Registrar-General of Land

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The Certificate of Correctness under the Land Transfer Act

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THE CERTIFICATE OF CORRECTNESS UNDER THE LAND TRANSFER ACT

CONTENTS

Pages

	Introduction	**1**
1.	**The Opinions of the Commentators**	**2-7**
2.	**The Courts – Formulation of Indefeasibility of Title**	**7-20**
	Introduction	***7***
	Early Principles	***8-9***
	The Original Rule	***9***
	The Cases	***10-20***
3.	**The Certificate of Correctness**	**20-39**
	Connection of the Cases with the Certificate of Correctness	***20-21***
	Certificate of Correctness in deferred Indefeasibility	***21-22***
	Certificate of Correctness in immediate Indefeasibility	***22-23***
	Practitioner's Role	***23-24***
	Assignment	***24***
	Assurance	***24-25***
	Accountability	***25-26***
	The Basis of the Registrar's Certificate of Registration	**27-30**
	1. Dealings or instruments presented for registration	***27***
	2. Registrar under duty to refuse registration, when:	
	(a) not in accordance with Land Transfer Act;	***28***
	(b) contravening a provision of Land Transfer Act;	***29***
	(c) in breach of any statute, regulation or law;	***29***
	(d) caveat or notice of claim prevents registration;	***29-30***
	(e) Registrar has knowledge of breach of trust.	***30***

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The Basis of the Practitioner's Certificate of Correctness **30-39**

1. *Instrument not voidable by reason of fraud;* *31*
2. *Instrument not void by reason of forgery;* *31*
3. *Parties not mistaken in their intentions;* *32-33*
4. *Instrument not void due to incapacity of transferee;* *33*
5. *Instrument not void due to incapacity of transferor;* *34-35*
6. *Instrument not void by being contrary to statute law;* *35-36*
7. *Instrument not void or voidable through failure to search the records* *36*

Reconciliation of the Certificates *37-39*

Chart – ***The Bases of Certificates of Correctness and Registration*** *39*

4. Potential for Certificate of Correctness and Compliance in a fully Automated System **40-41**

1. *The System* *40*
2. *The Behavioural Elements* *40*
3. *Legal Requirements* *40-41*

Future Action *41*

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The Certificate of Correctness under the Land Transfer Act

The certificate of correctness is a feature of many Torrens systems[1] and has had a place in the New Zealand system from 1870, being provided for in the first Land Transfer Act of 1870.

Although an integral part of virtually every instrument subject to the Land Transfer Act, the intention and effect of the certificate is not widely documented or explained by the commentators or the Courts and, given the shift in our understanding of the doctrine of indefeasibility post *Frazer* v. *Walker* (1967), a review of the meaning of the certificate is appropriate, at a time when the scope of the certificate may be enlarged to accommodate comprehensive automation of the system.[2]

To do so involves a consideration of the concept of indefeasibility of title and its passage over time from deferred indefeasibility (title subject to review by the Courts post registration, the early meaning given by the Courts in New Zealand over the period 1870-1905[3] - and arguably up to 1967[4]) to immediate indefeasibility (title instantly on registration per *Frazer* v. *Walker* in 1967), as is now the law.

A summary of the opinions of the commentators on the certificate of correctness will first be provided; then a review of the effect of the decisions of the Courts in formulating the doctrine of indefeasibility of title; then an analysis of the law relating to "correctness"; leading to a commentary on the potential for a solicitor's certificate of correctness and **compliance** in a fully automated system.

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[1] A certificate of correctness is required in all of the Australian States except Victoria and Western Australia: Hogg, "The Australian Torrens System" at p.917.

[2] **Editor's note** – since the publication of this paper, written by Brian Hayes, a former Registrar-General of Land, in July 2000, further steps to automate the system, which began with the passing of the Land Transfer (Automation) Amendment Act 1998, have been taken by the introduction of "e-dealings" under 'Landonline', the LINZ computer registration system, facilitated by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002. This paper places in its historical context the conveyancer's 'certificate of correctness', still governed, in the case of manual transactions, by s.164 of the Land Transfer Act 1952, but now governed in the electronic medium by ss.164A–164E of the Act and reg.12 of the Land Transfer Regulations 2002.

[3] This is to take the first era in Torrens administration from the commencement of the first Act of 1870 up to the decision of the Privy Council in *Assets Co*. v. *Mere Roihi*. As will be illustrated, the effect of *Assets Co*. is not clear cut.

[4] The Supreme Court considered itself in general bound by the decision of the Court of Appeal in *Boyd* v. *Mayor of Wellington* (1924) NZLR 1174 CA which, in interpreting *Assets Co*. as authority for immediate indefeasibility, created much controversy. The Court was, however, quick to distinguish Boyd's case, if that were its preference. In 1966, when the Court of Appeal heard *Frazer* v. *Walker* (1966) NZLR 331 CA, all three Judges were clearly uncomfortable with Boyd's case. See p.19 (post)

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1. The Opinions of the Commentators[5]

The earliest texts on the Land Transfer Act make mention of the obligation to certify instruments correct,[6] but do not elaborate on the background of the requirement.

In the *Handy Book on the Land Transfer Act 1870* (1878), **Joshua S Williams** (formerly Registrar-General of Land and then a Judge of the Supreme Court) says, under the heading "Instructions for Conducting Transfers and other Dealings with Land, applicable to Instruments Generally," at p.15:

> "In every case, the words "Correct for the purposes of the Land Transfer Act," signed by the party claiming under the instrument, or by his Broker or Solicitor, must be indorsed thereon. No instrument can be registered unless in accordance with the provisions of the Land Transfer Act, but the prescribed forms may be used with such alterations as the character of the parties or circumstances of the case may render necessary, and no variation from them, except in matter of substance, will affect their validity. Care should be taken that none of the parties to any instrument (except in mortgages to Building Societies) are described as trustees, and no mention, direct or indirect, should be made of any trust."

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[5] For convenience, extracts are set out in full

[6] The current section is s.164 of the Land Transfer Act 1952:

> "Correctness of instrument to be certified
>
> (1) No Registrar shall receive any application for bringing land under this Act, or any instrument purporting to deal with or affect any estate or interest under the provisions hereof, unless there is endorsed thereon a certificate that the same is correct for the purposes of the Act, signed by the applicant or party claiming under or in respect of the instrument, or by a licensed landbroker or a solicitor of the High Court employed by that applicant or party:
>
> > provided that where any instrument has not been certified as correct under the foregoing provisions of this subsection any other person who is a party to the instrument or claims any interest thereunder or in respect thereof or his legal personal representative may apply to the High Court for authority to certify that the instrument is correct for the purposes of this Act, and the Court may order accordingly if it is satisfied that it is just and expedient that the authority be granted; and, upon production of a sealed copy of the order, the Registrar may register the instrument if it is certified as correct for the purposes of this Act by the person so authorised.
>
> (2) A corporation may authorise any person to certify on its behalf.
>
> (3) Every person who falsely or negligently certifies to the correctness of any such application or other instrument commits an offence, and is liable on summary conviction before a District Court Judge to a fine not exceeding $100."

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No further commentary on the certificate of correctness is provided but paragraph No.2 on the same page of the Handy Book says:

> "2. The 112th section of the Land Transfer Act subjects to a penalty of fifty pounds any person who shall *falsely* or *negligently* certify to the correctness of any instrument. Persons transacting business are cautioned that this penalty will be strictly enforced." [7]

A further *Handy Book* then on the Land Transfer Act 1885 (which is in almost the same form as the Land Transfer Act 1952) was published in 1899 and repeats the above extract at page 15 of the new publication.

James Hogg, in the first leading text on the Torrens system *The Australian Torrens System* (1905), which included a commentary on New Zealand, at p.916, says:

> "In addition to attestation by prescribed witnesses, the instrument must (except in Victoria and Western Australia) be endorsed with a certificate, by the person who seeks to have it registered—or his properly constituted agent,—that it is "correct for the purposes of" the local Statute . . .
> The provision seems —in the five Statutes in which it occurs—to afford some further ground for the argument that the intention of the legislatures, in enacting it, was to ensure by all possible means the correctness of the instrument tendered for registration, and relieve the person who obtained registration on the faith of it from all further liability."

The New Zealand author **Baird** in *Real Property* (1926), at page 221 says:

> "Instruments affecting the land can be entered on the Registrar only by registration in the manner laid down in the Act or in the special manner especially laid down in any Act authorizing special registration. The responsibility for seeing that he gets a valid document and that it is signed by the proper person, and for seeing that the document and the certificate of title are duly produced for registration rests upon the person taking title. In order to safeguard the Registrar it is required that the person claiming estate or interest under a document must either sign it correct or have it signed correct by his solicitor or licensed land broker, so as to certify that it is entitled to registration under the Act. If this certificate is incorrectly given, not only is the person giving it liable to a penalty, but the document itself is liable to be struck off the Register, as the registration of it has been wrongfully obtained. This certificate, if given by a solicitor, must be a manual one, and must be given by the solicitor directly employed by the party, and must not be given by a solicitor employed by the party's solicitor, nor must it be given in a firm name."

Adams in *The Land Transfer Act 1952* (2nd ed.) (1971), at p381-2, puts it this way:

> "The purpose of the certificate is to assure the Land Transfer Department that the instrument is *bona fide* and genuine. Thus, it has been held that the signing of the certificate of correctness of a *forged* transfer by the transferee or his agent has been held to be a wrongful act inducing registration within s.81; this point becomes important if there is any claim against the Consolidated Revenue Account: *District Land Registrar* v. *Thompson* [1922] N.Z.L.R. 627.

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7 This penalty, now in s.164(3), has not been enforced over the last 45 years and there is no evidence of earlier enforcement.

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Such cases as *De Chateau* v. *Child* [1928] N.Z.L.R. 63 show what an important matter certification as to correctness is: thus, if an instrument is materially altered after it has been certified correct, a fresh certificate should be signed before the instrument, as altered, is presented for registration. As to *De Chateau's* case, cf. *Farrier-Waimak* v. *Bank of New Zealand* [1965] N.Z.L.R. 426 (J.C.).

The certificate of correctness probably is a guarantee that the Registrar may accept an instrument at its face value, i.e., that the person signing the certificate is aware of the antecedent circumstances which culminated in the execution of the instrument. If the instrument *ex facie* is not in order, then it will be rejected notwithstanding the certificate of correctness. The Registrar only sees what actually appears in the instrument, hence it seemed necessary to have the dealing vouched for. In other words, the Registrar places a trust in the solicitor or broker, and when a person certifies an instrument, only reasonably close contact with the facts which culminate in the execution of that instrument would appear to discharge that trust, but a solicitor or broker whose staff arrangements are such that every transaction is investigated with care and accuracy should be safe in certifying: *Jessup's Land Titles Office and Forms*, 2nd ed. 389; and unless this were so, conveyancing practice in New Zealand would be considerably retarded.

A solicitor or landbroker certifying as to correctness should sign his own name and not that of his firm: *Baalman and Wells's Land Titles Office Practice*, 3rd ed. 223. And the certificate shall show that he is acting for the party claiming under the instrument: Reg. 17 of the Land Transfer Regulations 1966 (S.R. 1966/25).

A minor cannot sign a certificate as to correctness: *Jessup's Land Titles Office Forms and Practice*, 2nd ed. 388.

The following may certify as to their respective transactions: transferee, mortgagee, lessee, encumbrancee, mortgagor in a discharge or partial discharge of a mortgage or in a reduction of mortgage *simpliciter*, lessor in a surrender of lease, mortgagee in a variation or extension of mortgage, lessee in an extension of lease.

Section 164 of the Land Transfer Act 1952 casts on the alienee the responsibility for falsehood or negligence in the endorsed certificate that a document is correct for registration. A certificate of correctness by the person conveying the interest is gratuitous and ineffective: *Merry* v. *Australian Mutual Provident Society (No.2)* (1872) 3 Q.S.C.R. 36."

Jessup's *Forms and Practice of the Land Titles Office of South Australia* 6th ed. (1982) describes certifying requirements in a homely way, at p.394:

"When South Australia introduced the first Real Property Act (1 July 1858), it was obviously placing a heavy responsibility on the State. Where previously, the parties to a transaction had to rely on personal assurance as to title, this was now the burden of the State. It has been mentioned previously that the system when introduced met with great hostility. The present generation finds it difficult to understand why so much opposition and bitterness surrounded what, to them, is so simple and secure . . .

The R.P.A. requires every instrument to be certified correct by a solicitor or licensed land broker or the party deriving benefit thereunder. The words "Certified correct for the purpose of the Real Property Act, 1886, as amended", are endorsed on the instrument and may be signed by a solicitor (of South Australia), licensed land broker, the applicant under any application, or the following may so certify their respective transaction: transferee, mortgagee, lessee, encumbrancee, mortgagor in a discharge of mortgage, lessor in a surrender of lease, mortgagee in an extension of mortgage, lessee in an extension of lease, and if there is more than one such person, all must so certify. A corporation (aggregate or sole) cannot so certify, neither can a marksman, nor, of course, a minor.

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> The requirement of certification could hardly have been intended to cover clerical correctness only (and see Hogg, *Australian Torrens System* 917, and *Merry v. A.M.P. Society,* vol. II *Queensland Law Journal* (Notes of Cases) 10). Section 232 provides a penalty for negligent certification. Suppose a solicitor or broker were to certify as correct an instrument which was the result of a transaction the details of which were unknown to him. In other words, suppose he signed it as correct merely to oblige an acquaintance, or merely as a matter of form to secure registration. The official view is that this would be an entire misconception of the nature of the responsibility assignable to him. If a solicitor or broker is not aware of the circumstances surrounding a given transaction, how can he give an assurance that is bona fide, and it is this assurance which, it would seem, the certification was intended to produce. For example, a solicitor or broker who has interviewed both vendor and vendee, has seen the contract for sale, has identified the land by official search, and has officiated at the actual settlement, can honestly certify the memorandum of transfer, or a solicitor or broker whose staff arrangements are such that every transaction is investigated with care and accuracy should be safe in certifying.
>
> The Registrar-General only sees what actually appears in the instrument, hence it seemed necessary to have the dealing vouched for. It can be seen therefore that much reliance is placed on the certification. In other words the Registrar-General places a trust in the solicitor or broker, and when a person certifies an instrument, only reasonably close contact with the facts which culminate in the execution of that instrument, would appear to discharge that trust."

As is illustrated, there is in fact very little written on the certificate of correctness[8] (given the requirement it be endorsed on every instrument) and the writers who do rate it a mention show a certain diffidence — Adams (*supra* at p.4) says:

> "The certificate of correctness **probably is a guarantee** that the Registrar may accept an instrument on its face value . . . ".

Jessup (*supra* p.4) attempts to place the value of the certificate in relation to the views of officialdom:

> "….The requirement of certification could hardly have been intended to cover **clerical correctness only** …. Suppose a solicitor or broker were to certify as correct an instrument which was the result of a transaction the details of which were unknown to him. In other words, suppose he signed it as correct merely to oblige an acquaintance, or merely as a matter of form to secure registration. **The official view** is that this would be an entire misconception of the nature of the responsibility assignable to him. If a solicitor or broker is not aware of the circumstances surrounding a given transaction, **how can he give it an assurance that it is *bona fide*, and it is this assurance which, it would seem, the certification was intended to produce?"** *(emphasis added)*

[8] *The Land Transfer Act* Hutchen (1925) Whitcombe and Tombs (2nd ed.), at p.157, provides no commentary, except a note on dedications of roads not requiring certification and a brief reference to *District Land Registrar* v. *Thompson*. Other texts are similarly non-informative.

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On the other hand, **Baalman**, in the "Torrens System in New South Wales" (2nd ed.) (1974), at p.388, on a substantive provision exactly the same as s164(1) NZ says:

> " . . . The actual words of the section are mainly concerned with locating the liability for negligently or fraudulently misdescribing the parcels of the parties."

No other commentator suggests so narrow a range of accountability. Baalman provides no authority in support[9].

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[9] Subsequently, s.117 of the Real Property Act 1900 (the relevant provision in NSW) was repealed and possibly influenced by Baalman's observation (which is repeated by other writers in respect of the new s117). The new s.117 requires a certificate of correctness from each signatory or their solicitor or agent. In New South Wales, both the transferor and the transferee must sign a memorandum of transfer, so both provide a certificate of correctness.

Note - the requirement for a certificate from the transferor is an extremely doubtful practice, if immediate indefeasibility is the preferred doctrine, and has the potential to destabilize the law.

In its new form, section 117 of the Real Property Act 1900 - *Certificate of correctness* says:

(1) "The Registrar-General:

(a) may refuse to accept a primary application, dealing or caveat presented for lodgement, and

(b) may:

(i) where a primary application has been lodged with the Registrar-General refuse to proceed with, or reject, the application,
(ii) where a dealing has been lodged with the Registrar-General for registration refuse to register, or reject, the dealing, or
(iii) where a caveat has been lodged with the Registrar-General reject the caveat,

if the application, dealing or caveat, as the case may be, does not bear a certificate that it is correct for the purposes of this Act signed by each person who has executed the application, dealing or caveat, each such person's solicitor or each such person's agent authorised in that behalf.

(2) Any person who falsely or negligently certifies to the correctness of any such application, dealing or caveat shall incur therefor a penalty not exceeding 1 penalty unit.

(3) Such penalty shall not prevent the person who may have sustained any damage or loss in consequence of error or mistake in any such certified application, dealing or caveat from recovering damages against the person who has certified the same."

The Torrens System in New South Wales, Woodman and Nettle (1984), at p.618, says, in respect of the new section:

> "Formerly, s.117 required any application for bringing land under the provisions of the Act and any dealing to bear an endorsement that it was correct for the purposes of the RP Act and further required that this certificate be "signed by the applicant or party claiming under or in respect of such dealing, or by his solicitor, or by the conveyancer employed by the applicant or party". It was also the policy of the Registrar-General to insist upon personal acceptance where a burden was cast upon the transferee, for example, where the transferee entered into a restrictive covenant. *(contd.)*

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None of the commentators attempts to explain the relationship the certificate first had with deferred indefeasibility and later with immediate indefeasibility.

Hogg (*supra* p.3) opens a window:

> "…to ensure by all possible means the correctness of the instrument tendered for registration, and relieve the person who obtained registration on the faith of it from all further liability."

but does not complete the vision.

Baird (*supra* p.3) gives a comprehensive account which is the closest to the principles of certification inherent in the doctrine of deferred indefeasibility. The scope and effect of the certificate of correctness in immediate indefeasibility remains as a question not answered by any formal commentary.

2. The Courts – Formulation of Indefeasibility of Title

The Torrens system is not a static collection of statutory rules for registration. From the beginning, the Courts have developed the concept central to it — indefeasibility of title — so that today the system is, in large part, a judicial creation.

Indefeasibility of title is now a simple concept — an assurance of conclusiveness of title on completion of registration. The history of indefeasibility of title is extraordinarily complex, strewn with judicial and academic differences. This commentary will not generally cover the facts, upon which the cases dealt with by the

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> The section has been widened, and covers not only primary applications and dealings, but also caveats. In particular, the former prohibition against processing primary applications and dealings that did not bear a certificate has been removed, and the Registrar-General has a discretion in respect of such certificates in regard to primary applications, dealings and caveats. The certificate, unless dispensed with by the Registrar-General, is to be signed by each person who has executed the application, dealing or caveat, or by her or his solicitor or agent authorised in that behalf. It is no longer the policy of the Registrar-General to insist upon personal acceptance where a burden is cast upon the transferee.
>
> The words of the section are mainly concerned with creating the liability for falsely or negligently certifying the correctness of any application, dealing or caveat. In addition to the penalty provided in s 117(2), a false certificate exposes the person making it to an action for damages; formerly, s 130(1) of the RP Act placed a time limit on actions, but this subsection was repealed by the *Notice of Action and other Privileges Abolition Act* 1977, Sch. 1 and the matter is now governed by the *Limitation Act* 1969.
>
> It is probable that registration procured by virtue of a false certificate of correctness would be "wrongfully obtained" within the meaning of s 136, thereby attracting the Registrar-General's power to compel production of the certificate of title for correction: *District Land Registrar* v *Thompson* [1922] NZLR 627; *Re Land Transfer Act* 1915 [1922] Gaz LR 255. See also *Merry* v *AMP Society* (1872) 11 QLJ (NC) 10. "

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Courts were decided, but will focus on principles, which can be clearly seen evolving, at least with the benefit of hindsight.

An understanding of the scope, changing emphasis and accountability under the certificate of correctness cannot be achieved, without reference to the development of indefeasibility of title.

Early Principles

In *Registration of Title to Land Throughout the Empire* (1920) James E Hogg says, at p.94, under the heading 'Conclusiveness of the Register':

> "The conclusiveness of the register constitutes the State warranty of title which it is one of the purposes of the registration statutes to bring into existence. The warranted title which is conferred by the register being made conclusive is sometimes spoken of as "indefeasible" and the registered title as "conclusive".

In the context of automation, it is the "when" and "how" a title becomes indefeasible that is relevant to the process of automated registration. The "when" and "how" of indefeasibility, as clarified by the judiciary, have undergone a transformation from the view taken in the early Torrens years (1870-1905), when compared with the modern law (1967-2000), and the transition in approach from 1905 to 1967, when the law was not clear.

Although the Courts in each of the Canadian, Australian and New Zealand jurisdictions (the principal early Torrens states) were considering issues relating to indefeasibility of title from the inception of the system in each individual jurisdiction, the main Privy Council cases, with one exception, have originated in New Zealand.

Seven cases[10] illustrate the progression of the doctrine over the period 1888 to 1967 — there are other cases in New Zealand [11] and many others overseas.[12] However, the principles which impact not only on the theory of title but on the administration of the Act in New Zealand flow from the law developed and demonstrated in the line of

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[10] (i) Ex parte Davy (1888) 6 NZLR 760 CA
(ii) Gibbs v Messer (1891) AC 248 PC
(iii) Mere Roihi v Assets Company (1905) NZPCC 275
(iv) In re Mangatainoka (1913) 33 NZLR 23
(v) District Land Registrar v Thompson (1922) NZLR 627
(vi) Boyd v Mayor of Wellington (1924) NZLR 1174 CA
(vii) Frazer v Walker (1966) NZLR 331 CA (1967) NZLR 1069 (JC)

[11] The up-to-date authorities are recorded in *Adams' Land Transfer*, Butterworths para.1.2.1

[12] Extensive references are noted in:
Canada: *Registration of Title to Land*, Carswell, Di Castri at chapter 17.
New South Wales: *The Torrens System in New South Wales*, Woodman and Nettle, Commentary on Part VI Real Property Act 1900.
Victoria: *Transfer of Land in Victoria*, Robinson at p.180.

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seven leading cases, which began in New Zealand in 1888, through which the growth of the doctrine of indefeasibility may be traced.

Unfortunately, the general body of case law is far from harmonious. Professor Garrow, writing in the 2nd Ed of *Law of Property* (1924) Vol.1 at p.212, said in his commentary on indefeasibility—

> "In the absence of fraud registration is conclusive as to the title of a registered proprietor, whether the first or a subsequent registered proprietor. Assets Co. *v*. Mere Roihi (1905) A.C. 176.
> The foregoing statement of the position is too sweeping so far as one can see from the decided cases . . . The position is, in the common phrase, "somewhat obscure" and one can only take the decided cases, so far as they go, as being authority for the points actually decided in the circumstances of the particular case."

Wise words! Measuring changing judicial approaches against the legislation (which in the sections relevant to indefeasibility has not changed since 1885) is in itself not an easy task; extracting a line of pure authority is even more difficult; relating change to the day-to-day conduct of business — the task of the practitioner and the registrar — is in a sense the ultimate test of understanding.

The Original Rule

The original rule, as understood by the early administrators and judiciary in New Zealand, was a rule of qualified or deferred indefeasibility.

Under this rule, a transferee or other taker obtained a valid title by registration, only if the instrument tendered for registration was a valid instrument. Indefeasibility was deferred until:

- either the Court declared title valid; or
- to the point when the owner transferred the land to a purchaser, i.e., the root of title was always good at the moment when title changed hands, indefeasibility being effectively deferred until that time.

After registration was effected, notwithstanding that registration appeared to be complete, unless the rights of some third person purchasing in good faith and for value on the faith of a registered instrument had supervened, the Court retained jurisdiction to investigate the validity of the instrument.

If an instrument was void, or was voided, for any reason, registration could be cancelled and title returned to the aggrieved registered proprietor. Under the auspices of the judiciary this rule was to change, in fact to be reversed, so that today an invalid instrument confers a good title immediately when registered — immediate indefeasibility. Implicit in this reversal of the law is a change in the effect of the certificate of correctness.

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The Cases

In 1888, the New Zealand Court of Appeal considered one of the first cases of Torrens forgery, in ***Ex parte Davy*** (1888) 6 NZLR 760 CA. Williams J (the former Registrar-General of Land), in judicially establishing the deferred doctrine, said:

> "The notion of the framers of the Act seems everywhere to be that the estate passes to the immediate transferee not simply by the act of registration, but by the registration of a valid instrument.
> In the present case the instrument being a forgery was absolutely void, and it would require the clearest expression of the intention of the Legislature before we could hold that the person claiming immediately under such an instrument obtained, by virtue of its wrongful registration, an indefeasible title in himself."

His reference to a universality of opinion is significant and, although there seems little doubt that at that time in New Zealand and in sister jurisdictions, the deferred principle would be the preferred one, the decision of the Court has not escaped early criticism. Hogg *(supra)* at p.145 says:

> "Registration is, in a system of registration of title, to be regarded as the equivalent of getting in the legal estate in unregistered land, and instruments of transfer, mortgage, &c., are to be regarded as authorities directed to the custodian of the register authorizing him to alter the register in terms of the authority produced. This seems an additional reason for regarding the registration effected on the faith of a forged or invalid instrument as merely voidable and inconclusive, not void. A different view has been taken in New Zealand [in *Ex parte Davy*], the forged instrument and the registration effected on the faith of it being held bad for fraud on the part of the transferor, &c. — in cases where the transferee is innocent — and the title of any subsequent purchaser being held to depend on the doctrine of estoppel. This does not seem to be either a necessary or satisfactory theory."

In this criticism there is an early glimmer of immediate indefeasibility as a preferred doctrine. However, the point to note is that the concept of registration of a valid instrument as a precursor to a valid title as expressed in *Ex parte Davy* remained as a fountainhead of authority, applied in some cases, but not in others, including Boyd's case in 1924, but clearly still alive at least up until 1967,[13] when *Frazer* v. *Walker* settled the law.

The next case of significance was ***Gibbs* v. *Messer*** (1891) AC 248 PC, in which the Privy Council considered some complex facts arising in Australia and again applied as a test the valid instrument theory. The headnote reads:

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

This authority, which is based on complicated facts involving a transfer to a fictitious person and a transfer on from the fictional person so, at the second transfer stage, there is no actual dealing with a real registered proprietor, when rightly understood, is

[13] Note the comments of North P. at p.19 (post)

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a further statement of the same essential principle in *Ex parte Davy*. The fictitious intermediary is an incidental to the broad principle, creating an anomaly, but doing no violence to the doctrine of deferred indefeasibility, which requires that a valid instrument should be registered.

The indefeasibility test developed in *Ex parte Davy* thus remained unaffected after the first Privy Council consideration of the basis of the doctrine in *Gibbs* v. *Messer,* under the law, as explained in these authoritative cases. An instrument must always be taken in good faith by an incoming registered proprietor, but also must neither be void (wholly a nullity at common law), nor voidable.

The Privy Council was next to consider the indefeasibility question in ***Assets Co* v. *Mere Roihi*** (1905) NZPC 275. The facts in the three appeals from the New Zealand Court of Appeal, which were consolidated, enabling the Privy Council to provide one opinion, were extremely complicated. Whilst this case is perhaps best known for its elaboration of the rule that, under the Land Transfer Act, fraud means "dishonesty of some sort, not what is called constructive or equitable fraud," the views of their Lordships provide a smorgasbord of opinion on indefeasibility, providing an opportunity for widely differing judicial opinion in subsequent cases.

There is a curious conflict between the actual decision and *dicta* raised in the course of the judgement. The decision would indicate a preference for deferred indefeasibility, whilst dicta can and have been construed to favour immediate indefeasibility. At p.300 their Lordships said:

> "In upholding the title of the appellants on this broad ground it is satisfactory to find that their Lordships are not disturbing, but upholding, the views which had been until recently taken and acted upon in the Colony for many years in actions brought against *bona fide* purchasers on the Register."

They preceded that statement by the following observation, at p.299:

> "The evidence of fraud by the company entirely breaks down. The evidence shows that in all these cases the agents of the Assets Co. in the Colony took to the Registrar and got him to register certain documents which, according to their purport and effect, entitled, and which they believed did in fact entitle, the company to be registered as owners. There is no evidence whatever of any fraudulent statement made by the company's agents to the Registrar nor of any bribery, corruption, or dishonesty in the matter."

Interestingly, the Privy Council adopted the full judgement of Williams J in the New Zealand Court of Appeal hearing of this case as its own statement of the law. Williams J gave a dissenting judgement in the Court of Appeal.

It was Williams J who in 1888 in *re Davy* (*supra*) formulated the requirement of a valid instrument for registration. There is nothing in his judgement in *Assets Co*. to indicate he has changed his mind. [14]

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[14] The late Warrington Taylor providing a New Zealand perspective on *Frazer* v. *Walker* for Australian lawyers in "Scotching Frazer v. Walker" (1970) 44 ALJ 248 at 257 said in an analysis preferring deferred indefeasibility:

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Despite the prominence *Assets Co*. has achieved, particularly in relation to the definition of Torrens fraud, the *ratio* has never been agreed by the judiciary and academic writers.

> "….what was really decided in the *Assets Co.* case. The case involved three separate appeals from New Zealand heard together by the Privy Council. The facts were very complicated and there has been endless argument ever since about the precise details, but basically the case involved claims by certain Maori owners who said their lands had been taken from them (twenty-five years before the date of the appeal) by fraudulent documents by a man named Cooper; from them the lands had passed (through a long chain of documents and devolutions) into the name of the Assets Company as registered proprietor. There were various other complications—such as defective Native Land Orders and registration on the Provisional Register—but it was established that the fraud and invalidity applied only to the earlier stages of the chain and that Assets Company was a (*contd*) a bona fide and valid sub-transferee with a duly registered title. Nevertheless the Maoris argued, on the lines of the old Deeds System and the maxim "Non dat quod non habet," that the fraud and defects carried forward and vitiated the title of the Assets Company. The Privy Council decided in favour of Assets Company and in doing so, used the following sentence (Clue No. 1): "The sections making registered certificates conclusive evidence of title are too clear to be got over."

Now it is most important to note that, instead of delivering a complete judgment of its own, the Privy Council concurred in and adopted the judgment of the one dissenting Judge in New Zealand. By coincidence that Judge was none other than Williams J. who had made the emphatic pronouncement of the deferred theory in *Davy's* case. Great controversy has continued to the present time about the precise ratio in the *Assets* case, but whatever may be taken from the "ambiguous" dicta, one thing is abundantly clear; neither Williams J. nor the Privy Council in their respective judgments in the *Assets* case said one single word to indicate a switch to a diametrically opposite principle from that laid down in *Davy's* case and *Gibbs* v. *Messer* a few short years earlier. When their Lordships used the sentence quoted above, they undoubtedly meant that the certificate was conclusive evidence of title in the case *of a valid transfer from a registered root notwithstanding all the prior defects frauds and complications*. It is inconceivable (unless they clearly said so in positive words) that they could have intended a *volte face*, involving a new and contradictory rule that a title was conclusive in favour of a person *who had himself taken a forged or void transfer*. In using that sentence they would no more think it necessary to add the words "by a valid transfer" than to add the words "provided she had not murdered her husband" in a judgment about joint property vesting by survivorship in a widow. Some things are too clear and obvious to require stating!

In the *Assets* case there is also another sentence (Clue No. 2) hidden away in the long judgment, which has given much ammunition to the "immediate" protagonists. In discussing fraud, which was a major issue in the case, the Privy Council said "A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

This sentence has been commonly interpreted to indicate that Assets Company had a defective transfer but that, because it was itself innocent of fraud, its title was validated. But there is a different interpretation. If the *Assets* case is more carefully studied, it appears that, (as often happens on a three-cornered settlement) the Assets Company on the settlement of its own transfer had been given a bundle of prior unregistered (and, as it turned out, defective) documents including Maori vesting orders, to register along with its own valid transfer. The Maoris argued, inter alia, before the Privy Council that by presenting such defective earlier documents for registration the Company was involved in some kind of technical or equitable fraud. The Board in my interpretation said, "No: a person who merely presents for registration a *prior* document (not his own document) which is forged or fraudulent, is not guilty of fraud if he believes it is genuine." But nevertheless the dictum has been almost *(contd.)* universally misinterpreted in the way set out before, and this has helped, with Clue No. 1, to build up the case for validation of forged documents."

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For a discussion on the *dicta,* which are the source of the difficulties, this decision bestowed on 70 years of Torrens administration, please refer again to footnote **13** (*supra*). The temptation to apply principles of immediate indefeasibility based on the *Assets Co.* dicta proved attractive to the judiciary in the period post- *Assets Co*., which soon, however, achieved a robust vacillation in applying the doctrine.

An excellent account of the manner in which the Courts in New Zealand grappled with the new concept is provided by E W Henderson in 'Indefeasibility of Land Transfer Title' 1950 NZLJ 24 at 39. [15]

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[15] "Cases….have concerned Native Land leases made in contravention of the Native Land legislation. The first of importance was that of *Wolters* v. *Riddiford* (1905) 25 N.Z.L.R. 532, which came before Sir Robert Stout, C.J., in the same year as *Stevens* v. *Carterton Borough*, (1905) 26 N.Z.L.R. 226. The plaintiff had contracted to sell to the defendant a lease which the plaintiff held from Natives. The defendant had made a number of requisitions in respect to the title, and the plaintiff applied to the Court by way of originating summons for an order declaring that the objections and requisitions were not well founded and that the defendant should specifically perform his contract. The objection of the defendant was that the lease was contrary to the provisions of the Native Land Act, 1894, and its Amendments in several particulars. The learned Chief Justice found that, in certain respects, the lease was in violation of this statute, and not rendered effectual by the confirmation order made by the Native Land Court. The plaintiff, however, had not been guilty of fraud in procuring the registration of the lease under the Land Transfer Act, and, accordingly, had acquired a complete and irrefragable title. The learned Chief Justice said, at p.533:

> "In my opinion it would be frittering away the decision in the Assets cases to attempt to distinguish this case from the decision in those cases."

The defendant was accordingly ordered to complete his contract. The lease was, on the face of it, contrary to law, and the learned Chief Justice suggested that the duty of the District Land Registrar was to have refused to have registered it upon these grounds.

Another case concerning the validity of a lease of Native land came before Sir Robert Stout, C.J., seven years later: *Harris* v. *McGregor*, (1912) 32 N.Z.L.R. 15. A lease of Native land had been confirmed by the Native Land Court and later registered. The successors of the lessor brought action against the lessees seeking various relief, and, in particular, to have the lease removed from the Register, on the grounds that it was illegal and void. The learned Chief Justice found that the lease and confirmation were null and void as being contrary to law. Referring to his earlier judgment in *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, he said, at p.22:

> "The latter case was not a case in point, for there the question was one between a purchaser and a vendor, and the decision was that a purchaser who was registered as the owner could give a good title to the purchaser even though the lease that was registered was illegal."

It is suggested that, in view of the influence of Sir Robert Stout, C.J., on the development of the law relating to void and voidable instruments registered under the Land Transfer Act, this explanation of his views at that time is particularly interesting. It seems to show that, despite his judgment in *Stevens* v. *Carterton Borough*, (1905) 26 N.Z.L.R. 226 (which is discussed below, and which was concerned with the effect of a void Proclamation, and was, therefore, not a case of a document alleged to be void *inter partes*), the learned Chief Justice was not then of the opinion that registration validated all void instruments. Continuing his judgment, he stated, at pp. 22, 23:

> "The case of the *Assets Company* v. *Mere Roihi* ([1905] A.C. 176) was a case in which the Assets Company had been purchasers from one Cooper, and therefore a case in which the question turned upon the rights of a registered owner who no doubt had got a title by illegality. The Privy Council, however, in dealing with this case did not decide that the case of *Gibbs* v. *Messer* ([1891] A.C. 248) was not good law. Now, *Gibbs* v. *Messer* ([1891] A.C. 248) decided that if a deed was null and void that deed could be removed from the Register, so long, at all events, as no person had acquired the title under it by purchase from the registered owner. Here the relief asked is to cancel the registration of the lease. The

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present lessees are the persons who registered the lease; they have not been purchasers from a registered proprietor. They knew that when they registered that lease the Court had not confirmed that lease *simpliciter*. What the Court had confirmed was a transaction which did not appear in the lease, a transaction which the Court was not asked in accordance with its rules or its statutes to confirm; and I am of opinion that it would be carrying the case of the *Assets Company* v. *Mere Roihi* ([1905] A.C. 176) beyond what the Privy Council has laid down if it could be said that a person who got a lease registered illegally and improperly, having got the Court to sanction something which the Court had no *(contd)* no power to sanction—something which was beyond the jurisdiction of the Court—that that lease was to remain on the Registry, and the persons who had been deprived of their property were without redress."

The defendants appealed from this judgment successfully. The Court of Appeal (Williams, Denniston, Edwards, and Chapman, JJ.) disagreed with Sir Robert Stout, C.J.'s, interpretation of the facts, and held that the Native Land Court had not exceeded its jurisdiction in confirming the lease, and that, although the Native Land Court Judge may have given undue weight to matters which he should hot have considered, and neglected matters which he ought to have considered, the Supreme Court had no jurisdiction to review his decision. The Court of Appeal held, further, that the lessee had not acted fraudulently in registering the lease. In delivering the judgment of the Court, Williams, J., stated, at pp.39 40, 41:

"If, however, it be assumed that the lease could have been set aside as invalid by reason of irregularities of procedure in the Native Land Court or even by reason of its being in contravention of some provisions of the Native Land Acts, yet, as the lease has been registered under the Land Transfer Act, it confers a good title on the lessees. That was decided in the case of *Assets Company* v. *Mere Roihi* ([1905] A.C. 176) . . . That case was followed in the Supreme Court by the case of *Wolters* v. *Riddiford* (25 N.Z.L.R. 532) . . . That case was stronger than the present . . . It was suggested that the case of *Wolters* v. *Riddiford* (25 N.Z.L.R. 532) was distinguishable from the present, as it was a case between vendor and purchaser. The judgment on the summons, however, declared that the defendant had a complete and irrefragable title. That meant, of course, a good title as against all the world. It was necessary for the decision that the vendor should have such a title, because, if he had not, the Court could not have forced a bad title on an unwilling purchaser.

It is clear from the explanation of Sir Robert Stout, C.J., quoted above, that he had never intended to decide in *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, that a lease which was void and illegal was necessarily indefeasible *inter partes* after registration; but the Court of Appeal held that the learned Chief Justice had actually decided this point. In so far, then, as the Court of Appeal relied upon *Wolters* v. *Riddiford*, one can hardly regard the decision in *Harris* v. *McGregor*, (1912) 32 N.Z.L.R. 15, as very satisfactory."

Both *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, and *Harris* v. *McGregor*, (1912) 32 N.Z.L.R. 15, were followed by Fair, J., in *Mereana Perepe* v. *Anderson*, [1936] N.Z.L.R. 47. This was an action between the successors of the original Native lessor and the executor of the original lessee. The lease, which required confirmation by a Maori Land Board, had had an alteration made in its terms by the confirmation orders of the Board. As there was no evidence establishing fraud or mistake on the part of the lessor, lessee, or Board, the learned Judge held that the registration of the lease under the Land Transfer Act precluded the raising of the question whether or not the alterations or confirmation order were *ultra vires*.

In the same year as *Mere Roihi*'s case, (1905) N.Z.P.C.C. 275, and *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, Sir Robert Stout, C.J., had to consider, *(contd)*
in *Stevens* v. *Carterton Borough*, (1905) 26 N.Z.L.R. 226, the effect of a Proclamation, alleged to be void, which had been registered under the Land Transfer Act. He held that, apart from the question whether the Proclamation was or was not void, its registration made it unassailable. He said, at p. 228: *(contd.)*

"The Privy Council has decided in *The Assets Company* v. *Mere Roihi* ([1905] A.C. 176) that once a title is registered it cannot be impeached, except on the ground of fraud."

He did not refer to *Gibbs* v. *Messer*, [1891] A.C. 248, which is rather surprising, in view of the Chief Justice's own statement (quoted above) that the effect, *inter partes*, of a void instrument was directly in issue in Gibbs v. *Messer*, whereas it was not in *Mere Roihi's* case, (1905) N.Z.P.C.C. 275."

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In ***re Mangatainoka*** 1BC No2 (1913) 33 NZLR 23 the full Supreme Court of Five Judges dealt with a case stated by the Maori Appellate Court. Although opinions may vary on the impact of this case the decision adopted and applied the deferred rule.

The case involved a question of whether the Land Transfer Act granted protection to a valid sub-transferee who derived from a defective root of title (as a majority of four judges held) or protected also a valid sub-Transmission to an executor from a defective root, as Edwards J held. The long minority judgement of Edwards J however placed a new interpretation of immediate indefeasibility taken from the *Assets* case and his now classic summary of it at p.65 is as follows:

> "59. If the judgment of their Lordships is carefully perused it will be found that it is an explicit decision that any person who can, without fraud, as defined by their Lordships, procure himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title, although he is not a purchaser for value from a registered proprietor, or in fact a purchaser at all." [16]

Next, in 1922, ***Thompson* v. *District Land Registrar*** (1922) NZLR 627 SC concerned a forged transfer which was registered by a purchaser who was unaware of the forgery and who in good faith provided value for the purchase. When the forgery was discovered the District Land Registrar called in the certificate of title for cancellation.

Sim J held that the registration of the forged transfer did not confer title and although there had been no fraud on the part of Thompson, the entry in the register had been wrongfully obtained. He expressed the view that the Registrar had been induced to register the transfer by the certificate of correctness endorsed upon it, when in fact it was a forgery. The judgement shows some doubt and confusion about the statement of Edwards J (above) and some of the "difficult" expressions [17] in the *Assets Co*. case.

It is an illustration of the law in uncertainty and it is not good law today post-*Frazer* v. *Walker*. It preserved, however, at least in that point of time, the qualified indefeasibility rule dating back to *In re Davy* in 1888.

Indefeasibility of title in the sense in which the term is understood today took on an extended meaning in 1924 when the New Zealand Court of Appeal in ***Boyd* v. *the Mayor of Wellington*** (1924) NZLR 1174 C.A., building on the dicta of *Assets Co*. and the interpretation of it by Edwards J in *re Mangatainoka*, by a majority of 3 to 2, provided a new rule.

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[16] Although this statement was to acquire profound status in later litigation, it is extracted from the discussion of their Lordships on one only of the three appeals and the interpretation placed on it by Edwards J. does not form part of the decision of the Privy Council, which expressly decided the three appeals on the same basis. For a contrary analysis, the judgement of Salmond J. at p.1201 (at p.1208) of Boyd's case is a model of judicial precision. Nevertheless the statement of Edwards J. became the basis of the momentum, with which the immediate doctrine began to overtake the deferred theory.

[17] For a commentary see the judgement of McGechan J in *Housing Corporation* v. *Maori Trustee* (1988) 2 NZLR 662 at 685.

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The head note commences —

> "Any person who without fraud succeeds in procuring himself to be registered a proprietor of land under the Land Transfer Act has an indefeasible title, whether he is a purchaser for value or not, and although the documents which form the basis of his registration are absolutely inoperative in themselves.
>
> Opinion as to the effect of the decision of the Privy Council in
>
>> *Assets Co. Ltd.* v. *Mere Roihi*, expressed by Edwards, J., in *In re Mangatainoka Block*, approved (by Stroud, C.J., Sim and Adams, JJ.; Stringer and Salmond, JJ. dissenting).
>> *Gibbs* v. *Messer* distinguished."

Notice how carefully the paragraph is drawn. The majority in fact approved the earlier opinion of Edwards J (a dissenting opinion in *In re Mangatainoka* a Supreme Court case) on the effect of the *Assets Co.* Case. The thread of authority at that time is very much a fine line rather than a true chain and debate on the correctness of the decision in Boyd's case was to ensue for the next forty years.

In Boyd's case land was taken by the local body under the Public Works Act 1908 and the title was duly registered. Subsequently it was claimed that the proclamation was void for non-compliance with certain statutory procedures and the claimant asked that the register should be rectified by the removal of the entry of registration.
The headnote further reads —

> *"Held* by the Court of Appeal (Stringer and Salmond JJ., dissenting), That, even assuming the Proclamation to be void, its registration under the Land Transfer Act had conferred on the defendant Corporation, in the absence of fraud, an indefeasible title to the land affected; that there was no evidence of fraud; and that the plaintiff was not entitled to have the Register rectified.
>
> Per *Stringer* and *Salmond, JJ.* (dissenting).—That an instrument which is null and void before registration remains so *inter partes* after registration, and creates no indefeasible title until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened; that until then it is the right and duty of the District Land Registrar to rectify the Register by cancelling a registration which was wrongly procured and therefore ought not to be continued; and that the Court should, therefore, in the circumstances, proceed to examine the validity of the Proclamation and to consider the other questions involved in the action."

Immediate indefeasibility had arrived, although the majority held illogically, that an immediate taker under a forged instrument would not get protection. The result was that, after 1924, we were left in New Zealand in the position that:

(i) registration had a directly opposite effect on forged [18] and void documents;
(ii) resulting from a decision of the barest majority of three to two;

[18] Forged instruments were governed by the rules of deferred indefeasibility; void instruments by immediate defeasibility.

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(iii) upon facts (a void Proclamation) which did not include a dealing *inter partes*;
(iv) based on a disputed interpretation of two possibly ambiguous sentences (Clues 1 and 2 footnote [19] at p12) in a very involved case (*Assets Co.*) the real *ratio* of which has never been unanimously agreed on by Courts or academic writers;
(v) largely influenced by another ambiguous sentence;
(vi) used by a Judge who was in a minority of one to four; and
(vii) all this despite the outstandingly clear pronouncements of principle to the opposite effect given by the two original leading cases [20].

Despite the approval some 40 years later of Boyd's case by the Privy Council in ***Frazer* v. *Walker,*** the uncertainty and debate that Boyd's case ignited were not in the best interests of the system and it is probably a pity that the Privy Council did not get the opportunity to get its teeth stuck into the issue in 1924.

The restraining voices of Stringer and Salmond JJ were to echo again 40 years later in the Court of Appeal, when that court considered *Frazer* v. *Walker*, but when the Privy Council subsequently provided advice in the latter case, the anticipatory opinion of Edward J given in 1914 was to triumph and immediate indefeasibility became a part of the law.

It is instructive in terms of the development of the law to consider *Frazer* v. *Walker* in two phases. The **first phase** is in the Court of Appeal (1966) NZLR 331 and the earlier decision of the then Supreme Court and the **second phase** is the subsequent advice of the Privy Council at (1967) NZLR 1069.

Stated simply the registered proprietor is Frazer, a mortgage of Frazer's land was forged in favour of Radomski (who was unaware of that forgery and took in full good faith) and subsequently in exercise of the power of sale in that mortgage Walker became a purchaser in good faith and for value. The transfer was registered. Frazer commenced proceedings to have registration of that transfer put aside.

In the Supreme Court Richmond J held himself bound by Boyd's case, applied the principles of immediate indefeasibility, doubted whether "nullity due to forgery can be distinguished in principle from nullity due to some other cause" and held the registration of the transfer valid.

In the Court of Appeal, in adjudicating between the litigants it was really only necessary to determine the validity of the transferee (i.e. Walker)'s title and the Court concerned itself primarily with that issue. The three judges of the Court held unanimously that section 183 of the Land Transfer Act was decisive in deciding in favour of the transferee.

Section 183 (as amended by s. 43(1) of 1998 No.123) reads:—

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[19] Please refer to text of footnote **12**

[20] *Ex parte Davy* (supra) and *Gibbs v. Messer* (supra)

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"(1) Nothing in this Act or the Land Transfer (Automation) Amendment Act 1998 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 or the Land Transfer (Automation) Amendment Act 1998 on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

(2) This section shall be read subject to the provisions of sections 77 and 79 hereof."

McCarthy J, at p358, provides a summary of the general principles upon which the Torrens system is based. His concluding paragraph in this extract is particularly apt, for he notes the interlocking effect of the indefeasibility sections of the Land Transfer Act and, in this explanation, provides an insight into the advice of the Privy Council, which soon was to follow the judgement of the Court of Appeal:

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

"Their Lordships do not propose to criticise in detail the various enactments of the statute relating to the validity of registered rights. The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title (*ibid*., 254)."

Then in *Fels* v. *Knowles* (1906) 26 N.Z.L.R. 604; 8 G.L.R. 627 this Court, speaking of our 1885 Act, said:

"The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements of incorporeal rights, to the right registered." (*ibid*., 620; 635).

In *Boyd* v. *Mayor, etc., of Wellington (supra)* Salmond J. said (of the 1915 Act):

"One of the main purposes of the Land Transfer Act was to abolish this rule of the common law in favour of the rule that he who purchases a registered title in good faith from the registered proprietor obtains for himself an indefeasible title unaffected by any defect in the title of his vendor. This purpose is thus expressed by the Privy Council in *Gibbs* v. *Messer*" (ibid., 1201; 504).

Salmond J. continued:

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> "The effect of registration, therefore, is to validate the purchaser's title notwithstanding defects in the vendor's registered title. The common law rule of *non dat qui non habet* is wholly abolished in favour of purchasers of registered titles in good faith" (*ibid*., 1202; 504).

And then he summed it all up:

> "As I understand *Gibbs* v. *Messer*, indefeasibility of title is a privilege given to purchasers who honestly and in reliance on the registration of their vendor's title acquire that title from him by a valid and registered instrument. Such a purchaser cannot, in the absence of fraud, be affected by the defects in his vendor's title" (ibid., 1203; 505).

These general statements are not founded on s.183 alone. They are distilled from a succession of sections, and in particular, in the present New Zealand statute, ss.62 and 63 which make the estate of a registered proprietor paramount and protect him from ejectment except in certain specified cases, s.64 which guarantees the title of a registered proprietor, s.75 which makes the test of title evidence of ownership and of the particulars endorsed on it, and then, of course, ss.182 and 183. Moreover it is not only s.183 which expressly sets out to extend protection to a *bona fide* purchaser. One finds such a protection in s.63(1)(c) which provides that an action for possession or recovery of land at the suit of a person deprived of that land by fraud shall not be sustained against a registered proprietor under the provisions of the Act who took as a transferee *bona fide* for value even though from or through a person registered through fraud. In the words of Dixon J. in *Clements* v. *Ellis* (1934) 51 C.L.R. 217, 237, The Act's objective in relation to purchasers is to protect those who "subsequently deal in good faith and for value *in a manner, which, on its face, the register appears to authorise*, and who then obtain registration". This, I think, includes a purchaser of the fee simple taking under a transfer executed pursuant to a power of sale conferred by a registered mortgage." [21]

The 3 Judges each expressed reserve concerning the breadth of the decision in Boyd's case (North P. at pp.350, 351; Turner J. at p.355 and McCarthy J. at pp.356, 359) and the Court declined to rule on the correctness of that decision, contenting itself with the observation that a further consideration by the Privy Council on "the whole question of indefeasibility of title as between immediate parties to a void instrument" (North P. at p.351) is required, before the law may be considered settled.

North P. explicitly stated that "this court must continue to hold itself bound by *Ex parte Davy* until further light is thrown on this difficult matter by their Lordships in the Privy Council." (p.348). In effect the deferred theory was upheld by the Court of Appeal.

However, when *Frazer* v. *Walker* reached the Privy Council, the invitation of the New Zealand Court of Appeal was responded to in quite resounding terms.

> "Their Lordships are of opinion that this conclusion (in *Boyd* v. *Mayor of Wellington*) 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 *(supra)* 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. "

[21] His Honour's comments on s.183 and ss.62, 63 and 75 describe the basis of the later advice of the Privy Council in establishing immediate indefeasibility. It is possible to do without s.183; rely on ss. 62, 63 and 75; and thus make indefeasibility immediate.

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Estates and interests acquired under all instruments whether void for forgery, fraud or any other reason, are immediately indefeasibility vested when registered. The rule is simply stated. The conclusiveness of the register is indelibly clear. The Privy Council chose not to attempt to unravel the tangle of cases since *Ex parte Davy* in 1888, but much of the old law is swept away.

3. The Connection with the Certificate of Correctness

This analysis has taken six of the most important New Zealand cases, together with *Gibbs* v. *Messer,* to illustrate the transition from deferred to immediate indefeasibility.

The factual differences and niceties in the cases have too often obscured in judgements and commentaries the simplicity of the principles which have governed the operation of the Land Transfer Act.

In reality, whether in the guise of its deferred version, or in immediate indefeasibility, it is a simple doctrine. In deferred indefeasibility, the essential prerequisite is a valid dealing; in the immediate species, the act of registration and not the validity of the dealing, determines proprietorship.

The connection between the certificate of correctness and deferred indefeasibility is obvious. A certificate of validity met the requirements for the powerful protection of the Land Transfer Act for valid dealings — the heart of the process. In immediate indefeasibility, the certificate of correctness continues as a statutory requirement but its meaning is not so clear.

In context, it seems appropriate to conclude the summary of case law principles with an extract from the judgement of the Privy Council in *Frazer* v. *Walker,* which deals specifically with certification.

> "Section 42 contains a prohibition against registration of any instrument except in the manner provided in the Act and unless the instrument is in accordance with the provisions of the Act. Section 157 requires every instrument, including such as charge any estate, to be signed by the registered proprietor and attested. Section 164 prohibits the Registrar from receiving any instrument such as a charge unless there is endorsed thereon a certificate that it is correct for the purposes of the Act signed by the applicant or party claiming under the instrument, a licensed landbroker or a solicitor employed by the applicant or party. The appellant invoked these sections, and Reg. 24 of the Land Transfer Regulations 1948 (S.R. 1948/137), in support of an argument that the forged mortgage could not be received for registration or validly registered and consequently that the mortgagee never became entitled to the benefit of registration.
>
> Their Lordships cannot accept this argument which would be destructive of the whole system of registration. Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry — the provisions as to this will be referred to later — registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise. As will appear from the following paragraphs, the inhibiting effect of certain sections (e.g., ss.62 and 63) and the probative effect of others (e.g., s.75) in no way depend on any fact other than actual registration as proprietor. It is in fact the registration and not its antecedents which vests and divests title…."

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Although an important evidentiary component of the process, the certificate of correctness is not now in itself an arbiter of anything essential. It is registration and not certification which determines the validity of title.

The Certificate of Correctness in Deferred Indefeasibility

The early decisions of the Courts in New Zealand were particularly influenced by Williams J. who, prior to his appointment to the judiciary, was both Registrar-General of Land and a District Land Registrar and who, therefore, provides the unique view of a Supreme Court Judge and an administrator, in the formative years of the system.

There is no doubt, given the written record that Williams J. has provided, that the original concept of indefeasibility was based on the premise that only valid instruments could generate valid titles.

With a background in deeds conveyancing, in which a valid conveyance was the key to title, it is scarcely surprising that the lawyers of that time would place emphasis on the validity of land transfer instruments as a prerequisite for registration.

In terms of the new system, in order to crank the powerful machinery of title by registration into action providing a guaranteed root of title for every dealing, a valid instrument was seen as necessary, given the interpretation intended by the framers of the legislation and formally put in place by the judiciary, in respect of the key indefeasibility provisions of the Act.

In operational terms, this meant that an instrument must conform to the requirements for validity at law, when not having the benefit of registration under the Land Transfer Act, i.e. when unregistered.

The certificate of correctness is the mechanism provided by the Act to provide an assurance that the instrument is free of defects which could upset title. In determining the range of the certificate of correctness the comments of Salmond J. at p.1201 of Boyd's case are apposite —

> "…although the vendor's title is good, there may be some invalidating defect in the conveyance or other transaction whereby the purchaser has endeavoured to obtain that title—the transaction being void or voidable for fraud, mistake, misrepresentation, incapacity, informality, illegality, or otherwise."

As well as the criteria mentioned by Salmond J., a certificate of correctness in a scheme of deferred indefeasibility would also cover the additional specific requirement established in *Gibbs* v. *Messer* — that the signature of the proper person alienating is obtained (probably inherent in the criteria of Salmond J.).

As originally envisaged by the framers of the Torrens legislation, the administrators and the judiciary, the certificate of correctness was part of a system of deferred indefeasibility. It provided a direct relationship between the professionals who handled transactions and prepared dealings, with (a) the State, and (b) their clients, in

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taking title guaranteed by the State. In an extreme case a client could lose title if a dealing were improperly certified. [22]

The Certificate of Correctness in Immediate Indefeasibility

Now that immediate indefeasibility is the law, what impact has the reversal of principle on the law?

A comprehensive extract from Salmond J. at p.1201 of Boyd's case assists in setting the scene for the transition. The rule that a purchaser of a registered title in good faith from the registered proprietor obtains an indefeasible title unaffected by any defect in the title of the vendor, applies to both immediate and deferred indefeasibility.

Salmond J integrates a commentary on this rule with a series of questions, which require answers; questions, which determine which of the two doctrines should become the law and questions, which impact on the effect of the statutory certificate of correctness.

> "Apart from the protective provisions of the Land Transfer Act, there are two entirely distinct ways in which a purchaser of land may fail to obtain a good title. In the first place, the title of the vendor may be itself bad. In the second place, although the vendor's title is good, there may be some invalidating defect in the conveyance or other transaction whereby the purchaser has endeavoured to obtain that title — the transaction being void or voidable for fraud, mistake, misrepresentation, incapacity, informality, illegality, or otherwise. As to the first of these cases — namely, a defect in the vendor's title — the rule of the common law was that no man could give a better title than he had: *Non dat qui non habet*. The only qualification of this rule was the destruction of adverse equitable interests by the purchaser of the legal estate for value and without notice. One of the main purposes of the Land Transfer Act was to abolish this rule of the common law in favour of the rule that he who purchases a registered title in good faith from the registered proprietor obtains for himself an indefeasible title unaffected by any defect in the title of his vendor.
>
> The effect of registration, therefore, is to validate the purchaser's title notwithstanding defects in the vendor's registered title. The common law rule of *non dat qui non habet* is wholly abolished in favour of purchasers of registered titles in good faith. The question which now arises for consideration is whether registration also validates, as between the parties themselves, all defects in the instrument registered. Is an instrument, when once registered, conclusively valid between the parties and thenceforward unexaminable in respect of any ground of invalidity whatever except fraud? In other words, can a purchaser who has registered a void instrument of transfer claim that, so long as he has acted without fraud, he has thereby succeeded in obtaining an indefeasible title?

Frazer v. *Walker* has answered each of these questions in the affirmative, in setting out the consequences of registration of an invalid instrument.

However, the general policy of the Act (and of general public policy) is founded on the registration of valid instruments and the issue of valid titles based on valid instruments. How then, given the sweep of *Frazer* v. *Walker,* is the validity of transactions to be assured?

[22] *Thompson v. District Land Registrar* (*supra*)

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Titles may be more precarious in immediate indefeasibility, for the incoming taker of title is always preferred to hold title in the event of a dispute. The certificate of correctness by express exclusion in *Frazer* v. *Walker* is no longer a determinant in the process of registration. (c.f. *District Land Registrar* v. *Thompson* (*supra* at p15)).

Registration when effected will clearly, and must clearly, prevail over certification. That, however, is not to diminish the importance of the certificate of correctness, which takes on a new character, given the guillotine-like power of registration.

The Practitioner's Role

In a system based on immediate indefeasibility, the certificate of correctness is the bulwark, which holds the line between validity and invalidity. No system of land registration is workable, nor worth working, unless within it there is a high degree of co-operation between property owners and their advisors and the registration system.

Without co-operation, any registration system would fail and be replaced by an alternative. But co-operation is not enough by itself. The business of land titles registration could not be undertaken in the property market as it has developed over the last 100 years, without a large measure of ethical conduct in the practice of that business.

Clearly, modern business practice does not provide a certifier with personal access to every essential aspect of the vendor's part in a transaction,[23] yet the certificate in an unqualified format must be provided by the taker of title — generally, the solicitor for the purchaser or mortgagee.

Much of the basis of the certificate (the identity of the registered proprietor, execution by the proper person, no undue influence etc) is centred on professional trust — the ethical relationship that exists in the profession. [24] Without that trust, business may be retarded, possibly become unmanageable.

In the era of deferred indefeasibility, the certificate of correctness was an operative part of the registration process, a factor taken into account by the court in determining the validity of title. The assurance it provided was part of the process, whereby the validity of instruments was determined.

[23] Note the idealistic comments of Jessup at p5 (*supra*)

[24] The comments of Barker J in Church of Samoa Trust Board v. Broadlands (1984) 2 NZLR at 715 are apt:

> "In this case, it is clear that the defendant as mortgagee, and its solicitors, acted honestly and in good faith throughout. The solicitor, with one possible query, acted diligently and in accordance with normal conveyancing procedure. The possible query extends to the fact that the solicitor did not seek a certificate from the plaintiff's then solicitor that the various procedures referred to in the registered rules of the plaintiff were carried out. However, he did accept assurances from the plaintiff's then solicitor that the document was properly executed. I cannot see how the plaintiff can now seek to take advantage as against an innocent mortgagee of a misrepresentation from its own agent; the plaintiff's remedy lies against that age."

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In the latter era of immediate indefeasibility, the certificate has become a statutory requirement, like many of the other statutory compliances the registrar must have, prior to completing registration. Its qualitative role — the assurance of validity has not changed — is still a certificate of correctness but, if given in error, the consequences of that error may not strike at the heart of a completed registration.

May the certificate of correctness take on the character of the registrar's examination for statutory compliance, enabling automated dealings to be processed automatically?

Assignment, Assurance, Accountability

These three abideth in an automated titles system, just as in their turn abide the faith hope and charity of the gospels. The faith of the register, the measure of hope that accompanies each instrument as it is lodged for registration and the conservative charity of the compensation system, figure in the Torrens System, whether automated or not. If external certification of every element of validity is to take place in preference to a final assessment by the State, prior to registration, some of the relationships may change; some will need to be freshly statute-based; and some may enure as they are.

1. The assignment of interests

The assignment of interests under the Land Transfer Act takes place in a controlled environment. Forms, the registration process, the examination-based activities of the registrar, all contribute.

In an automated system, some elements of assignment, such as matters of essential content of instruments, may be controlled by automation rather than by drafting and certification, either by the practitioner or registrar. One approach would have legislation authorise registration of all instruments and dealings in an automated format, but allow the classes of permitted instruments and dealings to be prescribed by regulations, or decision by the Registrar-General of Land.

2. Assurance

Jessup at p4 (*supra*) has pointed out that, in a Torrens system, it is the State not the vendor, who provides the assurance that title is in order. Denniston J in his judgment in the Court of Appeal hearing of *Mere Roihi* v. *Assets Company* 1902 (21) NZLR 473 at p725 said:

> "The intention of sections 189 and 190, and of the Land Transfer Act generally, is to make the title of a registered proprietor absolute against the world in the case of any person dealing with him, except in the case of actual fraud on the part of the person so dealing: *Gibbs* v. *Messer*, where the proposition is limited to purchasers *bona fide* and for value. With that view it is expressly provided that no intending purchaser need look beyond the Register, or be affected by knowledge of an unregistered interest which might make it unconscientious on the part of the registered proprietor to retain his certificate. It is the indefeasibility of the title of a purchaser for value from a registered proprietor — which indefeasibility exists in the interests of the purchaser and not of the vendor — which is the essential element in the Act. **A**

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> **registered proprietor unable to transmit an indefeasible title would be an anomaly in the Act….**" (emphasis added).

The statutory affirmation of title in a Torrens system cannot be the subject of qualification or certification by the incumbent registered proprietor. The requirement that the taker of title provides the certificate of correctness (a feature from the beginning of the system) is a corollary of this principle — the outgoing registered proprietor does not have a role to play in the certification of title.

3. Accountability

In establishing the "correctness" of an instrument for registration, the practitioner and the registrar have separate roles. In *Registrar-General of Land* v. *Marshall* (1995) 2 NZLR 189 at 200 Hammond J said:

> "Both practitioners and the District Land Registrar have distinct obligations in law. The practitioner has the heavy burden placed upon him by s.164 [25] and reg. 17 [26]. Doubtless the primary purposes of those provisions is to endeavour to avoid fraud in the system, by ensuring that the parties to a transaction are those they actually claim to be. But when a solicitor certifies a transaction correct, she surely also certifies that any collateral matters — such as proper advice to the Maori Land Court of the transaction — has been given where such is required by law. Mr Corbett was hopelessly negligent.
>
> The Registrar has a number of statutory obligations. Amongst them, he is obliged to comply with reg. 16 [27]. That obligation extends beyond a concern over the integrity of his own register. What else can the words "or if it is contrary to any other law or regulation in force" mean?"

---

[25] See footnote 4

[26] Reg. 17 Land Transfer Regulations 1966 (SR 1966/25) reads:

> **Certificate as to correctness of instrument—**The certificate required by section 164 of the Act, if given by a solicitor, shall be signed by the solicitor in his own name and not in the name of any firm with which he may be connected, and shall show that he is acting for the party claiming under the instrument…."

Editor's note - The Land Transfer Regulations 1966 were revoked by reg. 44 of the Land Transfer Regulations 2002.

See now reg. 15 of the 2002 Regulations – *How certificates of correction must be executed*

Regs. 11-14 of the 2002 Regulations provide for certifications required for electronic instruments under s.164A of the Land Transfer Act 1952.

[27] Reg. 16 Land Transfer Regulations 1966 (SR 1966/25) - *Instrument not to be received it not in order*

> "No application, instrument, dealing, or other matter shall be received for registration unless it complies in all respects with the requirements of the Act and of these and any other regulations for the time being in force thereunder, or if it is contrary to any other law or regulation in force, or if there appears to be fraud or improper dealing."

Editor's note - See now reg. 21 Land Transfer Regulations 2002 – *Things that must not be registered*

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The responsibility of the party taking under a document received early attention by the Court of Appeal in *Miller* v. *Davy* (1899) 7 NZLR 515, when Richmond J. at p.524 said:

> "I must add that this claim being upon a public fund it is proper to insist upon the observance by purchasers and their agents of the duties imposed upon them by the Act. The purpose of the statute, which is a very clumsy expression of an admirable principle, is to do away with the necessity of a retrospective deduction of title to land; but I do not understand that it guarantees a purchaser against the negligence of his own agent in preparing a conveyance. The purchaser must be responsible for the tender to the Registrar of a proper transfer from the registered owner. To hold otherwise would be to offer an indemnity to carelessness and an invitation to fraud."

The certificate of correctness is a comprehensive certificate (possibly in recent years given the familiarity we have with the certificate, it is somewhat underrated) but as E C Adams has pointed out at p4 (*supra*): "If the instrument *ex facie* is not in order, then it will be rejected by the registrar, notwithstanding the certificate of correctness." It is the duty of the registrar to refuse to register instruments, which his records show to be in contradiction of the statute law: *Finlayson* v. *District Land Registrar* (1904) 24 NZLR 341, 347.

In 1965, in an unreported case, *Ashburton Borough Council* v. *District Land Registrar* (Christchurch A 46/65 4 May 1965) Wilson J., in a reserved decision, held s161 (of the Land Transfer Act 1952, dealing with the common seals of Corporations) disentitled the District Land Registrar to check further, citing *Re Kaihu Valley Railway Co* (1890) 8 NZLR 522.

As to the extent to which Registrars, in the world of the 1960s, could be expected to engage in investigations, Wilson J., citing *Assets Co Ltd* v. *Mere Roihi* (1905) AC 176 at p.203, observed:

> "Reason and commonsense alike require that full effect be given to provisions such as s.161 of the Land Transfer Act 1952. The Registrar's duties are predominantly administrative. If he were under a duty to satisfy himself that *all* statutory requirements antecedent to the execution of instruments submitted for registration of deposit had been duly complied with the performance of his functions would become impossible. It is necessary for the efficient performance of his functions that he be entitled to accept and act upon instruments which are regular on their face. For this reason his responsibilities are limited to those which are specifically placed upon him by statute, as is recognised by s 216 of the Land Transfer Act 1952 in referring to 'any act or duty which he is hereby required or empowered to perform *under this Act or any other Act*'. Moreover, by omitting to provide the machinery necessary to enable the Registrar to conduct an investigation, the legislature has, I think, clearly shown its intention in this respect." [28]

Against a background of overlapping and shared accountability, it is nevertheless possible to codify the respective roles of the registrar and the practitioner as a certifier of "correctness".

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[28] Cited with approval by McGechan J in *Housing Corporation v. Maori Trustee* (1988) 2 NZLR 662

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The Basis of the Registrar's Certificate of Registration

(1) In respect of dealings or instruments presented for registration, the Registrar first has a duty to examine any dealing or instrument to ascertain whether the document is one which should be registered or refused registration. This duty is limited to an examination of the instrument, and it is not the duty of the Registrar to examine into the facts and circumstances, which are antecedent to it and which, on the face of it, or in the light of the registrar's own knowledge and records, disclose no irregularity or impropriety.

It is the duty of the registrar to prevent the registration of an instrument which, upon the information on the face of the instrument and present in the land registry office, discloses a breach of trust or is forbidden by positive law. But, if the dealing is not manifestly invalid or a breach of trust, the registrar is not concerned to enquire into the circumstances, or to require proof that it is within the powers of the parties:

In re Fairbrother to Allen, (1896) 15 NZLR 196 (a sale by an administrator upheld);
Ex p. Wisewould, (1890) 16 VLR 149;
In *re Kaihu Valley Railway Co*., (1890) 8 NZLR 522 (the Registrar ordered to register a mortgage by a Company alleged to be *ultra vires*);
Finlayson v. *Auckland District Land Registrar*, (1904) 24 NZLR 341; 8 GLR (upholding the refusal of the Registrar to register a transfer upon the ground that the land was inalienable under the Native Land laws);
In re Bevan, (1909) 29 NZLR 714; 12 GLR 329 (upholding the refusal of the Registrar to register a mortgage of Native land upon the ground that the statutory conditions and formalities had not been observed and upon the further ground that one of the mortgagors was a trustee without power to mortgage);
Ex p. Saunders, (1900) 21 NSWLR 291;
Ex p. Equity Trustees etc. Co. and O'Halloran, (1911) VLR 197*;*
Rex v. *Registrar of Titles, Ex p. Briggs*, (1913) VLR 549;
Rex v. Registrar of Titles, Ex p. The Commonwealth, (1915) 20 CLR 379;
Malone v. *Registrar of Titles*, (1919) VLR 370;
Temple v. *Leviathan Proprietary Ltd*., (1921) 30 CLR 34.

In *Temple,* Knox CJ. said, at p.53:

> "In my opinion, where it has come to the knowledge of the Registrar that a dealing lodged for registration is a breach of trust, or that for any other reason the person dealing with the land as registered proprietor is not competent at laws or in equity to deal with it in the manner proposed, it is his duty to refuse to register. I do not suggest nor was it contended that where the Registrar merely suspects that the dealing may be a breach of trust or otherwise improper, but knows no facts to justify him in concluding that it is so, it is any part of his duty, or that he has any right, to ask for information or make inquiries in order to ascertain the true facts. I desire to limit my opinion with regard to his power to refuse registration to those cases in which the facts within his knowledge appear to him to show that the proposed dealing is improper."

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(2) The Registrar is under a duty to refuse registration in these circumstances:

(a) When a dealing or instrument is presented for registration, which purports to transfer or affect any estate or interest subject to the Land Transfer Act otherwise than in accordance with the provisions of the Land Transfer Act.

Section 42 of the Land Transfer Act 1952 says:

> **"Informal instruments not to be registered**—No Registrar shall register any instrument purporting to transfer or otherwise to deal with or affect any estate or interest in land under the provisions of this Act, except in the manner herein provided, or as provided in any other Act authorising the registration of the instrument under this Act, nor unless the instrument is in accordance with the provisions of this Act or of that other Act, as the case may be."

John Baalman has pointed out that "The rule of law which binds a proprietor to a particular form binds the executive to insist on its observance."

Dual accountability is inherent in s.42 which, by necessary implication, binds those who prepare instruments, to comply with statutory requirements as to form and prohibits the registrar from registering anything which is non-compliant.

Section 42 was referred to and applied in *Miller* v. *Minister of Mines* (1963) NZLR 4560 (JC).

Taken literally, s.42 is a further exception to indefeasibility. In *Frazer* v. *Walker* the Privy Council was not prepared to permit that effect (extract at pp.20-21 *supra*).

Barker J., in *Merbank Corporation* v. *Cramp* (1980) 1 NZLR 721, in considering a mortgage registered without a charging clause, in affirming that a valid registered mortgage was nevertheless created said, at p.729:

> "Accordingly, I am of the view that rectification is not prevented by the Land Transfer Act. In fact, it is not needed to create a valid mortgage and a charge. To hold otherwise would mean that any person dealing with the register would have to ensure that all instruments registered complied with prescribed forms and the prescribed mode of registration before he could satisfy himself as to the authenticity of interests disclosed on the register. For example, if the words "do hereby transfer" were inadvertently omitted from a memorandum of transfer and the omission were not detected by the Registrar, it would not follow that a valid title would not be transferred to the transferee upon registration, or that subsequent transferees would need to examine prior documents to discover the true state of the title. To hold otherwise would seriously erode the principles of the Torrens system and opt for a concept of deferred defeasibility which was emphatically rejected in Frazer v Walker."

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(b) Where a dealing or instrument is presented for registration which, if registered, would contravene any other provision of the Land Transfer Act.

(c) Where the dealing or instrument is in breach of the provisions of any statute regulation or law.

These two heads of accountability may be dealt with together.

Wilson J., in *Paparua County* v. *District Land Registrar* (1968) NZLR 1017 at 1022, discusses Reg. 16 in some detail:

> "In my opinion the plain and unequivocal terms of Reg. 16 mean precisely what they say. It follows that if an instrument which is tendered for registration is contrary to a law or regulation in force the regulation requires the Registrar to refuse to accept it, whether or not there appears to be fraud or improper dealing; conversely, where there appears to be fraud or improper dealing in connection with an instrument which is presented for registration, the Registrar must refuse to accept it irrespective of whether the instrument is contrary to any law or regulation in force. I think, also, that, in deciding whether such an instrument is contrary to any law or regulation in force, the Registrar is not concerned with the question whether or not the instrument purports to give effect to a contract which would not be enforceable because of illegality. I hold that the purpose of Reg. 16 is to prevent registration of *all* instruments which are contrary to any law or regulation in force, it being the policy of the Act and the regulations to withhold the powerful protection of registration from such instruments. I agree with Mr Williamson that an intolerable burden would be placed on District Land Registrars if they were called upon to decide whether or not any particular breach of a law or a regulation were such as to make a contract which constitutes or includes such breach unenforceable for illegality; but I am satisfied that Reg. 16 imposes no such burden. Once it is apparent that an instrument is contrary to a law or regulation in force it cannot be accepted for registration. Likewise, if there appears to be fraud or improper dealing. There was, of course, no allegation of fraud in the instant case, but reliance was placed by Mr Mahon on improper dealing. The word "dealing" in this context has of course, a different significance from that which it bears at the beginning of Reg. 16 where it appears in association with "application", "instrument" and "other matter". In that context it signifies something concrete, such as a document, which is capable of being registered; but in the phrase "fraud or improper dealing" the reference is to behaviour or a course of conduct which is not proper, not "correct", and which has led to the presentation of some document for registration. Examples of "improper dealing" would be the presentation for registration of a document held in escrow or one executed by a person under disability. I have no doubt that the same phrase "fraud or improper dealing," when used in s.211(d) of the Land Transfer Act 1952, has precisely the same meaning as in Reg. 16. Whether the breach of a law or a regulation always constitutes improper dealing is a question which I do not find it necessary to decide but clearly there are some such breaches which, on any view, amount to a failure to act properly or correctly in the circumstances, and would, accordingly, be improper dealing."

(d) Where a caveat, notice of claim under the Matrimonial Property Act,[29] or notice having the effect of a caveat, prevents registration.

[29] **Editor' note** - See now s.42 of the Property (Relationships) Act 1976 and the Property (Relationships) Forms Regulations 2001 Sch.1

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The prohibitive effect of entry and the statutory formulae for dealing with entries on the register which suspend the right of registration are too well known to require comment.

(e) When the Registrar has knowledge that the dealing breaches a trust. The registrar should not however refuse to register on the basis of a mere suspicion and this duty will arise only when the facts are within the registrar's knowledge or are disclosed on the face of the instrument.

This category is significant enough to be recorded in its own right.

The registrar has two roles in relation to trusts:

1. In relation to public trusts, where the Crown or a local authority is the proprietor, the existence of the trust is disclosed in the certificate of title for the land. Sections 128 and 129 of the Land Transfer Act 1952 are explicit as to procedure.

2. In relation to private trusts, the registrar has in recent years taken a lesser role than once was the case. Caveats by the registrar to protect trusts, although previously common, are now infrequently entered. As the deeds system has retreated into a now distant past, the trusts there disclosed have little relevance today. However, if a trust is disclosed, the registrar, on the principles set out in paragraph 1 of this section at p.27 (*supra*), will enter a caveat or reject a dealing.

The Basis of the Practitioner's Certificate of Correctness

The registration of an invalid dealing, for whatever cause be it void or voidable, is a more serious matter in immediate indefeasibility, for registration will generally place an error beyond correction. [30]

In immediate indefeasibility, the certificate of correctness is closer to the registrar's certification of registration than a certificate of correctness in deferred indefeasibility. However, although the scope of each of the current certificates of correctness and registration will be demonstrated not to precisely co-incide, a substantial overlap is clearly evident. The nature of the modern process, the risk of error if dealings are not prepared to a standard that the registrar may accept without question, point to an essential role in certification.

There is a curious twist in attempting to codify the accountability of practitioners in that the cases which assist in establishing what is valid and what is not valid, for the purposes of the Land Transfer Act, tend to pre-date *Frazer* v. *Walker* and so, in some

[30] On analysis, the Registrar's power of correction would appear restricted by immediate indefeasibility. However the Court retains its *in personam* jurisdiction to order correcting transfers in restricted situations: *Frazer* v. *Walker* at p.1078

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instances, have been overruled by the decision in that case, at least in respect of the indefeasibility aspect of the decisions.

The principles concerning validity nevertheless remain intact.

A certificate of correctness certifies:

1) That the instrument is not voidable by reason of fraud

The exception of fraud is expressly provided for in the Land Transfer Act 1952, ss.62, 63, 75, 182, and 183. Fraud means actual and not constructive or equitable fraud: *Assets Co*. v. *Mere Roihi* (*supra*). For example, if a purchaser has acquired title, with knowledge of the existence of an unregistered agreement affecting the land, and with the intention of defeating the rights under that agreement, that purchaser acts fraudulently, and may be compelled to observe those rights; *Dillicar* v. *West* (1921) NZLR 617.

Richmond J., in *Sutton* v. *O'Kane* (1973) 2 NZLR 304 (CA), at 344, aptly put it this way, in discussing the sections, which exclude fraud from indefeasibility:

> "Accordingly, one can properly substitute for the phrase *"except in the case of fraud"* the words *"except in the case of dishonest conduct"*."

In providing this aspect of the certificate, the practitioner is certifying that there has been no dishonest conduct in the transaction.

2) That the instrument is not void by reason of its being a forgery

The practitioner certifies that the signature, upon which the taker of title relies, is the genuine signature of the registered proprietor. From the earliest times in Torrens administration, the Courts have required observance of this standard; *Ex Parte Davy*, *Gibbs* v. *Messer* (*supra*).

Williams J., in *Ex Parte Davy,* at p.764 was emphatic:

> " there is nothing in the Act which protects persons who deal with those who falsely represent themselves to be registered proprietors, and are fraudulently induced by them to accept a void instrument.
> There is no reason why the burden of ascertaining whether a person who represents himself to be the registered proprietor is really the person he represents himself to be, should not lie upon the person who dealt with him. The instrument is prepared, and the execution procured by the person in whose favour it is made, and not by the office, and it plainly is his duty to see that the person executing it is the person he represents himself to be, and not to tender for registration a void instrument. The Act expressly provides that he or his agent must certify to the correctness of the instrument tendered."

Although *Frazer* v. *Walker* overrules *Ex Parte Davy* the above principle continues to be a statement of proper practice.

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3) That the parties are not mistaken in their intentions

With one exception, the early approach taken by the Courts from the early Land Transfer Acts has been that registration will not validate, *inter partes*, an instrument void for mutual mistake.[31] The exception, *Jonas* v. *Jones* (1883) NZLR 2 SC 15, is an early instance of immediate indefeasibility where, notwithstanding there was a mistake, there being no fraud in procuring the registration, the Court held the title good. An early application of *Frazer* v. *Walker*.

Today, however, the Contractual Mistakes Act 1977 may have an application to instruments registered under the Land Transfer Act, when there is mutual mistake. New Zealand Conveyancing Law and Practice (CCH New Zealand Ltd) Vol 1 at para 4-050 observes:

> "It is not yet clear to what extent the courts will grant relief where this would interfere or conflict with a clear statutory regime in another field of law. It has been suggested that the courts should not grant relief where this would involve overriding the provisions of the *Land Transfer Act* 1952 (*Mitchell v Pattison* (unrep, HC Auckland, A 1163/84, a 47/85, 5 June 1986)). Whether this view will be generally adopted is not yet clear."

It is stated in s.5(2) of the Contractual Mistakes Act 1977 that nothing in the Act affects the doctrine of *non est factum* — "it is not my deed", a unilateral mistake.

At para. 4-092 of "Law and Practice" it is further noted:

> "Effect of indefeasibility
>
> The doctrine of indefeasibility is highly relevant to the defence of *non est factum*. If *non est factum* applies, the document is void against the signatory. The doctrine of indefeasiblity, however, affects the situation if the document is registered.
>
> The doctrine of immediate indefeasibility means that the registered transferee (or mortgagee or other person) has an indefeasible title. If the person seeking to enforce the document was fraudulent, his or her title is not indefeasible (s.62, *Land Transfer Act* 1952)."

Despite *Frazer* v. *Walker* and the affirmation of title instantly on registration, given the potential effect of the Contractual Mistakes Act on mutual mistake, the law may not be settled at this point in time.

There is, however, an interaction with the indefeasibility provisions of the Land Transfer Act, and the certificate of correctness must "touch and concern" the intention

[31] *Paora Torotoro and Rewi Haokore* v. *Sutton*, (1875) 1 N.Z. Jur. N.S. (S.C.) 57;
Watson v. *Cullen*, (1886) N.Z.L.R. 5 S.C. 17;
Loke Yew v. *Port Swettenham Rubber Co., Ltd.*, [1913] A.C. 491; and
Taitapu Gold Estates, Ltd. v. *Prouse*, [1916] N.Z.L.R. 825,
distinguished *Assets Co., Ltd*. v. *Mere Roihi*, (1905) N.Z.P.C.C. 275, and
Boyd v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174.

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of the parties. It is a certificate that the instrument carries into effect the intention of the parties.

4) That the instrument is not void because of the incapacity of the transferee

In the leading case, *Tataurangi Tairuakura* v. *Mua Carr* (1927) NZLR 688 CA, the Court of Appeal held that the register could be rectified by striking off a transfer, which was void, by reason of the transferee's incapacity.

The respondent was a member of the committee of management of certain tenants in common, incorporated under the Native Land Act, 1909, by order of the Native Land Court.

A lease of land was executed by the committee in favour of the respondent, duly confirmed by the appropriate Maori Land Board, and registered under the Land Transfer Act.

The Board did not know that the respondent was a member of the committee, but was satisfied that the lease was fair. Later, action was brought to have the lease declared void and removed from the Register, on the ground that the respondent was a trustee, and, therefore, could not lease to himself.

The Court found that, whilst the respondent was not a trustee of the land, the trustee being the corporation, he was an agent of the trustee, and, therefore, affected by the rule relating to the purchase of trust property by trustees: **in fact, any person standing in a fiduciary position would be so affected.** *[Emphasis added]*

This disability was not removed by the confirmation of the lease by the Maori Land Board. The only matter then remaining to be considered was whether registration under the Land Transfer Act validated this void lease, and this was disposed of by Sir Charles Skerrett, C.J. (delivering the judgment of the Court of Appeal), in these words, at p.702:

> "It was further contended that the registration of the lease under the provisions of the Land Transfer Act confers an indefeasible title upon the respondent Carr. I think that this contention is wholly untenable. The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his own interest. This principle appears to be well settled in Australia; See *Cuthbertson* v. *Swan* (11 S.A.L.R. 102), *Groongall Pastoral Co*. v. *Falkiner* (35 C.L.R. 157, 163), and *Barry* v. *Heider* (19 C.L.R. 197)."

Although this case would be overruled on the indefeasibility aspect by *Frazer* v. *Walker* the principle set out above is still proper practice.

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5) That the instrument is not void because of the incapacity of the transferor

Salmond J., in Boyd's case (*supra*), raised the query as to the effect upon a dealing, void because it had been executed by an infant. He said, at p.1203:

> "I can see no difference in this respect between an instrument which is void because (unknown to the parties) it is a forgery, and one which is void because executed by an infant."

Two Australian cases reached opposite conclusions. In *Coras* v. *Webb and Hoare* (1942) St R Qd 66, the views of Salmond J. were preferred to the majority opinion in Boyd's case on the effect of infancy want of authority, mistake and *ultra vires*.

Invalid instruments were not to be validated by registration. At about the same time, the Victorian Supreme Court, in *Percy* v. *Youngman* (1941) VLR 275, came to the opposite conclusion, approving the opinion of the majority in Boyd's case and validating a transfer from an infant.

In the theory of registration, *Frazer* v. *Walker* should have settled the matter. However, there is the distinct possibility that statutes enacted since *Frazer* v. *Walker* may have created further exceptions to indefeasibility. Adams' *Land Transfer Act* deals comprehensively with the new law on disability and, for convenience, the commentary at paras s.67.5, 6 is set out in full.

67.5 Minors and indefeasibility of title

While a minor (who is an unmarried person under 20 years of age) may be the registered proprietor of an estate or interest in land, he or she has limited contractual capacity to deal with that land. The minor's contractual capacity is governed by the Minors' Contracts Act 1969. In general, if the minor is under 18 years of age the contract is unenforceable against him or her. If it thinks that the contract is fair and reasonable, however, the Court may enforce it against the minor, either in part or in whole: s6. If the minor is 18 years or older, however, the contract is enforceable against him or her, subject to the Court's power to cancel it: s5.

If a Registrar has notice that a minor is to be registered as a proprietor of land or of an interest in land, s.67 of the Land Transfer Act requires him or her to state the particulars of the minority on the certificate of title. See also s.211(d), pursuant to which the Registrar may enter a caveat.

One effect of a Registrar noting the registered proprietor's minority upon the certificate of title is to confer notice of the minor's limited contractual capacity to third parties. The Registrar will also decline to register any instrument executed by the minor unless and until the underlying transaction has received the approval of the Court under s.9 of the Minors' Contracts Act 1969. If granted, the Court's approval is usually endorsed on the instrument. Failure of the Registrar to refuse registration will give rise to a claim for compensation under Part XI of the Land Transfer Act.

Even if the registered proprietor's minority has not been recorded on the certificate of title, there is an argument that the Minors' Contracts Act impliedly overrides the indefeasibility provisions of the Land Transfer Act. In support of this is the definition of "property" in s.2 of the Minors' Contracts Act 1969, which includes "land". Under s.7 of that Act, the Court may also make such order by way of compensation or restitution of property, as it thinks just. The learned authors of Hinde, McMorland and Sim, *Butterworths Land Law in New Zealand*

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(1997) para. 9.004 [32], suggest that the Minors' Contracts Act does constitute an exception. If so, relief may be obtained by seeking the Court's validation of the underlying transaction or compensation/restitution under s.7.

It would seem that a conveyancer needs to take the precaution of making inquiries as to the age of the registered proprietor, as even if no memorial appears on the title, the transfer may be defeasible.

67.6 Other disabilities

The direction under s.67 is not restricted to the disabilities arising from minority, but extends to other legal disabilities. If, for instance, a Registrar has notice that a registered proprietor is a "mentally disordered person" (defined in s.2 Mental Health (Compulsory Assessment and Treatment) Act 1992), particulars thereof should be noted on the certificate of title. A caveat under s.211(d), with respect to "unsoundness of mind" may also be entered.

Subject to the application of the Protection of Personal and Property Rights Act 1988 (noted below), such steps may be necessary to provide protection for the registered proprietor who is experiencing the disability, for, unlike the position with respect to minors, there is no indication that the general provisions of the Land Transfer Act as to indefeasibility of title will not apply to a registered proprietor who acquired his or her interest from a person suffering from this disability.

Under the Protection of Personal and Property Rights Act 1988, where the Family Court is satisfied that any person lacks wholly or partly the competence to manage his or her own affairs, and this may be because of a mental disorder, it may appoint another person to act as manager of that person's property. Under s.53, a protected person is incapable of exercising personally any of the powers vested in the manager, in respect of any property to which the manager's powers extend. Any transfer, lease, mortgage or other disposition of property entered into by a person subject to a property order is voidable by that person or the manager. Again, this disability can be noted on the certificate of title.

Presumably, the effect of s.53 of the Protection of Personal and Property Rights Act 1988 is similar to that of s.7 of the Minors' Contracts Act 1969, with the effect that it also constitutes an exception to indefeasibility. If so, s.53 also provides that the Court may make such orders as it thinks just. Relief may also be denied, wholly or in part, if a person who has taken title in good faith has so altered his or her position, in reliance of having received "an indefeasible" interest, that it would be inequitable to grant relief."

6) The instrument is not void by reason of being contrary to statute law

(a) Where the instrument is a private document between private parties, which correctly sets out the intention of the parties, but infringes the provisions of a statute; and

(b) Where the instrument is in the nature of a public document, such as a proclamation, which is void, because it infringes, or does not comply with, the authorising statute, or some other statute.

On the face of *Frazer* v. *Walker,* each of these classes of registration are beyond doubt. Validity is assured by registration. *Housing Corporation of New Zealand* v. *Maori Trustee* (1988) 2 NZLR 662 and *Registrar-General of Land* v. *Marshall*

[32] **Editor' note** - Retained in the on-line edition.

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(1995) 2 NZLR 189 have confirmed that there is no longer any doubt, not at least in the minds of the judiciary. In *Housing Corporation,* a mortgage over Maori freehold land had been registered, notwithstanding that s.233(1) of the Maori Affairs Act had not been complied with. Section 233(1) provides:

> "No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court."

McGechan J. had no doubt (at p.678) that s.233(1) was subject to the immediate indefeasibility effects of the Land Transfer Act 1952.

Hammond J. in *Registrar-General of Land* v. *Marshall* adopted this conclusion, at p.198:

> "In short, on this sort of question of primacy, the Land Transfer Act trumps the Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which absolute security is required — without any equivocation — it must be in the area of security of title to real property. I completely agree with the premise that, with respect, lies behind much of McGechan J's reasoning that any watering down of the primacy of indefeasibility of title through failure to carry out collateral notifications to other Registries ought to be resisted strenuously."

There seems no need to pursue this aspect further, except to note that the registrar as a law officer of the Crown has always had a responsibility in a unique way to enforce the policies of the Crown, as specified in its statutes. Observance of statutory precepts is also however a responsibility of solicitors certifying transactions correct — as Hammond J. said in *Marshall,* at p.200 —

> "a solicitor surely certifies any collateral matters"

At p.201, His Honour went on to say:

> "If then, both Mr Corbett (the deceased solicitor) and the Registrar had obligations in law in this instance to see that the Maori Land Court endorsement was attended to, but did not adhere to them, could liability be apportioned between them? The Judge answered that affirmatively. I think he was correct in that approach. As long ago as 1889 the Court of Appeal held, in *Miller v Davy* (1889) 7 NZLR 515, that the general doctrine of contributory negligence operated as a complete bar. The Contributory Negligence Act 1947 now allows apportionment (s 3(1)). That provision is not limited to pure tortuous liability (*Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (CA))."

7. The instrument is not void or voidable through a failure to search the records of the registry to ascertain the existence of prior competing interests

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Reconciliation of the Certificates

The distinction between the basis of the certificate of correctness and the basis of the certificate of registration is clear.

The correctness certificate covers the behavioural aspect of dealings — the part of the process which is external to the registry and over which the registrar has no control. The certifier knows of the antecedents, the intention of the parties and any special aspects of law which may apply.

The registrar's role is more prescribed. Instruments are examined on their face, tested against the records of the office and relevant law is applied. Whilst the current certificate of correctness is a certificate of statutory compliance with collateral application to a dealing, a distinction may be made between the function of the registrar and practitioner in terms of:

(a) statutory *enforcement* by the registrar; and
(b) statutory *observance* by the practitioner.

The registrar is like a policeman, being accountable only to and for the law. Like an auditor, the registrar looks both ways in a one-way street. The practitioner, on the other hand, has a responsibility to correctly observe the law and to act in the best interests of the client. How, if the practitioner's certificate is envisaged as the sole pass against the law, is a reconciliation of accountability to be achieved, given the power of the registration process to make an invalid instrument a valid one?

The answer may lie in the approach now operative in land titles administration. The two statutes, which in the past gave most difficulty in administration in the land registries, were the Public Works Act 1928 (Sections 125 and 128 dealing with legal frontage on subdivision) and the Land Settlement Promotion and Land Acquisition Act 1953 and its predecessors.

When the Public Works Amendment Act was enacted in 1900, as the first major piece of subdivisional law, the registrar became responsible for ensuring that roads were of authorised width and that legal frontage was provided for existing parcels when transferred and for new parcels when land was subdivided. Difficulties in interpretation were legend and often quite strenuously argued.

The Land Settlement Promotion and Land Acquisition Act, enacted principally to prevent the aggregation of farm land, enabled exemptions in certain circumstances for additional acquisitions, particularly in respect of trusts for children and grandchildren. It too was the subject of strenuous argument.

Sections 125 and 128 of the Public Works Act 1928 were superseded in Counties in 1961 and in Municipalities in 1964 and today have a residual function only in rare subdivisional situations where the current subdivisional legislation, the Resource Management Act 1991, does not apply, councils now having full responsibility for subdivisions.

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The Land Settlement Promotion and Land Acquisition Act is now repealed. The elimination of contentious statutes from the scheme of registration provides an opportunity to reassess the role of the registrar and practitioner in certifying the effect of dealings. The legislation which now affects established certificates of title is largely in the nature of a direction to the registrar, a prohibition, or requires some observance such as a consent by a local authority etc. etc.

The basis of the practitioner's certificate of correctness and the registrar's certificate of registration may be illustrated by taking the analysis at pages 27-30 (*supra*) (the registrar) and at pages 30-36 (*supra*) (the practitioner) and charting their respective contributions to the registration outcome. The chart is illustrated on the following page.

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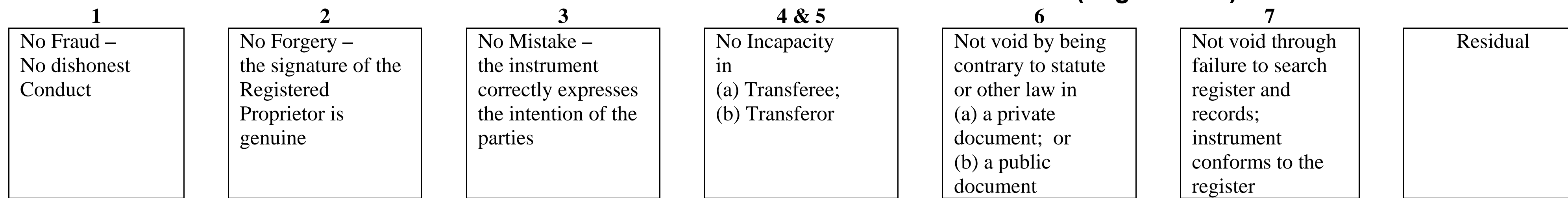
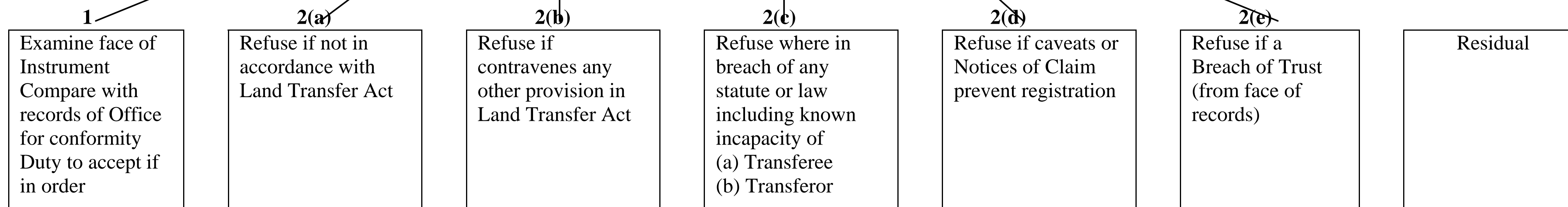
CERTIFICATES UNDER THE LAND TRANSFER ACT

The Basis of the Practitioner's Certificate of Correctness (Pages 30-39)



Registration



The Basis of the Registrar's Certificate of Registration (Pages 27-30)

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4 Potential for Certificate of Correctness and Compliance in a fully Automated System[33]

It is possible in a manual system not to have a certificate of correctness and rely wholly on the registrar's certificate of registration, cf. Western Australia and Victoria which, from the outset, dispensed with a certificate of correctness. What would happen to relationships in an automated system, in which instruments would be processed without human intervention, the registrar's examination being dispensed with? Reliance would be based wholly on the practitioner's certification.

1) The System

The automated system would refuse instruments which are not in accordance with the prescribed requirements as to form under the Land Transfer Act. The system would also decline registration, if the register were subject to a caveat or notice of claim or other entry preventing registration.

Items 1, 2(a) and 2(d) of the registrar's chart would be eliminated by the system. There would be no examination by registry staff and a correspondence of the instrument with the register and records of the registry would be achieved by the operation of the system.

2) The Behavioural Elements

The practitioner's certificate would continue to certify that there is no fraud, dishonest conduct or forgery, that the signature of the registered proprietor is genuine and there is no mistake — the instrument correctly expresses the intention of the parties.

Items 1, 2 and 3 of the practitioner's chart would continue to be certified as in the manual process.

3) Legal Requirements

The emphasis on enforcement in the registrar's chart 1, 2b, 2c and 2e would be replaced by observance of the appropriate protocols within the scope of items 4, 5, 6 and 7 of the practitioner's chart.

The registrar's duty to examine the instrument on its face and to ensure from the information so obtained and the records of the registry that there is no breach of the law, that so far as the register has notice of a disability that no breach of the law occurs and that no trust, of which the registrar has notice, is compromised, and there is no fraud, or improper dealing, may be subsumed into the legal elements of the practitioner's certificate.
The practitioner would certify, not from the narrower base of disclosure on the face of the instrument, but from the practitioner's knowledge of the origin and development of the dealing.

[33] **Editor's note** – See footnotes 2 and 34.

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The practitioner's certificate would therefore be more broadly based and, together with the checks provided by the system, would cover the matters now considered by the registrar prior to providing a certificate of registration.

However, whilst a certificate of correctness and statutory compliance may be achieved in a practical sense, it would not be fully supported by the current law.

Future Action

The first task is to identify all law-based requirements for the registrar's consideration in the statutes; all legal requirements imposed by statute law which affect the validity of instruments under the Land Transfer Act; and any statutory requirements that require the exercise of a discretion by the registrar. As well as providing a catalogue of items for certification of compliance when appropriate, any sections which may have to be amended will be identified.

The provisions of the Land Transfer Act which deal with form and legal requirements will require assessment and amendment. In particular Section 42 of the Land Transfer Act 1952 and Regs 16 and 17 of the Land Transfer Regulations 1966 (SR 1966/25) will require modification. Other sections dealing with compensation may require amendment to realign with and maintain the state guarantee of title. There may be room for some structural amendment which may limit liability in certifying statutory compliance. In this respect *Torrens Title*, Stein and Stone (1991) Butterworths, Sydney comment at p113:

> "The insertion of a s43B into the New South Wales Act went some way in this direction. The section holds that a statutory restriction would not bind a registered proprietor who became registered in good faith and for valuable consideration if the restriction was not recorded in the register when he became registered. Unfortunately the provision is limited to restrictions imposed by the Crown Lands Consolidation Act 1913, the Returned Soldiers Settlement Act 1916, the Western Lands Act 1901, any Act relating to closer settlement or any other Act relating to alienation of land of the Crown. Provisions such as this could solve the problem of uncertainty caused by overriding statutes to a great extent and their wide use is recommended."

This paper is not intended to provide particular solutions to individual statutory situations. Rather it seeks to establish the viability of the proposal to extend the effect of the solicitor's certificate of correctness to enable registration to be completed without further examination. Within the range of the certificate of correctness — a range defined by its history and potential — there is scope for the extension.[34] In the statute its status should be enhanced.

B E Hayes
Legal Consultant
12 July 2000

[34] **Editor's note** – For requirements for certification in the electronic medium, see *NZ Gazette* 2002/166, at pages 4175-4180

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