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An Inquiry into the Law on Racial and Religious Restraints on Alienation

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I

"A Statute of our Lord the King, concerning the Selling and Buying of Land"—such is the accepted translation of the title in the margin of the roll of that celebrated enactment of 1289 with its resounding preamble "Quia Emptores Terrarum".¹ It is from this statute that we have learned to date the original freedom of alienation of land inter vivos, never formerly the birthright of the Anglo-Saxon.

Early legal history reveals that the ability to alienate land was dependent upon the consent of the heirs of the landholder and in some cases upon the approval of his mesne lord. The common law had come to reject the objections of the heirs by the middle of the thirteenth century. "The donee", records Bracton, "acquires the thing given by reason of the gift, and his heirs after him by reason of possession, and the heir acquires nothing by the gift made to his ancestor, because he is not enfeoffed with the donee."² The common law then busied itself with fine distinctions between words of limitation and words of purchase, but once a fee simple was vested in the landholder, objections by the heirs to subsequent alienation proved ineffective.

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¹ 18 Ed. 1 (1289-90), The Statute of Westminster the Third.

² De Legibus, liber secundus, c. vi.

There remained immediately before the statute merely the need to obtain the approval of the mesne lord to an out-and-out conveyance of a portion of the lands held by the tenant. This approval had been required on the assumption that the mesne lord must be asked to permit the division of the feudal services, for it was he who would have suffered the resulting inconvenience. But, the necessity of abolishing subinfeudation involved the incidental expression of the wider principle set out in the statute that it "be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them".

Thus it was that the Parliament of Edward I ensured freedom of alienation almost by accident. The common law was quick to champion its cause but in modern times confusion has arisen as a result of the clash between freedom of alienation, supported as it is by freedom of race and of religion, and the other freedoms of contract and of association. The resulting difficulties received considerable publicity because of the circumstances surrounding *Noble v. Wolf*.³ Although in that case both at trial and in the Court of Appeal for Ontario the racial restraint on alienation there considered was unanimously upheld, it was nevertheless finally declared invalid on certain technical grounds by the Supreme Court of Canada. In view of the current conjecture about the limits of the decision of the Supreme Court and of the difficulties surrounding the interpretation of recent provincial legislation, an inquiry into the innocent manner in which our troubles started would not seem inappropriate.

II

Littleton expressed the fundamental distinction between the total restraint on alienation, which is bad, and the partial restraint, which is upheld. We are informed that,

... if a feoffment be made upon this condition that the feoffee shall not alienate the land to any, this condition is void. . . . for if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason.⁴

Coke in his commentary notes that the distinction is applicable to wills,⁵ and accordingly in 1617, in *Muschamp v. Bluet*,⁶ a con-

³ [1948] O.R. 579, 4 D.L.R. 123; [1949] O.R. 503, 4 D.L.R. 375; *sub. nom.*, *Noble and Wolf v. Alley*, [1951] S.C.R. 64, 1 D.L.R. 321. The implications of the decision, and of *Re Drummond Wren*, *infra*, for international law were considered by C. B. Bourne in a comment (1951), 29 Can. Bar Rev. 969.

⁴ Lit. s. 360.

⁵ Co. Lit. 223 (a): "... the like law is of a devisee in fee upon condition that the devisee shall not alien, is void".

⁶ (1617), J. Bridg. 132, 123 E.R. 1253.

dition that the devisee should not sell other than to the son of the testator failed on the ground that "to restrain generally and that he shall alien to none but one" amounted to the same thing, for the devisee, in either circumstance, is substantially deprived of his right of alienation.⁷

Reverting to the text of Littleton, we find the all-important qualification:

But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good.⁸

Coke applauded the reasoning but some four hundred years after its enunciation Mr. Justice Pearson was less enthusiastic, regretting that the question of policy had been allowed to intervene and displace all considerations of repugnancy.⁹ Many another jurist has shared his regret, but the second thoughts of Littleton have nevertheless remained over-riding. Freedom of alienation thus to some extent yielded ground before freedom of contract and the partial restraint has proved itself effective throughout the centuries.

Indeed since 1875 the doctrine of the partial restraint has been in little danger of wilting before the glare of its critics, for it has had for its stimulant the warm encouragement of Sir George Jessel. It was in that year that the Master of the Rolls was confronted in *Re Macleay*¹⁰ with a devise of land to the brother of the testatrix upon condition that the brother should not sell out of the family. The will itself indicated that there were a great many members of the family and the class of potential purchasers was sufficiently large to take the case outside the narrow scope of *Muschamp v. Bluet*. Sir George Jessel accordingly held that the condition was valid and, in reaching his conclusions, declared:

Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals; or you may restrict alienation by restricting it to a particular time.

In England the decision has survived considerable criticism, supported as it is by earlier cases,¹¹ where restraints even more

⁷ The Ontario Court of Appeal reached the same conclusion on similar facts in *Hutt v. Hutt* (1911), 24 O.L.R. 574.

⁸ Lit. s. 361.

⁹ *Re Rosher* (1884), 26 Ch.D. 801, at p. 813.

¹⁰ (1875), L.R. 20 Eq. 186.

¹¹ *Daniel v. Ubley* (1626), Sir W. Jones 137, 82 E.R. 73; *Doe d. Gill v. Pearson* (1805), 6 East 173, 102 E.R. 1253.

limited in character have been upheld. In 1902 the Supreme Court of Canada, although declining to adopt many of the principles expressed by Sir George Jessel, nevertheless did not doubt the validity of such a restriction, and Mr. Justice Davies acknowledged that it was already too late to call in question the merits of the decision itself.¹² *Re Macleay* has been consistently followed in Ontario with but little hesitation.¹³

The dictum of Sir George Jessel has been less successful. Doubtless where alienation is limited to a specified group of people, the restraint is the more likely to be enforced by the court if further qualified both as to manner and time, but nevertheless a prohibition against alienation aimed merely at a particular class of alienation, for example a condition not to mortgage,¹⁴ or one limited only as to time,¹⁵ will not by itself be deemed effective. The restraint is usually phrased so as to be personal to the devisee or the purchaser, as the case may be, and the relevance of the rule against perpetuities has yet to receive detailed judicial consideration. It was suggested in *Re Macleay* that a condition purporting to stretch out into eternity would be void for remoteness and that view, although not yet adequately confirmed,¹⁶ justifies extreme delicacy in draftsmanship.

The present significance of *Re Macleay* lies, however, not so much in the controversial propositions outlined in the judgment as in the conclusion that land subject to a restraint preventing the devisee from selling outside the family group is still available to a large enough class of potential purchasers as to be subject to but a partial restraint on alienation. The situation does not lack irony, for the first Jew to hold judicial office in England thus provided the basis for the subsequent contention that, if such a condition conforms to the principles of common law, then a restraint forbidding alienation outside the racial or religious group approved by the testator or vendor must also necessarily be valid.

The contention draws its strength from the resemblance between the family and the racial or religious group, and lays its emphasis, as did Sir George Jessel, upon the size of the class of potential purchasers. Indeed a racial or religious group, whether

¹² *Blackburn v. McCallum* (1903), 33 S.C.R. 65, at p. 79.

¹³ In particular, *O'Sullivan v. Phelan* (1889), 17 O.R. 730; *Re Martin and Dagneau* (1906), 11 O.L.R. 349; *Noble v. Wolf*, [1949] O.R. 503.

¹⁴ *Ware v. Cann* (1830), 10 B. & Cr. 433, 109 E.R. 511; *Hood v. Oglander* (1865), 34 Beav. 513, 55 E.R. 733.

¹⁵ *Blackburn v. McCallum*, *supra*.

¹⁶ *Re Hollis' Hospital*, [1899] 2 Ch. 540; *Re Da Costa*, [1912] 1 Ch. 337. *Contra: A.-G. v. Cummins*, [1906] 1 Ir. R. 406.

it be San Marinese or Doukhobor, is assuredly of larger dimensions than, even, a Victorian family. Immediately the question arises, however, whether or not number should be the only consideration; and reference is made to the principles that have given rise to the conception of public policy.

It has been indicated that the partial restraint is in essence contractual: that is to say, that although it may arise not only between vendor and purchaser but also between testator and devisee, nevertheless in either event he who takes the lands consents expressly or impliedly to be bound by the stipulation so far as it should prove enforceable. Significantly, it was in the nineteenth century that the partial restraint in favour of the family was so firmly established, and the triumph of contract over freedom of alienation thus substantially reaffirmed. Of that period it has been remarked that "there was no God but contract and Sir Henry Maine was its prophet".¹⁷ Sir George Jessel was more specific:

If there is one thing which more than another public policy requires it is that men of full age and competent understanding should have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.¹⁸

The seas of private enterprise were then running fast and the breakwaters were all too few. In another connection Lord Justice Denning has illustrated some of the resulting damage¹⁹ and the historians, writing of earlier times, after describing as anarchical the idea that all rights and duties can be fixed by mere agreement, conclude that "If there is to be any law at all, contract must be taught to know its place".²⁰

When the partial restraint was adapted in recent years to racial and religious discrimination there was therefore ample justification for the belief that the respective relationship of the separate freedoms should be reconsidered, for it was alleged that the power of contract was being harnessed to intolerance and was making a disagreeable reality of what had previously been merely a legally unenforceable attitude of mind.

We are accordingly led to consider that unhappy series of cases culminating in *Noble v. Wolf*, if indeed that be the ultimate

¹⁷ Seagle, *Quest for Law* (1941) p. 266.

¹⁸ *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at p. 465.

¹⁹ *Freedom under the Law* (The Hamlyn Lectures 1949) Lecture 3.

²⁰ Pollock and Maitland, *History of English Law* (2nd ed.), Vol. II, p. 233.

culmination, for the line might yet stretch out to the crack of doom.

An unreported case in 1911 provided a quiet introduction into British Columbia of the difficulties that were already making themselves felt in the United States.²¹ Upon a reference from the Registrar of the Victoria Land Registration District, Chief Justice Hunter, without expressing any reasons, declared that a stipulation in the guise of a restrictive covenant purporting to run with the land was inoperative and should not be entered upon the register.²² Similarly, in Ontario the early decisions caused little commotion. In neither *Essex Real Estate Co. v. Holmes*²³ nor *Re Bryers and Morris*²⁴ was the validity of such a restriction considered; in the former case the purchaser was found to be within the permitted class, in the latter, insufficient evidence was available to enable the court to pronounce upon the force of the restriction. In *Re McDougall and Waddell*²⁵ Mr. Justice Chevrier concluded that the Racial Discrimination Act²⁶ would not be violated by a condition restricting sale to persons of certain racial origins, but the issue there raised was undoubtedly a narrow one. The public, however, had shown such little readiness for discrimination that as late as 1945 the Master of Titles at Toronto was able to testify that he had not knowingly permitted anyone to register deeds containing restrictions of this kind and that, although he had on several occasions refused to accept for registration documents containing such provisions, in no case had an appeal been taken.

There was therefore little Canadian authority to assist Mr. Justice Mackay in pronouncing upon the racial and religious stipulations revealed in *Re Drummond Wren*.²⁷ The clause there under consideration provided that the land should not be sold to "Jews or persons of objectionable nationality". It failed on several grounds²⁸ — the decision attracting considerable attention because of the emphasis laid upon public policy.

²¹ The earliest reported decision in the United States appears to be *Gandolfo v. Hartman* (1892), 49 Fed. 181.

²² For a copy of the ruling and a discussion of that case see an article by H. S. Robinson, the Registrar of Titles at Vancouver, published in *The Advocate* (1950), p. 250.

²³ (1930), 37 O.W.N. 392.

²⁴ (1931), 40 O.W.N. 572.

²⁵ [1945] O.W.N. 272, 2 D.L.R. 244.

²⁶ Now R.S.O., 1950, c. 328.

²⁷ [1945] O.R. 778, 4 D.L.R. 674.

²⁸ In addition to being declared invalid as contrary to public policy, it was held ineffective as a restraint on alienation. Although the doctrine of *Re Macleay* was not challenged, the restriction was regarded as excessively severe, not being limited either to a specified number of years or to the life of the grantee. It was also held void for uncertainty.

The clause itself was full of scorpions and Mr. Justice Mackay did not limit himself to the conventional authorities. In this respect the judgment is based upon the fundamental assumption that public policy must fluctuate with the circumstances of the time. In order to determine the current principles, generous reference was made to the separate texts of the Charter of the United Nations, the Atlantic Charter, the speeches of President Roosevelt, of Mr. Winston Churchill and of General De Gaulle, as well as to certain Dominion and provincial statutes that gave some limited recognition to anti-discrimination.

Certain phrases in the judgment are not soon to be forgotten:

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. . . .

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 wide use of the doctrine of public policy as an active agent in the promotion of the public weal.

. . . 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.

Mr. Justice Cardozo would have said little more and Lord Mansfield himself could have said no less.

The contrary view was put forward three years later.²⁹ Mr. Justice Mackay had been concerned with a residential subdivision in Toronto. The subsequent case of *Noble v. Wolf* arose in connection with a summer colony on the shores of Lake Huron, and one is tempted to draw a careful distinction between the relevant circumstances. Nevertheless, although this distinction was noted in the subsequent decision, the opportunity was taken to reconsider the fundamental basis of public policy and, although *Re Drummond Wren* nominally survived, it can hardly be doubted that the views expressed in *Noble v. Wolf* were of sufficient breadth as to affect suburban and business premises as well as summer properties.

²⁹ Meanwhile *Re Drummond Wren* had been followed by Mr. Justice Barlow in an unreported judgment delivered on June 12th, 1946.

In the High Court³⁰ Mr. Justice Schroeder rejected the approach of Mr. Justice Mackay. He concluded, as did Lord Atkin in *Fender v. St. John-Mildmay*,³¹ that the doctrine of public policy should be invoked only in clear cases where the harm to the community is substantially incontestable, and that in other matters the contract should be given the benefit of the doubt.

The Court of Appeal for Ontario³² affirmed the judgment of Mr. Justice Schroeder. After a detailed consideration of the validity of a partial restraint on alienation, Chief Justice Robertson referred to the nature of a summer colony, suggesting that it is of the essence of a holiday that persons present should be congenial one with another. The judgment concludes in more general terms:

Doubtless mutual goodwill and esteem among the people of the numerous races that inhabit Canada is greatly to be desired, and the same goodwill and esteem should extend abroad, but what is so desirable is not a mere show of goodwill or a pretended esteem, such as might be assumed to comply with a law made to enforce it. To be worth anything, either at home or abroad, there is required the goodwill and esteem of a free people, who genuinely feel, and sincerely act upon, the sentiments they express. A wise appreciation of the impotence of laws in the development of such genuine sentiments, rather than mere formal observances, no doubt restrains our legislators from enacting, and should restrain our Courts from propounding, rules of law to enforce what can only be of natural growth, if it is to be of any value to anyone.

There is the contrast with *Re Drummond Wren*, and we are fortunate to have the two viewpoints set out so succinctly. There is no disrespect in loosely describing the one opinion as radical and the other as conservative, for here there is no clash of ideals: the difference that exists is over the assessment of realities.

It is to be noted, however, that even when the Ontario Court of Appeal was considering *Noble v. Wolf*, it was clear that, whether or not sincere goodwill may have been thereby occasioned, both the courts and the legislature had already propounded limited rules that did in fact forbid certain aspects of discrimination. It is well known that the innkeeper has long been under an obligation at common law to receive all travellers regardless of race or colour, if they be of good behaviour,³³ and, even apart from the Racial Discrimination Act, the Ontario legislature had intervened

³⁰ [1948] O.R. 579, 4 D.L.R. 123.

³¹ [1938] A.C. 1, at p. 10.

³² [1949] O.R. 503, 4 D.L.R. 375.

³³ A modern illustration is to be found in *Constantine v. Imperial Hotels, Ltd.*, [1944] K.B. 693, where an action lay for breach of the obligation even in the absence of proof of special damage.

³⁴ Now R.S.O., 1950, c. 183, s. 101.

to prevent discrimination in matters of insurance³⁴ and labour relations.³⁵ In these connections the law for the purpose of expediency had developed its principles, concern being shown not for the value of any pretended esteem but to avoid the dangers discrimination would bring.

The present problem, being contractual, is also of a limited nature and many of the analogies that are drawn on both sides are frequently inapplicable. Too much, for example, can be deduced from the emphasis placed by Lord Justice Denning upon the tolerance implicit in the common-law system:

It is perhaps easier for us to proclaim racial freedom than it is for other countries such as the United States and South Africa who are faced with a problem with which we have never had to deal. Nevertheless, concerned here as I am with the common law, it is clear beyond peradventure that the common law of England has always regarded a man's race or colour as just as irrelevant in ascertaining his rights and duties as the colour of his hair.³⁶

Without detracting from the justifiable pride we may take in such a heritage, let us appreciate that our own problem has a narrower context. If the colour of a man's hair were a condition of a contract, the matter then may become relevant in determining rights and duties, for equally erratic stipulations have withstood the scrutiny of law.

Neither is there any cause for discussion of ghettos, for those are areas involving compulsory seclusion, nor it seems of Indian reservations, for, if not granted by treaty, they are otherwise bestowed by a government anxious to prevent the extinction of a native culture in its native land. The biblical injunction to love thy neighbour is not offended by a Cambridge University Club excluding graduates from Oxford, but the analogies are not truly applicable, for the injunction loses its beauty if legally enforceable and the club principle in such circumstances has no undesirable effect.

There is difficulty in the suggestion that one view of public policy should be applied to summer cottages and another to suburban residences. The desire to live among congenial neighbours is not dependent upon the season. Many cities have their own unofficially exclusive areas, thus indicating that fastidiousness accompanies the individual whether he be at home or on holiday. Perhaps a distinction could be drawn between residential and business areas, but the resulting complexities would be not inconsiderable. The suggestion of zoning is in itself objection-

³⁵ Now R.S.O., 1950, c. 194, s. 34 (b).

³⁶ Freedom under the Law, *supra*, Lecture 2.

able and there is much to be preferred in the view of Mr. Justice Mackay that if the sale of one piece of land can be prohibited, so can the sale of another.

The basic difficulty arises not from the situation of the land affected but from the intangible nature of matters of morality. Discrimination, like sin, is too wide a conception for the law to fasten upon effectively; of the many aspects that are deplorable only a few can be illegal. And it is readily conceded that one cannot legislate tolerance, but, with respect, surely there is nothing worthless in legislating against certain intolerant practices. Doubtless in morality the real merit does lie in natural goodwill and esteem, and that is enjoyed today by the greater part of society. But if we had in the past restrained our lawmakers until education and example had ensured that good will be universal, there would indeed have been precious little law today. The courts did not wait for education to convince the gamblers of the moral impropriety of gambling, but meanwhile held the wagering contract unenforceable. There would seem no reason why the courts should wait for the intolerant to become tolerant before holding the discrimination covenant to be also unenforceable.³⁷

A strong plea is here made for such an interpretation of public policy. When the irrelevancies have been set aside we are still faced with the bitterness that stipulations of this sort inevitably occasion. Such dissension Canada, of all countries, can scarce afford. Frequently this land is described as blessed with many cultures, and the perversion of so great a potential looks none the better for its contractual origin. The plea put forward is not that discrimination in like matters should be punished, although that is in fact the law of Saskatchewan,³⁸ but merely that a contract enforcing discrimination should not be upheld.

III

The decisions of the courts of the United States on racial and religious restrictions affecting land may be studied to advantage.³⁹

³⁷ Compare the viewpoint expressed in the United Kingdom by Sir Hartley Shawcross, November 21st, 1949, who as Attorney-General declined to introduce legislation with regard to such covenants, remarking that they might well be void anyway as offensive to public policy: Hansard, Parliamentary Debates, House of Commons, 5th Series, Vol. 470, col. 2.

³⁸ The Bill of Rights Act, 1947 (Sask.), c. 35.

³⁹ For a comprehensive review of the abundant material available see especially: C. T. Foster, annotation (1949), 3 A.L.R. 2nd 466; W. R. Ming, Racial Restrictions and the Fourteenth Amendment (1949), 16 U. of Chi. L. Rev. 203; H. E. Groves, Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases (1950), 45 Ill. L. Rev. 614.

There, courts have been beset by many difficulties, for the stipulations have appeared in various guises. They have arisen not merely as restraints on alienation but in the separate garbs of the restrictive covenant, the determinable fee and the condition subsequent.

Until four years ago the trend in most jurisdictions in the United States was to consider only the garb in which the draftsman had dressed the stipulation and, if it accorded with the relevant technical requirements, then, whatever its appearance, the stipulation was in fact upheld.⁴⁰ Except in Pennsylvania,⁴¹ the defence of public policy consistently failed, and the reasoning in *Burkhardt v. Lofton*⁴² may perhaps be taken as typifying the opinion of the period:

No doubt public policy changes and develops with the times, but these changes must have their sources in the citizenry and not in the decisions of the courts or the pronouncements of publicists and politicians. The right to contract with reference to their own property is one that is preserved to all citizens, and, except where restricted by law, is a right which the peoples of all races may exercise freely. . . .

The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or of personal belief that the consequences would be for the general good.

The racial or religious stipulation survived the neighbourly tolerance of wartime and was indifferent to the subsequent enthusiasm for the United Nations with its acknowledgment of human dignity and worth. In contrast with *Re Drummond Wren*, a New York court, for example, took the view that the wording of the United Nations Charter could have no bearing upon domestic affairs.⁴³

The trend of decisions giving legal effect to these stipulations was, however, interrupted abruptly in 1948. In that year the Supreme Court of the United States considered two groups of cases and rejected requests for judicial enforcement of racial and religious restrictions affecting land. The first group comprised the companion cases of *Shelley v. Kraemer* and *McGhee v. Sipes*,⁴⁴ on

⁴⁰ Not so, however, in California and Michigan, where the stipulation was held invalid as a restraint on alienation, but enforceable if its appearance was that of a restrictive covenant: *Los Angeles Investment Co. v. Gary* (1920), 181 Cal. 680, 186 P. 596; *Burkhardt v. Lofton*, (1944), 63 Cal. App. 2d 230, 146 P. 2d 720; *Schulte v. Starks* (1927), 238 Mich. 102, 213 N.W. 102; *Parmalee v. Morris* (1922), 218 Mich. 625, 188 N.W. 330, 38 A.L.R. 1180.

⁴¹ *Yoshida v. Gelbert Improvement Co.* (1946), 58 Pa. D. & C. 321.

⁴² *Supra*.

⁴³ *Kemp v. Rubin* (1947), 69 N.Y.S. 2d 680, reversed on other grounds (1948), 298 N.Y. 590, 81 N.E. 2d 325. And see *Sipes v. McGhee* (1947), 316 Mich. 614, 25 N.W. 2d 638, also reversed on other grounds, *infra*.

⁴⁴ Both cases are reported together: (1948), 334 U.S. 1, 68 S. Ct. 836, 3 A.L.R. 2d 441.

appeal from the states of Missouri and Michigan, respectively. The relief requested in both cases was the enforcement, by means of the injunction, of agreements among property owners imposing restrictions against occupancy of certain lands by any persons not of Caucasian race. The only issue before the court was a constitutional one. It was held that enforcement by state courts of the restrictive agreements denied the equal protection of the laws which, in consequence of the Civil War, the Fourteenth Amendment⁴⁵ had endeavoured to ensure.

The second group of cases before the Supreme Court consisted of *Hurd v. Hodge* and *Urciolo v. Hodge*,⁴⁶ both on appeal from the District of Columbia. The Fourteenth Amendment was inapplicable, for by its phraseology it was limited to state jurisdiction. The agreements there considered provided that certain lots should never be leased or sold to any Negro or coloured person, and the lower court had set aside deeds of conveyance made in breach of the restrictions. The Supreme Court did not invoke public policy in order to declare the restrictions offensive, but used it in a different connection to ensure uniformity. Advocates of the doctrine had to rest content with the incidental declaration of Chief Justice Vinson that:

It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such action has been held to be violative of the guaranty of the equal protection of the laws.

Although the judgments of the lower court were reversed, the fundamental ground on which the Supreme Court rested its decision was not so much the desire for uniformity as the interpretation of the relevant local statute.

It was hoped that so authoritative a declaration that enforcement by the state courts was unconstitutional, or by the courts of the District of Columbia was invalid, had at last brought to a close a drawn out and unattractive chapter. But the basis for these decisions of the Supreme Court of the United States was not a wide one and a technical solution not infrequently invites technical distinctions.

The Constitution had proved most fortunately to be colour-

⁴⁵ The first section of the Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Ratification of the Amendment was certified on July 20th, 1868.

⁴⁶ Both cases are reported together: (1948), 334 U.S. 24, 68 S. Ct. 847.

blind, but the Constitution referred only to enforcement. In *Shelley v. Kraemer* the Supreme Court had been careful to hold that the discrimination covenant was not, if taken by itself, in violation of any rights guaranteed to the petitioner: it was the intervention by the state that offended the Amendment. The emphasis on enforcement became significant when viewed in the light of *Hurd v. Hodge*, for there the Supreme Court had referred to "general equitable powers" being denied to the state courts.

The limitation could scarcely have been intended. Indeed on a broad reading of the two judgments it does not appear to exist. Nevertheless, the highest court in Missouri subsequently interpreted *Shelley v. Kraemer* and *Hurd v. Hodge* as applicable only to specific enforcement.⁴⁷ The equitable remedies — specific performance, the injunction, the cancellation or rectification of a written instrument — these alone were said to have been declared unconstitutional. In the Missouri case, *Weiss v. Leacon*,⁴⁸ the defendant was not the Negro purchaser who had bought property in Kansas City already subject to racial restrictions, but the vendor who had sold in breach of his agreement. Decisions in the United States before 1948 had said that the agreement was not contrary to public policy. The Fourteenth Amendment was held inapplicable, for enforcement of the agreement was not requested, but merely compensation for its breach. The court in the *Weiss* case explained:

The fact that another remedy, specific performance, is ruled out because of constitutional reasons, does not necessarily affect the remedy by way of damages. . . .

In the result, the racial restraint once again proved itself effective and the way thereby opened for other courts to by-pass the Fourteenth Amendment.

It is apparent that the constitutional weapon wielded by the Supreme Court of the United States, in preference to public policy, has but scotched the discrimination covenant. It has certainly not killed it.

IV

The situation is no more obscure in the United States than in Canada. The reasons for the prevailing confusion are not dissimilar.

An appeal was taken from the decision of the Court of Appeal for Ontario in *Noble v. Wolf* to the Supreme Court of Canada.⁴⁹

⁴⁷ *Weiss v. Leacon* (1949), 225 S.W. 2d. 127.

⁴⁸ *Supra*.

⁴⁹ *Sub. nom., Noble and Wolf v. Alley*, [1951] S.C.R. 64, 1 D.L.R. 321.

and the issue of public policy was again necessarily argued. Mr. Justice Locke, in his dissenting judgment in the Supreme Court, expressed his agreement with Chief Justice Robertson of the Court of Appeal, but the issue was not otherwise mentioned by the Supreme Court. Whichever view of public policy is taken, it would seem unfortunate that we have not the guidance of the Supreme Court of Canada, for in the absence of authoritative advice from the final court the validity of any particular racial stipulation remains a matter for speculation. The Supreme Court may have felt either that the hands of the judges were tied or, alternatively, that there was no clear call from society to justify the application of the doctrine. In any event the opinion put forward by Chief Justice Robertson will prevail in Ontario, but the situation in other provinces, in the absence of legislation, is inevitably doubtful.

The decision of the Court of Appeal in *Noble v. Wolf* was, nonetheless, reversed by the Supreme Court of Canada. Since the reasons are of a technical nature, a detailed summary of the facts will be of assistance. Mrs. Noble, the purchaser of land in a development known as the Beach O'Pines near Lake Huron, covenanted with her vendor that she and her successors in title would observe certain restrictions and that she would in turn exact a similar covenant from any person to whom she might convey the land. The restriction to which objection was taken was to remain in effect until 1962, and provided that the land should never be sold, leased or in any manner whatever alienated to, and should never be occupied or used by "any person of the Jewish, Hebrew, Semitic or Negro or coloured race of blood". The express intention of the grantor was to restrict the ownership, use, occupation and enjoyment of the development to persons of the white or Caucasian race not excluded by the restriction.

Mrs. Noble agreed to sell the property to Wolf, who, being within the prohibited class, insisted upon applying for an order of the court in which it would be declared that the stipulation was of no effect. The grantor — that is the original covenantee — did not oppose the proceedings. The respondents were presumably purchasers of other lands in the development. If the respondents were to be able to enforce the stipulation, they had to show that it was a restrictive covenant within the meaning of *Tulk v. Moxhay*⁵⁰ and that the benefit of that covenant had been annexed to their own properties, or assigned to them, or accrued under a building scheme.

The respondents failed because they were unable to establish a

⁵⁰ (1848), 2 Phil. 774, 41 E.R. 1143.

restrictive covenant within the true meaning of that term. Such a covenant must relate to the user of land and be in its nature certain. The stipulation was found to lack both characteristics. Mr. Justice Kerwin, speaking for Mr. Justice Taschereau and himself, was not satisfied that the stipulation related to user of land; in essence it restricted not the enjoyment of the land by Mrs. Noble but her power of disposal. Mr. Justice Rand, on behalf also of Mr. Justice Kellock and Mr. Justice Fauteux, was similarly of the opinion that the stipulation was directed not to the land or to some mode of its use but to the transfer by act of the grantee. Even had the stipulation related to enjoyment, it would have failed for uncertainty. It was upon this last point that Mr. Justice Estey placed considerable stress. In noting the vague phraseology of the deed, he remarked:

The general language . . . fails to indicate the intention of the parties as to the amount or degree of the prohibited race or blood that might be permitted. It must, therefore, upon the authorities, be held void for uncertainty.

The decision is to be welcomed for its emphasis upon equitable principles, but the lack of a ruling upon public policy, it is submitted, leads to certain unfortunate results.

If a stipulation should be so phrased as to be definite in its nature, then the reasons of the Supreme Court of Canada indicate that it would accordingly be enforceable by at least the original covenantee. By careful draftsmanship there seems to be no reason why the heir of the covenantee should not similarly be enabled to enforce. The orthodox restraint on alienation should serve that purpose and in the alternative there is always available the determinable fee. Perhaps the restrictive covenant is an unsuitable garb in which to dress a stipulation that in essence limits the power of disposal. Since the mention of occupation and use in the deed signed by Mrs. Noble was insufficient to satisfy the rule in *Tulk v. Moxhay*, it is difficult to suggest alternative wording that would meet the requirements. It may be that the difficulty would be evaded by the deletion of words relating to transfer (which would at any rate be unnecessary where words restrictive of enjoyment were inserted), but in view of the Supreme Court's decision the form of the restrictive covenant is best left well alone.

If the restraint on alienation or the determinable fee should be adopted, the problem of certainty in the religious stipulation should not deter any draftsman worth his salt. If the exclusive do desire to live only among neighbours of their own faith, then the language used should relate to the particular and not to the

general. There is nothing uncertain in a provision limiting the alienation of land to those who have been *formally* admitted into some particular church. Sometimes even a reference to the general will suffice. The courts of both Eire and Northern Ireland have found nothing indefinite in the term "Roman Catholic". The President of the High Court in Eire recently declared:

We say that a man is a Catholic or that he is not; if he is, then in ordinary parlance whether he be a good Catholic, or a bad Catholic, or an indifferent one, a Catholic he remains. On the other hand, if a litigant undertakes to prove that a man who was a Catholic has actually given up the faith, so that he is no longer in ordinary parlance a Catholic, he may or may not succeed in court, because his proof of the fact that he has set out to establish may or may not be adequate, but his success or failure will not be due to any doubt about the accepted meaning of the expression 'Roman Catholic'.⁵¹

An interesting comparison is to be found in *Re Donn*,⁵² where the court considered the validity of a forfeiture clause to take effect if a beneficiary under a will should marry "anyone not of the Jewish faith". The provision was held void for uncertainty, because the testator had supplied in his will no test of adherence or non-adherence to that faith.

A stipulation relating to race may not be indefinite at common law if some particular test, such as nationality or citizenship, is adequately indicated. Mere reference to the blood of the prohibited class, as in *Noble v. Wolf*, is insufficient. In *Clayton v. Ramsden*⁵³ a testator bequeathed a share of residue to his daughter, subject to a condition subsequent that she should not marry anyone who was not of Jewish parentage. The House of Lords held the condition void. Lord Romer's judgment illustrates the difficulty:

what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if only one of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if, in addition, it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator.

The restriction aimed at the colour of the skin is of course equally uncertain.⁵⁴ The Anglo-Saxon varies from the blond to the

⁵¹ *Re McKenna*, [1947] Ir.R. 277, at p. 285. See also *McCausland v. Young*, [1948] N.I. 72.

⁵² [1944] 1 Ch. 8, [1943] 2 All E.R. 564, following *Re Blaiberg*, [1940] Ch. 385, [1940] 1 All E.R. 632. The quality of a Jew is not necessarily measured by faith: see the contrasting views of J. G. Fleming and Roy St. George Stubbs at (1951), 29 Can. Bar Rev. 466-467.

⁵³ [1943] A.C. 320, 1 All E.R. 16.

⁵⁴ A commentary on the difficulty of determining who is coloured is provided by L. C. Green, *Human Rights and the Colour Problem*, in *Current Legal Problems* 1950, at p. 240.

swarthy; and although it may not be possible to wash a blackamoor white, modern cosmetics have provided a poignant reflection on racial discrimination by enabling the negro to be bleached.⁵⁵ These difficulties of uncertainty may disappear, however, if the general words are qualified by a clause providing that the opinion of the covenantee shall determine whether or not the proposed transferee offends the stipulation.⁵⁶

V

In some provinces of Canada the legislatures have purported to invalidate the racial or religious stipulation,⁵⁷ but only in Saskatchewan does the purpose appear to have been achieved effectively. The sweeping language of the Saskatchewan legislature in the Bill of Rights Act⁵⁸ would seem to invalidate the stipulation, however it is phrased. The legislation in Ontario and Manitoba is unfortunately not so easily construed.

After the decision of the Court of Appeal in *Noble v. Wolf*, and before the appeal was heard in the Supreme Court, the Ontario legislature amended the Conveyancing and Law of Property Act. The amendment is now incorporated in section 21 of the present statute⁵⁹ and provides:

Every covenant made after the 24th day of March 1950, which but for this section would be annexed to and run with land and which restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person shall be void and of no effect.

⁵⁵ The feasibility of straightening curly hair is perhaps indicated by the fortune accumulated by the late Madame C. J. Walker of New York, the reputed "Queen of the Dekinkers".

⁵⁶ See in a similar connection *Zelland v. Driver*, [1939] 1 Ch. 1, [1938] 2 All E.R. 158.

⁵⁷ This may have been done even unintentionally. It is interesting to speculate upon the effect of such legislation as the Alien Real Property Act, R.S.O., 1950, c. 15, which was originally enacted to remove the ancient common law disability that prevented aliens from holding real estate. The language used by the legislature in statutes of this kind varies from province to province and in some instances seems sufficiently wide not only to give an alien the same inherent capacity as a Canadian citizen but incidentally to provide him also with an immunity from certain racial restrictions.

⁵⁸ 1947 (Sask.), c. 35, ss. 10 and 15. S. 10 provides:

"Every person and every class of persons shall enjoy the right to acquire by purchase, to own in fee simple or otherwise, to lease, rent and to occupy any lands, messuages, tenements or hereditaments, corporeal or incorporeal, of every nature and description, and every estate or interest therein, whether legal or equitable, without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons."

S. 15 (1) provides: "Every person who deprives, abridges, or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of any right under this Act or who contravenes any provision thereof shall be guilty of an offence. . . ."

⁵⁹ R.S.O., 1950, c. 68.

A similar amendment was passed in Manitoba avoiding like covenants made after April 22nd, 1950.⁶⁰

The choice of words in the Ontario and Manitoba amendments is curious. The sections are expressly limited to covenants and thus have no effect upon any testamentary stipulation; a restraint set out in a will, not being contrary to public policy, will be effective if expressed with certainty. In further emphasizing that the covenant must be one that but for the sections would be annexed to and run with the land, the amendments clearly do not affect the personal covenant. A grantee who enters into such an agreement, which does not purport to bind the land but only to bind himself, does not derive any benefit from the legislation. Nor does there seem to be any objection to the validity of an agreement providing that the grantee will also take a similar personal covenant from his successor in title. The language used by the legislature in these amendments is the language usually used to describe restrictive covenants. It may be wondered whether it does anything to prejudice a restraint on alienation or a determinable fee, even though such devices may be found in a deed.

VI

Nobler minds may argue the ethics of the cause. The prime purpose here is to point out that the effect of the Supreme Court of Canada's decision in *Noble v. Wolf* is not to outlaw the racial or religious stipulation. In provinces where there is no remedial legislation the stipulation may well remain effective, and even in Ontario and Manitoba a modified version may still be employed. One of the incidental results of the Supreme Court's decision is to confirm the insufficiency of the relevant statutory provisions in Ontario and Manitoba. Unless or until the racial or religious stipulation is considered offensive to public policy, the ingenuity of draftsmen outside Saskatchewan may enable it to prevail.

The crow has made wing to the rooky wood and the situation gives cause for considerable concern.

⁶⁰ 1950 (Man.), c. 33, An act to amend the Law of Property Act.