

prove a trust against her husband's executors. It is contrary also to the view expressed in Halsbury.⁵

No doubt the words "husband" and "wife" do not strictly speaking include "widower" and "widow," but the result is unfortunate. If the object of the section is to encourage unreserved confidence between spouses by preserving communications between them from disclosure in a court of law—and this would seem to be so although the privilege is that of the witness alone and not of the other spouse—then whether the disclosure is to occur during or after the termination of the marriage is irrelevant. Another curious result of the decision is this. The words "husband" and "wife" presumably have the same meaning in sec. 1 of the Evidence Amendment Act 1853 as in sec. 3, and therefore the rule in *O'Connor v. Marjoribanks* that a divorced wife or widow is not competent to give evidence for or against the divorced husband or the husband's estate was not abolished along with its parent rule that a wife is not competent for or against her husband. If it has been abolished at all it must be by virtue of the general provisions of the Evidence Act 1843 (sec. 22 of the Victorian Act) which provides that no person shall be excluded by reason of incapacity from crime or interest, but it is doubtful whether interest can have been the sole reason for an exclusion which prevailed whether the evidence was for or against the husband.

The judgments are however concerned mainly with the Common Law, tracing it from the days of Coke to the present time and are models of industry and learning.

—J. G. MANN.

5. Halsbury Edition, p. 728 (n.).

THE BENEFIT OF RESTRICTIVE COVENANTS.

*Marquess of Zetland v. Driver*¹

"The law relating to covenants restricting the use of land," Bennett J. observed in a fairly recent case,² "entered into by persons who do not stand towards one another in the relationship of landlord and tenant is of modern origin and is still in course of development." That such is the case is well illustrated by the questions raised in *Marquess of Zetland v. Driver*.¹

It is well established law that a purchaser who acquires only a part of the land which the restrictive covenant is intended to benefit, cannot acquire the benefit of the covenant, unless it appears on the interpretation of the covenant that the benefit was intended to run with the parts as well as with the whole of the land. But in *re Ballard's Conveyance*³ a further refinement was added to the law.

In that case, W. bought a few acres, part of a large estate, and entered into restrictive covenants for the benefit of the remainder of

1. (1939) 1 Ch. 1.

2. *In re Union of London & Smith's Bank Ltd.'s Conveyance* (1933) Ch. 611.

3. (1937) 1 Ch. 473.

the estate. The whole estate thus intended to be benefited was subsequently acquired by a company. W. asked for a declaration that no part of the property was any longer affected by any of the restrictions, or, in the alternative, that it might be declared whether the restrictions, or any of them were enforceable at the date of the summons, and if so, by whom? Clauson J. found as a fact that though the covenant might touch and concern some small part of the assigned estate, it did not touch the whole of it, and held therefore that the covenant could not be annexed to the whole of the land assigned by the original covenantee. There was no authority, the learned Judge declared, for the proposition that the benefit of a restrictive covenant could be annexed to the land where it could not be truly said that the covenant touched and concerned the land to which it was sought to annex it. Therefore, Clauson J. held that the attempted annexation failed, and that it was not the function of the court to modify the covenant and construe it as annexed to that part of the estate which it did touch and concern.

In the subsequent case of *Zetland v. Driver*, the facts were very similar. In both cases (a) the original parties had intended the restrictive covenant to run with the land, (b) the purchaser had acquired the whole of the land intended to be benefited; and (c) the greater part of the land could not possibly be affected by any breach of the restrictive covenant. In *Zetland v. Driver*, the Marquess of Zetland sold a small plot of his settled estate and the purchaser covenanted that nothing should be done thereon which, in the opinion of the vendor (including successors in title to the settled estate) might be a nuisance or detrimental to the unsold land of the vendor or any part thereof, or to the land of owners of any adjoining property. Despite the wideness of the covenant, the Court was satisfied that the paramount purpose of the covenant was to benefit the settled land retained. A sub-purchaser of the plot sold conducted a fried fish business thereon and the present owner of the settled estate, regarding this as a nuisance within the covenant, applied for an injunction. Bennett J. followed *re Ballard's Conveyance*. "To do otherwise," the learned Judge declared, "would only be to make the law relating to enforcement of restrictive covenants more uncertain than it already seems to be."⁴ Although the covenant did touch or concern the land in part, it would not affect the more remote parts and as in *re Ballard's Conveyance*, the attempt to annex it to the settled land was completely abortive.

On appeal to the Court of Appeal, counsel argued, firstly that *re Ballard's Conveyance* was wrongly decided, since there was no real authority for the proposition that the covenant must touch or concern every part of the covenantee's land, and secondly, that in any case, it was distinguishable, since in *Zetland's* case the covenant was for the benefit of the whole and every part of the settled land, whereas in *re Ballard's Conveyance* the covenant was made for the benefit of the whole of the land concerned. Farwell J. delivered the judgment of the Court of Appeal (Greene M.R. Luxmoore and Farwell JJ.) and without passing judgment on *Ballard's* case reversed the decision of Bennett

4. (1937) 1 Ch. at 661.

J. on the second ground. "It is not necessary for us, and we do not propose to express any opinion as to that decision beyond saying that it is clearly distinguishable from the present case if only on the ground that in that case the covenant was expressed to run with the whole estate whereas in the present case no such difficulty arises because the covenant is expressed to be for the benefit of the whole or any part or parts of the unsold settled property."⁵

It is respectfully submitted that if *re Ballard's Conveyance* is good law, then Bennett J.'s decision in the present case is correct, and that the ground on which the Court of Appeal found for the appellant cannot be supported. The question first arises as to the principle of law stated in *Ballard's* case. The principle is best stated from a negative standpoint.⁶ The decision "indicates that there cannot be an effective annexation in such a case at any rate if only a relatively small portion of the land is likely to be affected by the prohibited user; nor it seems will the Court sever the covenant and hold that the attempted annexation is effective as to that part of the land which it does touch or concern."⁷ At all events the reasoning in *re Ballard's Conveyance* may be reduced to the following proportions: (a) if the benefit of a restrictive covenant affecting the user of land is to run at law, it must touch or concern that land; (b) if a restrictive covenant touches or concerns only a small part of the land, the benefit of the covenant will not be annexed to the land. The argument then essentially depends on a question of fact. Does the covenant touch or concern every part of the land? If it does then the benefit of the covenant will in appropriate circumstances run with the land. If such is the case, the question of fact must be decisive.

It follows then, that it is immaterial whether the covenant be designed for the benefit of the whole or for the benefit of the whole or any part of the land, if the covenant is one which does not in fact touch or concern the whole, but merely a part of the land in question, since there will be many parts (if the covenant is as it was in *Ballard's* case or in the present case) which the restrictive covenant will not touch or concern. *Such a restrictive covenant will fail to measure up to one of the primary requirements of any such covenant: that it must touch or concern the land in question.* On these grounds, if *re Ballard's Conveyance* is law, then Bennett J.'s decision in *Zetland v. Driver* seems clearly correct, and it is submitted that the Court of Appeal, in basing its decision on the wording of the covenant without impugning the validity of *Ballard's* case, arrived at an incorrect decision.

The other question which arises is as to whether *re Ballard's Conveyance* is a correct statement of the law. It is submitted that the contention of counsel in *Zetland v. Driver* is worthy of consideration. There is no real authority for the proposition of law set down there, and it would appear to create an extra difficulty and super refinement in the law if it is to be necessary for a purchaser who acquires the whole of the land intended to be benefited to show that the covenant touches or

5. (1939) 1 Ch. at 10.

6. The rule is stated in a positive, though somewhat extreme, manner in the Solicitor's Journal, quoted 12 L.I.J. 179.

7. 6 C.L.J. 352.

concerns every "nook and cranny" of the land in question. There are admittedly many difficulties in the way of a logical statement of legal principle in such cases, but it might well be that a more satisfactory solution of the problem would be attained if the covenant in question should be shown to touch or concern the major part of the land in question. As such it would be a question of fact in each case to be decided by the Court. Whatever the correct answer to the question as to whether *re Ballard's Conveyance* is a correct or even satisfactory statement of the law, it is to be regretted that in *Zetland v. Driver* the Court of Appeal failed to deal with this very important issue.

—ZELMAN COWEN.

THE IMMUNITY OF FOREIGN PUBLIC SHIPS.¹

*Chung Chi Cheung v. Rex*²

It is a recognised rule of international law that foreign public ships enjoy immunity from the jurisdiction of a foreign state, when in its territorial waters. That immunity, however, like any other, can be waived, expressly or by implication by the flag state.

Marshall C.J. in *The Exchange v. McFaddon*³ said (in good orthodox positivist terms) that any exception to the full and complete power of a nation, within its own territory, must be traced to the assent, express or implied, of the nation itself. The mutual equality and independence of sovereigns and their common interests have given rise to a number of cases in which every sovereign is understood to limit the exercise of his exclusive territorial jurisdiction. The learned Chief Justice adduced as instances the immunity of the person of a sovereign from arrest when within a foreign country, the immunity of foreign ministers, and the immunity of foreign troops which a sovereign allows to pass through his dominions.

A public armed ship acts under the immediate and direct command of her sovereign, and is employed by him for national objects; she cannot therefore be interfered with, without affecting his power and dignity. Marshall C.J. sums up by saying "it must therefore be concluded that it is an undoubted principle of public law that national ships of war, entering the port of a foreign power open for their reception, are to be considered as exempted, by consent of that power, from its jurisdiction."

A good illustration of an implied waiver of immunity is furnished in the recent case of *Chung Chi Cheung v. Rex*.⁴ There the cabin boy of a Chinese armed customs cruiser shot the captain and wounded himself, while the ship was in Hong Kong territorial waters. Both the captain and the cabin boy were British nationals. In response to a signal from the cruiser, the Hong Kong water police boarded the ship and arrested

1. The authors gratefully acknowledge the assistance they have derived in writing this note from discussion with the class in Public International Law.

2. (1938) 4 All E.R. 786; (1939) A.C. 160.

3. 7 Cranch. 116.

4. *Ibid.* at p. 145.

5. (1938) 4 All E.R. 786; (1939) A.C. 160.