CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF THE ESTATE OF CHARLES MILLAR, DECEASED

1937
* Nov. 4.
* Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Validity—Public policy—Gift at expiration of ten years from testator's death "to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act [Ont.]"—"Children"—Not inclusive of illegitimate children—Gift not void as against public policy.

A clause in a will gave the residue of the testator's property to his executors in trust to convert, etc., and "at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act [Ont.]. If one or more mothers have equal highest number of registrations under the said Act to divide the said moneys and accumulations equally between them."

Held: (1) The word "children" in said clause did not include illegitimate children.

(2) The clause was not void as against public policy.

Judgment of the Court of Appeal for Ontario, [1937] O.R. 382, affirming judgment of Middleton J.A., [1936] O.R. 554, affirmed.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: Discussion as to the jurisdiction of the courts (in dealing with an attack against a contract or disposition of property as invalid as against public policy) to proceed (there being no contravention of statute law) under some new head of public policy—some principle of public policy not already recognized by judicial decision, in the sense explained in certain cases cited and discussed, particularly in the judgment of Lord Wright in *Fender* v. *Mildmay*, [1937] 3 All E.R. 402, at 425, 426. Decision on that question not given (as being unnecessary in the present case); but inclination intimated of view in favour of that of Lord Wright (restrictive as to the courts' jurisdiction) in his said judgment.

In the present case, it was not argued that the disposition in question was void upon any particular rule or principle established by judicial decision. Therefore, taking the most liberal view of the jurisdiction

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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of the courts, there were at least two conditions which must be fulfilled to justify refusal, on grounds of public policy, to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. These conditions are: (1) That the "prohibition is imposed in the interest of the safety of the State, or the economic or social well-being of the State and its people as a whole. It is therefore necessary * * * to ascertain the existence and the exact limits of the principle of public policy contended for, and then to consider whether the particular contract [or disposition] falls within those limits" (*Fender* v. *Mildmay, supra,* at 414); (2) "That the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (*ibid,* at 407; as to this condition, see also *Egerton* v. *Brownlow,* 4 H.L.C. 1, at 197, *Rodriguez* v. *Speyer,* [1919] A.C. 59, at 135-136, and *Fender* v. *Mildmay, supra,* at 436). In the present case it could not be affirmed that such conditions were fulfilled. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining the legacy to conduct themselves in a manner injurious to wife and children. (*Egerton* v. *Brownlow, supra,* at 24-26, 85, 86, 126-128).

Per Crocket J. (who agreed with the result in the present case): There is no generally accepted rule of law restricting the long recognized and salutory right and duty of the courts to refuse to enforce any and all contracts and testamentary dispositions of property regularly brought before them for adjudication, which they on sound judicial grounds find to be contrary to public policy in the sense of tending to subvert the public good. The judicial application to contracts and dispositions of property of the principle against contravention of public policy is not limited to contracts or dispositions which contravene the statute law or only those heads of public policy which are recognized by past decisions or to cases which clearly fall within the purview of those decisions. It is the courts' right and duty to bring their own judgment to bear upon the question propounded for their adjudication as to whether or not the purpose of a particular contract or disposition of property contravenes the public good. Nor is "substantial incontestability" as regards harm to the public a necessary condition of a ground of public policy for the exercise by the courts of their right to hold invalid contracts or dispositions of property on such ground. (Discussion of authorities and judicial dicta).

APPEAL from the judgment of the Court of Appeal for Ontario (1), which, affirming judgment of Middleton J.A. (2), held that the word "children," as used in clause 9 of the will of Charles Millar, late of the city of Toronto, in the province of Ontario, deceased, does not include illegitimate children; and that the said clause 9 is not invalid as being against public policy. The said clause is set out

(1) [1937] O.R. 382; [1937] 3 D.L.R. 234.

(2) [1936] O.R. 554; [1937] 1 D.L.R. 127.

at the beginning of the judgment of Duff C.J., now reported. The appeal to this Court was dismissed.

I. F. Hellmuth K.C. and *I. Levinter K.C.* for appellants (next of kin and those claiming under them).

W. N. Tilley K.C. and *B. V. McCrimmon* for the executors and trustees under the will of deceased.

G. T. Walsh K.C. for mothers of legitimate children.

T. R. J. Wray and *R. J. R. Russell* for mothers of legitimate children.

C. R. McKeown K.C. for mothers of children who may or may not be legitimate.

The judgment of Duff C.J. and Davis, Kerwin and Hudson JJ. was delivered by

DUFF C.J.—The question to be determined on this appeal concerns the validity of a clause in the will of the late Charles Millar of Toronto. It is in these words:

> 9. All the rest and residue of my property wheresoever situate, I give, devise and bequeath unto my Executors and Trustees named below in Trust to convert into money as they deem advisable and invest all the money until the expiration of nine years from my death and then call in and convert it all into money and at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the Registrations under the Vital Statistics Act. If one or more mothers have equal highest number of registrations under the said Act to divide the said moneys and accumulations equally between them.

The determination of this controversy as to validity involves the decision of a point of construction, viz., whether the word "children," as here employed, includes illegitimate children. That question was answered in the negative by Mr. Justice Middleton and by the Court of Appeal. We think it sufficient to say that we agree with this conclusion, which rests upon the reasons fully stated in the able judgments delivered by the Chief Justice of Ontario and Riddell J.A. in the Court of Appeal and by Middleton J.A.; and we think it unnecessary to add anything to these reasons.

The remaining question, concerning which we express our views more at length, is raised by the contention that this clause is void as "against public policy." In sup-

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port of that contention we have had a powerful argument from Mr. Hellmuth; but, giving due weight to it, we find ourselves in agreement with the conclusions of the Ontario judges who unanimously held the clause to be valid.

It is convenient to notice first of all the manner in which the principle of law operates, by force of which a contract or disposition of property is held to be invalidated as being obnoxious to the public good on some ground or principle comprehended within the general phrase "against public policy"; and this has not a little relevancy in examining the contentions advanced by the appellant.

As Lord Sumner said in *Rodriguez* v. *Speyer* (1),

> Considerations of public policy are applied to private contracts or dispositions in order to disable * * *

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. This is emphasized in the judgments of Lord Thankerton (at p. 414), and Lord Wright (at p. 425), in *Fender* v. *Mildmay* (2).

As regards the doctrine of public policy itself, there is some lack of unanimity upon the point of the jurisdiction of the courts to proceed under some new head of public policy, that is to say, some principle of public policy not already recognized by judicial decision in the sense hereinafter explained. There is high authority for the proposition that,

> It is not at the present time open to the courts of justice to hold transactions or dispositions of property void simply because in the judgment of the court it is against the public good that they should be enforced, although the grounds of that judgment may be novel.

This is the view expressed by Lord Halsbury in a well known discussion of the subject in *Janson* v. *Driefontein*

(1) [1919] A.C. 59, at p. 125. (2) [1937] 3 All E.R. 402.

Consolidated Mines, Ltd. (1). "I do not think," he said, that the phrase "against public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy.

And, at page 496,

> I do not think he [the judge] has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law.

Alderson B., in his opinion in *Egerton* v. *Brownlow* (2), agrees that such a principle "would altogether destroy the sound and true distinction between judicial and legislative functions," and he adds, "my duty is as a judge to be governed by fixed rules and settled precedents." And Parke B. in his opinion in the same case observes (p. 123):

> It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments.

The subject is discussed in, if I may say so, a very illuminating way by Lord Wright in *Fender* v. *Mildmay* (3). His conclusion is that the modern view of the law is that expressed in the observations, which he quotes, of Parke B. in *Egerton* v. *Brownlow* (4), and of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (5).

The passage from Parke B. is in these words:

> It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

The sentence taken from Lord Lindley's judgment is this:

> public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B., and Parke B., in *Egerton* v. *Brownlow* (6).

(1) [1902] A.C. 484, at 491.
(2) (1853) 4 H.L.C. 1, at 106.
(3) [1937] 3 All E.R. 402, at 425, 426.
(4) (1853) 4 H.L.C. 1, at 123.
(5) [1902] A.C. 484, at 507.
(6) (1853) 4 H.L.C. 1, at 106, 123.

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After stating that these passages embody the modern view of the law by which the courts in more recent times have governed themselves in exercising this exceptional jurisdiction, he proceeds—and the precise terms in which he expresses himself should be carefully observed:—

> Public policy, like any other branch of the common law, is governed by the judicial use of precedents. * * * They [the House of Lords in the *Mogul* case (1), in the *Maxim Nordenfelt* case (2) and in *Rodriguez* v. *Speyer* (3)] have proceeded to apply some recognized principle to the new conditions, proceeding by way of analogy and according to logic and convenience, just as courts deal with any other rule of the common law.

and he adds:

> It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world; but that is true of the principles of common law generally.

On the other hand, Lord Atkin (p. 407) expresses the definite opinion that Lord Halsbury's view is "too rigid." Lord Roche (p. 436) says the question is debatable and does not give his own opinion upon it. Neither Lord Thankerton nor Lord Russell of Killowen, I think, intends to pass upon the general question, although the conclusions of both are based upon rules or principles deduced from decided cases. Lord Russell says:

> as I see this case, there is here no question of inventing a new rule of public policy [p. 422].

Lord Wright says he can hardly conceive that at this day a new head of public policy could be discovered.

Before leaving the subject, we ought, perhaps, to refer to three sentences in the opinion of Parke B. in *Egerton* v. *Brownlow* (4) which immediately follow the passages quoted above. They seem to put more pointedly than the sentences which precede them the view which, subject to the explanation by Lord Wright already quoted, would appear to have been the view of Lord Halsbury. The sentences are these:

> The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail.

(1) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25.
(2) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535.
(3) [1919] A.C. 59.
(4) (1853) 4 H.L.C. 1, at 123-124.

He adds:

> But we are clearly of opinion that this cannot be shown here.

We should be disposed to think, if it were necessary to decide the question, that Lord Wright's view was the preferable view. We are, however, for the purpose of disposing of this appeal, under no obligation to decide this particular point touching the limits of the jurisdiction of the courts in respect of this branch of the law; and we are expressing no final opinion upon it.

It has not been argued by the appellants that the disposition in question here is void upon any particular rule or principle established by judicial decision. Such being the case, we think, taking the most liberal view of the jurisdiction of the courts, there are at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. First, we respectfully concur in these two sentences in the judgment of Lord Thankerton in *Fender* v. *Mildmay* (1):

> Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.

Secondly, we take the liberty of adopting the words of Lord Atkin in his judgment in the same case (at p. 407):

> * * * it [referring to Lord Halsbury's judgment in *Janson's case* (2)] fortifies the serious warning, illustrated by the passages cited above [among them is the passage, already quoted, from the opinion of Parke B.], that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.

The last sentence makes it plain that we have here no mere *obiter dictum*. As regards the second of these conditions, it was in substance expressed by Lord Truro in *Egerton* v. *Brownlow* (3) in this sentence:

> Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation.

(1) [1937] 3 All E.R. 402, at 414.
(2) [1902] A.C. 484.
(3) (1853) 4 H.L.C. 1, at 197.

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Lord Parmoor in *Rodriguez* v. *Speyer Brothers* (1) thus emphasizes the admonition:

> My Lords, in considering a rule of law founded on public policy care must always be taken not to introduce new principles which, to be valid, would require the sanction of the Legislature, and to maintain the important limitation, that it is beyond the jurisdiction of tribunals to determine matters of national policy.

Lord Roche, in his judgment in *Fender* v. *Mildmay* (2), says:

> Now, to evolve new heads of public policy, * * * if permissible to the courts at all, which is debatable, would, in my judgment, certainly be permissible only upon some occasion * * * where there was substantial agreement within the judiciary, * * *

We are asked to say that the tendency of this disposition is "against public policy" in the pertinent sense because, it is urged, its tendency is to give rise to a competition between married couples to bring about successive births of children in rapid sequence to the injury of the mothers' health, to the injury of the children, morally and physically, and to the degradation of motherhood and family life. It is even suggested that in cases in which the husband ceased to be fecund in course of the race, the contestants might be tempted to resort to other males to do his office.

The appellants argue that these tendencies bring the case within a sentence inadvertently ascribed to Lord Bramwell, but in fact taken from the judgment of Younger L.J. (now Lord Blanesburgh) in *In re Wallace; Champion* v. *Wallace* (3). That sentence is:

> This is only another way of saying that a tendency to be subversive of the public good within the meaning of the rule now under consideration must be subversive of something in the body politic which every normally constituted citizen of goodwill must, of necessity, desire to preserve.

This sentence, of course, does not define any head of public policy. It lays down a condition which must be present in order to enable the principle of public policy to operate. It leaves untouched the question, what precisely is the principle of public policy contended for in this case. We will, however, not dwell further upon the first condition.

We ask ourselves the question, is the second condition satisfied? Can it be judicially affirmed that for such reasons "the harm to the public" from such dispositions

(1) [1919] A.C. 59, at 135-136. (2) [1937] 3 All E.R. 402, at 436.
(3) [1920] 2 Ch. 274, at 303.

"is substantially incontestable"? Is it so clear that something like general agreement upon the point among judges of this country could be judicially assumed? It will not be overlooked that the Ontario judges unanimously held the opposite view.

It is the evil tendency of such dispositions in respect of some interest of the state, or of some interest of the people as a whole, with which we are concerned. We find it impossible to affirm from any knowledge we have that a policy of encouraging large families by pecuniary rewards to the parents or donations to the children would have a tendency injurious to the state or to the people as a whole; still less that anything like unanimity in favour of such a proposition could be assumed. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining this legacy to conduct themselves in a manner injurious to wife and children. That sort of argument is conclusively answered in *Egerton* v. *Brownlow* (1) in the judgment of the Lord Chancellor at the trial (pp. 24-26), in the opinion of Mr. Justice Cresswell (pp. 85, 86), and in the opinion of Baron Parke (pp. 126-128). One could easily conjure up the possibility that similar temptations might be inspired by a bequest of a large fortune to the grandchildren of the testator, to be divided equally among them, as inviting each of the children to have a numerous offspring in order to secure for his family as large a proportion as possible of the inheritance.

Conceive the case of a bequest of a large sum of money to each child of a given woman to vest at its birth. Such a bequest might, one could imagine, in some cases give rise to temptations similar to those whose possibility, it is said, is sufficient to invalidate the disposition before us. We do not suppose it would seriously be argued that in such a case the courts could deny the claim of a legatee on grounds of public policy.

In *Egerton* v. *Brownlow* (2), Alderson B. states explicitly, and there can be no doubt about it, that

> a sum of money or an estate left to the first son of a marriage if born within a year of the nuptials, would not be a void bequest or devise.

Would such a devise or bequest be void if given to the second son if born within two years?

(1) (1853) 4 H.L.C. 1.

(2) (1853) 4 H.L.C. 1, at 108.

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The observations of Parke B. in *Egerton* v. *Brownlow* (1) are so pertinent in this connection that we think it right to reproduce them textually:

> Suppose a large estate left to A, subject to the condition of his becoming senior wrangler and senior medallist at Cambridge. Would it be illegal, as tending to induce him to employ the money in corrupting the examiners, or betraying into idleness and profligacy, or destroying his most promising competitors? If a large estate is left to a man conditioned that he should within a stated time marry a countess, would it be void, as tending to induce him to use improper means to effect such an alliance? Or if an estate was to be forfeited in case the devisee did not take holy orders, or become a dean or a bishop, or take a degree of doctor of divinity in a certain time, would it be void, as having a tendency to induce him to obtain those orders, dignities, or distinctions by bad means? So the case of a condition to obtain the royal licence to use a particular name and arms, a most common occurrence, might on similar grounds be impeached, as having a tendency to cause the royal licence to be obtained by corrupt means. So even also the clause, in the form in this will, which is to use "the utmost endeavours to obtain it," might be said to have a similar though a more remote tendency to the same end; and yet to object to either of such clauses, on either ground, seems to be utterly untenable. Nay, a limitation to one for life, remainder to another, might be said to be void, as having a tendency to cause the remainder-man to try to kill the tenant for life; a limitation to first and other sons successively in tail, to induce the second son to destroy the life of the elder by a direct act of murder, or a continued course of cruelty and unkindness, or to use fraudulent artifices to prevent him from marrying. Insurances on lives might be avoided on the same ground. Insurances of property against fire, contracts by burial-clubs to pay sums of money for the funeral of wives or children; in short, there are few contracts in which a suspicious mind might not find a tendency to produce evil; and to hold all such contracts to be void would, indeed, be an intolerable mischief.

The appeal is dismissed. The executors will have their costs of the appeal to this Court as between solicitor and client, and those appointed to represent the different interested parties will have their costs as between party and party, out of the estate.

CROCKET J.—I am in full accord with my Lord the Chief Justice and the learned trial Judge and the Court of Appeal that this bequest for the benefit of the mother or mothers giving birth in the city of Toronto to the greatest number of children during the ten years following the testator's death cannot properly be construed as contemplating illegitimate as well as legitimate births, and that the principle of public policy cannot be successfully invoked against its validity in the circumstances of this

(1) (1853) 4 H.L.C. 1, at 127-128.

particular case. I thus qualify my concurrence in the judgment of the learned Chief Justice because I do not wish to be understood as assenting to the adoption by this Court of a number of the judicial dicta which are set out in his reasons, presumably as being applicable to Canadian as well as to British courts, and, moreover, because I cannot deduce from these dicta any such generally accepted rule of law restricting the long recognized and, in my opinion, salutory right and duty of the courts, both of England and of this country, to refuse to enforce any and all contracts and testamentary dispositions of property regularly brought before them for adjudication, which they on sound judicial grounds find to be contrary to public policy in the sense of tending to subvert the public good. In my view, which I venture to express with the greatest diffidence and respect to those who may think otherwise, it is quite impossible to find any consistent, logical ground in these various dicta to support the contention that the application of this wholesome principle by the courts of this country must now be taken as limited to the extent now contended for.

Some of them seem to be based on the suggestion that the Legislature is the sole repository of the wisdom and public opinion of the country; that in it alone resides the right and power to determine whether any kind or class of contracts do or do not offend against the principle of public policy; and that any attempt, therefore, upon the part of the judiciary of the country to test the validity of any such contract or disposition of property by due consideration of their effect upon the public welfare constitutes an invasion upon the functions of the Legislature. For my part, I cannot understand how the courts of the country in applying this principle can be said to trench in any way upon the legislative power unless it be held that the Legislature's omission to declare any particular kind or class of contract or other disposition of property unlawful must be taken as establishing their incontestable validity. I know of no dictum from which such a rule of law can fairly be deduced.

Other pronouncements in the House of Lords, carrying the great weight and authority of celebrated legal minds, such as the well known pronouncement of Baron Parke in

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Egerton v. *Lord Brownlow* (1), as to the province of the courts, are brought forward as limiting the judicial application of the principle now under discussion only to contracts and dispositions of property which contravene either the statute law of the country or the unwritten or common law as established by decisions of the past or of the existing courts of the country or to cases which clearly fall within the purview of these decisions. In the passage just referred to it is said:

> Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

From the words just quoted it has been sought to deduce the rule that the courts must not venture in any case to bring their own judgment to bear upon the question propounded for their adjudication as to whether the purpose of a particular contract or disposition of property contravenes the public good or not, but the context immediately preceding these words plainly shews, I think, that Parke, B., clearly recognized the right and duty of the courts to determine at least whether any particular case logically falls within the compass of any of the rules of the common law as established by past judicial decisions regarding the contravention of public policy.

Whatever may be the true interpretation of Baron Parke's pronouncement in *Egerton* v. *Brownlow* (1), it is quite apparent, I think, that in later cases it has been used as the basis for the development of a further limitation upon the jurisdiction of the courts of England to adjudicate upon the question of public policy. This will be particularly observed in Lord Chancellor Halsbury's discussion of the subject in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (2), where His Lordship quotes extensively from Baron Parke's reasons in the previous case and denies the right of any court to "invent a new head of public policy." This dictum, if taken literally and it be not *obiter,* and were accepted by the majoriy of the law lords hearing that particular case, would manifestly establish a new doctrine in the application by the courts of the prin-

(1) (1853) 4 H.L.C. 1, at 123. (2) [1902] A.C. 484.

ciple of public policy and limit their consideration of the subject, so far as the common law of England is concerned, to the old heads of that subject as recognized by past decisions. In *Fender* v. *Mildmay* (1), however, Lord Atkin points out that, although Halsbury, L.C., in *Janson* v. *Driefontein* (2)

> appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law

the Lord Chancellor's view did not receive the express assent of the other members of the House, and he added that that view seemed to him "too rigid." Lord Atkin went on to say:

> On the other hand, it fortifies the serious warning, illustrated by the passages cited above, that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel, M.R., cited above, the contract should be given the benefit of the doubt. But there is no doubt that the rule exists. In cases where the promise is to do something contrary to public policy, which, for short, I will call a harmful thing, or where the consideration for the promise is the doing, or the promise to do, a harmful thing, a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The contract is unreasonably to restrict a man's economic activities, to procure a marriage between two persons, to oust the jurisdiction of the court. These things are decided to be harmful in themselves. To do them is injurious to public interests.

It is to be observed that this very recent pronouncement clearly recognizes the continued existence of the rule regarding public policy, but that it in turn suggests what on its face appears to be a new condition or limitation for its application, viz.: "only in clear cases in which the harm to the public is *substantially incontestable.*" My Lord the Chief Justice in his reasons expressly adopts this dictum and treats "substantial incontestability" as regards "harm to the public" as a necessary condition for the exercise by the courts of their right to invalidate contracts or dispositions of property on the ground of public policy. With every possible respect I cannot follow His Lordship in the promulgation of such a new doctrine in this country upon the strength of what appears to me to be intended by its author only as a further reinforcement

(1) [1937] 3 All E.R. 402. (2) [1902] A.C. 484.

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of the warnings which are to be found in previous cases as to the danger of judges, in deciding questions involving the consideration of what is and of what is not for the public good, being influenced too much by their own peculiar views, rather than as a pronouncement for the purpose of defining any new rule for the application of the general principle he was discussing. A careful examination of the context in which the expression is contained, as I have above reproduced it, makes it clear to my mind that there was really no thought of propounding any new doctrine. Indeed, Lord Atkin introduces the presumed new doctrine as one which was "illustrated by the passages cited above." Among the passages he cites are the observations of Parke, B., in *Egerton* v. *Brownlow* (1), to which I have already called attention; a passage from the judgment of Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* (2); one from the judgment of Cave J. (later Lord Cave) in *Re Mirams* (3); one from Lord Davey's judgment in *Janson* v. *Driefontein* (4), and an extract from Marshall on Insurance, 3rd ed., 32, which had been approved by Lord Halsbury in *Janson* v. *Driefontein* (4). Not one of these passages makes use of any such expression as "substantially incontestable," but all of them seem to bear directly upon "the serious warning," which Lord Atkin says is illustrated by them, and to which he was particularly alluding, regarding "idiosyncratic inferences of a few judicial minds." Whatever may be the true significance of the dictum relied on, it ought not, in my opinion, to be made the basis of the promulgation of what will undoubtedly constitute an entirely new doctrine in this country, and one whose adoption by this Court, I fear, cannot but seriously and permanently tie the hands of this and all other Canadian courts in the administration of that very important branch of the law, which specially concerns the moral and social, as well as the economic welfare and the security of the people generally.

Lord Atkin says that there is no doubt that the rule exists and clearly intimates that its application is not subject to the limitation which Lord Halsbury's proposition would place upon it by closing the door against the con-

(1) (1853) 4 H.L.C. 1, at 123.
(2) (1875) L.R. 19 Eq. 462.
(3) [1891] 1 Q.B. 594.
(4) [1902] A.C. 484.

sideration of any new heads or categories of public policy, which limitation he describes as too rigid. Yet a single clause is extracted from one sentence in the very paragraph in which Lord Atkin thus expressed himself and of which no approval can be found in the lengthy reasons of the four other Law Lords who heard the case with him, and put forward as the foundation for the introduction into the courts of Canada of what, with deference, seems to me to be a much more drastic and far-reaching restriction upon the application of the principle of public policy than that suggested by Lord Halsbury, which Lord Atkin himself declined to recognize and termed "too rigid." May we not as well at once renounce the rule entirely as engraft upon it a condition which would render it practically inapplicable? How could any of the courts in any of the provinces of Canada invalidate any contract or disposition of property at all as tending to subvert the public good in the face of a pronouncement by this Court that they have no jurisdiction to do so unless the ground of public policy which is urged against it is one that is "substantially incontestable"? Contravention of public policy has always been recognized as a good plea against the enforcement of any contract or testamentary disposition of property by the courts of this country. The joining of issue on such a plea by the party or parties seeking the enforcement of the particular contract or disposition of property concerned necessarily creates a contestation between the parties, which it becomes the clear duty of a judge to try and to decide judicially. But he is told, notwithstanding the fact that he is now actually confronted with a *bona fide* and serious contestation between the parties before him, that this Court has laid it down that he has no jurisdiction to declare the contract or disposition of property invalid unless he is prepared to adjudge that the ground of public policy, on which it has been definitely challenged, is "substantially incontestable." If he is to ignore his own conscientious conviction upon the point as possibly proceeding from an idiosyncratic view, as has been suggested, where is he to look for a safe footing on which he can judicially determine that the apprehended "harm to the public is substantially incontestable"? It is suggested that he may look for something like general agreement

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upon the point among the judges of this country, or something like unanimity, as I take it, in the public itself, from which he could judicially assume it. But what is he to do in a case involving a ground of public policy which has never before been considered by any Canadian judge? Presumably he must then canvass the public opinion of the country as a whole in relation to the purpose or tendency of the particular contract or bequest and determine whether there would be likely to be anything like unanimity among the people as a whole in regarding it as injurious to the public good.

The recognition of such a method as a proper basis for a binding judicial adjudication by a trial judge of an issue of fact or law regularly brought before him, I very much fear, is itself fraught with quite as much danger to the public good as any possibly erroneous application by him of the rule of public policy could be. If a trial judge errs in taking too narrow a view of the question of public policy, his error in doing so may be as readily corrected on appeal to the higher courts of the country as any other erroneous decision may always be; but who can envisage the ultimate effect upon the country as a whole of the establishment of a rule of law that a trial judge or an appeal judge must in all cases involving the consideration of a question as to what may or may not be for the public good discard his own conscientious conviction upon a sound consideration of the subject and find its solution, either by assuming what the great majority of other judges throughout the country, none of whom have any responsibility in relation to the particular trial and no opportunity of fully considering the purpose or tendency of the particular contract or bequest involved, would be likely to think, or, alternatively, by assuming what the people of the country generally would be likely to think? I cannot help asking myself the question if the recognition at this time of such a rule of law may not tend to undermine the integrity of the whole system upon which the administration of justice in this country has been founded with all its safeguards and restraints to hold judges to the fearless and conscientious discharge of their duties and protect them as well against the danger of being swayed or influenced by what they may believe to be popular feeling or public opinion.

Suppose that a judge is called upon to adjudicate upon the validity of a bequest or devise of the whole of an extensive estate for the purpose of establishing and maintaining a permanent organization for the carrying on throughout the country of a campaign to propagate atheism or infidelity and to undermine the influence of all Christian churches and other religious organizations in Canada. Can it properly be said that a court of justice in deciding that issue cannot bring its own conscientious judgment to bear upon the point and declare the challenged disposition of property invalid because there may be throughout the country a large or substantial body of anti-Christian and anti-religious opinion, which would undoubtedly regard the purpose of the will as legitimate and beneficent? I venture to say unhesitatingly that I do not think so.

Appeal dismissed. The costs of the executors and trustees, as between solicitor and client, and the costs, as between party and party, of the interested parties for whom counsel were appointed to represent them in the Supreme Court of Ontario and who were represented by counsel in this Court, to be paid out of the estate.

Solicitor for the appellants: *Samuel Factor.*

Solicitor for the Executors and Trustees: *A. W. Hunter.*

Solicitors appointed by the Court to represent mothers of legitimate children: *George T. Walsh* and *T. R. J. Wray.*

Solicitor appointed by the Court to represent mothers of children who may or may not be legitimate: *C. R. McKeown.*