[HIGH COURT OF AUSTRALIA.]

CLEMENTS . . . . . APPELLANT;
DEFENDANT,

AND

ELLIS AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS, DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 26, 27; *June* 11.

Rich, Dixon, Evatt and McTiernan JJ.

Torrens System—Registration of dealing—Land subject to mortgage—Sale of unencumbered estate—Forged discharge of mortgage—Purchaser registered as proprietor of unencumbered estate—Effect of registration—Transfer of Land Act 1915 (*Vict.*) (*No.* 2740), *secs.* 47*, 53*, 67*, 72*, 163*, 179*—*Transfer of Land Act* 1928 (*Vict.*) (*No.* 3791), *secs.* 47*, 53*, 67*, 72*, 163*, 179*.

The registered proprietor under the *Transfer of Land Act* (Vict.) of land subject to a mortgage sold to a purchaser under a contract expressed to be "subject to the existing mortgage," though in fact the parties had agreed that the mortgage was to be discharged, and the purchaser was to receive an unencumbered title. In pursuance of the contract the purchaser gave a cheque for the purchase money to the husband and

* The *Transfer of Land Act* 1915 (Vict.) provided:—By sec. 47: "Certificates of title shall be in duplicate in the form in the Third Schedule hereto; and the Registrar shall keep a book to be called the 'Register Book,' and shall register or enter by binding up therein" the Crown grant "and one of the certificates of title, and shall deliver the other original (hereinafter called the duplicate) to the proprietor. Each grant and certificate shall constitute a separate folium of such book; and the Registrar shall endorse thereon in such manner as to preserve their priorities the particulars of all dealings and matters affecting the land by this Act required to be registered or entered." By sec. 53: "Every instrument . . . shall be registered in the order of and as from the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date

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agent of the vendor, who handed it to one, B, for the purpose in part of his paying off and procuring a discharge of the mortgage. B, having misappropriated such part of the money as was required to discharge the mortgage, prepared a discharge of mortgage, forged thereon the signatures of the mortgagees, and lodged the forged discharge of mortgage at the Office of Titles, together with a transfer, which disclosed no encumbrance, signed by the vendor and purchaser, for registration. An unencumbered certificate of title was subsequently issued to the purchaser. The Supreme Court of Victoria (*Lowe* J.) held (1) that the forged discharge of mortgage was a nullity, and (2) that the purchaser not having dealt at all with the registered proprietors of the mortgage, did not obtain either a valid transfer of the mortgage or a valid instrument of discharge, and, consequently, could not become effectively registered as proprietor of the land free from encumbrance. On appeal to the High Court:—*Rich* J. was of opinion that sec. 72 of the *Transfer of Land Act* provided the purchaser with complete protection, as there was no fraud on his part, and no forgery of such a kind as to prevent him having dealt with a real person, and that sec. 179 did not in any way restrict the operation of sec. 72, the result being that the purchaser was properly registered as proprietor of the land free from encumbrance. *Dixon* J. was of opinion that the conditions which give a transferee indefeasibility of title are not satisfied when up to the time of the transfer being presented for registration the transferor is not registered in respect of an unencumbered estate for which the transfer is apt, and the transferee has dealt, not upon the faith of the existing state of the register, but upon the footing that it will be put in a condition to enable him to be registered free from encumbrance; and that a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed, unless afterwards a person who, according to the existing condition of the register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered. *Evatt* J. was of opinion that the purchaser should succeed: A bona fide purchaser of the fee simple of registered land to

of the instrument." By sec. 67: "No certificate of title issued upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth and of the entry thereof in the register book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power." By sec. 72: "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from His Majesty or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title; but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the

whom it is transferred by registered instrument at a time when the registered title in fee simple is in his vendor does not lose the statutory indefeasibility of title although (1) there was a registered encumbrance on the title when negotiations commenced, and (2) prior to the registration of the transfer such encumbrance was removed from the register by the registration of a forged discharge thereof. *McTiernan* J. was of opinion that, as the discharge of mortgage and the transfer were produced together for registration, they became operative simultaneously by virtue of secs. 47 and 53 of the *Transfer of Land Act*, and there was no point of time at which the purchaser could be said to have dealt with the registered proprietor of an estate unencumbered by the mortgage: Accordingly the purchaser could not acquire a title free from the encumbrance.

Gibbs v. *Messer*, (1891) A.C. 248, *Assets Co.* v. *Mere Roihi*, (1905) A.C. 176, and *Boyd* v. *Mayor &c. of Wellington*, (1924) N.Z.L.R. 1174, considered.

The Court being equally divided, *Rich* and *Evatt* JJ. being of opinion that the appeal should be allowed, *Dixon* and *McTiernan* JJ. that it should be dismissed, the decision of the Supreme Court of Victoria (*Lowe* J.): *Ellis* v. *Clements*, (1934) V.L.R. 54, was affirmed.

APPEAL from the Supreme Court of Victoria.

The respondents, Smith Ellis and Esther Dunn Wilson, as executors and trustees of the will and estate of Richard Smith Ellis deceased, brought an action in the Supreme Court of Victoria against the appellant, Edwin Thomas Clements, Lily Holmes and the Registrar of Titles.

The statement of claim in substance alleged that on 25th May 1926 the defendant Lily Holmes became registered under the *Transfer*

grant certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser. Provided always that the land which is included in any certificate of title or registered instrument shall be deemed to be subject to the reservations exceptions conditions and powers (if any) contained in the grant thereof, and to any rights subsisting under any adverse possession of such land, and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates and other moneys which without reference to registration under this Act are by or under the express provisions of an Act of Parliament declared to be a charge upon land in favour of any responsible Minister or any Government department or officer or any public corporate body and to any leases licences or other authorities granted by the Governor in Council or any responsible Minister or any Government department or officer or any public corporate body and in respect of which no provision for registration is made and also where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively are not specially notified as encumbrances on such certificate or instrument." By sec. 163: "Upon production of a memorandum signed by the mortgagee or annuitant or his transferees and attested by a witness discharging the land from the whole or part of the moneys or annuity secured or discharging any part of the

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of Land Act 1915 (Vict.) as the proprietor of an estate in fee simple in "all that piece of land being lot 45 on plan of subdivision number 3,093 lodged in the Office of Titles, and being part of Crown Portion 206 at Gardiner Parish of Prahran County of Bourke, and more particularly described in certificate of title volume 3,407 folio 681,376," and continued to be so registered until 4th October 1929. On 2nd April 1928 the plaintiffs, as trustees of the estate of Richard Smith Ellis deceased, lent to the defendant Lily Holmes the sum of £800, upon the terms and conditions contained in an instrument of mortgage executed by Lily Holmes as mortgagor and the plaintiffs as mortgagees on the security of the land above described. On 12th April 1928 such instrument of mortgage was registered in the Office of Titles number 590,322, and was duly notified on the duplicate certificate of title and the folium of the register book constituted by the certificate of title as an encumbrance on the land described in the certificate. By the instrument of mortgage the defendant Lily Holmes, in consideration of the sum of £800 so lent by the plaintiffs to her, covenanted with the plaintiffs to pay them the sum of £800 as therein provided, with interest thereon at £8 per cent reducible to £7 per cent per annum, and for better securing the payment of the principal sum and interest the defendant Lily Holmes thereby mortgaged to the plaintiffs all the estate and interest which she was then entitled to, or able to transfer or dispose of, in the land. At 12.34 p.m. on 4th October 1929 a document purporting to be a discharge or

land from the whole of such moneys or annuity, the Registrar shall make an entry upon the original grant or certificate and upon the original mortgage or charge and upon the duplicate thereof (if any) stating the time at which it was made, that such mortgage or charge is discharged wholly or partially or that part of the land is discharged as aforesaid (as the case may be); and upon such entry being made the land or the portion of land described in such memorandum shall cease to be subject to or liable for such moneys or annuity or for the part thereof mentioned in such entry as discharged; and the Registrar shall make a corresponding entry on the duplicate grant or certificate of title when produced to him for that purpose." By sec. 179: "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." These provisions now appear (in sections correspondingly numbered) in the *Transfer of Land Act* 1928, which came into operation on 18th December 1929.

memorandum of discharge of the mortgage, signed by the plaintiffs, discharging the land from the whole of the moneys secured by the mortgage, was produced by one Beamsley to the Registrar of Titles, who thereupon made an entry upon the original mortgage to the effect that such mortgage was wholly discharged, and the land thereupon ceased to be subject to or liable for such moneys. The discharge of mortgage was not in fact signed by the plaintiffs or either of them, or by any person or persons acting on their behalf, and the signatures thereon purporting to be the signatures of the plaintiffs were forgeries, and the document was so produced to the Registrar of Titles and such entry was made by the fraud of Beamsley, without the authority, knowledge or consent of the plaintiffs or either of them. At the same time, i.e., at 12.34 p.m. on 4th October 1929, an instrument of transfer, whereby the defendant Lily Holmes transferred her estate and interest in the said land to the defendant Clements, was lodged in the Office of Titles, and the defendant Clements became registered as the proprietor of an estate in fee simple in the said land free from all encumbrances. The plaintiffs alleged that Beamsley, in so producing the discharge of mortgage for registration, did so as agent of the defendant Lily Holmes, and/or the defendant Clements, or alternatively on his own behalf and for his own purposes; that the defendant Lily Holmes had not paid to the plaintiffs the sum of £800, and there was then due and owing by her to them the sum of £1,056 for principal and interest, payable under the instrument of mortgage, and that by reason of the matters aforesaid the plaintiffs had been wrongfully deprived of the security over the land provided by the instrument of mortgage for the repayment of the loan and interest, and had suffered damage in that they were unable to obtain payment thereof from the defendant Lily Holmes, and were deprived of their security. The plaintiffs claimed (a) from the defendant Lily Holmes, the sum of £1,056, and (b) against the defendants Clements and/or the Registrar of Titles, (i.) an order (*a*) that the duplicate of the certificate of title be delivered up to the Registrar of Titles; (*b*) that the Registrar of Titles cancel, delete or remove from such certificate of title and the duplicate thereof and mortgage the entries made in consequence of the lodging of the

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discharge of mortgage by Beamsley, and make such amendment, alteration or endorsement on the certificate of title and duplicate and the mortgage as might be necessary to give to the plaintiffs the security over the land which they had when the mortgage was registered; (*c*) that the duplicate of the certificate of title and mortgage be delivered up to the plaintiffs; (ii.) £1,056 damages.

The defendant Holmes, by her defence, in substance alleged that if Beamsley produced the purported discharge for registration, he did not do so as her agent. The defendant Clements, by his defence, in substance alleged that Beamsley did not produce the purported discharge of mortgage as his agent, and that he (Clements) was at all material times a bona fide purchaser of the legal estate in the land for value, without notice of the plaintiffs' rights therein. As to the relief claimed in par. (*b*) (i.) of the statement of claim, Clements alleged that in becoming registered proprietor of the land under the *Transfer of Land Act* he dealt with the defendant Lily Holmes, the registered proprietor thereof, bona fide and for value, that if any such forgery or fraud as alleged was committed, Clements was not a party or privy thereto; that the Registrar, in addition to the entries of discharge made upon the certificate of title and upon the original mortgage also made an entry as required by the *Transfer of Land Act* upon the duplicate mortgage; that Clements was at all material times, or, alternatively, before becoming aware of the plaintiffs' claims, the registered proprietor of the land under the *Transfer of Land Act* free from encumbrances; and that the Court had no jurisdiction to direct the Registrar to do the acts claimed by the plaintiffs. As to the relief claimed in par. (*b*) (ii.) of the statement of claim, Clements claimed that he was at no time a person upon whose application any erroneous registration to the prejudice of the plaintiffs was made by the Registrar; that he did not acquire title to the estate or interest of the plaintiffs through fraud, error or misdescription, and accordingly no other right to damages against him was available under the *Transfer of Land Act* or otherwise; that the plaintiffs had not exhausted their legal remedies against the defendant Lily Holmes, and were consequently unable to show any damage resulting to them from the loss of the interest

or estate alleged; and that he claimed through the defendant Lily Holmes, who, if any person was at any time registered as proprietor of the plaintiffs' estate or interest through fraud or error, was the person so registered; that Beamsley was not his agent to do, and had no authority from him to do, any of the acts or things alleged; and that the plaintiffs were estopped from relying upon their claims against him, or alternatively were disentitled by their own conduct to the relief sought, inasmuch as the plaintiffs being trustees had in breach of trust allowed Beamsley to retain in his possession the certificate of title and the mortgage, and in breach of trust had for a period of several years failed to collect or endeavour to collect interest on the mortgage, and had thereby put it in Beamsley's power to commit the alleged fraud, or had represented that Beamsley was a person having authority to deal with the documents relating to the land; and moreover that he (Clements) had paid the whole of his purchase money to one Holmes, husband of the defendant Lily Holmes, to be paid to the plaintiffs for the purpose of obtaining a certificate of title in his (Clements') own name free from encumbrances, and thereafter he obtained a certificate of title free from encumbrances in his own name, which purported to state that the mortgage in question had been discharged, and by reason of the plaintiffs' failure in breach of trust to collect interest over a long period, they induced him to believe that the mortgage had been discharged, and that the discharge referred to on the certificate of title was a genuine one; and as a result of these facts after the issue of the certificate of title free from encumbrances to him on 18th November 1929 he equitably mortgaged the land to the Bank of New South Wales to secure the sum of £3,000 advanced to him, and interest, which mortgage was still in force, and that he until September 1932 believed that the plaintiffs' mortgage had been duly discharged, and acted in accordance with such belief, in that he did not in the meantime attempt to obtain repayment of the moneys from Beamsley, who, prior to September 1932, became impecunious, and he (Clements) in his financial expenditure had proceeded on the basis that he was entitled to the property free from encumbrances. Alternatively, Clements claimed that to the extent of the sum of £3,000 and interest

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he or the Bank was, by reason of the above-mentioned facts, entitled to priority over the plaintiffs, and any relief granted to the plaintiffs should be subject to such rights.

The Registrar of Titles, by his defence, in substance, submitted to the judgment of the Court all questions of law raised by the claims that the duplicate certificate of title should be delivered to him, and for rectification of the register, including the question whether the Court had jurisdiction to order rectification of the register ; and pleaded that the facts necessary to establish any claim for damages against him or against the assurance fund were not alleged in the statement of claim, and did not exist.

The action was heard by *Lowe* J., who found that about 8th June 1928 the defendant Lily Holmes agreed to sell the land in question to the defendant Clements for the sum of £1,500, and on that date Clements paid to her agent, first the sum of £2, and later a sum of £48 on account of a deposit of £300 which he had agreed to pay. The balance of the £1,500 was payable within twelve months, and was to bear interest at the rate of 6½ per cent per annum. His Honor found that no mention was made during the bargaining that the land was subject to a mortgage, and that at this time Clements was unaware of this fact. The contract of sale dated 2nd July 1928 which Clements signed contained as a condition a typewritten clause that " the said property is sold subject to the existing mortgage." Clements, while not denying that he had signed this document, said that he did not remember signing it, or of ever having seen this condition. His Honor found that this condition was in the document when Clements signed it, and that he then read it, and that it was not intended to impose on Clements any greater obligation than to pay the sum of £1,500 and interest. On 7th July 1928 Clements completed the payment of the deposit by paying the sum of £250, and by cheque dated 20th June 1929 Clements paid to Mrs. Holmes' husband the balance of £1,200. His Honor found that Holmes was acting in this and all subsequent matters relating to the transfer of title to Clements, except so far as his Honor indicated otherwise, as the agent and with the authority of Mrs. Holmes, and drew the inference from the evidence that in the preparation of the transfer to Clements, Beamsley was instructed by Holmes and was the agent

of Clements, but that, on the other hand, he was Mrs. Holmes' agent to pay to the plaintiffs the moneys owing to them on mortgage, and to procure a discharge thereof. Holmes paid the cheque for £1,200 to Beamsley, and the latter paid it into his trust account on 21st June 1929. On the same day Beamsley drew a cheque on this account for £400 in favour of Mrs. Holmes, which she paid into her account on 26th June, and which was subsequently paid by Beamsley's bank. The balance of the £1,200, namely, £800, which should have gone to discharge the mortgage to the plaintiffs, Beamsley misappropriated. His Honor also found that Beamsley prepared a discharge of mortgage bearing date 21st June 1929, and thereon forged the signatures of the plaintiffs. On 1st October 1929 both Mrs. Holmes and Clements signed a transfer of the land, which indicated no encumbrance thereon. This transfer was lodged in the Office of Titles together with the forged discharge of mortgage and the duplicate certificate of title on 4th October 1929, and, the forgery not being detected, in due course the certificate of title was endorsed with a memorandum of discharge of the mortgage and of transfer to Clements. His Honor drew the inference that Beamsley either personally lodged these documents or caused them to be lodged, and found that according to the true bargain between Mrs. Holmes and Clements the transfer was to be free of encumbrances, and that Clements had the right to require, and Mrs. Holmes was therefore under the obligation to procure, a discharge of the mortgage she had given to the plaintiffs. His Honor held that the fact that Clements did not insist upon getting the transfer and discharge of mortgage in exchange for the balance of purchase money did not affect his rights and obligations, and that what followed after the execution of the transfer, in the lodging thereof and of the forged discharge of mortgage in the Office of Titles, was in the circumstances of this case merely machinery to give effect to the rights of the various parties as effected on settlement. His Honor found that Beamsley was not the servant of any of the parties, and his mere act of forgery did not impose upon any of them liability for that forgery on the footing that he was an agent. His Honor also held that it was not material to consider for the purpose of imposing liability the question raised by the statement of claim: On whose

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behalf was Beamsley acting when he lodged or caused to be lodged in the Office of Titles the documents for registration? In his Honor's opinion the crucial matters for consideration were, broadly speaking, two, namely, the effect of the forged document in itself, and the question whether the registration provisions of the *Transfer of Land Act* had, in favour of the registered proprietor Clements, given any validity to that document. His Honor held that at common law, apart from the *Transfer of Land Act*, the forgery was a nullity, and that Clements could not derive protection from sec. 179 of the *Transfer of Land Act*, as that section affords protection only to those who actually deal with and derive right from a proprietor whose name is upon the register, and Clements dealt only with the proprietor of the land subject to the mortgage, and did not deal at all with the registered proprietor of the mortgage; that Clements had contracted to buy both Mrs. Holmes' interest and that which resided in the plaintiffs; that he could only become effectively registered in respect of the latter by a valid transfer of their interest to him, or by a valid instrument of discharge, and he got neither. His Honor also found that the alleged estoppel in favour of Clements had no foundation. As to the priority set up by Clements in favour of his creditor, the Bank of New South Wales, to whom Clements had equitably mortgaged the land, the Bank of New South Wales was not before the Court, and his Honor declared that his order was without prejudice to any question of priority between the plaintiffs' mortgage and the rights of the other encumbrancer. His Honor accordingly ordered the defendant Clements to deliver up to the Registrar of Titles for rectification the duplicate certificate of title in question, and ordered the Registrar to rectify the certificate of title and the duplicate thereof so as to restore to the plaintiffs the security given to them over the land by the instrument of mortgage No. 590,322, unless in the meantime the defendant, Lily Holmes, should have paid the moneys due under the mortgage, and also directed as against Clements and the Registrar of Titles that the duplicate of such instrument of mortgage should be delivered to the plaintiffs. His Honor also held that the claim against the Registrar for damages against the assurance fund failed.

From this decision the defendant Clements now appealed to the High Court.

Wilbur Ham K.C. and *Sholl*, for the appellant. The appellant, who was purchasing the land, was here dealing with a registered proprietor whose name was on the register, and not with the mortgagee. It was not the business of the purchaser to get a discharge of the mortgage, or to concern himself with the past history of the register book. The interest which the purchaser was here acquiring was the unencumbered fee simple of the land. Where a person honestly and bona fide obtains registration of an interest from one who is in fact registered, the fact that the title of the latter may be impeachable will not affect the title of the person who has become registered (*Gibbs* v. *Messer* (1); *Attorney-General* v. *Odell* (2); *Katene Te Whakaruru* v. *Public Trustee* (3)). Had the appellant dealt with the person who forged the discharge of mortgage, he might have been defeated, but he dealt with an actually registered proprietor. Prior to registration the mortgage was discharged, and the title was clear. It is immaterial that the title was clear only immediately before registration of the appellant's title. He has conformed to the requirements of secs. 72 and 179 of the *Transfer of Land Act* 1928 which, in the circumstances, confer an indefeasible title. *Gibbs* v. *Messer* (4) is in favour of the appellant. [Counsel also referred to the *Transfer of Land Act* 1928, secs. 67 and 163; *O'Connor* v. *O'Connor* (5); *Messer* v. *Gibbs* (6); *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (7); *Bailey* v. *Cribb* (8); *Coleman and Clark* v. *Riria Puwhanga* (9).]

Fullagar K.C. (with him *Magennis*), for the respondents Ellis and Wilson. The judgment of the Supreme Court is correct. A forged document confers no rights at common law. It is a nullity. Even if a purchaser becomes registered without knowledge of the forgery he is still liable to have the register rectified on the application of the true owner. In this case the contract was stated to be "subject to the existing mortgage," and £1,500 is the value of the land unencumbered. The vendor or mortgagor was not the only person who could discharge the mortgage. Under the

(1) (1891) A.C. 248, at p. 257.
(2) (1906) 2 Ch. 47.
(3) (1893) 12 N.Z.L.R. 651.
(4) (1891) A.C. 248.
(5) (1887) 9 A.L.T. 117.
(6) (1887) 13 V.L.R. 854, at p. 868.
(7) (1926) A.C. 101.
(8) (1884) 2 Q.L.J. 42.
(9) (1886) 4 N.Z.L.R. 230.

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contract it could equally have been the duty of the purchaser. The appellant is not protected by sec. 179 of the Act. Sec. 67 applies only to a certificate of title properly issued in accordance with the provisions of the Act, and under sec. 124 the transfer must be signed by the proprietor and registered; and to be effective under sec. 163 a discharge of mortgage must be signed by the mortgagee. Sec. 72 is to be read as though it were merely a proviso to sec. 67, and carries the matter no further. The position under the Act is the same as under the general law, and a forgery cannot form a good root of title. Clements did not deal on the faith of an unencumbered title to the freehold. The material time, both at equity and under the Act, is when the consideration was paid. Sec. 179 is not dealing with the moment of registration, and has completely performed its function before that time. Beamsley was Clements' agent to register both the discharge and the transfer, and Clements was affected by Beamsley's knowledge that the discharge of mortgage was a forgery. [Counsel referred to *Groongal Pastoral Co.* v. *Falkiner* (1); *Ex parte District Land Registrar* (2); *House* v. *Caffyn* (3); *Boyd* v. *Mayor of Wellington* (4); *Gregory* v. *Alger* (5); *Hogg* on *Registration of Title to Land Throughout the Empire* (1920), pp. 107, 108.]

Adam, for the Registrar of Titles. The judgment of the Supreme Court was correct. A discharge of mortgage is not effective under sec. 163 unless it is signed by the mortgagee. In order to obtain the benefit of sec. 179 the purchaser would, in this case, have had to deal with the registered proprietor of the mortgage, but he dealt only with the registered proprietor of the land.

Sholl, in reply. The expression "issued" in sec. 67 refers to the time when the ministerial act is done. There is a continuous dealing right up to the time of registration.

Cur. adv. vult.

(1) (1924) 35 C.L.R. 157.
(2) (1888) 6 N.Z.L.R. 760.
(3) (1922) V.L.R. 67; 43 A.L.T. 129.
(4) (1924) N.Z.L.R. 1174, at pp. 1213, 1215, 1224.
(5) (1892) 19 V.L.R. 565, at pp. 570, 573; 15 A.L.T. 22, at pp. 23, 25.

The following written judgments were delivered :—

RICH J. Mrs. Holmes, who was the registered proprietor of certain land under the *Transfer of Land Act*, agreed to sell it to the appellant for the sum of £1,500. On 8th June 1928 he paid Mrs. Holmes' agent first the sum of £2 and then a further sum of £48 on account of a deposit of £300. During the oral bargaining, nothing was said about the existence of a mortgage registered in the names of the plaintiffs (respondents) over the land, and the appellant was not aware of it. On 2nd July 1928 a formal contract of sale was signed by the appellant, which embodies the conditions in Table A of the *Transfer of Land Act*. Clause 10 of the written contract provided that " the said property is sold subject to the existing mortgage." *Lowe* J., who tried the case, was " quite satisfied on the evidence that neither " the appellant " nor Mrs. Holmes intended by the formal contract to vary the terms of the bargain they had orally arrived at in regard to the purchase price, and that neither intended by the words of the condition quoted to impose any greater obligation on " the appellant " than to pay the sum of £1,500 and interest " (1). From first to last the contract was a purchase by the appellant from a registered proprietor of an unencumbered estate. On 7th July 1928 the appellant paid £250, the balance of the deposit. On 20th June 1929 the appellant paid Mrs. Holmes' husband and agent in this regard the balance of purchase money, namely, £1,200. The appellant asked Holmes to allow him to inspect the certificate of title. Holmes said it was in the possession of one Beamsley, and took the appellant to the latter's office. After a conversation with Beamsley, Holmes told Clements that he could not then produce the certificate of title as there was a mortgage upon it, but that he would procure a discharge of the mortgage and let the appellant have the certificate of title later on. The appellant was content with this assurance, left the cheque with Holmes and departed. The appellant asked Holmes to see that the transfer was properly attended to, and to do it by whatever procedure he thought fit. *Lowe* J. found the following further facts relating to the transaction (2) :—" The contract incorporated the provisions of Table A of the *Transfer of Land Act* 1915, which, in clause 7,

(1) (1934) V.L.R. 54, at p. 64. (2) (1934) V.L.R., at pp. 65, 66.

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Rich J.

provided that the transfer was ' to be prepared by and at the expense of the purchaser.' I draw the inference from the evidence before me that in the preparation of the transfer to Clements, Beamsley was instructed by Holmes and was the agent of Clements. He was, on the other hand, in my opinion, Mrs. Holmes's agent to pay to the plaintiffs the money owing to them on mortgage and to procure a discharge thereof. Holmes paid the cheque for £1,200 to Beamsley, and the latter paid it into his trust account on the 21st June 1929. On the same day Beamsley drew a cheque on this account for £400 in favour of Mrs. Holmes, which she paid into her account on the 26th June and which was subsequently paid by Beamsley's bank. The balance of the £1,200, namely, £800, which should have gone to discharge the mortgage to the plaintiffs, Beamsley misappropriated. Apparently realizing, however, that the transfer to Clements of an unencumbered interest in the land sold could not be made if matters remained in this state, Beamsley moreover prepared a discharge of mortgage bearing date the 21st June 1929, and thereon forged, as I find, the signatures of the plaintiffs. Time went on, but the transfer was not executed. Clements' requests for explanation of the delay brought forth various excuses, until, on the 1st October 1929, both Mrs. Holmes and Clements signed a transfer of the land, which indicated no encumbrance thereon. This transfer was lodged in the Office of Titles together with the forged discharge of mortgage and the duplicate certificate of title on the 4th October 1929, and, the forgery not being detected, in due course the certificate of title was endorsed with a memorandum of discharge of the mortgage and of transfer to Clements. I draw the inference from the evidence that Beamsley either personally lodged these documents or caused them to be lodged. The result therefore is that the plaintiffs to whom the mortgage money has not been repaid find themselves, as the register now stands, deprived of their security over the land ; that Mrs. Holmes has lost the mortgage money which she supposed had been paid to the plaintiffs ; and that Clements, who has paid the whole of the money he agreed to pay for an unencumbered title, is threatened with an encumbrance of £800 and interest on the land he bought."

The endorsements on the certificate of title show that the discharge of the mortgage was entered before the transfer to the appellant. Fraud is not suggested against the appellant, and he was not in any way implicated in the forgery nor had he any dealings with the mortgagees. He dealt solely with the registered proprietor, and accepted a transfer from her which was duly registered.

In the circumstances, how do the relevant secs. 72 and 179 of the *Transfer of Land Act* apply ?

Sec. 72 provides that the proprietor of land or of any estate or interest in land shall, except in the case of fraud, hold the same subject to such encumbrances as may be noted on the grant or certificate of title, but absolutely free from all others, with certain exceptions (including the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title). This section is general in its language, and is not, in terms, restricted to any particular class of registered proprietors. There are several ways in which a person may become a registered proprietor. He may be an original grantee. He may have brought the land under the provisions of the Act. He may have obtained and registered a transfer or some other registrable assurance from a previous registered proprietor. Or he may have obtained and registered a transfer from a person who, though not the registered proprietor himself, has power to transfer the interest of the registered proprietor, e.g., the sheriff (sec. 178).

Sec. 179 provides: "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding ; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." This section deals with the case of a person who is contracting or dealing with or taking or proposing to take a transfer from a registered

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proprietor, and it intimates that such a person shall enjoy certain immunities. Read literally, the section is applicable to such persons irrespectively of whether they procure the registration of the interest which they may acquire from the registered proprietor. But the substance of the scheme of the Act is to substitute conveyance by registration for conveyance by deed (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1); *Crowley* v. *Templeton* (2)). Until registration, the estate and interest of the proprietor remain in him; and until then the proprietor has not done all that is necessary to divest the estate out of himself and vest it in the transferee (*Taylor* v. *Land Mortgage Bank of Victoria Ltd.* (3)). The section then is not available to any person who has not registered the interest which he has so acquired. It applies moreover to the dealing from its initiation down to registration (per *Way* C.J., *Public Trustee* v. *Arthur* (4)). Construed in this way, what is the operation and significance of the section? Is it intended to confer on the registered proprietor who has acquired his interest from a previous registered proprietor a higher immunity than a registered proprietor who has otherwise acquired it? Or does it impliedly restrict the generality of the immunity conferred by sec. 72? In *Assets Co.* v. *Mere Roihi* (5), the Privy Council expressed the view that no distinction can be drawn between the first registered owner and any other, except that a registered bona fide purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor. The exception is implied in sec. 72. *Gibbs* v. *Messer* (6) is explained as being a case in which, by reason of the interposition of a mythical person to and from whom forged transfers were executed, there was nothing to deprive the first registered owner of her property—nothing on which the subsequent registrations could operate (7). 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 some one else (8); and not, it is conceived, on

(1) (1912) 14 C.L.R. 286, at p. 289.
(2) (1914) 17 C.L.R. 457, at p. 462.
(3) (1886) 12 V.L.R. 748, at p. 755; 8 A.L.T. 39, at p. 41.
(4) (1892) 25 S.A.L.R. 59, at p. 78.
(5) (1905) A.C. 176, at pp. 202-204.
(6) (1891) A.C. 248.
(7) (1905) A.C., at p. 204.
(8) (1891) A.C., at p. 211.

any inherent superiority of title in a transferee from a registered proprietor conferred by sec. 179. I cannot regard sec. 179 as in any way impliedly restricting the operation of sec. 72. I think that it operates as a partial elucidation of that section (cf. *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1)), and that no inference adverse to the scope of sec. 72 can be drawn from the fact that the elucidation is partial only.

In the present case, there is no suggestion of any fraud on the part of the appellant. This being so, sec. 72, in my opinion, provides him with complete protection, unless it can be shown that there has been an act of forgery of such a kind as to prevent the appellant from having dealt with a real person at all, or, at least, that the transfer was a forgery. This was not the position. The appellant was dealing with a registered proprietor, and was dealing with her for an unencumbered interest. It was the duty of the registered proprietor to procure the discharge of the mortgage. By virtue of a discharge forged by the vendor's agent, the mortgage was removed from the register; and the appellant obtained and registered an authentic transfer upon a certificate of title which had been cleared of the mortgage. In these circumstances I am of opinion that the appellant is protected by sec. 72. If any additional protection is required I am of opinion that the appellant is protected by sec. 179 also.

The appeal should be allowed.

DIXON J. The defendant Lily Holmes was the registered proprietor of an unencumbered estate in fee simple in a parcel of land under the *Transfer of Land Act*. In order to secure the repayment of a loan to her from the plaintiffs of a sum of £800, she executed an instrument of mortgage in their favour, which, on 12th April 1928, was duly registered. On 8th June 1928 she contracted to sell the land to the defendant Clements at a price for the unencumbered estate of £1,500. Of this sum £300 was paid on or before 7th July 1928, and the balance of £1,200 was payable on 2nd July 1929, bearing interest in the meantime. On or about 20th June

(1) (1926) A.C. at pp. 105, 106.

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1929 the defendant Clements, who appears to have made no investigation of the title and to have been unaware of the plaintiffs' mortgage, nevertheless paid over the balance of purchase money. He obtained a cheque for £1,200, and attended with it at the place of business of the vendor's husband, Holmes, who acted in the transaction on behalf of his wife. He asked Holmes for the title. Holmes took him to the office of a neighbouring estate agent named Beamsley, who had, he said, acted for him for a considerable time. After consulting with Beamsley, Holmes said that he could not produce the title then, as there was a mortgage upon it, but that he would discharge the mortgage and let the defendant Clements have the title later. Clements appears to have been content with this statement, and he simply left the cheque with Holmes, who handed it over to Beamsley. Beamsley paid it into his bank account, and drew against it a cheque for £400 which he paid to Holmes. He retained the balance of £800, which was the amount of the plaintiffs' mortgage, ostensibly for the purpose of paying off that encumbrance. But he soon appropriated the money to his own use. After the lapse of some six weeks Clements again applied to Holmes for the title, who again took him to Beamsley. Beamsley said that the delay was caused by the Titles Office. Over the next few months, Clements repeated the request many times, but was put off with the same or similar excuses. A solicitor named McKinley occupied or used the same office as Beamsley, who sometimes acted as his clerk. This solicitor was acquainted with the plaintiffs, and sometimes acted on their behalf. It was he who had in the first place put before the plaintiffs the application of Lily Holmes for a loan, and they had made the investment through him. They had left the duplicate mortgage and certificate of title in his custody on their behalf. On 14th September 1929 McKinley died. On the following day his nephew wrote to the plaintiffs informing them of his death, and adding :—"Uncle has left the whole of his legal documents and affairs in my hands together with certain requests I shall in a day or two be addressing you thereon, so would ask you (if you do not mind) to await same before contemplating the making of any change in relation to your business association with him. In the meantime both Mr. Beamsley and I shall safeguard your interests." Apparently

Beamsley took possession of the duplicate certificate of title and of the mortgage. He prepared a discharge of the mortgage, and dated it 21st June 1929. He then forged the signatures of the plaintiffs to it, and also, as it would appear, the attestation of the late McKinley. He prepared a transfer bearing the date 1st October 1929, which was executed by the defendant Lily Holmes and by the defendant Clements. When precisely this instrument was so executed is uncertain. On 4th October 1929 Beamsley lodged at the Office of Titles simultaneously the forged discharge and the transfer, and produced the duplicate mortgage and certificate of title. These instruments were registered as of 4th October 1929. Across the entry of the mortgage, endorsed upon the folium of the register book constituted by the certificate of title, was written the word "Discharged" with the date 4th October 1929, and authenticated by the signature of the Registrar. Under this entry there was inscribed a certificate that Clements was now the proprietor of the within described estate by transfer registered on 4th October 1929. On 9th October 1929 Clements learned on inquiry at the Titles Office that the instruments had been lodged for registration on 4th October. He wrote to Beamsley complaining of his conduct in blaming the Titles Office for delay of which he himself was guilty, and he obtained from him an order upon the Registrar of Titles for delivery of the duplicate certificate of title to a bank, which on 15th October 1929 received it accordingly.

The plaintiffs, or one of them, had been casually informed, in June 1929, that the mortgagor was in process of selling the property, and that the purchaser might pay off the mortgage, but otherwise they had no knowledge of the transaction between Mrs. Holmes and Clements, and they did not discover what had occurred until 1932. They then brought an action against Mrs. Holmes, Clements, and the Registrar of Titles, claiming against Mrs. Holmes payment of the mortgage moneys, and against Clements and the Registrar of Titles, cancellation of the entry upon the register of the discharge of mortgage, and, evidently as an alternative, payment of the amount of the mortgage moneys, in the case of Clements, as damages *scil.* under sec. 246 of the *Transfer of Land Act* 1928 and, in the case of the Registrar, as compensation payable out of the assurance fund.

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The action was heard before *Lowe* J., who decided that the registration of Clements as a proprietor free from encumbrances was not indefeasible, because, throughout Clements' transaction with his transferor Mrs. Holmes until the transfer and forged discharge were lodged for registration, the plaintiffs' mortgage stood upon the register. He ordered that the register be rectified to restore the plaintiffs' security, and he entered judgment against the mortgagor, Mrs. Holmes, for the amount owing upon the mortgage. The order contained a provision designed for the protection of any encumbrance created by Clements which might be entitled to priority, and in particular of an unregistered security, which, according to the evidence, Clements had given to his bank. From this order Clements now appeals.

The question upon which, in my opinion, the appeal depends, although of much importance, is confined within narrow limits. If Mrs. Holmes had supplied Beamsley with money out of her own resources to pay off the plaintiffs' mortgage, and he had misappropriated it, forged a discharge and obtained its registration, Mrs. Holmes would have become registered as a proprietor of an unencumbered estate. But I think it is quite clear that her registration as a proprietor free of encumbrances would not have been indefeasible, but would have been exposed to the restoration of the plaintiffs' mortgage to the register. If, on the other hand, before the plaintiffs' mortgage was so restored, Clements had in good faith and for value taken a transfer from Mrs. Holmes of the unencumbered estate of which she so stood registered as proprietor, he would, by registration of the transfer, have obtained an indefeasible title to such an estate, and the plaintiffs' mortgage would have been finally overreached.

The question is whether a transferee's title is also indefeasible when up to the time the instrument of transfer is presented for registration the transferor is not registered in respect of the unencumbered estate for which the instrument is apt, and the transferee has dealt, not upon the faith of an existing state of the register, but upon the footing that it will be put in a condition which will result in his registration free from encumbrances. If the transfer was registered first so that, notwithstanding the sufficiency of the

instrument of transfer to carry an unencumbered estate, the transferee became registered as proprietor subject to the mortgage, and then afterwards the mortgage was discharged by registration of the forged instrument, indefeasibility could not be claimed for the resulting certification of freedom from encumbrances, except upon the ground, which I consider untenable, that a certificate of title cannot be recalled, although founded upon a forged or void instrument, unless it is obtained by fraud to which the proprietor is privy. But when the forged discharge is registered before the instrument of transfer, however short may be the interval of time, the register in that interval is in a condition in which it states a title in the transferor to an unencumbered estate. The transferee, having in good faith paid his purchase money and obtained a transfer in anticipation of the removal of the encumbrance, acquires by the registration of his transfer the unencumbered estate so stated to belong to his transferor, and obtains a certificate of his proprietorship. Is his title absolute, or is it liable to the reversal of the unwarranted entry made upon the register immediately prior to his registration? My answer is that his title is not absolute, is not protected from the rehabilitation upon the register of the mortgage, because upon the true interpretation of the *Transfer of Land Act*, an interpretation settled by authority, to obtain that protection it is necessary to deal with a person who is then actually registered as the proprietor of the estate or interest intended to be acquired. The principle, in my opinion, is that a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed unless afterwards a person, who, according to the existing condition of the register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered. The justification for destroying an existing legal estate or interest, which has already been duly established upon the register, is, in other words, found only in the necessity of protecting those who subsequently deal in good faith and for value in a manner, which, upon its face, the register appears to authorize, and who then obtain registration. Almost since the legislation was first adopted, its application has been found difficult when innocent persons, as a result of irregular or dishonest practices by third

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parties, assert conflicting claims to estates or interests, or claims to conflicting estates or interests. A reason for this difficulty is the existence in the statute of provisions which lay down general propositions, without qualifications which other provisions require or clearly imply. By emphasizing one of these provisions and ignoring another, each claim may in turn be supported. Thus the appellant, Clements, relies upon the provision which lays down in universal terms the rule that a certificate of title shall be conclusive evidence of proprietorship; while the respondents, the plaintiffs, emphasize the provision which relieves from inquiry into the circumstances in which registration was obtained only those who take a transfer from or otherwise deal with the proprietor of the estate or interest. The sections which deal with the defeasibility and indefeasibility of titles must be considered together in order to obtain a just view of the meaning of the legislation. In *Gibbs* v. *Messer* (1), in the Privy Council, the sections as they stood in Act No. 301 were all examined and discussed closely during the re-argument, a shorthand report of which I have had the advantage of reading. The statement of their effect contained in the judgment appears to me to have been framed by Lord *Watson* as a brief, but exact, expression of the rule which their Lordships deduced from "the various enactments of the statute relating to the validity of registered rights" (2) which he did not "criticise in detail" (2). But, as the nature or extent and the operation of the statutory principles are in dispute, and as another decision of the Privy Council, *Assets Co.* v. *Mere Roihi* (3), is relied upon as supporting the interpretation of the legislation urged by the appellant, I shall state the effect of the material provisions of the legislation. They have undergone no substantial change, except of order, since they appeared in Act No. 301. Sec. 51 of the *Transfer of Land Act* 1928 ends with a declaration that "the person named in any grant certificate of title or instrument so registered as the grantee or as the proprietor of or having any estate or interest or power shall be deemed and taken to be the duly registered proprietor thereof." Sec. 67 contains the statement: "Every certificate of title issued

(1) (1891) A.C. 248.
(2) (1891) A.C., at p. 254.
(3) (1905) A.C. 176.

under any of the provisions herein contained shall be received in all courts of law and equity as evidence of the particulars therein set forth and of the entry thereof in the register book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power."

In spite of their absolute terms, these provisions do not mean to give an unqualified finality to the certificate in all circumstances. It is enough to refer to sec. 244, which enacts that no action for the recovery of land shall lie against the person registered as the proprietor thereof, except in any of the cases there following of which the fourth is : " (IV.) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

The fact that secs. 51 and 67 contain no reference to the case of fraud, which in very many provisions of the Act is made an exception to the benefit of registration, shows clearly that sec. 67 cannot be understood as more than a general statement to be read subject to other provisions. In what was the following section, but is now sec. 71, express provision is made giving a conclusive effect to the certificate in actions for specific performance by the registered proprietor, being a vendor, against a person " not having notice of any fraud or other circumstances which according to the provisions of " the legislation " would affect the right of the vendor." Not only these exceptions, but also the mere fact of the presence in the Act of such an express provision giving conclusive force to the certificate against a purchaser, show that the provision contained in sec. 67 cannot be understood in the sense contended for. Sec. 72, which gives paramount effect, except in cases of fraud, to the estate or interest of the registered proprietor over all encumbrances not notified on the folium of his registration, with specified exceptions, also operates against a literal application of the words of sec. 67. Although it so operates, sec. 72 uses language which may be misunderstood and applied too widely. It

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must be remembered that the word "proprietor," which is used in sec. 72, is defined by sec. 4 in terms which require the existence of ownership as well as its registration. Further, the subject of proprietorship is not merely land, but also leases, mortgages and charges. An encumbrance upon or other dealing with a lease, mortgage, or charge, is not notified on any certificate of title (cf. secs. 51, 52 and 62), and, accordingly, some difficulty exists in applying the provisions of sec. 72 literally in respect of these interests in land. But, apart from these difficulties, this section, like sec. 67, must be read subject to the provisions of secs. 80, 81 and 245. Secs. 80 and 81 enable the calling in for correction or cancellation of certificates issued in error, or bearing entries or endorsements made in error, and certificates wrongfully or fraudulently obtained, or bearing entries or endorsements so obtained. Sec. 245 refers to the recovery of land or of any estate or interest therein by any proceeding at law or in equity from the person registered as proprietor. These expressions are of much importance. They imply that the person registered as proprietor may be unable to resist an adverse claim to that property in respect of which he is registered, and the implication extends, not only to land, but to interests therein such as mortgages, which are not the subject of certificates of title. Further, the section expressly authorizes the cancellation of certificates and entries. In reference to the provisions of the present sec. 67, Lord *Herschell*, during the argument of *Gibbs* v. *Messer* (1), suggested that, while the state of the register might be conclusive so long as it stood, that was not a reason why there should not be power to rectify it and set it right. Sir *Horace Davey* :—"No. I was going to suggest what is the same proposition, that it means conclusive evidence except in an action or proceeding to rescind, or vary, or rectify the register. I am not quite sure that that would be sufficient. We need not discuss it, because everybody admits that it must be read together with the other sections of the Act." Lord *Watson* :—"It comes to the same thing. The register may be rectified on any of the grounds set forth in the Act." At an earlier stage, Lord *Watson* had said in reference to the same provision : "The provisions of this Act seem to be perfectly consistent, if you

(1) (1891) A.C. 248.

assume what appears to me, at present, to be the meaning of the Legislature, that down to this point they are dealing with nothing except genuine instruments."

It must not be forgotten that sec. 245, which authorizes cancellation, makes it a remedy consequential upon the recovery of the land. The result would appear to be that the conclusiveness of the register prevents any collateral investigation of ownership, but is not an answer to proceedings directly impugning the registration and claiming land or an interest therein of which the plaintiff has been deprived by improper or unauthorized entries. Two important provisions of the Act supply the necessary guidance as to the principle upon which a title founded upon improper or unauthorized entries may yet become indefeasible. They are sec. 247 and sec. 179. Sec. 247 refers to the actions of ejectment allowed against a proprietor by sec. 244, and the action of damages, when his registration is wrongful, allowed against him by sec. 246, and protects him from these proceedings. This section is expressed ungrammatically, but apparently means to say that a bona fide purchaser for value of land, who is registered as a proprietor, cannot be ejected or made liable in damages "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; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever."

The provisions of sec. 179, which originally followed what is now sec. 72, express the conditions which give indefeasibility. They are as follows: "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in

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existence shall not of itself be imputed as fraud." It has been repeatedly decided that the provisions contained in this section give protection only to persons obtaining registration. The decisions are collected in *Wiseman's Transfer of Land*, 2nd ed. (1931), at p. 304. It follows that its purpose is to give additional protection to persons who, being registered, obtain the benefit of sec. 51, and persons who, holding certificates of title, enjoy also the benefit of sec. 67. One of the conditions of that protection is that the person relying upon it shall answer the description, a person "contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge." "Proprietor" means registered proprietor. "Transfer," in this condition as elsewhere, means the instrument. (Cf. sec. 121 and definition of "instrument" in sec. 4, and *Great West Permanent Loan Co.* v. *Friesen* (1).) A definition of "transfer" contained in Act No. 160 was dropped in Act No. 301. The word was defined to refer to the passing of property, a meaning inapplicable to very many provisions of the enactment, including those now contained in sec. 179. The condition appears to me plainly to refer to the transaction between the parties preceding lodgment for registration.

In *Gibbs* v. *Messer* (2) a forged transfer of the plaintiff's land to a fictitious transferee had been registered, and a certificate issued in the name of the non-existing person. A mortgage purporting to be by that fictitious person had been taken bona fide for value by the defendants, and a memorial had been endorsed upon the certificate. The Privy Council held that the certificate of title and the plaintiff's registered mortgage were defeasible. During the argument Lord *Herschell* said:—"The Act as I understand assumes that in many cases although a certificate has been given you may go behind it and set it aside unless there has intervened some one who has gained a right without notice on the faith of the registration. You may always set aside a transfer which has been improperly obtained." The Lord Chancellor: "Between the same parties." Lord *Herschell*: "Between the same parties." Lord *Watson*: "I do not know that there is anything which expressly says that you are entitled to maintain your position on the register if you cannot show that you

(1) (1925) A.C. 208, at p. 220. (2) (1891) A.C. 248.

have derived title somehow." Sir *H. Davey*: "No." Lord *Watson*:— "The mere fact of registration is not conclusive as a defence in those cases. It is deriving title from a person who is apparent owner while entered on the register, and it is a good title though his ownership might be apparent."

Later in the argument Lord *Hobhouse* said that he thought the provisions of what is now sec. 179 threw a good deal of light on the controversy. Lord *Watson* said: "I think the section is important in another point of view, because it appears to me to indicate what in other clauses I am inclined to think is the scheme of the statute, namely, to protect no dealings except dealings with the registered proprietor himself." In the judgment he says:—"The main object of the Act, and the legislative scheme for the attainment of that object, appear to" their Lordships "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" (1).

The last sentence is founded upon the combined effect of several sections which I have discussed; but Lord *Watson* treats them as together containing a "provision" to the effect stated. Later he says: "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" (2). Now the words "by its terms" are of great importance, for they refer to the terms of what is now sec. 179. It is thus certain that the judgment proceeds upon the basis that unless the purchaser for value from the person whose registered proprietorship is defeasible brings himself within the description contained in the opening of that section, his title is also defeasible. He must be a person contracting or dealing with or taking or proposing to take a transfer from the owner whose name appears or is entered

(1) (1891) A.C., at p. 254. (2) (1891) A.C., at p. 255.

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as the proprietor in the register book of any registered land, lease, mortgage or charge. Lord *Watson* proceeds: "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 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" (1). Again, in referring to the reasons of the Court appealed from, he says:—"The opinion thus expressed appears to recognise the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the incumbrance. So far their Lordships agree" (2).

The ground of the decision was that because the mortgagees (whose name was McIntyre) did not and could not deal with an existing registered proprietor, there being nothing but a name on the register, the name of a fictitious person, their mortgage was defeasible. Their Lordships negatived the contention that the name registered was assumed by the forger, Cresswell, who therefore was the real registered proprietor. "The McIntyres cannot, therefore, as matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell" (3). Finally, Lord *Watson* said:—"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" (4).

The mortgagees in *Gibbs* v. *Messer* (5) failed to comply with the conditions of indefeasibility because an abstraction was registered

(1) (1891) A.C., at p. 255.
(2) (1891) A.C., at p. 256.
(3) (1891) A.C., at p. 257.
(4) (1891) A.C., at pp. 257, 258.
(5) (1891) A.C. 248.

as proprietor of the estate needed to support the interest assured, and with an abstraction they could not deal. They dealt with an actual person, who was not registered himself and represented only a figment. But the decision necessarily defined what were the required conditions of indefeasibility. Upon the terms of the judgment as well as upon the terms employed by the statute, in sec. 179, the conditions include the existence of a state of the register which authorizes the transaction when it takes place, that is the dealing *inter partes* independently of the subsequent registration. For the reasons given, I do not think that the appellant Clements complies with the necessary condition. He dealt with a proprietor whose estate was encumbered at the time of the transaction.

The general view of the Act adopted in *Gibbs* v. *Messer* (1) was not new. (See *Hogg, Registration of Title Throughout The Empire* (1920), at p. 145, and the cases there cited.) The necessity of transacting with a person who has already been constituted a proprietor by registration, as opposed to one who is to be afterwards so constituted, was suggested as early as 1872. In *Davis* v. *Wekey* (2) *Molesworth* J. sent to a hearing the question : " Whether dealings completed with a person before he becomes a proprietor under the Act can be protected by the machinery of the Act as to his vendee, by making him a proprietor, and at the same instant a transferror."

None of the considerations upon which such cases as *Gibbs* v. *Messer* and this case depend is necessarily involved in cases, of which *Bonnin* v. *Andrews* (3) is a leading example, where land is brought under the Act, and a certificate is given by way of initial registration. Much less do they apply when the initial registration is the result of alienation by the Crown or other original acquisition of ownership under the law. The conclusions which I have stated and the reasoning upon which they depend are not, in my opinion, affected by the second decision of the Privy Council (*Assets Co.* v. *Mere Roihi* (4)). I have deferred the discussion of that case, or rather those cases, for there are three, because in view of the reliance placed upon them, or one of them, and of the existence of much

(1) (1891) A.C. 248.
(2) (1872) 3 V.R. (E.) 1, at p. 5.
(3) (1878) 12 S.A.L.R. 153.
(4) (1905) A.C. 176.

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confusion or difference of opinion as to what was the principle upon which they went, a full examination of that authority appears necessary.

The circumstances of the *Assets Co.'s Cases* (1) arose out of the provisions of the New Zealand law governing native land, the conversion of customary native tenure to freehold, and the registration under the Torrens system of estates acquired therein. Until 1894, when customary land was converted by statute into land in which the native owners, subject to all equities affecting their estates or interests therein and to all existing restrictions on alienation, took estates in fee simple, the native owners of such land could obtain from the Native Land Court declarations of ownership specifying who were the collective owners and what were their shares and identifying the land by means of a sealed plan showing its boundaries. This declaration was embodied in a memorial of ownership inscribed upon the folium of the Court rolls. After a memorial was obtained, the native owners might sell the land by a transaction conducted in the Court. The sale was effected by a statutory form of transfer, but it was necessary that, after an investigation of the proposed transaction, the Court should make an endorsement upon the memorial that it appeared to be bona fide, and no difficulty existed in respect of the alienation of the land. A certificate of the completeness of the sale was required, and a declaration that thenceforth the purchasers should hold the land as freehold. A Crown grant might then be issued. If it appeared that some of the collective owners were unwilling to sell, but that a majority wished to do so, the Court might partition the land, and those who wished to sell might then proceed with a sale of the land apportioned to them. Upon the making of an order declaring that land should be held as freehold, the land came under the provisions of the *Land Transfer Act*, but, until the registration of a Crown grant, it was made the subject of a provisional register of which the order of the Court formed the first folium. As against the person named in the order of the Court, and all persons claiming through, under or in trust for him, the provisional register was conclusive and the provision of the *Land Transfer Act* applied. A warrant from the Governor-in-

(1) (1905) A.C. 176.

Council directed the Registrar to issue a certificate of title, and thereupon he did so, and closed the provisional register. But the certificate of title was subject to all dealings appearing upon the provisional register, and if, according to it, the estate had already become vested in some other person, the certificate might then be issued directly to him as proprietor. Within a limited time, the Governor-in-Council might order a re-hearing of any proceedings in the Native Land Court, and thereupon the order already made became null, and the entries upon the provisional register were vacated. But if, upon the re-hearing, an order was again made in favour of any of the persons previously found entitled, all dispositions made by them in the meantime regained their efficacy. Trust Commissioners were appointed to supervise the alienation of native land, and, after 1881, no instrument might be registered unless bearing an endorsement by a Commissioner to the effect that, after inquiry, he was satisfied of the validity of the alienation according to the true intent of the legislation. When, in 1894, native owners of customary land became *ipso facto* proprietors of estates in fee simple under the *Land Transfer Act*, subject to equities affecting the estates, it was provided that persons claiming to have acquired an interest in such land by an alienation might apply to the Native Land Court for confirmation of the alienation, and upon confirmation should be entitled to be registered under the *Land Transfer Act* as proprietors of the estate or interest acquired. But it was also enacted that an instrument already endorsed with a Commissioner's approval should be deemed to have been confirmed by the Court, and no further confirmation should be necessary. In the Privy Council (1) these provisions were considered to give efficacy to existing transfers approved by a Commissioner, and to authorize the registration of the transferees as proprietors of the new fee simple arising from the statutory conversion of customary tenure into estates. (See *Native Land Act* 1873, secs. 33, 47, 58, 59, 60, 61, 75, and 83; *Native Land Act Amendment Act* 1878 (*No.* 2), sec. 10; *Native Land Frauds Act* 1881, sec. 15; *Native Land Division Act* 1882; *Native Land Court Act* 1886; *Native Land Administration Act* 1886; *Native Land Court Act* 1894, secs. 57 and 73; *Creditors'*

(1) (1905) A.C., at p. 209.

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Trustee of Arekatera te Wera v. *Walker* (1); *Hami Tikitiki* v. *Assets Co. and District Land Registrar* (2); *Land Transfer Act Amendment Act* 1871, secs. 8-12; *Land Transfer Act* 1874, secs. 9 and 10; *Land Transfer Act* 1885, secs. 10-16 and 42-46.).

The Assets Co. was formed to acquire the property of the City of Glasgow Bank from its liquidators, and by Imperial Statute (45 & 46 Vict. c. 152) the assets of the bank were vested in it as from December 1882. Included in the bank's property were rights or claims which had been independently assigned to it, and in respect of three separate parcels of native land. The Assets Co. became registered proprietor of an estate in fee simple in each of these parcels of land, but, in the case of each of them, former native owners obtained in the Supreme Court of New Zealand orders declaring void the registration and the instruments of title upon which it was founded, and ordering the certificates to be delivered up for cancellation. The Assets Co. appealed to the Privy Council from these orders, and, notwithstanding that three independent chains of title were in question, the appeals were dealt with together. To make clear what is my interpretation of the decision of the Privy Council, it is necessary to state shortly the material circumstances of each case.

In the case of *Mere Roihi*, reported in the Court below in the *New Zealand Law Reports* (3), which related to a block of land called "Waingaromia No. 3," the steps by which the land passed from the native owners and ultimately became the subject of the Assets Co.'s certificate were these:—A provisional order for a memorial of ownership was pronounced in favour of a number of natives, but not to issue until a plan was certified. Next, memoranda of transfer of their interests were signed by or on behalf of the native owners in favour of a European. Thereupon the memorial of ownership was signed, and, notwithstanding that no inquiry took place, an order for freehold tenure in favour of the European transferee was signed and sealed. The District Land Registrar then constituted this order the first folium of the provisional register under the *Land Transfer Act*. A

(1) (1884) N.Z.L.R. 3 C.A. 91. (2) (1899) 18 N.Z.L.R. 226, at p. 236.
(3) (1902) 21 N.Z.L.R. 691.

mortgage by the European so registered to clients of the bank, who ultimately transferred it to the bank, was then given and duly registered. Shortly afterwards a caveat was lodged by the Crown to protect an interest it claimed in part of the land. After the caveat a transfer was presented for registration. This was a transfer to persons whose rights passed to the bank. Registration was prevented by the caveat. Some ten years afterwards an arrangement was made with the Crown by the Assets Co., which in the meantime had succeeded to any beneficial rights given by the transfer as well as those given by the mortgage. Under this arrangement the Crown was to withdraw its caveat, and steps were to be taken to obtain for the Crown a title to a relatively small quantity of the land, and for the company a title to the balance. Transfers of the respective portions of the land direct to the Crown and to the company were executed by the European, the earlier transfer to the company being discarded. The memorial of ownership and order for freehold tenure in favour of the European were again drawn up and signed by the then Judge on behalf of the former Judge who had made them. The Governor signed a warrant authorizing the issue of a certificate of title to the European, and, upon receiving it, the Registrar issued a certificate of title to the Assets Co. None of the steps taken in the Native Land Court was regular, and the Supreme Court held that the Assets Co. obtained no title to the land. The Privy Council reversed this decision, not because it considered the transactions with the native land were regular, but because of the effect of registration. Now it is apparent that this conclusion might be supported because of the effect attributed to the transactions on the provisional register treating the company as bona fide purchasers for value of land held by the transferor upon a registered but defeasible title; or, on the other hand, upon a view of the effect of the certificate of title issued to the company as an initial registration of land definitively brought under the system. The latter, in my opinion, was the view upon which the decision in this and the other two cases proceeded.

In the second case, that of *Panapa Waihopi*, reported in the Supreme Court in the *New Zealand Law Reports* (1), which related

(1) (1903) 22 N.Z.L.R. 37.

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to land called "Waingaromia No. 2," an order for a memorial was made subject to a plan. Next a transfer in favour of the same European was signed by the natives entitled under the memorial. An order in his favour for freehold tenure was then made, but the Governor in Council ordered a re-hearing. The re-hearing resulted in a regular order being made for a memorial in favour of the same natives. But while the re-hearing was pending, the European executed a transfer to the liquidators of the bank. Another order of freehold tenure was made in his favour, but irregularly. This was then constituted the first folium of a provisional register. The existing, or possibly a fresh (cf. the *New Zealand Law Reports* (1)) transfer to the liquidators was then registered, and afterwards, although no Governor's warrant existed, a certificate of title was issued to the liquidator, who then, by registering the Imperial statute, transferred the land to the Assets Co., which thus became the registered proprietor. Again, the Supreme Court of New Zealand considered the registration of the company liable to cancellation, and again the decision was reversed because of the effect of the register. The decision again might be based upon the effect of the initial registration, or of dealings upon the provisional register. It also might be based upon the transfer by the first registered proprietors to the Assets Co. effected by registration of the statute.

In the third case, that of *Teira Ranginui*, reported in the Supreme Court in the *New Zealand Law Reports* (2), which related to a block of land called "Rangatira No. 2," the facts need to be stated with more particularity. On 21st May 1875 a memorial of ownership was made in favour of a number of natives. Between 1878 and 1883 signatures were obtained from more than half the number to memoranda of transfer to a firm called "Kinross & Graham." There were no proceedings for partition, no certification of the transaction, and no order for freehold tenure. In 1882 Kinross & Graham assigned their rights in or claim to the land to the bank, and they became vested by the statute in the Assets Co. In May 1886 a Trust Commissioner endorsed the transfers with his approval. On 12th May 1886 the Native

(1) (1903) 22 N.Z.L.R., at p. 39. (2) (1903) 22 N.Z.L.R. 1.

Land Court made an order for partition, cancelled the memorial of 21st May 1875, and made an order for a Crown Grant to the natives willing to sell in respect of the land apportioned to them, namely, Rangitira No. 2. The fees upon this order remained unpaid until 1895. The company then paid them, and caused the order of 12th May 1886 to be transmitted to the District Registrar, who, on 1st July 1895, made it a folium of a provisional register. On that day the transfers from the native sellers to Kinross & Graham were registered, and a direct transfer from Kinross & Graham to the Assets Company was also registered. On 19th September 1895 a Governor's warrant for a certificate of title in favour of the natives issued, and, on 23rd October 1895, the District Registrar issued a certificate of title to the Assets Company. It will be observed that the dealings on the provisional register consisted of transfers executed before the first folium was constituted. The Supreme Court of New Zealand regarded the transfers to Kinross & Graham as quite ineffectual, but the Privy Council considered that, under the legislation of 1894, they obtained an efficacy as they had been certified by a Trust Commissioner. Again the Privy Council held the company's title indefeasible. The company's title once more was an initial registration.

In my opinion, the decision of the Privy Council was that inasmuch as the company had bona fide acquired an initial registration as proprietor upon the strength of transactions entered into before the land came definitely under the system (and indeed before it ceased to be native land) which, however irregular, were honest, and as that initial registration was not called in question by the Crown, it was conclusive. The decision does not relate to any question between claimants to inconsistent registered interests, or to the question in what circumstances a certificate is indefeasible when the registered proprietor is a transferee from a transferor whose title, except for the registration of a forged instrument, would not have justified the transfer of the estate in respect of which the transferee obtained the certificate. At the commencement almost of the judgment, Lord *Lindley*, who delivered it says (1) :—" The company's title as registered owner is impeached by the plaintiffs in all three cases on two grounds,

(1) (1905) A.C., at p. 189.

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namely, first, that the registration of the company as owner was procured by fraud; and, secondly, that such registration was invalid by reason of the invalidity of the orders of the Native Land Court on which warrants of the Governor, having the effect of Crown grants, were issued, on which warrants the registration was founded. Before dealing with the facts relied upon for the purpose of establishing these contentions, it will be convenient to examine the statutes relating to the land registry, and to ascertain the legal effect of registration, for if this effect is what the Assets Company contends there is an end of the natives' claim. The Assets Company contends that, in the absence of fraud by the company or its agents, registration is conclusive, and confers a good title on the company; and that defects in the proceedings in the Native Land Court, even if proved, cannot affect the title of the company, although such defects may possibly entitle the natives to compensation for any injury caused to them by an improper registration." His Lordship then proceeded to examine the *Land Transfer Acts*, laying stress upon the provisions relating to bringing land under the Act, particularly the surrender of documents of title for cancellation, the contribution to the assurance fund, and the remedy of persons deprived of land by its being brought under the Act (1). In dealing with the Registrar's power to correct errors, he says (2): "Their Lordships have not to consider his power, but they doubt whether the Registrar can set aside a Crown grant, or its statutory equivalent; they are disposed to think that his power to rectify is limited to some fraud or other cause intervening after the Crown grant or equivalent instrument which originally brought the land on the register." His Lordship then states and discusses some of the provisions of the Native Land laws, and next the course of the New Zealand decisions in which registrations had been impeached. In doing so, he distinguishes between the case of the Crown seeking to set aside the certificate, that is, the original registration, or grant, and a private individual. After dealing with the facts in *Mere Roihi's Case* (3) (that relating to Waingaromia No. 2), his Lordship continued (4):—"It was strenuously contended by counsel for the

(1) (1905) A.C., at pp. 190, 191.
(2) (1905) A.C., at p. 195.
(3) (1905) A.C. 176.
(4) (1905) A.C., at pp. 201, 202.

natives that the proceedings in the Native Land Court were not only irregular, but 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 on the ground that it was *coram non judice*. The same contention assumed another shape when relied on to show that the lands in question were never brought under the *Land Transfer Act*, 1885, so as to render its provisions applicable to them. Their Lordships have very carefully considered the judgments delivered in the Court of Appeal upon this part of the case, as well as the very able and exhaustive arguments of the learned counsel for the native claimants ; but their Lordships are unable to concur in the view taken by the majority of the Court, and they concur in that taken by *Williams* J. who dissented from the judgment. The sections making registered certificates conclusive evidence of title are too clear to be got over."

Now *Williams* J. had described the protection given to a registered proprietor's title, and had conceded that the order of freehold tenure forming the first folium of the provisional register had been improperly obtained, and that there were irregularities of procedure in the Native Land Court prior to its issue, but had denied " that a purchaser or other person claiming title bona fide and for value under the order is affected by constructive notice of such impropriety or irregularity " (1). The mortgage and the transfer, registration of which was blocked by the Crown's caveat, he considered, put the mortgagees and the transferees in the position of bona fide purchasers for value (2). The subsequent transfer direct to the Assets Co., which was registered on the provisional register, he treated as completing the title bona fide. Had these dealings been transferred to the register from the provisional register, they would have given a protected title, and the issue to the company of a certificate in its own name gave the same or an equal protection (cf. the *New Zealand Law Reports* (3)). These reasons of *Williams* J. rather rely upon the bona fides of the derivative title shown on the provisional register. It is with this fact in view that the next ensuing observation of Lord *Lindley* should be read (4) :—" In dealing with actions

(1) (1902) 21 N.Z.L.R., at p. 714.
(2) (1902) 21 N.Z.L.R., at p. 717.
(3) (1902) 21 N.Z.L.R., at pp. 718, 719.
(4) (1905) A.C., at p. 202.

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between private individuals, their Lordships are unable to draw any distinction between the first registered owner and any other. A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor, even if the title of the latter could be impeached by the Crown. The reasons for arriving at this conclusion are so clearly given by *Williams* J. that their Lordships do not think it necessary to do more than adopt them and supplement them by a few remarks on some of the arguments addressed to them, and to which they are unable to assent." I understand this to mean that, as *Williams* J. had shown, a bona fide purchaser for value from a registered proprietor, whose title was defeasible, defeasible even at the instance of the Crown, obtained an absolute title upon registration, but that their Lordships considered that a first or original registration, as between subject and subject, was equally protected if it rested on bona fide dealings. In accordance, as it appears to me, with this view, Lord *Lindley* goes on (1) :—" It is to be observed that in *Solicitor-General* v. *Mere Tini* (2) the title of the first registered owner was successfully impeached by the Crown. But in *Public Trustee* v. *Registrar-General of Land* (3) his title was admitted to be unimpeachable. These cases are noticed above. Their Lordships are not prepared to hold that a Crown grant, or a warrant, or a certificate having the statutory effect of a Crown grant, can be impeached except at the instance of the Crown, or, at any rate, in an action to which the Crown is a party. The power of the Crown to set aside its own grant or its equivalent has not to be considered on the present occasion, and their Lordships do not, therefore, express any opinion upon it."

Again, (4) :—" Having regard to the *Land Transfer Acts* and the *Native Land Acts*, their Lordships are of opinion that it was not the duty of a district land registrar to examine into the validity of a Crown grant, nor to enquire how a Governor's warrant had been obtained, nor to enquire into the proceedings in the Native Land Court culminating in an order of freehold title. The Acts show that these documents may be assumed to have been properly obtained,

(1) (1905) A.C., at pp. 202, 203.
(2) (1899) 17 N.Z.L.R. 773.
(3) (1899) 17 N.Z.L.R. 577.
(4) (1905) A.C., at p. 203.

and may safely be acted upon by the district land registrars and by other persons acting in good faith."

In dealing with *Gibbs* v. *Messer* (1), his Lordship says (2): "Lord *Watson*, in his observations on the protection given to bona fide purchasers, points out that a bona fide purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud." It is difficult to see to what passage in Lord *Watson's* judgment this refers, except the statement (3): "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."

Lord *Lindley* proceeds (2): "But there is nothing in his judgment in favour of the view that an original registered owner, claiming through a real person, does not get a good title against every one, except in the cases specially mentioned in the Act, fraud being one of them." This statement, to my mind, draws in clear terms the distinction between the protection given to the person who is first placed upon the register, a protection given because he is so constituted by a public authority who takes the responsibility of adjudicating upon or creating his title, and the derivative owner, whose protection is given to him because he transacts upon the faith of the register. Lord *Lindley* ends his consideration of the conclusiveness of the company's registered title by saying (4):—"The conclusions thus arrived at really dispose of all three appeals, except so far as they are based on fraud. But before dealing with the charges of fraud their Lordships will shortly allude to the special grounds relied upon in the second and third appeals."

In dealing with the third appeal, namely, *Teira Ranginui's Case* relating to Rangatira No. 2, he says (5):—"Their Lordships have already expressed their view of the conclusiveness of the register. But as the objection to the validity of the transfers was argued at great length and prevailed in the Court of Appeal, their Lordships think it right to express their opinion upon it." The final conclusion

(1) (1891) A.C. 248.
(2) (1905) A.C., at p. 204.
(3) (1891) A.C., at pp. 257, 258.
(4) (1905) A.C., at p. 205.
(5) (1905) A.C., at p. 206.

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of that opinion is expressed as follows (1): "There may have been irregularities in the procedure adopted, but their Lordships are of opinion that the Act of 1894 put matters right, and that there was nothing wrong in substance—nothing to affect the validity of the final certificate and registration of the company as owner."

The effect of the decision was much discussed in *Boyd* v. *Mayor, &c., of Wellington* (2). The question to be decided in that case was thus stated by *Stringer* J. (3):—"The plaintiff in this action was the owner of a section of land in the City of Wellington, for which he held a certificate of title under the *Land Transfer Act*. By proclamation dated 29th September, 1917, a portion of this land was declared to be vested in the defendant corporation for public purposes, and on the 21st November a copy of this proclamation, together with a plan of the land taken, was deposited in the District Land Registry Office, and was registered against the land. The action seeks for a declaration that the proclamation was void, and for rectification of the register by removing therefrom the entry of registration." *Stout* C.J., *Sim* and *Adams* JJ. (*Stringer* and *Salmond*, JJ. dissenting), held that, assuming the proclamation to be void, its registration conferred upon the Corporation an indefeasible title. The decision and the dissent appear to have turned upon the differing views held of the effect of the *Assets Co.'s Cases* (4), particularly of *Teira Ranginui's Case*. The majority took 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 considered that the decision of the Privy Council was confined to bona fide purchasers for value acquiring registration from a registered proprietor. In answering this view of the minority, *Sim* J. said (5), in reference to *Teira Ranginui's Case*: "On the contrary, it is clear, I think, from the judgment that the Privy Council dealt with this case on the basis of the company being the first registered owner." In this view I completely agree, though I do not see how it tended to support the wider interpretation of the judgment which made it

(1) (1905) A.C., at p. 210.
(2) (1924) N.Z.L.R. 1174.
(3) (1924) N.Z.L.R., at p. 1195.
(4) (1905) A.C. 176.
(5) (1924) N.Z.L.R., at p. 1191.

applicable to the case then in hand, where the land of a registered proprietor had, *ex hypothesi*, been transferred from him without lawful authority to a new registered proprietor. *Salmond* J. said (1):—"In order to avoid misapprehension it is well to observe that the question now under consideration does not relate to the effect of that initial registration whereby land for the first time is brought under the *Land Transfer Act* in the name of a registered proprietor. The question relates exclusively to the effect of subsequent registration as against the title of an already registered proprietor. It is obvious that in point of conclusiveness and indefeasibility very different considerations may apply to initial and to subsequent registration. In the case of initial registration in error the contest is between the registered proprietor and outsiders whose unregistered interests have been erroneously disregarded by that registration. In the case of subsequent registration, on the contrary, the contest is between two registered proprietors, one of whom has been displaced by the erroneous registration of the other. As to the former case, there are many different methods by which land may be brought under the *Land Transfer Act* and initial registration obtained: as, for example, on the application of the owner, or by the issue of a Governor's warrant, or by the registration of a Native Land Court order. Where land is brought under the Act on the application of the owner and in pursuance of a quasi-judicial investigation of the precedent title by the registrar, it is settled law that the registered title so obtained is indefeasible, and cannot be attacked by the owners of prior adverse interests on the ground that the registrar erroneously disregarded those interests and issued a registered title to one who was not entitled to it. All such prior interests are, in the absence of fraud or other specific exceptions, finally and conclusively destroyed by the bringing of the land under the Act and the issue of an adverse title to some other person. The remedy of persons whose titles have been thus destroyed is not by way of attack on the indefeasible registered title, but by way of claim for pecuniary compensation against the assurance fund established by the Act for this purpose. This was long since determined

(1) (1924) N.Z.L.R., at pp. 1203-1205.

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by the Supreme Court of South Australia in *Bonnin* v. *Andrews* (1), a decision approved by the Privy Council in *Assets Co.* v. *Mere Roihi* (2). It may be that the same principle is applicable to other modes of initial registration, and is not limited to the case of bringing land under the Act on the application of the owner, but it is not necessary for the present purpose to consider whether or to what extent this is so. Presumably the question depends in each class of case on the interpretation and effect of the particular statutory provisions under which initial registration is authorized and effected. Even, however, if it were true that initial registration is in all cases conclusive and unexaminable at the suit of prior owners of unregistered interests, it would not follow that a subsequent erroneous registration is conclusive and unexaminable at the suit of the prior registered proprietor whose title has been wrongly removed or encumbered by the registration of an invalid instrument. As already indicated, *Gibbs* v. *Messer* (3) shows that this is not the case. The registered title of A cannot pass to B except by the registration against A's title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration."

This appears to me to be an admirable statement of the true position. But, in support of his view of the law, *Salmond* J. (4) claims that all the *Assets Co.'s Cases* (2) were "decided on one and the same principle—namely, that he who derives title by way of bona fide purchase of a prior registered title obtains an indefeasible title unaffected by any defects in the title so purchased." In this I do not agree. *Salmond* J. then says (5):—"The facts in *Teira Rangiuui's Case* are as follows: The original registered title was constituted on 1st July 1895 by the entry in the provisional register of a Native Land Court order for a Crown grant in favour of the native plaintiffs, such order having been made on 12th May 1876. After the registration of this order, and on the same day, there was registered against the natives' title a transfer from the natives to

(1) (1878) 12 S.A.L.R. 153.
(2) (1905) A.C. 176.
(3) (1891) A.C. 248.
(4) (1924) N.Z.L.R., at p. 1208.
(5) (1924) N.Z.L.R., at pp. 1208, 1209.

Kinross & Graham, dated 10th February 1878. After the registration of this transfer, and on the same day, there was registered a transfer from Kinross & Graham to the Assets Co., dated 30th July 1895. Thereafter on the 19th September 1895 a Governor's warrant was issued for a certificate of title in favour of the natives in pursuance of the registered Native Land Court order. In pursuance of this warrant, and in pursuance of the intermediate transfers appearing on the provisional register against the natives' title, the certificate of title was issued directly to the Assets Co. as being the owner registered on the provisional register." There is something wrong with the dates given ; 12th May 1876 was clearly a mistake for 12th May 1886. A transfer of 30th July 1895 could not have been registered on 1st July 1895 as stated. I think 30th June 1895 was probably the date which *Salmond* J. intended to give, from the records available to him. The date of the transfer is not given in the reports. But, upon this basis, the dealings which were lodged together by the Assets Co. were all transactions prior to the land coming under the provisions of the Act, which renders his explanation impossible. Until the legislation of 1894, the land remained native land (see per *Edwards* J. (1)). The Supreme Court took the view that no estate or interest whatever could be passed by the so-called transfers to Kinross & Graham, and that this appeared on the face of the documents from their character and nature. In these circumstances it appears to me to be an untenable explanation of the decision to say, as *Salmond* J. does (2) :—" There was no invalidity in the instrument under which the Assets Company immediately claimed—namely, the conveyance from Kinross & Graham to the company. This was a purchase in good faith by the company, effected by an instrument which *inter partes* was perfectly valid and capable of transferring any title which the vendors possessed. The invalidity was in the prior instrument whereby the natives sold this land to Kinross & Graham. But this invalid instrument was on the registered title before the registration of the valid instrument under which the company derived its own title. The company, therefore, acting in good faith, obtained the benefit of this prior registration."

(1) (1903) 22 N.Z.L.R., at p. 14.

(2) (1924) N.Z.L.R., at p. 1209.

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Further, no word of such a mode of reasoning appears in the judgment of the Privy Council, but, on the contrary, Lord *Lindley* expressly puts it upon the effect of an original registration obtained bona fide.

I think for these reasons that the *Assets Co.'s Cases* (1) do not support the appellant's case.

No argument was made in support of the ground of appeal that no power existed to make an order for rectification of the register.

In my opinion, the judgment of *Lowe* J. is right, and ought to be affirmed.

That judgment was inconsistent with the plaintiffs' alternative claim for damages against Clements, and for compensation against the Registrar of Titles. Its reversal would throw these claims open to the plaintiffs, and would, in my opinion, require the remission of the cause to the Supreme Court for their determination if the plaintiffs should desire to prosecute them.

I think the appeal should be dismissed.

EVATT J. On or about June 8th, 1928, the appellant agreed to purchase from a Mrs. Holmes certain land which was at all material times registered under the provisions of the *Transfer of Land Act* 1915 of the State of Victoria. The purchase price was £1,500, and on June 8th, the appellant paid to the agent of Mrs. Holmes the sum of £50 on account of the agreed deposit of £300. The formal contract of sale was signed by the appellant on July 2nd, 1928. On July 7th, 1928, the appellant paid to Mrs. Holmes the balance of the deposit.

In June 1929, when the time for completion of the transaction was approaching, an appointment to settle was made, and the appellant paid to Mrs. Holmes' husband (who was then her agent) the sum of £1,200, being the balance of the purchase money.

The written contract of sale provided in clause 1 that the conditions in Table A of the *Transfer of Land Act* should apply to the contract. The effect of the insertion of these words is described in sec. 278 of the *Transfer of Land Act* 1915, and in the 25th schedule, Table A. By clause 7 of Table A it was provided that

> "the vendor will upon due payment of the full amount of purchase money sign a transfer of the property to the purchaser, such transfer to be prepared by and at the expense of the purchaser."

(1) (1905) A.C. 176.

Clause 10 of the written contract provided that the said property was "sold subject to the existing mortgage." The learned trial Judge (*Lowe* J.) seems to have accepted the appellant's evidence that he was unaware of this condition when he signed the contract, but he was of opinion that the clause was in the contract at the date of signature. The point seems to be of little importance, because, as the learned Judge found, the transaction between the appellant and Mrs. Holmes was for the sale of the land free of encumbrances for the price of £1,500. In that view clause 10 is to be regarded as meaning that the property was sold subject to the existing mortgage being discharged by the vendor.

After the written contract was signed, the appellant ascertained that the vendor's title to the land sold was subject to a registered mortgage. This was the mortgage of the respondents Ellis and Wilson. Thereupon, according to *Lowe* J.,

> "Holmes conversed with Beamsley and then informed Clements that he could not then produce the certificate of title as there was the mortgage upon it, but that he would procure a discharge of the mortgage and let Clements have the certificate of title later on. Clements was content with this assurance, left the cheque with Holmes, and departed" (1).

Later, the appellant pressed Holmes to complete the transaction. Holmes employed an estate agent named Beamsley for this purpose. Holmes gave the appellant's £1,200 cheque to Beamsley, who duly collected it, and on or about June 26th drew a cheque in favour of Mrs. Holmes for £400, which was duly honoured. Beamsley was bound to employ the balance of the £1,200, namely, £800, in discharging the mortgage to the respondents Ellis and Wilson. Instead of doing this, he misappropriated the £800. Beamsley next prepared a discharge of the respondents' mortgage, bearing date June 21st, 1929, and forged therein the signatures of the respondent mortgagees. Beamsley did not, however, register the forged discharge until October 4th, 1929, more than three months later.

During this time, Clements made further requests for expedition, and finally, on October 1st, 1929, Mrs. Holmes, the vendor, and the appellant signed and accepted a transfer of the land. The transfer indicated that, at the time of transfer, there were no registered encumbrances on the title. The transfer was lodged by or on

(1) (1934) V.L.R., at p. 65.

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behalf of Beamsley on October 4th, 1929, together with the forged discharge of mortgage, and the duplicate certificate of title. The forgery was not detected at the registry, and the certificate of title to the land was duly endorsed with a memorandum of the discharge of the registered mortgage. It was subsequently endorsed with a memorandum of the registered transfer by Mrs. Holmes to the appellant, so that when the appellant took title the certificate was clean and clear from every registered interest.

In the course of his judgment *Lowe* J. said that

> " Clements had contracted to buy both Mrs. Holmes's interest and that which resided in the plaintiffs. He could only become effectively registered in respect of the latter by a valid transfer of their interest to him, or by their execution of a valid instrument of discharge, and he got neither " (1).

In my opinion, this is not a correct way to look at the transaction. Whatever meaning might otherwise have been ascribed to clause 10 of the written contract of sale, his Honor expressly held (2) that he should examine the case upon the footing of the real bargain between Mrs. Holmes and the appellant. Now Mrs. Holmes's contract was to sell the land free from encumbrances, and to sign a transfer of all the property sold, i.e., of the fee simple free from encumbrances. Any authority that was exercised by or on behalf of the appellant was necessarily limited to preparing and procuring the registration of such a transfer as Mrs. Holmes actually signed and the appellant accepted. It was quite true that it was a necessary preliminary for due completion that Mrs. Holmes should procure a discharge of the mortgage by her mortgagee, because, unless she did so, she could not perform her contract with the appellant and make title. But Clements contracted to buy not (1) from Mrs. Holmes, the registered title subject to the registered mortgage and (2) from the respondent mortgagees, the registered mortgage ; but simply to buy from Mrs. Holmes the fee simple of the land entirely free from encumbrances. The appellant did not know the mortgagees, and never intended to deal with them, nor did they intend to deal with him. Indeed, this is recognized by *Lowe* J.'s statement that

> " Clements dealt only with the proprietor of land subject to the mortgage and did not deal at all with the registered proprietor of the mortgage " (2).

(1) (1934) V.L.R., at p. 71.

(2) (1934) V.L.R., at p. 66.

But the main question is whether the final conclusion of *Lowe* J. is correct. His method of analysing the problem was as follows :

> " In my judgment the crucial matters for consideration are, broadly speaking, two, viz., the effect of the forged document in itself, and the question whether the registration provisions of the *Transfer of Land Act* have, in favour of the registered proprietor Clements, given any validity to that document."

His Honor held, first, on the authority of *Gibbs* v. *Messer* (1), that the forged discharge of the respondents' registered mortgage was a nullity, and, secondly, that the statute gave no validity to the forged document in favour of the appellant.

This way of approaching the question was forcibly criticized by counsel for the appellant upon the ground that their client is not claiming either under the forged discharge or its subsequent registration. They say that the appellant is claiming solely under the genuine transfer from his vendor and the registration of that instrument. They emphasize that the appellant dealt with a vendor who had contracted to transfer to him the unencumbered fee simple when the time came for completion, that he dealt with the vendor upon that footing only and that, the time having arrived for completion, the transaction was duly carried out, Mrs. Holmes being then registered proprietor of the land free from encumbrances and transferring the fee simple to the appellant, the transfer being duly registered.

On the other hand, the respondent mortgagees relied upon the decision of the Privy Council in *Gibbs* v. *Messer* (1). It is unnecessary to set out the well-known facts of that case, but it may be noted that it was always admitted that Mrs. Messer was entitled to have her name entered in the register as registered proprietor, and the only contest was whether her title should be subject to the registered mortgage of the McIntyres who had accepted a mortgage purporting to be executed by the " myth " Hugh Cameron, which was the name and personality devised by the forger Cresswell for the purpose of carrying out his scheme of fraud. In the event, the McIntyres' registered mortgage from " Cameron " was held to be 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

(1) (1891) A.C. 248.

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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" (1).

The same principle was enunciated by the Full Court of Victoria, the Privy Council thus referring to the judgment of *a'Beckett* J.:—

"The opinion thus expressed appears to recognize the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the encumbrance. So far their Lordships agree" (2).

The same principle was also stated at p. 254, where it was said:—

"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."

Now it is reasonably plain that the only question upon which the Privy Council really differed from the Full Court of Victoria was the question of fact whether the name of "Hugh Cameron" was a name "assumed" by Cresswell when he fraudulently represented himself to be Hugh Cameron. This view of the facts was rejected by the Privy Council, who held that Cresswell's act was not merely fraud but forgery, because he had represented to the McIntyres that there was a registered proprietor of the land and that person was not himself. Further, the Privy Council definitely accepted the principle that a forged transfer or mortgage, when duly entered on the register, may enable a subsequent bona fide purchaser to obtain a good title by "force of the statute" (3).

In the subsequent case of *Assets Co.* v. *Mere Roihi* (4), the following statement was made by the Privy Council:—

"It was urged by counsel that the decision of this Board in *Gibbs* v. *Messer* (5) 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" (6).

(1) (1891) A.C., at p. 258.
(2) (1891) A.C., at p. 256.
(3) (1891) A.C., at p. 257.
(4) (1905) A.C. 176.
(5) (1891) A.C. 248.
(6) (1905) A.C., at p. 211.

In the case of *Boyd* v. *Mayor, &c., of Wellington* (1), the majority of the New Zealand Court of Appeal held that any person who, without fraud, becomes registered as proprietor of land under the *Land Transfer Act* acquires an indefeasible title, although the documents forming the basis of his registration are in themselves void and inoperative. Sir *John Salmond*, who dissented, was of opinion that an instrument which was void before registration did not upon registration operate to create an indefeasible title, but only so operated when the rights of some third person, purchasing in good faith and for value on the faith of the registered instrument, supervened.

Boyd's Case (1) is of some importance here in the following way. *Salmond* J. gave the broadest interpretation to *Gibbs* v. *Messer* (2). He could see no difference between an instrument which was void because of forgery, and one which was void because of infancy, absence of agent's authority, mistake or *ultra vires* (3). He also held that the authority of *Gibbs* v. *Messer* was in no way impaired by *Assets Co.* v. *Mere Roihi* (4). Yet, in spite of this view of *Gibbs* v. *Messer*, the reasoning of *Salmond* J. is undoubtedly based upon general principle according to which the present appellant is clearly entitled to succeed against the respondent mortgagees, whose names were removed from the register through the fraud and forgery of the estate agent. The matter is of sufficient importance to warrant a fuller reference to his judgment. *Salmond* J. said :—

> "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 (3)."

Applying this principle, the appellant is a purchaser who honestly and in reliance upon the registered title in fee simple of Mrs. Holmes acquired that title from her. *Salmond* J.'s observations do not support the doctrine that indefeasibility of title only enures to a purchaser in those cases where, at the commencement of a proposed transaction, the register shows the vendor as already possessing the

(1) (1924) N.Z.L.R. 1174.
(2) (1891) A.C. 248.
(3) (1924) N.Z.L.R., at p. 1203.
(4) (1905) A.C. 176.

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title which is the subject of sale and purchase. And unless such a doctrine is accepted the appellant should succeed here.

Salmond J. also says (1):

> "It is the right and duty of the registrar to rectify his register by the removal of the wrongful entry so long as subsequent registered titles have not been acquired by bona fide purchasers in pursuance of it."

It is clear that the phrase "in pursuance of it" is deliberately used by *Salmond* J. so as to indicate that indefeasibility attaches to a registered title, not included in the special statutory exceptions, although the wrongful entry (wrongful because of forgery or for any other reason) has immediately preceded the registration of the purchaser's title, and although the negotiations originated at a time long antecedent to the date of the wrongful entry.

This conclusion is justified by reference to *Salmond* J.'s argument that, in the Privy Council judgment in the case of *Assets Co.* v. *Mere Roihi* (2), the principles which he was asserting were in no way departed from. He closely analysed the facts of the third appeal before the Privy Council in the *Assets Co.'s Cases*. This third appeal was called the *Teira Ranginui Case*. *Salmond* J. was endeavouring to negative the argument that in these appeals the Privy Council must have recognized the doctrine that the statutory indefeasibility of title attached immediately upon the registration of an instrument, although the instrument was void. He endeavoured to show that, although indefeasibility was successfully claimed by the Assets Co. for all its registered titles, indefeasibility did not occur upon the registration of the void instrument, but only upon the subsequent registration of the company's title. He said (3):—

> "As I understand the matter, this decision" (that of the Privy Council in the *Assets Co.'s Cases*) "does not involve the doctrine of immediate indefeasibility, but is merely an application of the doctrine that a void instrument in favour of one person is the root of a good title when followed by a subsequent registered transfer in favour of another person. There was no invalidity in the instrument under which the Assets Company immediately claimed—namely, the conveyance by Kinross & Graham to the company. This was a purchase in good faith by the company, effected by an instrument which *inter partes* was perfectly valid and capable of transferring any title which the vendors possessed. The invalidity was in the prior instrument

(1) (1924) N.Z.L.R., at p. 1215. (2) (1905) A.C. 176.
(3) (1924) N.Z.L.R., at pp. 1209, 1210.

whereby the natives sold this land to Kinross & Graham. But this invalid instrument was on the registered title before the registration of the valid instrument under which the company derived its own title. The company, therefore, acting in good faith, obtained the benefit of this prior registration. If, however, the natives had claimed their land while still in the hands of Kinross & Graham as the registered owners thereof, the question of immediate indefeasibility would in fact have arisen for decision ; and if in such a case the Privy Council had decided that Kinross & Graham by registering a void conveyance in their own favour against the natives' registered title had thereby destroyed that title and acquired an indefeasible title for themselves, such a decision would have clearly established the contention which I now dispute. Such a decision would have been in direct conflict with *Gibbs* v. *Messer* (1), and it would have been necessary to treat the earlier case as no longer of authority. But no such contention can be properly based on the facts and decision in *Teira Ranginui's Case* (2). There the title which the Privy Council held indefeasible was not the title of a purchaser who had registered a void instrument, but the title of a sub-purchaser who had registered a valid instrument of purchase of the intermediate title so obtained by his vendor. *Gibbs* v. *Messer* has no application to such a case."

Whether *Salmond* J.'s analysis and explanation of the *Assets Co.'s Cases* (2) are correct or not, is beside the point on which the present case turns. He was endeavouring to support *Gibbs* v. *Messer* (1) and to prove that it was not affected by the later decision of the Privy Council. Whether he was right or wrong on that point, it is clear that he was of opinion that the principle recognized both in *Gibbs* v. *Messer* and in the *Assets Co.'s Cases* was that, so long as the register shows that one instrument is succeeded by a later instrument, although invalidity may attach to the former, a person taking under the later instrument is not prevented from obtaining an indefeasible title merely because the transaction which concluded in the registration of the later instrument originated before either instrument was registered.

It is of value to return to the words of the relevant sections of the Victorian *Transfer of Land Act* 1915. They are as follows: sec. 67, sec. 72 and sec. 179.

By sec. 67 every certificate of title issued under the Act is to be received as evidence in all Courts of law, and shall be accepted as " conclusive evidence that the person named in such certificate " is " the proprietor of . . . the land therein described."

(1) (1891) A.C. 248. (2) (1905) A.C. 176.

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It should be noticed that it was not possible in *Gibbs* v. *Messer* (1) to apply such a provision. But this was so, not because the certificate of title which issued from the register in the name of "Hugh Cameron" did not issue under the Act, but because the attempt to give the section its full force and effect meant that upon production of the registered transfer and mortgage, "Hugh Cameron" was to be deemed the proprietor of an estate in fee simple in the land, and, in the case of the mortgage, that the McIntyres were the registered proprietors of a mortgage from "Hugh Cameron" to themselves. It was impossible for a Court to apply the section, so soon as it was found as a fact that "Hugh Cameron" was not the name of a real person but was a mere "myth." It was just as though the name in the registered transfer and registered mortgage had been, as Lord *Watson* said in the course of the argument in *Gibbs* v. *Messer*, "The Emperor Julius Cæsar."

Sec. 72 provides that, notwithstanding the existence of any estate or interest which might otherwise be held to be paramount or to have priority, a proprietor of land under the Act shall, except in case of fraud and certain other specified cases, hold the same subject to the encumbrances noted on the certificate of title, but absolutely free from all other encumbrances whatsoever.

This section is the key section of the Act. But, in *Gibbs* v. *Messer* (1), how could such a provision have been applied? The McIntyres were the persons named as proprietors of a mortgage, but that mortgage, being an interest created by a non-existent person, had to be regarded as creating no interest at all. The result was that, in the special circumstances of *Gibbs* v. *Messer*, neither sec. 67 nor sec. 72 could have been used to preserve the title of the McIntyres to the mortgage from "Hugh Cameron." In the present case, the situation is quite different, and it is not only possible but mandatory to apply secs. 67 and 72 to the facts. Indeed, *Gibbs* v. *Messer* itself implies that a forged instrument cannot be allowed to affect and infect subsequently registered instruments, so long as the person who obtains registration acquires title from the registered proprietor for the time being, and does not come within the exceptions mentioned in sec. 72.

(1) (1891) A.C. 248.

Sec. 179 next provides that, except in the case of fraud, " no person contracting or dealing with or taking or proposing to take a transfer from " the registered proprietor " shall be required or in any manner concerned to inquire or ascertain the circumstances under . . . which such proprietor or any previous proprietor . . . was registered " and shall not be " affected by notice . . . of any trust or unregistered interest." Further, even if such knowledge exists, that is not of itself to be regarded as fraud. This is a very important section. It is explanatory of and complementary to sec. 72. It provides a definition of that " fraud " which constitutes one of the exceptions mentioned in sec. 72. Sec. 179 also lays down a new rule as to investigation of title. Further, it provides that, in dealing with land under the Act, not only is the person who is to accept a registered title not bound to make the usual inquiries which might be incumbent upon him under the general law, but the registered proprietor who is to make title is himself empowered to dismiss many inquiries by saying that they are of no concern to the purchaser.

Now it is not contended that the appellant comes within the exceptions of sec. 72 in that " fraud " is to be attributed to him. Fraud was not pleaded or suggested against him, it was not proved, it was not found. Sec. 179, however, is sought to be used by the respondent mortgagees in this way. They point to the shortness of time between the registration of the forged discharge of mortgage and the registration of a clean transfer to the appellant. They say that, during this interval of time, there was no new " dealing with " Mrs. Holmes (the vendor), and there could have been no such dealing with her. They say, therefore, that sec. 179 does not apply so as to assist the appellant, and that the appeal should fail.

But this argument seems to rest upon a complete misconception of the function of sec. 179. The appellant claims indefeasible title by the operation of sec. 72 upon his registered transfer from the previously registered proprietor. The exception " except in case of fraud " does not operate, so that the question is, can sec. 72 be applied ? The answer is : Yes. No such difficulty exists as was present in *Gibbs* v. *Messer* (1). The appellant accepted title from a person who was,

(1) (1891) A.C. 248.

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at the time of registration of the transfer, the registered proprietor in fee simple of the land. Upon registration of this transfer, the appellant held the land free from all encumbrances except those noted on the certificate at the time he acquired title. There were no encumbrances noted. It is quite immaterial that the registration of the discharge of mortgage took place immediately prior to the registration of the clean transfer to the appellant. In the absence of fraud on the part of the appellant this was an accidental feature of the case, and is of no legal significance. Registration of the discharge might just as easily have taken place on June 21st, 1929, when Beamsley forged it, as on October 4th, 1929, when it was in fact registered.

The conclusion reached in this opinion is supported by the reasoning of the Privy Council in *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1). In that case Lord *Buckmaster* had to answer the question whether a person who had become registered proprietor of land in New Zealand at a time when the title was clear upon the register, a pre-existing caveat having been recently removed, took subject to the claim on which the caveat had been based. The important part of the case is the principle applied by the Privy Council in determining the question of indefeasibility of title.

Sec. 58 of the New Zealand Act corresponded with sec. 72 of the Victorian Act, and sec. 197 of the New Zealand Act with sec. 179 of the Victorian Act. Dealing with the first section, Lord *Buckmaster* said :—

> "The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose ; while sec. 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud. Upon the first point, therefore, it is plain that unless conduct coming within the meaning of the word 'fraud' as used in these sections can be imputed to the respondents their title succeeds" (2).

His Lordship went on to adopt with approval the following words of the New Zealand Court of Appeal :—

> "'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 the 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 authorized by the statute' ('By statute' would be more correct).

(1) (1926) A.C. 101.

(2) (1926) A.C., at p. 106.

'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 authorized, as in the case of easements or incorporeal rights, to the right registered'" (1).

It seems clear from this reasoning that in the present case the question is to be determined mainly by reference to sec. 72, and that sec. 179, if of any relevance at all, is of no assistance to the respondents. Further, if sec. 179 is applicable at all, the appellant was, at the time of the registration of his unencumbered title, a person either "taking" or "proposing to take" a transfer from the registered proprietor, so that if the appellant requires any assistance from sec. 179 he should get it.

In the result, therefore, this appeal should succeed. The appellant's title does not depend upon, nor has it to be constructed out of, the forged discharge of mortgage. In truth, that forgery was but the means adopted for building up the title of the vendor Mrs. Holmes. If the principle of the judgment appealed from were accepted, proposing purchasers of Torrens land would be obliged to go behind the register in order to ascertain the validity of every registered discharge of mortgage or other registered dealing, whenever any such registration is effected between the commencement of the negotiations for purchase and the registration of the clean transfer from vendor to purchaser. Indeed, by the same reasoning, the purchaser should have to inquire into the genuineness of every transaction by virtue of which the vendor himself became registered after the commencement of such negotiations. This, of course, is the very reverse of what the statute intends. If any such antecedent forgery deprives a person of his registered title, his remedy is to be against the statutory assurance fund, and not against an honest purchaser who registers and accepts a registered title.

The appeal should be allowed.

McTIERNAN J. The facts have been stated in preceding judgments, and I shall not recapitulate them. The forged discharge of the mortgage and the transfer from Mrs. Holmes to the appellant were lodged together in the Office of Titles by Beamsley or someone acting for him. Beamsley, it was found, acted in the preparation of the transfer for the appellant. The evidence is that these two

(1) (1926) A.C., at p. 106.

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instruments were lodged together at 12.34 p.m. on 4th October 1929. The certificate of title and the duplicate mortgage were also lodged at that time. The discharge and the transfer were entered in the register on that day.

If the forged discharge alone had been registered, the mortgagees' registered interest would not have been destroyed, and they would be entitled to have the register rectified. But the transfer to the appellant was also registered, and if the appellant should be held to have dealt with Mrs. Holmes as a registered proprietor whose estate according to the register was free from the encumbrance, the registration of the transfer by her, as such proprietor, to the appellant would have passed an estate to him which would be paramount over the interest of the mortgagees, notwithstanding that the discharge of the mortgage which gained entry to the register was a forgery. These propositions are, I think, established by *Gibbs* v. *Messer* (1).

At the time the discharge and transfer were produced for registration in order to convey the unencumbered estate to the appellant, the respondent mortgagees were entered in the register as the proprietors of an encumbrance on the land. The register was at that time conclusive evidence that Mrs. Holmes' estate was subject to this encumbrance, and the Act confirmed the paramountcy of the mortgage over unregistered interests in the land, including that of the appellant as purchaser (secs. 67 and 72).

The discharge and the transfer having been registered, the appellant is entered on the register as the proprietor of an unencumbered estate. His title depends upon the registration of the instrument of transfer which states that the land was free from any encumbrance. The *Transfer of Land Act* empowers the registered proprietor of land under the Act and of certain interests therein, to transfer the same, and provides that upon registration of the transfer the estate and interest of the proprietor shall pass to the transferee (sec. 121). The transfer of land is one of a number of dealings which the Act empowers the registered proprietor of land to make (see Part VI.). Sec. 179 is one of a set of miscellaneous provisions in Part VI. relating to dealings with land under the Act. It is unnecessary again to set out the terms of this section.

(1) (1891) A.C. 248.

There is no suggestion that either the appellant or the vendor was involved in any fraud. The respondents, the mortgagees, are also entirely free from any suspicion of fraud. In *Gibbs* v. *Messer* (1), Lord *Watson*, speaking for the Judicial Committee, said :—" 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 [*sic*] title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer for mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title." And his Lordship also said (2) : " 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." It is not disputed that the appellant succeeded at least to the estate of Mrs. Holmes, who was the proprietor of the fee simple subject to the mortgage. Although the appellant did not deal with the proprietors of the mortgage, it is contended nevertheless that, upon the registration of the transfer of Mrs. Holmes' estate, the appellant acquired an indefeasible title to the land free from any encumbrance. This contention is founded upon the assumption that the instrument of discharge was registered before the instrument of transfer, and upon the view that the process of " dealing with " or " taking a transfer " from the registered proprietor, who after such registration would, according to the register, hold the land free from the encumbrance, continued, although perhaps only momentarily, until the conveyance of the unencumbered estate was effected by the registration of the transfer. But, as already stated, the evidence is that the discharge and the transfer were produced together for registration at 12.34 p.m. on 4th October 1929. There is no evidence that the discharge was in fact registered before the transfer. The discharge, it is true, is entered in the register across the memorial of the mortgage, which is above the memorial of the

(1) (1891) A.C., at p. 254.

(2) (1891) A.C., at p. 255.

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transfer to the appellant. But there is no reason, it seems to me, for the presumption that the instrument of discharge became operative by registration before the instrument of transfer was registered. Sec. 53 provides that every instrument shall be registered in the order of and as from the time at which the same is produced for registration, and that instruments purporting to affect the same estate or interest shall be entitled to priority as between themselves according to the date of registration, and not according to the date of the instrument. By force of this section the registration of the discharge and the transfer became effective from the same point of time. Neither the order nor the time of their production entitled one to priority over the other. They were produced together at the same time. Sec. 47 provides that the Registrar shall endorse on the folium in such manner as to preserve their priority, the particulars of all dealings and matters affecting land required by the Act to be registered. There was no order in the production of these two instruments, nor any difference in the time at which they were produced whereby one obtained a priority which it was necessary to preserve in registering them. In the case where instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented to the Registrar for registration, he is directed by sec. 61 to " endorse " that instrument which is presented by the person producing the duplicate grant or certificate of title. But this provision does not apply to the present case. The result of the operation of secs. 47 and 53 is, in my opinion, that the discharge of the mortgage and the transfer of Mrs. Holmes' estate in the land, which according to the evidence were produced together for registration, became operative simultaneously. The removal of the mortgage from the register and the conveyance of the land, both of which occurred upon registration, were contemporaneous acts. Assuming that the process of " dealing with " or " taking a transfer " from Mrs. Holmes continued until the registration of the transfer to the appellant, it follows that such process continued while the mortgage was still on the register, and it was not discharged by registration until the process ended. Even on that assumption, therefore, the appellant did not deal with Mrs.

Holmes on the faith of entries in the register notifying that she was the registered proprietor of the land free from the mortgage.

I would add however that it appears to me to be a difficult conception that Beamsley, by or on whose behalf the instrument of transfer had been taken from Mrs. Holmes on its execution, was, in lodging it and awaiting its registration, "dealing with" or "taking a transfer" from her on behalf of the appellant.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Maddock, Jamieson & Lonie.*

Solicitors for the respondents, plaintiffs, *Davis, Cooke & Cussen.*

Solicitor for the Registrar of Titles, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.