INDEFEASIBILITY OF TITLE AND THE REGISTRAR'S 'UNWELCOME' S81 POWERS

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I. Introduction

The concept of indefeasibility of title is not defined in the Land Transfer Act 1952 ("the Act"), nor is it referred to in what, for some, are the Act's key sections. It is regarded, nevertheless, as central to our understanding of the Act. Indeed, indefeasibility of title has been described as the "heart" and the "foundation" of land registration statutes, such as the Act, that are modelled on the Torrens system.

Yet, despite such accolades, it has generated significant controversy. The "indefeasibility debate" has been between the advocates of "immediate" indefeasibility and "deferred" indefeasibility.

To most lawyers and academic commentators, however, this controversy was settled in favour of immediate indefeasibility when, in 1967, Lord Wilberforce delivered the opinion of the Privy Council in *Frazer v Walker*.4

So, why another article on indefeasibility?

The short answer is that there is evidence of a judicial re-evaluation of indefeasibility. In the course of delivering the judgment of the Court of Appeal in *CN and NA Davies Ltd v Laughton*,5 for instance, Thomas J suggests that indefeasibility of title is concerned with "protecting persons who deal with the registered proprietor on the face of the register" such as a transferee, saying:

It is now over a century since the nature and purpose of the Torrens system was described by the Privy Council in *Gibbs v Messer* [1891] AC 248 at p 254. 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 the title and to satisfy themselves of its validity. This end is accomplished by providing that everyone who purchases land, without fraud and for value, from a registered proprietor and enters his or her deed of transfer or mortgage on the register thereby acquires an indefeasible right notwithstanding any infirmity in the title.6

The reference to *Gibbs v Messer* is significant. That case has been perceived by many as advancing deferred indefeasibility. The aim of this

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1 Sections 62, 63 and 75. The term 'indefeasibility' does appear, however, in ss 54 and 199 which respectively provide for the application of the Act to provisional registrations and limited certificates of title.

2 *Ri Cartridge and Granville Savings and Mortgage Corporation (Manitoba CA).* 172 per Philp JA.

3 *Bahr v Nicolay (No 2)* [1988] 164 CLR 604 (HC of Aust), 613 per Mason CJ and Dawson J.

4 [1967] NZLR 1069. The following two judicial observations are representative of this perception; viz: "The old and beloved arguments as between immediate and deferred indefeasibility now are dead": *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 at 671 per McGeachan J; and "[A]s we now know any possibility of 'deferred indefeasibility' of title has been rejected by the Privy Council: *Frazer v Walker*: Registrar-General of Land v Marshall* [1995] 2 NZLR 189 at 196 per Hammond J.

5 [1997] 3 NZLR 705.

6 Ibid at 711.

7 Ibid at 712-713.
article, however, is not to reopen the indefeasibility debate. Nor is it to suggest that registration does not confer protection upon the registered proprietor against certain challenges to his or her title. Rather, it is to encourage a reconsideration of the present orthodox understanding of Frazer v Walker.

New Zealand lawyers have had a preoccupation with indefeasibility. It is somewhat ironic that legislation designed to simplify transactions should be difficult to interpret. But that has been the position. The explanation may be, as Salmond J suggested in Boyd v Mayor etc., of Wellington, that the legislation is “badly drafted”.8 The antidote has been to use the concept of indefeasibility to help understand the powers and direction of the Act; so the tail has wagged the dog.

This preoccupation has continued when reading the advice in Frazer v Walker. This too is mistaken. The result has been to misinterpret that advice.

Indeed, subject to the operation of some well defined exceptions, it is assumed by many that the protection conferred by registration is absolute, i.e., “not liable to be made void; unable to be forfeited or annulled” to use a dictionary meaning of indefeasibility.9

The thrust of this article is that Lord Wilberforce advanced a more sophisticated view of the Act. It will be recalled that an object of the Act was to simplify the transfer of estates and interests in land; the aim was to make this process both safer and cheaper than it had been. To achieve this some challenges to the register had to be precluded. A classic example is the claim that one’s ownership had survived the registration of another. Lord Wilberforce described such challenges as “adverse claims”.10 And, as he noted, the general effect of registration is to exclude them. Subject to the established exceptions registration confers immunity against all adverse claims. It is this immunity that Lord Wilberforce referred to as indefeasibility of title.11

As evidenced by the in personam claim, however, there are other challenges to the register that are consistent with the operation of the Act, if not sometimes necessary to achieve its aims.12 Lord Wilberforce did not name this group of challenges but I shall refer to them as “allowable claims”. He did, however, recognise that an indefeasible title provides no protection against them, what protection there is, is provided by s183.

The Act identifies two types of registered proprietor as worthy of special protection. These are purchasers and mortgagees who have dealt on the faith of the register and who have become registered “bona fide for valuable consideration”. For the Act to work they need to be assured that claims available against their vendor or mortgagor will not be available against them.13 The function of s183 is to provide this protection.14 It reinforces

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8 [1924] NZLR 1174 at 1211 (CA).
10 [1967] NZLR 1069 at 1078.
11 Ibid at 1075.
12 The aim of simplifying the transfer of land would be hindered if, for example, a vendor’s status as the registered proprietor precluded specific performance of the agreement for sale and purchase. Section 118 of the Act is interesting as it can be viewed as a statutory example of the in personam claim.
13 WN Harrison, “The Transformation of Torrens’s System into the Torrens System” (1962) 4 UQLR 125 at 130.
14 Section 183 provides:
15“(1) Nothing in this Act shall be so interpreted as to render subject to an action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is
the immunity against adverse claims conferred by an indefeasible title and ensures that a claim that would be allowable against the transferor/mortgagor is not available against the registered purchaser/mortgagee.

For some, this view of the Act, in particular the existence of allowable claims, will be unsettling. Indeed, so strong is the perception that registration provides absolute protection, that Lord Wilberforce’s recognition of the in personam claim, has had to be repeatedly reiterated.

There is another aspect of Lord Wilberforce’s advice that does not fit the popular perception of the Act. This is his views on the power of correction and cancellation conferred upon the Registrar by s81. That section provides:

Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

Not only did Lord Wilberforce say that these powers are “significant and extensive”, but he warned that they ought “not to be overlooked when a total description of the [registered proprietor’s] rights is required.”

Nevertheless, s81 is regarded by some as “an unwanted anachronism”, inconsistent with the “carefully circumscribed” power conferred upon the courts by s85 and, as such, in need of legislative attention.

Is law reform needed? The Registrar seems sympathetic to that view, heading judicial encouragement to see s81 with a ‘Nelsonian eye’. Nevertheless, s81 remains and the present position has been likened to “a time bomb which will one day explode”.

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.”

15 As Lord Wilberforce said, if necessary s183 provides the “complete answer to the continuation of an adverse claim” [1967] NZLR 1069 at 1079.
18 Ibid at 1075.
19 Housing Corporation of New Zealand v Maori Trustee [1988] 2 NZLR 662 at 701 per McCechan J.
20 [1967] NZLR 1069 at 1076. As interpreted by Lord Wilberforce, the court’s power under s85 is limited to those situations where proceedings for the recovery of land are not barred, i.e. where adverse claims are allowed. Section 85 provides: “Upon the recovery of any land, estate, or interest by any proceeding in any Court from the person registered as proprietor thereof; the Court may, in any case in which such a proceeding is not expressly barred, direct the Registrar to cancel any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute such certificate of title or entry as the circumstances of the case require, and the Registrar shall give effect to the order accordingly.”
22 Housing Corporation of New Zealand v Maori Trustee [1988] 2 NZLR 662 at 701 per McCechan J.
23 (1988) 4 BCB 255 at 256.
More recently, there are signs that the hostility to s81 is misguided. In *Duncan v McDonald,*25 for instance, a case involving the registration of an illegal mortgage, Blanchard J, who delivered the judgment of the Court of Appeal, specifically noted that no arguments had been raised as to the potential application of s81.

Parts II and III provide necessary background to our examination of *Frazer v Walker.* In Part II the different shades of meaning that "indefeasibility" may attract are considered. Then, in Part III, *Gibbs v Messer,*26 *Assets Co v Mere Roihii,*27 ("Assets Co") and *Boyd v Mayor etc of Wellington*28 ("Boyd") are examined.

Against this background, the now orthodox view of *Frazer v Walker* is considered in Part IV. That there are difficulties with it is displayed in the accompanying examination of s81.

Then, Part V invites a reconsideration of *Frazer v Walker.*

II. INDEFEASIBILITY

To repeat an earlier observation, New Zealand lawyers have a preoccupation with indefeasibility. This may be a response to difficulties in interpreting the Act. As identified by Dixon J, the problem is that the Act contains "provisions which lay down general propositions without qualification which other provisions require or clearly imply."29 By emphasising some provisions and ignoring others, different views of the Act can be advanced.

Consider the inter-relationship of ss 63 and 183. Section 63 confers a general protection upon a registered proprietor against actions for possession or for the recovery of land. Subject to five specified exceptions, subsection (1) provides that "[n]o action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered ... ."

On a literal reading, s63 suggests that the act of registration provides protection against all claims. But if so, s183 appears superfluous. Can this be right? It appears to confer protection against defects in a former registered proprietor's title by providing:

(1) Nothing in this Act shall be so interpreted as to render subject to an 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 mortgagee 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.

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28 [1924] NZLR 1174 (CA).
29 *Clements v Ellis* (1934) 51 CLR 217 (HC of Aust), 238. His Honour was considering comparable legislation.
Rather than s183 being superfluous, for some its existence suggests that the protection conferred by s63 is not as extensive as it initially appears.\textsuperscript{30} It was to resolve such difficulties that resort has been had to indefeasibility.

But what is wrong with this?

Some would say ‘nothing’; indefeasibility has a history of use in both the English land reforms of the mid nineteenth century\textsuperscript{31} and in Torrens’ own writings on the South Australian Real Property Act 1857-8.\textsuperscript{32}

But, what does indefeasibility mean?

Answering this is complicated by the indefeasibility debate; a struggle which by its very existence reveals different interpretations.

A starting point is to consider what Torrens meant by it. This has to be deduced from his writings.\textsuperscript{33} For him, it appears that the key reform was the removal of the then regime of “dependent title” in favour of one of “independent title”.

It will be recalled that prior to Torrens’s reforms, purchasers and mortgagees had to “trace title back through successive proprietors, each instrument examined, each transaction scrutinised, to ascertain that all necessary formalities have been observed, and that no equitable interest or claim remain outstanding.”\textsuperscript{34} This subjected them to a number of risks, three of which are considered here, two now and the third later.

There was “the nemo dat risk”, the risk that there was a defect in the vendor’s title. Then the risk of the continuation of an equitable interest; recall that an equitable interest will survive a transfer of the legal title if the new legal owner is not a bona fide purchaser for value without notice. Given equity’s expansive notions of notice, the vulnerability of a purchaser/mortgagee to this “continuation of equitable interests risk” was quite real.

A “first principle” of Torrens’s reforms was directed at these two risks, as he observed, the idea was that “retrospective investigation [of title] is cut off; each proprietor of the fee [would] hold direct from the Crown subject to such mortgages, charges, lease-hold or other lesser estates as may exist or be created affecting land.”\textsuperscript{35} “Indefeasibility of title created by registration” would then follow, “of necessity as a corollary to the principle of independent title.”\textsuperscript{36}

Unfortunately there is a complicating factor when considering Torrens’s view of indefeasibility. The legislation reproduced alongside his commentary is not the original legislation, rather it reflects substantial amendments thereto.\textsuperscript{37} While Torrens’s commentary does describe the amended Act, his reference to independent title, “appl[ies] rather more accurately to the

\textsuperscript{30} Pursuant to the alternative view of Frazer v Walker advanced herein, it can be argued that these sections are consistent. Section 63 can be seen as directed to adverse claims while s183 provides both more limited protection against allowable claims and a safeguard against adverse claims.

\textsuperscript{31} Prominent among these is its express use in Lord Westbury’s Act (1862, 25 & 26 Vict. c53).

\textsuperscript{32} Robert R Torrens, The South Australian System of Conveyancing by Registration of Title (1859), pp 9, 43.

\textsuperscript{33} Ibid at 9, 43.

\textsuperscript{34} Ibid at 9.

\textsuperscript{35} Ibid at 9.

\textsuperscript{36} Ibid at 9.

\textsuperscript{37} The Real Property Law Amendment Act 1858. This involved the repeal of seventy sections of the original legislation.
original Act.” As originally enacted, every holder of a fee simple estate was to be an immediate grantee from the Crown; transfers were to be implemented by the surrender of the existing title and the issue of a fresh title vesting the estate in the transferee “indefeasibly.”

Against this background it seems clear that Torrens regarded indefeasibility as referring to protection against the nemo dat risk and the continuation of equitable interests risk. Indeed, if one regards reference to ‘infirmity of title’ as including both common law and equitable interests, this seems to be what Lord Watson meant, when, in the following extract from Gibbs v Maser, he referred to an indefeasible right:

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.

It will be recalled that this is the passage referred to by Thomas J in CN and NA Davies Ltd v Laughton considered in the Introduction.

Regarded as providing protection against both the nemo dat risk and the continuation of equitable interests risk, an indefeasible title would confer protection against some, but not all, competing claims.

Returning to the risks that confront those who wish to acquire an interest in land, a third risk is the existence of some irregularity or defect in dealings with the ‘owner’, for instance a forged signature.

At this point one encounters the indefeasibility debate and subtle variations in the meaning of indefeasibility. Applying the deferred version, ‘indefeasibility’ carries with it similar consequences to that suggested above, in that an indefeasible title does not bring with it protection against all claims. With immediate indefeasibility, however, ‘indefeasibility’ is seen as conferring just that, registration becomes a decisive and inviolable act.

Of course, irrespective of whether ‘indefeasibility’ is immediate or deferred, the Act does recognise specific situations, such as fraud, when registration is not decisive. Nevertheless, the above difference in the meaning of indefeasibility intuitively affects our understanding of these situations.

When regarded as conferring limited protection the concept of indefeasibility operates quite consistently with those situations where registration is not decisive. The reverse is true, however, when indefeasibility is regarded as conferring ‘absolute’ protection. While registration is said to

38 WN Harrison, “The Transformation of Torrens’s System into the Torrens System” (1962) 4 UQLJ 125 at 127.
39 Torrens, The South Australian System of Conveyancing by Registration of Title, op cit n 32.
40 [1891] AC 248 at 254.
41 [1997] 3 NZLR 705.
42 While the operation of the nemo dat rule and existence of defects in the memorandum of transfer are distinct risks they may overlap in the situation when the vendor was in fact a rogue who had purported to be the owner and forged his or her signature. Here, arguable, there is both a defect in the rogue’s title and a defect in the conveyance and views may differ as to whether this defect should be classified as being in the immediate transaction or in the vendor’s title. Observations of Salmond J in Boyd v Mayor of Wellington [1924] NZLR 1174 at 1201 (CA), however, suggest that this situation would be classified as coming within the later risk.
be decisive we know that it is not, the Act tells us so. A solution is to classify those situations where registration is not decisive as exceptions. And exceptions are treated as such. Consider the following observation from *Fels v Knowles*:

The cardinal principle of the [Land Transfer Act] is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.  

Indeed, if one regards registration as decisive, the removal of any entry or memorial is tantamount to the destruction of existing ownership rights and, as such, demands to be closely proscribed. Given both the significance of s63 for the advocates of immediate indefeasibility and the fact that that section (as does the associated s62) specifically recognise situations where registration is not decisive, it is not surprising that these should become 'the' exceptions.  

A paradox also develops. While registration confers this absolute protection it is vulnerable to the subsequent registration of another. Indefeasibility, becomes a misnomer. The irony is apparent in the comments of Barwick CJ, that, "[s]o long as the certificate is unamended it is conclusive and of course when amended it is conclusive of the new particulars it contains."  

Both these subtle differences in the meaning of indefeasibility and the consequential implications should be kept in mind when one encounters attempts to explain the workings of the Act through reference to indefeasibility.

### III. THE DIFFICULT TRIO

Prior to *Frazer v Walker* the indefeasibility debate focused upon the effect of three cases, *Gibbs v Messer, Assets Co and Boyd*.  

For some, these cases are old acquaintances. For others, however, principally those who have focused their attention on *Frazer v Walker* and have restricted their understanding of these cases to Lord Wilberforce's comments on them, they are largely unknown territory. This is unfortunate, especially since Lord Wilberforce's observations were made in the context of and, it is suggested, were intended to be read against, a general familiarity with them.  

At the outset it should be acknowledged that lawyers and commentators have found these cases to be difficult. And they remain so. Our concern, however, is not so much with what they actually decide but with what they have been perceived as contributing in the indefeasibility debate.

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43 (1906) 26 NZL R 604 (CA) at 619 per Edwards J.  
44 Interestingly, the *in personam* claim is not regarded as an exception to indefeasibility. Reminiscent of fictions of old, it is said that a successful *in personam* claim does not directly challenge a registered proprietor's title; rather the Court just requires the registered proprietor to honour personal obligations that have arisen out of his or her conduct; and this may entail an obligation to divest himself or herself of the registered title: see *Breskvar v Wall* (1971) 126 CLR 376 (HC of Aust) at 384-5 per Barwick CJ.  
45 As Thomas J recently observed in delivering the judgment of the Court in *CN and NA Davies v Laughton* [1997] 3 NZL R 705 at 712, "[I]t has been widely recognised that the concept of indefeasibility is something of a misnomer. Certainly it is far from absolute. A subsequent registration by a new registered proprietor who can claim an indefeasible title may defeat the 'indefeasible title' of an earlier registered proprietor."  
46 *Breskvar v Wall* (1971) 126 CLR 376 (HC of Aust) at 385.
It should also be acknowledged that Lord Wilberforce’s observations of
them can be read, and have been read, as explaining them within an
immediate indefeasibility framework. In Part V, however, it will be argued
that this interpretation was not intended by Lord Wilberforce and is a product
of the preoccupation with indefeasibility.

1. Gibbs v Messer

Although involving an appeal from Victoria, the Privy Council’s advice
has been regarded as of general application to Torrens based systems.
A Mrs Messer was the original registered proprietor. While overseas
her husband had her power of attorney and their solicitor — Cresswell —
forfeited his signature to a transfer of the land in favour of a ‘Hugh Cameron’,
a “fictitious and non-existing transferee”.47 He then executed Hugh
Cameron’s signature to a mortgage in favour of the McIntyres. Upon
learning of the fraud, Mrs Messer sought a new certificate of title free of
both the registration in favour of Hugh Cameron and the McIntyres’
mortgage, or, failing that, the award of appropriate compensation.

Removal of the transfer in favour of Hugh Cameron was not
contentious.48 Turning to the McIntyres’ mortgage, the advice was that,
notwithstanding its registration, it did not constitute an encumbrance. The
Registrar was directed to cancel the associated memorial.

But why?

The cause of the McIntyres’ difficulties was that they had not dealt with
a registered proprietor, Hugh Cameron was “a myth”. As Lord Watson
commented, “[h]is was the only name on the register, and, having no
existence, he could neither execute a transfer nor a mortgage.”49

Viewed against a backdrop of the indefeasibility debate Gibbs v Messer
can be regarded, and has been regarded, as advancing deferred
indefeasibility.50 Support for this is provided by Lord Watson’s general
observation as to the “main object of the Act” reproduced earlier.

Then there is his Lordship’s observation that the extent of the protection
given by “the statute ... to persons transacting on the faith of the register”
is limited:

[It is] limited to those who actually deal with and derive right from a proprietor whose name
is upon the register. Those who deal, not with the registered proprietor, but with a forger
who uses his name, do not transact on the faith of the register, and they cannot by registration
of a forged deed acquire a valid title.51

Further support is provided by Lord Watson’s comments in which he
considers the effect of registering what was at common law a void instrument:

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.52

Notwithstanding this popular view of Gibbs v Messer that case may
not, in fact, involve indefeasibility, in the sense of protection against adverse
claims. Rather, as is discussed in Part V, it appears that their Lordships were concerned with an allowable claim.

2. Assets Company Limited v Mere Roihi

It is an understatement to say that the Privy Council’s advice in this case has generated controversy. A combination of factors has contributed to this. The ‘case’ actually comprised three consolidated appeals in which the appellants, focusing upon irregularities in the procedure whereby their native customary title had been extinguished and the land brought under the coverage of the then Land Transfer Act, were seeking to recover land that Assets Co was now the registered proprietor of. They argued that in these circumstances the registration was invalid. Not surprisingly, the facts in each appeal differed. The appeals also raised complex issues involving: (i) the inter-relationship of the provisional register and the register; (ii) the effect of a Crown Grant, and/or a warrant from the Governor General directing the Registrar to issue a certificate of title; and (iii) the fact that some of the transactions concerning the land occurred in anticipation of registration.

Given the result in Gibbs v Messer, the appellants’ argument must have looked attractive, especially with respect to the third appeal, that of Teira Ranginui, where Assets Co could be regarded as the “first” registered proprietor. Nevertheless it was unsuccessful, Assets Co’s registration was upheld.

It is significant, therefore, that Lord Lindley, who delivered their Lordships’ advice, considered that the result was consistent with that in Gibbs v Messer. In the following two passages he offered these comments:

It is said that Gibbs v Messer shows that registered titles may not be conclusive even in favour of a bona fide registered purchaser from a registered owner. The case, no doubt, does show that such a case may occur. The case was one of fraud and forgery. A transfer from a registered owner to a non-existent person had been fraudulently procured and registered, and a fictitious transfer from that fictitious transferee to a bona fide mortgagee was afterwards registered. In a suit by the first registered owner against the registrar, the registered mortgagee and the perpetrator of the fraud, the name of the first registered owner was ordered to be restored to the register by this Board. The Supreme Court of Victoria had held that the true owner had lost her property, but was entitled to damages out of the compensation fund. The appeal was by the registrar from this decision. This Board held that, as there was, in fact, neither any transferee from the first registered owner, nor any transferor to the registered

53 The appellants’ arguments of fraud need not concern us.
54 Influenced by the belief that Lord Lindley did not state the facts fully, they have attracted considerable scrutiny. The core facts of each appeal appears to be as follows. In the first appeal - that of Mere Roihi involving land known as Waingaromia No 3 - one Cooper was the purchaser and first registered proprietor upon the provisional register. He granted a mortgage in favour of certain clients of the City of Glasgow Bank and it was registered. Then that mortgage was transferred to the Bank. Following the Bank's liquidation, its assets were vested in Assets Co by Imperial Statute (45 & 46 Viet, c 152). Ultimately the Governor General issued a warrant and a certificate of title in favour of Assets Co resulted.

The facts of the second appeal - that of Panapa Waitahi involving land known as Waingaromia No 2 - were broadly similar but the first registered proprietor on the register was the liquidator of the Bank and Assets Co was a registered transferee thereof.

In the third appeal - Teira Ranginui involving land known as Rangatira No 2 - the original Maori owners were registered upon the provisional register. A void instrument of transfer to a firm called Kinross & Graham was then registered, followed in turn by a transfer to Assets Co who, on the issue of the Governor’s warrant, received the certificate of title. To complicate the matter further the acts of registration were recording transactions that had occurred earlier so that Assets Co could be regarded as the ‘first’ registered proprietor.
mortgagee, there was nothing to deprive the first registered owner of her property—nothing, in fact, on which the subsequent registrations could operate; and those registrations were accordingly ordered to be cancelled. 55

And:

It was urged by counsel that the decision of this Board in Gibbs v Messer shews 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 some one else. Moreover, forgery is more than fraud, and gives rise to considerations peculiar to itself. 56

Uncertainty remains, however, as to why Lord Lindley regarded Gibbs v Messer as raising different considerations. Some see no difference; Lord Lindley is regarded as just artificially distinguishing Gibbs v Messer so as to enable him to advance a contrary view of the Act. For others, there is a key difference, the use of the fictitious proprietor in Gibbs v Messer.

Notwithstanding the differences, underlying both views is an assumption that all challenges to the register are similar and, that subject to the recognised exceptions, registration confers an indefeasible title, the only question is whether it is immediate or deferred. But once it is realised that there are two types of challenge, adverse claims and allowable claims, another explanation arises, that Gibbs v Messer and Assets Co involved different types of challenge to the register.

3. Boyd v Mayor etc, of Wellington

Boyd was the registered proprietor of land needed for a tramway. A proclamation was issued by the Governor-General taking this land and vesting it in the City of Wellington. The proclamation was registered. Boyd then argued that the proclamation was void and sought its removal from the register.

Even assuming that the proclamation was void, the majority of the Court of Appeal — Stout CJ, Sim and Adams JJ — held against Boyd. In doing so they considered that in Assets Co the Privy Council had found in favour of immediate indefeasibility. Registration of the proclamation therefore, even if void and ineffectual at common law to transfer title, had the effect of conferring an indefeasible title upon the City.

But what about Gibbs v Messer?

In essence, the majority considered that Gibbs v Messer had “no bearing”, to use the words of Stout CJ, on the issue before it. More particularly, Stout CJ considered that Lord Lindley confined Gibbs v Messer to situations involving fraud and forgery. 57 For Adams J, it was to confine Gibbs v Messer to forgery. 58

Sim J also considered that the facts before him were “altogether different” 59 from those in Gibbs v Messer. Nevertheless he proceeded to suggest that Lord Lindley’s treatment of Gibbs v Messer indicated an artificial distinguishing of that case, tantamount to its reversal. He observed:

55 [1905] AC 176 at 204.
56 Ibid at 211.
57 [1924] NZLR 1174 at 1188.
58 Ibid at 1224.
59 Ibid at 1193.
If there is in fact any conflict between the law as expounded in [Gibbs v Messer] and in the case of Assets Co this Court is bound, I think, to accept the Privy Council’s statement in 1905 [ie in Assets Co] of the effect of the earlier decision. ... It certainly is more respectful to accept the explanation given in 1905 of the earlier decision than to assert that such explanation is wrong.60

IV. Frazer v Walker

1. The orthodox view

Present orthodoxy is that Frazer v Walker confirms the victory of immediate indefeasibility. Representative of this is Professor Hinde’s comments that their Lordships “plainly wished to settle the conflict of opinion which had so long centred around its earlier statements about indefeasibility of title in Gibbs v Messer and Assets Co”61 and “ha[ve] finally pronounced in favour of immediate indefeasibility.”62

Professing to act on behalf of herself and her husband, Mrs Frazer acquired a loan from the Radomskis. Security was to be provided by a mortgage over land jointly owned by the Frazers. Mrs Frazer uplifted the memorandum of mortgage from the Radomskis’ solicitors and when she brought it to her solicitor’s office for witnessing, it already bore her husband’s signature. The mortgage was registered. Following default — no payments being made — the Radomskis exercised their power of sale in favour of Walker. The transfer to Walker was registered and he sought possession of the land.

Mr Frazer then asserted that his signature was a forgery. He sought: (i) a declaration that his interest in the land was not affected by either the mortgage or the sale; (ii) a declaration that the mortgage was a nullity; and (iii) orders directing the District Land Registrar to cancel the registrations in favour of the Radomskis and Walker and to restore him and his wife as joint owners of the land.63

It is clear that because of Walker’s registration, Mr Frazer’s claim had to fail. Section 183 would have been “a complete answer”64 to it.65 Nevertheless, their Lordships did consider the position of the Radomskis and concluded that Mr Frazer was directly challenging the protection conferred upon them by ss 62 and 63 of the Act. In doing so they do provide support for the present orthodox view of their advice.

It will be recalled that s62 provides that subject to fraud and three other specified exceptions, the estate or interest of the registered proprietor is paramount to all competing estates or interests except those “encumbrances, liens, estates or interests” which are noted on the register. Section 63 reinforces this by protecting the registered proprietor against proceedings for possession or for the recovery of the land. Their Lordships considered that the declarations and orders sought by Mr Frazer were tantamount to “an action for recovery of land within the terms of s. 63” and, as none of

60 Ibid at 1193.
62 Ibid.
63 [1967] NZLR 1069 at 1077.
64 Ibid at 1079.
65 This was the approach of the Court of Appeal, reported [1966] NZLR 331.
that section’s exceptions applied, he was precluded from challenging the Radomskis’ registered title.66

Similarly, while s183 would have been “a complete answer” to Mr Frazer’s claim against Walker, this claim was also an action for the recovery of land and as such was barred by s63.

Reinforcing this practical emphasis upon the act of registration there are a number of observations directed to the consequences flowing from registration. Prominent among these is:

Registration once effectuated must attract the consequences which the Act attaches to registration whether that was regular or otherwise. ... The inhibiting effect of certain sections (e.g., ss 63 and 63) and the probative effect of others (e.g., s75) in no way depend on any other fact than actual registration as proprietor. It is in fact the registration and not its antecedents which vests and divests title.67

Then, there is the observation in which indefeasibility, in the context of ss 62, 63 and 75, is referred to, Lord Wilberforce noting that it is these sections which confer upon the registered proprietor what has come to be called ‘indefeasibility of title’. The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration.68

Last of the comments referred to here, but not least, are those directed to Gibbs v Messer, Assets Co and Boyd. Gibbs v Messer was regarded as having “no application as regards adverse claims made against a registered proprietor, such as came before the Courts in Assets Co and Boyd and in the present case”.69 Rather, the Board in Gibbs v Messer was said to be “concerned with the position of a bona fide ‘purchaser’ for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor”.70

Assets Co was regarded as the “leading case as to the rights of a person whose name has been entered upon the register without fraud”, in such circumstances “registration was conclusive”.71

Then, there is the confirmation of the decision of the majority in Boyd:

Boyd’s case ... was rightly decided and that the rationale of that decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.72

Against this background it is not unreasonable to infer that Frazer v Walker supports immediate indefeasibility, even if this results in a number of inconsistencies. One is Gibbs v Messer. While it had been regarded as advancing deferred indefeasibility, it receives Lord Wilberforce’s approval. We will return to Gibbs v Messer later but at the moment it suffices to observe that to accommodate the result in Gibbs v Messer it has been suggested that there is a ‘fictitious registered proprietor exception to immediate indefeasibility’.73 Another is the uncertain response to the

67 Ibid at 1075.
68 Ibid at 1075. To anticipate later comments, it should be noted that Lord Wilberforce’s observation about indefeasibility is directed to adverse claims.
69 Ibid at 1078.
70 Ibid at 1078.
71 Ibid at 1077.
72 Ibid at 1078.
73 GW Hinde and DW McMorland, Butterworths Land Law in New Zealand (1997), section 2.057, p 135.
registered proprietor who is a volunteer. Do they receive an indefeasible title or, notwithstanding Lord Wilberforce's focus upon the act of registration, is it restricted to those who give consideration?\textsuperscript{74}

Then there is s81.

2. The s81 anomaly

Notwithstanding his comments on the effect of registration, Lord Wilberforce did say that the Act contains "provisions by which the entry on which [a registered proprietor] relies may be cancelled or corrected."\textsuperscript{75} Indeed, the Registrar's powers under s81 were said to be "significant and extensive"\textsuperscript{76} and "are not coincident with the cases excepted in ss 62 and 63."\textsuperscript{77}

The problem with s81 is that it appears to be totally inconsistent with the orthodox view of Frazer v Walker. But, rather than prompting a re-evaluation of our understanding of that case the general response has been to regard s81 as the anomaly. Consider the approach in Housing Corporation of New Zealand v Maori Trustee.\textsuperscript{78}

This case involved a mortgage over Maori Freehold land that, contrary to the Maori Affairs Act 1953, had not been produced to the Registrar of the Maori Land Court for endorsement. While the Maori Affairs Act 1953 provided that the mortgage should have no force or effect, it had been registered and, McGechan J held applying Frazer v Walker, that the mortgage had acquired an indefeasible title.\textsuperscript{79}

In response the Maori Trustee argued that in these circumstances registration of the mortgage had been "wrongfully obtained or is wrongfully retained", two of the grounds specified in s81, and that the Registrar could exercise the power under that section to cancel the registration.

McGechan J agreed that the registration had been wrongfully obtained. But this placed him in a quandary; the problem, a personal dislike for Lord Wilberforce's observations on s81\textsuperscript{80} but a realisation that they were "an integral component of the decision".\textsuperscript{81} His solution, while seeing "no escape from giving the Privy Council decision full force and effect"\textsuperscript{82} he stated his strong belief that s81 was "an unwanted anachronism".\textsuperscript{83} And, while stating that the exercise of this power was a matter for the Registrar, he expressed his personal opinion that the power should not be exercised.

\textsuperscript{74} There is recent conflicting Australian authorities as to the application of indefeasibility to volunteers. For recent examples, compare Bogdanovic v Kostoff (1988) 12 NSWLR 472 (which holds that indefeasibility applies) and Rasmussen v Rasmussen [1995] 1 VR 613. This issue is discussed by Scott, "Indefeasibility of Title and the Volunteer" (1995) 7 BCB 114; see also the commentary in Adams' Land Transfer, para 1.3.10.

\textsuperscript{75} [1967] NZLR 1069 at 1075.

\textsuperscript{76} Ibid at 1075.

\textsuperscript{77} Ibid at 1079.

\textsuperscript{78} Since Frazer v Walker, s 81 had also received New Zealand judicial comment in Chan v Lower Hutt City Council [1976] 2 NZLR 75 at 84-85, and Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd [1984] 2 NZLR 704 at 714-715. In Miller v Minister v Mines [1963] NZLR 560 the Privy Council recognised that either expressly or by implication another statute could override the protection conferred by the Act upon registered proprietors. In Housing Corporation of New Zealand v Maori Trustee it was unsuccessfully argued that this was the effect of the endorsement requirement provided for by the Maori Affairs Act. For a recent example of the continuation of this approach with respect to a successor of the Maori Affairs Act 1953, the Te Ture Whenua Maori Act 1993, see Register-General of Land v Marshall [1995] 2 NZLR 189.

\textsuperscript{79} [1988] 2 NZLR 662 at 699.

\textsuperscript{80} Ibid at 691.

\textsuperscript{81} Ibid at 699.

\textsuperscript{82} Ibid at 701.
Indeed, in what can only be described as a masterly judgment, McGechan J suggests: (i) that “as a matter of pure logic” the Privy Council “could have reached its conclusion favouring immediate indefeasibility acknowledging no more than a very narrow power in the Registrar, or virtually no power at all” and (ii) that a Registrar, to avoid being both labelled an “activist” and “looked upon severely askance” would be well advised not to use these “ancestral powers”.  

Consistent with the ancestral powers epithet (some may say, epitaph), an historical explanation for s81 is advanced in which his Honour suggests that this power was conferred at a time when: (i) “communications were primitive”; (ii) “[t]he prospects of quick resolution of disputes by Court action outside the four main centres was remote”; (iii) there was about to be a “considerable expansion in European land settlement, some in the uneasy context of confiscated lands and recent hostilities”; and (iv) the bringing of land under the then Act was “not unaccompanies by sharp practice and dispute.” Later, when New Zealand was no longer a “frontier society” and the infrastructure of the country had developed so as to enable relatively quick judicial resolution of such disputes, his Honour identifies a growth in “judicial distaste” and “antipathy” to these powers.

Turning to Frazer v Walker, McGechan J first questions the significance to be placed upon Lord Wilberforce’s use of the phrase, “significant and extensive (see Asset Co case)”, in discussing s81. In Assets Co these powers had been referred to as “large” and McGechan J suggests that the former description is attributable to the influence of counsel. He then advances a reason beyond the historical explanation for the reservation of these, presumably now, unnecessary powers, namely, as a “comforting safeguard” or “potential escape route from the more unacceptable consequences of the immediate indefeasibility doctrine being adopted.”

The conclusion, that their Lordships “resurrection” of this safeguard “was not needed”, “is not wanted”, and “is inappropriate to local conditions.”

Many may agree with these sentiments, but the question: “To what extent did the perceived victory of immediate indefeasibility influence his Honour’s conclusion?” should be asked.

V. An Alternative View of Frazer v Walker

The thrust of this article is that to date, not only has Frazer v Walker been read against a preoccupation with indefeasibility but that it has been interpreted so as to conform with it. The result, the now orthodox view that, subject to the operation of so well defined exceptions, the protection conferred by registration is absolute.

84 Ibid at 691.
85 Ibid at 699.
86 Ibid at 682.
87 Ibid at 679.
88 Ibid at 679.
89 Ibid at 679.
90 Ibid at 679.
91 Ibid at 682.
92 Ibid at 682.
93 [1967] NZLR 1069 at 1079.
94 [1905] AC 176 at 194.
95 [1988] 2 NZLR 662 at 691.
96 Ibid at 691.
97 Ibid at 698.
It is time to re-examine *Frazer v Walker*. The core proposition is that, irrespective of the internal validity of the registered instrument, the act of registration attracts certain consequences.\(^{98}\) One of these, is the "vest[ing] and divest[ing] of title".\(^{99}\) Except as is specifically provided for in ss 62 and 63, registration also confers an "immunity from attack by adverse claim".\(^{100}\) *Frazer v Walker* settles the controversy that divided the Court of Appeal in Boyd as to whether registration of a void instrument attracts these consequences, it does; in this sense, registration is conclusive.

But the Privy Council also made it clear that registration does not "involve [the consequence] that the registered proprietor is protected against any claim whatsoever".\(^{101}\)

This provides immediate support for the view of the Act advanced herein. Lord Wilberforce has noted that there are two quite distinct types of challenge to the register, adverse claims and the category which I referred to as allowable claims.

Subject to the recognised statutory exceptions, registration provides immediate protection against adverse claims. It is the court’s role to determine if an adverse claim comes with a recognised exception and, if so, to order the cancellation of the registration/ correction of the register pursuant to s85 of the Act.

Reinforcing the general protection conferred by registration (and providing yet a further safeguard upon the registered proprietor), the court’s power has been "carefully circumscribed"\(^{102}\) so as to ensure that it "does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act".\(^{103}\) To quote Lord Wilberforce, the court’s power arises "[u]pon the recovery of any land...", a "clear reference" to the exceptions recognised in s63.\(^{104}\)

Turning to allowable claims, as Lord Wilberforce stressed, registration does not confer immunity against claims *in personam*, the exercise of the Registrar’s s80 "slip" section, nor the exercise of the Registrar’s s81 powers; powers that Lord Wilberforce said are both "evidently wider in scope" than those conferred by s80\(^{105}\) and are "quite distinct from the power of the Court ... under s85".\(^{106}\) Further reinforcing that the s81 power of correction is not an adverse claim (and thereby excluded by registration) is Lord Wilberforce’s observation that the power is "not coincident with the cases excepted in ss. 62 and 63".\(^{107}\)

As was noted in the Introduction, allowable claims are only inconsistent with the Act if they cannot survive the subsequent registration of a bona fide "purchaser or mortgagee" who provides valuable consideration. The role of s183 is to ensure that they do not. This explains Lord Wilberforce’s comments that "[s]ignificant and extensive"\(^{108}\) as the s81 powers are, they "must be read with and subject to s183".\(^{109}\)

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\(^{98}\) [1967] NZLR 1069 at 1075.
\(^{99}\) Ibid at 1075.
\(^{100}\) Ibid at 1075.
\(^{101}\) Ibid at 1075.
\(^{102}\) Ibid at 1076.
\(^{103}\) Ibid at 1075.
\(^{104}\) Ibid at 1076.
\(^{105}\) Ibid at 1076.
\(^{106}\) Ibid at 1076.
\(^{107}\) Ibid at 1075.
\(^{108}\) Ibid at 1079.
\(^{109}\) Ibid at 1079.
So much for this alternative view of *Frazer v Walker*. Is it consistent with the result in that case? The answer, “Yes”.

1. **Application to the facts in *Frazer v Walker***

Mr Frazer’s claim was an adverse claim. He was bringing, within the terms of s63, an action for recovery of land and, in so far as he sought cancellation of the entry of the mortgage on the register, the claim could only be based on the court’s powers under s85.\(^{110}\)

Indeed, Lord Wilberforce specifically noted that “[n]o question of the invocation of the Registrar’s powers under s80 and s81 arises in the case.”\(^{111}\) Even if it had been, the subsequent registration of Walker and the protection conferred by s183 would have been “a complete answer”\(^{112}\).

Admittedly throughout his advice, Lord Wilberforce does refer to ‘indefeasibility of title’ but this does not undermine his observations on ss81. Rather, it appears clear that Lord Wilberforce attributes a different meaning to indefeasibility than advocates of immediate indefeasibility do. On his first use of this phrase, for instance, his Lordship advises that it is just “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.”\(^{113}\) And, by adverse claim, Lord Wilberforce was not meaning all claims; as used by his Lordship, the conferral of an indefeasible title does not make the registered proprietor immune against the Registrar’s exercise of his ss81 powers.

2. **Application to the ‘difficult trio’**

Some, mindful of Lord Wilberforce’s observations on *Gibbs v Messer*, *Assets Co* and *Boyd*, may remain sceptical about the adverse claim / allowable claim distinction. It will be recalled that Lord Wilberforce approved of the majority’s approach in *Boyd*. Nevertheless, as displayed in the following three quotations, this approval is quite consistent with the alternative interpretation of *Frazer v Walker*. In reading these passages it is important to remember the meaning that Lord Wilberforce attributes to indefeasibility and to adverse claims.

The focus of the first quotation is on the perceived effect of *Boyd*. Lord Wilberforce observing:

[\(\text{it has been generally accepted and followed in New Zealand as establishing, with the}\]
\(\text{supporting authority of the *Assets Co* case, the indefeasibility of the title of registered}\]
\(\text{proprietors derived from void instruments generally.}\(^{114}\)]

After discussing *Boyd* Lord Wilberforce then comments:

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 which they have examined. They consider that *Boyd’s* case was rightly decided and that the ratio of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.\(^{115}\)

\(^{110}\) Ibid at 1077.
\(^{111}\) Ibid at 1077.
\(^{112}\) Ibid at 1079.
\(^{113}\) Ibid at 1075. Emphasis added.
\(^{114}\) Ibid at 1078. Emphasis added.
\(^{115}\) Ibid at 1078. Emphasis added.
Then, after discussion *Gibbs v Messer*, his Lordship continues:

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

The adverse claim/ allowable claim distinction is also consistent with the results in *Gibbs v Messer*, *Assets Co*, and *Boyd*.

Lord Wilberforce's insight was to recognise that *Gibbs v Messer* has nothing to do with adverse claims (or indefeasibility as his Lordship defines that term). As his Lordship noted:

[No question there arose as to the effect of such sections as correspond (under the very similar Victorian Act) with ss 62 and 63 of the Act now under consideration. ... The decision has in their Lordships' opinion no application as regards adverse claims made against a registered proprietor, such as came before the Courts in *Assets Co*, in *Boyd* and in the present case.]

It appears that in *Gibbs v Messer* the Privy Council was considering the Victorian Act's equivalent of the registrar's power of correction and s183. There were two registrations in that case, that of the transfer to 'Hugh Cameron' and the mortgage to the McIntyres. The first registration was clearly erroneous. As Lord Watson observed, it was 'clear that the registration of the name Hugh Cameron a fictitious and non-existing transferee, cannot impede the right of the true owner ... to have her name restored.'

The McIntyres, however, were in a different position. As has been noted, for the Act to achieve its object, bona fide purchasers and mortgagees for value who have dealt on the faith of the register have to be protected from claims that were allowable against a former registered proprietor. This is one of the roles of s183. And, as Lord Wilberforce observed, s81 is subject to s183.

The issue in *Gibbs v Messer* was whether the mortgagees could avail themselves of s183's protection; the Privy Council's advice was no. Why? Because Hugh Cameron had been a fictitious person. As Lord Wilberforce explained:

The Board was then concerned with the position of a bona fide 'purchaser' for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor.

*Gibbs v Messer* therefore establishes that the protection conferred by s183 is dependent upon the transferee dealing with a “person”; not a myth.

This explains Lord Watson’s comments, that “if ‘Hugh Cameron’ had been a real person whose name had been fraudulently registered by Cresswell, ... a mortgage executed by Cameron himself, in the knowledge of Cresswell’s fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee.”

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116 Ibid at 1078. Emphasis added.
117 Ibid at 1078.
118 Sections 132 and 145 respectively of the Transfer of Land Statute 1866 (Vic No 301).
120 [1891] AC 248 at 254-255.
121 [1891] AC 248 at 253.
122 [1891] AC 248 at 254-255.
Unlike *Gibbs v Messer*, *Assets Co* and *Boyd* did involve adverse claims and, as such, *Frazer v Walker* explains why the registration was decisive. At this stage a counter argument that some may raise should be negated. This is that the registration in both cases was in error and as such subject to correction under s81. The thrust of the argument is that in both cases the Courts’ confirmation of the register impliedly rejects the distinction being advanced. But, in both cases, the error argument was not available. Consider *Assets Co*.

In all three appeals the Company’s registered title was challenged on the grounds of irregularities in the procedure whereby the customary title was extinguished in favour of a title issued under the Act. At this point the procedure should be explained. The first step was for the native owners to obtain a declaration of ownership from the Native Land Court. This was, in turn, embodied in a memorandum of ownership. Subject to that Court’s supervision, the land could then be sold and ultimately a declaration would issue that the purchaser held that land as freehold. At that stage while the land came under the coverage of the Act it formed part of the provisional register. Ultimately a Crown Grant or more commonly a warrant from the Governor General directing the Registrar to issue a certificate of title, would be issued and the provisional register closed in favour of entry upon the register.

In obeying the warrant and issuing a certificate of title the Registrar was performing a purely ministerial function and, as such, had no discretion not to give effect to it. The result, even if there was a defect in the warrant or any prior irregularity, the first entry on the register was not a correctable error for the purposes of s81; there could be no question of invoking the Registrar’s powers of correction. This is recognised by Lord Lindley himself who, after describing the Registrar’s powers as ‘large’, observed:

> Their Lordships have not to consider his power, but they doubt whether the registrar can set aside a Crown grant or 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.

Not only is *Assets Co* consistent with the alternative analysis of the Act being advanced but the above observation supports it.

What about *Boyd*? It will be recalled that it involved the registration, pursuant to s24(3) of the Public Works Act 1908, of proclamation taking land for a tramway. Arguably the registration was void.

Assuming it was, the registration still could not be challenged. Section 24 (3) of the Public Works Act 1908 provided that the Registrar “shall register” such proclamations. As in *Assets Co*, the Registrar was precluded from exercising the s81 powers. Indeed, as Adams J observed in *Boyd*, “[t]he registration of the proclamation was the act of the District Land Registrar done in pursuance of his duty under s24(3). ... In such circumstances it cannot be suggested that the title is wrongfully obtained or wrongfully retained ....”

Both these cases therefore offer no guidance on s81, they involved adverse claims.

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123 *Re Mangatainoka IBC (No 2) Block* (1913) 33 NZLR 23 at 73.
125 [1924] NZLR 1174 at 1225.