[HIGH COURT OF AUSTRALIA.]

GIBB AND ANOTHER . . . . . APPELLANTS;
APPLICANTS,

AND

THE REGISTRAR OF TITLES (VICTORIA) . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A 1940.

MELBOURNE, *May* 24; *July* 25.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Torrens System—Mortgage—Form—Registration—Covenant—"Set forth and specified"—Reference in covenant to other documents—Registrable instrument—Transfer of Land Act 1928 (*Vict.*) (*No.* 3791), *secs.* 61, 145, *Twelfth Schedule.*

In an instrument of mortgage over land under the *Transfer of Land Act* 1928 (Vict.) a special covenant required the mortgagors to build a house on the land in accordance with certain plans and specifications which the parties to the mortgage did not intend to register as part of the instrument. On the instrument being lodged for registration without the plans and specifications, the Registrar of Titles refused to register it on the ground that the covenant in the mortgage referred to and incorporated documents which would not appear on the register.

Held that, as the covenant was the actual agreement made between the parties, it was "set forth and specified" as required by the provisions of the *Transfer of Land Act* 1928 (Vict.), and that it was neither confusing nor embarrassing to the practical working of the Office of Titles to register the instrument without the plans and specifications; accordingly, the registrar's refusal was unjustified and the instrument should be registered.

Decision of the Supreme Court of Victoria (*Mann* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

On 13th April 1939 Nora Alicia Gibb and Andrew Charles Lyle Gibb became registered as the proprietors of the land comprised in certificate of title, volume 6285, folio 1256870, being land subject

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.).

to the provisions of the *Transfer of Land Act* 1928 (Vict.). On 17th May 1939, they executed an instrument of mortgage over the land to the Fourth Victoria Permanent Building Society to secure a loan obtained for the purposes of building a house on the land. On 4th July 1939 the instrument of mortgage was lodged at the Office of Titles, Melbourne, for registration.

The instrument of mortgage contained the following covenant:— "E. That if the principal sum is being advanced for the purpose of erection of any buildings additions reparations or other improvements upon the said land, the mortgagors hereby covenant with the mortgagee that they will erect or completely finish such buildings additions reparations or other improvements with all reasonable speed, and in a good substantial and workmanlike manner, fit for habitation and use, in accordance in all respects with the plans and specifications submitted to the mortgagee upon the application for the advance, and to the satisfaction in all things of the mortgagee or its architect, and the said principal sum shall not be advanced in greater sums than such architect shall from time to time certify to the mortgagee as being payable having regard to the progress made at the date of such certificate, and all the costs charges and expenses of such architect in respect of each certificate shall be deducted from the said principal sum and when paid to such architect shall be deemed to be a payment to the mortgagors of part of the said principal sum Provided always and it is hereby agreed that in the event of the mortgagors making default in erecting and completely finishing the said buildings additions reparations or other improvements (of which default the mortgagee shall be the sole judge) it shall be lawful for the mortgagee by its servants agents and workmen to enter upon the said land and to proceed to erect or do such buildings additions reparations or other improvements, and to completely finish the same in accordance with such plans and specifications, or in such other manner as the mortgagee may deem advisable at the sole risk cost and expense of the mortgagors, and all moneys whatsoever paid or expended for all or any of such purposes whether in excess of the amount agreed to be lent or otherwise shall with interest thereon at the rate of seven pounds per centum per annum calculated from date or respective dates of payment thereof be repayable to

the mortgagee on demand and shall be a charge against the said land and policy and be deemed to be hereby secured."

The plans and specifications referred to were not lodged with the instrument for registration, and on 6th July 1939 the following requisition was communicated by the Registrar of Titles to the solicitors for all parties : " Specific reference to plans and specifications not on the register should be excised (proviso E)."

On 10th July 1939 the solicitors replied on behalf of all parties, declining to make the amendment. To overcome the objection, the registrar then suggested either that the plans and specifications referred to in the above proviso be attached to the instrument of mortgage and thus be placed on the register or that such clause be amended so as to remove the specific words of reference to such plans and specifications. The solicitors refused to accede to this suggestion and stated that it was desired to make this a test case, and the mortgagors named in the instrument requested the registrar pursuant to sec. 248 of the *Transfer of Land Act* 1928 to set forth under his hand the grounds of his refusal.

On 22nd February 1940 the Registrar of Titles stated the following grounds :—" (*a*) The instrument lodged for registration is not in the form prescribed (See section 145 and 12th Schedule of the *Transfer of Land Act* 1928). (*b*) The variation from such form is a matter of substance within the meaning of section 279 of the said Act. (*c*) The said Act requires the covenants set forth in an instrument of mortgage to be fully and completely set forth but the covenant E in the said instrument fails to comply with this requirement by reason of its reference to plans and specifications off the register. (*d*) The said Act does not authorize or contemplate the insertion in an instrument of mortgage of any covenant or condition which requires for its interpretation a reference to unregistered documents. (*e*) The instrument if registered would be calculated to cause confusion or to mislead or to impede or embarrass the practical working of the Office of Titles. (*f*) It is contrary to the established practice of the office to permit specific reference to plans and specifications as in the said instrument as it would incorporate into the mortgage agreements something not included in the instrument lodged."

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.).

On 1st March 1940 Nora Alicia Gibb and Andrew Charles Lyle Gibb, the mortgagors, issued a summons from the Supreme Court of Victoria requiring the Registrar of Titles to substantiate and uphold the grounds of his refusal to register the instrument of mortgage.

Mann C.J. dismissed the summons, and the mortgagors appealed to the High Court.

Voumard, for the appellant. The covenants in an instrument of mortgage are sufficiently " set forth " if the nature of the covenants is clear (*Transfer of Land Act* 1928, sec. 145, Twelfth Schedule). If it is possible to see from the document on the register what the agreement of the parties was, that is all that is required. Anyone dealing with the land would be entitled to requisition for the production of the plans and specifications referred to in the instrument. They would also be entitled to ask whether the covenant had been performed. [Counsel referred to sec. 61 of the *Transfer of Land Act* 1928.] In *Wilkin* v. *Deans* (1), relied upon by *Mann* C.J., the covenant was not " set forth." It was obvious in that case that it was impossible to tell the nature of the obligation. The Fourteenth Schedule of the *Transfer of Land Act* 1928 shows that the necessity to refer to something outside the register does not mean that it is outside, and not in compliance with, the provisions of the Act. The Tenth Schedule shows the same thing; e.g., the reference to fencing, painting and insurance shows that external circumstances may be referred to. Neither sec. 61 nor the Twelfth Schedule require this covenant to have incorporated with it the plans and specifications referred to (*Crowley* v. *Templeton* (2); *Currey* v. *Federal Building Society* (3)). The covenant in this case clearly identifies the plans and specifications, and any person who had a right to see them would have the right also to requisition for their production. The form is not open to objection, and it is not likely to embarrass or confuse the registrar or the public or the practical working of the office (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (4)). Either

(1) (1888) 6 N.Z.L.R. 425.
(2) (1914) 17 C.L.R. 457, at pp. 466, 467.
(3) (1929) 42 C.L.R. 421.
(4) (1912) 14 C.L.R. 286, at pp. 290, 295.

the covenant is in all respects in accordance with the requirements of the Act, or, if not, then under sec. 279 of the *Transfer of Land Act* 1928 the variation is not a matter of substance and the document is not one that should cause confusion or embarrassment; and therefore it should have been registered.

Fullagar K.C. (with him *A. D. G. Adam*), for the respondent. All the terms of the covenant must be set out, for the scheme of the Act is "to substitute title by registration for title by deed" (per *Griffith* C.J. in *Crowley* v. *Templeton* (1)). *Wiseman, The Transfer of Land Act*, 2nd ed. (1931), p. 218, discusses *Currey* v. *Federal Building Society* (2); *Beckenham and Harris, The Real Property Act (N.S.W.)* (1929), p. 134. The reference to the plans and specifications is opposed to a long-standing practice of the Office of Titles (*Currey, Titles Office Practice* (1933), p. 112). In the Ninth Schedule words may be inconsistent with the policy of the Act, but to refer to other documents under the Twelfth Schedule is to be inconsistent with the general scheme (*Lee* v. *Barnes* (3); *Wilkin* v. *Deans* (4); *Wilson* v. *Bendigo Mutual Permanent Land and Building Society* (5); *Crowley* v. *Templeton* (6), per *Isaacs* J.; *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (7); *Mahony* v. *Hosken* (8)). All these authorities show what the policy of registration is (*Toohey* v. *Gunther* (9)). The duty of the registrar in such a case as this is set out in *Beckenham and Harris, The Real Property Act (N.S.W.)* (1929), at pp. 76, 77. [Counsel referred to secs. 61, 127, 146 and 279 of the *Transfer of Land Act* 1928.]

Voumard, in reply. Sec. 61 of the *Transfer of Land Act* 1928 is no authority in its terms for the proposition that any specific covenant must be set out to the last detail. The distinction between "express" and "implied" covenants is brought out in the section. The same distinctions are made in sec. 146 and sec. 127.

Cur. adv. vult.

(1) (1914) 17 C.L.R. at p. 462.
(2) (1929) 42 C.L.R. 421.
(3) (1886) 17 Q.B.D. 77.
(4) (1888) 6 N.Z.L.R. 425.
(5) (1896) 23 V.L.R. 24.
(6) (1914) 17 C.L.R. at p. 466.
(7) (1912) 14 C.L.R. 286.
(8) (1912) 14 C.L.R. 379, at pp. 384, 385.
(9) (1928) 41 C.L.R. 181.

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). July 25.

The following written judgments were delivered :—

LATHAM C.J. The *Transfer of Land Act* 1928, sec. 61, provides that upon registration of an instrument the estate or interest comprised in this instrument shall pass or (as the case may be) the land shall become liable and subject to " the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature." Sec. 145 provides that the proprietor of any land under the Act may mortgage the land by signing a mortgage in the form of the Twelfth Schedule. The Twelfth Schedule consists of a form of mortgage which includes certain covenants, and then, under the head " fourthly," there appears : " here set forth any special covenants."

The appellants mortgaged land owned by them to a building society and presented a mortgage for registration. The mortgage contained a covenant that, if the advance was being made for the purpose of erecting a building (which was the fact), the mortgagors would erect such building on the land in a good, substantial and workmanlike manner fit for habitation and use " in accordance in all respects with the plans and specifications submitted to the mortgagee upon the application for the advance and to the satisfaction in all things of the mortgagee or its architect." The registrar refused registration of the mortgage substantially upon the ground that the covenants were not set forth and specified in the mortgage because the covenant mentioned referred to plans and specifications off the register. The registrar, in giving reasons for his refusal to register, further stated that the instrument, if registered, would be calculated to cause confusion or to mislead or to impede or embarrass the practical working of the Office of Titles. In refusing to allow the registration of the mortgage on the ground first stated the registrar acted in accordance with a practice which has been observed for many years in Victoria : See *Currey, Titles Office Practice* (1933), p. 112 ; as to New South Wales, see *Beckenham and Harris, The Real Property Act* (*N.S.W.*), (1929), p. 134 ; and generally, see *Hogg, Registration of Title to Land throughout the Empire* (1920), p. 213 (quoted by *Mann* C.J. in his judgment) : " And in general unregistered instruments should not be incorporated by reference ;

the statutory mortgage may thereby either be made unregistrable, or the incorporated instrument may not form part of the mortgage."

The appellants took out a summons under the *Transfer of Land Act*, sec. 248, calling upon the registrar to uphold the grounds of his refusal to register. *Mann* C.J. held that the registrar was entitled to refuse to register because the covenant in question had not been " set forth " as required by sec. 61 as well as by the Twelfth Schedule, and because the registration of the document would be embarrassing, because if it were registered, it would be doubtful whether the covenant (not being duly " set forth ") would have any effect upon the title to the land. His Honour referred to *Wilkin* v. *Deans* (1), where it was held that a covenant by a mortgagor in a registered mortgage to observe all the rules of a building society did not incorporate the rules of the society in the mortgage so as to create in relation to the land rights in the mortgagee which would prevail in insolvency against other creditors of the mortgagor.

The first question is whether the covenant is " set forth " in the instrument. The covenant actually made by the parties is so set forth. It is true that the covenant refers to and incorporates by reference certain plans and specifications which were not lodged for registration and which have not been registered in the Titles Office in connection with any other transaction. But the whole of the covenant which the parties in fact made is stated in accurate terms in the instrument presented for registration. In order to ascertain the extent of the obligations created by the covenant it is necessary to refer to other documents, namely, to the plans and specifications, but those documents cannot, in my opinion, accurately be said to be part of the covenant itself. If, for example, the mortgagor of an hotel covenants to perform and observe all the provisions of the *Licensing Acts* which are binding upon a licensed victualler (Cf. *Mahony* v. *Hosken* (2)), those provisions do not themselves become part of the covenant. The whole of the covenant is set forth in the mortgage if its terms are truly stated therein without copying into or annexing to the document any provisions of the *Licensing Acts*. I am, therefore, of opinion that it cannot be held that the covenant has not been set forth in the mortgage.

(1) (1888) 6 N.Z.L.R. 425.

(2) (1912) 14 C.L.R. 379.

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). Latham C.J.

It may be observed that this covenant is relevant in every sense to the mortgage transaction. The mortgage provides that if the mortgagors make default in the due performance or observance of any of the covenants, including the covenant in question, the mortgagee may call up the money and exercise his power to sell: See *Transfer of Land Act*, sec. 146. The covenant, therefore, is a covenant which affects the title to the land and therefore, prima facie, is such as ought to be registered. It is not a provision similar to that which was considered in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1), where the registrar was compelled to register an agreement some of the parties to which were not interested in the land at all, and which could not possibly affect the title to the land in any event: See per *Griffith* C.J. (2), and, per *Isaacs* J. (3): "No one would suggest that the undertaking of the guarantors would or could affect the land, or be taken into consideration by the registrar or any person subsequently interested in the land." But the court nevertheless compelled the registrar to register the mortgage containing the undertaking. Thus, as the law stands at present, the registrar may be compelled to register, under a system of registry of land titles, covenants which have no relation whatever to any land. Even if the covenant in the present case were completely irrelevant to all questions of title to the land, the registrar would apparently be bound to register it because it was part of the actual transaction between the parties. But, as already stated, the covenant in question is not irrelevant to rights in the land.

The objection that the registration of the mortgage with the covenant in its proper form would be embarrassing and would confuse the register is not, in my opinion, established in this case. The registrar is entitled to prevent the register from being encumbered with documents which raise difficulties either for the office or for the public (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (4) and *Mahony* v. *Hosken* (5)). Questions of embarrassment and confusion are necessarily questions of degree. In the present case I am unable to see that any real embarrassment

(1) (1912) 14 C.L.R. 286.
(2) (1912) 14 C.L.R., at p. 290.
(3) (1912) 14 C.L.R., at p. 294.
(4) (1912) 14 C.L.R., at p. 295.
(5) (1912) 14 C.L.R., at p. 386.

can be caused either to the Office of Titles or to the public. It is true that in order to ascertain whether the covenant in question had or had not been performed it would be necessary to obtain and examine the plans and specifications and to inspect the house, if any, erected upon the land. But, whenever a question of breach of a covenant arises, it is necessary to ascertain facts apart from the terms of the document itself which contains the covenant. Accordingly the circumstance that, if a question as to the performance of the covenant arises, reference must be made to matters which are off the register is not a good ground for refusing registration.

If the mortgagors pay off the mortgage, the mortgage will be discharged, and there will be no possible risk of embarrassment to any person. If either the mortgagors or the mortgagee should transfer their or its interest during the currency of the mortgage, the purchaser can readily protect himself against risks arising from non-performance of the covenant by making a requisition upon title and requiring satisfactory evidence that the covenant has been performed before he proceeds with his dealing. In my opinion, the ground based upon possible confusion and embarrassment fails.

Accordingly I am of opinion that the appeal should be allowed, that an order should be made that the registrar do register the mortgage, and that the registrar should pay the costs in the Supreme Court and in this court.

STARKE J. Appeal from the Supreme Court of Victoria dismissing a summons issued pursuant to the *Transfer of Land Act* 1928, sec. 248, calling upon the Registrar of Titles to substantiate and uphold the grounds of his refusal to register an instrument of mortgage dated 17th May 1939 given by the appellants, Nora Gibb and her husband, to a building society, namely, the Fourth Victoria Permanent Building Society. It contained the following covenant:—"That if the principal sum is being advanced for the purpose of the erection of any buildings additions reparations or other improvements upon the said land the mortgagors hereby covenant with the mortgagee that they will erect or completely finish such buildings additions reparations or other improvements with all reasonable speed and in a good substantial and workmanlike manner fit for habitation and

H. C. OF A. 1940.

GIBB v. REGISTRAR OF TITLES (VICT.).

Starke J.

use in accordance in all respects with the plans and specifications submitted to the mortgagee upon the application for the advance and to the satisfaction in all things of the mortgagee or its architect and the said principal sum shall not be advanced in greater sums than such architect shall from time to time certify to the mortgagee as being payable having regard to the progress made at the date of such certificate and all the costs charges and expenses of such architect in respect of each certificate shall be deducted from the said principal sum and when paid to such architect shall be deemed to be a payment to the mortgagors of part of the said principal sum Provided always and it is hereby agreed that in the event of the mortgagors making default in so erecting and completely finishing the said buildings additions reparations or other improvements (of which default the mortgagee shall be the sole judge) it shall be lawful for the mortgagee by its servants agents and workmen to enter upon the said land and to proceed to erect or do such buildings additions reparations or other improvements and to completely finish the same in accordance with such plans and specifications or in such other manner as the mortgagee may deem advisable at the sole risk cost and expense of the mortgagors and all moneys whatsoever paid or expended for all or any of such purposes whether in excess of the amount agreed to be lent or otherwise shall with interest thereon at the rate of seven pounds per centum per annum calculated from the date or respective dates of payment thereof be repayable to the mortgagee on demand and shall be a charge against the said land and policy and be deemed to be hereby secured."

The mortgage moneys were advanced or agreed to be advanced for the purpose of the erection of buildings upon the land. The mortgage was lodged for registration under the provisions of the *Transfer of Land Act* 1928, but the Registrar of Titles refused registration unless specific reference to the building plans or specifications were excised or the plans and specifications were annexed to the mortgage. Apparently the registrar would have been satisfied if the definite article " the " before the words " plans and specifications " were excised from the covenant so that it read " with plans and specifications submitted to the mortgagee." It seems unfortunate that the parties should in these circumstances contest the question

and incur the costs of proceedings in the Supreme Court and of an appeal to this court.

But the question must now be decided by this court whether the Registrar of Titles was right or wrong in refusing the registration of the mortgage in its present form.

The registrar is not an automaton whose duty it is to register all documents affecting title to land under the *Transfer of Land Act*. "The registrar," as *Higgins* J. said in *Templeton* v. *Leviathan Pty. Ltd.* (1), "has to discharge not merely ministerial but also judicial duties, and it is his duty to 'prevent instruments from being registered which in law, as well as fact, ought not to be placed on the register,'" for instance, a transfer which on its face was a breach of trust and improper. Again, as *Isaacs* J. said in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (2), "if . . . an instrument in the most perfect form were presented for registration linked with other matters, so as to manifestly encumber the register, or even so as to raise a fair case for the registrar's consideration as to office difficulties or public inconvenience, it would be difficult to persuade a court to overrule his refusal to accept the documents. The Act, while prescribing a statutory form as the only expressed essential, assumes reasonable conduct on the part of those lodging the instruments and due regard by them for the conduct of public business and the facilities of inspection and investigation. And a court is not so well able to determine that in a doubtful case as the registrar."

There is nothing contrary to law or the rights of any person or that is improper in the building covenant contained in the present mortgage; so the question really resolves itself into an objection to the form of the mortgage. The *Transfer of Land Act* 1928, sec. 145, prescribes that the proprietor of any land may mortgage the same by signing a mortgage thereof in the form of the Twelfth Schedule, which, following the covenant on the part of the mortgagor, contains these words "Fourthly (here set forth any special covenants)." The mortgage under consideration follows the form, and the building covenant that the parties agreed upon is set forth in the document. The fact that the covenant refers to or incorporates another document

(1) (1921) 30 C.L.R. 34, at p. 64. (2) (1912) 14 C.L.R. at p. 295.

H. C. OF A. 1940.

GIBB v. REGISTRAR OF TITLES (VICT.).

Starke J.

does not make it any the less the covenant which the parties agreed upon.

But it was said that it would cause office difficulties or public inconvenience if documents incorporated in or annexed to an instrument submitted for registration were not lodged with the registrar. That may be so in some cases. But cluttering up the registry with plans and specifications would create "office difficulties" rather than dissipate them. Again, I cannot conceive what public convenience would be served by having the plans and specifications in the registry. An examination of the plans and specifications would not disclose to the public whether the covenant in the mortgage had or had not been executed in all respects in accordance with the plans and specifications mentioned. The essential thing for the public is that the registration of the mortgage discloses the nature of the covenant and that it affects the title to the land. All the rest is a matter for investigation and requisition.

The main support for the registrar was, however, found in sec. 61 of the Act. It provides that no instrument, until registered, shall be effective to pass any estate or interest in any land but upon such registration the estate or interest comprised in the instrument should pass subject to the covenants or conditions set forth and specified in the instrument. It was argued that the building covenant was not set forth and specified in the mortgage, for those words require that every covenant or condition that affected the title to land under the Act should be ascertainable from the registry itself. Consequently the documents that define the obligations of the parties must be registered, or those obligations could not bind the land whatever contractual effect might be given to them. Such a result, it was truly said, would greatly embarrass the office and the public and ought not to be permitted.

In my opinion the building covenant is set forth and specified in the mortgage in the present case within the meaning of sec. 61 of the Act. The covenant, for the reasons already given, is set forth in the mortgage, but has it been specified, which I take to mean particularized or definitely mentioned ? There is no real distinction, I think, between setting forth and specifying a covenant. If a covenant in a mortgage requires that a building be erected according

to a plan that is annexed to the mortgage or is identifiable, then the plan is particularized and definitely mentioned in the mortgage. Indeed, the covenant is in the form agreed upon between the parties. Strangely enough, if the covenant were more indefinite than it is, the registrar would register the mortgage, but because of the very definiteness and particularity of the covenant in the present case the registrar refuses to register the mortgage. In my opinion that view cannot be right and the registrar should register the mortgage the subject of these proceedings. But no rigid rule can be stated, and each instrument presented for registration must depend upon its terms and the circumstances of the case. The case of *Wilkin* v. *Deans* (1) was referred to. The decision is based, I think, upon the view, stated in the headnote, that there was no right of consolidation of mortgages under the *Land Transfer Act* and, consequently, that there could be no set-off under those Acts of a surplus on one mortgage against a loss on another mortgage. It is unnecessary to consider whether the view that mutual liabilities could not be set off in the circumstances of that case was right or wrong, but, if the foundation of the judgment be as I think it was, then the case has no bearing upon the case now before us.

This appeal should be allowed.

DIXON J. The instrument of mortgage of which registration has been refused contains a building covenant on the part of the mortgagors by which they bind themselves to erect and complete the buildings " in accordance with the plans and specifications submitted to the mortgagee upon the application for the advance." The mortgagee is a building society. The document is a printed form which apparently is intended for use in cases where the loan is not for the purpose of building as well as in cases where a building is to be erected. The covenant is, therefore, framed in a conditional or hypothetical form. It is introduced by the condition, " If the principal sum is being advanced for the purpose of the erection of any buildings additions " &c. Notwithstanding that the covenant is thus expressed as upon an hypothesis, the Registrar of Titles has treated the words " the plans and specifications submitted to the

(1) (1888) 6 N.Z.L.R. 425.

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). Dixon J.

mortgagee " as referring to specific documents and as incorporating them in the covenant. Taking this view of the covenant, he has refused to register the instrument on the ground that it is against the practice of the Office of Titles to allow such a reference to other documents as would incorporate in the mortgage agreement something not included in the instrument lodged and that to frame a covenant or condition in an instrument of mortgage in such a way that, for its interpretation, it is necessary to refer to unregistered documents is a thing which the *Transfer of Land Act* neither authorizes nor contemplates. The registrar says that the form provided by the Act requires that covenants in a mortgage shall be set forth in the instrument and that it has not been done, with the consequence that the form has been varied in a matter of substance and in such a way as is calculated to cause confusion and embarrassment in the practical working of the office. The chief ground for thinking that some confusion or difficulty might be produced in the working of the Office of Titles must lie in the possibility of the registrar being called upon to consider the covenant for the purpose of deciding whether the mortgagee's power of sale has arisen so that he ought to register an instrument of transfer given by the mortgagee in pursuance of a purported exercise of the power. The statutory power of sale arises on notice after default either in payment of principal or interest or in the observance or performance of the covenants contained in the mortgage. In any event the mortgagee may, under the provisions of the mortgage, call up the mortgage moneys if there is a failure to perform the covenant. Such a calling up might be the first step towards, not only an attempt to exercise the power of sale, but also an application to the commissioner for a foreclosure order. In this way the registrar or the commissioner might find it indirectly necessary or desirable to inquire into the performance of the covenant. The statute relieves the registrar of any duty to call for proof of due exercise by a mortgagee of his power of sale when a transfer by the mortgagee is pending (sec. 148), but it remains within his province to do so. Apparently he regards it as inconvenient that any part of the test or criterion of the performance by a mortgagor of his covenant should be contained in unregistered documents. These

matters concern rather the discretion of the registrar than the requirements of the Act.

The chief ground upon which reliance was placed in support of his refusal to register the instrument of mortgage was that it departed substantially from the form given by the statute for such an instrument. The form is contained in the Twelfth Schedule and provides a place for special covenants. Included in square brackets is an italicized direction, "here set forth any special covenants." It is contended that these words show that all the acts or things to be done by the covenantor must be described in the covenant without reference to and reliance upon any other deed or writing. I am unable to agree to this interpretation of the words. They are concerned to assign a place where the parties may express their covenants, whatever they may be. In many places in the Act references will be found to provisions contained in instruments. The form in which these references are expressed is apparently more or less accidental, though the words "set forth or specified" are frequently used in contradistinction from "implied." Sec. 61 speaks of "the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature." Sec. 127 provides that a transferor of land subject to an encumbrance shall be indemnified by the transferee against liabilities which it describes as "in respect of any of the covenants therein contained or by this Act declared to be implied therein on the part of the transferor." Sec. 143 implies in every sub-lease a covenant on the part of the lessee sub-lessor to "observe the covenants and agreements contained in the original lease." Sec. 146 speaks of the "observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage." In the Ninth Schedule, which deals with leases, there is a direction, "here set forth any special covenants or conditions"; but in the Eleventh Schedule dealing with sub-leases the corresponding direction speaks of "covenants and conditions," and the Thirteenth Schedule requires the parties to "state (*inter alia*) any special covenants or powers." It appears to me that from such expressions as "set forth," "state," "specified," "contained," &c., no inference can be drawn that the legislature intended to exclude from covenants any reference to other documents.

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). Dixon J.

The question how far an instrument may refer to unregistered documents was not, I feel sure, in contemplation, when these expressions were used. It is a question which cannot, in my opinion, be determined by a general proposition. To say generally that no registrable instrument, except where the legislature expressly allows it, may refer to and rely upon the terms or provisions of a document unless it also is upon the register would, I think, be unwarranted.

For example, there appears to be no objection to a statement in a mortgage that it is intended to operate as a security collateral with a specified mortgage under the general law: Cf. *Wiseman's Transfer of Land Act*, 2nd ed. (1931), p. 538. On the other hand, it is easy to understand that the device of incorporating by reference conditions expressed in unregistered documents might be used so as to make the register either unintelligible or misleading, if it were freely allowed. The necessity for adhering substantially to the forms provided by the Act makes the general use of such a device impracticable. For the forms deal with the principal elements of transactions which may be embodied in registrable instruments and, where the actual title to an estate or interest is affected, I think it would be difficult to avoid including in the instrument itself express and appropriate provisions. For the rest it must be remembered that the courts have conceded to the Registrar of Titles a control over the register which would enable him "to preserve his entries and records from confusion, and to prevent the intrusion of anything calculated to obscure or mislead, or even to impede the ordinary and practical working of his department" (per *Isaacs* J., *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1)) —and see sec. 237. The court, however, is invested with a special jurisdiction under sec. 248, and, when that jurisdiction is invoked, it becomes the duty of the court to say whether, notwithstanding the determination of the registrar, the particular instrument ought to be registered.

In the case now under consideration the only objection to the instrument lies in its reference to already existing plans and specifications. The plans and specifications of a building are the means of describing with exactness the form which an intended physical

(1) (1912) 14 C.L.R. at p. 295.

structure is to assume, the materials of which it is to be composed, and the manner in which they are to be used. In my opinion the register is no place for documents serving such a purpose. Neither in a building lease nor in a mortgage would any lawyer expect to find the plans and specifications of the building proposed set out in full. They do not directly touch the title or form a natural part of the provisions proper to such instruments. The practical course of conveyancing under the general law would exclude them from such instruments and treat them as, so to speak, objective descriptions of things to be done by contractors, architects and agents of the covenantor in the course of the work which would be necessary before his covenant would be performed. Accordingly they would be referred to only for the purpose of identification.

It is unnecessary to say that the practice of conveyancing under the general law affords only an analogy in a matter concerning a dealing under the Act. But, in a question what is a proper part of a covenant and what is not, I think that it is a better guide than can be obtained from any attempt to devise a logical or theoretical definition of the things that may and the things that may not be legitimately and appropriately relegated to writings forming no part of the covenant itself.

In my opinion the instrument should be registered.

I think the appeal should be allowed.

EVATT J. The question for our decision is whether the Registrar of Titles (who is the respondent) was justified in his refusal to register an instrument of mortgage executed by the appellants in favour of a certain building society. The instrument was lodged for registration as long ago as 14th July 1939. Except for the special covenant referred to below, the instrument was admittedly in proper form and entirely suitable for registration. But the instrument contained a special clause providing that, in case the principal sum was being advanced for the purpose of the erection of any building upon the land, the mortgagors covenanted that they would erect such buildings " with all reasonable speed and in a good substantial workmanlike manner fit for habitation and use *in accordance in all respects with the plans and specifications submitted to the mortgagee*

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). Evatt J.

upon the application for the advance and to the satisfaction in all things of the mortgagee or its architect and the said principal sum shall not be advanced in greater sums than such architect shall from time to time certify to the mortgagee as being payable having regard to the progress made at the date of such certificate and all the costs charges and expenses of such architect in respect of each certificate shall be deducted from the said principal sum and when paid to such architect shall be deemed to be a payment to the mortgagors of part of the said principal sum."

The registrar objected to the words which I have italicized, contending that " specific reference to plans and specifications not on the register should be excised." The registrar ruled in effect that the plans and specifications referred to in the clauses must be amended in order to omit all reference to the plans and specifications.

The form of covenant thus objected to is quite common in building mortgages, where the land is under the Torrens system of registration of title. But it appears to have been the practice in the Victorian office to refuse registration of any instrument if it contains a clause which refers to another document, unless such document is either incorporated in some way in the register or is made an integral part of the instrument sought to be registered. In the State of New South Wales there is no such practice.

The registrar bases his refusal to register the instrument upon the ground that there has been a failure to comply with the terms of the *Transfer of Land Act* 1928. Sec. 145 of that Act authorizes an instrument of mortgage in the form of the Twelfth Schedule to the Act. Turning to that form, we find that it contains covenants providing, first, for payment of the principal sum; second, for payment of interest; and third, for insurance against fire. The form then runs, " Fourthly [here set forth any special covenants "].

It is said that the words " set forth " in this direction absolutely forbid the inclusion of any special covenant which refers to another document, unless that other document is itself made part of the mortgage instrument. If so, the plans and specifications referred to in the covenant here in question have themselves to be incorporated in the instrument. But this contention by the registrar also involves

the almost absurd consequence that if, for example, the specifications refer to other documents (e.g., lists of quantities or prices, requirements as to quality of material, plans or specifications of other buildings, rules or regulations governing building practices), each and every one of these additional documents must also be either incorporated in the instrument of mortgage or otherwise included in the register book.

In my opinion the contention of the registrar is based upon a misapprehension of the meaning and intent of the Twelfth Schedule. The direction, "here set forth any special covenants," is not intended to restrict the freedom of contract of the parties or their manner of expressing their agreement. It merely indicates that, if the parties have made an agreement on additional matters, they should set out such agreement in the form of separate covenants in the mortgage instrument. In the present instance the parties have fully complied with this direction. In short, the covenant which has been brought into dispute is an additional special covenant, and it is "set forth" in the instrument as the direction requires.

It is sought to defend the ruling of the registrar by reference to secs. 61, 127 and 146 of the *Transfer of Land Act*. But these sections, which refer to covenants or conditions "set forth and specified" or "specified" or "expressed" in any instrument, are concerned with making land under the Act liable to the obligations contained in express as well as to those in implied covenants. None of these provisions seem to deal in any way with the question which arises in this case, whether the Act impliedly forbids the registration of an instrument solely because it contains some reference to another unregistered document.

The ruling of the registrar was also defended by general reasoning from the purposes of the *Transfer of Land Act* as set forth in its title and recitals. I do not think that any real support for the ruling can thus be found. Indeed, one of its stated objects is that the Act is "to render dealings with land more simple and less expensive"; and, as *Griffith* C.J. said in *Drake* v. *Templeton* (1), "the object of the *Transfer of Land Act* is not to obstruct but to facilitate business, and . . . the registrar is not justified in refusing to register an

(1) (1913) 16 C.L.R. 153, at pp. 157, 158.

H. C. OF A. 1940. GIBB v. REGISTRAR OF TITLES (VICT.). Evatt J.

instrument merely because it does not literally comply with the precise form prescribed for such instruments, provided that any variation from the form does not affect the substance."

It seems to me that nothing could be more inconvenient and expensive than to insist upon the incorporation in the register itself of every document that might be referred to in any and every clause in an instrument of mortgage or lease. The object of the Act is not to do away with reasonable requisitions as to matters which may affect title, but to bring to the notice of persons intending to deal with registered land the existing state of the title, and to bring to the attention of all who make a search every clause or covenant which may affect title. In the present case, where it is said that title to the land may be affected by failure to build in accordance with certain plans and specifications, a certificate of such compliance may be demanded as a requisition on title. But many precautions of such a character are quite consistent with the general scheme of registered title to land. Most certainly it is not the intention of the statute to allow the register to take the place of legal advisers, whose duty it is to take reasonable precautions as to many matters which of necessity involve inquiries *dehors* the register.

The only point remaining is whether, assuming that the instrument of mortgage complied with the Act and schedule, the registrar still possessed a discretionary authority to refuse its registration. It might well be sufficient to point out that, as the registrar rigidly followed the rule laid down in a text-book of practice written by his predecessor in office, viz., that all documents referred to in an instrument must themselves be brought into the register record, he has not in fact exercised any discretion in relation to the particular instrument before him. But the argument may also be disposed of on broader grounds. As *Isaacs* J. said in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1), the registrar may have a right and even a duty to preserve his records from confusion, or to prevent the intrusion into the register of misleading matter. But he added :—" He has no discretion to declare that an instrument is not in statutory form which in fact and in law is in statutory form, or that an addendum to the document destroys the statutory form

(1) (1912) 14 C.L.R., at p. 295.

of the instrument sought to be registered, when in fact and in law that is not the effect. If, however, an instrument in the most perfect form were presented for registration linked with other matters, so as to manifestly encumber the register, or even so as to raise a fair case for the registrar's consideration as to office difficulties or public inconvenience, it would be difficult to persuade a court to overrule his refusal to accept the documents."

The above passage indicates that here, where the instrument is in proper statutory form and where its acceptance for registration cannot possibly cause confusion or introduce misleading matter, the registrar's ruling cannot be supported upon the theory of a possible exercise of discretionary power. Indeed, much could be said in favour of a ruling to the effect that the inclusion in the register of the actual plans and specifications would cumber and confuse the mortgage instrument, and that they should merely be referred to and not incorporated within it. But enough has been said to show that it is not possible to support the registrar's decision in the present case.

For these reasons the appeal should be allowed, and it should be declared that the registrar should at once cause the instrument of mortgage to be registered. He should also be ordered to pay the costs here and in the Supreme Court.

McTIERNAN J. In my opinion the appeal should be allowed. I agree with the reasons for judgment of my brother *Dixon*.

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order that registrar do register the mortgage dated 17th May 1939, Red Ink Number 3769206. Registrar to pay costs of appellants in Supreme Court.

Solicitors for the appellants, *Gair & Brahe*.

Solicitor for the respondent, *Frank G. Menzies*, Crown Solicitor for Victoria.

O. J. G.