EQUITY AND THE TORRENS SYSTEM

By Brian Hunter*

The reason why the relationship between the rules of equity and the Torrens system of registration of title to land provides material for consideration and discussion may be stated in the following way. The rules of equity, so far as they affect real property, were developed in relation to the rules of the common law with respect to real property. They presuppose the existence of those rules; the way in which they affect them is well established. When there is introduced a new system of statutory law relating to real property, having fundamental differences from the common law system which it replaces, it is obvious that the old rules of equity will not be likely to fit the new system in the comfortable way in which they fitted, and still do fit, the old one.

None of the legislatures which produced Torrens system legislation took the extreme course of removing, or trying to remove Torrens system land from the sphere of equity altogether.[1] They recognized that such land would still be affected in some ways by equitable rules and they took some steps to regulate the effect of such rules upon such land, but it cannot be said that they fully and explicitly resolved all the problems arising from the fact that, in the case of Torrens system land, the system of law to which the rules of equity have to be applied is not the system for which they were designed. This has, accordingly, remained a matter to be dealt with by the courts.

An essential element in the Torrens system is, of course, the indefeasibility (subject to relatively unimportant exceptions) of the title of the registered proprietor. This result could not have been achieved if it were to have remained possible for the title of the registered proprietor to be affected by all those equitable interests by which it could have been affected, had it been a title to land under the general law. Accordingly, one finds that, in the South Australian Real Property Act 1886-1963, for example, in addition to the more general provisions as to indefeasibility of title,[2] specific provision relating, *inter alia*, to equitable interests is made by sec. 186, which provides that "No person contracting or dealing with, or taking or proposing

* LL.B., Adelaide.

1. That Torrens system land has not been so removed has been fully recognized in judicial decisions: see *Barry* v. *Heider* (1914) 19 C.L.R. 197; *Great West Permanent Loan Co.* v. *Friesen* (1925) A.C. 208; *Abigail* v. *Lapin* (1934) A.C. 491; *I.A.C. Finance Pty. Ltd.* v. *Courtenay* (1963) 37 A.L.J.R. 350, at p. 354.

2. Secs. 69, 70.

to take a transfer or other instrument from the registered proprietor of any estate or interest in land shall . . . be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding."[3] Sec. 187 excludes from this protection "any person who has acted fraudulently or been a party to fraud," but goes on to provide that "the contracting, or dealing, or taking, or proposing to take a transfer or other instrument as aforesaid, with actual knowledge of any trust, charge, or unregistered instrument,[4] shall not of itself be imputed as fraud."[5] Moreover, fraud in this section, as elsewhere in the Real Property Act, means actual dishonesty, and not mere constructive fraud.[6] Sec. 72 provides generally that "Knowledge of the existence of any unregistered estate, interest, contract, or trust shall not of itself be evidence of want of *bona fides* so as to affect the title of any registered proprietor."[7]

Although the language of secs. 72 and 186, like that of other sections of the Act relating to indefeasibility of title, might seem to be wide enough to provide protection to the volunteer registered proprietor as well as to the purchaser for value, this is not the view of the Torrens system statutes which has been generally adopted. It is considered that the legislative intention which appears from each of the statutes, read as a whole, is generally to exclude the volunteer from the protection given to the purchaser for value.[8]

The result of the statutory provisions discussed above is to ensure that the registered proprietor of land under the Torrens system, who has taken *bona fide* for valuable consideration (or any person *bona fide* claiming through or under him), has a title unaffected by the equitable interests which, by reason of the equitable doctrines as to notice, might have affected it, had it been a title to land under the general law. So far as persons coming within the above-mentioned categories are concerned, it might, at first sight, seem that they have been placed beyond the reach of equity, but this is not, of course, the case.

3. Corresponding provisions are Real Property Act 1900-1956 (N.S.W.) Sec. 43; Transfer of Land Act 1958-1960 (Vic.) sec. 43; Real Property Act 1861 to 1960 (Qld.) sec. 109; Transfer of Land Act 1893-1959 (W.A.) sec. 134; Real Property Act 1862-1962 (Tas.) sec. 114 (1).
4. In view of the related character of secs. 186 and 187, it would seem to have been better draftsmanship and more clearly productive of the result apparently intended by the legislature to have used the same phrase ("any trust or unregistered interest") in sec. 187 as well as in sec. 186.
5. Corresponding provisions are Real Property Act 1900-1956 (N.S.W.) sec. 43; Transfer of Land Act 1958-1960 (Vic.) sec. 43; Transfer of Land Act 1893-1959 (W.A.) sec. 134; Real Property Act 1862-1962 (Tas.) sec. 114 (2).
6. *Public Trustee* v. *Arthur* (1892) 25 S.A.L.R. 59.
7. As to the effect of this provision, see *E. Ryan and Sons Ltd.* (1910) S.A.L.R. 67; *Stuart* v. *Kingston* (1923) 32 C.L.R. 309.
8. See Baalman, *Torrens System in New South Wales* pp. 149-50; Hogg, *Registration of Title to Land throughout the Empire,* pp. 106-8.

Sec. 71 of the Real Property Act provides:—

"Nothing in the two preceding sections[9] contained shall be construed so as to affect any of the following rights or powers, that is to say—

. . . . . .

IV. the rights of a person with whom the registered proprietor shall have made a contract for the sale of land or for any other dealing therewith:

V. the rights of a *cestui que trust* where the registered proprietor is a trustee, whether the trust shall be express, implied, or constructive: Provided that no unregistered estate, interest, power, right, contract, or trust shall prevail against the title of a registered proprietor taking *bona fide* for valuable consideration, or of any person *bona fide* claiming through or under him."

And sec. 249 provides:—

"Nothing contained in this Act shall affect the jurisdiction of the Courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally.

And the intention of this Act is that, notwithstanding the provisions herein contained for preventing the particulars of any trusts being entered in the Register Book,[10] and without prejudice to the powers of disposition or other powers conferred by this Act on proprietors of land, all contracts and other rights arising from unregistered transactions may be enforced against such proprietors in respect of their estate and interest therein, in the same manner as such contracts or rights may be enforced against proprietors in respect of land not under the provisions of this Act: Provided that no unregistered estate, interest, contract, or agreement shall prevail against the title of any *bona fide* subsequent transferee, mortgagee, lessee, or encumbrancee for valuable consideration, duly registered under this Act."[11]

The purpose of secs. 71 and 249 is to prevent the registered proprietor's using his registration as a means of escaping equitable or other obligations relating to the land which he has himself assumed or accepted.[12] The registered proprietor who has created a trust over his land or who has accepted the land as a trustee, the registered

9. I.e., the sections provided for the indefeasibility of the title of the registered proprietor.
10. See Real Property Act 1886-1963 (S.A.) sec. 162.
11. A corresponding provision is to be found in the Real Property Act of 1877 (Qld.) sec. 51. See also Transfer of Land Act 1893-1959 (W.A.) sec. 83.
12. The South Australian Act makes rather fuller and more explicit provision on this matter than the other Australian Torrens system statutes, but the general position is in all cases the same.

proprietor who has given an equitable mortgage over his land, the registered proprietor who has entered into a contract for the sale of his land, are all bound by their obligations. The title of the registered proprietor taking *bona fide* for valuable consideration is not affected by equitable obligations created by others, except insofar as he has expressly or impliedly accepted them as binding upon himself, but his title is affected by equitable obligations created or accepted by himself, by "personal equities," to use a convenient term adopted by Baalman.[13] This situation is completely consistent with the idea of indefeasibility of title, the purpose of which is to enable parties to deal with land in reliance on what appears on the register, but the purpose of which is not to enable them to escape obligations which they have themselves created or accepted.

The possibility that a registered proprietor might misuse the indefeasibility principle to defeat, wholly or partially, the rights of persons whose equitable (or contractual) interests in the land he has himself created or accepted can, of course, be guarded against by use of the caveat system. A caveat creates no rights, but it can prevent a registered proprietor from destroying rights by the transfer or other disposition of land or an interest in land to one who, by virtue of the indefeasibility principle, would take it freed from such rights.

It may be useful to consider, with these principles in mind, the position of restrictive covenants running with the land and of building schemes, in relation to Torrens system land. *Prima facie* it would seem that neither of these equitable conceptions can be fitted into the Torrens scheme of things, unless, as is the case in some Torrens system jurisdictions, there is specific statutory provision made for them.[14] A restrictive covenant, provided that it complies with the several requirements which the courts have decided are necessary to produce this result, is enforceable against any successor in title of the covenantor except a purchaser of the legal estate for value without notice. To treat as bound by such a covenant, in the absence of fraud, the registered proprietor of Torrens system land who has purchased for value, even though with notice of the covenant, seems to involve a disregard of, in particular, the provisions of sec. 186 of the South Australian statute or the corresponding provision of other Torrens system statutes. It would seem that to treat a registered proprietor as

13. See Baalman, op. cit., pp. 150-1; Kerr, *Australian Lands Titles (Torrens) System,* pp. 132-3, 183-5. Constructive trusts, which affect the title of the registered proprietor (see sec. 71 of the South Australian Act), may not quite fit into the description of "equitable interests created or accepted by himself," but they are at least created by the registered proprietor in the sense that they are imposed upon him by reason of his own conduct.

14. See Conveyancing Act 1919-1954 (N.S.W.) sec. 88 (3); Transfer of Land Act 1958-1960 (Vic.) sec. 88; Transfer of Land Act 1893-1959 (W.A.) sec. 129A.

bound in such circumstances would be to cause him to be affected by equitable obligations neither created nor accepted by him.

The situation is summed up in a passage from the judgment of Kitto J. in *Pirie* v. *Registrar-General*,[15] in which, contrasting the position under the general law with that under the Torrens system, he says[16] that the fact that a restriction which is enforceable in equity under the doctrine of *Tulk* v. *Moxhay*[17] "does confer an interest in the land to which a subsequent owner's title is subject unless he or his predecessor has taken by purchase of the legal estate for value without notice must be taken as settled, as regards land not under the provisions of the Real Property Act, by the decision of the Court of Appeal in *In re Nisbet & Potts' Contract*[18] and as regards land under that Act the position before the Conveyancing Act[19] was, I think, that although the interest was not unenforceable against the covenantor by reason of s. 42[20]; *Barry* v. *Heider*;[21] *Great West Permanent Loan Co.* v. *Friesen*;[22] *Abigail* v. *Lapin*,[23] it was unenforceable against a registered proprietor subsequent to the covenantor if he took as or under a purchaser for value, whether with or without notice, since s. 43[24] supplements the principle of *In re Nisbet & Potts' Contract* by making notice immaterial."

In the light of these principles, it may be suggested, with respect, that one of the grounds upon which the decision in the recent South Australian case of *Blacks Ltd.* v. *Rix*[25] is expressed to be based, may be open to question. The case was one in which a company which was the proprietor of land under the Real Property Act subdivided the land into allotments, which were sold to purchasers, subject to restrictions. Each purchaser covenanted with the vendor company to observe the restrictions, the covenants of each purchaser being embodied in an encumbrance registered upon his title. All the elements required to constitute a building scheme in the case of land under the general

15. (1962) 36 A.L.J.R. 237.
16. At p. 240.
17. (1848) 2 Ph. 774; 41 E.R. 1143.
18. (1906) 1 Ch. 386.
19. The Conveyancing Act 1919-1954 (N.S.W.), sec. 88 (3) of which provides that the Registrar-General shall have and be deemed always to have had power to enter in the appropriate folium of the register book relating to land subject to the burden of "a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land" a notification of such restriction.
20. Sec. 42 of the Real Property Act 1900-1956 (N.S.W.), which provides for indefeasibility of title (the equivalent of secs. 69 and 70 of the South Australian Act).
21. (1914) 19 C.L.R. 197.
22. (1925) A.C. 208.
23. (1934) A.C. 491, at p. 500.
24. The equivalent of sec. 186 of the South Australian Act.
25. (1962) S.A.S.R. 161.

law were present. The questions arising for decision were whether the vendor company and the owners of other allotments in the subdivision were entitled to enforce against the successors in title of an original purchaser the covenants entered into by that purchaser and whether the owners of the other allotments were entitled to protect their rights by registration of a caveat. Napier C.J. answered both questions in the affirmative.

In the course of his judgment,[26] His Honour said that he thought that the relevant provision of the Real Property Act (S.A.) was sec. 249.[26a] (The text of this section is set out earlier in this article.) It may seem that this view of the effect of sec. 249 does not sufficiently take into account sec. 186 (the relevant portions of which are also set out above) or, indeed, the proviso to sec, 249 itself. Any equity which is to affect the title of a registered proprietor taking *bona fide* for value must do so by virtue of being in some way registered, and not merely by virtue of the fact that it exists. It is submitted, with respect, that sec. 249 does not really assist the plaintiffs. If their position fell short of their having a registered interest, no equitable rights they might have had could be of any avail against a registered proprietor taking *bona fide* for value.

It is possible that His Honour took the view that the defendants against whom enforcement of the covenants was sought did not take *bona fide*. He says,[27] "It appears that the defendants bought or acquired their registered titles subject to the encumbrance, that is to say, well knowing that the land had been bought on the faith of the restrictive covenants as covenants running with the land, and enuring to the benefit of all the purchasers under the building scheme." In view, though, of the provisions of secs. 72 and 187 to the effect that knowledge of an adverse interest is not of itself to be taken as evidence of want of *bona fides* or be imputed as fraud, it seems unlikely that this passage in the judgment is to be taken as meaning that there was lack of *bona fides* in the defendants.

The other of the two grounds upon which the decision in *Blacks Ltd.* v. *Rix* rests is the fact that the restrictive covenants were on the register in that they were contained in an encumbrance registered upon the title of the party sought to be affected. The following comments may be made on this aspect of the case.

The device adopted for getting the restrictive covenants onto the register is one that is possible within the framework of the Real Property Act, although it certainly does not seem likely that the

26. (1962) S.A.S.R., at pp. 164-5.

26a. See *Maio* v. *Piro* (1956) S.A.S.R. 233, at p. 238, for the view that sec. 249 refers only to those equities "which would have been recognised by the former courts of Chancery."

27. (1962) S.A.S.R., at p. 165.

legislature ever intended or foresaw this particular use of the statutory machinery.

Sec. 128 of the Act provides that ". . . whenever any land is intended to be charged with, or made security for, the payment of an annuity, rent-charge, or sum of money, in favour of any person, the registered proprietor shall execute an encumbrance in the form of the tenth schedule hereto." The relevant parts of the "Memorandum of Encumbrance for Securing a Sum of Money" contained in the tenth schedule read as follows:—

"I, A.B. . . . desiring to render the said land . . . available for the purpose of securing to and for the benefit of the said C.D. the (sum of money, annuity, or rent charge) hereinafter mentioned, do hereby encumber the said land . . . for the benefit of the said C.D. with the (sum, annuity, or rent charge) of £ , to be raised and paid at the time and in the manner following, that is to say—(*here state the times appointed for the payment of the sum, annuity, or rent charge intended to be secured, the interest, if any, and the events on which such sum, annuity, or rent charge shall become and cease to be payable, and also any special convenants or powers and any modifications of the powers or remedies given to any encumbrancee by 'The Real Property Act, 1886'*) . . ."

When an encumbrance is used for the purpose of getting restrictive covenants into the register, the sum of money, annuity, or rent charge, which would normally constitute the *raison d'être* of the transaction, becomes a merely nominal sum, to be paid if demanded, and the part of the document that really matters is the "special covenants," which contain the restrictions. This must seem a considerable departure from the purpose which the legislature apparently intended an encumbrance to serve, but the device is not necessarily any the less effective for this reason.[28]

Sec. 77 requires the Registrar-General to "record on every certificate (of title) issued by him . . . memorials of all subsisting . . . encumbrances." Sec. 69 provides that "The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests, as may be notified on the original certificate of such land, be absolute and indefeasible . . ." Sec. 57 provides that "Every instrument shall, when registered, be deemed part of the register book . . ."

There is thus available in the South Australian statute a means whereby, even if somewhat indirectly, restrictive covenants may be got into the register.[29]

28. See Adams, *The Land Transfer Act 1952 (N.Z.)*, pp. 184-5; Hogg, op. cit., p. 298.
29. In New South Wales and Victoria, the practice (which existed prior to receiving the statutory justification which it now has) is to include such covenants in Transfers, the covenants then being noted by the Registrar on the title to the burdened land.

The question that then arises is whether restrictive covenants, whether forming part of a building scheme or not, *should* be placed on the register, so as to acquire the protection against subsequent registered proprietors which such treatment gives them, or whether the covenantee should be left to protect his rights by means of the caveat system. If the latter alternative were the correct one, the covenantee would need to obtain from the covenantor, not merely covenants imposing the particular restrictions that he desired, but also a covenant that the covenantor would not transfer the land unless the intending transferee had first entered into a similar set of covenants with the original covenantee. This latter covenant could then be protected by caveat. To have his covenant on the title is obviously, from the point of view of the covenantee, both more convenient and more effective than reliance on a caveat. *Blacks Ltd.* v. *Rix* establishes that he is entitled to be placed in this more advantageous position.

The question whether restrictive covenants could be placed on the title or be protected only by the caveat system arose in the recent case of *Re Arcade Hotel Pty. Ltd.*[30] (referred to and to some extent relied on by Napier C.J. in *Blacks Ltd.* v. *Rix*) and is very fully discussed in the dissenting judgment of Scholl J.[31] In Victoria the practice has existed since at least as early as 1888 of embodying restrictive covenants in transfers, which the Registrar of Titles has then noted as an encumbrance on the certificate of title to the land affected. Statutory authority for this practice is now provided by the Transfer of Land Act 1954 (Vic.), sec. 88, but its validity prior to the enactment of this provision was challenged in *Re Arcade Hotel Pty. Ltd.* The validity of the practice was upheld by Scholl J., who said[32] that, even before 1954, the Registrar of Titles "was not in my opinion prevented by the Act from noting restrictive covenants on the title of burdened land. This constituted them encumbrances, notice of which as an actual limitation of the registered proprietor's title or interest could not be avoided by a person dealing with the registered proprietor of land, and against which the provision of s. 179[33] of the Transfer of Land Act 1928, and corresponding previous sections could not protect him. . . . The general law was then left to deal with the effect of such notice, since the covenant itself was not a legal interest in respect of which a certificate of ownership could issue."

The differing methods used in Victoria and South Australia to get restrictive covenants onto the title have the following consequence. In Victoria, since the covenants are put into the *instrument of transfer*

30. (1962) V.R. 274.
31. At pp. 280-7. The majority of the court found it unnecessary to discuss this question since their view on another point concluded the case.
32. At p. 282.
33. The then equivalent of secs. 186 and 187 of the Real Property Act (S.A.).

of the land to be affected, they would remain merely covenants between the immediate transferor and transferee,[34] unless also noted as an encumbrance on the title, which, as is mentioned above, is in fact done. In South Australia, on the other hand, as has been explained, the covenants are contained in a *memorandum of encumbrance,* which, once it is registered, presumably binds subsequent transferees, without anything further being done. This result, so far as the covenants are concerned, does not appear to follow by reason of sec. 97 of the South Australian Act (which provides for certain covenants to be implied upon the transfer of mortgaged or encumbered land), because, although this section provides for a covenant to be implied on the part of the transferee that he will indemnify the transferor, not merely against the payment of the principal, interest, and other moneys secured, but also "from and against all liability in respect of any of the covenants contained in such mortgage or encumbrance or by this Act implied on the part of the transferor," it does not provide for a covenant by the transferee with the mortgagee or encumbrancee that he (the transferee) will perform and observe *all* the covenants contained or implied in the mortgage or encumbrance, but only that he will pay "the principal, interest, and other moneys secured by such mortgage or encumbrance." But, since restrictive covenants, if they comply with the relevant rules of equity, will, unlike covenants for the payment of moneys secured by mortgage or encumbrance,[35] run with land under the general law, they will, once they are on the register, presumably do likewise with Torrens system land,[36] unless prevented from doing so by the matters discussed later in this article.

The question whether interests other than registrable interests can, in the absence of express statutory authority, be placed on the certificate of title, instead of being left to be taken care of by the caveat system, is to be decided essentially, no doubt, by reference to the principle stated by *Scholl J.* as follows, "It was really a matter of ascertaining, in the absence of any express prohibition, the implications of the legislation."[37] The case in favour of placing such interests, and, in particular, restrictive covenants, on the certificate of title may be summed up as follows, (1) although there may be no express authority in the Torrens statutes for such a course, there is also no

34. See Kerr, op. cit., pp. 283-4.

35. See Baalman, op. cit., p. 221.

36. ". . . a registered interest . . . is a legal interest, acquired by a statutory conveyancing procedure and protected from competition to the extent provided for by the Act, but having, subject to the Act, the nature and incidents provided by the general law." (*I.A.C. Finance Pty. Ltd.* v. *Courtenay* (1963) 37 A.L.J.R. 350, at p. 354). And see Wiseman, *Transfer of Land,* at p. 436, as to "the general tendency of the courts in construing the Act to assimilate rights and liabilities under it to those existing under the general law and to alter previous law as little as possible."

37. *Re Arcade Hotel Pty. Ltd* (1962) V.R. 274, at p. 285.

express prohibition of it, (2) such a course is, in various Torrens system jurisdictions, supported by long-standing practice, and (3) in the case of restrictive covenants, the fact that they may be regarded as in the nature of easements may also afford some support to an argument in favour of placing them on the certificate of title.[38] The argument against placing such interests on the certificate of title may perhaps be said to rest mainly on the thesis that such a course does run counter to "the implications of the legislation," that it does not accord well with the general scheme of the Torrens system, that "a branch of the law which rests so heavily on the doctrine of notice cannot be grafted on to a tree which repudiates that doctrine . . . without impairing the general health of the tree."[39]

Turning from these rather general considerations to a more specific matter, it is to be noted that there is an objection, not so far mentioned in this article, of a rather fundamental character, which may be advanced against treating covenants entered into in pursuance of a building scheme (as distinguished from the simpler case of a covenant imposed upon piece of land A merely for the benefit of piece of land B) as being valid against a subsequent registered proprietor. It is an objection which would have been open, it would seem, to the defendants, (other than the vendor company) in *Blacks Ltd.* v. *Rix*, but it is not mentioned in the judgment in that case and, as no argument was presented on behalf of the defendants, it may be that it was not brought to the notice of the court. The objection in question is that to treat covenants entered into in pursuance of a building scheme as valid against a subsequent registered proprietor involves looking at matters *dehors* the register and to do this is to depart from the principles of the Torrens system.

The well-known requirements for a "building scheme" or "scheme of development" are, as expressed in *Elliston* v. *Reacher*,[40] "(1) that both the plaintiffs and defendants derive title under a common vendor; (2) that prior to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in detail as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were

38. See Currey, *Titles Office Practice*, p. 125.
39. Baalman, op. cit., p. 221, referring to restrictive covenants, but his comment may be applied to equities and equitable interests generally.
40. (1908) 2 Ch. 374, at p. 384.

also intended to be and were for the benefit of other land retained by the vendor; (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of other lots included in the general scheme whether or not they were also to enure for the benefit of other land retained by the vendors."

With these requirements in mind, three questions may be asked. Firstly, how is an intending purchaser of Torrens system land, who finds registered upon the title of the land which he intends to purchase an encumbrance containing a restrictive covenant, to tell from the register whether or not the covenant was entered into in pursuance of a scheme complying with the second, third, and fourth of the *Elliston* v. *Reacher* requirements? He obviously cannot do so, even though the matter is one that may greatly affect his title. Secondly, is such a purchaser, finding such an encumbrance upon the title of the land which he intends to purchase, put upon inquiry as to whether the second, third, and fourth requirements do, in fact, exist? It would be, it is suggested, unreasonable, obnoxious to the objectives of the Torrens system, and repugnant to the statutory provisions as to indefeasibility of title (in particular, sec. 186 of the South Australian Act and the corresponding sections of other statutes), to require him to make such inquiry. Thirdly, is it possible to get all the elements of a building scheme onto the register? The existence of a building scheme is frequently a matter to be deduced from all the circumstances of the case, and "there is no prescribed form for registering circumstances."[41] In the great majority of cases (and it appears that *Blacks Ltd.* v. *Rix* itself was one), where, if the land were under the general law, a building scheme would be found to exist, the position when the land is Torrens system land will be that such a finding will be possible, if one looks at matters outside the register, but not possible, if one restricts one's view to the register. And so, even though it may be possible, by skilful conveyancing, to devise a series of covenants which will produce the effect of a building scheme without the necessity of taking into account matters outside the register,[42] it will still remain true that cases will continue to arise in which the question whether one may look at matters outside the register will demand an answer.

The present discussion has been concerned mainly with the relationship between the Torrens system and that species of equitable right

41. Baalman, in an article at 22 A.L.J. 71. See generally, on building schemes and the Torrens system, this article and a further article by the same author at 27 A.L.J. 366.

42. See the covenants suggested by Sholl J. in *Re Arcade Hotel Pty. Ltd.*, at p. 287, and see also Baalman, 22 A.L.J., at p. 72.

which results from restrictive covenants affecting the user of land and little reference has been made to the various other types of equitable right which also impinge upon the system at various points. The justification offered for this treatment is that restrictive covenants seem to constitute an area of the law which displays particularly well the problems of adjustment between the Torrens system and the rules of equity. If sound solutions can be found for the problems of adjustment in this area, the principles applied will, it is thought, usually be found of use in other areas where similar adjustments are required. In making these adjustments, whether in the field of restrictive covenants or elsewhere, matters which, it is submitted, should not be lost sight of are (1) the line of demarcation between "personal equities" and those equities against which the indefeasibility provisions of the Torrens legislation protect the registered proprietor, (2) the irrelevancy in almost all circumstances of notice under the Torrens system, so far as the title of a registered proprietor is concerned, and (3) that to have regard to matters *dehors* the register is impermissible, except when the statutory provisions clearly permit such a course.[43]

43. As, for example, when fraud is involved.