? They were the persons who purported to sell him an estate, and as it happened they were the persons who actually signed the transfer to him. Faced with these facts Mr. Temm was prepared to say; the persons named as mortgagors in the mortgage were the vendors; the mortgagees were acting at best only on their behalf and as their agents. Mr. Temm called in aid in this regard the provisions of section 105 of the Act, which he said tended to support the submission that the mortgagees, in exercising a power of sale under a mortgage, do so as the statutory agents of the mortgagor or mortgagors. I have carefully reflected on this argument, but cannot bring myself to accept it. Section 105 merely provides that the mortgagees, by exercising the power of sale given in a mortgage, may effectively pass the estate of the mortgagors — but the fact that the mortgage gives to mortgagees this

power does not seem to me to constitute them the agents of the mortgagor. They do not seem to me answerable to their mortgagor in any way comparable with the responsibility of an agent to his principals. I completely agree with what has been said on this topic in the judgment which the President has just delivered, and I do not propose to add anything further on the point. And it was not contended by Mr. Temm that there was anything in the text of this particular mortgage which in the particular case constituted the mortgagees the agents of the mortgagors or purported to do so. I am of the opinion that the words "his vendor" in section 183 are apt to include a mortgagee or mortgagees selling under a power of sale in the mortgage, and hence include in this case second respondents; and that first respondent is included in the words "any purchaser **bona fide** for valuable consideration of land" in the section. This being so, first respondent, by virtue of section 183, cannot be deprived of the estate or interest in respect of which he is now registered as proprietor on the ground that second respondents, his vendors, may have themselves become registered as proprietors as mortgagees under a void or voidable mortgage.

This result is adverted to, as one appropriate to the case of a **bona fide** purchaser for value from a transferee under a forgery, in **Gibbs v. Messer** itself, the case on which Mr. Temm depended as the very foundation of his argument. That was a case in which the original registered proprietor sought, and was granted rectification of the title where forgeries ha dbeen placed upon the Register. It is to be remembered that in that case the forgery was two-fold. First, the forger forged the signature of the registered proprietor to a transfer to a fictitious person; and then the ultimate mortgagee became registered by virtue of a second forgery, in which the mortgage to him purported to be signed by the fictitious person whose name now appeared upon the register as the registered proprietor of the land. It was specifically held that the name of the fictitious transferee was not inserted in the memorandum of transfer simply as an alias for the forger, and the case was not decided on the basis that the forger had thus, by a forged transfer, himself become registered proprietor in a false name, using which he (a real person) had then signed a mortgage to a mortgagee for value without notice. Had these been the facts I think it is clear that, though the first transfer would of course have been no more than a forgery, the signature to the mortgage would have been genuinely that of the registered proprietor, using an alias; and in these circumstances it seems clear that their Lordships would have held a good title in the ultimate mortgagee by virtue of the plain words of the provision which now appears as section 183. This appears from a passage on page 254 of their Lordships' judgment where it is said:

> "In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificate 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."

In the Court of Appeal of New Zealand

9. Reasons for Judgment of Turner, J. 15th November, 1965 *continued*

The conclusion which I have reached, if correct, disposes of this appeal in favour of respondents; and it is unnecessary to consider the remainder of the arguments submitted by Counsel. I do not propose, therefore, to traverse, in this judgment, the very interesting argument of Mr. Speight and Mr. Morris; but it is right that I should say that it appeared to me to involve formidable difficulties. The ground upon which Richmond, J., decided the matter must, however, be mentioned, if only in due courtesy to the learned trial judge. Richmond, J., rested his decision simply on the judgments of the majority of the Court of Appeal in **Boyd v. The Mayor of Wellington** (1924) N.Z.L.R. 1174. He held that, without reliance being placed on section 183 of the Land Transfer Act 1952, sections 62 and 63 give complete protection to him who, by registering a null instrument without fraud on his part becomes registered as proprietor, if that instrument is not itself a forgery. If it is itself a forgery, (forgery being a special case, and in a class by itself) then so long as the person taking under it remains on the title no doubt that title can be rectified — **Gibbs v. Messer (supra) ex parte Davy** (1888) 6 N.Z.L.R. 760 **District Land Registrar v. Thompson** (1922) N.Z.L.R. 627 **Davies v. Ryan** (1951) V.L.R. 283; but if he transfers, and the Memorandum of Transfer is duly registered, his transferee, even if he cannot invoke section 183 (e.g. if he is a transferee not for value), acquires an indefeasible title by virtue of sections 62 and 63, simply because of the fact that

> "any person who can, without fraud as defined by their Lordships, procure himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title, although he is not a purchaser for value from the registered proprietor, or in fact a purchaser at all"

— per Sim, J., in **Boyd v. The Mayor of Wellington (supra)** at page 1190. On this ground Richmond, J., held for respondents.

Boyd v. The Mayor of Wellington, a decision of this Court, has now stood for over forty years. Even if one were disposed, after due consideration, to conclude that it was wrongly decided, or that the majority judgments were too widely expressed, what was therein said could be overruled in this Court only after the most careful deliberation. It must be remembered, however, that the case has been much criticised, and that it was a decision by a narrow majority — three Judges to two. These two, moreover, were Stringer and Salmond, JJ., and perhaps one can be reminded of the allusion from Lucan which fell from the lips of Lord Radcliffe in **Edwards v. Bairstow** (1955) 3 All.E.R. 48 at page 56 when he testified to the authority of a dissenting judgment when the dissenting Judge was Rowlatt, J. **Boyd's** case was not one of a null transfer by a registered proprietor who himself held under a forgery; it was a case where a genuine act of the Governor-General in Council had nevertheless been done without complying with the formalities essential for its validity. Once the Proclamation was registered, it was held to vest the title indefeasibly in the Corporation. Whether the decision in **Boyd's** case, which must like every case be read on its own facts, should be extended to confer indefeasibility upon everyone who (in the words of Sim, J., at page 1190 of **Boyd's** case) "can, without fraud . . . procure himself to be registered as proprietor . . . although he is not a purchaser for value from a registered

proprietor, or in fact a purchaser at all" is a question which must ultimately be finally resolved; but while three Judges in this Court so concluded on the very special set of facts in that case, Stringer, J., and Salmond, J., thought otherwise; and in Australia, Dixon, J., is on record in **Clements v. Ellis** (1934) 51 C.L.R. 217 as of a similar opinion. It is possible that a future consideration of the matter by the Privy Council may synthesise all the authorities so as to leave **Boyd's** case as a special case; and while one may hope for the day when that tribunal may make a final statement of principle, upon argument deliberately submitted, in the meantime I propose, like North, P., to say nothing one way or the other as to the final validity of the considerations which were accepted by Richmond, J., as deciding this matter.

In the Court of Appeal of New Zealand

9. Reasons for Judgment of Turner, J. 15th November, 1965 *continued*

For the reasons which I have already given, I agree with the President that this appeal should be dismissed.

10. JUDGMENT OF McCARTHY, J.

In the Court of Appeal of New Zealand

10. Reasons for Judgment of McCarthy, J. 15th November, 1965

The judgments which the other members of this Court have now delivered reveal that the arguments which we heard on this appeal covered a number of questions of difficulty and importance relative to indefeasibility of title to land under our Land Transfer system of registration. There was, it will be recalled, Mr. Temm's first submission that Richmond, J., was wrong in the Court below in applying **Boyd v. Mayor, Etc., of Wellington** (1924) N.Z.L.R. 1174 and that this error sprang from his failure to appreciate adequately the force of the distinction accepted, or created, by the Privy Council in **Gibbs v. Messer** (1891) A.C. 248 between forgery and what might be called the more normal illustrations of fraud, a distinction which, he claimed, is still crucial notwithstanding the later decision of the Privy Council in **Assets Company Ltd. v. Mere Roihi** (1905) A.C. 176. Then, there were the submissions for the respondents, or one of them, to the effect that this Court should be bold and concede an irreconcilable conflict in principle between these two Privy Council cases; that we should then discard **Gibbs v. Messer** (supra) in favour of **Assets Company Ltd. v. Mere Roihi** (supra); and that we should say that **Boyd v. Mayor, Etc., of Wellington** (supra) correctly interprets **Assets Company Ltd. v. Mere Roihi** in terms which extend it to forgery cases so as to protect any registered proprietor of the fee simple taking without fraud on his part, even one taking under a forged transfer and not for value. Richmond, J., did not go as far as that, he was content to say that **Boyd v. Mayor, Etc., of Wellington** applied because the instrument by virtue of which the first respondent became registered as proprietor of the fee simple was not itself a forgery, though the mortgage creating the power to sell had been forged. But as all counsel, including Mr. Temm, were agreed that these questions became of no importance if, as the respondents contend, the first respondent was entitled to claim the protection afforded to certain purchasers for value under Ss.182 and 183, the logical thing to do is, I conceive, to turn first to those sections and see if they do provide a complete answer to the appellant's claim.

In the Court of Appeal of New Zealand

10. Reasons for Judgment of McCarthy, J. 15th November, 1965 *continued*

I do not need to describe the facts. That has already been done. Perhaps, though, I could emphasise that the present is the case of an innocent purchaser for value who took a transfer from a vendor registered at the date of sale as the proprietor of an estate or interest in the land which interest conferred a power of sale of the fee simple. He acted innocently throughout, relying on the state of the register, and dealing with a person registered on the title, albeit registered as a result of a forged document. The case therefore differs from **Gibbs v. Messer** where the parties whose interests were attacked did not rely on the register nor did they deal with the then registered proprietor; instead they dealt with a forger and took title from him, though, it is true, by way of an invented person whom the forger, as an intermediate step, had registered and whose transfer the forger then purported to execute. It is not open to doubt, I consider, that "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" — Lord Watson in **Gibbs v. Messer** at page 257. That proposition has been universally accepted in New Zealand and Australia. Mr. Temm does not question it; he would, however, limit its operation to occasions when the vendor is registered as proprietor of the particular interest which is transferred. Therefore, he claims that it does not apply in this present case, where the interest transferred is different from the vendor's own, even though the power to transfer arises hereby virtue of the registered instrument which created the vendor's estate. I do not agree. Here, as in the more usual case of a sale and transfer by the proprietor of the fee simple, a valid root of title, in my view, is created by registration of the interest of the vendor; and, if that interest when registered reveals a power of sale, a purchaser taking under an exercise of that power is entitled to rely on the face of the register. His interest when registered is then protected. This, in my view, is the intention of the Legislature exhibited by the Land Transfer Act as a whole, and especially and finally, by section 183. Though the text of that section is to be found in the judgments of my brothers, I will repeat it now for I wish to discuss that text:

> **"No liability on bona fide purchaser or mortgagee —**
> (1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee **bona fide** for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.
> (2) This section shall be read subject to the provisions of sections seventy-seven and seventy-nine hereof."

I consider that this section, when properly construed, disposes of this case. This, I believe, is the result of a literal reading, and is, moreover,

in conformity with the general intention of the Legislature emerging from the Act as a whole.

I attempt first a literal reading. There are certain observations which can be made about the language. First, it will be observed that the word "vendor" is used to describe, in the case of a sale, the person from whom the registered estate is obtained. The Victorian Statute (currently The Transfer of Land Act 1958) to which we were referred because of several well-known decisions on it runs (S.44 (2)) "on the ground that the proprietor through or under whom he claims was registered as **proprietor** through fraud or error or has derived from or through a person registered as proprietor through fraud or error". It does not use the word "vendor". Moreover, it does not contain our words, "under any void or voidable instrument", which words, incidentally, were not in our original Act, the Land Transfer Act of 1870, but were introduced by the Act of 1885. One imagines, that they were adopted in 1885 to ensure that purchasers from vendors who had become registered under instruments void ab initio, such as a forged document, would be protected, as well as those from vendors whose root of title was merely a voidable one. Be that as it may, I do not overlook that under the Victorian Act, "proprietor" has the same meaning as is given that word in our Act, "any person seized or possessed of any estate or interest in land, at law or in equity, in possession or expectancy", and so it may be that there is no material difference between "proprietor" in the Victorian section and "vendor" in the New Zealand section; but the deliberate adoption in New Zealand of the word "vendor" seems to me rather to indicate an intention on the part of our Legislature to protect titles which might descend in ways other than as the result of a normal sale by the registered proprietor of a fee simple.

Having made these general observations about the section, I must now consider Mr. Temm's submission on its text. It is this: accepting that the word "vendor" can be read in a fairly wide sense, the section nonetheless should be construed so that the word "proprietor" in the phrase "may have been registered as proprietor" is taken to mean, in the instance of a transfer, the proprietor of the very estate or interest in respect of which the person against whom the claim is made is subsequently registered as proprietor; and consequently, applying the section so read to the facts of this case, the word "proprietor" cannot here include the mortgagees, the Radomskis, for they were never proprietors of the estate or interest in respect of which the purchaser, Walker, became registered, namely the fee simple. But whilst that construction is one which could be taken, a much wider reading is permissible on a literal interpretation. As I have said already, the word "proprietor" is defined in S.2 as one possessed of **any** estate or interest in the land, not merely the fee simple. That meaning should therefore be given the word wherever it appears in the Act, unless the context requires a different meaning. The Radomskis were registered as proprietors of **an** estate or interest, an interest as mortgagees. Therefore, they were, strictly, proprietors as defined by the Act. The question then is whether the context requires a narrower construction. I do not think it does. Moreover, as I have already indicated, a construction which brings mortgagees selling under powers of sale within the operation

In the Court of Appeal of New Zealand

10. Reasons for Judgment of McCarthy, J. 15th November, 1965 *continued*

of S.183, seems to me consonant with the spirit of the Act. I shall now explain why I say that.

The general purposes of the Torrens system in Australia, or our own version of it, are well known. In **Gibbs v. Messer,** Lord Watson referring to the Victorian statute, which is very like our own, said:

> "Their Lordships do not propose to criticise in detail the various enactments of the statute relating to the validity of registered rights. The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object 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 every one 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."

Then, in **Fels v. Knowles** (1906) 26 N.Z.L.R. 604, 620, this Court, speaking of our 1885 Act, said:

> "The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements of incorporeal rights, to the right registered."

In **Boyd v. Mayor, Etc., of Wellington,** Salmond, J., said at p.1201 (of the 1915 Act):

> "One of the main purposes of the Land Transfer Act was to abolish this rule of the common law in favour of the rule that he who purchases a registered title in good faith from the registered proprietor obtains for himself an indefeasible title unaffected by any defect in the title of his vendor. This purpose is thus expressed by the Privy Council in **Gibbs v. Messer."**

Then follows the citation from Lord Watson which I quoted some little distance back. Salmond, J., continued:

> "The effect of registration, therefore, is to validate the purchaser's title notwithstanding defects in the vendor's registered title. The common-law rule of Non dat qui non habet is wholly abolished in favour of purchasers of registered titles in good faith."

And then, at p.1203, he summed it all up:

> "As I understand **Gibbs v. Messer** indefeasibility of title is a privilege given to purchasers who honestly and in reliance on the registration of their vendor's title acquire that title from him by a valid and

registered instrument. Such a purchaser cannot, in the absence of fraud, be affected by the defects in his vendor's title."

These general statements are not founded on S.183 alone. They are distilled from a succession of sections, and in particular, in the present New Zealand Statute, Ss.62 and 63 which make the estate of a registered proprietor paramount and protect him from ejectment except in certain specified cases, S.64 which guarantees the title of a registered proprietor, S.75 which makes the test of title evidence of ownership and of the particulars endorsed on it, and then, of course, Ss.182 and 183. Moreover it is not only S.183 which expressly sets out to extend protection to a bona fide purchaser. One finds such a protection in S.63 (c) which provides that an action for possession or recovery of land at the suit of a person deprived of that land by fraud shall not be sustained against a registered proprietor under the provisions of the Act who took as a transferee bona fide for value even though from or through a person registered through fraud. In the words of Dixon, J., in **Clements v. Ellis** (1934) 51 C.L.R. 217, 237, the Act's objective in relation to purchasers is to protect those who "subsequently deal in good faith and for value **in a manner, which, on its face, the register appears to authorise**, and who then obtain registration". This, I think, includes a purchaser of the fee simple taking under a transfer executed pursuant to a power of sale conferred by a registered mortgage.

To sum up the situation as I see it under S.183, the Radomskis were "the vendor". They sold under a power vested in them which was apparent on the title. They did not sell as agents for the mortgagors; indeed they sold without their approval. In my view although they did derive their right to sell through an instrument which might have been set aside, they had a good root of title and so a purchaser from them receives the protection of the statute.

Having decided that S.183 is conclusive in this appeal, should I now go on to consider the other questions to which I referred in the opening passages of this judgment? In my view, since this Court appears to be unanimous as to the effect of S.183, I think it preferable not to make observations in relation to such important questions of law as these are, observations which can only be obiter in the circumstances of this case. None of those questions must necessarily be decided as a step in the reasoning that S.183 applies; and to express our view now on, for example, the suggested conflict between **Gibbs v. Messer** and **Assets Company Ltd. v. Mere Roihi**, could, possibly, inhibit this Court on a future occasion when the facts are not as they are here, and especially when the person taking is not a bona fide purchaser for value. In these circumstances, I propose to say only that the first respondent receives the statutory protection given a bona fide purchaser for value by the Act, and especially by S.183, and that for that reason the appeal must be dismissed.

In the Court of Appeal of New Zealand

11. FORMAL JUDGMENT OF COURT OF APPEAL

11. Judgment of Court of Appeal 15th November, 1965

Friday the 15th day of November, 1965

BEFORE

The Honourable Mr. Justice North, President
The Honourable Mr. Justice Turner
The Honourable Mr. Justice McCarthy

THIS APPEAL coming on for hearing on the 18th, 19th and 20th days of August 1965

AND UPON HEARING Mr. Temm of Counsel for the Appellant, Mr. Beattie, Q.C., and Mr. Sim of Counsel for the First Respondent, and Mr. Speight and Mr. Morris of Counsel for the Second Respondent

THIS COURT HEREBY ORDERS that the appeal brought by the Appellant against the Judgment of the Honourable Mr. Justice Richmond delivered in the Supreme Court of New Zealand at Auckland on the 20th day of May 1965 be and the same is hereby dismissed

AND DOTH FURTHER ORDER that the Appellant pay to the First Respondent and to the Second Respondent the sum of £150 each as costs, and £10. 2. 0. each as disbursements.

By the Court,
W. L'Estrange
Deputy Registrar

L.S.

SCHEDULE OF DISBURSEMENTS

First Respondent

Copies of Judgments: £10. 2. 0.

Second Respondent

Copies of Judgments: £10. 2. 0.

In the Court of Appeal of New Zealand

12. ORDER GRANTING LEAVE TO APPEAL

12. Order Granting Final Leave to Appeal to Her Majesty in Council 28th February, 1966

Monday the 28th day of February, 1966.

BEFORE

The Hon. Mr. Justice North, President.
The Hon. Mr. Justice Turner.
The Hon. Mr. Justice McCarthy.

UPON READING the Notice of Motion of the Appellant dated the 22nd day of February 1966 and the affidavit of Johannes Christoffel Hendrikse filed herein

AND UPON HEARING Mr. Arndt, of Counsel for the Appellant, and Mr. Larsen, of Counsel for the Respondents consenting thereto

THIS COURT HEREBY ORDERS that final leave to appeal to Her Majesty in Council from the Judgment of this Honourable Court delivered herein on the 15th day of November 1965 be and is hereby granted to the Appellant.

By the Court,
G. J. GRACE,
Registrar.

L.S.

20.VI 31/ 21/ amt 53

Form approved by District Land Registrar, Auckland. No. 3371.

New Zealand

Memorandum of Mortgage

ALAN FREDERICK FRAZER of Papatoetoe, Farmer and RHODA AGNES FRAZER his wife ✓

(hereinafter called "the Mortgagor") being registered as proprietor of an estate in fee simple as joint tenants

subject, however, to such encumbrances, liens and interests as are notified by memoranda underwritten or endorsed hereon, in that piece of land described in the Schedule hereto IN CONSIDERATION of the sum of THREE THOUSAND POUNDS (£3000)

(hereinafter called "the principal sum") this day paid lent and advanced to the Mortgagor by EDWARD RADOMSKI of Auckland, Farmer and NELLIE RADOMSKI his wife as tenants in common in equal shares

(hereinafter called "the Mortgagee") the receipt of which sum the Mortgagor doth hereby acknowledge DOTH HEREBY COVENANT with the Mortgagee that:—

1. (a) THE MORTGAGOR will pay to the Mortgagee the principal sum on the 1st day of June one thousand nine hundred and Sixty Six

(b) The Mortgagor will on the 1st day of July next pay to the Mortgagee interest on the principal sum calculated from the 1st day of June One thousand nine hundred and Sixty One after the rate of TEN POUNDS (£10) per centum per annum and will thereafter and for so long as the principal sum or any part thereof shall remain owing and unpaid pay to the Mortgagee interest thereon after the rate aforesaid by monthly payments on the first day of the months of each year during the currency hereof ~~in each year~~ PROVIDED HOWEVER that if the Mortgagor shall on or within fourteen days after any day on which interest shall fall due as aforesaid pay to the Mortgagee interest on the principal sum at the rate of EIGHT POUNDS (£8) per centum per annum then the Mortgagee, subject to all interest and other moneys previously due hereunder having been paid and all other obligations of the Mortgagor hereunder having been observed and performed, will accept interest at such lower rate in lieu of and in full satisfaction of interest at the higher rate hereinbefore provided in respect of every period for which such interest shall be so paid.

~~1. The Mortgagor will pay to the Mortgagee the principal sum together with~~ interest thereon or on so much thereof as shall not for the time being have been repaid from the day of One thousand nine hundred and until total repayment of the principal sum at the rate of per centum per annum by equal instalments of each on the day of in every year until the day of One thousand nine hundred and and will on such last mentioned day pay to the Mortgagee the balance (if any) of the principal sum and interest and any other moneys (if any) then remaining unpaid, the first of such instalments to be paid on the day of One thousand nine hundred and On the day of one thousand nine hundred and and thereafter on the day of in each and every year an account shall be taken by the Mortgagee of the payments received by the Mortgagee in the ending on the day on which such account is being so taken wherein the said payments shall be applied by the Mortgagee FIRSTLY in payment of interest at the rate aforesaid on the amount of the principal sum owing at the commencement of such period SECONDLY in payment of any moneys (other than principal or interest moneys) for the time being owing by the Mortgagor to the Mortgagee hereunder AND THIRDLY in reduction and part payment of the said principal sum.
PROVIDED HOWEVER that if the Mortgagor shall have paid to the Mortgagee each said instalment on the due date thereof or within seven days after such due date (all prior instalments and any other moneys which may have previously fallen due hereunder being then paid and all covenants conditions and agreements on the Mortgagor's part expressed or implied being then duly observed performed and kept) then the Mortgagee will in such account calculate and accept interest at the rate of per centum per annum in lieu of and in full satisfaction of interest at the higher rate hereinbefore provided in respect of every period during which the said ~~instalments shall be so paid~~

2. ALL MONEYS payable by the Mortgagor to the Mortgagee hereunder shall be paid at the office of the Mortgagee's solicitors at Auckland or at such other place in New Zealand as the Mortgagee shall or may from time to time direct clear of exchange and all other deductions.

3. THE MORTGAGOR will keep all buildings fences gates and drains now or hereafter erected constructed or being upon or bounding the said land in good clean and substantial order condition and repair to the satisfaction of the Mortgagee And will comply with the provisions of "The Noxious Weeds Act, 1950" "The Fencing Act 1908" and "The Orchard and Garden Diseases Act 1928" and every statutory amendment or modification thereof or substitution therefor or for any of the said Acts for the time being subsisting.

4. IF the said land or any part thereof is farm land the Mortgagor will farm such land in a careful and husbandlike manner according to modern methods of husbandry obtaining in the district in which the said land is situated and so as not to impoverish the soil thereof And will keep the same free and clear of all gorse briar brambles Californian and Canadian thistles and other noxious vegetation And from rabbits And will comply with and indemnify the Mortgagee against all liability under the provisions of all Statutes relating to dairy farms and to orchard garden and farm diseases and pests (including noxious weeds) for the time being in force in New Zealand and affecting the said land.

5. THE MORTGAGOR will insure all such buildings as aforesaid in the name of the Mortgagee against loss or damage by fire in some responsible insurance office or offices in Auckland to be nominated by the Mortgagee to the amount of the full insurable value thereof.

6. THE MORTGAGOR will forthwith or immediately after every such insurance as aforesaid shall have been effected deliver to the Mortgagee the interim receipt or receipts and the policy or policies for the said insurance And will not later than the forenoon of the day on which any premium for such insurance falls due deliver or cause to be delivered to the Mortgagee the receipt for the payment of such premium.

7. THE MORTGAGOR will punctually pay all costs charges stamp duties and expenses in or about the preparation execution stamping and registration of these presents or any variation thereof or the discharge thereof and of any security or securities collateral therewith.

8. THE MORTGAGEE shall not be bound to produce at any Land Registry Office or elsewhere the Certificate of Title or other instruments of Title to the lands or interests hereby mortgaged or this Mortgage if any default shall then exist in payment of any principal interest or other moneys which should theretofore have been paid by the Mortgagor hereunder or if any default shall then exist in the observance or performance of any covenant or obligation whether expressed or implied which should theretofore have been observed and performed by the Mortgagor hereunder and unless the reasonable costs of such production shall have first been paid to the Mortgagee's solicitors.

9. IN the event of the sale transfer or other disposition of the Mortgagor's interest in the said land or any part thereof the principal sum and all other moneys intended to be hereby secured shall at the option of the Mortgagee become immediately due and payable

PROVIDED ALWAYS and it is hereby expressly agreed and declared that:

In case the Mortgagor shall make default in payment of the principal sum at the time and in the manner hereinbefore appointed for payment therof or in the observance or performance of any other covenant expressed or implied in this mortgage or if and whenever the Mortgagor shall make default for the space of twenty-one days in payment of interest upon the principal sum in accordance with the covenant in that behalf hereinbefore contained or if the Mortgagor shall become bankrupt or compound with or assign his estate for the benefit of his creditors the principal sum and all moneys intended to be hereby secured shall without any previous demand of payment notice or delay whatsoever (save such as is mandatorily required by law) at the option of the Mortgagee become at once due payable and recoverable notwithstanding that the time or times herein appointed for payment thereof respectively may not have arrived and it shall be lawful for the Mortgagee thereupon or at any time or from time to time thereafter to exercise the power of sale and incidental powers in that behalf vested in mortgagees by "The Property Law Act 1952" and "The Land Transfer Act 1952" or any such powers without it being necessary for the Mortgagee to make any demand wait any space of time give any notice or do any act or thing whatsoever other than as required by Section 92 of "The Property Law Act 1952" anything in any rule of law or equity to the contrary notwithstanding And no purchaser at any sale purporting to be made in exercise of the powers hereby conferred shall be concerned to enquire as to the fact of any such default as aforesaid having been made or otherwise as to the necessity for regularity or propriety of the sale or be affected by notice that no such default as aforesaid has been made or that no moneys remain owing under this security or that the sale is otherwise unnecessary irregular or improper

THE EXPRESSIONS "Mortgagor" and "Mortgagee" wherever used in these presents shall where such construction is applicable be construed in accordance with the provisions of Section 70 of "The Property Law Act, 1952" AND where two or more Mortgagors are parties hereto the covenants and agreements on their part herein expressed or implied shall bind them jointly and each of them severally.

THE COVENANTS conditions and powers implied in mortgages by any Act or Acts so far as the same are inconsistent with or contradictory or repugnant to the express provisions hereof but not otherwise are hereby expressly negatived.

The Liability of the mortgagors hereunder shall be both joint and several.

AND for the better securing to the Mortgagee the payment in manner aforesaid of the principal sum interest and other moneys intended to be hereby secured the Mortgagor doth hereby mortgage to the Mortgagee all the estate and interest of the Mortgagor in the land described in the Schedule hereto.

IN WITNESS WHEREOF these Presents have been executed by or on behalf of the Mortgagor this 16th day of June One thousand nine hundred and SixtyOne

THE SCHEDULE ABOVE REFERRED TO.

ALL THAT piece of land containing TEN ACRES TWENTY ONE DECIMAL EIGHT PERCHES (10 a or 21.8p) more or less being portion of Clendon's Grant and all the land comprised and described in Certificate of Title Volume 1377 Folio 23 (Auckland Registry) (Limitedas to parcels).

SIGNED by the said ALAN FREDERICK FRAZER and RHODA AGNES FRAZER as Mortgagors in the presence of :

A F Frazer

R A Frazer

507511

No.

POWER OF SALE EXERCISED.
(TRANSFER No. 69095-57)

MORTGAGE of

F R E E H O L D

ALAN FREDERICK FRAZER ET UXOR **Mortgagor**

EDWARD RADOMSKI ET UXOR **Mortgagee**

Particulars entered in the Register Book, Vol. 1377

Folio 23

the 21st day of July 1961

at 10.51 o'clock.

Assistant Land Registrar of the District of Auckland.

DISTRICT LAND REGISTRAR AUCKLAND N.Z.

MEMORANDUM OF DISCHARGE

I/We hereby acknowledge that I/we have received all moneys intended to be secured by the within written mortgage.

Dated this day of 19

Mortgagee

Witness to the signature of

as Mortgagee

LAND & DEEDS
Nature: PJ
21 JUL 1961
Time: 10.57
Fees: 2
Abstract: 3625

MEREDITH CLEAL & CO.
Solicitors,
AUCKLAND.

Correct for the purposes of the Land Transfer Act.

Solicitor for the Mortgagee

SUPREME COURT,
AUCKLAND
v.
Exhibit A
/ / Registrar.

Correct for the purposes of the Land Transfer Act.

Solicitor for the Mortgagor

Reference: Vol. 535 , Folio 14, 520/100
Transfer No. 586233
Order for N/C No.

DUPLICATE

Register-book,

Vol. 1377 , folio 23

Land and Deeds—4
FORM No. 2

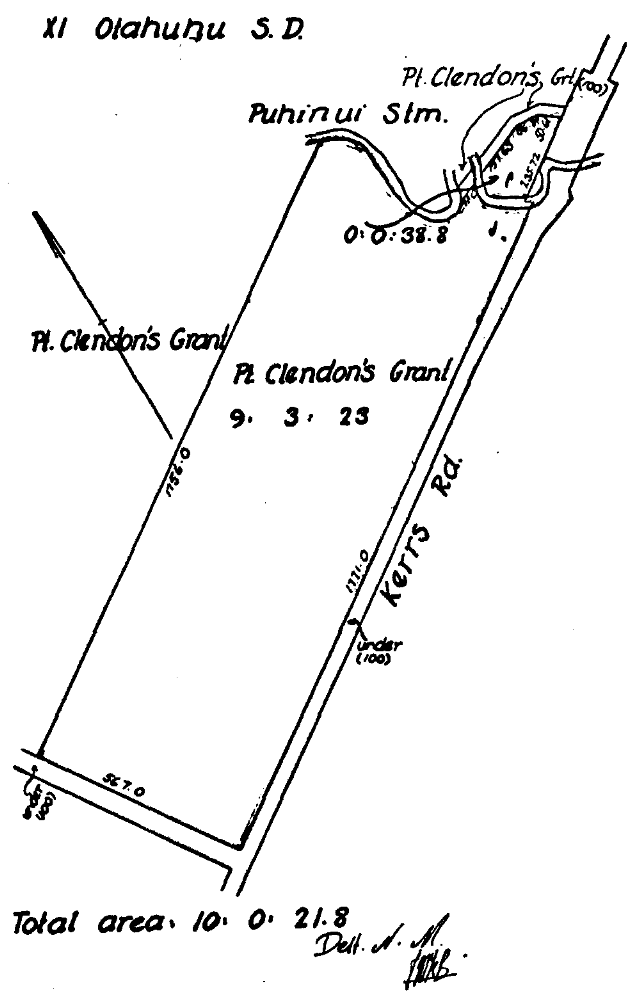
2. In the Supreme Court of New Zealand Plaintiff's Exhibit B Certificate of Title Volume 1377 Folio 23, 29th November, 1962

NEW ZEALAND

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

This Certificate, dated the fourth day of April, one thousand nine hundred and fiftyseven under the hand and seal of the District Land Registrar of the Land Registration District of AUCKLAND **Witnesseth** that JOSEPH THOMAS HOSKEN of Auckland plasterer and GLADYS FLORENCE LOUISA HOSKEN his wife —

~~is~~ are seised of an estate in fee-simple (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial under written or endorsed hereon, subject also to any existing right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly of New Zealand) in the land hereinafter described, as the same is delineated by the plan hereon bordered green, be the several admeasurements, a little more or less, that is to say: All ~~that~~ those parcel of land containing together ten acres and twentyone decimal eight perches more or less being portions of Clendon's Grant



Dell. N. M.

AUCKLAND DISTRICT LAND REGISTRAR NEW ZEALAND

[signature]
~~District~~ Assistant Land Registrar.

Transfer 590527 to Alan Frederick Frazer of Papatoetoe, farmer, and Rhoda Agnes Frazer his wife. Produced 11/7/1957 at 10.30 o'c
[signature] A.L.R.

Mortgage 464967 to [illegible] Graham and Edward [illegible] Produced 20/[illegible] at 10:36 o'c
DISCHARGED Produced 21 [illegible]
[signature] A.L.R.

Mortgage 507511 to Edward Radomski and Nellie Radomski [illegible] in common in equal shares Produced [illegible] 1958 at 10.51 o'c
POWER OF SALE EXERCISED TRANSFER No. [illegible]
[signature] A.L.R.

Transfer 690955 in exercise of power of sale contained in mortgage 507511 Edward Radomski and Nellie Radomski to Douglas Hamilton Walker of Auckland, public accountant. Produced 29·11·1962 at 11·40 o'c
[signature] A.L.R.

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD

I, GERALD JOSEPH GRACE,Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 57 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing:
10 AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this th day of May 1966.

G. J. GRACE
Registrar

L.S.

In the Privy Council.

No. 12 of 1966.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

ALAN FREDERICK FRAZER *Appellant*

AND

DOUGLAS HAMILTON WALKER .... *First Respondent*

EDWARD RADOMSKI and NELLIE RADOMSKI .... *Second Respondents*

RECORD OF PROCEEDINGS

BLYTH, DUTTON WRIGHT & BENNETT
Hastings House,
10 Norfolk Street,
Strand,
London.

As Agents For
J. C. HENDRIKSE,
Otahuhu,
New Zealand.
Solicitor for the Appellant

BELL, BRODRICK & GRAY,
29 Martin Lane,
London, E.C.4.

As Agents For
METCALFE & JONES,
Auckland,
New Zealand.
Solicitors for the First Respondent

MACKRELL & CO.,
31 Bedford Street,
Strand,
London.

As Agents For
MEREDITH, SPEIGHT, CONNELL & CO.,
Auckland,
New Zealand.
Solicitors for the Second Respondents

ASCP—26571