1914

*June 4.
*June 19.

JOHN A. PEARSON (PLAINTIFF).....APPELLANT;

AND

JOHN H. ADAMS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Sale of land—Stipulation as to user—Covenant or condition—Detached dwelling house—Apartment house.

In a deed of sale of land it was stipulated that it was "to be used only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars, etc."

Held, that this stipulation constituted a covenant.

Held, also, reversing the judgment of the Appellate Division (28 Ont. L.R. 154), and restoring that of the Divisional Court (27 Ont. L.R. 87), Fitzpatrick C.J. and Duff J. dissenting, that an apartment house intended for occupation by several families was not a "detached dwelling house" within its meaning.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment of a Divisional Court(2), in favour of the plaintiff.

The action was brought for an injunction to restrain the respondent from erecting an apartment house on lot 32 on the east side of Maynard Avenue in the City of Toronto, and which adjoins the lands upon which the appellant has erected a valuable private residence.

The lands now owned by the appellant and re-

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 28 Ont. L.R. 154. (2) 27 Ont. L.R. 87.

spondent respectively were formerly owned by the Reverend George Maynard.

The executors of the reverend George Maynard conveyed lot 32 above mentioned to one John Williamson by deed dated the 18th April, 1888, the material portion of which is as follows: "All and singular that certain parcel or tract of land and premises (describing them) to be used only as a site for a detached brick or stone dwelling house to cost at least two thousand dollars to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots."

The respondent's title is derived through this conveyance to Williamson.

When the appellant purchased the land now owned by him it was one of the few remaining vacant lots on Maynard Avenue, and he did so with the knowledge that there were restrictions on that street governing the class of buildings to be erected thereon and also knowing from his personal inspection that the houses on the street were all private dwellings and worth from $7,000 to $10,000. The appellant erected a first-class private dwelling house costing approximately $14,000, over and above the value of the land, which he would not have done had he not believed that there were building restrictions sufficient to prevent the erection of such a building as is proposed by the respondent.

The respondent proposes to construct what is called an apartment house upon lot 32, and the plans and specifications which he had prepared shew that it is intended to include the construction of six separate and distinct suites or sets of rooms, each cut off

1914

PEARSON v. ADAMS.

from the others by its own front door and composed of a living room, four bed rooms, a bath room, a dining room and a kitchen.

The appellant believing that his property would be very greatly depreciated and damaged if the respondent were permitted to construct the proposed building, commenced this action.

By assignment dated the 9th April, 1912, Adelaide M. Maynard, one of the executors of the reverend George Maynard and one of the grantors in the deed to Williamson from which the respondent derives his title, assigned to the appellant all her rights as grantor in the said conveyance to enforce the conditions imposed thereby and authorized the appellant to take such legal proceedings as he might deem necessary to prevent the respondent from violating the said condition by the erection of an apartment house on the said lands.

After the commencement of the action the appellant moved for an interlocutory injunction. The motion was by consent turned into a motion for judgment and on the 3rd May, 1912, judgment was pronounced by Mr. Justice Middleton dismissing the action with costs.

The learned judge considered that he was bound by the decision in *Re Robertson and Defoe*(1), and dismissed the action. This judgment was reversed by the Divisional Court (composed of Falconbridge C.J. K.B., Britton and Riddell JJ.), Britton J. dissenting.

The judgment of the Divisional Court was reversed by the Appellate Division (R. M. Meredith, Garrow,

(1) 25 Ont. L.R. 286.

Maclaren, Magee and Hodgins JJ.A.), Maclaren and Magee JJ.A., dissenting.

From the judgment of the Court of Appeal for Ontario the appellant appealed to the Supreme Court of Canada.

Glyn Osler and *J. H. Cooke* for the appellant. The conveyance to Williamson contains a restrictive covenant limiting the use of the land by the grantee and his assigns. *Mackay* v. *Dick*(1), at page 263; *Rawson* v. *Inhabitants of School District*(2), *Brookes* v. *Drysdale*(3), at page 60.

The words used are to be interpreted in their ordinary and popular sense. *Rogers* v. *Hosegood*(4), at page 409; *Hext* v. *Gill*(5); *Ex parte Breull*(6).

J. M. Godfrey for the respondent referred to *Kimber* v. *Admans*(7); *Robertson* v. *Defoe*(8); *Neill* v. *Duke of Devonshire*(9), at page 149.

THE CHIEF JUSTICE (dissenting).—I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The respondent claims that he is entitled within the terms of a grant of certain lands conveyed to be

> used only as a site for a detached brick or stone dwelling house to cost at least two thousand dollars, to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots

(1) 6 App. Cas. 251.
(2) 7 Allen (Mass.) 125.
(3) 3 C.P.D. 52.
(4) [1900] 2 Ch. 388.
(5) 7 Ch. App. 699.
(6) 16 Ch. D. 484.
(7) [1900] 1 Ch. 412.
(8) 25 Ont. L.R. 286.
(9) 8 App. Cas. 135.

1914

PEARSON v. ADAMS.

Idington J.

to erect on said site half a dozen dwelling houses so attached together and covered in that they may wear the external appearance of one house.

If this is to be construed as a covenant I conceive and respectfully submit that respondent is simply attempting by a juggling use of the word "apartment" to seem to keep the promise to the ear yet break it to the hope.

It is part of the office of the law to defeat such like attempts and see that what was within the reasonable contemplation of the parties to a contract as expressed in their use of the words thereof, is so adhered to that neither the purpose nor the language is frittered away by over refinement.

It is the use of the site and not the use or abuse of the detached dwelling when built that is in question. The illustrations pressed in argument of what might be done in way of overcrowding even a detached dwelling, against which this stipulation is not aimed, are therefore of no avail.

But I must not by multiplying words darken the meaning of what is so plainly expressed in the deed.

In arguing that this term is so expressed in the deed as to constitute a condition instead of a covenant, it may possibly be that a fairly arguable proposition is put forward.

It certainly, in view of the later covenant contained in the same deed, specially directed to the restrictive use of the premises and wherein this stipulation is not included, does suggest a doubt.

But there is nothing in the later covenant inconsistent with this stipulation. And when it is pressed on argument that there is no right of re-entry reserved for a breach of the condition, one is tempted to say

that if it had been intended merely as a condition, such a right of re-entry would likely have been found in the deed.

It is necessary if possible to give due effect to the purpose of the parties and as this can only be given some effect by holding it to be a covenant, I think it must be held to be a covenant.

No particular form of words beyond such as shew, the parties' concurrence in agreeing to abide by some specific course of conduct in future, are needed to constitute a covenant. Indeed, as has been said by high authority, the same words in some cases may constitute both a condition and a covenant.

We must look at the whole instrument and doing so here I have no doubt the grantor and grantee intended the latter should be bound to use the land in the manner stipulated, and for this purpose I presume the grantee executed the deed.

I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting).—The covenant in this case, in my judgment, has no application to the building in question. The building is, undoubtedly, a house. It is a dwelling house because it is constructed solely for housing people as dwellers. The contention that because the house contains a certain number of apartments in which separate families might conveniently live, it is therefore not a "detached" dwelling house is a contention which if not wholly irrelevant must involve the proposition that the building is not a dwelling house but an assemblage of dwelling houses. I think it is rather extravagant to affirm that a given house is not a "detached" house solely be-

1914

PEARSON v. ADAMS.

Duff J.

cause it contains a number of apartments capable of separate occupation.

I think the considerations which ought to govern the determination of the case are set forth very satisfactorily in the judgment of Mr. Justice Meredith in the court below.

ANGLIN J.—It is common ground that the terms of the "covenant" in question should be given the meaning ordinarily attached to them when used in common parlance. *Rogers* v. *Hosegood*(1); *Hext* v. *Gill*(2), at page 719. It is urged by the appellant that the construction put by the respondent upon these terms is technical and refined; the respondent makes a similar complaint of the construction insisted upon by the appellant.

It would be a most extraordinary description of a modern apartment house, such as the defendant proposes to erect, to call it "a detached dwelling house" —a description that nobody would ever dream of using colloquially. No purchaser of a property, which he had not seen but had bought relying on the vendor's description of it as "a detached dwelling house," would expect to have foisted upon him or be compelled to take, as answering that description, an apartment house such as the defendant's plans provide for. If further evidence were required of the purview of the restriction intended to be imposed upon the user of the property in question as a building site, it is furnished by the fact that, his purpose being to ensure that Maynard Avenue should maintain its character as a first-class residential street, the vendor stipulated

(1) [1900] 2 Ch. 388, at p. 409. (2) 7 Ch. App. 699.

that on the site now owned by the respondent there should be erected nothing other than a dwelling house of brick or stone costing at least $2,000. What sort of modern apartment house built of brick or stone could be constructed for $2,000 ? The amount of this minimum price seems to shew conclusively that the purpose was that nothing other than a single dwelling house in the ordinary acceptation of that term should be erected on the land.

I am, with respect, of the opinion that the decision in *Robertson* v. *Defoe*(1), relied on by the respondent cannot be sustained. Each apartment in the modern residential apartment building is a residence. I cannot understand how such a building can be deemed in compliance with a covenant that "every residence erected on the land shall be a detached house." "House" was the word considered in *Kimber* v. *Admans*(2). "Dwelling-house" was the term dealt with in *Rogers* v. *Hosegood*(3). See, too, *Ilford Park Estates* v. *Jacobs*(4). As I read *Rogers* v. *Hosegood* (3) it supports the view which I take of the proper construction of the stipulation with which we have to deal, although it is not on all fours with the present case because of the provision there found that each messuage to be erected should be "adapted for and used as and for a private residence only."

I have no doubt as to the right of the plaintiff to maintain this action. It is shewn that part of the consideration for his purchasing his adjacent property was the existence of the building restriction in question as affecting all the lots on Maynard Avenue. He

(1) 25 Ont. L.R. 286.
(2) [1900] 1 Ch. 412.
(3) [1900] 2 Ch. 388.
(4) [1903] 2 Ch. 522.

1914

PEARSON v. ADAMS.

Anglin J.

bought the benefit *inter alia* of the covenant of the respondent's predecessor in title. Moreover, he has an express assignment of that covenant from one of the covenantees. See *Rogers* v. *Hosegood*(1), at pages 394, 407-8; *Formby* v. *Barker*(2), at page 551; *Child* v. *Douglas*(3).

For the reasons stated by Mr. Justice Riddell in the Divisional Court I agree with his conclusion that the provision in question should be deemed a covenant and not a condition. The fact that, no right of re-entry for breach being reserved, the stipulation, treated as a condition, would be ineffectual, affords another reason for treating it as a covenant; *ut res magis valeat*. To the authorities cited by Riddell J., I would merely add a reference to *Hodson* v. *Coppard*(4), and *Stevinson's Case*(5).

I would, for the foregoing reasons, with respect, allow this appeal with costs in this court and the Court of Appeal and would restore the judgment of the Divisional Court.

BRODEUR J.—The appellant is the owner of a lot on Maynard Street in the City of Toronto and the respondent is the owner of an adjoining lot on the same street. These lots were sold with the covenant that each of them "would be used only as a site for a detached brick or stone dwelling house to cost at least $2,000, to be of fair architectural appearance and to be built at the same distance from the street as the houses on the adjoining lots."

(1) [1900] 2 Ch. 388.
(2) [1903] 2 Ch. 539.
(3) Kay 560, at p. 571.
(4) 29 Beav. 4.
(5) I Leon. (Pt. I) 324.

1914

PEARSON v. ADAMS.

Brodeur J.

The respondent proposes to erect an apartment house and the appellant, as transferee of the rights of the original vendor, claims an injunction to restrain the respondent from building that apartment house. He claims that the apartment proposed to be erected is not a detached house and is, in that respect, an infringement of the covenant above referred to.

The respondent submits, on the other side, that the proposed building is a detached dwelling house and is in no way infringing the said covenant.

When the contract was made, in 1888, apartment houses were not being built in the City of Toronto. There were flats and tenements which were used or leased by a certain class of the population.

There was also the detached house which was used for the residence of one family. Those detached houses were necessarily more expensive than the others and were supposed to be used by a wealthier class of the community.

There is no doubt that Mr. Maynard, when he opened the street in question and sold those lots, had in view the establishment of a nice residential quarter and those covenants were stipulated evidently for that purpose. He did not want to have any flats nor any tenements erected on those lots which would be occupied by two or three lessees.

The only difference I see between the apartment house which the respondent proposes to build and those flats is that in the case of an apartment house there is a common entrance from the street and in the other there are two or three entrances, or as many as there are lessees in that house.

I consider that apartment houses were not within

1914

PEARSON v. ADAMS.

Brodeur J.

the covenant and that its construction is an infringement of that covenant. *Rogers* v. *Hosegood*(1).

The apartment proposed to be built might be a house and a detached house; but being a series of separate dwellings, it is not the *detached dwelling house* which the parties had in view, viz., a house for the residence of one family. The apartment is more connected with the idea of flats than with the idea of a detached dwelling house.

I consider that the words in the covenant should be given their ordinary popular meaning. *Rogers* v. *Hosegood,* at page 409; *Ex parte Breull; In re Bowie* (2).

For these reasons I think that the injunction prayed for should be granted.

Appeal allowed with costs.

Solicitor for the appellant: *J. H. Cooke.*

Solicitors for the respondent: *Robinette, Godfrey & Phelan.*

---

(1) [1900] 2 Ch. 388.

(2) 16 Ch. D. 484.