After a consideration of these authorities Windeyer J. concluded that the civil law rule that the owner of higher land has a right to insist upon his lower neighbour receiving surface water running off his land

> is not part of the common law as it exists in Australia and that so far as the dicta in the Privy Council case suggest that it is, they should not be followed by this court.[21]

The lower owner may block the flow of surface water by works on his land so long as they are "reasonably necessary to protect his land for his reasonable use and enjoyment".

Hence one might briefly conclude that there is now binding authority in Australia that the general principles involved in the "common enemy" rule are part of our law. In disputes of this nature the court's duty is to balance conflicting interests. If the Civil law doctrine had been followed the higher owner would have been placed in an unduly dominating position in relation to the lower owner.

21. (1962) 36 A.L.J.R. 43, 57.

REAL PROPERTY ACT 1886-1961

Equity and the Torrens System—Scheme of Development

The decision in *Black's Ltd. and Others* v. *Rix and Others*[1] is significant for two reasons. First, it endorses the propriety of noting by way of an encumbrance on the certificate of title restrictive covenants concerning land held under the Torrens system. Secondly, by invoking the equitable doctrine of a scheme of development, it throws some light on the obscurity surrounding the status of equitable interests in land registered under the Real Property Act 1888-1961.

Both the facts and the central issue were relatively simple. One of the plaintiffs, Springfield Ltd., had sub-divided an estate for the sale of separate lots to purchasers prepared to build residences of a certain minimum standard. Each lot was sold subject to certain restrictions of user, a particular restriction being the prohibition of further sub-division of any such lot. This was done by following a common conveyancing practice whereby the purchaser accepted a transfer subject to covenants comprising the restrictions, and providing for the payment, if demanded, of a perpetual and nominal annual rent charge.

In these circumstances, the substantial question before the court (Napier C.J.) was whether the plaintiffs, Springfield Ltd., and others who had purchased lots, could enforce such a covenant against the defendant, who was assignee of an original covenantor. Since the covenants existed only between original purchasers and the common vendor, and not between the covenantors inter-se, the necessary right of enforcement between the latter could be estab-

1. 1962 Law Society Judgment Scheme 289.

lished only by employing the equitable doctrine of a "scheme of development".

This was in fact done by His Honour, who, after enumerating the now well-settled criteria for such a scheme,[2] concluded that the necessary conditions were fulfilled, and allowed the plaintiffs their claim for a declaration of right to enforce.

The first point of interest in the case concerns the finding that the plaintiff's use of the encumbrance provisions to note the relevant restrictive covenant on the certificate of title was a proper procedure. Although this has long been the practice of the Lands Titles Office, it appears that the present case contains explicit judicial recognition of its propriety in South Australia.

There has always been a body of opinion that only registrable interests could be placed on the certificate of title, and that the protection of restrictive covenants is properly relegated to the caveat process.[3] In arriving at his decision, His Honour alluded to the settled Victorian practice allowing such notation, and also to the form of "encumbrance" in the tenth schedule of the Real Property Act 1888-1961 which expressly includes "any special covenants". Read in conjunction with Sections 77 and 128, this would seem to provide a sound basis for the procedure.

Once the covenant is properly noted on the certificate of title, Section 69 will presumably operate to preserve it as an interest "notified on the original certificate of such land". Whilst it does not strictly follow from the mere fact of the covenant being on the title certificate that the equitable interests sought to be enforced are thereby "notified on the original certificate", (such equitable interests derive only from the coincidence of the covenants with the factual circumstances of a building scheme), yet it appears that the noting of the covenants will itself sufficiently satisfy this requirement.[4] Thus an equitable interest is indirectly placed on the certificate of title and is enforceable by virtue of that fact. This aspect of the present case involves the important conclusion that the protection of equitable interests is not in all cases necessarily relegated to the caveat process; those equitable interests for which legal ingenuity can devise a means of noting on the certificate of title will come under the blanket protection of Section 69. This would include equitable interests arising out of mortgage agreements as well as those arising from restrictive covenants.

His Honour also held that an independent support for the equit-

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2. See *Elliston* v. *Reacher* [1908] 2 Ch. 374, 384: C.A. (ibid.) 665.
3. See *Re Arcade Hotel Pty. Ltd.* [1962] V.R. 274, 283 per Sholl J. (dissenting.) (Dealing with the same question, the Victorian Supreme Court held that restrictive covenants could be noted as encumbrances.)
4. But see Baalman (27 *A.L.J.* 366, 367) who argues: "In order to show that any of the neighbours had an interest in the enforcement of such a covenant it would be necessary to invoke the common building scheme doctrine, and to look beyond the four corners of the instrument containing the covenant for attendant circumstances, as laid down in *Elliston* v. *Reacher* ([1908] 2 Ch. 374). If such a course is to be permissable in a Torrens title, then the key section of the Real Property Act must be held to be partly meaningless."

able interest might be found in Section 249, the enacting portion of which states:

> 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.

If this was the operative section, then the only obstacle would be the requirement of notice, since equitable interests arising from a scheme of development cannot be enforced against a bona fide purchaser of the legal estate for value without notice.[5] His Honour found this requirement of notice to be satisfied by the encumbrance itself.

> 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.[6]

Such an encumbrance apparently guaranteed that whoever took a legal interest in the present case could not do so without notice of the equitable interests. This requirement of notice may cause difficulty in future cases where the form and content of the encumbrance is not so readily identifiable with a scheme of development.

In this context, His Honour did not find it necessary to discuss Section 186 which provided that :

> No person contracting or dealing with, or taking or proposing 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.

A literal translation of this provision appears inconsistent with the equitable doctrine of a scheme of development. A consistent interpretation would afford the purchaser immunity from notice if and when he does become registered, and not before. This is Hogg's view,[7] and is the view endorsed by Knox C.J. in *Templeton* v. *Leviathon Proprietary Ltd.*[8] when dealing with the equivalent section 179 of the Transfer of Lands Act 1915 (Vict.). With regard to this question, and also the question of equitable interests deriving from a registered encumbrance, it is a matter for regret that the action was undefended. It is not often that a case arises which invites the consideration of equitable interests under the Torrens system; when it does, the vigorous presentation of both sides of the question will undoubtedly assist its lucid exposition.

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5. Preston and Newsom: *Restrictive Covenants* pp. 30-31.
6. 1962 Law Society Judgment Scheme, 292.
7. *Hogg on the Registration of Title to Land throughout the Empire,* at pp. 125-127.
8. (1921) 30 C.L.R. 34, 55.

In principle, the employment by the Court of the building scheme doctrine was to be commended.[9] The fact that one must go beyond the express words of a covenant in order to demonstrate the "community of interests" that "requires and imports a reciprocity of obligation"[10] should not be allowed to frustrate the reasonable expectation of parties to such schemes. Maintenance of the residential standard is an important aspect of the purchaser's proprietary interest. The strict protection of this interest is even more essential to the modern communal "home-unit", where the purchasers share a single building as distinct from a mere neighbourhood. Since the statutory formulation of such protection remains in an experimental stage,[11] there is much to be said for the employment of such equitable doctrines as are available.

A point of considerable interest in regard to equities under the Torrens system arises from the recognition of the "scheme of development" doctrine. In 1956 His Honour Ligertwood J. was faced with the problem of recognition of a deserted wife's equity to remain in the matrimonial home.[12] In that case, His Honour interpreted Section 249 as referring only to equities "which would have been recognised by the former courts of Chancery . . .";[13] presumably meaning those equities recognised before the enactment of the Judicature Act. Although there is considerable difficulty in any attempt to ascertain the origin of the building scheme principle, there is some evidence that it "only found full deliverance in the speech of Lord MacNaghten in *Spicer* v. *Martin* (1888) 14 App. Cas".[14] If this is the case, then the limitation of Section 249 suggested by Ligertwood J. will not prevail. If it is true that Equity "must not be presumed to be past the age of child-bearing", then her resultant offspring need not be still-born as regards the Torrens system.

9. An alternative method of securing the parties' rights would be for each covenantee to place a caveat on every title involved. This method would be both costly and cumbersome.
10. 1962 Law Society Judgment Scheme 291-292.
11. For a recent legislative solution see p. 146 infra.
12. *Maio* v. *Piro* [1956] S.A.S.R. 233.
13. *Ibid.*, 238.
14. Per Simonds J. in *Lawrence* v. *South County Freeholds Ltd.* [1939] Ch. 656 at pp. 675, 676.