

**Alan Frederick Frazer** - - - - - *Appellant*

v.

**Douglas Hamilton Walker and others** - - - - - *Respondent*

FROM

**THE COURT OF APPEAL OF NEW ZEALAND**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 7th December 1966

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*Present at the Hearing:*

VISCOUNT DILHORNE  
LORD DENNING  
LORD HODSON  
LORD WILBERFORCE  
SIR GARFIELD BARWICK

[*Delivered by* LORD WILBERFORCE]

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This appeal is from a judgment of the Court of Appeal of New Zealand which dismissed the appellant's appeal from a judgment of Richmond J. in the Supreme Court.

The appellant, Alan Frederick Frazer, and his wife Flora Agnes Frazer were in 1961 the registered proprietors under the Land Transfer Act 1952 of a farm property in a suburb of Auckland, subject to a mortgage to one Bailey on which £1,732 was owing.

In 1961 Mrs. Frazer, professing to act on behalf of herself and the appellant, arranged to borrow £3,000 from the second respondents which sum was to be secured on a mortgage over the property. A form of mortgage was prepared by the second respondents' solicitors from whom it was collected by Mrs. Frazer. She took it to solicitors acting for her and in their office a clerk witnessed her genuine signature to the mortgage and also a signature purporting to be that of the appellant which she had previously inserted. The mortgage document and the certificate of title were forwarded by these solicitors to the solicitors of the second respondents: they paid the £3,000 partly to Mrs. Frazer's solicitors and partly on her behalf in discharge of the existing mortgage, and in due course registered at the Land Registry Office, Auckland, on 21st July, 1961, the memorandum of mortgage together with a discharge of the previous mortgage.

As no payment of principal or interest was made, the second respondents exercised their power of sale, and on 26th October 1962 the property was sold by auction to the first respondent for £5,000. The second respondents as mortgagees executed a memorandum of transfer to the first respondent which was registered on 29th November 1962. It is conceded that the second respondents and the first respondent acted throughout in good faith and without any knowledge of the irregularity on the part of Mrs. Frazer.

On 16th March 1964 the first respondent commenced proceedings in Magistrates Court at Auckland against the appellant for possession of the property, relying on his title as registered proprietor. These proceedings were removed into the Supreme Court. The appellant pleaded a defence to this claim and also filed a counterclaim against the first respondent, to which he joined the second respondents as defendants, asserting that what purported to be his signature on the mortgage was a forgery and that the mortgage, the advance by the second respondents, and the sale by the mortgagees had occurred without his knowledge. He claimed a declaration that his interest in the land was not affected by the purported mortgage or by the sale to the first respondent, a declaration that the mortgage was a nullity and an order directing the District Land Registrar to cancel the entries or memorials in the register whereby the second respondents were registered as mortgagees and the first respondent was registered as proprietor and to restore the name of the appellant and Mrs. Frazer as joint owners of the land.

At the trial, Richmond J. held that the appellant had given no authority to Mrs. Frazer to mortgage his interest in the land. But nevertheless he gave judgment in favour of the first respondent and dismissed the appellant's counterclaim holding that the second respondents had obtained registration of an indefeasible title and that in any event the subsequent transfer gave the first respondent an indefeasible title. On appeal to the Court of Appeal, the appellant's appeal was dismissed on the ground that the first respondent, as a *bona fide* purchaser, had obtained an indefeasible title. The Court gave no decision as to the position of the second respondents, although certain observations as to this appeared in the judgments. Before their Lordships both the first respondent and the second respondents appeared and addressed arguments.

Their Lordships will deal first with the appellant's claim against the second respondents. This raises the question whether it was open to the appellant to bring proceedings attacking the validity of the mortgage against the second respondents, whose interest as mortgagees was entered in the register, and claiming cancellation of this entry. This question must be considered by reference to the provisions of the Land Transfer Act 1952. The relevant sections may be considered under five main headings.

I. Those sections which deal with the procuring of registration, the principal of which are sections 42, 157 and 164.

Section 42 contains a prohibition against registration of any instrument except in the manner provided in the Act and unless the instrument is in accordance with the provisions of the Act. Section 157 requires every instrument, including such as charge any estate, to be signed by the registered proprietor and attested. Section 164 prohibits the Registrar from receiving any instrument such as a charge unless there is endorsed thereon a certificate that it is correct for the purposes of the Act signed by the applicant or party claiming under the instrument, a licensed land-broker or a solicitor employed by the applicant or party. The appellant invoked these sections, and regulation 24 of the Land Transfer Regulations 1948, in support of an argument that the forged mortgage could not be received for registration or validly registered and consequently that the mortgagee never became entitled to the benefit of registration. Their Lordships will not accept this argument which would be destructive of the whole system of registration. Even if non-compliance with the Act's requirements for registration may involve the possibility of cancellation or correction of the entry—the provisions as to this will be referred to later—, registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise. As will appear from the following paragraphs, the inhibiting effect of certain sections (*e.g.*, sections 42 and 63) and the probative effect of others (*e.g.*, section 75) in no way depend on any fact other than actual registration as proprietor. It is in fact the registration and not its antecedents which vests and divests title.

II. Those sections which provide protection to the registered proprietor against claims and proceedings. These are sections 62 and 63. Without attempting any comprehensive or exhaustive description of what these

sections achieve, it may be said that while section 62 secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from encumbrances, with three specified exceptions, section 63 protects him against any action for possession or recovery of land, with five specified exceptions. Subsection (2) of section 63 is a particularly strong provision in his favour: it provides that the register is, in every court of law or equity, to be an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud", and section 63 using the words "as against the person registered as proprietor of that land through fraud". The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent. (See *Assets Co. Ltd. v. Mere Roihi*—[1905] A.C. 176 at p. 210.)

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

III. Those sections which state the effect of the certificate of title. The principal section on this subject is section 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seised of or as taking estate or interest [*sic*] in the land therein described as seised or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another—a probative—aspect of "indefeasibility", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it upon trust or to deliver it up through an action in personam.

IV. Those sections which deal with correction or calling in of the certificate. The principal sections are sections 80 and 81 and section 85.

Taking first section 85, this gives to the Court power to direct the Registrar to cancel or correct certificates of title or entries in the register. But the power is carefully circumscribed. It arises upon the recovery of any land, estate or interest by any proceeding in any Court from the registered proprietor but only in any case in which such a proceeding is not expressly barred. This is a clear reference to section 63, which, as has been said, bars proceedings against a registered proprietor in all but the excepted cases. The effect is that the power of the Court to cancel or correct does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act. (See *Assets Co. Ltd. v. Mere Roihi* u.s. at p. 195.)

Sections 80 and 81 are in a different field; they deal with the powers of the Registrar. Section 80 is little more than a "slip" section and not of substantive importance, but section 81 is evidently wider in scope. It applies in cases where it appears to the satisfaction of the Registrar that a certificate of title has been issued in error or contains a misdescription of land or boundaries or that any grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained or is fraudulently or wrongfully retained. It is not a section which directly applies in the present case, though some consideration will be given to its scope later in this judgment.

V. Those sections which relate to the position of third parties dealing with a registered proprietor: these are, in effect, sections 182 and 183. Section 182 deals with notice. In all systems of registration of land it is usual and necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice, or inquiry as to matters possibly affecting the title of the owner of the land. Section 182 is of no direct relevance in the present case, which does not involve any question of notice.

Section 183 is in the following terms:—

“(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.”

Their Lordships will revert to it when they deal with the appellant's claim against the first respondent.

Before leaving the provisions of the statute some reference should be made to the compensation provisions, on which each side relied in argument.

The principal section is section 172. Under paragraph (b) compensation may be claimed by any person deprived of any land, or of any estate or interest in land, by the registration of any other person as proprietor of that land or by an error, omission or misdescription in any entry in the register and who by the Act is barred from bringing an action for recovery of that land, estate or interest.

Their Lordships do not wish to arrive at any firm view upon the possible application of this section in the present case—it would be undesirable that they should do so, since claims for compensation may have to be made. They are prepared to assume, for the purpose of argument only, that according as either failed in these proceedings, the former owner, the appellant, would, and the purported mortgagees, the second respondents, would not, be enabled to claim compensation under this section, but they cannot find in this assumed conclusion any reason for deciding that the second respondents did or did not obtain an indefeasible title. If, as the effect of the rest of the Act, they did not, it might still have been the intention of the Legislature, that they should bear their own loss, which has not arisen from any fault of the Registry, or even from any reliance by them on the Registry, rather than that it should fall upon taxpayers in New Zealand. Their Lordships do not therefore feel entitled to base any argument upon the manner in which the compensation sections might be operated.

The effect of these provisions upon the claim of the appellant against the second respondents must now be considered. It does not in their Lordships view admit of any doubt. Although a mortgage of a fee simple does not take effect as a transfer of the fee simple (see section 100) it does create a charge on the land which the Act treats as an estate or interest in the land (see section 2, definitions of “estate or interest” and “proprietor”). It is therefore apparent that the appellant's counter-claim against the second respondents, in so far as it sought a declaration that the appellant's interest in land was not affected by the purported mortgage and a declaration that the mortgage was a nullity, was an action for recovery of land within the terms of section 63. In so far as it sought cancellation by the Court of the entry of the mortgage on the register, it could only be based on section 85. The proceeding does not fall within either the exception of fraud or within any of the other exceptions allowed by section 63. The power of cancellation by the Court is also excluded

by the express terms of section 85, because the proceeding (for the recovery of land) is itself barred. No question of the invocation of the Registrar's powers under sections 80 and 81 arises in the case. The conclusion must follow that the appellant's claim against the second respondents was correctly dismissed by Richmond J., and their Lordships find that his judgment on this point is supported by the authorities.

The leading case as to the rights of a person whose name has been entered upon the register without fraud in respect of an estate or interest is the decision of this Board in *Assets Co. Ltd v. Mere Roihi* [1905] A.C. 176. The Board there was concerned with three consolidated appeals from the Court of Appeal in New Zealand, which had decided in each case in favour of certain aboriginal natives as against the registered proprietors. In each appeal their Lordships decided that registration was conclusive to confer upon the appellants a title unimpeachable by the respondents. The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise ratio decidendi—the main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a *bona fide* purchaser from such a proprietor whose title is indefeasible. In *Boyd v. Mayor, Etc., of Wellington*, [1924] N.Z.L.R. 1174, the majority of the Court of Appeal in New Zealand held in favour of the former view, and treated the *Assets Co.* case as a decision to that effect. The decision in *Boyd v. Mayor, Etc., of Wellington* related to a very special situation, namely that of a registered proprietor who acquired his title under a void proclamation, but with certain reservations as to the case of forgery it has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the *Assets Co.* case, the indefeasibility of the title of registered proprietors derived from void instruments generally.

Their Lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act 1952 which they have examined. They consider that *Boyd's* case was rightly decided and that the ratio of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

The appellant relied on the earlier decision of the Board in *Gibbs v. Messer* [1891] A.C. 248 as supporting a contrary view, but their Lordships do not find anything in the case which can be of assistance to him. Without restating the unusual facts, which are sufficiently well known it is sufficient to say that no question there arose as to the effect of such sections as corresponded (under the very similar Victorian Act) with sections 62 and 63 of the Act now under consideration. The Board was then concerned with the position of a *bona fide* "purchaser" for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a *bona fide* purchaser from a real registered proprietor. The decision has in their Lordships' opinion no application as regards adverse claims made against a registered proprietor, such as came before the Courts in *Assets Co. Ltd. v. Mere Roihi*, in *Boyd v. Mayor, Etc., of Wellington* and in the present case.

Before leaving this part of the present appeal their Lordships think it desirable, in relation to the concept of "indefeasibility of title" as their Lordships have applied it to the facts before them, to make two further observations.

First in following and approving in this respect the two decisions in *Assets Co. Ltd. v. Mere Roihi*, and *Boyd v. Mayor, Etc., of Wellington* their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952 confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under section 62 and 63) immune from adverse claims, other than those specifically

accepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and of Australia—see for example *Boyd v. Mayor, Etc., of Wellington* u.s. at p. 1223 per Adams J. and *Tataurangi Tairuakena v. Mua Carr* [1927] N.Z.L.R. 688 at p. 702 per Sir Charles Skerrett C.J.).

Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of sections 62 and 63 may not be maintained.

The second observation relates to the power of the Registrar to correct entries under sections 80 and 81. It has already been pointed out (as was made clear in the *Assets Co.* case by this Board—see [1905] A.C. at pp. 194–5) that this power is quite distinct from the power of the Court to order cancellation of entries under section 85, and moreover while the latter is invoked here, the former is not. The powers of the Registrar under section 81 are significant and extensive (see *Assets Co.* case u.s.). They are not coincident with the cases excepted in sections 62 and 63. As well as in the case of fraud, where any grant, certificate, instrument, entry or endorsement has been wrongfully obtained or is wrongfully retained, the Registrar has power of cancellation and correction. From the argument before their Lordships it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word “wrongfully”. It is clear, in any event, that section 81 must be read with and subject to section 183 with the consequence that the exercise of the Registrar’s powers must be limited to the period before a *bona fide* purchaser, or mortgagee, acquires a title under the latter section.

As the appellant did not in this case seek relief under section 81, and as, if he had, his claim would have been barred by section 183 (as explained in the next paragraph), any pronouncement on the meaning to be given to the word “wrongfully” would be obiter and their Lordships must leave the interpretation to be placed on that word in this section to be decided in a case in which the question directly arises.

The failure of the appeal against the second respondents entails (and it was not contended otherwise) that it must equally fail against the first respondent. But their Lordships would add that the action against that respondent was an action for the recovery of land within the meaning of section 63 and that it would be directly barred by that section, quite apart from the fact that it could not be maintained against the other respondents. The defendant could not bring his case against the first respondent within any of the exceptions to that section. Also their Lordships would add, that, if it had been necessary for the first respondent to rely upon section 183 of the Act, he would by it have had a complete answer to the claim. The appellant argued that the second respondents were not “vendors” within the meaning of the section—the suggestion being that he is only a vendor who sells the precise estate or interest of which he is the registered proprietor, so that a mortgagee does not fall within the description. It was further contended that the second respondents were not “proprietors” because they did not own the estate or interest (*i.e.*, the fee simple) which they purported to transfer. Their Lordships are in agreement with the Court of Appeal in holding that the section should not be so narrowly read and that it extends to the case of a mortgagee who is “proprietor” of the mortgage and who has power of sale over the fee simple. Their Lordships need not elaborate on this part of the case since they concur with the conclusions agreed on by all three members of the Court of Appeal.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents’ costs.

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**In the Privy Council**

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**ALAN FREDERICK FRAZER**

v.

**DOUGLAS HAMILTON WALKER  
AND OTHERS**

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LORD WILBERFORCE