Judgment of the Lords of the Judicial Committee of the Privy Council on (1) *the Consolidated Appeals of The Assets Company, Limited,* v. *Mere Roihi and others, and The Assets Company, Limited,* v. *Wiremu Pere and another;* (2) *The Consolidated Appeals of The Assets Company, Limited,* v. *Panapa Waihopi and others, and The Assets Company, Limited,* v. *Wi Pere and others;* and (3) *The Consolidated Appeals of The Assets Company, Limited,* v. *Teira Ranginui and others, and The Assets Company, Limited,* v. *Heni Tipuna and others, from the Court of Appeal of New Zealand; delivered 1st March* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

The substantial question raised in each of these three Appeals is whether the Assets Company, Limited, has acquired a good title, as against the Plaintiffs, who are Natives, to certain lands in New Zealand. The Natives have long been out of possession. The Assets Company is and has been for many years not only in possession but also registered in the land registers of the Colony as owner of the lands in dispute. The Appeals arise out of actions brought in the Supreme Court by a few Natives to recover portions of land which formerly belonged to them and many others. In form the actions are not

34532. 100.—3/1905. [10, 11, and 12.] A

for recovery of possession, but for the rectification of the register and for mesne profits. But whether the substance or the form of the actions is regarded, it is obvious that it is for the Plaintiffs to establish their claim, and not for the Assets Company to prove their title as if they were themselves Plaintiffs out of possession.

The lands in question in the first Appeal are known as Waingaromia No. 3; those in question in the second Appeal as Waingaromia No. 2; and those in question in the third Appeal as Rangatira No. 2.

The title of the Assets Company is derived historically through one Cooper, who many years ago bought the lands in question from the natives. The sales to him were carried out in the Native Land Court. Orders and other documents necessary to enable the Assets Company to be registered as owner under the Land Transfer Acts were obtained, and the Assets Company was registered accordingly as its titles were completed. The Company's title as registered owner is impeached by the Plaintiffs in all three cases on two grounds, viz., first, that the registration of the Company as owner was procured by fraud, and secondly, that such registration was invalid by reason of the invalidity of the orders of the Native Land Court on which warrants of the Governor, having the effect of Crown Grants, were issued, on which warrants the registration was founded.

Before dealing with the facts relied upon for the purpose of establishing these contentions it will be convenient to examine the Statutes relating to the Land Registry, and to ascertain the legal effect of registration, for if this effect is what the Assets Company contends there is an end of the Natives' claim. The Assets Company contends that, in the absence of fraud by the Company or its agents, registration is conclusive,

and confers a good title on the Company; and that defects in the proceedings in the Native Land Court, even if proved, cannot affect the title of the Company, although such defects may possibly entitle the Natives to compensation for any injury caused to them by improper registration. The question thus raised is one of the greatest importance in the Colony, and, unfortunately, there is a difference of opinion upon it amongst the members of the Supreme Court.

The system of Land Registry in New Zealand was introduced in 1860; and from 1870 to 1885 it was governed by the Land Transfer Act of 1870 and Acts amending it passed in 1871, 1874, 1880, and 1885, when it was repealed, but re-enacted with amendments and additions.

Land Transfer Act, 1870, Sects. 7 and 19.

The Act of 1870 was, shortly, to the following effect. In every district there was a District Land Registrar whose duty it was to examine into the title of every person applying for registration, and if satisfied with the title he was to issue a certificate of title and to register it. His certificate duly authenticated under his hand and seal was made evidence in all Courts of Law and Equity of the particulars therein set forth, and of their being entered in the Register Book; and except in cases after provided the certificate was conclusive evidence that the person named in it was entitled to the land mentioned in it for the estate or interest therein mentioned, and no certificate could be impeached on the ground of want of notice or of insufficient notice of the application to bring the land under the provisions of the Act or on account of any error, omission, or informality in such application or in the proceedings pursuant thereto by the District Land Registrar.

Sect. 23.
Sect. 37.

Sects. 39 and 139.

Sects. 22 and 23

In connection with this enactment it is material to notice that on registration the applicant's documents of title had to be given

up to the Registrar to be cancelled and kept in the office.

The excepted cases mentioned in the clause referred to above were fraud, prior certificates or registered grants, omitted or misdescribed easements and errors in descriptions of parcels or boundaries. There was moreover another exception in favour of persons adversely in possession when the land was brought under the provisions of the Act and continuing up to the time of granting the certificate.

Sects. 46 and 129.

Sect. 139.

As regards fraud, it was provided that, except in cases of fraud, no person dealing with a registered proprietor need inquire into the circumstances in, or the consideration for, which he or any previous registered proprietor became registered, nor see to the application of purchase money, nor be affected with notice direct or constructive of any trust or unregistered interest; and knowledge of any such trust or interest was not of itself to be imputed as fraud.

Sect. 119.

It was further provided that no action for possession or other action for the recovery of any land should lie against the registered proprietor for the estate or interest in respect of which he was registered except in certain specified cases; and except in these cases the production of a registered grant or certificate was an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. The only excepted case which need be mentioned was thus expressed: "the case of a person deprived of any "land by fraud as against the person registered "as proprietor of such land through fraud, or as "against a person deriving otherwise than as a "transferee *bonâ fide* for value from or through "a person so registered through fraud."

Sect. 129.

The other excepted cases above referred to do not require further attention.

Land Transfer Act 1870, Sect. 19, Cl. 4. Sect. 116.

There was power to rectify the Register; and to state cases for the opinion of the Supreme Court. The provisions relating to these matters were re-cast in the Act of 1885 and may be passed over.

Sects. 35 and 130.

Light is thrown on the general scheme of the Act by the provisions relating to the Land Assurance Fund. A schedule of charges to be paid by persons applying for registration is given at the end of the Act and these charges form the fund. Any person deprived of land in consequence of any fraud, or through the bringing of such land under the provisions of the Act or by the registration of any other person as proprietor, or in consequence of any error, omission, or misdescription in any certificate of title or in any entry or memorial in the Register Book might bring an action for damages against the person upon whose application such land was brought under the provisions of the Act or such erroneous registration was made, or who acquired title through such fraud, error, omission, or misdescription. This was qualified in certain cases of a transfer to a *bonâ fide* purchaser for value by making the assurance fund bear the damages sustained. This provision, taken in connection with those already referred to, went far to show that except in the excepted cases the registered certificate was to be conclusive and that the remedy of persons wrongfully deprived of their property was to obtain damages from the wrong-doer.

So the matter stood under the Act of 1870.

Land Transfer Act 1871, Sects. 8 and 12.

The Act of 1871 introduced a Provisional Register for dealings with Crown lands before grants for them were obtained and before certificates of title under the Act of 1870 could be issued. The temporary receipts and memorials

Land Transfer Act, 1871, Sect. 9.

issued under this Act were made evidence, but it was enacted at the end of Section 9 that the

estate or interest of a registered proprietor of land on the Provisional Register should be indefeasible only against the person named in the original receipt and all persons claiming through, under, or in trust for him. This shows pretty plainly what the effect of being on the Permanent Register was understood to be.

Land Transfer Act 1874.

The Act of 1874 provided for the registration of instruments affecting land granted under the Native Land Acts, but for which no Crown grant had been issued. The machinery of the Provisional Registry was made applicable to these cases; but otherwise the Act is not important.

Land Transfer Act of 1880, Sects. 7 and 9.

The Act of 1880 merely extended the Act of 1870 to some cases to which that Act did not originally apply.

Land Transfer Act, 1885.

The Land Transfer Act of 1885 consolidated and amended the previous Acts, and although it was not in force when the property in dispute was being dealt with in the Native Land Court, it was in operation when the Assets Company was registered as owner. The system of registration already described was continued, but some important provisions were added, and many of the clauses in the previous Acts were revised and altered. The following are those sections which are important on the present occasion.

Sect. 10.

Section 10 describes the land subject to the provisions of the Act. It includes—

"All land which has already in any manner "become subject to the provisions of the Land "Tranfer Act, 1870, or any Act amending the "same, or of the Land Registry Act, 1860."

"All land hereafter alienated, or contracted to "be alienated, from the Crown in fee."

"All land in respect of which any order shall "hereafter be made under the provisions of any "Native Land Act in force for the time being "which shall have the effect of vesting such "land in any person in freehold tenure."

All the lands in dispute in these Appeals appear to their Lordships clearly to come within this Section 10. The certificates of title issued under the Act of 1870, Section 33, and the issue of the Governor's warrants make this point plain.

Land Transfer Act, 1885, Sect. 12.

Section 12 makes a certificate of title issued on the Governor's warrant equivalent to a Crown grant, and Section 13 makes the warrant conclusive evidence to the Registrar of the matters required to be stated therein.

Sect. 13.

Sect. 17 *et seq.* and Schedule 2.

The mode of applying for certificates of title is much the same as before; and the old title deeds are to be delivered up and cancelled as before. The sections relating to this subject, and the forms in Schedule 2, strongly confirm the view that the lands in dispute come within Section 10.

Sects. 19 and 28.

Sect. 31, &c.

The old provisions respecting the Register and the duty to keep it are reproduced, and a certificate of registration is conclusive evidence of registration. No instrument not registered is effectual to pass any estate or interest in land under the provisions of the Act, but upon the registration of any instrument in manner described the estate or interest specified in such instrument shall pass according to its terms.

Sect. 35.
Sect. 36.

Sect. 42.

The old enactments relating to provisional registration are consolidated, and provision is made for transferring to the Register the memorials and entries on the Provisional Register as soon as they are finally completed.

Sect. 43 and 44.

Sect. 45.

Section 45 enacts that, subject to any special provisions in the Act, all its provisions shall, so far as circumstances will admit, apply to land on the Provisional Register and to the registration of instruments and other matters affecting the same. This lets in a number of important sections making the Register conclusive (*e.g.*, Sections 55, 67, 189, and 190), but it is provided that the estate or interest of a proprietor

on the Provisional Register shall be indefeasible only against the person named in the original receipt or order and those claiming through, under, or in trust for him. This reproduces the last part of Section 9 of the Act of 1871 before referred to. As in the Act of 1870, so in this Act of 1885, the Register is made conclusive evidence of the title of the registered proprietor except in cases of fraud, prior certificates of title or registered grants, omissions or misdescriptions of easements and wrong description of parcels or boundaries, to which must be added adverse claimants in possession at the time of bringing the land under the Act and continuing in such possession at the time of issuing the certificate.

Land Transfer Act, 1885, Sect. 55.

Sect. 67.

Certificates of title duly signed and sealed are made conclusive evidence of title as in the Act of 1870, Sections 39 and 139.

Sects. 65 and 66.

The protection thus afforded is strengthened, as in the Act of 1870, by the preservation in Section 56 of the enactment against bringing actions against registered proprietors (*i.e.*, Section 129 of 1870) already noticed.

Sect. 56.

Further protection is afforded by the reproduction of Section 119 of the Act of 1870 relating to notice and knowledge of unregistered interests, and there is a new clause specially protecting *bonâ fide* purchasers or mortgagees from registered proprietors.

Sect. 189.

Sect. 190.

The provisions relating to the correction of certificates of title and of the Register have been re-cast, and the powers of the Registrar in this respect have been enlarged. Subject to regulations under the Act he is empowered to correct errors and supply omissions, and to require certificates of title or other instruments to be delivered up to be cancelled or corrected if issued in error, or if they contain any misdescription of land or boundaries, or if fraudulently or wrongfully obtained. He can apply to the Supreme

Sects. 68 and 69.

Sects. 70 and 71.

Court to compel people to appear before him and to deliver up documents as required. Appeals lie from his decisions to the Supreme Court. Large, however, as these powers are, it has been decided that they cannot be exercised to the prejudice of a registered *bonâ fide* purchaser. *In re Macarthy and Collins*, 19 N.Z. L.R., 545 (1901). Their Lordships have not to consider his power, but they doubt whether the Registrar can set aside a Crown Grant or its statutory equivalent; they are disposed to think that his power to rectify is limited to some fraud or other cause intervening after the Crown Grant or equivalent instrument which originally brought the land on the Register.

Sect. 191, &c.

There does not, moreover, appear to be any power conferred on the Supreme Court to cancel or correct any certificate of title or entry on the Register unless applied to by the Registrar or on appeal from him, except where land or some estate or interest therein is recovered by some proceeding in that Court from a registered proprietor. In such a case, if the proceeding is not expressly barred,—*i.e.*, if having regard to Section 56 the Plaintiff is entitled to recover—the Supreme Court or Judge can direct the Registrar to cancel a certificate or entry and to substitute another for it.

Sect. 73.

These provisions confer upon the Supreme Court jurisdiction to entertain such actions, and to make such orders as those which give rise to these Appeals, if the Plaintiffs are entitled to recover the land. Whether those orders have been rightly made is a different question.

The provisions relating to the insurance fund are also reproduced, but are considerably altered and extended. Any person sustaining loss through any omission, mistake, or misfeasance of the Registrar or any of his officers, and any person deprived of any land through its being brought

Land Transfer Act 1885, Sect. 177, *et seq.*

Sect. 178.

under the Act, or by the registration of any other person as proprietor, or by any error in any certificate of title or in any entry or memorial of the Register, or who has sustained any loss by the wrongful inclusion of land in any certificate, and who by that Act is barred from bringing an action for possession or other action for the recovery of the land may obtain compensation out of the fund. Provision is also made for the recovery by the Registrar of any money paid out of the fund as compensation for loss occasioned by fraud. Certain cases are excluded from compensation out of the fund, but they are not material on the present occasion. Actions for the recovery of compensation out of the fund are barred after the lapse of six years with an extension in case of disability.

Sect. 182.

Sect. 185.

Sect. 187.

The acquisition by Europeans of lands held by Natives under their Native customs was regulated by the Native Land Act 1873. The procedure to be followed is there fully set out. The proceedings commenced by bringing in a claim for investigation of the Native title; and if the title of the Natives was found satisfactory a memorial of their ownership was drawn up and signed by the Judge, and sealed with the seal of the Court and enrolled. It might be appealed against; but, subject to appeal, a certified copy of the memorial signed by a Judge of the Court and sealed with its seal, was not only evidence of the facts stated in it, but was made "conclusive of the "ownership of the land described therein accord-"ing to Native custom." Leases for not more than 21 years could then be granted, but Native land could not be otherwise dealt with except under the direction of the Court. Section 87 is express on this point. In the case of a sale, a memorandum of transfer by the sellers to the purchasers was signed and submitted to the Judge, and it was his duty to satisfy himself that everything

Native Land Act 1873, Sects. 33, 47.

Sect. 58.

Sect. 51.

Sects. 48, 59, 60, 87.

was in order, and that the proposed sale was fair to the Natives, and that the consideration was adequate and was paid. The memorandum of transfer was an important document, but it was not binding even as an agreement (Section 87).

Sect 61.

On being satisfied that all was right, the Judge was to draw up a certificate of the completion of the sale, and endorse it on the memorial of ownership with a declaration as thereinafter mentioned to the effect that the purchaser should thenceforth hold the land as freehold. This document was then to be sent by the Judge to the Governor with a recommendation for a Crown Grant. By Section 75 the Judge of the Native Land Court was authorised, by an Order signed by him and under the seal of the Court, to declare that the land should be held for the future in freehold tenure, and it was enacted that such land should be held as freehold accordingly anything thereinbefore provided notwithstanding, and from the date of such Order the Native title over the land comprised in such Order should be extinguished; and the Governor was empowered at any time thereafter to issue a Crown Grant for any such land. The effect of such an order, commonly called an "Order of freehold tenure" was not to transfer the title of the Natives, but to extinguish it, and to confer a new right on the purchaser.

This Act of 1873 was followed by several amending Acts, and was repealed by the Native Land Court Act, 1886.

Their Lordships do not consider it necessary at present to allude further to the Native Land Acts. The important matters to be borne in mind are: (1) That the Native Land Act, 1873, was passed after the Land Transfer Act 1870, and that Orders made by Judges of the Native Land Court would have to be acted on by District Land Registrars; (2) That the Native Land Court

was specially created to watch over and protect the Natives against being unfairly dealt with by Europeans in transactions relating to lands; and that the jurisdiction of that Court to sanction sales, and make orders vesting lands in purchasers for estates of freehold cannot be denied. How far errors in procedure affect the validity of Orders made by the Court in the exercise of its jurisdiction is one of the questions raised by these Appeals.

Their Lordships' attention was called to many decisions on the Native Land Acts and the Land Transfer Acts, and some of them are important. The memorial of ownership which is a very important document, and the root for future purposes of the title of the Natives mentioned in it has been held to be conclusive. (*In re The Okirae Block*, 10 N.Z. L.R., S.C. 677.)

A memorandum of transfer has been held to have no operation as a transfer or as an agreement until approved by the Native Land Court, but after such approval it becomes binding. (*In re The Kotarepaia Block*, 3 N.Z. L.R., S.C. 54; *Creditors' Trustee of Arekatera Te Wera* v. *Walker*, 3 N.Z. L.R., A.C. 91; *Paraone* v. *Matthews*, 6 N.Z. L.R., 744 and 7, ib. 528.

Orders of freehold tenure have given rise to differences of opinion. There are several decisions to the effect that, as between private individuals, they are conclusive in favour of *bonâ fide* registered purchasers, viz., *Att.-Gen.* v. *Tipae*, 6 N.Z. L.R., S.C. 157 (1887); *Matai* v. *Assets Company*, ib., 359; *Hami Tikitiki* v. *Assets Company and District Land Registrar*, 18 N.Z. L.R., 226 (1899); and *The Public Trustee* v. *The Registrar-General of Land*, 17, ib. 577 (1899), mentioned below. Indeed except the decisions under appeal their Lordships have found no case to the contrary. There are cases, however, in which orders of the Native Land

Court have been impeached and held void and great reliance was placed upon them by the Counsel for the Respondents. They were as follows:—

In *Te Raihi* v. *Grice*, 4 N.Z. L.R., A.C. 219, (1886) the Native Land Court made an order and then cancelled it and made another on which a Crown Grant issued. The Supreme Court in an action to which the Attorney-General was a party declared the Crown Grant void on the ground that the order on which it was obtained was void, the Native Land Court having had no power to cancel its first order. This case turned on an Act of 1867, and not on any of the Statutes which have to be considered on the present occasion. No registered title was in question then.

Seymour v. *Macdonald*, 5 N.Z. L.R., A.C. 167 (1887), was an application for a mandamus which was very properly refused. The last part of the head note, viz. that the certificate, if granted, would be invalid, does not appear in the Judgment, and can only mean that the applicant for it could not properly make use of it.

Poaka v. *Ward*, 8 N.Z. L.R., 338, (1889–90), was an application for a prohibition to stay a partition amongst Natives. There was no question of registered title. But the Court held that the proper steps to obtain a partition had not been taken and a prohibition was granted.

Paraone v. *Matthews* 6 N.Z. L.R., 744, affirmed 7 ib., 528 (1889) was really a case of fraud, and might have been shortly disposed of on that ground. The defendants knew they had no title when they got on the Register. The case, however, was decided on the ground that the proceedings were null and void rather than on the ground of fraud.

The Solicitor-General v. *Mere Tini*, 17 N.Z. L.R. 773 (1899), was a somewhat similar case,

but the Crown there applied to have a certificate of title followed by registration cancelled. This case does not show that if the suit had been between private individuals it would have succeeded.

Rutu Peehi v. *Davey*. 9 N.Z. L.R., S.C. 134 (1890) was a decision on points of law raised before trial. The District Land Registrar was a party, and compensation out of the assurance fund was claimed. It is obvious that this involved a much wider inquiry than an action against a registered owner; and in that very case no decision was given to the prejudice of the only *bonâ fide* purchaser.

The Public Trustee v. *The Registrar-General of Land*, 17 N.Z. L.R. 577 (1899), was, again, an application for compensation out of the assurance fund on the ground that the Crown had been wrongfully deprived of certain reserve lands vested in it. The title of the registered purchaser was admitted to be unimpeachable.

No one of these cases can be regarded as a clear decision adverse to the Assets Company on these Appeals unless fraud be establised against it.

The Assets Company procured itself to be registered in the following way:—

As regards the lands known as Waingaromia No. 3, the Company produced to the District Land Registrar a Warrant from the Governor of the Colony on the 7th May 1889.

As regards Waingaromia No. 2, the Company bought from the Liquidators of the Glasgow Bank, who were already on the Register, and produced an Imperial Act of Parliament vesting the assets of the Bank in the Company.

As regards Rangatira No. 2, the Assets Company produced certificates of title from the Native Land Court and Crown Grants and it was provisionally registered. Its title depends

on the Native Land Court Act 1894, which has no application to the other cases.

As regards Waingaromia No. 3, the Assets Company rely primarily on the absence of fraud and on the conclusiveness of their registered title. They raise other defences if their main contention fails. The question of fraud will be considered later; but apart from fraud the Respondents contend that the warrant was invalid because it was founded on an invalid order of freehold tenure, that this order was invalid because it was founded on an invalid memorandum of transfer from the Natives; that this was invalid because it was not founded on any memorial of title but only on an order for a memorial, and that this order was worthless because there was no certified plan before the Court when the order was made.

The alleged invalidity of the memorandum of transfer itself is based on evidence of irregularities in the signatures to it. It is alleged that some Natives who were interested did not sign it, and that others who were minors were not properly represented, and other irregularities are suggested. Having regard to the lapse of time and the long undisturbed possession and to what subsequently took place, their Lordships think they ought not to entertain objections of this character to the memorandum of transfer. They must assume that Judge Rogan performed his statutory duty and satisfied himself that the memorandum was substantially in order.

The objection to the Order of freehold tenure made by him is more serious. It is admitted that what is described as a sketch plan was before the Court, and that it was in all particulars identical with the plan which was afterwards approved by the proper officer except that it was not certified. The Judge could not therefore then make a memorial of ownership,

and in making his Order for a memorial, which was dated the 27th December 1876, he made a note in pencil, "Order not signed to stand over "till plan is certified to." It is not denied by the Appellants that the Judge could not make an order of freehold tenure until a memorial of ownership had been signed and enrolled upon which the order could be endorsed. And their Lordships think that Judge Rogan's order of freehold tenure must be regarded as provisional only until the plan should be certified. The important point for observation is that the judicial proceedings before Judge Rogan were complete, and upon the production of the plan, with the proper certificate on it, nothing more was required than the purely ministerial act of signing the formal documents necessary for carrying into effect the result of the proceedings before the Judge. No further exercise of judicial discretion was required, and on production of the certificate to the plan Judge Rogan might have signed the formal documents at any time.

Chief Judge Macdonald had express statutory power conferred upon him in 1886 to act for Judge Rogan and to complete what he had left uncompleted; and it appears to their Lordships that Chief Judge Macdonald had jurisdiction to do what he did. It will be remembered that Cooper, or those claiming under him, had throughout been in possession. This, no doubt, was the reason why Chief Judge Macdonald thought it right to antedate his orders. Their Lordships do not overlook the fact that Chief Judge Macdonald was correcting a mistake made by Judge Brookfield in 1884 when he ordered a Crown Grant or certificate of title to be issued to the Natives. This order, which was never signed, must have been made in ignorance of Cooper's position. The Respondents attach importance to this order, and in fact rely upon

Native Land Court Act, 1886, Sect. 67, and *see* Sects. 52 to 64 and 115 to 117.

Native Land Div. Act, 1882, Sect. 10.

it as showing their title to sue. This, however, places them in a difficulty, for Judge Brookfield's order presupposes a memorial of ownership in the Natives and would be worthless without it, and yet the only memorial they had to rely upon was the order for one made by Judge Rogan in 1876, which they now contend was itself worthless.

But realising as their Lordships do the difficulties arising from Judge Rogan's failure to complete the course of procedure prescribed by the Native Land Acts, their Lordships are of opinion that the registered title of the Assets Company to Waingaromia No. 3 can only be impeached for fraud. It was strenuously contended by Counsel for the Natives that the proceedings in the Native Land Court were not only irregular, but that the irregularities were of such a nature as to affect the jurisdiction of the Native Land Court and to render its proceedings and its order of freehold tenure absolutely null and void on the ground that it was *coram non judice*. The same contention assumed another shape when relied on to show that the lands in question were never brought under the Land Transfer Act, 1885, so as to render its provisions applicable to them.

Their Lordships have very carefully considered the judgments delivered in the Cour of Appeal upon this part of the case, as well as the very able and exhaustive arguments of the learned Counsel for the Native claimants, but their Lordships are unable to concur in the view taken by the majority of the Court and they concur in that taken by Williams J. who dissented from the Judgment. The sections making registered certificates conclusive evidence of title are too clear to be got over.

In dealing with actions between private individuals their Lordships are unable to draw any

distinction between the first registered owner and any other. A registered *bonâ fide* purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor, even if the title of the latter could be impeached by the Crown. The reasons for arriving at this conclusion are so clearly given by Williams J. that their Lordships do not think it necessary to do more than adopt them and supplement them by a few remarks on some of the arguments addressed to them and to which they are unable to assent. It is to be observed that in *The Solicitor-General* v. *Mere Tini*, 17 N.Z. L.R. 773, the title of the first registered owner was successfully impeached by the Crown. But in *The Public Trustee* v. *The Registrar-General*, ib., 577, his title was admitted to be unimpeachable. These cases are noticed above.

Their Lordships are not prepared to hold that a Crown Grant, or a warrant, or a certificate having the statutory effect of a Crown Grant, can be impeached except at the instance of the Crown, or at any rate in an action to which the Crown is a party. The power of the Crown to set aside its own Grant, or its equivalent, has not to be considered on the present occasion, and their Lordships do not therefore express any opinion upon it.

It by no means follows that errors in procedure, even in matters which in one sense affect jurisdiction, need be noticed or ought to be noticed by other persons whose duty it is to act on orders brought to them. It is not their duty to attend to such matters; if it were, their action would be paralyzed. What they have to look to is the order, and if that is good on the face of it, it is their duty to act upon it; and it must be treated as a sufficient foundation for what they do. Not only are they protected from liability if the order turns out to have

been improperly obtained, but if what they do under it is made conclusive on questions of title, a title which might be otherwise impeachable must be treated as valid.

The cases of *Matai* v. *Assets Company* 6 N.Z. L.R., S.C. 359, *In re Aldridge*, 15 N.Z. L.R. 361, and *Hami Tikitiki* v. *Assets Company* 18 N.Z. L.R. 226, &c., were decided and, in their Lordships' opinion, rightly decided on this principle. Having regard to the Land Transfer Acts and the Native Land Acts their Lordships are of opinion that it was not the duty of a District Land Registrar to examine into the validity of a Crown Grant, nor to enquire how a Governor's Warrant had been obtained, nor to inquire into the proceedings in the Native Land Court culminating in an order of freehold title. The Acts show that these documents may be assumed to have been properly obtained and may be safely acted upon by the District Land Registrars and by other persons acting in good faith.

See also 17 N.Z. L.R., p. 593.

The difference between want of jurisdiction over persons and subject-matter and wrong procedure in a court having such jurisdiction will be found discussed in *Pemberton* v. *Hughes*, L.R. 1899, 1 Ch. 781, where the Court of Appeal in England had to consider the validity of a divorce in Florida alleged to be *coram non judice* and void by reason of errors in procedure. The Court of Appeal held that such matters ought not to be regarded by a foreign tribunal called upon to recognise the Florida decree.

It is said that *Gibbs* v. *Messer*, 1891, A.C. 248 shows that registered titles may not be conclusive even in favour of a *bonâ fide* registered purchaser from a registered owner. The case no doubt does show that such a case may occur. The case was one of fraud and forgery. A transfer from a registered owner to a

non-existent person had been fraudulently procured and registered, and a fictitious transfer from that fictitious transferee to a *boná fide* mortgagee was afterwards registered. In a suit by the first registered owner against the Registrar, the registered mortgagee and the perpetrator of the fraud, the name of the first registered owner was ordered to be restored to the Register by this Board. The Supreme Court of Victoria had held that the true owner had lost her property but was entitled to damages out of the compensation fund. The Appeal was by the Registrar from this decision. This Board held that as there was, in fact, neither any transferee from the first registered owner, nor any transferor to the registered mortgagee, there was nothing to deprive the first registered owner of her property; nothing, in fact, on which the subsequent registrations could operate, and those registrations were accordingly ordered to be cancelled. Lord Watson, in his observations on the protection given to *boná fide* purchasers, points out that a *boná fide* purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud. But there is nothing in his Judgment in favour of the view that an original registered owner claiming through a real person does not get a good title against every one except in the cases specially mentioned in the Act, fraud being one of them.

Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true, for although trusts are kept off the Register a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged *cestui que trust* is a rival claimant, who can prove no trust apart from his

own alleged ownership, it is plain that to treat him as a *cestui que trust* is to destroy all benefit from registration. Here the Plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent. Their Lordships cannot give effect to the ingenious arguments addressed to them on this point. Nor can they adopt the case of *The Solicitor-General* v. *Mere Tini* (17 N.Z. L.R. 773) as an authority which ought to be followed in these Appeals.

The conclusions thus arrived at really dispose of all three Appeals, except so far as they are based on fraud. But before dealing with the charges of fraud their Lordships will shortly allude to the special grounds relied upon in the second and third Appeals.

In Waingaromia No. 2 the Liquidators of the Glasgow Bank, who claimed through Cooper, were registered as owners on the Provisional Register, and in August 1882 they obtained a certificate of title from the District Land Registrar.

45 & 46 Vict., c. clii., sects. 3 and 4, and 2nd Schedule.

By an Imperial Statute, the City of Glasgow Bank (Liquidation) Act, 1882, all the assets of the Glasgow Bank were vested in the Assets Company on their obtaining a discharge from the Liquidators for the purchase money and on the recording of such discharge as mentioned in the Act. The purchase money was to be paid on or before the 1st October 1882, but it was not in fact all paid before December 1882, and the statutory vesting did not take effect until then. On 15th August 1883 the Glasgow Bank Act was produced to the District Land Registrar, and he endorsed on the Liquidators' certificate of title a transfer to the Assets Company and

registered it. The Act vesting the assets in the Company vested them "subject to the "existing charges, debts, engagements, and "liabilities specifically affecting the same in the "hands of the Bank or the Liquidators," and the Court below has held that these words had the effect of overriding or controlling the Land Transfer Acts of the Colony. Their Lordships are unable to concur in this view. There is nothing in the Glasgow Bank Act to show that interference with the Colonial Land Acts was ever contemplated, still less that those Acts were to be overridden. The general vesting clause, when applied to lands in the Colony, must be read so as to work in harmony with the Colonial Acts, and in effect as conferring upon the Assets Company the right to procure themselves to be registered according to the laws of the Colony; and if that registration gave them rights in the Colony beyond what they might have without it there is nothing in the Imperial Act to deprive them of those rights.

Section 4.

Then it was ingeniously argued that these particular lands were not bought from the Liquidators on the faith of their being registered owners, and that the Land Transfer Acts did not therefore apply. But although the agreement to buy the assets of the Glasgow Bank in block was not based on the Colonial Land Transfer Acts, the completion of the purchase of these particular lands was based upon them, and nothing more can be reasonably required.

In 1883 the Land Transfer Acts in force in the Colony were the Act of 1870 and the Acts amending it. But the reasons for which registration under the Act of 1885 confers a good title apply also to the Acts in force in 1883, and although the Liquidators were only themselves entered as owners on the Provisional Register, a good transferable title had been acquired by

them, and the subsequent registered title of the Assets Company cannot be disturbed.

Passing now to Rangatira No. 2 the Assets Company rests its title on the fact that in October 1895 it obtained a certificate of freehold title under the Land Transfer Act 1885 and is registered as owner under that Act. The title is impeached for fraud and for irregularities in the Native Land Court, and especially for the invalidity of the memoranda of transfer from Natives, on which the title is founded. Fraud is denied, and will be passed over for the present. Their Lordships have already expressed their view of the conclusiveness of the Register. But as the objection to the validity of the transfers was argued at great length and prevailed in the Court of Appeal, their Lordships think it right to express their opinion upon it. The history of the case is complicated. It is fairly and correctly stated in the Appellant's case, paragraphs 8 to 12, and their Lordships do not think it necessary to repeat it in detail. The important points are that in 1875 the lands in question were brought by the Natives under the Native Land Acts, when a memorial of ownership was issued to them. Their title was then investigated and determined. They obtained a statutory title and ceased to hold solely by their old custom or usage. In the same year (1875) the Natives granted a lease for 21 years. Afterwards, between 1878 and 1883, most of the Natives signed memoranda of transfer of all their interests to the then lessees. These memoranda of transfer are those now impeached. No orders of freehold tenure followed them. But in May 1886 they were produced to, and approved and endorsed by, the Trust Commissioner, and his duty was, by the Act of 1881, to protect the Natives in their dealings with Europeans, to see that everything was fair, and that the

Native Lands Frauds Prevention Act of 1881. Sects. 4, 6, and 15.

purchase money was really paid. Without his certificate no transaction with the Natives could be registered. No rent was ever paid to the vendors after this. In 1886 partition proceedings were pending between the Natives; and the lands known as Rangatira No. 2 were allotted to those adult Natives who had sold their interests as above mentioned, and in May 1886 an order was made for the issue of a Crown Grant of this block to those sellers. Other blocks were allotted to the other Natives, and Crown Grants were ordered to be issued to them; and the memorial of ownership issued in 1875 was then cancelled. All this was done before August 1886, when two important Acts were passed. Mr. Graham, who represented the purchasers, was a consenting party to all these proceedings which were really taken not only to effect a partition between the Natives, but also to facilitate the completion of the purchaser's title.

These orders for Crown Grants were made, but were retained in the office as the fees for them were not paid.

Then the Native Land Court Act 1886 and the Native Land Administration Act 1886 were passed. The former Act by Section 115 repealed the Native Land Act 1873, but enacted that incompleted procedure might be completed either under the new Act or under the old. This Act was amended in 1888 and 1889.

Native Land Court Act, 1886, Sect. 115.

By the Native Land Administration Act, 1886, further provision was made for the protection of Natives and for the completion of incompleted transactions. This Act did not come into operation until January 1887, and it was repealed in 1888.

Native Land Administration Act, 1886, Sect. 24.

The Native Land Act, 1888, Sect. 8.

The Assets Company did not complete its title under either of these Acts.

So matters stood when the Native Land Court Act, 1894, was passed. At that time the lease and

the interests of the Native sellers, which had been bought as above stated, had become vested, first in the Liquidators of the Glasgow Bank, and afterwards in the Assets Company, by virtue of the Imperial Statute which has been already referred to, and in July 1895 the Company obtained the registration on the Provisional Register of the transfers from the Natives and its other documents of title, and in October following obtained first a warrant from the Governor for the issue of a certificate of title to the Native sellers, and lastly, from the District Land Registrar, a certificate of the Company's ownership under the Act of 1885, and registration of the Company as owner accordingly.

The contention of the Assets Company is that the Act of 1894 cured all defects and enabled it to acquire a complete title and to procure itself to be registered as owner. The contention on the other side is that the transfers had become pure waste paper, and that there was no title to register.

The Native Land Court Act, 1894.

It will be convenient first to consider the Act of 1894. It repealed the Native Lands Frauds Prevention Act, 1881, to which reference has already been made, and also the several Native Land Court Acts of 1886, 1888, and 1889.

Ib., Sect. 57.

The Act of 1894 enacts (Section 57) that every instrument endorsed by a Trust Commissioner as approved in terms of the Act of 1881 is to be deemed to have been confirmed by the Court within the meaning of the Act of 1894 and no further confirmation is required.

Ib., Sect. 73.

By Section 73 all land which was customary land when the Act of 1894 came into operation (and by Section 2 Rangatira No. 2 was such land) became subject to the Land Transfer Act, 1885 (already referred to), and every Native owner of such land, subject to all equities affecting his interest therein and to all existing restrictions on alienation thereof,

Ib., Sect. 2.

is to be deemed the proprietor thereof under the said Act for an estate in fee simple in possession. Further, by the same Section 73 any person claiming to have acquired an interest in any such land by virtue of any alienation prior to the coming into operation of the Act of 1894 may apply to the Court to have such alienation confirmed, and upon confirmation thereof the claimant becomes entitled to be registered under the Act of 1885 as proprietor of the estate or interest acquired. *Ib.*, Sect. 73.

This latter part of Section 73 above referred to cannot mean that cases that fall within Section 57, and which require no confirmation, are to be again confirmed. The latter part of Section 73 can only apply to incomplete transactions not approved and certified by the Trust Commissioner. This being the case, their Lordships are unable to see why Section 57 does not apply to these memoranda of transfers from the Natives which the Trust Commissioner did approve and certify, and their Lordships can see nothing substantially wrong in the procedure which resulted in the registration of the Company.

To treat the memoranda of transfer as waste paper appears to their Lordships to go a great deal too far. They were not valid as transfers, but they were the first step for obtaining such transfers and entitled the parties to take the necessary proceedings for completing them.

The repeal of the Act of 1873 led to difficulties which do not appear to have been removed by subsequent legislation prior to 1894. This is apparent from *Poaka* v. *Ward* (8 N.Z. L. R. 338) already referred to. The Act of 1894 was apparently passed to remedy them.

The true effect of the Act of 1894, Sections 57 and 73, was, in their Lordships' opinion, to entitle all the selling Natives to their shares in the lands sold, but subject to all equities

affecting the same. These equities included the right of the Assets Company to have the transfers which had been approved by the Trust Commissioner carried out and completed. There may have been irregularities in the procedure adopted, but their Lordships are of opinion that the Act of 1894 put matters right, and that there was nothing wrong in substance, nothing to affect the validity of the final certificate and registration of the Company as owner.

Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sections 40, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (viz. Sections 55, 56, 189, and 190) appear to their Lordships to show that by fraud in these Acts is meant actual fraud, *i.e.* dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that

he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him. 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.

In dealing with Colonial titles depending on the system of registration which they have adopted, it is most important that the foregoing principles should be borne in mind, for if they are lost sight of that system will be rendered unworkable. Their Lordships are keenly alive to the necessity of vigilance to protect Natives against unfair and oppressive dealings on the part of Europeans; but on the other hand it is equally important not to disturb registered titles of *bonâ fide* purchasers, especially when accompanied by long possession and large outlays.

It was urged by Counsel that the decision of this Board in *Gibbs* v. *Messer* (1891 A.C. 248) shows that it is not in all cases essential to bring fraud home to the registered owner. This is true; but the case is not really in point. As already explained, in *Gibbs* v. *Messer*, two *bonâ fide* purchasers were on the register, and the case turned on the non-existence of any real person to accept a transfer and get registered himself and then to make a transfer to some one else. Moreover, forgery is more than fraud and gives rise to considerations peculiar to itself.

In the First Appeal, Waingaromia No. 3, the fraud charged is fraud by the Assets Company in obtaining a warrant from the Governor and a certificate of title from the District Land Registrar.

In the Second Appeal, Waingaromia No. 2, various frauds on the Natives are charged

against Cooper and the Liquidators of the Glasgow Bank who purchased from him. There is no definite charge of fraud by the Assets Company. The only charge against the Company is that the Company obtained from the District Land Registrar an indorsement of the transfer from the Liquidators to the Company and that the obtaining of that endorsement was fraudulent and void as against the Plaintiffs.

In the third Appeal, Rangatira No. 2, the fraud charged is, again, that frauds were committed by other people and that the obtaining and retaining by the Company of a certificate of title from the District Land Registrar was fraudulent and void as against the Plaintiffs.

The evidence of fraud by the Company entirely breaks down. The evidence shows that in all these cases the agents of the Assets Company 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.

Their Lordships cannot help thinking that the equitable doctrines of constructive fraud have weighed too much with the Court of Appeal and have induced it to impute fraud to the Assets Company, although no dishonesty by the Company or its agents, or by the Liquidators of the City of Glasgow Bank, was really established. Nor is there any proof whatever that the Liquidators or the Assets Company dishonestly refrained from making inquiries which an honest purchaser would have made.

The conclusions thus arrived at dispose of all these Appeals. Their Lordships do not therefore think it necessary to give any opinion on several other defences to these actions which were raised in the Court of Appeal and relied upon by Counsel for the Appellants in their argument before this Board. Their Lordships refer to the defences based on the defective title in the Plaintiffs, the absence of other parties, the Statute of Limitations, the effect of long possession and large outlays on the lands sought to be recovered, and the effect of decisions in former unsuccessful actions by Natives suing on behalf of themselves and others. Their Lordships base their Judgment on the conclusiveness of the registered title in the absence of fraud.

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 *bonâ fide* purchasers on the Register. The same view has been taken in South Australia, as is shown by *Bonnin* v. *Andrews* (12 S. Austr. L.R. 153).

The conclusion of the whole matter is that their Lordships will humbly advise His Majesty to allow these Appeals and to reverse the Judgments appealed from, with costs, and to enter Judgment in each action for the Defendants, the Assets Company, with costs, and the costs of each Appeal must be borne by the Respondents thereto.