

requirements of changing social conditions, and the changing elements and character of the political institutions under which we live."⁷

McDonald v. Cain does not contain any new legal doctrines. It is, however, a case of considerable importance with reference to the Victorian Constitution Act and the jurisdiction of the Supreme Court in matters pertaining to Victorian constitutional law.

G. V. TOLHURST

⁷ per O'Bryan J. at p. 993.

PROPERTY — RESTRICTIVE COVENANTS — LACHES AND ACQUIESCENCE

A LENGTHY considered judgment of Smith J. in *Bohn v. Miller*¹ presents an interesting discussion of some of the principles relating to the passing of the benefit of a restrictive covenant. Land was sold to the defendants subject to a restrictive covenant restraining them from erecting any building other than a dwelling house on each lot, and later, portions of the land to which the benefit of the covenant was attached were sold by the original covenantees to the plaintiffs in this action, but no assignment to them of the benefit of the covenant was made. The defendants erected on the land a sawmill, which was later destroyed by fire, and the plaintiffs sought an injunction to restrain the erection of the proposed new sawmill buildings.

The plaintiffs claimed that a right to enforce the covenant had become vested in them by reason of their ownership of their land. Three grounds were relied on for this. First, that their land and that of the defendant company was part of a building scheme; second, that the ordinary common law and equitable rules applied to pass the benefit of the covenant; third, that s. 56 or s. 78 Property Law Act, or ss. 72, 121 or 269 Transfer of Land Act, entitled the plaintiffs to sue. The defendants denied that any of these grounds had been established and argued further that the right to enforce the restrictions had been lost by reason of laches or acquiescence.

Smith J. stated first that he was not satisfied on the evidence that there was any such building scheme as was alleged by the plaintiffs.

He then turned to discuss the ordinary rules of common law and equity as to the passing of the benefit of restrictive covenants to successive holders of the land, and here agreed with the general tendency of the authorities, culminating in *Zetland v. Driver*,² that in order that the benefit of a covenant may pass with a part of the

¹ [1953] A.L.R. 711.

² [1939] Ch. 1.

land to which it was annexed, it is necessary that the benefit should have been annexed to the land as a whole and to each and every part thereof. He held that such annexation was not established by showing that at the time the covenant was entered into a plan of subdivision existed with respect to the land purchased by the transferee, especially as the benefit of the covenant was expressed to apply also to other lands not comprised in the plan of subdivision. And he refused to agree that the covenant should be construed as so annexed if there appeared any reason to doubt that the parties so intended. Such reason was provided here by the inclusion of streets and of unidentified areas in the plan of subdivision.

He also dealt briefly with the argument from statute, but did not feel that any of the provisions referred to, as usually interpreted, could support the contention of the plaintiffs.

Although discussion of the question of laches and acquiescence was thus not necessary for the decision of the case, Smith J. gave it full consideration in his judgment, and his conclusion that this defence would not have succeeded, as the only presumption which could be drawn was that particular breaches committed in the past were authorised, appears to be based on the analysis of the law hereon in Brunyate, *Limitation of Actions in Equity*.³

R.A.N.

³ at pp. 185-261.

TORT—DUTY OF OCCUPIER TO PERSONS ENTERING PREMISES UNDER CONTRACT

*Watson v. George*¹ affords a useful illustration of the extent of the duty of an occupier to a person who enters his premises under contract.

Watson, who was a lodger for valuable consideration at the defendant's lodging house, died as the result of poisoning by carbon monoxide, emitted from the bath heater which he was using. At the hearing of an action by his widow in the Supreme Court of South Australia, under the S.A. Wrongs Act 1936-40, it was found that the heater, which had been installed for about twenty years, had suffered gradual deterioration. Further, it was found that the accident was due to the inward bulging of the water jacket and the accumulation of rust in the elbow of the flue; that these defects were easily discoverable by an expert; but that there was nothing to cause the occupier (who was in fact unaware of the defects), to believe that the heater required attention. The action having been

¹ (1953) A.L.R. 665.