A CONSPECTUS OF THE LAW OF SERVITUDE INTERESTS IN LAND IN AUSTRALIA.*

I. Introductory.

I have chosen the term "Servitude Interests in Land" as a convenient blanket expression to cover what are generally termed incorporeal hereditaments—in other words easements, profits and restrictive covenants (in so far as the last mentioned constitute an interest in land). This is to avoid confusion of thought, because other types of interest such as rent charges are also frequently classified as incorporeal hereditaments.

The law relating to these interests is of ever increasing importance in the modern world, and cases in relation to them are more and more frequently encountered in the reports. Historically easements and profits are not modern concepts—they date back many centuries, but, at any rate so far as the characteristic qualities of easements are concerned, learning had not crystallized much before the foundation of the Australian colonies. As equitable interests in land restrictive covenants are little more than a century old.

It may perhaps surprise some of my readers to know that in BLACKSTONE'S famous COMMENTARIES which were published in the second half of the eighteenth century, 'easements' and 'profits' are not even mentioned as such. A section of the work deals with incorporeal hereditaments of which the author names 10 *viz.*, advowsons, titles, commons, ways, offices, dignities, franchises, corrodies, annuities, and rents.

One species of profit is covered in the COMMENTARIES by the term 'common', but the profit in severalty is not even mentioned, and the right-of-way is the only type of easement referred to. The learned Commentator includes under this heading ways founded on 'special permission', or what we would now call licences, and he also refers briefly to ways 'by prescription' and 'by operation of law' (*e.g.*, ways of necessity), but he does not deal at all with rights of way by express grant. This indicates a considerable degree of looseness of thought on the subject of easements. HOLDSWORTH, in his monumental A HISTORY OF ENGLISH LAW[1] shows that rights of common, most of which originated in the manorial system, were well known to the law in the

* A paper read at the 1964 Law Summer School held at the University of Western Australia.

1 2nd ed. (London) 1937. vol. VII ch. 9.

sixteenth century, but until the seventeenth century cases as to profits granted to be enjoyed in severalty were rare.

He comments that it was not until after BLACKSTONE wrote that the rules as to easements were elaborated and combined into a definite body of legal doctrine which defined the incidents both of easements in general, and of particular types of easements.

It is now a well established rule of English law that there is no such thing as easement "in gross"—an easement must be appurtenant to a dominant tenement, but, as HOLDSWORTH points out, the question whether or not there could be such a thing as an easement "in gross" had remained an uncertain question right down to the latter half of the nineteenth century, and the possibility of the existence of such an easement has been "supported by text writers and not decisively condemned by the judges". This doubt probably arose from a failure to distinguish between easements proper and customary rights in the nature of easements.

It also probably accounts for the appearance in existing legislation of some of our Australian States of the expression "easements in gross" —caught up no doubt from early real property legislation. I may instance in this relation section 81 of the South Australian Real Property Act 1886-1961, and section 33 of the Tasmanian Real Property Act of 1886. These are, of course, to be distinguished in principle from recent legislation in New South Wales, Queensland, and Western Australia expressly authorizing the creation of easements "in gross" in certain limited instances in favour of the Crown or public or local authorities—an entirely new creature in the legal menagerie. In South Australia the registration of easements "in gross" in favour of private individuals is looked upon askance by the Lands Title Office, but if an individual insists, there is no alternative but to issue a title for such an easement, the words of the statute being too clear to be disregarded.

In New South Wales MILLARD, LAW OF REAL PROPERTY IN NEW SOUTH WALES, in earlier editions referred to easements being "in gross" or "appurtenant". In the fourth edition, published in 1930, the first edition prepared by the writer, this heresy was abjured and it was stated that "an easement properly so called can only exist as appurtenant to land". This is not the case in the United States, as in the volume of the RESTATEMENT OF THE LAW dealing with servitudes it is said that easements may be created "in gross". There seems to be no logical reason why an easement should not exist "in gross" *e.g.*, in the case of a right-of-way, just as a profit may so exist.

As interests in land, restrictive covenants were not recognized until the leading case of *Tulk v. Moxhay*,[2] decided in 1848. It may, therefore, be said that the period of real development in the law of easements and restrictive covenants affecting land coincides approximately with the period from the foundation of the first Australian colony in 1788 up to the present time. On general principles as to characteristics of these interests there is but little divergence between the law in Australia and that of England, save in so far as the matter is the subject here of special legislation, or as it has to be reconciled with the special features of the all pervading Torrens title legislation. This proposition is not entirely correct, for one has to consider the impact of local history and conditions on the doctrines of prescription and modern lost grant, and also such judicial decisions as the controversial case of *Dabbs v. Seaman*.[3]

II. Profits a Prendre.

It may be convenient to consider in the first place the most rarely encountered of the three named interests, that is to say the profit à prendre. One cynic said that a "virgo intacta is a rara avis only rarer!" This *bon mot* might well have been applied to the profit.

Its appearances in Australian case law are exiguous—and are mainly limited to cases concerning timber.

Mr. John Baalman, a former Examiner of Titles in New South Wales and probably the outstanding authority in Australia on the Torrens system says of it in his TORRENS SYSTEM IN NEW SOUTH WALES:—[4]

> "The subject of profits à prendre has received scant attention in New South Wales. Most legal writers and educators have been satisfied to dismiss it as associated only with manorial rights of common which were not transported with the First Fleet. The authors of the Real Property Act [that is the title of the Torrens Act in New South Wales] possibly shared that view. But their failure to prescribe a specific form whereby an owner in fee could grant the right to take substances from his land is not a reason why such an instrument could not be registered under the Act."

In fact, in New South Wales, a profit à prendre will be registered under the Real Property Act whether it is created by a memorandum

2 (1848) 2 Ph. 774; 41 E.R. 1143.
3 (1925) 36 Commonwealth L.R. 538.
4 Sydney, 1951.

of transfer having no other purpose than its creation or whether it is reserved to the transferor out of a transfer of the subject land. The practice in other States is no doubt the same. A profit, unlike an easement, may exist in gross. Rights to depasture cattle and to cut and remove timber have been registered as profits in New South Wales. In THE PRACTICE OF THE LAND TITLES OFFICE,[5] BAALMAN AND WELLS state that "it is important (from the point of view of the parties) to state whether the profit is to be enjoyed exclusively by the grantee, or shared by the servient owner"—in other words whether it is to be "exclusive" or "non-exclusive". In an article published under the title of *The Neglected Profit à Prendre,*[6] Mr. Baalman, in effect, appeals to the profession not to be scared of the profit. He says:

> "As previously stated, the reasons for this furtive approach to the subject of *profits à prendre* is not apparent. But there does appear to be good reason, at least in New South Wales, for not trying to express them as easements."[7]

Thus, though a right to take water from another's land is anomalously an easement, a right to take timber cannot be made the subject of an easement.

There is but little case law on the subject of profits in Australia. The type of profit most frequently encountered in this continent relates to timber.

In *McCauley v. Federal Commissioner of Taxation,* Rich J. said:—[8]

> "A contract by which one person authorizes another to cut and remove timber from the land of the former may be of one or other of two different types. It may amount to a sale, as chattels, of all or some specified part of the trees on the land for a price payable in a lump sum, or by instalments . . . or it may amount to the creation of a *profit à prendre,* an interest in the timber, treated as part of the realty, coupled with a right to remove it on payment of sums stipulated for as consideration for the rights created by the *profit.* The category in to which any particular contract falls depends on its terms . . . If the contract creates a right to enter the land whenever the party is disposed to do so, and to cut and take therefrom such timber (or such timber of a specified class) as he may from time to time desire to obtain,

5 3rd ed. 1952.
6 (1948-1949) 22 AUST. L.J. 302.
7 *Ibid.,* at 303.
8 (1944-1945) 69 Commonwealth L.R. 235, at 244.

on payment of a sum determined by the quantity taken, the contract is not one of sale but creates a *profit à prendre*: . . ."

In another High Court case, *Reid v. Moreland Timber Co. Pty. Ltd.*,[9] the substantial question was whether the rights conferred on the party to the contract were exclusive or non-exclusive. It was not necessary for the Court to determine whether the contract amounted to a *profit à prendre* or a licence only, though, in fact, the Court appeared to take the unanimous view that it was a licence.

A common form of reservation found in Crown grants in New South Wales and Victoria is of "sand clay stone gravel and indigenous timber and all other materials the natural produce of the land which may be required for the construction and repair of public ways etc." This has been held in Victoria to constitute a non-exclusive *profit à prendre* in favour of the Crown: *Bayview Properties Pty. Ltd. v. Attorney-General for Victoria.*[10]

In a quite recent New South Wales case, *Ex parte Henry; Re Commissioner of Stamp Duties,*[11] the nature of a mineral lease was examined. Adopting the language of Lord Cairns in *Gowan v. Christie,*[12] the Court affirmed that what we call a mineral lease is really, when properly considered, a sale out-and-out of a portion of land. It said that a licence to dig minerals of itself confers no estate or interest in the soil or mine containing them. "However a licence to dig minerals, coupled with a grant to carry them away, is more than a mere licence. It is a *profit à prendre,* an incorporeal hereditament lying in grant, and is capable of assignment."[13]

One type of profit which exists in England is unknown in this continent—that is the "common" or profit to be enjoyed by a group of persons. There are statutory commons in New South Wales—these are areas of land set apart by the Crown for grazing purposes to be enjoyed by a limited number of persons who are enrolled, but these in no way resemble the English commons which, in the main, originated in the manorial system.

The last case to which I will refer under this heading is *Nicholls and Others v. Lovell,*[14] which reminds us that a profit may be equitable

9 (1946-1947) 73 Commonwealth L.R. 1.
10 [1960] Victorian R. 214.
11 (1963) 80 Weekly Notes (N.S.W.) 435.
12 (1873) L.R. 2 Sc. & D. 273.
13 (1963) 80 Weekly Notes (N.S.W.) 435, at 439.
14 [1923] State R. (South Aust.) 542.

as well as legal. In that case a contract to take salt from salt leases was held to be an agreement to give a non-exclusive profit.

III. Easements.

One is surprised and somewhat appalled at the paucity of legislative attention to the subject of easements in some of our Australian States, and more particularly in Queensland and South Australia.

I propose in the first place to sketch briefly the legislation which exists in relation to easements in general, that is to say in relation to those affecting both lands under old system or common law title and those under the Torrens system. I choose the terms "Torrens title" and "Torrens system" to avoid confusion because in some of the States, namely New South Wales, Queensland, South Australia, and Tasmania the statutes which govern the Torrens system are termed "Real Property Acts" whilst in Victoria and Western Australia they are called "Transfer of Land Acts". I am personally so accustomed to referring to the "Real Property Act" or "Real Property Act Land", that my references might be perplexing to my readers if I did not apply the popular title.

I now propose to refer to important Australian developments in the statute and common law as to easements and will then pass on to a consideration of the effect of the Torrens title statutes on easements relating to lands under that system.

New South Wales will be found in the forefront in general legislation.

(a) *Express creation—common law title.*

At common law, easements, being incorporeal hereditaments, "lay in grant", that is to say they could be created by a deed of grant without anything equivalent to livery of seisin. They might also be created by a reservation to a conveyor when he disposes of part of his land and retains the rest. At common law a legal easement could not be created by simple reservation to a conveyor, but if a conveyance containing such a reservation were executed by the conveyee, that was held to operate as a "regrant" of the easement from the conveyee to the conveyor.

In England, execution by the conveyee was made unnecessary to give effect to the reservation of an easement or profit by section 65 (1) of the Law of Property Act 1925, and this was copied in New South Wales by section 45A of the Conveyancing Act 1919, as inserted by the Conveyancing (Amendment) Act 1930.

There is a very similar section[15] in the Property Law Act 1958 of Victoria.

Another method of reserving an easement or profit was by means of the "executed use"—a conveyor would convey land to *X* and his heirs to the use that the conveyor should have a legal easement or profit, and subject thereto to the use of the conveyee. This required statutory sanction because the grantee was not *seised* of the easement within the meaning of the Statute of Uses 1531. Such legislative machinery was provided in England by the Conveyancing Act 1881, which was followed in Victoria as to conveyances made after 31st January 1905 by section 194 of the Property Law Act 1958, and in New South Wales as to those made on and after 1st July 1920 by section 45 of the Conveyancing Act, and in Tasmania by section 74 (1) of the Conveyancing & Law of Property Act 1884.

These sections do not seem to have a counterpart in the other States. The repeal of the Statute of Uses in England by the Law of Property Act made the creation of an easement by means of uses ineffective there, but that is not the case in the Australian States mentioned. The rule that an easement cannot exist "in gross" has been modified; in New South Wales as from 1st January 1931 by section 88A of the Conveyancing Act which enacts that it shall be, and shall be deemed always to have been, possible to create an easement in favour of the Crown or of any public or local authority constituted by Act of Parliament without a dominant tenement; in Queensland by a similar section, section 51(2) of the Real Property Act 1861-1960, relating to Torrens title land only; and in Western Australia by section 33A of the Public Works Act 1902-1961. This renders unnecessary the artificial expedient of, for example, making an easement to lay water pipes appurtenant to the undertaking of a water works Company as in the case of *Re Salvin's Indenture, Pitt v. Durham County Water Board.*[16]

The same New South Wales and Western Australian sections make it possible to make appurtenant or to annex to an easement another easement or the benefit of a restriction as to the user of land.[17]

But perhaps the most important legislative provision in regard to the creation of easements in New South Wales and which has not, so far as I am aware, any counterpart in the other States, is contained

15 Sec. 65.
16 [1938] 2 All E.R. 498.
17 See secs. 88A (2) and 33A (6).

in section 88 of the Conveyancing Act 1919, as inserted by the 1930 Act. This section applies not only to easements, but also to restrictions as to the user of any land the benefit of which is intended to be annexed to other land, *i.e.*, restrictive covenants and agreements. The section replaces and extends section 89 of the original Conveyancing Act of 1919, which was in substantially similar terms, but which concerned restrictive covenants only and not easements. Moreover the present section extends to restrictions "arising under covenant *or otherwise*" and so is not solely applicable to those resulting from a contract under seal.

The section enacts that an easement or restriction of the type mentioned, the benefit of which is intended to be annexed to other land, shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction and *not being a party to its creation* unless the instrument clearly indicates:—

(a) the land to which the benefit of the easement or restriction is appurtenant;

(b) the land which is subject to the burden of the easement or restriction;

(c) the persons (if any) having the right to release vary or modify the easement or restriction other than the persons having, in the absence of agreement to the contrary, the right by law to release vary or modify the same; and

(d) the persons (if any) whose consent to a release variation or modification of the easement or restriction is stipulated for.

The section applies to Torrens title land as well as to land under common law title. It will readily be understood that the section probably has more utility in relation to restrictive covenants than to easements, because the annexation of the benefit of the latter is easier to trace.

It is customary in New South Wales in instruments relating to easements and restrictions to set out the statements required by section 88 in paragraph form though this is not necessary. The section does, in fact, effect an alteration to the general law, at least so far as easements are concerned, because at common law parol evidence is admissible to identify the dominant tenement where the instrument granting the easement does not clearly do so.[18] This section, which will be discussed more fully in relation to restrictive covenants, has a

[18] See Gapes v. Fish, [1927] Victorian L.R. 88; Johnstone v. Holdway, [1963] 1 All E.R. 432.

definite utility in that it forces conveyancers to focus their minds on the question of what land the easement is intended to benefit.

(b) *Modification and extinguishment.*

Section 84 of the English Law of Property Act 1925 provides for the modification and extinguishment of restrictions upon the user of land and for declaration by a court whether or not, in any particular case, land is affected by a restriction.

This was copied in general terms in section 88 of the New South Wales Conveyancing Act 1919, but the amending Act of 1930 repealed that section and replaced it by section 89 which extends the power of modification and extinguishment to easements as well as restrictive covenants. Though, as will be seen later, similar sections as to modification and extinguishment exist in other States in relation to restrictions, New South Wales appears to be unique so far as concerns their application to easements.

There appear to be no reported cases in New South Wales on the modification or discharge of easements by court order though there are many in regard to restrictive covenants.

One may note a provision in the New South Wales Public Works Act enabling the Crown to resume an easement (which may, of course, be an easement in gross) as distinct from resuming land.[19]

Once an easement has been created it will generally pass on conveyance of the land to which it is appurtenant by virtue of the general words which used to be included in every conveyance on sale and which are now implied by legislation.[20]

(c) *Substantive law.*

It has already been adumbrated that there is little novel in the development in Australia of the substantive law of easements. The general principle that the list of easements is not closed, but must alter and expand with changes in the circumstances of mankind, was underlined by the High Court of Australia in *The Commonwealth v. Registrar of Titles for Victoria,*[21] in the language of the first Chief Justice, Sir Samuel Griffith, who referred to the passage of aircraft, passage of electric current and the passage of a flash from a heliograph station as possible subjects for an easement.[22] Even an easement to

19 Public Works Act 1912, sec. 4A.

20 See, for example, Conveyancing Act 1919 (N.S.W.) sec. 67; Property Law Act 1958 (Vic.) sec. 62; Law of Property Act 1936-1960 (S.A.) sec. 36; Conveyancing and Law of Property Act 1884-1962 (Tas.) sec. 6.

21 (1917-1918) 24 Commonwealth L.R. 348.

22 *Ibid.,* at 354.

create a noise over adjoining lands was upheld in the Victorian case of *Re The State Electricity Commission of Victoria v. Joshua's Contract.*[23]

The common law as to creation of easements by implied reservation has been followed in Australia.[24]

(d) *Prescription.*

There is one instance in which a bold stroke of judicial legislation on the part of the High Court when in its very infancy swept away a lot of technicalities with regard to the creation of easements by prescription. I refer, of course, to the now famous case of *Delohery v. Permanent Trustee Company.*[25] Western Australia adopted the English Prescription Act 1832 *in toto.*[26] South Australia having been founded after 1832, would appear to have inherited it, and Tasmania passed a Prescription Act in 1934, but so far as I can ascertain the three Eastern States, New South Wales, Queensland, and Victoria have no legislation on the subject.

In Australia by reason of its recent origin, prescription based on the fiction of user from time immemorial *i.e.,* since 1189, was obviously inapplicable, and the fiction of a "lost modern grant" was equally unpalatable by reason of its very artificiality and the strain it might put on the consciences of a jury. The High Court held in *Delohery's Case* that the doctrine of lost modern grant had never been regarded as anything more than an artificial and subsidiary rule, designed for the purpose of giving effect to a substantial right and that it was not necessary to take the doctrine literally as assuming the actual existence of an instrument, and to treat it, for that reason, as irreconcilable with legislation requiring registration. Thus it was established that the fiction amounted to the making of a law that, after 20 years enjoyment of a right *nec clam, nec vi, nec precario,* the landholder should have an easement.

The case in which this was formulated related to an easement of access of light, and as the establishment of "ancient lights" was repugnant to the social ideas of a new country, all States speedily passed legislation negativing the acquisition by prescription of rights to light. In New South Wales, Victoria, and Western Australia this legislation extends also to acquisition by prescription of easements of access of air.

23 [1940] Victorian L.R. 121.

24 The Mayor and others of Perth v. Halle, (1911-1912) 13 Commonwealth L.R. 393; Bolton v. Clutterbuck, [1955] State R. (South Aust.) 253.

25 (1903-1904) 1 Commonwealth L.R. 283.

26 See 6 William IV No. 4.

(e) *Short forms.*

One may now make brief reference to the use of what I may term "statutory shorthand" in the creation of easements. By this I mean the use of short forms which have extended meanings.

In New South Wales the Conveyancing Act provides for these in relation to lands under both systems of title in respect of "right of carriage way" and "right of footway",[27] and "party wall"[28]; in Victoria,[29] Western Australia,[30] and Tasmania[31] in respect of "right of carriage way" and then only in relation to Torrens title land; and in Tasmania in respect of "right of drainage".[32]

(f) *Easements under Torrens title.*

And now, proceeding to the more specialized inquiry into the effect of Torrens legislation on the law relating to easements over land under that system, I propose to deal briefly with the following aspects:

(1) The effect of the "indefeasibility" or "conclusiveness" sections of the Torrens Acts;

(2) How far easements may be acquired by prescription in relation to lands under such Acts;

(3) The method of express creation of easements under the Acts;

(4) The application of the rule in *Dabbs v. Seaman*,[33] which has sometimes been referred to as establishing "easements by estoppel."

(5) The application to lands under the Acts of the creation of easements by implied grant or reservation in the case of "continuous apparent accommodations".

(g) *"Omitted easements"—Torrens title.*

One of the vital sections in all the Torrens Acts is that which proclaims the conclusiveness of the certificate of title. These sections are very similar to one another in their basic declaration; and section 42 of the New South Wales Real Property Act 1900 may be taken as a pattern. This reads:—

27 Sec. 181.
28 Sec. 181 B.
29 Transfer of Land Act 1958, sec. 72.
30 Transfer of Land Act 1893-1960, secs. 65, 66.
31 Real Property Act 1886, sec. 27.
32 Real Property Act 1886, sec. 27A.
33 (1925) 36 Commonwealth L.R. 538.

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, *except in case of fraud*[34] hold the same, subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register book . . . but absolutely free from all other encumbrances, liens, estates, or interests whatsoever . . ."

This basic declaration is followed by a list of exceptions to the general rule, and one of these exceptions relates to "omitted easements" *i.e.,* easements not noted on the register. The wording of this exception differs from State to State:

In New South Wales and Queensland it reads:—

"except:

(b) in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land: . . ."

In Victoria[35] it reads:—

"(2) Notwithstanding anything in the foregoing the land which is included in any crown grant certificate of title or registered instrument shall be subject to:—

(d) any easements *howsoever acquired*[36] subsisting over or upon or affecting the land;"

In South Australia it reads:—[37]

"(IV) Where a right-of-way or other easement not barred or avoided by the provisions of the "Rights-of-Way Act, 1881", or of this Act, has been omitted or misdescribed . . . In which case such right of way or other easement shall prevail, but subject to the provisions of the said the "Rights-of-Way Act, 1881", and of this Act."

In Tasmania it reads:—[38]

"except—

(ii) So far as regards the omission or mis-description . . . of any public or other right of way or other easement created in or existing upon any land:"

34 Author's italics.
35 Transfer of Land Act 1958, sec. 42.
36 Author's italics.

and in Western Australia it reads:—[39]

> "Provided always that the land . . . shall be deemed to be subject to . . . any easements acquired by enjoyment or user or subsisting over or upon or affecting such land . . ."

As regards the New South Wales Act, Mr. Justice Nicholas, Chief Judge in Equity, held in 1943 in *Jobson v. Nankervis,*[40] that the exception in section 42 (b) is confined to easements created *before* land is brought under the Act. In this ruling he followed a line of cases decided in New Zealand. In effect he decided that once land is brought under the Act an easement may be created only expressly by means of a transfer. This decision has not been challenged in New South Wales. Admittedly it is the decision of a single judge, but of one of great ability. The conclusion Nicholas J. arrived at was foreshadowed as early as 1927 by the late Dr. Kerr in his work THE PRINCIPLES OF THE AUSTRALIAN LAND TITLES (TORRENS) SYSTEM.

Owing to the similarity of language, the decision if correct should apply also to the Queensland and Tasmanian Acts. In Queensland the conclusion has modified judicial support from *Boulter v. Jochheim and the Registrar of Titles,*[41] where doubt was expressed whether an easement could be acquired against a registered proprietor except by express grant. However in Tasmania in *Wilkinson v. Spooner,*[42] Burbury C.J. held that an easement may be acquired over land under Torrens title by prescription under the Prescription Act 1934 of that State.

On the somewhat wider language of the Victorian Act on the other hand it was held in *Nelson v. Hughes,*[43] that the easements referred to in the exception to the indefeasibility section are not limited to easements in existence at the time the land was brought under the Act, but include easements coming into existence at a later stage, and that they extend to include easements acquired under the doctrine of "lost modern grant" or the form of prescription recognised by the High Court in *Delohery's Case.* This probably applies also in regard to Western Australia, especially as the matter of omitted easements is not referred to there by way of an exception, but as a proviso to

37 The Real Property Act 1886-1936, sec. 60.
38 Real Property Act 1862, sec. 40.
39 Transfer of Land Act 1893-1960, sec. 68.
40 (1944) 44 State R. (N.S.W.) 277.
41 [1921] State R. (Queensland) 105.
42 [1957] State R. (Tasmania) 121.
43 [1947] Victorian L.R. 227.

section 68. There is no "official" view on the matter, but I understand it is the personal view of the present Commissioner of Titles that easements may be acquired by prescription over Torrens title land.

In South Australia the official view of the Land Titles Office is that easements cannot be acquired by prescription.

Delohery's Case in the High Court was an appeal from a decision of the Supreme Court of New South Wales, but curiously enough neither the report of the case at first instance nor that on appeal indicates whether the subject land was under common law or Torrens title. No question was raised in *Delohery's Case* as to the indefeasibility clause and no argument was based on it. It may, in fact, be the irony of things that this leading case could have been decided on an entirely different ground.

(h) *Express creation—Torrens title.*

The machinery for the express creation of easements under the Torrens statutes is fairly uniform.

Dr. Kerr, writing nearly 40 years ago, submitted that except in Queensland a private easement over land under the Torrens system cannot be created expressly by any writing other than a registered memorandum of transfer or of lease (because, of course, an easement may be created for a term as well as in fee).

In New South Wales an easement may only be created by express grant or reservation in a transfer.

In Queensland the Real Property Acts make no express provision as to the form of an instrument for creating an easement, except where this is done by way of an instrument of "transfer and charge" under the 1877 Act, and in practice the form normally used is a common law deed registered under the Act.[44] It is understood that, occasionally, a transfer form is used, and this would seem to be justified by section 48 of the 1861 Act coupled with the definition of land in section 3. The easement must be registered on the certificate of title of the servient tenement and on that of the dominant tenement when produced to the Registrar. Where in Queensland land is intended to be transferred *subject to* an easement (*i.e.*, a new easement) the transferor and transferee are both required to execute a memorandum in one of the forms "T". Curiously these forms are not the conventional Torrens title type transfer forms but are framed as indentures. They seem to be intended to apply to the reservation of an easement to a

[44] See Real Property Act 1861-1960, sec. 51.

transferor and the creation of an easement in favour of a third party simultaneously with a transfer of land.

In Victoria, as elsewhere, easements may be created by grant or reservation in a transfer of land, but also by a separate instrument such as an unregistered deed. In either case, upon application in writing, the Registrar is required to notify it in the register book.[45] This elasticity no doubt ties in with the fact that a certificate of title there is not conclusive as to omitted easements.

In South Australia, as in New South Wales, the view is taken that easements may only be created by express grant or express reservation in a memorandum of transfer. This is registered on the servient certificate and production of the title for the dominant tenement is also required. New titles are issued, one showing the dominant tenement with the easement, and another showing the servient tenement subject to the easement.[46] But under section 14a of the Town Planning Act 1929-1963 easements in favour of the Minister for Works or a council may be created automatically by registration of a subdivision plan. Such an easement may be varied or extinguished by consent of all parties interested.[47]

In Tasmania up to the present time easements are normally created by transfer, and this will continue to apply in the case of a simple grant of easement from one landowner to another where no subdivision is involved. But sweeping changes have been made as regards subdivisions by the Local Government Act 1962, and an amending Act of 1963, which will probably be proclaimed to take effect on and after 1st January 1964. Under these Acts, all subdivision plans submitted for approval by a local council must have attached to them a schedule of the easements, profits, and restrictive covenants to which each lot is subject. When the plan is approved by the council and the Recorder of Titles it "comes into effect" and thereupon the Recorder issues separate titles for each lot, notifying the existence of the easements, profits and restrictive covenants affecting such lot. These rights thereupon "come into being—and continue as if created by the most effectual instruments between the parties" and they are not affected by unity of seisin of the dominant and servient tenements of an easement or profit, or the identity of parties to a covenant, except during the continuance of such unity or identity.

45 See Transfer of Land Act 1958, sec. 72 (2).
46 See Real Property Act 1886-1961 (S.A.), sec. 88.
47 *Ibid.*, sec. 90a.

In Western Australia, easements are, I believe, created either by registering a document prepared and lodged expressly for the purpose of creating the easement, or by grant or reservation in a memorandum of transfer or lease registered under the Act.[48]

In the case of New South Wales the provisions of section 88 of the Conveyancing Act before referred to, must be complied with in any transfer creating an easement whether by way of grant or reservation, otherwise the easement cannot be enforced against any person who was not a party to its creation, *i.e.*, other than against the original grantor.

Of course, in all systems there may exist an equitable easement—in the form of an agreement to create an easement. This, like other equitable interests, may be protected by a caveat. The caveat does not make it a registered interest in the land, but has a suspensory effect giving the person entitled to it the opportunity if needed of taking action by way of a suit for specific performance to have the equitable right converted into a legal one.

(i) *Dabbs v. Seaman.*[49]

I now pass to the examination of what has been termed the creation of "easements by estoppel". This is a name applied to easements resulting from the doctrine which emerged in the High Court case of *Dabbs v. Seaman*—a case so well known that I will refrain from going into the facts of it with any particularity. In brief it was held that where, as a result of a transfer land is shown on the certificate of title of the transferee as bounded by a lane, the transferor of the land is not entitled, as against the transferee, to deny that the transferee is entitled to use the land so shown as a right-of-way.

This doctrine was a blow to the preconceived ideas as to the indefeasibility of the certificate of title, and Mr. Baalman, the ardent defender of that basic principle of the Torrens system, exhaustively analysed the judgment in his article *"Easement by Estoppel".*[50] He there stated that he would attempt to show that "easements by estoppel" is a "misleadingly loose phrase which cannot be reconciled with strict law, and certainly not with the judgments in *Dabbs v. Seaman."* He points out that of the three judges who decided the case, two (Isaacs and Higgins JJ.), held that an easement had not been created, the third one, Starke J., felt he was bound to follow an old New South

48 See Transfer of Land Act 1893-1959, secs. 65 and 88A.

49 (1925) 36 Commonwealth L.R. 545.

50 (1957-1958) 31 Aust. L.J. 800.

Wales case, *Little v. Dardier*,[51] decided in 1891 without, however, noticing or, at any rate, without mentioning, the fact that in *Little v. Dardier* the common law right had attached *before* the land had been brought under The Real Property Act (Torrens title), in consequence of which it would be saved under the exception to the indefeasibility clause.

All members of the Court agreed that Seaman, the transferor, by representation in the plan attached to the transfer and reproduced on the certificate of title, was estopped from denying the existence of the lane, but Higgins J. held that this was not sufficient to confer rights on Mrs. Dabbs, and no authority was cited to show that the estoppel would enure against assigns of the representor. It was fundamental to the decision that the representor Seaman was before the Court and still owned the land but would the estoppel have held good against a transferee from Seaman? Mr. Baalman contends that it would not.

Isaacs J. based his decision on the conclusiveness of the certificate of title of Mrs. Dabbs and on a contention that the abuttal on the lane was an "inherent characteristic" of her conclusive certificate of title.

Seaman's certificate of title to the servient land was, in fact, marked "land 20 feet wide" and one of the acts which initiated the litigation was an application by Seaman to the Registrar-General to remove this notation.

The actual basis of the theory on which *Dabbs v. Seaman* was decided has for long been a matter of controversy. If the "inherent characteristic" theory is the basis, then it would seem that the application of the decision is not limited, as Mr. Baalman would suggest, to cases where the owner of the alleged servient tenement was the person who was actually responsible for the description, but would bind successors as well.

The decision in *Dabbs v. Seaman* was followed in New South Wales by Harvey J. in *Cowlishaw v. Ponsford*.[52] In that case His Honour, an outstanding Judge, held that, where the quasi-dominant tenement is under Torrens title and the quasi-servient tenement is under common law title, the principle would not apply in favour of the would-be dominant owner but, in the case under consideration he held as a fact that the "estoppel" easement had arisen when both the

51 (1891) 12 N.S.W. L.R. (Eq.) 319.
52 (1928) 28 State R. (N.S.W.) 331.

dominant and the servient lands were under the common law title and had not been extinguished by the bringing under the Torrens system of the dominant tenement.

So far as concerns lands in Victoria under the Torrens system, the creation of an easement on the *Dabbs v. Seaman* principle seems to be negatived by section 96 (2) of the Transfer of Land Act 1958, which enacts that "Mention of an abuttal in any certificate of title shall not give title to the abuttal or be evidence of the title of any person who is referred to in the description as owner or occupier of the land upon which any abuttal stands or of any land constituting an abuttal." The principle would, however, still apply there as between lands under common law title.

(j) *Implied grant or reservation—Torrens title.*

Another method by which an easement may be acquired at common law is implied grant or reservation. A way of necessity is an example. So also is the implication in cases of "continuous apparent accommodations". Such a right should not be implied unless, upon the evidence, the Court can infer an intention common to both parties that the property should be subject to the easement claimed, the onus being on the plaintiff to establish the facts to prove, and prove clearly, that his case is an exception to the general rule.[53]

On the authority of *Jobson v. Nankervis,* an easement could not so be implied in relation to Torrens title land in New South Wales. The principle of implied grant of a continuous apparent accommodation was applied in Western Australia in 1955 by Wolff J. in *Stevens v. Allan.*[54]

(k) *Release of easement—Torrens title.*

An easement over Torrens title land may in New South Wales be wholly or partly released by a memorandum of transfer altered as the circumstances of the case may require.[55] There is no express provision for writing off a registered easement on proof of the happening of an event whereon the easement is expressed to determine or on proof of abandonment, but in practice the Registrar-General, on application, will in such cases make an entry under section 32 (3) of the Real Property Act which empowers him to cancel an entry in the register book relating to anything which he is satisfied has ceased to affect the land to which the entry applies. Under section 73 of the

53 Bolton v. Clutterbuck, [1955] State R. (South Aust.) 253.
54 (1956-1957) 58 West. Aust. L.R. 1.
55 Real Property Act 1900-1956, sec. 47A.

Victorian Transfer of Land Act 1958, the Registrar is expressly empowered to remove from the register book in whole or in part any easement where it has been abandoned or extinguished. Proof to the satisfaction of the Registrar that the easement has not been used or enjoyed for a period of not less than 30 years constitutes sufficient evidence of abandonment.

There is a similar provision in section 229A of the Western Australian Act (inserted in 1950), the period there being 20 instead of 30 years. Moreover, by section 73A of the Victorian Act, upon an application to bring land under that Act or to amend a certificate of title, if it is proved to the satisfaction of the Registrar that any land constituting a private road or subject to a right-of-way, has been exclusively continuously and adversely occupied by the applicant and those through whom he claims for not less than 30 years, the Registrar may issue the certificate of title without noting the right or easement of way as an encumbrance on it.

There is a similar provision in section 230 of the Western Australian Act of 1893, as inserted in 1950, the period in that section again being 20 years instead of 30 as in Victoria.

IV. Restrictive covenants.

(a) *General.*

These interests have in recent years assumed an increasingly important role in the law of real property. In the original Australian Digest for the period from the commencement of our institutions to 1933 they do not rate a separate heading as easements do, but are accommodated under the heading of "Vendor and Purchaser", and this has been repeated in subsequent issues of the Digest.

For that first period of over 100 years the subject of restrictive covenants occupies only three-and-a-half pages in the Digest. For the next period of 14 years, from 1934 to 1947, it occupies one-and-a-half pages, and since 1947 the annual volumes rarely have less than two or three reported cases on the subject making a total of seven-and-a-half pages from 1948 to 1961.

Restrictive covenants made their appearance in Australia on a legal stage ill-designed to accommodate them. They are, to say the least of it, awkward creatures. So far as they constitute interests in land they are equitable and not legal, and, as such, are subject to those frailties to which all equitable interests are heir. They are still undergoing a phase of development by judicial decision, though their general features have long been established. Generally speaking the

legislature has taken but little notice of them, and as regards land under Torrens title they have had to be fitted into the Torrens scheme as best they may. To quote an example, the indefeasibility sections in the Torrens statutes, all of which make special exceptions of easements, ignore the impact of restrictive covenants.

In Dr. Kerr's monumental work on the Australian Torrens system, written nearly 40 years ago, they rate, out of 514 pages, one-and-a-half pages only, and two other casual mentions.

It is hardly necessary to recall the general features of these covenants so far as they constitute interests in land. These are summarized by Myers J. in the Supreme Court of New South Wales in *Re Barry and the Conveyancing Act*,[56] in these words:—

> "If a covenant restrictive of the user of land is not entered into for the benefit of other land retained by the covenantee, it is considered to be . . . merely a personal covenant. If such a covenant has been entered into for the purpose of assisting the vendor to dispose of other land the benefit may be assigned by him to the purchaser of that land, but otherwise the benefit of a personal covenant is not assignable at all. If, on the other hand, a restrictive covenant is entered into for the benefit of other land retained by the coventee, it is said to be annexed to that land, or to enure for the benefit of it, and the benefit passes, without express assignment of the covenant to the successive owners of the land:"[57]

This description is somewhat misleading since it suggests, like the classification of the subject under the heading "Vendor & Purchaser" in the Digest, that restrictive covenants of this type can only be entered into as between vendor and purchaser. Although this is by far the most usual form, there is nothing to prevent one of two adjoining land holders entering into a restrictive covenant with his neighbour burdening his own land for the benefit of the neighbour's land, just as one land holder may grant his neighbour an easement over the grantor's land.

The subject is further complicated by the doctrine of the "common building scheme" which was clearly formulated only early in the present century in *Elliston v. Reacher*,[58] whereby, in effect, a restrictive covenant may bind persons who are not in fact successors to the

[56] (1962) 79 Weekly Notes (N.S.W.) 759.
[57] *Ibid.*, at 760.
[58] [1908] 2 Ch. 374, and 665.

original covenantor. Thus if *A*, a vendor, obtains from *B* and *C*, successive purchasers, covenants with *A* binding the purchasers and their successors in favour of *A* and his successors, *D* a successor of *B* would be bound in favour of *C* and of *E* as a successor of *C*, because they are both successors of *A*, but *C* or *E* would not be bound in favour of *B* or *D* because they were not successors of *A* at the time of *C's* covenant—they had preceded that covenant. However if there exists a "common building scheme", perhaps more accurately described as a "common scheme of development", all owners of land in the area covered by the scheme including the vendor (who may not in fact have covenanted at all) are bound to one another regardless of the order in point of time of their several covenants. They are all subject to a so-called "local law".

It is proposed to consider the subject of restrictive covenants, first of all generally, noting legislative provisions of a general nature, and then to proceed to a short examination of special features relating to their application to lands under Torrens title.

(b) *General legislation.*

Legislative provisions of a general nature are scanty in all jurisdictions but here, again, New South Wales leads the way. In the first place the laws of most of the jurisdictions contain a section derived from section 78 of the English Law of Property Act 1925, that a covenant relating to land of the covenantee is deemed to be made with the covenantee and his successors in title and persons deriving title under him or them, and will take effect as if such successors and other persons were expressed.[59] In addition, they contain another section, derived from section 79 of the same English Act, that a covenant relating to any land of a covenantor, or capable of being bound by him by covenant, shall, unless the contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself and his successors in title and persons deriving title under him or them.[60]

It seems to be generally accepted that this latter section does not have the effect of making the burden of positive covenants *e.g.*, to spend money, "run with the servient land".[61]

59 See Conveyancing Act, 1919, (N.S.W.) sec. 70; Property Law Act 1958, (Vic.) sec. 78; Conveyancing and Law of Property Act 1884, (Tas.) sec. 71, (inserted by amending act of 1962).

60 See Conveyancing Act, 1919, (N.S.W.) sec. 70A; Property Law Act 1958, (Vic.) sec. 79; Conveyancing and Law of Property Act 1884, (Tas.) sec. 71A, (inserted by amending act of 1962).

61 MEGARRY AND WADE, THE LAW OF REAL PROPERTY, (2nd ed., 1959) 730.

The first mentioned section would, however, suffice to make the benefit of restrictive covenants run with the dominant land without express mention of successors and assigns.

There is yet another section derived from section 56 (1) of the English Act that a person may take the benefit of a covenant or agreement over or respecting land although he may not be named as a party to the assurance or instrument.[62]

(c) *Annexation of benefit and burden.*

In New South Wales there is section 88 of the Conveyancing Act, already mentioned in regard to easements, which requires the instrument creating the restriction to indicate clearly the lands having the benefit and burden respectively of the restriction, the persons having the right to release vary or modify the restriction (other than those having the right by law to do so) and the persons (if any) whose consent to a release variation or modification is stipulated for.

The impact of this section is perhaps less important in relation to restrictive covenants than to easements because, in the case of easements, as before stated, where the dominant tenement of an easement is not clearly expressed, parol evidence is admissible to identify it.

This section has no counterpart in the other States of the Commonwealth. It has the effect, however, of focussing the attention of a draftsman on the necessity which exists, quite apart from the section, for exact definition of the tenement intended to have the benefit of any restrictive covenant. This necessity has been underlined by a series of recent Australian cases in which restrictive covenants have been held to be ineffective quite apart from non-compliance with the requirements of section 88. These seem to stem from the case of *Re Ballard's Conveyance.*[63]

In that case the stipulations made detailed provision for securing that about 18 acres of land should be used for the purpose of substantial dwelling houses. The learned judge who decided it (Clauson J.) held that, on the language used, the annexation of the benefit was to the *whole* of an estate of 1700 acres and that it was obvious that, while a breach of the stipulations might affect part of the land, by far the larger part of the area could not be affected.

62 See Conveyancing Act, 1919, (N.S.W.) sec. 36C; Property Law Act 1958, (Vic.) sec. 56; Law of Property Act, 1936 (S.A.) sec. 34; 8 & 9 Vict. c. 106 sec. 5, adopted by 12 Vict. No. 21 (W.A.); Conveyancing and Law of Property Act 1884, (Tas.) sec. 61 (1) C.

63 [1937] Ch. 473.

It followed from this that the 1700 acres area was not "touched and concerned" by the covenants and that, accordingly, they were unenforceable.

The general proposition for which the case is an authority is that annexation to defined land *as a whole* is only effective to make the covenant run with the whole, or at all, if it can also be found that the land as a whole is "touched and concerned", the "touching and concerning" of some parts only of the land is insufficient to make the annexation effective.

In PRESTON & NEWSOM on RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND,[64] it is stated that it is by no means certain that even the narrow ground enunciated by Clauson J. is in accordance with principle. The learned authors state:—"But while the estate exists as such it would be arguable, at least in the Court of Appeal, that anything which affects part of the estate necessarily affects the estate as such, and that in such a case as *Re Ballard* the annexation is effective." Nevertheless the decision in *Re Ballard* has stood now for well over 20 years.

It has been followed in New South Wales by McLelland J. in *Lane Cove Municipal Council v. H. & W. Hurdis Pty. Ltd.*,[65] and by Myers J. in *Re Roche & The Conveyancing Act*,[66] and in Victoria by Adams J. in *Langdale Pty. Ltd. v. Sollas*,[67] and by the Full Supreme Court in *Re Arcade Hotel Pty. Ltd.*[68]

In another case in New South Wales, *Re Barry and the Conveyancing Act*,[69] Myers J. held a covenant ineffective on a somewhat different ground.

In that case the benefit of a covenant was expressed to be appurtenant to "the whole of the land in Bland Street" shown in a certain plan of subdivision. There were 50 lots in this subdivision fronting Bland Street, and of these only 13 were owned by the covenantee at the time of the covenant. Myers J. held that, as the covenant could not be construed as intended to be annexed to some only of the lots fronting Bland Street, and as the parties had no power to annex the benefit to lots that were not owned by the vendor, the covenant failed altogether.

64 London, 1955.
65 (1955) 55 State R. (N.S.W.) 434.
66 (1960) 77 Weekly Notes (N.S.W.) 430.
67 [1959] Victorian R. 634.
68 [1962] Victorian R. 274.
69 (1962) 79 Weekly Notes (N.S.W.) 759.

An Examiner of Titles at the Registrar-General's Department in Sydney has privately expressed the view that probably the majority of the restrictive covenants in New South Wales are unenforceable on one or other of these grounds.

These cases make it clear that a draftsman must be ultra cautious in drafting his covenant. If the vendor (covenantee) wishes to annex the benfit of the covenant by the purchaser (covenantor) not only to land he still holds, but to lots in a subdivision with which he has parted, use can be made of the section above quoted under which a person may take the benefit of a covenant contained in an instrument to which he is not a party. It must be borne in mind that this section does not, however, operate to confer rights on persons not in existence at the time of the covenant.[70]

To give the covenant effectiveness in the case of a large subdivision, and to escape the net of the *Re Ballard* line of cases, it is suggested that the covenant be worded thus:—

> "And the purchaser hereby covenants with the vendor and also with all other persons who are now the registered proprietors [in the case of old system title "are now the tenants in fee simple"] of lots comprised in Deposited Plan No. — and to the intent that the burden of this covenant may run with and bind the land hereby transferred [conveyed] and every part thereof *AND* to the intent that the benefit thereof may be annexed to and devolve with the whole and every part of the land comprised in Certificate of Title Volume — Folio — [or in Deposited Plan Registered No. —] [or, in the case of old system title, "in the land comprised in conveyance Registered No. — Book —"; or as the case may require] to observe the following stipulations:—"

This would be a sufficient compliance in New South Wales with the requirements of section 88 of the Conveyancing Act but if it is desired to express the matter in paragraph form it could be worded thus:—

> "(a) The land to which the benefit of the restriction hereinbefore set out is appurtenant is the whole of the land comprised *etc.* and every part thereof.
>
> (b) The land which is subject to the burden of the said restriction is the land hereby transferred (conveyed)."

(d) *"Common building scheme" or "scheme of development".*

The doctrine of the "common building scheme" and its requirements, briefly mentioned above, is based on the implication of obliga-

70 See Bird v. Trustees Executors & Agency Co., [1957] Victorian R. 619.

tions as opposed to express covenants. It rarely exists on its own but normally supplements express covenants. Thus if its requirements are satisfied it can be called in aid to bind a vendor who has not covenanted at all or, as already stated, to bind a later transferee in favour of an earlier one where the express covenant of the later transferee would not enure to the benefit of the earlier one. There are but few cases in which a common building scheme has been upheld in Australia. The special difficulties which beset its application to lands under Torrens title will be discussed later.

(e) *Modification and extinguishment.*

Statutory machinery for modification and extinguishment of restrictive covenants and for orders declaring whether or not, in any particular case, land is affected by a restriction, exists in four States.[71]

These statutory provisions are based on section 84 of the English Law of Property Act 1925. In New South Wales, as we have noticed, the section applies to easements as well as to restrictive covenants. In Western Australia it is limited to lands under the Torrens system, but I am given to understand that the amount of land under common law title in that State is negligible. Except in the case of Tasmania the procedure is by application to the court for an order. In Tasmania it is by way of application to the Recorder of Titles for an order or declaration, his decision being subject to appeal to the Supreme Court.[72] The governing conditions are:—

1. By reason of change in the user of any land having benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances which the Court may deem material, the restriction ought to be deemed obsolete, or the continued existence of the restriction, would, or would unless modified, impede the reasonable user of the servient land without securing practical benefit to the persons entitled to the dominant land.
2. That persons of full age and capacity entitled to the benefit of the restriction have agreed to the restriction being modified or, by their acts or omissions, may reasonably be considered to have waived the benefit of the restriction, wholly or in part.
3. That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit.

71 See Conveyancing Act, 1919, (N.S.W.) sec. 89; Property Law Act 1958, (Vic.) secs. 84, 85; Conveyancing and Law of Property Act 1884, (Tas.) sec 90 D; Transfer of Land Act 1893-1959, (W.A.) sec. 129 C.

72 Conveyancing and Law of Property Act 1884, sec. 90 D.

This wording is taken from the New South Wales provision. There are slight variations in the wording in other jurisdictions, but not in any material respect.

A certain amount of case law has been built up as to the conditions on which an order for discharge or modification will be made. The courts have not seen fit to treat applications lightly. The onus of proof is on the applicant, who must establish, to the reasonable satisfaction of the tribunal, that one or other of the prescribed conditions apply.[73] "Substantial injury" where used in the section does not mean 'large or considerable' injury but an injury which has present substance—not a theoretical injury but something real. "Obsolete" means incapable of fulfilment or serving no present purpose.[74]

The benefits to the person entitled to the dominant tenement are not necessarily to be measured in terms of money value.[75]

In *Perth Construction Pty. Ltd. v. Mount Lawley Pty. Ltd.*,[76] the learned Judge queried whether he had a discretion to refuse relief when an applicant had brought himself within the literal words of the section, and said he was by no means satisfied that such a discretion does not exist. On the other hand it has been held in New South Wales that "may" in section 89 of the New South Wales Act should be read as "ought" when the conditions prescribed in the section exist.[77]

From these examples it will be gathered that the powers conferred on the courts have been exercised cautiously and sparingly.

(g) *Restrictive covenants and Torrens title.*

Restrictive covenants are awkward intruders on Torrens title. When the Torrens system was first designed these covenants as constituting interests in land were in their infancy. Their parent, the leading case of *Tulk v. Moxhay*,[78] was decided only in 1848. One of the basic principles of the Torrens system is that equitable interests should be kept behind a curtain. No notice of trusts may appear on the register, and they must exist, if at all, as unregistered and un-

73 In re Rose Bay Bowling and Recreation Club Ltd., (1935) 52 Weekly Notes (N.S.W.) 77; Re Parimax (S.A.) Pty. Ltd., (1955) Weekly Notes (N.S.W.) 386.

74 Re Mason and the Conveyancing Act, (1961) 78 Weekly Notes (N.S.W.) 925.

75 Heaton v. Loblay, (1960) 77 Weekly Notes (N.S.W.) 140; Perth Construction Pty. Ltd. v. Mount Lawley Pty. Ltd., (1955) 57 West. Aust. L.R. 41.

76 *Ibid.*

77 See In re Rose Bay Bowling and Recreation Club Ltd., (1935) 52 Weekly Notes (N.S.W.) 77.

78 (1848) 2 Ph. 774; 41 E.R. 1143.

registrable interests rather inadequately protected by the caveat system which is designed to give the party entitled to an equitable interest limited time to assert it in equity as against a registered proprietor who should seek to ignore or override it.

Of restrictive covenants in relation to Torrens title land Mr. Baalman in his COMMENTARY wisely says: "The general impact of restrictive covenants upon the Torrens system still requires much judicial enlightenment. A branch of law which rests so heavily on the doctrine of notice cannot be grafted on to a tree which repudiates the doctrine without impairing the general health of the tree."

Though sometimes termed "equitable easements" these interests, in their structure, have little in common with easements and would not come within the exception of "easements" from the operation of the indefeasibility sections. The legislature in several States, uninterested in law reform measures, has been inclined to ignore their existence.

In Dr. Kerr's book[79] published in 1927 he stated:[80] "It seems obvious that restrictive covenants, not contained in a registered instrument which constructively forms part of the Register Book, would not bind a subsequent transferee for value, even with express notice. *A fortiori,* no such restrictive covenant could confer rights as between purchasers from the covenantor."

Rather misleadingly, however, he stated in a footnote, "Under the general law restrictive negative covenants can be imposed, . . . but such restrictive covenant does not confer any rights as between purchasers from the covenantor *unless a building scheme is made out.*"[81]

Let us see to what extent special legislation has attempted to deal with the problem of restrictive covenants in each of the States.

In New South Wales section 88 of the Conveyancing Act (as substituted by the Act of 1930) provides in relation to Torrens title land that the Registrar-General should have *and should be deemed always to have had* power to enter on the appropriate folium in the register book relating to land subject to the burden of the restriction a notification of the restriction, and a notification of any instrument purporting to affect its operation, and when the restriction is released varied or modified to cancel or alter the notification. Any such notification should not give the restriction any greater operation than it has under the instrument creating it.

79 THE AUSTRALIAN LANDS TITLES (TORRENS) SYSTEM.
80 At 249.
81 Italics added.

Every such restriction notified on the register book is to be an "interest" within the meaning of section 42 of the Real Property Act (*i.e.*, the Torrens Act). Section 42 is the indefeasibility section, consequently the reference to the restriction being an "interest" means that when it is notified on the register book the registered proprietor holds subject to it. Prior to this enactment it was customary for the Registrar-General to note restrictive covenants on the register but the effect of this was doubtful, as there was no express statutory authority.

The enactment of section 88 (3) then puts the equitable interests created by restrictive covenants on quite a different footing to other equitable interests in that it makes them, in effect, registered interests.

The Victorian Transfer of Land Act of 1958 is very similar is language and effect.[82]

Mr. Moerlin Fox's commentary on the Victorian Act[83] also states that it had long been the practice of the Office of Titles in Victoria to note a restrictive covenant as an encumbrance. It is to be noted however, that the Victorian section does not purport to validate retrospectively entries already made, as the New South Wales section does.

The Western Australian Transfer of Land Act 1893-1959 contains a provision in section 69 requiring the Registrar to endorse as an encumbrance "any special building condition" contained "in a grant conveyance or other document of title". The reference to "grant conveyance or other document of title" suggests that this refers to assurances outside the ambit of the Act, and it probably authorized the creation of restrictive covenants by deed so long as they comply with the description "special building condition". What would constitute a "building condition" would seem to be a matter of speculation. However in 1950 there was introduced into the Act Division 3A, including sections 129A, 129B and 129C. Section 129A (1) enables restrictive covenants to be created by "instruments in the prescribed form" but I understand that no form has yet been prescribed. In practice they are embodied in the transfer and are not the subject of separate documents.

In Queensland and South Australia restrictive covenants are not even mentioned in legislation as to Torrens title lands and I am informed that in Queensland there is no method by which such covenants may be registered in relation to such lands at all, and the present Registrar does not favour any amendment of the Act in this regard.

82 See sec. 88.

83 THE TRANSFER OF LAND ACT 1954 WITH ANNOTATIONS, (1957), at 101.

In South Australia the long and accepted practice in regard to creation of restrictive covenants is, to say the least of it, novel. The purchaser enters into a memorandum of encumbrance securing a purely nominal rent charge and in which the restrictive covenants are contained. All successive buyers of the land subject to the encumbrance must, therefore, be bound by the covenants since the encumbrance when registered forms part of the register book and the covenants contained in it are rights *in rem*. Presumably the reason covenants are not embodied in a transfer is that on registration of a transfer its operation as such is spent whilst an encumbrance with its covenants, like a mortgage remains "alive" on the title until discharged. The official view of the Land Title Office is opposed to the inclusion of restrictive covenants in transfers. The system of embodying restrictions in a memorandum of encumbrance received judicial approval in *Blacks Ltd. v. Rix*.[84]

Tasmania, in the provisions inserted in the Real Property Act of 1886 by the Real Property Act 1962, has a satisfactory and up-to-date code relating to restrictive covenants. Under section 29B these are entered into as between vendor and purchaser by an instrument in the form set out in the Schedule separate from the instrument of transfer and the covenants are to be entered in the register by the Recorder of Titles. He may refuse to enter the covenant where the provisions are not wholly or in part enforceable in equity between assigns of the parties. A covenant between vendor and purchaser which might have been made by instrument under the section and which is not so made is unenforceable between assigns of the parties.

Section 27C is somewhat similar to section 88 (3) of the New South Wales Act and section 88 of the Victorian Act, and enacts that, when entered, the restriction may be enforced notwithstanding any provision in the Principal Act (*e.g.*, the indefeasibility section) but that it has no greater operation by reason of the notification than it would have had if the lands on the title of which the restriction is noted had not been under Torrens title and the registered proprietor were affected in equity by express notification. This is a much more lucidly expressed version of the New South Wales and Victorian provisions.

Section 27D (1) appears to relate to restrictive covenants between parties who are not vendor and purchaser, and provides a separate form for these.

84 [1962] State R. (South Aust.) 161.

Under section 27D (3) where land subject to a covenant touching and concerning it and enforceable in equity is brought under the Torrens system, a memorandum of the covenant in form approved by the Recorder is to be lodged with the Recorder and noted by him as if it were an instrument made under subsection (1) *i.e.,* the subsection last quoted.

One must again mention the important provisions in the new Tasmanian Local Government Act of 1962 under which restrictions attaching to a subdivision and embodied in a subdivision plan come into effect and attach to titles automatically without express covenants, and are not extinguished by identity of parties.

(h) *Operation of various types of restriction under Torrens title.*

The normal type of restriction is contained in a covenant, the benefit of which is annexed to definite ascertainable land and which runs with the land to which the benefit is attached.

By reason of those provisions in some Torrens statutes which state that restrictive covenants noted on titles have no greater operation than they would have had under the instrument creating them, it is necessary to refer back to that instrument and to examine the structure of the restriction. Thus, even if noted on the certificate of title to one lot in a subdivision, it is necessary to see whether the restriction when originally created was intended to benefit the whole subdivision or the whole *and every part of it,* and if the latter whether the land comprised in the particular certificate on which it is noted (if in fact it is noted on the dominant certificate) is capable of deriving benefit from it. In other words one cannot assume from the notation of a restriction on a dominant or a servient certificate that the restriction is operative to benefit or burden the land in that certificate. Further examination and analysis is essential in each case.

(i) *Operation of the assignable type of restriction under Torrens title.*

As before stated there is a second type—what Myers J. in *Barry's Case*[85] mentioned as "entered into for the purpose of assisting the vendor to dispose of other land,—the benefit may be assigned by him to the purchaser of that land . . ."

This type of case depends on the rules enunciated in *Re Union of London and Smith's Bank Ltd.'s Conveyance, Miles v. Easter.*[86] The conditions applicable to this type of restriction have been sum-

85 (1962) 79 Weekly Notes (N.S.W.) 759, at 760.
86 [1933] Ch. 611.

marized in PRESTON & NEWSOM'S work on restrictive covenants.[87] The learned authors say that for it to operate:—

"(a) the covenantee must, at the date of the covenant, have had 'ascertainable' land;

(b) the covenanting parties must have intended to benefit the 'ascertainable' land;

(c) Some or all of the 'ascertainable' land must be capable of being so benefited;

(d) The plaintiff must be interested in at least some of the 'ascertainable' land;

(e) The plaintiff must be the express assignee of the benefit of the covenant."

Section 88 (3) of the New South Wales Conveyancing Act empowers the Registrar-General to enter on the folium of the register book relating to land subject to the burden of a restriction a notification of such restriction. Subsection (1) of the same section is the one which provides that a restriction the benefit of which is intended to be annexed to other land shall not be enforceable against a person interested in the land claimed to be subject to the restriction (not being a party to its creation) unless the instrument clearly defines the dominant and servient tenements.

One of the 'assignable' restrictions which we are now considering could not comply with subsection (1), could it then be noted by the Registrar-General under subsection (3)? Jacobs J. in *Re Pirie and The Conveyancing Act,*[88] took the view that the only restrictions which can be noted under subsection (3) are those which can comply with subsection (1) and this view is upheld as far as concerns obligations taking effect on and after 1st January 1930 by four out of five of the Justices of the High Court in the same case on appeal.

The identical difficulty would not arise under section 88 (1) of the Victorian Act, because that Act has nothing equivalent to the New South Wales section 88 (1). On the language of the Victorian subsection it would appear competent for the Registrar to enter a notification of an assignable restriction on the certificate to the servient tenement.

The Tasmanian section 27B (inserted by the Act of 1962) states that the Recorder may refuse to enter particulars of a restriction

87 RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND, (3rd ed.) at 27.
88 (1961) 79 Weekly Notes (N.S.W.) 701.

where the provisions are not wholly or in part enforceable in equity between assigns of the parties. That would seem to be the case in regard to the assignable variety of restriction.

Under section 129A (1) and (2) of the Western Australian Act it would also appear open to the Registrar of Titles to make an entry of an assignable covenant.

As South Australia and Queensland have no express statutory provisions on the subject, it would appear that no entry could properly be made in either of those States.

In the case of the first-mentioned State, if the device of the memorandum of encumbrance is used, it is difficult to see how a covenant made in the encumbrance with the encumbrancee (original vendor) could be assigned apart from and outside the scope of the encumbrance itself.

(j) *Application of the "common building scheme" doctrine to land under Torrens title.*

We are now on the threshold of a very difficult inquiry—to what extent the common building scheme doctrine applies to lands under Torrens title. Here we may strike a conflict between the indefeasibility of the Torrens system and the desire to give effect to perfectly reasonable restrictions designed to preserve the amenities of a subdivision for the benefit of all concerned.

At the risk of being tedious I may again state—that where there are successive purchasers, *A* and *B,* from the same vendor each of whom enters into a restrictive covenant with the vendor, *B* in taking his assurance gains rights against *A* because *A*'s covenant runs with the land to *B* but *A* has no rights against *B.* And neither of them has rights based on express covenant against the vendor who has not in fact covenanted at all.

If, however, there exists a common building scheme all purchasers regardless of their order, and the vendor, have mutual rights and obligations. Such rights depend in part on the express covenants and in part on obligations implied in equity. This is the usual pattern. But indeed the whole scheme may depend on implied obligations as in the leading case of *Elliston v. Reacher*[89] itself. Although referred to as "common building schemes" PRESTON & NEWSOM prefer the term "schemes of development". They say, " 'Building schemes' are a mere species of a genus:—see per Greene M.R. in *White v. Bijou*

[89] [1908] 2 Ch. 374, and 665.

Mansions Ltd.[90] It is convenient to refer to the genus as 'schemes of development'."[91] It is obvious that one has to be very careful as to one's terminology. The "doctrine of the common building scheme" is misleading because obligations in a scheme of development may, as I have illustrated earlier in this paper, be made to depend entirely on express covenant. To be meticulous, a better title would be "the implication of obligations in a common building scheme" or (if you prefer it) "in a scheme of development".

To examine this implication in lands under Torrens title it is desirable to take the case of (i) the vendor who does not enter into a covenant, and (ii) the obligation of a later purchaser to an earlier one. Now despite the indefeasibility sections of the Torrens statutes it is well established that a registered proprietor of land under the system with a clean certificate of title is nevertheless subject to "personal equities".

As Isaacs J. said in *Barry v. Heider*:—[92]

> "They [*i.e.*, the Torrens statutes] have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them."[93]

A common example is the enforcement against a registered proprietor of an equitable mortgage by deposit. If then the three requisites of the *Elliston v. Reacher* rule exist, *viz*:

(i) a common vendor;

(ii) a scheme applicable to an area which the vendor intends to sell in lots and the scheme provides for restrictions which are to be imposed on all lots;

(iii) an intention on the part of the vendor that the restrictions are to be for the benefit of all lots and an intention on the part of the original purchasers to take the benefit of the restrictions;

the vendor should be bound by implication and, perhaps more doubtfully, a later purchaser should be bound in favour of an earlier one on the basis of "personal equities", but a successor to the vendor of

90 [1938] Ch. 351, at 357 *et seq.*
91 *Supra,* note 87, at 31.
92 (1914) 19 Commonwealth L.R. 197.
93 *Ibid.,* at 213.

the whole or part of the vendor's land who inherits the vendor's clean certificate and whom the vendor has not required to enter into a covenant, will not be bound if he takes without notice of the scheme, by reason of the indefeasibility of his certificate and the absence of any personal equity, and a transferee from a later purchaser even if he takes with notice, will not be liable to the earlier transferee or a successor of the earlier transferee because his transferor's covenant is, *ex hypothesi,* with the vendor and successors and passes to successors of the vendor who take *after* the covenant, and, because, apart from that, there is no personal equity binding him. There seem to have been only 4 reported cases in Australia in which it was necessary to determine whether a common building scheme existed *viz., Re Wilson & The Conveyancing Acts,*[94] *Re Naish and the Conveyancing Act,*[95] *Langdale Pty. Ltd. v. Sollas,*[96] and *Cobbold v. Abraham,*[97]—all of them relating to lands under Torrens title.

In the first-mentioned case the learned Chief Judge in Equity held that a common building scheme had been established, but did not attempt to explain its application to Torrens title lands but rather seemed to assume that it applied. In the second and third cases it was held that the necessary elements of a common building scheme had not been made out. In the fourth case His Honour did not give any detailed consideration to the application of the building scheme rule to Torrens title but also seems to have assumed that it applies. In this case the plaintiff's case was assisted by an express assignment of the covenant.

The decision in *Wilson's Case* is criticised by BAALMAN in his COMMENTARY ON THE TORRENS SYSTEM IN NEW SOUTH WALES where he says:—[98]

> "He [*i.e.,* the Judge] did not explain how these doctrines of English equity applied to what the Privy Council described as a "totally different land law" namely a system of registration of title contained in a codifying enactment . . . In an Article in 22 *Australian Law Journal* at page 71 it is submitted that a common building scheme has no application to land under the Real Property Act except as between parties within the contractual ambit"

(and, one might suggest adding, "and those subject to a personal equity").

94 (1949) 49 State R. (N.S.W.) 276.
95 (1960) 77 Weekly Notes (N.S.W.) 892.
96 [1959] Victorian R. 634.
97 [1933] Victorian L.R. 385.
98 At 127.

The recent case of *Re Pirie & The Real Property Act*,[99] before Jacobs J. in the Supreme Court of New South Wales, and on appeal before the Hight Court of Australia,[1] is most interesting in this regard.

In the High Court Their Honours appeared to consider that in the case under consideration there was no evidence of the existence of a building scheme, so in this regard their comments are obiter. Jacobs J. at first instance appeared to take the view which would have delighted Mr. Baalman, that only obligations of the kind contemplated by section 88 (1) of the Conveyancing Act, *i.e.*, those where the dominant and servient tenements are defined as required in that subsection, could be noted by the Registrar-General in the register book and consequently he considered that the common building scheme rule would not apply to Torrens title land.

There seems to be some confusion of expression on the part of the learned Judge in a later stage of his judgment where he said:—

> "The fact that extrinsic evidence may show that a building scheme was intended will not exclude the intention to annex the covenant . . . But I can see no substantial reason why, if an intention is shown to annex the benefit of the covenant to land previously transferred, in the course of creating a building scheme, the covenant should not be enforceable by a transferee from the common owner prior to the transfer of the land sought to be burdened."[2]

This, it seems, would be on the basis of personal equities binding the vendor and transferees being enforceable against registered proprietors.

In the High Court the building scheme doctrine was only mentioned incidentally. Windeyer J. said:—

> "I agree that since 1931, and in some cases since 1920, the doctrine of a common building scheme will not, of itself, suffice to sustain in New South Wales a restrictive covenant, whether under the *Real Property Act* or under common law title. The statutory conditions must be complied with."[3]

In an article entitled *The common building scheme and statutory provisions*,[4] I have attempted to show that His Honour may have been mistaken in his reference to the statutory conditions. Section 88 (1)

99 (1962) 79 Weekly Notes (N.S.W.) 701.
1 (1962) 36 Aust. L.J.R. 237.
2 *Supra.*, note 99, at 704.
3 *Supra.*, note 1, at 248.
4 (1963) 37 Aust. L.J. 81.

only relates to restrictions contained in *an instrument* and I have contended that its requirements do not relate to implied obligations at all.

In *Pirie's Case,* four out of five justices considered that, as regards restrictions created on and after 1st January 1931, the Registrar-General may only note in the register book restrictions which answer the description in section 88 (1).

This tends to reinforce the view which I expressed earlier, *viz.,* that the common building scheme implication of obligations can only affect lands under Torrens title where such obligations are enforceable as personal equities against persons who are not bound by express covenants. The same reasoning would appear to apply in relation to jurisdictions like those of Western Australia, Victoria, and Tasmania which appear to provide for the recording of express covenants only.

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