

***Re Drummond Wren*, [1945] OR 778 (HC)**

Mackay J.

[1] This is an application brought by Drummond Wren, owner of certain lands registered in the Registry Office for the County of York, to have declared invalid a restrictive covenant assumed by him when he purchased these lands and which he agreed to exact from his assigns, namely, — “Land not to be sold to Jews or persons of objectionable nationality.”

[2] The application is made by way of special leave and pursuant to s. 60 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, and Rules 603 and 604 of The Rules of Practice and Procedure.

[3] Under s. 60(1) of The Conveyancing and Law of Property Act, a wide discretion is given to a judge to modify or discharge any condition or covenant “Where there is annexed to any land any condition or covenant that such land or any specified portion thereof is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.”

[4] Rules 603 and 604 provide respectively that:

603. (1) Where any person claims to be the owner of land, but does not desire to have his title thereto quieted under *The Quieting Titles Act*, he may have any particular question which would arise upon an application to have his title quieted determined upon an originating notice.

(2) Notice shall be given to all persons to whom notice would be given under *The Quieting Titles Act*, and the Court shall have the same power finally to dispose of and determine such particular question as it would have under the said Act, but this shall not render it necessary to give the notice required by Rule 705.

604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

[5] While, pursuant to an order made by me, notice of this application was served upon various persons interested in this and in adjacent lands subject to the same or a similar restrictive covenant, no one appeared in Court upon the return of this motion to oppose it.

[6] The restrictive covenant which is the subject of this proceeding and which by the deed aforesaid the grantee assumes and agrees to exact from his assigns, reads as follows: “Land not to be sold to Jews, or to persons of objectionable nationality.” Counsel for the applicant seeks the discharge and removal of this

covenant on these alternative grounds: first, that it is void as against public policy; secondly, that it is invalid as a restraint on alienation; thirdly, that it is void for uncertainty; and fourthly, that it contravenes the provisions of The Racial Discrimination Act, 1944 (Ont.), c. 51. The matter before me, so defined, appears to raise issues of first impression, because a search of the case law of Great Britain and of Canada does not reveal any reported decision which would be of direct assistance in this proceeding.

[7] Counsel for the applicant did refer me to three Ontario cases dealing with restrictive covenants similar to that here involved, but, in my view, he rightly took the position that in none of those cases was the Court called upon to pass on the validity of the particular restriction in the way in which I am obliged to do in this case. Garrow J. in *Essex Real Estate Co. Ltd. v. Holmes*, 37 O.W.N. 392, affirmed 38 O.W.N. 69, did not have to determine the validity of the restriction in that case because he found that the purchaser of the land was not within its terms. Again, in *Re Bryers & Morris*, 40 O.W.N. 572, which was a vendor's and purchaser's motion, Hodgins J.A. refrained from passing on the validity of the restrictive covenant there in question. The third case mentioned by counsel for the applicant is a recent decision of Chevrier J., *Re McDougall and Waddell*, [1945] O.W.N. 272, [1945] 2 D.L.R. 244, which arose out of a vendor's and purchaser's motion for an order that the particular restrictive covenant there objected to offended against the terms of The Racial Discrimination Act, *supra*. The issue raised in that case was a narrow one, and I shall return to a discussion of it later in my judgment.

[8] In this short canvass of the authorities directly applicable, it may not be amiss to point out that, according to an affidavit filed on behalf of the applicant, the present Master of Titles at Toronto has not knowingly permitted anyone to register deeds containing restrictive covenants of a character similar to that in question here, and has on several occasions refused to accept for registration documents containing such covenants, and in no case has an appeal been taken from such refusal.

[9] The applicant's argument is founded on the legal principle, briefly stated in 7 Halsbury, 2nd ed. 1932, pp. 153-4, that: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." Public policy, in the words of Halsbury, "varies from time to time."

[10] In "The Growth of Law", Mr. Justice Cardozo says: "Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth."

[11] And Mr. Justice Oliver Wendell Holmes, in "The Common Law", says: "The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I

mean, of course, what is expedient for the community concerned.”

[12] The matter of not creating new heads of public policy has been discussed at some length by McCardie J. in Naylor, *Benzon and Co., Limited v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331, later affirmed by the Court of Appeal, [1918] 2 K.B. 486. There he points out that “the Courts have not hesitated in the past to apply the doctrine [of public policy] whenever the facts demanded its application.” “The truth of the matter,” he says, “seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. This view is exemplified by the decisions which were discussed by the House of Lords in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Limited*, [1894] A.C. 535 . . . The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal C.J. in *Horner v. Graves* (1831), 7 Bing. 735, 743, 131 E.R. 284. ‘Whatever is injurious to the interests of the public is void, on the grounds of public policy.’”

[13] It is a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy: see *Walkerville Brewing Co. Ltd. v. Mayrand*, 63 O.L.R. 573, [1929] 2 D.L.R. 945.

[14] First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The preamble to this Charter reads in part as follows:

We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors . . .

[15] Under articles 1 and 55 of this Charter, Canada is pledged to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

[16] In the Atlantic Charter, to which Canada has subscribed, the principles of freedom from fear and freedom of worship are recognized.

[17] Section 1 of The Racial Discrimination Act, *supra*, provides:

No person shall,

- (a) publish or display or cause to be published or displayed; or
- (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other representation indicating

discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

[18] The Provincial Legislature further has expressed itself in The Insurance Act, R.S.O. 1937, c. 256, s. 99, as follows: “Any licensed insurer which discriminates unfairly between risks within Ontario because of the race or religion of the insured shall be guilty of an offence.”

[19] Moreover, under s. 6 of the Regulations passed pursuant to The Community Halls Act, now R.S.O. 1937, c. 284, it is provided that “Every hall erected under this Act shall be available for any public gathering of an educational, fraternal, religious or social nature or for the discussion of any public question, and no organization shall be denied the use of the hall for religious, fraternal or political reasons.”

[20] Proceeding from the general to the particular, the argument of the applicant is that the impugned covenant is void because it is injurious to the public good. This deduction is grounded on the fact that the covenant against sale to Jews or to persons of objectionable nationality prevents the particular piece of land from ever being acquired by the persons against whom the covenant is aimed, and that this prohibition is without regard to whether the land is put to residential, commercial, industrial or other use. How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or, conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.

[21] Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not

conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

[22] That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

[23] My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.

[24] It may not be inexpedient or improper to refer to a few declarations made by outstanding leaders under circumstances that arrest the attention and demand consideration of mankind. I first quote the late President Roosevelt:

Citizens, regardless of religious allegiance, will share in the sorrow of our Jewish fellow-citizens over the savagery of the Nazis against their helpless victims. The Nazis will not succeed in exterminating their victims any more than they will succeed in enslaving mankind. The American people not only sympathize with all victims of Nazi crimes but will hold the perpetrators of these crimes to strict accountability in a day of reckoning which will surely come.

I express the confident hope that the Atlantic Charter and the just World Order to be made possible by the triumph of the United Nations will bring the Jews and oppressed people in all lands the four freedoms which Christian and Jewish teachings have largely inspired.

[25] And of the Right Honourable Winston Churchill:

In the day of victory the Jew's sufferings and his part in the struggle will not be forgotten. Once again, at the appointed time, he will see vindicated those principles of righteousness which it was the glory of his fathers to proclaim to the world. Once again it will be shown that, though the mills of God grind slowly, yet they grind exceeding small.

[26] And of General Charles de Gaulle:

Be assured that since we have repudiated everything that has falsely

been done in the name of France after June 23rd, the cruel decrees directed against French Jews can and will have no validity in Free France. These measures are not less a blow against the honour of France then they are an injustice against her Jewish citizens.

When we shall have achieved victory, not only will the wrongs done in France itself be righted, but France will once again resume her traditional place as a protagonist of freedom and justice for all men, irrespective of race or religion, in a new Europe.

[27] Also, the resolution passed by the representatives of over sixty million organized workers at the World Trade Union Congress recently held at London that “every form of political, economic or social discrimination based on race, creed or sex, shall be eliminated.”

[28] The resolution against discrimination adopted unanimously by the Latin American nations and the United States in Mexico City on 6th March 1945, at the time of the Act of Chapultepec, is that the governments of these nations shall “prevent with all the means in their power all that may provoke discrimination among individuals because of racial and religious reasons.”

[29] It is provided in art. 123 of The Constitution of the Union of Soviet Socialist Republics, that:

Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, state, cultural, social and political life, is an indefeasible law.

Any direct or indirect restriction of the rights of, or, conversely, any establishment of direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, is punishable by law.

[30] The second point raised by counsel for the applicant is that the covenant is invalid as a restraint on alienation. It is unnecessary to quote authorities in support of the long-established principle of the common law that land should be freely alienable. True, a limited class of exceptions to this general principle has from time to time been recognized, as in *In re Macleay* (1875), L.R. 20 Eq. 186, though it may be pointed out that this decision runs counter to the earlier case of *Attwater v. Attwater* (1853), 18 Beav. 330, 52 E.R. 131. Moreover, in *In re Rosher*; *Rosher v. Rosher* (1884), 26 Ch. D. 801, Pearson J. stated that he failed to appreciate how the exception recognized in *In re Macleay* arose. It is not necessary to challenge the doctrine of *In re Macleay*, which has been followed in some Canadian cases, in order to find that the covenant with which I am concerned is invalid as a restraint on alienation. The particular covenant in the case before me is not limited either in time or to the life of the immediate grantee (see Sweet, Restraints on Alienation, 33 L.Q.R. 236, 342, particularly at p. 354), which would seem to be characteristic of the partial restraints which were enforced in the decided cases that I have been able to find.

The principle of freedom of alienation has been too long and two well established in the jurisprudence of English and Canadian courts to warrant me at this late stage in recognizing a limitation upon it of a character not hitherto the subject of any reported case, especially in view of my conclusions as to public policy.

[31] Counsel for the applicant contended before me that the restrictive covenant here in question is void for uncertainty. So far as the words “persons of objectionable nationality” are concerned, the contention admits of no contradiction. The conveyancer who used these words surely must have realized, if he had given the matter any thought, that no court could conceivably find legal meaning in such vagueness. So far as the first branch of the covenant is concerned, that prohibiting the sale of the land to “Jews”, I am bound by the recent decision of the House of Lords in *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16, to hold that the covenant is in this respect also void for uncertainty; and I may add, that I would so hold even if the matter were *res integra*. The law lords in *Clayton v. Ramsden* were unanimous in holding that the phrase “of Jewish parentage” was uncertain, and Lord Romer was of the same opinion with regard to the phrase “of the Jewish faith”. I do not see that the bare term “Jews” admits of any more certainty.

[32] I should like, in conclusion, to refer to the judgment of Chevrier J. in *Re McDougall and Waddell*, *supra*. The learned judge there decided that the registration of a deed containing a covenant restricting the sale or user of land to “Gentiles (non-semetic [*sic*]) of European or British or Irish or Scottish racial origin” did not constitute an infringement of The Racial Discrimination Act. He came to this conclusion by holding that registration of a deed was not among the proscribed means of publishing or displaying enumerated in s. 1 of the Act. Counsel for the applicant herein contended that these proscribed means related only to the terms of clause (b) of s. 1, and that they did not qualify clause (a) of s. 1, which reads as follows:

No person shall, — (a) publish or display or cause to be published or displayed . . . any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

[33] Mr. Cartwright further submitted that if this section had been read by the learned judge without this limitation, registration in the Registry Office constituted publication of a notice or other representation as aforesaid, and that following 29 Halsbury, 2nd ed. 1938, p. 444, “registration constitutes actual notice to all the world”, therefore he should have found that the particular clause was in breach of the said Act.

[34] I do not deem it necessary for the purpose of this case to deal with this argument, except to say that it appears to me to have considerable merit. My opinion as to the public policy applicable to this case in no way depends on the terms of The Racial Discrimination Act, save to the extent that such Act

constitutes a legislative recognition of the policy which I have applied; in fact my brother Chevrier, as I read his judgment in *Re McDougall and Waddell*, is in accord with me in this respect.

[35] An order will therefore go declaring that the restrictive covenant attacked by the applicant is void and of no effect.

Order accordingly.