3. Dicey's explanation of *Re Bethell* on the basis that a domiciled Englishman cannot contract a valid polygamous union is contrary to decided cases, including *Sara* v. *Sara* and possibly *Khan* v. *Khan*. In *Ali* v. *Ali*, Cumming-Bruce, J. decided that the effect of the acquisition of an English domicile preclude the husband from taking further wives. The point of Dicey's explanation of *Re Bethell* was not directly relevant, but his Lordship does appear to have assumed its validity. It is submitted that the approach of Lord, J. in *Sara* v. *Sara* is to be preferred to that of Cumming-Bruce, J. The mere fact of domicile in a country permitting only monogamous marriage should not render a person incapable of contracting a valid polygamous union.

4. There remains considerable scope for the application of common law principles in this area of the law despite s. 6A Matrimonial Causes Act. The Victorian case of *Khan* v. *Khan* may not now be covered by s. 6A if the wife immediately prior to her marriage was domiciled in Victoria. If this is so then it is submitted that *Khan* v. *Khan* is anachronistic and ought not to be followed in the future for the reason outlined in discussion.

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INDEFEASIBILITY OF TITLE

FRAZER v. *WALKER*[1]

I INTRODUCTION: WHAT IS INDEFEASIBILITY OF TITLE?

> The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. . . . It does not involve that the registered proprietor is protected against any claim whatsoever . . . there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam.[2]

The Act referred to in the above quote was the Land Transfer Act 1952, the New Zealand counterpart of our Real Property Act, 1900-1967. Although the definition enunciated is equally applicable wherever what may be referred to as Torrens Title land is situated, at least as between New Zealand and New South Wales there are certain differences in the wording of one corresponding section of the respective Acts which must be borne in mind when considering the application of judicial decisions under the statutes. The variations between the statutes will be illustrated in the discussion of *Frazer* v. *Walker*.

Probably most lawyers would agree with the above definition. There would be less agreement, however, as to what is the correct practical application of the indefeasibility doctrine. Two schools of thought have come into existence, the first of which is typified by the following statement:

> The cardinal principle of the Statute is that the register is everything and except in cases of actual fraud on the part of the person dealing with the

[1] (1967) 1 All E.R. 649.
[2] *Id.* at 652.

> registered proprietor, such person upon registration of the title . . . has an indefeasible title against all the world.[3]

The second school, on the other hand, asserts:

> The justification for destroying an existing legal estate or interest which has already been duly established upon the register, is . . . 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 authorise, and who then obtain registration.[4]

In Australia there has since 1934[5] existed a conflict of judicial opinion, reflecting the differences between the two schools mentioned. One judicial view is that the title of a registered proprietor which immediately follows registration of a void instrument is indefeasible where there has not been any fraud by that registered proprietor[6] and this seems to correspond with the first school of thought. The other view is that indefeasibility is deferred until registration of a further dealing made pursuant to a transaction entered into upon the faith of the register[7] and this seems to correspond with the second school of thought.

In Part I of this note it is proposed to consider the Privy Council decision in *Frazer* v. *Walker* and from the issues raised therein to examine the judicial authorities on the law of indefeasibility of title. Particular reference will be made to the problem of the quality of title acquired by a person who becomes registered by a valid instrument itself registered immediately after the registration of a void instrument. In the quote from the principal case comprised in the first paragraph of this note it was said that indefeasibility does not involve that the registered proprietor is protected against any claim whatsoever.[8] In other words, it is admitted that registered proprietorship is not co-extensive with indefeasibility.[9] The theme of Part I will be that the title acquired by registration immediately after the entry on the register of a void instrument is one instance where indefeasibility and registered proprietorship are co-extensive.

The Decision of the Privy Council in Frazer v. *Walker & Others*[10]

Frazer, the appellant, and his wife were the registered proprietors of a farm property. Mrs. Frazer, professing to act on behalf of herself and her husband, the appellant, arranged to borrow £3,000 from the second respondents (Mr. and Mrs. Radomski) which loan was to be secured by a first mortgage over the property. Mrs. Frazer took the mortgage to the solicitors acting for her where a clerk witnessed her genuine signature to the mortgage and also a signature purporting to be that of the appellant which she had previously inserted. The mortgage and certificate of title were forwarded to the solicitors for the second respondents who paid over the loan moneys and in due course attended to registration of the mortgage. As no payment of principal and interest was made the second respondents exercised their power of sale and

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[3] *Fels* v. *Knowls* 26 N.Z.L.R. 604 at 620.

[4] *Clements* v. *Ellis per* Dixon, J. (1934) 51 C.L.R. 217 at 237.

[5] In 1934 the High Court of Australia was evenly divided in hearing an appeal from the decision of Lowe, J. in *Clements* v. *Ellis* (1934) V.L.R. 59. Four justices sat in the High Court (*supra* n. 4) of whom two were in favour of allowing the appeal whilst the two other justices adjudged that the decision of Lowe, J. be upheld. The facts and judgments of this case are fully considered later.

[6] *Supra* n. 4 *per* Evatt, J. at 265 and 270-1. See also the judgment of Rich, J. at 233.

[7] *Id. per* Dixon, J. at 237.

[8] *Supra* n. 2.

[9] See e.g., the Real Property Act (1900-1967) s. 42 which provides an important exception in the case of fraud. The fraud, however, must be that of the registered proprietor in obtaining registration. Authority for this is found in *Assets Co. Ltd.* v. *Mere Roihi* (1905) A.C. 176 at 210 and *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* (1926) A.C. 101 at 106-7.

[10] *Supra* n. 1.

the property was sold to the first respondent (Walker). The second respondents as mortgagees executed a memorandum of transfer to the first respondent which was registered some sixteen months after the registration of the second respondents' mortgage. It was conceded that both the first respondent and the second respondent acted throughout in good faith.

Subsequently the first respondent commenced proceedings against the appellant for possession of the property, relying on his title as registered proprietor, but the appellant counterclaimed asserting that what purported to be his signature on the mortgage was a forgery. He claimed a declaration that his interest in the land was not affected by the purported mortgage or by the sale to the first respondent, a declaration that the mortgage was a nullity and an order directing the District Land Registrar to cancel the entries made so as to restore the name of the appellant and Mrs. Frazer as joint owners.

It is convenient to set out in full the wording of s. 183 of the New Zealand Land Transfer Act which, except for the two phrases italicized, corresponds with s. 135 of the New South Wales Real Property Act. The New Zealand section is as follows:

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

While the sections dealing with indefeasibility cannot be individually isolated but must be looked at as a whole,[11] it is noteworthy that the appellant was seeking to recover possession of the property from the registered proprietor on the ground that his title was derived from or through a person (the second respondents) registered as proprietor under a void or voidable instrument. Yet this s. 183 prevents. It should be noted that the appellant was not claiming that the first respondent's title was derived from or through a person registered through fraud. For that it must be the fraud of the transferee.[12] The absence of provision in the New South Wales section for cases involving void or voidable instruments does not, it is submitted, mean that on identical facts here an appeal to the High Court would succeed. Without yet considering the effect which *Frazer* v. *Walker* may have on the authority of *Clements* v. *Ellis,* it is sufficient to observe that the High Court in the latter case was faced with a question of the defeasibility of the registered title following immediately after the registration of a void instrument whereas in *Frazer* v. *Walker* the void mortgage was registered prior to the registration of the memorandum of transfer made pursuant to the title of the registered mortgagee. Thus the purchaser from the mortgagee transacted in a manner which upon its face the register appeared to authorise and this was the very situation which Dixon, J. contemplated as being essential for indefeasibility to arise.[13]

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[11] *Supra* n. 4 *per* Dixon, J. at 238.

[12] *Supra* n. 9.

[13] *Supra* n. 4 *per* Dixon, J. at 236. His Honour here stated that if A was registered proprietor of a title subject to a mortgage to B, of which a forged discharge was registered, A's title as proprietor free from encumbrances would not have been indefeasible but would have been exposed to the restoration of B's mortgage. However, if before restoration C in good faith and for value took a transfer from A of the unencumbered estate he would by registration have obtained indefeasibility.

The major argument for the appellant to the Privy Council appears to have been directed against the registration of the forged mortgage given to the second respondents[14] for it was conceded that if the appeal failed against the second respondents it must do likewise against the first respondent.[15] The appellant's argument that the forged mortgage never became entitled to the benefit of registration was dismissed by the Privy Council in the following words:

> Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry . . . registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise.[16]

From here it was open to the Privy Council to consider the question whether the registration of the forged mortgage itself attracted indefeasibility or whether that did not result until the registration of the subsequent transfer by the mortgagee exercising power of sale. The consideration, therefore, was whether indefeasibility attached to the title obtained by registration of an otherwise void instrument but this is very different from the question posed in *Clements* v. *Ellis,* namely, whether indefeasibility attaches to the registration of an otherwise valid instrument which is entered on the register immediately after the entry of a void instrument and being part of the same transaction. Further, it was not necessary for a decision in the case for the Privy Council to express a concluded view on the quality of the title obtained by the mortgagee for the rights of a third party had intervened so that in fact the conflict was between the previous owner and the third party transferee.[17]

After a consideration of relevant provisions of the Land Transfer Act Lord Wilberforce proceeded to discuss the case law. He stated:

> The leading case as to the rights of a person whose name has been entered on the register without fraud . . . is the decision of this Board in *Assets Co. Limited* v. *Mere Roihi.*[18] The Board there was concerned with three consolidated appeals from the Court of Appeal in New Zealand. . . . The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise ratio decidendi—the main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a *bona fide* purchaser from such a proprietor whose title is indefeasible. In *Boyd* v. *Wellington Corporation*[19] the majority of the Court of Appeal in New Zealand held in favour of the former view and treated the *Assets Co. Case* as a decision to that effect. The decision in *Boyd* v. *Wellington Corporation* . . . has been generally accepted and followed in New Zealand as establishing, with the supporting authority of the *Assets Co. Case,* the indefeasibility of the title of registered proprietors derived from void instruments generally.
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> Their Lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act, 1952 which they have examined. They consider that *Boyd's Case* was

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[14] *Supra* n. 1 at 651.
[15] *Id.* at 655.
[16] *Id.* at 651.
[17] Once rights of third parties intervene different considerations arise. See e.g., *supra* n. 13 and also *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* (1913) A.C. 491 at 505, where the statement of principle is made subject to the rights of third parties.
[18] (1905) A.C. 176.
[19] (1924) N.Z.L.R. 1174. The correct name of the decision is *Boyd* v. *Mayor of Wellington* but the author of the All England Law Reports incorrectly states the respondent's name as "Wellington Corporation".

rightly decided and that the ratio decidendi applies as regards titles derived from registration of void instruments generally.[20]

The conclusion thus reached was in favour of immediate indefeasibility, not in the sense mentioned earlier of title acquired by registration following immediately after the entry on the register of a void instrument, but of the indefeasibility of the registration of the void instrument itself. Thus, having found the registered mortgage indefeasible the Privy Council proceeded in conclusion to decide in favour of the transferee not only on this ground but also because the action could not be supported under s. 183 of the Land Transfer Act (referred to earlier) or under s. 63 which is similar in terms to s. 124 of the Real Property Act.[21]

Despite the conclusion reached by the Privy Council after its discussion of case law it is submitted that the decision cannot for Australian law be taken to be the final and conclusive declaration on the indefeasibility of a registered title acquired under a void instrument or on the indefeasibility of a title entered on the register pursuant to a valid instrument registered immediately after the entry of a void instrument (as in the *Clements* v. *Ellis* situation).

First, the conclusion was reached by stating that there was a difference of opinion as to whether the *Assets Co. Case* established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument or whether it is only a *bona fide* purchaser from such a proprietor whose title is indefeasible, and then accepting the enunciation of the majority judges in *Boyd's Case* that it established the former statement as law.[22] In the next section of Part I it will be submitted that the *Assets Co. Case* is not authority for either proposition. Certainly the Privy Council's treatment of the point was not a recommendation of it but merely a ratification of the earlier authority.

Secondly, there are statements in *Clements* v. *Ellis* which involve the opposite conclusion to that reached in the Privy Council.[23] to reiterate the point made earlier, the High Court was concerned with a different aspect of indefeasibility. *Clements* v. *Ellis* was not referred to by Lord Wilberforce in his judgment though it was adverted to in argument. It is worth noting that his Lordship delivered the judgment of the Board which included Sir Garfield Barwick who was undoubtedly quite aware of the implications for Australia of the High Court's decision. It may well be that Lord Wilberforce did not intend to express an opinion for Australian law let alone on the aspect of indefeasibility dealt with in the High Court. If it was intended to overrule the decision of such a notable judicial authority that could have been done explicitly. It will later be submitted by the writer that *Clements* v. *Ellis* was wrongly decided by the majority judges[24] but in doing so no reliance will be placed on the authority of the subject case in regard to the issues to be dealt with.

Finally, the application of s. 183 of the Land Transfer Act stated earlier shows that different considerations would arise in New Zealand and Australia in the case of the purported indefeasibility of the registered title acquired immediately after the registration of the void instrument. In cases of void or voidable instruments the section protects a *bona fide* purchaser or mortgagee for value from attacks against the estate in respect of which he is registered

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[20] *Supra* n. 1 at 654.
[21] *Id.* at 655.
[23] *Supra* n. 20.
[23] *Supra* n. 4 at 236-7. Evatt, J. may have been in agreement with Dixon, J. on this point for (at 265) he cites with approval a passage from the dissenting judgment of Salmond, J. in *Boyd* v. *Mayor of Wellington, supra* n. 19 at 1203, that "indefeasibility 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".
[24] There was in fact no majority in the High Court but the phrase "majority judges" refers to Dixon and McTiernan, JJ. whose opinions prevailed in the result.

as proprietor on the ground that his vendor or mortgagor may have been registered under a void or voidable instrument or may have derived from or through a person registered under such an instrument. The section does not establish the indefeasibility of the proprietorship of a person registered under a void instrument for its terms do not appear to extend that far. Nevertheless, once the void instrument is registered the Registrar's powers of correction of the title, if they could be invoked, would be limited to the period before a *bona fide* purchaser or mortgagee under a valid instrument became registered.[25] Thus if R., a rogue, being in possession of A's certificate of title arranged a sale of the land and forged a transfer to a *bona fide* purchaser who signed a mortgage to C to enable him to complete the purchase whereupon the transfer and mortgage were registered simultaneously, C would be protected under the section. Taking another illustration, if Z, a *bona fide* purchaser, lodged a forged discharge of mortgage from X to Y and a genuine transfer from Y to himself and the two were registered simultaneously, would Z be protected? Before registration Y was the registered proprietor in fee simple of the land subject to the mortgage of which X was the registered proprietor.[26] Section 183 will apply if Y became registered as proprietor under a void instrument and he did become registered free from the encumbrances under such an instrument. It is submitted that the section extends this far and accordingly Z would be protected. This briefly was a statement of the facts in *Clements* v. *Ellis*, decided without the existence of the important words in the section and with the opposite result.

Indefeasibility Through the Cases

Clements v. *Ellis* is a convenient starting point for this section of the note as through it a number of leading decisions may be placed in their correct perspective. The facts are well stated in the judgment of Dixon, J.[27] Mrs. Holmes was the registered proprietor of a parcel of land subject to a mortgage to the plaintiffs. She entered into a contract to sell the land to Clements, who apparently made no investigations of title and paid the balance of purchase money to the vendor's husband, requesting in return the certificate of title. Mr. Holmes told Clements why he could not produce it but told Clements he would discharge the mortgage and let him have the title later. Clements appears to have accepted this and left the cheque with Mr. Holmes who paid it to one, Beamsley, an estate agent. Beamsley paid the cheque into his bank account and drew against it a cheque for part of these moneys. He gave this to Holmes, retaining the balance ostensibly for the purpose of paying off the mortgage. However, he misappropriated the moneys, forged a discharge of the mortgage and lodged it with the transfer from Mrs. Holmes to Clements and the certificate of title, with the result that the two dealings were registered simultaneously. When the plaintiffs discovered this they brought an action claiming *inter alia* the cancellation of the entry on the register of the discharge of the mortgage.

The case was heard at first instance in the Supreme Court of Victoria[28] by Lowe, J., the rationale of whose judgment is largely based on the premise that the purchaser had contracted to buy the interest of the vendor and also that residing in the mortgagee and that he could not become registered in

[25] *Supra* n. 1 at 655.
[26] The Real Property Act (1900-1967) s. 3 defines "proprietor" as any person seised or possessed of any freehold or other estate or interest in land. This has been held in *Clements* v. *Ellis*, *supra* n. 4 *per* Dixon, J. at 240, and *Frazer* v. *Walker*, *id.* at 656, to include a mortgage.
[27] *Supra* n. 4 at 233-5.
[28] (1934) V.L.R. 54.

respect of the latter except by a valid discharge of mortgage.[29] The High Court in dealing with the appeal was evenly divided[30] and the appeal was therefore disallowed.[31] Dixon, J. gave a detailed judgment in which his Honour examined at length the law of indefeasibility of title. The basis of his judgment appears in the passage which follows immediately after a passage mentioned above.[32] He said:

> 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 . . . my answer is that his title is not absolute . . . 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.[33]

Davis v. *Wekey*[34] was cited by his Honour as authority for the necessity of transacting with a person who is actually registered as proprietor rather than one who is afterwards so constituted. But the main authority relied upon by his Honour was the interpretation which he placed upon s. 179 of the Transfer of Land Act (Vic.) which is the equivalent of s. 43 of the Real Property Act (N.S.W.), an interpretation which was concluded from the Privy Council decision of *Gibbs* v. *Messer*.[35] There, through the activities of a fraudulent solicitor a non-existent person had been made the registered proprietor of a parcel of land to the detriment of the true owner and later a mortgage obtained by the solicitor for the nonentity was registered. The decision of the Privy Council was read by Lord Watson who, when dealing with what is in New South Wales s. 43 of the Real Property Act, stated: "It appears to me to indicate . . . the scheme of the statute, namely, to protect no dealings except dealings with the registered proprietor himself."[36] He also said:

> 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. (Therefore) 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.[37]

To return to the judgment of Dixon, J., it will be noted that this was couched in similar language to that used by Lord Watson. His Honour had posed the question of indefeasibility as between the person who has dealt "not upon the faith of an existing state of the register but upon the footing that

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[29] *Id.* at 71.

[30] *Supra* n. 5. Evatt, and Rich, JJ. would have allowed the appeal but Dixon and McTiernan, JJ. adjudged that it be dismissed.

[31] Judiciary Act 1903, s. 23(2)(a).

[32] *Supra* n. 13.

[33] *Supra* n. 4 at 236-7.

[34] (1872) III V.R.E. 1 at 5. Molesworth, J. did not, however, appear to express a concluded opinion but merely posed the question. Here A had fraudulently acquired a lease and transferred it to B who was held to be a purchaser with notice. The dealings were registered simultaneously but B's notice precluded his protection.

[35] (1891) A.C. 248. This decision is dealt with by Dixon, J. *supra* n. 4 at 243-5.

[36] *Gibbs* v. *Messer id.* at 254.

[37] *Id.* at 255.

it will be put in a condition which will result in his registration" and the person who has dealt with one who is actually registered. It is submitted, however, that in his consideration of *Gibbs* v. *Messer* made before his Honour wrote his judgment a linguistic slide had occurred and his Honour in stating the question had presupposed the answer. Lord Watson had said, to receive the protection of the Act it is necessary to "actually deal with . . . a proprietor", meaning only that the dealing must be with a real person not, as in the facts before him, with an abstraction. Dixon, J. however appears to have paraphrased this to require a dealing with the actual registered proprietor. Then Lord Watson had said that a person who does not deal with the registered proprietor does not transact on the faith of the register, meaning that a person who deals with an abstraction does not so transact. On the other hand, Dixon, J. had already transposed the requisite non-abstraction to the actual registered proprietor. Thus for his Honour it followed that any dealing with a person not registered as proprietor was not a dealing on the faith of the register. Accordingly no protection could be given to those who deal "not upon the faith of an existing state of the register". The words "dealing with the registered proprietor" which Dixon, J. had made the basis of his judgment are to be found in s. 43 of the Real Property Act (N.S.W.) His Honour clearly thought that his decision was justified by that section and that Lord Watson had proceeded on the basis that as a condition precedent to achieving indefeasibility a purchaser must bring himself within the opening words of the section.[38] These words describe a person "contracting or dealing with or taking or proposing to take a transfer from the registered proprietor". In *Gibbs* v. *Messer* the mortgagees were held not to have dealt with a registered proprietor and the section was considered no further. Indeed there was no need to do so. An abstraction having already been registered the mortgagees could not deal with the registered proprietor nor had they contracted with him. Further it was inappropriate to consider the words "taking or proposing to take a transfer from the registered proprietor" as the document registered was a mortgage. On the other hand in *Clements* v. *Ellis* it is submitted that Dixon, J. should have, after stating that the protection of the Act is given only to those who bring themselves within the opening words of the section,[39] gone on to consider the application of the classifications other than just "dealing with the registered proprietor".

It is the writer's submission that the words "proposing to take a transfer from the registered proprietor" are the crucial words which should have been adverted to by Dixon, J. Clements was a person proposing to take a transfer free from encumbrances and did take such a transfer by virtue of which he became registered. It is true that s. 43 applies to give protection only upon registration[40] and it may be thought that to have reference to the time before registration when the person who subsequently becomes registered was proposing to take the transfer is in effect to bring forward the protection which the section gives on registration to a period prior to that date. Section 43A may in fact serve to do this but the precise interpretation of that section is unclear.[41] Aside from this it is submitted that s. 43 can be given the interpretation suggested above by looking no further than the words of the section itself. It operates only upon registration but reference may be had to facts occurring prior to that date. If other words of the section detract from

[38] *Supra* n. 4 at 241-3. *Cf. Coleman* v. *De Lissa* (1885) 6 N.S.W.L.R. Eq. 104 and *Re Elliott* (1886) 7 N.S.W.L.R. 271, the rationes of which would appear to be confined to sales by the sheriff under a writ of *fi fa.*

[39] *Supra* n. 38.

[40] *Supra* n. 4 at 242. See also *Lapin* v. *Abigail* (1930) 44 C.L.R. 166 and *Templeton* v. *Leviathan Pty. Ltd.* (1921) 30 C.L.R. 34.

[41] *I.A.C. (Finance) Pty. Ltd.* v. *Courtenay* 37 A.L.J.R. 350.

this suggestion the description of the person "contracting with the registered proprietor" supports it.

It is not unimportant that the conclusion reached by Dixon, J. is at odds with the usual practice in many conveyancing matters in that protection would on his Honour's reasoning be denied to the purchaser. It has been submitted that the reasoning is incorrect but if his Honour's conclusion is good law the purchaser who in so many conveyancing transactions attends on settlement and accepts an executed discharge of mortgage, certificate of title and memorandum of transfer, is taking a risk. Yet his Honour's speech in *Lapin* v. *Abigail*[42] only four years earlier, is often quoted as a classical argument based on conveyancing practice. He said:

> The view has sometimes been expressed that a failure on the part of a prior equitable owner to lodge a caveat is default sufficient to postpone his interest to a subsequent equity acquired by one who has searched the register for caveats and having found none has thereupon acquired his interest[43] . . . no doubt if it were the settled practice for all owners of equitable interests to lodge caveats a failure to conform to the practice would naturally lead those who searched to believe that there was no outstanding equity. It may well be doubted however, whether such a regular practice has actually been established.[44]

The principal dissentient in *Clements* v. *Ellis* to the view of Dixon, J. was Evatt, J. His Honour stated that Clements had not contracted to buy firstly Mrs. Holmes' registered title subject to the mortgage and secondly the mortgagees' interest (though it is implicit in the judgment of Dixon, J. that he should have so contracted) but that his contract was to purchase only from Mrs. Holmes the fee simple free from encumbrances, for he knew nothing of the mortgagees.[45] On completion the transaction was duly carried out and Mrs. Holmes became registered free from encumbrances before transferring the unencumbered fee simple to Clements. His Honour continued by applying a statement made by Salmond, J. in his dissenting judgment in *Boyd* v. *Mayor of Wellington*[46] and concluded that Clements was a purchaser who honestly and in reliance on the registered title of his vendor had acquired that title and ought to be protected.[47] Section 42 of the Real Property Act was conclusive in Clements' favour, his Honour thought, but in *Gibbs* v. *Messer* which was relied on by the respondents the fact that there was no real registered proprietor made that section inapplicable.[48]

It is pertinent to return to the judgment of Dixon, J. for his Honour discussed certain aspects of the law of indefeasibility other than the question of the effect of registration immediately after the entry on the register of a void instrument. The latter is merely one instance of the working of indefeasibility in practice but, being a legal restatement of the facts of the case, a decision thereon was directly in point in *Clements* v. *Ellis*. On the other hand his Honour dealt in some detail with the law of indefeasibility in general and it is therefore possible to accept certain of those statements whilst at the same time attempting to refute his reasoning on the material facts of the case. His

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[42] (1930) 44 C.L.R. 166.

[43] This appears to be the *ratio decidendi* of *Butler* v. *Fairclough* (1917) 23 C.L.R. 78 at 91-2 *per* Griffith, C.J.

[44] *Lapin* v. *Abigail supra* n. 40 at 205. This statement casts some doubt on the proposition for which *Butler* v. *Fairclough* (*ibid*) is said to stand. In *Courtenay* v. *Austin*, 78 W.N. 1082 at 1091, the logical conclusion of Dixon, J.'s statement was reached by Hardie, J. thereupon further detracting from the correctness of the principle of *Butler* v. *Fairclough*.

[45] *Supra* n. 4 at 262.

[46] (1924) N.Z.L.R. at 1203.

[47] *Supra* n. 4 at 265.

[48] *Id.* at 268.

Honour commenced his opinion of the legal issues by stating that if Mrs. Holmes had herself supplied Beamsley with money to pay off the mortgage and he had misappropriated it, forged a discharge and registered it, the registration of Mrs. Holmes free from encumbrances would have been defeasible for it would have been exposed to the restoration of the mortgage.[49] The writer proposes to accept this as a correct statement of the law for reasons set out hereunder but recognises that it appears diametrically opposed to the proposition which the Privy Council in *Frazer* v. *Walker* drew from the *Assets Co. Case* and *Boyd's Case*.[50] The *Assets Co. Case*, however, involved appeals as to three separate parcels of land at least as to one of which the *Assets Company* was the initial registered proprietor under the Land Transfer Act.[51] Unless the statements made in the case are read with this in mind an application of them to a case involving dealings *inter partes* will therefore tend to confuse the issue.

Nevertheless in *Boyd's Case*, where a statutory corporation acquired the plaintiff's land under a proclamation which was alleged to be invalid, the majority of the Court of Appeal relied on the *Assets Co. Case*.[52] Stout, C.J. went as far as saying that the case was authority that a transfer having been registered without fraud, makes the title of the registered proprietor conclusive.[53] On the other hand, Sim, J. recognised that the Privy Council had dealt with the Assets Company as the first registered owner[54] but it was the statement of Lord Lindley that "In dealing with actions between private individuals their Lordships are unable to draw any distinction between the first registered owner and any others"[55] upon which he and Adams, J. apparently relied in extending the authority of the *Assets Co. Case* to the facts before them.[56] This, it is respectfully submitted, they should not have done. Lord Lindley had clearly stated when discussing *Gibbs* v. *Messer* that there was nothing in Lord Watson's judgment to support "the view that an original registered owner claiming through a real person does not get a good title against everyone except in the cases specially mentioned in the Act".[57] Here his Lordship was dealing with the facts before him and in the opinion of Dixon, J. the statement is demonstrative of the special protection given to the first registered owner "because he is so constituted by a public authority who takes the responsibility of adjudicating upon or creating his title".[58] This is very different from the case of a derivative transferee.

In *Caldwell* v. *Rural Bank*[59] the Supreme Court of New South Wales had the opportunity of considering the law of indefeasibility in facts virtually identical to those in *Boyd's Case* and came to the opposite conclusion. Owen, J. approved the reasoning of Dixon, J. in *Clements* v. *Ellis* almost in its entirety.[60] Unfortunately, from the present writer's point of view, his Honour also approved the section of Dixon, J.'s judgment regarding the necessity of dealing with a person actually registered as proprietor.[61] On the facts of *Caldwell's Case*, registration under an invalid resumption, that issue was not in point. His Honour did, however, appear to accept that the *Assets Co. Case* was con-

[49] *Supra* n. 13.
[50] *Supra* n. 20.
[51] (1905) A.C. at 199. See also *Clements* v. *Ellis supra* n. 4 *per* Dixon, J. at 245-55 and *Boyd* v. *Mayor of Wellington supra* n. 19 *per* Sim, J. at 1191.
[52] *Id. per* Stout, C.J. at 1186 ff.; *per* Sim, J. at 1190 ff.; and *per* Adams, J. at 1216 ff.
[53] *Id.* at 1186.
[54] *Id.* at 1191.
[55] *Assets Co. Ltd.* v. *Mere Roihi* (1905) A.C. at 202.
[56] *Supra* n. 19 at 1191-2 and 1221.
[57] *Supra* n. 55 at 204.
[58] *Supra* n. 4 at 255.
[59] (1952) 69 W.N. 246.
[60] *Id.* at 250-1.
[61] *Supra* n. 33.

cerned with the registration of the first registered proprietor which raised different considerations from those before him.[62]

Loke Yew v. *Port Swettenham Rubber Co.*[63] was heavily relied upon by Owen, J.[64] There the interest in certain land of the appellant was acquired by the respondent by actions which were held to amount to fraud. The respondent sought to rely on his registration as giving to him an indefeasible title. Such argument, said Lord Buckmaster—

> Take(s) no account of the power and duty of a Court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of registration if the register be not rectified. . . . It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do. . . .[65]

Three points should be noted about this case. First, Lord Buckmaster dealt with a clear fraud in obtaining registration[66] and the instance of fraud by the transferee is an exception to the indefeasibility rule[67] so that the judgment may go no further than this. Still, his Lordship's language appeared stronger and was couched in the coloured terms of "wrong-doer" and "honesty". Owen, J. thus read the above passage as illustrating a type of general law principle over and above the statute that there is a power of rectification apart from the statutory exceptions to the general rule of indefeasibility.[68] The following passage from his Honour's judgment should be carefully noted:

> . . . Where the rights of innocent third parties have not become involved a registration procured by fraud would have been capable of rectification without the aid of any statutory exception to the general rule of indefeasibility of a registered title. That must surely be because, in such a case, the instrument which has been registered is a nullity. An instrument shown to have been procured by fraud or one which has been forged is, I think, neither more nor less a nullity than one purporting to be created under a statute which gives no power to create it. I fail to see how there can be degrees of nullity.[69]

This seemingly was involved in his Honour's admitted concern to do justice to the "rightful owner".[70] The terminology is necessarily vague and its limits uncertain but the writer submits that the principle can be and is applied. No doubt in any case it will continue to have at least a subconscious effect.

Secondly, Lord Buckmaster was at pains to exclude from the application of his principle the case of intervention of rights of innocent third parties. Thus to accept it does not detract from the view that *Clements* v. *Ellis* was incorrect in its result for there the rights of an innocent third party in the presence of the purchaser had intervened.

Finally his Lordship referred to the absoluteness of registration if there

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[62] *Id.* at 251.
[63] (1913) A.C. 491.
[64] *Caldwell* v. *Rural Bank supra* n. 59 at 252.
[65] *Loke Yew* v. *Port Swettenham Rubber Co. supra* n. 17 at 504-5.
[66] *Id.* at 503.
[67] *Supra* n. 9.
[68] *Caldwell* v. *Rural Bank supra* n. 59 at 252. See also *Barry* v. *Heider* (1914) 19 C.L.R. 197 at 213 where Isaacs, J. said that "the Land Transfer Acts . . . have . . . been regarded as in the main conveyancing enactments and as giving greater certainty to titles of registered proprietors but not in any way destroying the fundamental doctrines by which Courts of equity have enforced . . . conscientious obligations. . . ."
[69] *Id.* at 252.
[70] *Ibid.*

is no rectification. This is illustrative of the fact that a *bona fide* purchaser from the proprietor before the intervention of the court will, if he obtains registration, achieve indefeasibility. If the vendor with whom he dealt was actually registered as proprietor then no doubt indefeasibility would attach to the purchaser on registration, but this does not mean that one must always deal with a vendor whose name is actually entered upon the register. It is submitted as being only one instance of it. The issue is inextricably interwoven with the submissions put forward above in relation to the judgment of Dixon, J. in *Clements* v. *Ellis*. The duty of the court to rectify because of the absolute effect if it is not done emphasises that the power to rectify is limited to the period before rights of innocent third parties intervene.[71]

To return for a moment to *Caldwell's Case* it should be noted that all of the observations of Owen, J. on the law of indefeasibility may have been *obiter*. His Honour found that the purported resumption of the plaintiff's land was invalid.[72] Accordingly no compensation would have been payable by the Minister for Public Works under the Public Works Act 1912 in virtue of which the resumption was effected and it followed that the Minister was not a *bona fide* purchaser for value.[73] It is true that the Real Property Act does not expressly stipulate such a requirement but it would be strange if a registered title could be defeated by a gratuitous purchaser's invalid actions. This argument is not applicable to the similar facts in *Boyd's Case* for there the majority judges did not (or would not) decide on the validity or otherwise of the resumption.[74]

It is of interest to conclude with an examination of a further statement made in *Frazer* v. *Walker*. In approving the *Assets Co. Case* and *Boyd's Case* Lord Wilberforce stated that the principle following thereby does not deny the right of a plaintiff to bring against a registered proprietor a claim *in personam* for such relief as a court acting *in personam* may grant.[75] Adams, J. in *Boyd's Case* adverted in this regard to the power of the Court to enforce trusts and to rectify mistakes in carrying a contract into effect but in such cases his Honour recognised a power to rectify the register upon the ground of an implied trust.[76] Here his Honour appears to accept that certain general equitable principles are applicable in the contests for indefeasibility and that such principles can give rise to rectification of the register in instances not specifically mentioned in the Act.[77] This therefore supports the observations of Owen, J.,[78] and if the Court can rectify in one case on equitable grounds then why not in others—so long, of course, as rights of innocent third parties do not intervene?

Conclusions

When one looks again at the facts in *Frazer* v. *Walker* it seems surprising that an appeal was taken to the Privy Council. It will be recalled that a mortgage was entered on the register although the signature of one of the mortgagors was forged. Had that person ascertained this occurrence before the rights of the third party in the form of the transferee from the registered mortgagee had eventuated, much of the Privy Council's reasoning would have

[71] *Boyd* v. *Mayor of Wellington supra* n. 19 *per* Salmond, J. at 1213 and *Frazer* v. *Walker supra* n. 1 at 655.
[72] *Caldwell* v. *Rural Bank supra* n. 59 at 249.
[73] *Id. per* Roper, J. at 254.
[74] *Supra* n. 19 at 1186, 1190 and 1216.
[75] *Supra* n. 1 at 655. See also *Boyd* v. *Mayor of Wellington supra* n. 19 *per* Adams, J. at 1223 and *Tataurangi Tairuakena* v. *Mua Carr* (1927) N.Z.L.R. 688 at 702.
[76] *Boyd* v. *Mayor of Wellington supra* at 1223. See also *Taitapu Gold Estates* v. *Prouse* (1916) N.Z.L.R. 825.
[77] Ss. 12(d) and 138 of the Real Property Act make no mention of the enforcement of trusts.
[78] *Supra* n. 69.

been relevant. The question of the validity of the registration of a void instrument *per se* would have come squarely before the Board without the complication of the intervention of third party rights. But despite the Board's deliberations on it the question did not arise. The purchaser had dealt with the registered proprietor from whom he acquired his interest before the appellant had acted and he thus complied with the stringent requirements of the second school of thought enunciated in the opening paragraphs of this note. *A fortiori* he complied with the conditions of the first school and the Privy Council could, it is clear, have come to no other conclusion that it did.

The last preceding paragraph is illustrative of the distinction between *Frazer* v. *Walker* and *Clements* v. *Ellis* for in the former the purchaser at all times dealt with the registered proprietor from whom he acquired his interest whereas in the latter he dealt with the proprietor registered in respect of the interest acquired by him only after completion of the transaction, viz. when the discharge of the mortgage was registered. But whilst that document was forged the transfer was a valid instrument and the writer has earlier submitted reasons why the registration of the transfer should have been indefeasible. On the other hand, the notion that "the register is everything" asserted by the first school of thought has been rejected despite the usual linking of this view with the proponents of the argument that *Clements* v. *Ellis* was incorrect in its result. The writer submits that he is able to support his conclusions by dint of his submissions as to the interpretation of s. 43 of the *Real Property Act*, Dixon, J.'s reliance on *Gibbs* v. *Messer* and the reference to conveyancing practice. In other words, the writer is suggesting a modification of the dogma of the second school of thought by deleting the requirement of a dealing with the actual registered proprietor and placing the emphasis on *bona fides*, subject to the intervention of the rights of innocent third parties.

What, however, can be said for these academic arguments in practice? Great heed should be taken of the following enunciation made recently in the High Court of Australia.

> It is not . . . for a Supreme Court of a State to decide that a decision of this Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with the reasoning of the Judicial Committee (of the Privy Council) in a subsequent case. If the decision of this Court is to be overruled it must be by the Judicial Committee or by this Court itself. It cannot be treated by a Supreme Court as if it were overruled. The matter is of course different where this Court's decision is not precisely in point and comparison has to be made merely between two lines of reasoning.[79]

It is clear from this statement that an argument to the Court of Appeal of New South Wales that *Frazer* v. *Walker* has effected an implied rejection of the majority view in *Clements* v. *Ellis* should not be accepted. This in itself may answer the suggestion made recently by a writer in the *Australian Law Journal* that "the proponents of indefeasibility of a Torrens title immediately following registration of a void instrument have won a major victory in the decision of the Privy Council in *Frazer* v. *Walker*".[80] Whilst the present writer supports the view that indefeasibility should result in that situation, he recognises that the Privy Council's decision cannot support the view, first, because it does not even mention *Clements* v. *Ellis* let alone overrule the decision and, secondly, because the issues raised in the facts before the Privy Council did not correspond with the issues dealt with in our long-standing High Court decision. For the latter to be overruled it must be done by the High Court or by the Privy Council.

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[79] (1967) 40 A.L.J.R. 306 at 308.
[80] (1967) 40 A.L.J. 373 (though see the final sentence at 374).

II INDEFEASIBILITY IN PRACTICE

As a result of *Clements* v. *Ellis* there have been suggestions that a purchaser may insist on the registration of the discharge of a mortgage on the vendor's title prior to settlement,[81] provided that there is no special clause in the contract precluding such a requisition. The suggestion is no doubt based on the reasoning of Dixon, J. that to achieve indefeasibility the purchaser must deal with the registered proprietor and not upon the footing of a future condition of the register.[82] His Honour was, however, stating only his opinion of the conditions which must exist for indefeasibility to prevail. He was therefore interpreting a statute and not the contractual relationship of vendor and purchaser out of which the right to make requisitions arises. Evatt, J., on the other hand, did look to the nature of the contract between the parties when he stated that the purchaser had not contracted to buy firstly the vendor's registered title subject to the mortgage and secondly the mortgagee's interest but rather he had contracted with the vendor to purchase the unencumbered fee simple.[83]

The situation envisaged by Evatt, J. is that which exists in the situation dealt with in this part. The contract is made between the owner, whose registered title is subject to a registered mortgage, and the purchaser. If the purchaser wishes to satisfy the requirements to obtain indefeasibility stipulated by Dixon, J. he should either have insisted before exchanging parts of the contract that it provide for registration of the discharge prior to settlement or that the contract is only in respect of the vendor's interest in the property and that the purchaser will make a separate contract with the mortgagee. On either alternative he will have fulfilled Dixon, J.'s requirement of a dealing with the registered proprietor. However, if this has not been arranged before the exchange of parts of the contract at which time the contractual relationship is established it is submitted that the purchaser cannot subsequently achieve the effect of a matter of contract by a requisition on title. It should be noted that the standard contract now used in this State is the contract for sale approved by the Law Society of New South Wales and the Real Estate Institute of New South Wales. It makes no provision for the disclosure or discharge of subsisting mortgages.

To sustain further the abovementioned view that a purchaser could not requisition for a discharge to be registered the writer suggests that an application of conveyancing practice would be relevant. Conveyancing practice has been important in judicial decisions[84] and in *Bartlett and the Real Property Act*[85] Jacobs, J. was concerned *Inter alia* with a purchaser who insisted on registration of the discharge. However, this aspect was settled before it could be decided upon though his Honour did comment that he would give a decision on this point "in the light of conveyancing practice". It seems as common a practice not to register discharges of mortgages before settlement as it is not to lodge caveats on behalf of purchasers other than under terms contracts[86] and it is submitted that the practice can be established in the event of the necessity arising in litigation. The practical aspect that the vendor in the large majority of cases requires a portion of the purchase moneys to discharge the mortgage emphasises the conveyancing practice. So, too, does the failure of the Law Society approved contract to make provision in this regard.

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[81] See the article under *Moot Points* (1966) 39 *A.L.J.* 419.
[82] *Clements* v. *Ellis supra* n. 4 at 236-7.
[83] *Id.* at 262.
[84] *Supra* n. 44.
[85] Unreported decision of Jacobs, J. in the Supreme Court of N.S.W. on 11/8/1965; referred to (1966) 39 *A.L.J.* 419.
[86] *Courtenay* v. *Austin* (1961) 78 W.N. 1082 at 1091. Here Hardie, J. accepted the evidence of a solicitor that it was not the practice of conveyancers to lodge caveats on behalf of purchasers other than under terms contracts.