JOHN S. GALBRAITH (*Plaintiff*) .....APPELLANT;

AND

THE MADAWASKA CLUB LIMITED (*Defendant*) ..... } RESPONDENT.

1961
*Feb. 28
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Restrictions on transfer of shares.

Real Property—Restrictive covenant—Assignee of servient land taking with notice—Essential requirements for enforcement of covenant lacking.

In an action against an incorporated club the claims of the plaintiff were: (1) on behalf of himself and all other shareholders of the company for a declaration that those provisions of the by-laws of the company which purported to restrain the transfer of its shares were void; (2) as one of two joint tenants in fee simple (the other being his wife) of part of an island for a declaration that these lands were not subject to specified restrictions. As to the first point the judgment at trial declared that the by-laws in question were invalid. As to the second point it declared that the lands were subject to certain covenants which it was held ran with the land as set forth in the company's by-laws and that save as aforesaid the said lands were free of the restrictive covenants set out in a deed of the part of the island in question from F (a grantee in fee simple from the company) to the plaintiff, including the by-laws of the company annexed thereto. This judgment having been set aside by the Court of Appeal, the plaintiff appealed to this Court asking that the judgment at trial be restored except in so far as it declared that the lands were subject to the covenant in the relevant part of by-law 19 which read: "Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors".

Held: Appeal allowed. Judgment at trial restored with modifications.

Per Curiam: With respect to the first claim, the provisions of the company's charter governed. As the ground covered by the by-laws in question was already dealt with by the charter, the matter was disposed of. In so far as it extended beyond the terms of the charter, it was problematical if any situation would arise calling for the consideration or use of the by-laws and, therefore, no declaration as to the invalidity of any of them should be made.

Per Kerwin C.J. and Taschereau J.: As to the second point, in view of the admissions expressed in its statement of defence the defendant was not entitled to argue that the directors had exceeded their powers as defined in the company's by-laws. *The Tasmania,* 15 App. Cas. 223; *SS. Tordenskjold v. SS. Euphemia* (1909), 41 S.C.R. 154; *David Spencer Ltd. v. Field,* [1939] S.C.R. 36, referred to. By-law 17 authorized the directors to convey the islands by deed subject to the conditions set forth. The defendant admitted that a deed had been given to the intent, *i.e.,* with the intention, that the burden of the covenants

*PRESENT: Kerwin C.J. and Taschereau, Abbott, Judson and Ritchie JJ.

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should run with the land but not (i) that they did not bind the plaintiff, and (ii) that they were invalid. The lands in question were subject only to the restrictions contained in by-laws 18(a) and (b) and 28, but not those contained in by-law 19.

Per Curiam: If the plaintiff as assignee of the servient land taking with notice was to be bound by the covenant in by-law 19 certain essential requirements were to be satisfied: (i) the covenant must touch and concern the dominant land, (ii) the club as covenantee must retain land capable of being benefited by the covenant, and (iii) there must be express annexation of the covenant to the dominant land. All three requirements were lacking in this case. *Noble and Wolf v. Alley,* [1951] S.C.R. 64; *Canadian Construction Co. Ltd. v. Beaver Lumber Ltd.,* [1955] S.C.R. 682, followed; *Tulk v. Moxhay* (1848), 2 Ph. 774; *Rogers v. Hosegood,* [1900] 2 Ch. 388; *Zetland v. Driver,* [1939] Ch. 1, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Ferguson J. Appeal allowed. Judgment at trial restored with modifications.

Terence Sheard, Q.C., for the plaintiff, appellant.

R. F. Wilson, Q.C., and *M. J. Wheldrake,* for the defendant, respondent.

The judgment of the Chief Justice and of Taschereau J. was delivered by

THE CHIEF JUSTICE:—This is an appeal by John S. Galbraith from a judgment of the Court of Appeal for Ontario[1] dismissing his action against The Madawaska Club Limited, hereinafter referred to as the Company. The claims of the plaintiff were two-fold: (1) on behalf of himself and all other shareholders of the Company for a declaration that those provisions of the by-laws of the Company which purport to restrain the transfer of its shares were void; (2) as one of two joint tenants in fee simple, (the other being his wife) of part of an island in Georgian Bay in Ontario known as No. 122 for a declaration that these lands were not subject to specified restrictions.

As to the first point the judgment at the trial declared that the by-laws of the Company nos. 2, 5, 6, 9 and 30 were invalid. As to the second point it declared that the lands

[1] (1960), 23 D.L.R. (2d) 6

were subject to the following covenants which it was held ran with the land as set forth in the Company's by-laws nos. 18, 19 and 28:

18. (a) The decision on all matters pertaining to the delimitation and allotment of sites shall rest with the Board of Directors. In all cases of dispute between members as to the limits and boundaries of lots, or the location of buildings, wharves, etc., the Board of Directors shall have full power to make final decision.

(b) No building or structure shall be erected on any site unless the plan and location thereof shall have been approved by the Board of Directors. The Board of Directors may, after due notification, order or cause to be removed any building or structure, which, after December 1, 1904, may be erected without such approval having previously been secured.

19. (In Part) Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors.

28. Not more than one dwelling house shall be erected on any member's holding, nor shall any building on such holding, allotted to a member, be used for the purpose of keeping boarders or paying guests.

and that save as aforesaid the said lands were free of the restrictive covenants set out in a deed of the part of island No. 122 in question from Ella R. Firth to the plaintiff, dated January 24, 1947, including the by-laws of the defendant Company annexed thereto. With these exceptions the judgment dismissed the action without costs.

The plaintiff appealed to the Court of Appeal only with respect to the declaration that the property was subject to that part of by-law 19 set forth above. The defendant cross-appealed on the ground that the restrictions on the transfer of shares were authorized by its letters patent, that the provisions of the by-laws affecting land were binding in equity and that, in any event, the trial judge improperly exercised his discretion in making any declaration. The Court of Appeal dismissed the plaintiff's appeal, allowed the defendant's cross-appeal and, setting aside the judgment at the trial, dismissed the action with costs and ordered the plaintiff to pay the defendant its costs of the appeal and of the cross-appeal. On the appeal to this Court the plaintiff asks that the judgment at the trial be restored except in so far as it declared that the lands were subject to the covenant in the relevant part of by-law 19.

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On July 12, 1898, the defendant was incorporated under *The Ontario Companies Act,* R.S.O. 1897, c. 191, by letters patent containing the following provisions:

> AND WE DIRECT that the right to acquire and hold shares in the said Club shall be limited to the persons mentioned in this Our Charter and to any Graduate or Under-Graduate of the University of Toronto or of the School of Practical Science or any official connected with either the said The University of Toronto or the said The School of Practical Science.
>
> AND WE FURTHER DIRECT that the capital stock of the Club shall be deemed to be incapable of being assigned or transferred to any body corporate whatever or to any individual (other than those specified in this Our Charter) who is not a graduate or under-graduate of the said The University of Toronto or of the said The School of Practical Science or who is not an official connected with either the said The University of Toronto or the said The School of Practical Science AND WE HEREBY EXPRESSLY EXCLUDE all other persons from the right to acquire and hold a share or shares in the said Club.

The Company was incorporated "for the purpose and objects following that is to say (a) SUBJECT to the provisions of the laws respecting the protection of Fish and Game TO protect preserve and propagate fish and game and to pursue hunt capture and take the same in over and upon the lands waters and property of the Club and (b) TO conduct experimental work in Forestry Biology and other branches of Natural Science." The share capital was $2,000 divided into eighty shares of $25 each. We are not concerned with designated free grant lands mentioned in the letters patent as about to be acquired by the Company from the Province of Ontario. Under various Ontario statutes the Company had power to acquire by purchase and to hold and sell other lands and on October 12, 1911, the Department of Indian Affairs of Canada granted to the Company a number of islands in Georgian Bay, of which No. 122 is one. The Company still owns a number of these islands or parts thereof.

While the plaintiff applied for membership in the Company on November 21, 1952, his testimony shows that nothing occurred as a result thereof and Exhibit-1 is Share Certificate No. 288 in his name for two fully-paid-up shares in the Company and dated as recently as November 29, 1952. There is in the record a certificate for two fully-paid-up shares of the Company of $25 each in the name of Ella R. Firth, dated January 18, 1947, on the back of which certificate is an assignment by her to the plaintiff dated January 24, 1947. A witness for the respondent testified that it

was on the basis of this assignment that the plaintiff became a shareholder and the plaintiff gave evidence that he became a shareholder only about the time of the conveyance to him by Ella R. Firth of January 24, 1947, of part of island No. 122.

On October 17, 1945, the Company conveyed the said part of island No. 122 to Ella R. Firth, her heirs and assigns for her sole and their sole and only use forever

.....

Subject nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown; To the intent that the burden of these covenants may run with the lands aforesaid during the Corporate existence of The Madawaska Club, Limited, the said Grantee for herself, her heirs, executors, administrators and assigns, DOTH COVENANT AND AGREE WITH THE said Grantor its successors and assigns as follows: that she the said Grantee, her heirs, executors, administrators and assigns

(*a*) Will not or will any of them transfer said land by Deed of Ownership or any similar agreement to any person not a member of the Club, and that any such sale, lease or transfer to any person not a member of the Club, or attempted alienation of the said land to take it out of the control of the by-laws of the Club shall be null and void;

.....

(*d*) Will observe and carry out the by-laws of The Madawaska Club, Limited, annexed hereto marked "A" and will hold the said land subject to the terms herein contained and subject to the terms and conditions imposed upon the said land by the said by-laws.

The deed signed by the grantee contained a covenant on her part to observe the Company's by-laws, a copy of which was annexed to and made part of the deed. Ella R. Firth conveyed the same lands to the plaintiff by grant dated January 24, 1947, the same date that she assigned the two shares to him. The plaintiff signed the conveyance, covenanted with the grantor in the same terms set forth above in the conveyance to her and also covenanted with the grantor to observe and carry out the by-laws of the Company, a copy of which was annexed to and made part of the document. On February 21, 1951, the plaintiff conveyed the lands to himself and his wife as joint tenants,—the deed containing none of the covenants included in the conveyance to Ella R. Firth or in that from her to the plaintiff.

As to the first claim of the plaintiff in this appeal the provisions of the Charter govern. It is argued on his behalf that ss. 17 and 39 of *The Corporations Act,* 1953 (Ont.), c. 19, are applicable. These sections are in Part II of the

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Act and by s. 17 that Part applies "(c) to every company incorporated by or under a general or special Act of the Legislature",—which includes the defendant Company. By subs. (2) of s. 39, "subject to subs. (3) (which is not relevant) no by-law shall be passed that in any way restricts the right of a holder of fully-paid shares to transfer them but by-laws may be passed regulating the method of transfer thereof". Section 39(2) was in substance first enacted in 1912 by 2 Geo. V, c. 31, s. 54(2), which was subsequent to the date of the Company's Charter. This subs. (2) looks to the future and in any event the provisions of the Charter are explicit.

The trial judge held by-laws 2, 5, 6, 9 and 30 to be invalid. These read:

2. The membership shall be limited to 120, and shall consist of charter members, and of graduates and undergraduates of the University of Toronto or of the School of Practical Science, and of any officials connected therewith.

.....

5. Election of new members shall take place at the annual meeting only. All applications for membership shall be made in writing to the Board of Directors at least three weeks before the annual meeting, on a form to be approved by the Board of Directors, and the Board of Directors shall cause the names of such applicants as are eligible under the charter to be inserted in the notice calling the annual meeting.

6. The election of new members shall be by ballot, each member present in person or by proxy being entitled to cast one vote, and any applicant receiving six adverse votes shall be rejected.

.....

9. No member shall at any time hold more than ten shares of the capital stock of the Club.

.....

30. An undivided holding and the shares attached may be devised and bequeathed by will to a single devisee and legatee, provided that the devisee or legatee is eligible for membership under the By-laws; and the said devisee or legatee shall become a member of the Madawaska Club without election, by submitting proper documentary proof of the devise or legacy to the Board of Directors, and shall be entitled to acquire possession of the property so devised or bequeathed on paying the entrance fee required from new members; and shall thereafter hold said property subject to the terms of the By-laws of the Club.

According to Exhibit-3 all of these, except 30, were "adopted May 18, 1932, as amended, 194?" However, Exhibit-21 shows that the by-laws were first passed December 12, 1904, that is prior to s. 54(2) of 2 Geo. V, c. 31, including the first four of those mentioned (with a slight variation as to 6).

In so far as the ground covered by these by-laws is already dealt with by the Charter, the matter is disposed of and this includes by-law 30 as the Charter directs "that the right to acquire and hold shares in the said Club shall be limited to the persons mentioned in this Our Charter and to any Graduate or Under-Graduate of the University of Toronto or of the School of Practical Science or any official connected with either the said The University of Toronto or the said The School of Practical Science". In so far as it extends beyond the terms of the Charter, I agree with the Court of Appeal that it is problematical if any situation will arise calling for the consideration or use of the by-laws and that, therefore, no declaration as to the invalidity of any of them should be made.

In connection with the second point it should first be stated that the circumstance that Mrs. Firth or her representatives were not parties was never alluded to even when counsel were asked to argue certain additional points before the Court of Appeal, but, in any event, it cannot affect the matter as it does not appear that she or they have any interest in any other part of island No. 122 or any part of any other island in Georgian Bay. Next, it should be noted that irrespective of the date when the plaintiff actually became a shareholder, he is, under *The Registry Act* of Ontario, charged with notice of the covenants including those in the by-laws which appear in and are attached to the deed from the Company to Ella R. Firth and that, furthermore, he signed the deed from her to him even though "under protest". It is now necessary to examine the pleadings. Paragraphs 7A and 7B of the amended statement of claim were as follows:

7A. By deed of grant dated October 17th, 1945, and registered in the Registry Office at Bracebridge, Ontario, for the Registry Division of Muskoka as number 393 for the Township of Gibson, the Defendant granted to Ella R. Firth, widow, that part of island number 122 in the Georgian Bay hereinafter more particularly described.

7B. By the said deed of grant the said Ella R. Firth for herself, her heirs, executors, administrators and assigns, to the intent that the burden of the covenants hereinafter referred to might run with the lands, covenanted as follows:

(*a*) That she would not nor would any of them transfer the said lands to any person not a member of the Club and that any such sale, lease or transfer to any person not a member of the Club or attempted alienation of the said lands to take it out of the control of the By-Laws of the Club shall be null and void.

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(*b*) That she would continue to be liable for and will pay all taxes, dues and charges imposed upon her as holder of the said land under the By-Laws of the Club dealing with the holding of sites which are in force at the time of the purchase of the said property save only that the payments under By-Law 15, Section (*b*) subsection (1) shall cease from this date and that the regular payments of all annual dues, taxes and charges save as aforesaid shall be a condition of the transfer and sale of the said lands.

(*c*) That she would pay her due share of all Municipal and Parliamentary or other taxes, which may at any time be levied upon the property owned or leased by the Club, such share to be determined by resolution of a general meeting of the shareholders.

(*d*) That she would observe and carry out the By-Laws of The Madawaska Club Limited annexed to the said deed of grant and would hold the said land subject to the terms therein contained and subject to the terms and conditions imposed upon the said lands by the said By-Laws.

These paragraphs are expressly admitted by para. 1 of the statement of defence. This was a trial and not a motion as in *Noble and Wolf v. Alley*[1]; the rule expressed in *The Tasmania*[2], *SS. Tordenskjold v. SS. Euphemia*[3] and *David Spencer Limited v. Field*[4], applies and the Company was not entitled to argue in the Court of Appeal and may not argue in this Court that the directors exceeded their powers as defined by the Company's by-laws. The Chief Justice of Ontario refers to a number of by-laws which, in his view, demonstrated that the directors had no power under the by-laws to grant land acquired from the Indian Department in fee simple, but he does not in my view give sufficient weight to by-law 17 which provides, as well in the by-laws adopted December 12, 1904, as in the by-laws adopted May 18, 1932, as amended, (the underlining has been added):

17. Any member to whom a site has or shall have been allotted and who desires to own the said site instead of leasing it from the Club, may do so, subject (in the case of sites upon the mainland) to the provisions of the charter and patent granted by the Ontario Government, and (in the case of sites upon the islands) to the provisions of the agreement with the Dominion Government; and such ownership shall be further subject to the following conditions:

(1) Such member shall pay to the Treasurer of the Club the amount at which the Dominion Government values the land in question, or (in the case of sites upon the mainland) the amount of $2 per acre. He shall also pay all the costs, charges and expenses of the transfer of the said property.

[1] [1951] S.C.R. 64, 1 D.L.R. 321.
[2] 15 App. Cas. 223 at 225.
[3] (1909), 41 S.C.R. 154 at 164.
[4] [1939] S.C.R. 36, 1 D.L.R. 129.

(2) Such member shall continue to be liable to all dues, taxes and charges imposed upon the holders and lessees of sites by the by-laws dealing with the holding of sites which may be in force at the time he purchases the said property; save only that the payments under By-law 15, section (*b*), sub-sections (1) and (2) shall cease from the time of such purchase. The regular payment of all such annual dues, taxes and charges shall be a condition of the transfer and sale of the property in question, and shall be so expressed in the deed; and the said purchaser shall execute the deed in the terms of the said conditions, and the covenant containing such conditions shall run with the land.

(3) It shall also be stipulated and provided in the deed as a condition of the transfer of said property, that it shall not subsequently be transferred by deed of ownership or lease, or any similar agreement to any person not a member of the Club, and that any such sale, lease, transfer or alienation of the property in question as shall take it out of the control of the by-laws of the Club, shall be null and void.

The by-law therefore authorizes the directors to convey the islands by deed subject to the conditions set forth. The defendant admitted that a deed had been given to the intent, *i.e.*, with the intention, that the burden of the covenants should run with the land but not (1) that they did not bind the plaintiff, and (2) that they were invalid.

In this Court the main argument was in connection with part of by-law 19 which, for convenience, is again reproduced:

19. Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors,

as counsel for the plaintiff admitted that the trial judgment was correct in holding that by-laws 18(*a*) and (*b*) and 19 ran with the land. However by the wide terms of that judgment, it was declared that, with the exceptions mentioned, the lands were free not only of the restrictive covenants set out in the deed from Ella R. Firth to the plaintiff but also free of all restrictive covenants in the Company's by-laws and the plaintiff asks for the restoration of the trial judgment except as to by-law 19. The by-laws were not referred to before us in detail but a careful examination of them in order to ascertain which ones except 19 might have any relation to the matter under discussion indicates that

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only 17, 21, 22, 24 and 30 need be considered, all of which are referred to by Chief Justice Porter except 24. These read as follows:

17. Any member to whom a site has or shall have been allotted and who desires to own the said site instead of leasing it from the Club, may do so, subject (in the case of sites upon the mainland) to the provisions of the charter and patent granted by the Ontario Government, and (in the case of sites upon the islands) to the provisions of the agreement with the Dominion Government; and such ownership shall be further subject to the following conditions:

(1) Such member shall pay to the Treasurer of the Club the amount at which the Dominion Government values the land in question, or (in the case of sites upon the mainland) the amount of $2 per acre. He shall also pay all the costs, charges and expenses of the transfer of the said property.

(2) Such member shall continue to be liable to all dues, taxes and charges imposed upon the holders and lessees of sites by the by-laws dealing with the holding of sites which may be in force at the time he purchases the said property; save only that the payments under By-law 15, section (*b*), subsections (1) and (2) shall cease from the time of such purchase. The regular payment of all such annual dues, taxes and charges shall be a condition of the transfer and sale of the property in question, and shall be so expressed in the deed; and the said purchaser shall execute the deed in the terms of the said conditions, and the covenant containing such conditions shall run with the land.

(3) It shall also be stipulated and provided in the deed as a condition of the transfer of said property, that it shall not subsequently be transferred by deed of ownership or lease, or any similar agreement to any person not a member of the Club, and that any such sale, lease, transfer or alienation of the property in question as shall take it out of the control of the by-laws of the Club, shall be null and void.

.....

21. In the case of the death of any member of the Club holding a site by lease or purchase according to the by-laws, then, upon the regular annual payment of all dues, taxes and charges prescribed for such member by the by-laws, his immediate family may continue to occupy the premises formerly held by the deceased, for a period of two years, and thereafter from year to year, upon the annual permission of the Board of Directors. During the period of occupancy the legal representative of the estate of the deceased member may dispose of the said member's interest in the said premises to any member of the Club, subject to the by-laws of the Club.

22. (*a*) In case the premises formerly held by a deceased member are not disposed of as provided in By-law 21, then upon six months' notice being given in writing, either by the legal representative of the estate of the deceased member, or by the Board of Directors, of the discontinuance of occupancy, an allowance may be made to the estate of the deceased for the interest in the site held by the deceased, for such buildings as may have been on the said site at the date of the passing of this by-law, and such buildings as may thereafter be erected thereon by permission of the Board of Directors, and for such improvements as may have been made on the said site.

(*b*) The amount of such compensation shall be determined conjointly by a representative of the estate and a representative chosen by the Board of Directors from among themselves; in case of non-agreement between these two arbitrators, a third arbitrator shall be chosen by the aforesaid arbitrators, and the Board of Arbitration so constituted shall finally determine the amount of compensation to be allowed.

(*c*) The Board of Directors may elect to take over the interests of the deceased member at the valuation fixed by the said Board of Arbitration, and if they fail to make such election within six months after the decision of the Board of Arbitration has been received by the Board of Directors, the legal representative of the estate of the deceased member may dispose of the said member's interest in the said site, and the buildings and improvements upon the said site, to any person whomsoever, subject to the conditions under which the Club holds the land in question from the Ontario or Dominion Government; and subject also to the terms under which the deceased member held the site in question, with such modifications or alterations as may be approved by the Board of Directors; and such person shall execute the assignment of the lease, or deed, as the case may be, and covenant with the Club to observe and perform all the terms, covenants and conditions therein contained, with such modifications or alterations as may have been approved by the Board of Directors.

.....

24. The use of fire-arms shall be prohibited from the first day of June to the thirty-first day of August, inclusive, except by special permission of the Board of Directors; and the use of rifles shall be prohibited at all times.

.....

30. An undivided holding and the shares attached may be devised and bequeathed by will to a single devisee and legatee, provided that the devisee or legatee is eligible for membership under the By-laws; and the said devisee or legatee shall become a member of the Madawaska Club without election, by submitting proper documentary proof of the devise or legacy to the Board of Directors, and shall be entitled to acquire possession of the property so devised or bequeathed on paying the entrance fee required from new members; and shall thereafter hold said property subject to the terms of the By-laws of the Club.

I agree with Judson J. that for the reasons given by him the lands in question of the plaintiff John S. Galbraith are subject only to the restrictions contained in by-laws 18(*a*) and (*b*) and 28, but not to those contained in by-law 19.

The appeal should be allowed and the judgment of the Court of Appeal set aside. The judgment at the trial should be restored except that Paragraph 1 should be amended by striking out the declaration that the lands of the plaintiff John S. Galbraith are bound by by-law 19 and by striking out Paragraph 2 thereof. The order as to costs at the trial should stand; there should be no costs in the Court of Appeal, but the appellant should have one-half of his costs in this Court.

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Judson J.

The judgment of Taschereau, Abbott, Judson and Ritchie JJ. was delivered by

JUDSON J.:—I agree with the reasons of the Chief Justice on the first branch of the case that the appellant fails in his claim for a declaration concerning the restrictions on the transfer of shares. I also agree that the appellant and his wife are joint tenants in fee simple of the land and not licensees as the Court of Appeal held. In my opinion the result of this litigation is that the plaintiff is bound only by the restrictions contained in by-laws 18(*a*) and (*b*) and 28 but not by by-law 19 and to this extent I would modify the judgment of the learned trial judge.

After a trial in which he was largely successful, Galbraith appealed to the Court of Appeal on one point only—whether he was bound by by-law 19. He was, of course, a purchaser with notice. By-law 19, so far as it is applicable, reads:

> Occupation of a dwelling or premises by persons who are not members of the Club shall only be by special permission of the Board of Directors.

The Club cross-appealed on all points. The Court of Appeal held, as a result of a point raised before them for the first time in the litigation, that Galbraith was a licensee of the land and not an owner in fee simple and consequently subject to all the restrictions. On appeal to this Court, he seeks to have the judgment at trial restored with the above mentioned modification as to not being bound by the restrictive covenant contained in by-law 19. He has never appealed against the declaration that he is bound by by-laws 18(*a*) and (*b*) and 28.

The chain of title in this case is short. The Club acquired the fee simple to the land in question by grant from the Dominion of Canada. I mention this because other club lands were acquired by grant from the Province of Ontario. The provincial grant contains special conditions limiting the persons who may become interested in the lands and nothing that I say in these reasons has any application to the lands contained in the provincial grant. In 1945 the Club granted in fee simple to Ella R. Firth part of island 122. The grantee covenanted in the following terms:

> to the intent that the burden of these covenants may run with the lands aforesaid during the Corporate existence of The Madawaska Club Limited, the said Grantee for herself, her heirs, executors, administrators and

assigns, DOTH COVENANT AND AGREE with the said Grantor its successors and assigns as follows: that she the said Grantee, her heirs, executors, administrators and assigns

(*a*) Will not nor will any of them transfer said land by Deed of Ownership or any similar agreement to any person *not a member of the Club*, and that any such sale, lease or transfer to any person not a member of the Club, or attempted alienation of the said land to take it out of the control of the by-laws of the Club shall be null and void;

.....

(*d*) Will observe and carry out the by-laws of The Madawaska Club Limited, annexed hereto marked "A" and will hold the said land subject to the terms herein contained and subject to the terms and conditions imposed upon the said land by the said by-laws.

By-law 19, which was the main subject-matter of argument on this branch of the appeal, is thus introduced by way of covenant (*d*) contained in the deed.

In 1947 Mrs. Firth conveyed in fee to Galbraith and took from him the same covenants. In 1951 Galbraith conveyed to himself and his wife as joint tenants and this deed did not contain the covenants. Thus, notwithstanding the fact that the action is one brought by Galbraith for a declaratory judgment, the dispute is really one between the Club as the original covenantee and a subsequent purchaser of the restricted land who takes with notice but claims to be free of the covenant.

If Galbraith, as assignee of the servient land taking with notice, is to be bound by this covenant, certain essential requirements must be satisfied. I will take it that the covenant is negative in substance, if not form, for the negative implication is very clear. The requirements are that this covenant must touch and concern the dominant land, that the Club as covenantee must retain land capable of being benefited by the covenant and that there must be express annexation of the covenant to the dominant land. In my opinion all three requirements are lacking in this case.

The juridical basis for the enforcement of these covenants has undergone a marked change since *Tulk v. Moxhay*[1]. The doctrine of notice was the decisive factor in that case. The presently developed theory of enforceability is that expressed by Rand J. in *Noble and Wolf v. Alley*[2]:

Covenants enforceable under the rule of *Tulk v. Moxhay* (1848) 11 Beav. 571; 50 E.R. 937, are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable

[1] (1848), 2 Ph. 774.

[2] [1951] S.C.R. 64 at 69, 1 D.L.R. 321.

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servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.

Assuming for the moment that there has been an annexation of this covenant to some land of the Club capable of being benefited at the time of the conveyance to Mrs. Firth, does this covenant relating to occupation of the servient land touch or concern the dominant land for it is that land which must be "touched or concerned" (*Rogers v. Hosegood*[1])? There is no privity of contract between Galbraith, as owner of the restricted land, and the Club. The Club has parted with the fee simple. If the Club is to enforce the covenant against Galbraith, it must be done for the benefit of land retained by the Club at the date of the covenant. It is this protected land which must be touched and concerned by the covenant, within the classic definition of Farwell J. in *Rogers v. Hosegood, supra,* p. 395:

> The covenant must either affect the land as regards mode of occupation or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.

The covenant in question here gives the Club the right to choose the persons who shall occupy the servient land, if the owner wishes to go outside the club membership. This has nothing to do with the use to which the land may be put, but relates only to the kind of person who may be given occupation. It is imposed by the vendor for its own benefit as a club. It does not touch or concern the land, as being imposed for the benefit of or to enhance the value of land retained by the Club. It calls into being the exercise of an unfettered personal discretion by the club management and its plain purpose is to preserve the amenities of the Club. That such a covenant does not touch or concern the dominant land is concluded in this Court by the decision in *Noble and Wolf v. Alley, supra.* The covenant in that case covered occupation as well as alienation in the following terms:

> The lands and premises herein described shall never be sold, assigned, transferred, lease, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being

[1] [1900] 2 Ch. 388 at 404, 69 L.J. Ch. 652.

the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

It was held that this was not a covenant touching or concerning the land and I can see no possible ground for any distinction between a covenant restricting alienation and one restricting occupation.

There is nothing in the conveyance from the Club to Mrs. Firth which attempts to annex the benefit of the covenant to any land retained by the Club. Further, there is no evidence anywhere in the record to indicate whether the Club had any such land capable of being benefited. The grantee simply covenants for herself, her heirs, executors, administrators and assigns, with the grantor, its successors and assigns, to the intent that the burden of the covenants should run with the lands during the corporate existence of the Club but nothing is said about any other lands. This fails to meet what I think must be regarded as the minimum requirements that the deed itself must so define the land to be benefited as to make it easily ascertainable (*Zetland v. Driver*[1]).

There was exactly the same situation in *Canadian Construction Company Limited v. Beaver Lumber Limited*[2]. In that case Beaver Lumber was the owner of two parcels of land, A and B. It conveyed parcel A in 1944 and took a covenant that the grantee would not, for a period of 25 years, carry on a lumber business on the lands. The lands eventually came into the hands of Canadian Construction Company with notice of the covenant. There was nothing in the agreement containing the covenant which annexed its benefit to parcel B on which Beaver Lumber Limited was carrying on a lumber business. The inference drawn by the learned trial judge was that the covenant was intended by the parties to be personal to the covenantee and not for the benefit of parcel B. The Court of Appeal reversed the finding of the trial judge but the judgment at trial was restored in this Court. The majority of the Court did not find it necessary to consider the extent of the admissibility of evidence of surrounding circumstances, for the purpose

[1] [1939] Ch. 1 at 8, 107 L.J. Ch. 316.
[2] [1955] S.C.R. 682, 3 D.L.R. 502.

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of indicating the existence or situation of other land of the covenantee intended to be benefited. However, the plain implication in the judgment of this Court in affirming the trial judgment was that a restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone.

I would allow the appeal and set aside the judgment of the Court of Appeal which dismissed the action with costs. I would restore the judgment at trial with these modifications:

(a) Paragraph 1 should be amended by striking out the declaration that the plaintiff is bound by by-law 19;

(b) Paragraph 2, declaring by-laws 2, 5, 6, 9 and 30 to be invalid insofar as they restrict or purport to restrict the transfer of shares, should be struck out.

The order as to costs at trial should stand. As success was divided in the Court of Appeal there should be no order as to costs. In this Court I would allow the appellant one-half his costs. For him an appeal was necessary to establish that he was an owner in fee simple and that he was not bound by by-law 19. On these points he succeeded. He failed on the issue relating to the shares.

Appeal allowed.

Solicitors for the plaintiff, appellant: Johnston, Sheard & Johnston, Toronto.

Solicitors for the defendant, respondent: Day, Wilson, Kelly, Martin & Campbell, Toronto.