

## ***Blackburn v McCallum*, [1903] 33 SCR 65**

Davies J. —

[1] The question raised for our decision in this case is whether a general prohibition on alienation attached to a devise in fee of lands which prohibition would, if unlimited, be bad by the rules of Common Law, is made good by being limited as to time. I am of opinion that it is not. The will of Donald Chisholm after devising his farm of 100 acres to his two sons William and Hugh in fee and equally dividing it between them, contained the following provision:

I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease, and farther, I will that the said parcels of land shall remain free from all incumbrance, and that no debts contracted by my sons, William Chisholm and Hugh Chisholm, shall by any means incumber the same during twenty-five years from the date of my decease.

[2] With the exception of the limitation as to time the restraint upon alienation by the devisees is general. The question is one of real property law, and it is a pure question of authority. The general rule avoiding conditions which prohibited a grantee in fee from alienating his land is to be found clearly laid down in all the earlier books of authority, and is founded upon principles about which there can be no doubt and which are easily intelligible. But there can be equally little doubt that upon this general rule there have been grafted several exceptions. The cases of *Gill v. Pearson*, in which the judgment of the full Court of King's Bench was delivered by Lord Ellenborough, and the later case of *In re Macleay*, decided by Jessell M.R., establish the existence of exceptions to the general rule which it is not necessary for us to call in question. These two cases determine that a restriction upon alienation prohibiting it to a particular class of individuals is good. All the leading text writers upon real property law cite these cases with approval and in my opinion it is too late in the day now for us to call them in question. The whole subject is reviewed exhaustively by Pearson J. in the case of *In re Rosher*. The same question that is now before us was there before him and he held that the proviso in the will he was construing amounted to an absolute restraint upon alienation during the life of the testator's widow and that it was void in law. The learned judge, while admitting that authority could be found in the notes to Shepherd's Touchstone, 7th ed., p. 130, for the proposition that a "grantee might also be restrained from alienation for a particular time being a reasonable one," went on to declare, p. 821:

But there has been no judicial decision to that effect; and it is a curious thing that although Littleton's book is more than 400 years old and although Lord Coke died 250 years ago there is not a single judicial decision to be found in the books shewing that a limitation as to time added to such a condition makes it a valid condition.

[3] He further stated that even without judicial decision, if he found that this

had been an “accepted dictum of law,” and that by not following it he should be disturbing anything done in former times over and over again on the faith of the dictum, he should feel himself bound by it, and that it would be exceedingly mischievous to attempt to alter any rule which had been adopted and acquiesced in for more than a century. But he does not find that any such rule existed with respect to the validity of a general restraint upon alienation being validated by a limitation of the time within which it is to be exercised, and he concludes as follows:

I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule. So far as I can find that an exception to the rule has been laid down and judiciously decided, I am bound by that exception. But I will not add other exceptions for which I can find no authority and the addition of which to my mind will only introduce uncertainty and confusion into the law which we have to administer.

[4] If an exception to a general rule of law is well established by the cases I am not bound to inquire into the logical sufficiency of the reasons given. And so I do not feel it necessary to discuss the cases of *Gill v. Pearson*, or *In re Macleay*, or to justify the reasons which underlaid these decisions. In allowing this appeal we are, it is true, following the decision of *Re Rosher*, but we are not over-ruling either of the other cases above referred to in which limited restraints upon alienation were allowed. The decision we have reached while not being contrary to any judicial decision in England follows that of Pearson J. in *Re Rosher*, and is in line with the late cases of *Re Parry v. Daggs*; *Corbett v. Corbett*; and also with *Renaud v. Tourangeau*; and the Irish case of *Martin v. Martin*.

[5] We have of course been pressed by the case of *Earls v. McAlpine* decided by the Court of Appeal for Ontario in 1881. The restriction upon alienation in that case was no doubt one limited as to time and on the point we have now before us. But the case of *Re Rosher* had not then been decided, and the authorities cited by Mr. Justice Patterson, namely, *Daniel v. Abby*; *Doe v. Pearson*; and *In Re Macleay*; while they support the contention that a restriction upon alienation limited to a specified class only may be good, do not support the proposition we are asked to indorse that a general restriction upon alienation which, if unrestricted as to time would be admittedly bad, is made good by a time limitation. It seems to me that a time limitation is necessary in any case where restrictions upon alienations are attempted to be imposed upon a fee simple devise, even with respect to a class of persons; otherwise the devise might be bad as contravening the rule against perpetuities. But I cannot concur in the proposal that we should enlarge the exceptions to the general rule against restrictions upon alienations by the addition of one not at any rate judicially adopted in England and which would give validity to a restriction otherwise bad simply by limiting the time during which it should last. I cannot find any rule for determining how long this time might be beyond that suggested by Mr. Preston

in his note to Shepherd's Touchstone, p. 130, that "it must not trench on the law against perpetuities." But while that suggestion with respect to a time limitation may be good and necessary when applied to restrictions limited to a class of persons, and which might otherwise be bad for remoteness, I cannot, either on reason or authority, find that its application to a general restriction bad in itself operates to make that restriction good.

[6] The appeal should be allowed with costs and it should be declared that Hugh Chisholm took a fee simple absolute by his father's will in the lands devised to him and was able to convey the same in fee notwithstanding the restriction in the will. And also that the fee simple in the lands was subject to sale under execution as against Hugh Chisholm for his debts.

**Mills J.** —

[...]

[7] The restraints upon alienation, which were the logical outcome of the feudal system, were gradually relaxed. There was the law of Henry I which enabled a man to dispose of the land which he himself had purchased, for over them the law recognised in him a more extensive power than over those which had come to him by descent from his ancestors. He was not, however, to dispose of the whole of what he had acquired, if by doing so he disinherited his children. He might sell one-fourth of what he had inherited, with the consent of the heir. These restrictions were removed by the statute of *Quia Emptores*, which conferred upon all tenants, whether tenants in chivalry or in sergeanty, the liberty to alien their lands except in the case of the King's tenants in capite, subject to the condition that the purchaser of the fee should hold of the chief lord, and not of the grantor. Pearson J., in referring to the restraint upon alienation mentioned by Littleton, says:

I confess that I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases includes a liberty to alien to J.S. if he chooses to do so.

[8] I think when we trace the history of real property law, that it is not difficult to understand how the limited restraint mentioned by Littleton came into existence. It must not be forgotten that under the feudal system the right of alienation was restrained. That system established certain relations between the lord and his tenant. It was based upon an implied contract upon which the structure of society, as it then existed, rested, and it could not be departed from without the common consent of those concerned. The relaxations in the system are indicative of the changes which society itself was undergoing, and these relaxations did not proceed equally in the direction of all parties concerned. The law, as we would be inclined to make it so as to give to it logical consistency, did not at any time exist.

[9] It is the scientific and systematised view that we get from looking back historically over the field after a good deal of progress has been made. It is reasonable to say that where an estate is bestowed, of which the power of alienation is an incident, that one conveying such an estate to another shall not have the power to alter its character, and to make it something wholly different from what it has been made by the law. To do so is to assume the power to make an estate unknown to the law. It is an attempt not simply to convey away an estate, but to exercise a legislative power, and to create a new form of property in land.

[...]

[10] In my opinion this appeal should be allowed, and it should be declared that Hugh Chisholm took an estate in fee simple, relieved from the restrictions imposed by his father's will upon the sale of the estate, and against incumbering it with any debts which he may contract.

Appeal allowed without costs.