

***Re Noble and Wolf v Alley*, [1951] SCR 64**

The judgment of Kerwin and Taschereau JJ. was delivered by Kerwin J.:

[*This case—decided just five years after Re Drummond Wren—addressed a discriminatory restrictive covenant attached to land forming part of a summer resort development called the Beach O’Pines. The covenant, in clause (f), prohibited the sale, transfer or lease of the land to, or use or occupancy by, individuals of Jewish “race or blood” or people of colour, and expressed an intention to restrict ownership of land in the resort development to “persons of the white or Caucasian race not excluded by this clause.”*]

[...]

[1] In the Courts below emphasis was laid upon the decision of Mackay J. in *Re Drummond Wren*, and it was considered that the motion was confined to the consideration of whether that case, if rightly decided, covered the situation. The motion was for an order declaring that the objection to the covenant made on behalf of the purchaser had been fully answered by the vendor and that the same did not constitute a valid objection to the title or for such further and other order as might seem just. The objection was:

REQUIRED in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (f) and an order declaring that the restrictive covenant set out in the said clause (f) is void and of no effect.

[2] The answer by the vendor was that the decision in *Re Drummond Wren* applied to the facts of the present sale with the result that clause (f) was invalid and the vendor and purchaser were not bound to observe it. In view of the wide terms of the notice of motion, the application is not restricted and it may be determined by a point taken before the Court of Appeal and this Court, if not before Mr. Justice Schroeder.

[3] That point depends upon the meaning of the rule laid down in *Tulk v. Moxhay*. This was a decision of the Lord Chancellor, Lord Cottenham, affirming a decision of the Master of the Rolls. The judgment of the Master of the Rolls appears in 18 L.J.N.S. (Equity) 83, and the judgment of the Lord Chancellor is more fully reported there than in Phillips’ Reports. In the latter, the Lord Chancellor is reported as saying, page 777:

That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.

[4] In the Law Journal, the following appears at p. 87:

I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. That this Court has authority to enforce a contract, which the owner of one piece of land may have entered into with his neighbour, founded, of course, upon good consideration, and valuable consideration, that he will either use or abstain from using his land in any manner that the other party by the contract stipulates shall be followed by the party who enters into the covenant, appears to me the very foundation of the whole of this jurisdiction. It has never, that I know of, been disputed.

[5] At p. 88 of the Law Journal, the Lord Chancellor states that the jurisdiction of the Court was not fettered by the question whether the convent ran with the land or not but that the question was whether a party taking property, the vendor having stipulated in a manner, binding by the law and principles of the Court of Chancery to use it in a particular way will not be permitted to use it in a way diametrically opposite to that which the party has covenanted for. To the same effect is p. 778 of Phillips's.

[6] In view of these statements I am unable to gain any elucidation of the extent of the equitable doctrine from decisions at law such as *Congleton v. Pattison* and *Rogers v. Hosegood*. It is true that in the Court of Appeal, at p. 403, Collins L.J., after referring to extracts from the judgment of Sir George Jessel in *London & South Western Ry. Co. v. Gomm*, said at p. 405:

These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land.

[7] This, however, leaves untouched the problem as to when a covenant binds the land.

[8] Whatever the precise delimitation in the rule in *Tulk v. Moxhay* may be, counsel were unable to refer us to any case where it was applied to a covenant restricting the alienation of land to persons other than those of a certain race. Mr. Denison did refer to three decisions in Ontario: *Essex Real Estate v. Holmes*; *Re Bryers and Morris*; *Re McDougall v. Waddell*; but he was quite correct in stating that they were of no assistance. The holding in the first was merely that the purchaser of the land there in question did not fall within a certain prohibition. In the second an inquiry was directed, without more. In the third, all that was decided was that the provisions of s. 1 of *The Racial Discrimination Act*, 1944, (Ontario), c. 51 would not be violated by a deed containing a covenant on the part of the purchaser that certain lands or any buildings erected thereon should not at any time be sold to, let to or occupied by any person or persons

other than Gentiles (non-semitic (sic)) of European or British or Irish or Scottish racial origin.

[9] It was a forward step that the rigour of the common law should be softened by the doctrine expounded in *Tulk v. Moxhay* but it would be an unwarrantable extension of that doctrine to hold, from anything that was said in that case or in subsequent cases that the covenant here in question has any reference to the use, or abstention from use, of land. Even if decisions upon the common law could be prayed in aid, there are none that go to the extent claimed in the present case.

[10] The appeal should be allowed with costs here and in the Court of Appeal. There should be no costs of the original motions in the Supreme Court of Ontario.

The judgment of Rand, Kellock and Fauteux JJ. was delivered by Rand J.:

[11] Covenants enforceable under the rule of *Tulk v. Moxhay*, are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable 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.

[12] But by its language, the covenant here is directed not to the land or to some mode of its use, but to transfer by act of the purchaser; its scope does not purport to extend to a transmission by law to a person within the banned class. If, for instance, the grantee married a member of that class, it is not suggested that the ordinary inheritance by a child of the union would be affected. Not only, then, it is not a covenant touching or concerning the land, but by its own terms it fails in annexation to the land. The respondent owners are, therefore, without any right against the proposed vendor.

[13] On its true interpretation, the covenant is a restraint on alienation. [...]

[14] The effect of the covenant, if enforceable, would be to annex a partial inalienability as an equitable incident of the ownership, to nullify an area of proprietary powers. In both cases there is the removal of part of the power to alienate; and I can see no ground of distinction between the certainty required in the one case and that of the other. The uncertainty is, then, fatal to the validity of the covenant before us as a defect of or objection to the title.

[15] I would, therefore, allow the appeal and direct judgment to the effect that the covenant is not an objection to the title of the proposed vendor, with costs to the appellants in this Court and in the Court of Appeal.

Appeal allowed with costs.