CHANGE IN THE CHARACTER OF A NEIGHBOURHOOD AS A DEFENCE TO THE ENFORCEMENT OF RESTRICTIVE COVENANTS BY INJUNCTION—A COMPARATIVE STUDY

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Extensive litigation over removal of restrictions raises important questions as to the degree of stability of the environment, which is either desirable or maintainable. The cases contain a lore of urban growth and decay. The historian of the city has yet to tap this wealth of social change, the planner to ponder the experiences of this attempt to perpetuate a human aim. Does litigation experience confirm or reject the theses of urban change examined thus far? What does it indicate of limitations of prophesy and of the role of the market mechanism? What should be the effect of the master plan in determining a change of condition? Should actions for a declaration of unenforceability due to changed circumstances be determined by zoning or planning boards rather than by courts? How does legislative action, such as clearing statutes, differ in effect and purpose from judicial doctrines? How can the framework of public controls make private agreement more effective?[1]

The right to enforce a restrictive covenant, once properly taken, may be terminated in a variety of ways.[2] A covenantee (or other person for the time being entitled to the benefit of the covenant) may, either expressly or by implication, release his right to enforce the covenant.[3] Such a right may be lost by acquiescence,[4] enforcement may be precluded by estoppel,[5] or the covenantee (or his assigns) may be prevented from enforcing the covenant on the basis that he has, by his acts or omissions, disregarded past breaches in such a way as to justify a reasonable belief that future breaches will likewise be disregarded.[6]

These methods of termination are not, however, necessarily exclusive one to the other. To some extent at least a question of ter-

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1 Haar, *Land-Use Planning,* (1959) 625-626.

2 Generally, Behan, *The Use of Land as Affected by Covenants and Obligations not in the Form of Covenants,* (1924) 149-164; Elphinstone, *Covenants Affecting Land,* (1946) Ch. VII, 104-115; Casner, *American Law of Property,* (1952) vol. ii, ss. 9.23, 9.37, 9.38.

3 *Roper v. Williams* [1822] T. & R. 18; *Peek v. Matthews* (1867) L.R. 3 Eq. 515; *Sobey v. Sainsbury* [1913] 2 Ch. 513, 528. Generally, Elphinstone, *op. cit.,* 104-106.

4 Behan, *op. cit.* 149-152.

5 Elphinstone, *op. cit.* 106-109.

6 *Chatsworth Estates Co. v. Fewell* [1931] 1 Ch. 224. Also, *Thodos v. Shirk* (1956) 79 N.W.2d. 733.

minology is involved.[7] There is a further method. There may be a change of circumstances, a situation where there has been such a change in the character of the neighbourhood that a question may reasonably present itself as to the continuance or as to the enforceability of a restrictive covenant. Such a question may arise for consideration in different contexts. A restrictive provision may be contained in a legislative enactment which may, in the event of conduct constituting a breach, confer a right of action upon any person injured or affected thereby. If this is so, changed conditions have no effect, for a court is bound to interpret the act and to apply the remedy which it points out.[8] Further, in many jurisdictions, *affirmative* judicial relief may be available.[9] The owner of property burdened by a restriction may, in declaratory proceedings or otherwise, seek its judicial cancellation or modification, for example, as a cloud on title. Jurisdiction of this nature which, in large measure, owes its existence to statute, is of relatively late origin and is not the concern of this present paper. What is here considered is some aspects of the problem with which the courts were first confronted, that is, the effect which a change in the character of a neighbourhood has upon a suit to enforce performance of a restrictive covenant by an injunction. As early as 1927, the Supreme Court of North Carolina noted that this issue was becoming one of increasing importance:

> The question of restrictive covenants in deeds covering property designed for residential purposes exclusively is becoming more and more an important and perplexing proposition. In all of the larger cities of this State, suburban developments are multiplying, and the popularity of these developments rests upon the assurance given purchasers that they may confidently rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that they may further be assured that the essential residential nature and character of the property will not be destroyed. Upon this assurance our citizens are daily erecting and constructing expensive and comfortable homes away from the noise and stress of city life, and, moreover, where they can secure larger home sites for their residences and more playing space for their children.[10]

[7] *Chatsworth Estates Co. v. Fewell* [1931] 1 Ch. 224, 231, *per* Farwell J.: 'Now, as stated in many authorities, the principle upon which this equitable doctrine rests is that the plaintiffs are not entitled to relief if it would be inequitable to the defendant to grant it. In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, "Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guesthouse?" '

[8] *Bird v. Eggleton* (1885) 29 Ch.D. 1012.

[9] *Infra.*

[10] *Starkey v. Gardner* (1927) 138 S.E. 408, 409, *per* Brogden J. Similar sentiments were expressed in the initial case of *Duke of Bedford v. Trustees of the British Museum* (1822) 2 My. & K. 522, 571, *per* Sir T. Plumer M.R.: 'In that point of view, it appears to be a consideration of great importance, more especially with

Nor, as is discussed below, has the advent of the planning laws had much impact on this branch of the law.

1. THE DOCTRINE OF CHANGE OF NEIGHBOURHOOD

An action is brought to enforce a restrictive covenant. Usually, though not necessarily,[12] the covenant is taken upon a subdivision and is part of the scheme of development. A 'typical'[13] situation is where the covenant restricts the use of the land to residential purposes but, although fitting quite properly into the state of affairs which existed (and perhaps could reasonably have been foreseen) at the date when the covenant was taken, the character of the neighbourhood has now radically altered. Commerce, and maybe even industry, has crept towards the property burdened by the covenant, sometimes bordering it on one or more sides. The land can profitably be devoted to commercial purposes, and this is the development that the owner wishes to undertake. The plaintiff seeks an injunction to compel compliance with the covenant. The problem with which the court is faced is whether, having regard to the changes which have occurred, injunctive relief should be granted or withheld.

The cases begin with *Duke of Bedford v. Trustees of the British Museum*.[14] In 1675 land was conveyed subject to a covenant which provided, in effect, that if the property were to be built upon, one mansion only should be erected with suitable gardens and offices. Such a mansion was later built and the property, then known as Montague House, became vested in the defendants. The plaintiff, who was entitled by purchase from the covenantee, sought an injunction to restrain the defendants from erecting in the gardens additional buildings to house certain statues and other monuments of ancient art brought from Greece. The plaintiff argued that the proposed buildings would involve a breach of the restrictive covenant. The Court rejected the plaintiff's claim, pointing out that since 1675 the plaintiff and his predecessors in title had themselves surrounded Montague House with streets and buildings, and that although not

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reference to property in the metropolis, how far parties shall now be permitted to go back, and revive all the objections arising out of long antecedent covenants and engagements, and to give them such an application to the buildings of the metropolis in its present rapidly increasing state, that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land.'

11 *Infra.*

12 *Duke of Bedford v. Trustees of the British Museum* (1822) 2 My. & K. 552; *Trustees of Columbia College v. Thacher* (1882) 87 N.Y. 311.

13 *Wilshire, Inc. v. Harbison* (1952) 88 A.2d. 121, affirmed: 91 A.2d. 404.

14 (1822) 2 My. & K. 552. Also, *Roper v. Williams* [1822] T. & R. 18; *Peek v. Matthews* (1867) L.R. 3 Eq. 515; *German v. Chapman* (1877) 7 Ch.D. 271.

in breach of any covenant, such development had created a state of affairs which rendered equitable relief inapplicable. Sir T. Plumer M.R. stated:

> There were here two large mansions—one erected, the other to be erected, contiguous to each other—to be enjoyed by two noble families, with their appendages of gardens and offices; and the question is, whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from everything which could contribute reciprocally to their beauty, ornament, and use . . . but the question is, whether a Court of Equity must not consider how far it is reasonable to permit a party who has so dealt with the property, and so altered its condition, to obtain his remedy by the interposition of this Court . . . Upon these grounds, therefore, and without the least imputation upon the duke or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should be enforced.[15]

It may be noted that the Court stressed the fact that it was the plaintiff and his predecessors in title who had, on their land, caused the changed state of affairs. For reasons mentioned below, this is not surprising.[16] There are, indeed, very many cases where the conduct of the owners of property benefited by the restrictions has either caused or contributed to the changed situation, as there are also an abundance of decisions where such change has resulted from activity on land *inside* the restricted addition, or on land both inside and outside thereof. The presence of such factors, however, means that the court need not necessarily base its decision upon what may be called an 'independent' change of neighbourhood doctrine. Alternative grounds of relief may be available. The issue which is here discussed is whether relief against an injunctive suit can be granted, in the absence of any other circumstances, on the basis of changed conditions alone. If not, it is not very easy to assert that an independent doctrine exists. For could not any relief that a court might grant be relegated to some other principle? Change of conditions resulting through violations within the subdivision raise a problem of abandonment.[17] And is it not a form of acquiescence for the plaintiff (or his predecessors in title) to so develop land retained as to effect a change in the character of the neighbourhood, or for such development to occur on other lots through the permission of the plaintiff in licencing specific projects? It is to comment upon this issue, to discuss what is called the independent doctrine of change of neighbourhood, that is the purpose of this paper. What is meant by this is that there is a doctrine that applies where the change of neighbour-

15 (1822) 2 My. & K. 552, 572, 573, 575.
16 *Infra.*
17 *Thodos v. Shirk* (1956) 79 N.W.2d. 733.

hood has been brought about otherwise than by the conduct of the owners of property benefited by the restriction, and also where such change has resulted from activity on land *entirely* outside the tract. This combination of factors can, and does, frequently occur. As stated by Owen J. in *Ward v. Prospect Manor Corp.*:

> Such changed conditions may result from the natural growth of the city, bringing industry, smoke, soot, and traffic into such close proximity to the restricted area as to render it undesirable for the purposes to which it is restricted.[18]

2. THE EXISTENCE OF THE DOCTRINE

A. *English Law*

Whether the doctrine, as here defined, exists in English law is uncertain.

In *Sayers v. Collyer*[19] land was sub-divided into building lots. Each purchaser entered into a covenant with the vendors and with the purchasers of the other lots entitled to the benefit of the covenant that, *inter alia,* no building should be erected or used as a shop and that no trade should be carried on upon any lot. The plaintiff and defendant were each purchasers of a lot. The plaintiff used his house as a private residence, while the defendant used his property as a beer shop. The plaintiff had known of this user for three years before he commenced the present proceedings, and had himself bought beer at the shop. The plaintiff sought an injunction and damages. Evidence was adduced that the user of other lots did not conform to the provisions of the restrictive covenant. An injunction was refused. It appeared to Pearson J., at first instance, that the *Duke of Bedford's Case* furnished the principle upon which he ought to proceed. Accordingly, he rested his refusal of injunctive relief upon the basis that the estate had ceased to be a residential area and that the original purpose for which the covenant was taken had failed. An appeal by the plaintiff was dismissed. However, the members of the Court of Appeal did not agree with Pearson J. that the case fell within the change of neighbourhood doctrine. Baggallay L.J. expressly stated that he did not decide the case on that ground, but on the acquiescence on the part of the plaintiff. Bowen and Fry L.JJ. also reached their decision on the plaintiff's acquiescence, and both were at pains to explain that the *Duke of Bedford's Case* was confined to circumstances where the change of conditions had resulted through the conduct of the plaintiff or of those through whom he claimed. Fry L.J. stated:

[18] 206 N.W. 856, 860.

[19] (1883) 24 Ch.D. 180. On appeal (1884) 28 Ch.D. 103. And see, *Pulleyne v. France* (1912) 57 Sol.Jo. 173.

> I agree that the rule in *Duke of Bedford v. Trustees of the British Museum* is not applicable to this case. It applies where an alteration takes place through the acts or permission of the plaintiff, or those under whom he claims, so that his enforcing his covenant becomes unreasonable. But I do not think that it applies to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff. Therefore I think, although we have not heard the Respondent on the point, that the learned Judge was not right in applying the principle of that case to the present.[20]

Sayers v. Collyer seems, therefore, to present a clear statement that, to be effective, the change in character of a neighbourhood must have resulted from conduct on the part of the plaintiff or of his predecessors in title. This is without doubt a denial of the existence of an independent doctrine of change of neighbourhood. So too in 1913 in *Pulleyne v. France*[21] the Court of Appeal re-affirmed its view that it was insufficient to establish a change in character without evidence of personal acquiescence in the change on the part of the person seeking to enforce the covenant. The principle of these cases was adopted by the Vice-Chancellor and, perhaps with some qualification, by the Court of Appeal in the Irish case of *Craig v. Greer*.[22] It also finds expression in the judgment of the Court in *Osborne v. Bradley*.[23]

[20] (1885) 28 Ch.D. 103, 109. Also, 108, *per* Bowen L.J.: 'In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient; because there is no evidence that such alteration was caused by the Plaintiff. But the true ground of our decision is that the Plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way in which he has behaved towards the Defendant.'

[21] (1912) 57 Sol.Jo. 173.

[22] (1899) 1 Ir.R. 258, 278, *per* the Vice-Chancellor: 'The principle to be deduced from these authorities seems to me to be that in order to defeat the right of a person with whom a covenant has been entered into restricting the mode of user of lands sold or demised, it must be clearly established that there is a personal equity against him arising from his acts or conduct in sanctioning or knowingly permitting such a change in the character of the neighbourhood as to render it unjust in him to seek to enforce his covenant by injunction; a change resulting from causes independent of him will not have such an operation.' And see 298, *per* FitzGibbon L.J., with whom Walker and Holmes L.JJ. concurred: 'I do not accept Mr. Ronan's contention that the plaintiff is necessarily free from the equitable considerations in question because the change in the character of the locality is chiefly due to circumstances over which he had no control, or to buildings upon neighbouring lands which do not belong to him. The estoppel, where it exists, rests on personal conduct, and the acts which have been done upon her lands, though they have not originated the change, have at least adopted it, and have made a profit from it, and in that point of view might, in kind, suffice to make it inequitable for her to insist against another upon rights to which she herself has paid no regard. But nothing done, at least as yet, by the plaintiff or by her predecessors, has in my opinion involved her own residence of Sydenham House, or other portions of the property demised in 1854, which still retain the character which was intended to be protected, in the consequences which would follow from permitting the defendants to carry out their intentions.' Cited in *Brown v. Huber* (1909) 88 N.E. 322.

[23] (1903) 2 Ch. 446, 451, *per* Farwell J. (italics supplied): 'Contractual obligations do not disappear as circumstances change, but a person who is entitled to the benefit of a covenant may, *by his conduct or omission,* put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist upon its enforcement by injunction: *Sayers v. Collyer,* followed and adopted by the Court of Appeal in Ireland in the case of *Craig v. Greer.*'

But other cases have disfavoured so narrow an approach and have denied that *Sayers v. Collyer* must be so construed.[24] In *German v. Chapman,* James L.J. spoke of a change of neighbourhood, such as would preclude injunctive relief, occurring '. . . by a long chain of things, . . .'.[25] In *Knight v. Simmonds,*[26] the Court found that there had been no departure worth mentioning from the scheme initially adopted, and that the plaintiff had not acquiesced in the breach of which he now complained. But Lindley L.J., referring to the judgment of James L.J. in *German v. Chapman,* stated:

> It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom if ever have arisen except from a departure by the vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; *but, whatever the explanation of the altered state of things may be,* if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused. Nor do I understand the observations of Bowen and Fry L.JJ. in *Sayers v. Collyer* to be opposed to this view of the law. Their object evidently was, not to discredit the cases I have referred to, but rather to guard against a loose application of the principle on which they proceed.[27]

Both *German v. Chapman* and *Knight v. Simmonds* were cited by the Court in *Craig v. Greer.* But this notwithstanding, the trend away from a restrictive reading of *Sayers v. Collyer* was continued, in no uncertain terms, by the Court in *Sobey v. Sainsbury.*[28] There an application for an injunction was dismissed, it being found that the conduct of the plaintiff and of his predecessors in title was ample to prevent the Court from granting equitable relief. But Sargant J. was not content to rest his decision at this point, and went further, saying:

> But if this alone were not enough I think the Court is, under the express and precise language to that effect both of James L.J. in *German v. Chapman* and of Lindley L.J. in *Knight v. Simmonds,* entitled also

[24] Also, Behan, *op. cit.,* 154-162.

[25] (1877) Ch.D. 271, 279. The judgment of James L.J. merits a more extensive extraction: 'That is to say, if there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been either entirely or so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered at an end, then the covenantee is now allowed to come into the Court for the purpose merely of harassing and annoying some particular man where the Court could see he was not doing it *bona fide* for the purpose of effecting the object for which the covenant was originally entered into.'

[26] [1896] 2 Ch. 294, 299. *C.f. The Mayor of Plymouth v. Martin* (1884) 1 T.L.R. 5.

[27] *Knight v. Simmonds* [1896] 2 Ch. 294, 298. Italics supplied.

[28] [1913] 2 Ch. 513.

> to take into account the general change in the character of the neighbourhood irrespective of the particular acts and omissions of the plaintiff and his predecessors in title.[29]

To do otherwise, reasoned Sargant J., might result in proceedings for enforcement being brought from motives of spite or caprice, or from a desire to profit from the relaxation of technical but obsolete restrictions. This argument found favour with Farwell J. in *Chatsworth Estates Co. v. Fewell,*[30] the last of the English cases where the present issue was discussed. There, land which formed part of an estate was subject to a covenant, *inter alia,* not to use otherwise than as a private dwellinghouse. The property was being used as a guesthouse, and the plaintiff sought an injunction. Two grounds of defence were raised. The one of present interest was that, quite apart from the conduct of the plaintiffs or of their predecessors, the character of the neighbourhood had changed to such an extent that the covenant was no longer enforceable. Neither ground succeeded, and an injunction was awarded. But Farwell J. far from denied that such a defence could exist:

> A man who has covenants for the protection of his property cannot be deprived of his rights thereunder merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not *bona fide* at all, and merely brought for some ulterior purposes.[31]

It should, however, be noted that in no case has injunctive relief been granted where the activity complained of had occurred on land outside the tract, or had not been brought about by the conduct of the plaintiff or by that of his predecessors in title.

Section 84 of the Law of Property Act 1925 empowers the Lands Tribunal to discharge or modify a restrictive covenant on being satisfied, *inter alia,* that by reason of changes in the character of the neighbourhood such resriction ought to be deemed obsolete.[32] Sub-section

[29] *Ibid.* 529. [30] [1931] 1 Ch. 224.

[31] *Ibid.* 230. But see arguments on 227, 228: 'The Court is entitled to consider the change in the neighbourhood irrespective of the plaintiffs' acts or omissions: *Sobey v. Sainsbury,* where Sargant J. took into account the change brought about by the acts of adjoining owners outside the district.'

'(Farwell J. I need not consider whether that was right, but I doubt it) . . .'

'It is unnecessary here to consider whether in *Sobey v. Sainsbury* Sargant J. went too far in considering the change in property outside the district.'

'(Farwell J. I think he did. But the question here is whether the plaintiffs or their predecessors have so acted as to put the defendant to rest as regards these covenants).'

[32] (1) The authority hereinafter defined shall . . . have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant . . . as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—(a) that by reason of changes in . . . neighbourhood or other circumstances

(9)[33] provides that where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Lands Tribunal for the discharge or modification of the covenant and to stay the proceedings in the meantime. Perhaps for this reason there have been no decisions directly on the change of neighbourhood doctrine in recent times.[34]

In *Frick v. Foley*, the Court of Chancery of New Jersey said:

> In England, the rule appears to be firmly established that a change in the character of a neighbourhood will not impel a court of equity to deny the enforcement of a restrictive covenant of this nature, where the change which has taken place was beyond the control, and independent of the action, of complainant or those under whom he holds. *Osborne v. Bradley*, (1903) L.R. 2 Ch. 446, 450; *Sayer v. Collyer*, *(sic)* L.R. 28 Ch.Div. 103; *Craig v. Greer*, (1899) 1 Ir.Ch. 258. In these cases the leading case of *Bedford v. British Museum*, 2 Myl. & K. 552, is distinguished, in that in the *Bedford Case* the acts of complainant contributed to the changed conditions which made burdensome the restraint which was sought.[35]

This reading of English law may be questioned. Being decided in 1928, *Frick v. Foley* pre-dated *Chatsworth Estates Co. v. Fewell*. But the omission of the Court to refer to *Sobey v. Sainsbury*, and the cases there discussed, cannot be so explained. Contrary to the view expressed by the New Jersey Court, the English cases are in conflict.

Thus, it seems clear that a court requires 'very strict evidence' of changed conditions.[36] And *Sayers v. Collyer* undoubtedly insists that the principle of the *Duke of Bedford's Case* is one aspect only of the rule that he who comes to equity must come with clean hands. Its operation requires a personal equity against the plaintiff, a requirement which would, in general, render the principle inapplicable to cases where development had occurred on land outside the tract.

There seems, however, no good reason for so restrictive an approach. Certainly in the *Duke of Bedford's Case* the plaintiff's conduct was subject to careful scrutiny by the Court, and the refusal of the *Sayers v. Collyer* line of cases to permit the existence of the change of neigh-

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of the case . . . the restriction ought to be deemed obsolete, . . . Lands Tribunal Act, 1949, s. 1: (4) The Lands Tribunal shall . . . exercise (a) the jurisdiction conferred on the authority under s. 84 of the Law of Property Act 1925 (which relates to the discharge and modification of restrictive covenants) . . .

[33] *Feilden v. Byrne* [1926] Ch. 620; *Richardson v. Jackson* [1954] 1 W.L.R. 447. Also, *Chatsworth Estates Co. v. Fewell* [1931] 1 Ch. 224.

[34] Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, (1960), 3rd ed., 130.

[35] (1928) 141 Atl. 172, 172-173, *per* Leaming V.C. (affirmed *Frick v. Northern Trust Co.* (1929) 146 Atl. 914).

[36] *Ramuz v. Leigh-on-Sea Conservative and Unionist Club (Limited)* (1915) 31 T.L.R. 174.

bourhood doctrine separate from acquiescence no doubt relates back to this undue movement to the plaintiff. But the *Duke of Bedford's Case* was one of first impression and, quite understandably, the Court was not reluctant to emphasize the plaintiff's activity and so bring into its decision some notion analogous to the 'clean hands' doctrine. Indeed, the facts would seem to have all but precluded any other approach by the Court. Unlike the general run of later cases, there had been no sub-division. The action was not between subsequent purchasers of different lots. The defence did not allege conduct on land completely disconnected with the plaintiff and with the scheme of development. There seems no reason, therefore, why the Court should not have concerned itself with, and based its decision upon, the facts before it. But if this is so, why must the decision be so limited? If, as stated by Lindley L.J. in *German v. Chapman*, the ground for refusing injunctive relief is that the preservation as intended of the land burdened by the covenant is no longer possible, the merit of mechanically applying the reasoning of the Court out of its context to circumstances where development has occurred outside the tract, is not easy to discern. Participation by the plaintiff in bringing about the altered state of affairs may give rise to alternative reasons for denying relief. Acquiescence or abandonment may, in such circumstances, also be pleaded. At the most, however, such concepts have served their function of rendering more easy the formulation of new principles. Their absence should in no way necessarily preclude the Court from withholding injunctive relief.

B. *Canadian Law*

Few Canadian cases have discussed this issue. In *Van Koughnet v. Denison*,[37] *Sayers v. Collyer* was, without question, applied by at least two members of the Ontario Court of Appeal. But this was not so in *Cowan v. Ferguson*,[38] a later decision of the Appellate Division of the Supreme Court of Ontario. The action, which concerned land in Galt, was based upon a restrictive covenant taken in 1842, and was brought to restrain the defendant from maintaining a foundry upon her land. In 1842 Galt was a small country village but, by the date of the action, it had become a thriving industrial city. It seemed to Latchford J., at first instance, that there was no merit in the plaintiff's claim, which he dismissed invoking the change of neighbourhood principle. The plaintiff appealed. It was contended that the docrine was applicable only where the party seeking to enforce the covenant (or his predecessors in title) had been a party to making the changes. This contention was rejected by the Court, which approved and

[37] [1885] O.A.R. 699, 701, 710.

[38] (1919) 48 D.L.R. 616.

applied *Sobey v. Sainsbury.*[39] In *Munnion v. Winch*[40] the Court of Kings Bench of Manitoba held that there had been no change in the nature of the district, and accordingly the plaintiff's injunctive suit succeeded. In *Alexander v. Malcheski*[41] the same Court again granted an injunction holding that, unlike in *Chatsworth Estates Co. v. Fewell,* there had not been so complete a change in the character of the neighbourhood that there was no longer any value left in the agreement at all, and distinguished both *Cowan v. Ferguson* and *Sobey v. Sainsbury* on the basis that the restrictions had not become obsolete and meaningless.

C. *American Law*

(i) The first cases

In *Trustees of Columbia College v. Thacher*[42] the plaintiff, who owned land on Fiftieth Street, New York, entered into an agreement with Beers, the then owner of adjacent portions of the block between Fifth and Sixth Avenues and Fiftieth and Fifty-First Streets. The general object of this agreement was 'to provide for the better improvement of the lands, and to secure their permanent value'. This object was to be effectuated by the erection, by both parties, of superior class dwellinghouses and by their entering into covenants restricting the use of the land accordingly. The plaintiff sought to enjoin the use, in part, of the lot on the corner of Fiftieth Street and Sixth Avenue for the purposes of trade and business. Thacher, having acquired title to this property with notice of the covenant and with notice of the proceedings, was made a defendant by order of the court, upon his own application. It was contended that there had been such an entire change in the character of the neighbourhood as to defeat the object and purpose of the agreement, and further, that it would be inequitable to deprive the defendant of the privilege of conforming his property to the then character of the surrounding land, so that he could use it to his greater advantage, and in no respect to the detriment of the plaintiff. Business user had encroached up Sixth Avenue and had reached and passed beyond the defendant's lot. On this alone the plaintiff would have succeeded, for as the Court found, this was the circumstance which the original parties had foreseen and intended to guard against. But the factor of critical importance was the erection in Sixth Avenue, since the proceedings were commenced, of an elevated railway. This railway ran past the defendant's premises and

39 [1913] 2 Ch. 513, 528.
40 [1937] 2 D.L.R. 469. Appeal dismissed [1938] 4 D.L.R. 656.
41 (1953) 8 W.W.R. (N.S.) 73. Appeal dismissed (1953) 9 W.W.R. (N.S.) 334.
42 (1882) 87 N.Y. 311.

a station had been built in front of them at the intersection of Sixth Avenue and Fiftieth Street. Danforth J., with whom the other members of the New York Court of Appeal concurred, said:

> It is obvious, without further detail, that the construction of this road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, on all those originally owned by him, who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance. Nor are the causes of this depreciation transient . . . The land in question furnishes an ill seat for dwelling-houses, and it cannot be supposed that the parties to the covenant would now select it for a residence, or expect others to prefer it for that purpose . . . Submission to this is necessary, because it is authorized by the legislature, and so the defendant is made incapable of carrying out, if he should desire it, the wishes of those by whose agreement he would otherwise be bound.[43]

This case merits further consideration, for practically all the later decisions are 'bottomed upon' the rule there pronounced.[44] Although decided some sixty years earlier, the *Duke of Bedford's Case* was not mentioned by the Court. On reflection this is not curious for, though the *Columbia College Case* was decided one year before *Sayers v. Collyer* rendered less easy a more liberal reading of the *Duke of Bedford's Case*, the issues before the respective courts were quite dissimilar.[45] Instead, the Court drew support from *Baily v. DeCrespigny*.[46] There, an action at law was commenced against the defendant for damages for breach of agreement. The land, the subject of this agreement, had been compulsorily acquired by a railroad company whose activity had caused the breach of which the plaintiff complained. The action failed on the ground that the transfer to the company was not voluntary but by compulsion of law, and that accordingly the defendant was discharged from his covenant: *lex non cogit ad impossibilia*. It seemed to Danforth J. that although in the *Columbia College Case* the land was not itself taken, the elevated railroad had taken away those features of the district which induced the original parties to restrict the use of the property exclusively to dwellinghouses. Perhaps because of the wording of the agreement the Court tended to stress the permanent, as opposed to transient, nature of the depreciation. Worthy of note also is the change of approach. In the *Duke of Bedford's Case* it was the conduct of the *plaintiff* which was stressed: that he had by his conduct rendered the granting of an injunction inequitable. In the *Columbia College Case* emphasis was placed upon the *defendant's* conduct. The railroad company, acting under statutory powers, had

[43] (1882) 87 N.Y. 311, 320, 321.
[44] *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398, 408.
[45] *Infra.*
[46] (1869) L.R. 4 Q.B. 180.

created a state of affairs wherein the defendant was incapable of carrying out the intention of the parties to the agreement.

Much the same approach is discernible in *Jackson v. Stevenson*,[47] decided ten years later by the Supreme Court of Massachusetts. There, the City of Boston owned an area of land known as the 'Arsenal Estate' which was situated in an area of the City then chiefly used for the more expensive residences. The City caused the land to be divided into eight lots and sold. In order to preserve the character of the land as residential, the sales were subject to certain restrictions as to building. The parties to the present action were each owners of a lot. The defendant also owned property abutting on the rear of his lot. He intended to erect a market on this other property and proposed to build a connecting structure over the entire rear portion of his lot in a manner inconsistent with the restrictions. To this the plaintiff objected and sought to enjoin such activity. It was found that after the lapse of thirty-eight years there had been a considerable change in the character of the neighbourhood which was, at the date of the action, to all intents and purposes, a business or mercantile one. In denying the plaintiff injunctive relief, the Court said:

> Assuming these points in favour of the plaintiffs, we are nevertheless of the opinion that an injunction should not be granted in the present case. It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that owing to the general growth of the city, and the present use of the whole neighbourhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than this breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made. *Duke of Bedford v. Trustees*, 2 Mylne & K. 552; *German v. Chapman*, 7 Ch.Div. 274, 279; *Sayers v. Collyer*, 24 Ch.Div. 180, 187; *Trustees v. Thacher*, 87 N.Y. 311; *Green v. Richmond*, 155 Mass. 188; 29 N.E.Rep. 770.[48]

(ii) The doctrine exists

Numerous cases have upheld the existence of the doctrine, as here discussed.

A reading of the cases where the changed conditions have occurred entirely on land outside the tract discloses no insistence that, for injunctive relief to be denied, there must be a personal equity against the plaintiff. It seems of no moment that the required change might have resulted from circumstances over which neither of the parties

[47] (1892) 31 N.E. 691.

[48] (1892) 31 N.E. 691, 693.

had any control.[49] Thus in *Frick v. Foley*, the Court (enforcing a covenant restricting the use of property to residential purposes only, despite the fact that there had been a development of business enterprise on the opposite side of the street in unrestricted territory), after reviewing some English cases,[50] said:

> In this country some courts have adopted, and others have rejected, the view that the change in the character of a locality may so far defeat the object and purpose of the covenant, and render its observance so burdensome to defendant, and of so little benefit to complainant, that its enforcement will be denied, even though complainant should in no way be in fault or responsible for the change. *Trustees of Columbia College v. Thacher*, 87 N.Y. 311, 41 Am.Rep. 365, is a leading case of that class.
>
> In this state, in *Page v. Murray*, 46 N.J.Eq. 325, 19 A. 11, Chancellor McGill appears measurably to sanction the New York rule, but found as a fact that the complainant's conduct equitably denied him the relief which he sought.[51]

In the result, however, the Court did not find it necessary to determine whether the New York rule might be said to obtain in New Jersey, though later cases have established that it undoubtedly does.[52]

Nor is the fact that the changed conditions occurred entirely on land *without* the restricted addition considered material. In *Elrod v. Phillips*[53] the Court did not concur with the conclusion that the lack of any substantial change in the use of the property *within* the boundary of the subdivision, as originally laid out and restricted, was a '*sine qua non*' to the plaintiff's position. In *Talles v. Rifman*,[54] there were no breaches in the restricted block. It was contended that changes, even radical changes, in the adjoining neighbourhoods, did not affect the covenants there in issue and that, therefore, there was no ground for equitable relief. This argument was rejected by the Court of Appeals of Maryland, which said that while it did not disagree with the contention that the change alleged must have affected the property in question, it did not think that the courts were limited to an investigation of what had happened in the restricted property itself. This is because the object of the enquiry is to determine whether the reasons which produced the restrictions continue to exist.

Possible exceptions:

In the vast majority of cases, however, that there is an independent doctrine of change of neighbourhood has been assumed without comment. But occasionally statements denying its existence are found.

49 *Katzman v. Anderson* (1948) 59 A.2d. 85; *Daniels v. Notor* (1957) 133 A.2d. 520. 50 *Supra* p. 213 51 (1928) 141 Atl. 172, 173, *per* Leaming V.C.

52 *Weinstein v. Swartz* (1949) 68 A2d. 865; *Humphreys v. Ibach* (1932) 160 Atl. 531. 53 (1938) 199 S.E. 722, 725.

54 (1947) 53 A2d. 396. Also, *Pollack v. Bart* (1953) 95 A2d. 864; *Esso Standard Oil Co. v. Mullen* (1952) 90 A2d. 192; *Norris v. Williams* (1947) 54 A2d. 331.

In *Rombauer v. Compton Heights Christian Church* the Court, interpreting *Pierce v. St. Louis Union Trust Co.*,[55] stated:

> If no radical change in the condition and use of the restricted property occurs, the circumstances that there have been changes in the territory *surrounding* the covenanted area will not of itself be sufficient to destroy the restrictions.[56]

But the *St. Louis Union Trust Co. Case* was decided on the basis that there had been no radical change of conditions, and the Court immediately continued by pointing out that this rule did not mean that the purpose of the restrictions could be defeated only by some physical change in the usage within the tract. An 'exception'[57] thereto would occur if a tract restricted to residential use should become surrounded with industrial buildings which emit obnoxious smoke or fumes or otherwise create objectionable conditions such as to render the district wholly undesirable, or totally unfit for residential purposes.[58] In the result, therefore, the Missouri cases seem quite consistent with the decisions of other jurisdictions.[59]

In *Vernon v. R. J. Reynolds Realty Co.*,[60] the Supreme Court of North Carolina was of the opinion that equity was bound to give effect to a contract unless changed conditions could be shown within the covenanted area which were acquiesced in to such an extent as to constitute a waiver or abandonment. Burnhill J. said:

> The changed conditions outside the development afford no grounds for relief. Those who purchase property subject to restrictive covenants must assume the burdens as well as enjoy the benefits, for equity does not grant relief against a bad bargain voluntarily made and unbreached.[61]

Restricted to the problem of the encroachment of business up to the perimeter of a residential tract, this view accords with the majority rule,[62] though there is a decided conflict on this point within the North Carolina cases themselves.[63] Business encroachment was not, however, the issue with which the Court was dealing in the *Vernon Case*. If it was there meant to formulate some large principle that a

[55] (1925) 278 S.W. 398.
[56] (1931) 40 S.W.2d. 545, 553, *per* Ellison C. Also, *Schwartz v. Hubbard* (1947) 177 P.2d. 117.
[57] *Porter v. Johnson* (1938) 115 S.W.2d. 529, 534. Also *Swain v. Maxwell* (1946) 196 S.W.2d. 780.
[58] *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545, 553, *per* Ellison C.: 'Thus, for example, a tract restricted to residential use might become surrounded by manufacturing establishments emitting obnoxious odors or gases or otherwise creating objectionable conditions such as would render it totally unfit for use as a residential section, although the manufacturing enterprises causing the changed conditions were not actually located within it.'
[59] *Infra.*
[60] (1946) 36 S.E.2d. 710.
[61] *Ibid.* 712.
[62] *Infra.*
[63] *Infra.*

change in conditions outside a tract is immaterial *in any context*, this certainly refuses change of neighbourhood an independent operation. But there is no uniformity, and whether the doctrine is so rejected must be regarded as doubtful. Recently, in *Logan v. Sprinkler*, it was said:

> Furthermore, in light of the findings by the court below, the court has the right to consider the changed conditions *in the immediate area, without as well as within the development. Muilenburg v. Blevins,* 242 N.C. 271, 87 SE2d. 493; *Shuford v. Asheville Oil Co.,* 243 N.C. 636, 91 SE2d. 903.[64]

(iii) Comments on English law in the American cases

There is not overmuch mention of the *Duke of Bedford's Case*. This is not surprising, for the *Columbia College Case* has itself provided a most fertile, and almost exclusive, source of reference, a source to which subsequent courts have almost invariably returned when they have felt in need of guidance. But on such occasions as the English authorities are discussed, it seems that the reading of English law in the early cases has been accepted without question by later courts. The result is that there is virtually no reference to *Sobey v. Sainsbury* and the trend away from a restrictive reading of the *Duke of Bedford's Case* there crystallized.[65] As in *Frick v. Foley*,[66] any discussion of English law seems to have centred around the *Sayers v. Collyer* line of cases which, though this may not be so,[67] seems generally to have been regarded as stating the law in England. By way of illustration, in 1931 the Supreme Court of Missouri stated:

> But the principal difference between the English doctrine and that followed in America is that in England restrictive covenants will be enforced by injunction, *irrespective of changed conditions,* if the complainant or his predecessors in title were not responsible for them.[68]

And a like view is expressed in other cases.

In *Star Brewery Co. v. Primas*[69] the plaintiff, the owner of the Bluff Saloon, sold in 1891 a vacant lot situated near to his property, to a predecessor in title of the defendant. The conveyance included a clause to the effect that, so long as the plaintiff owned the Bluff Saloon, the property sold was not to be used as a saloon. This property was so

64 (1961) 123 S.E.2d. 209, 214.

65 *Supra.*

66 (1928) 141 Atl. 172. *Supra.*

67 *Supra.*

68 *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545, 554, *per* Ellison C. This passage continues: 'See 28 L.R.A. (N.S.) page 707, note; 54 A.L.R. page 813, note. In this country, while a radical change in conditions may deter the courts from granting injunctive relief, yet a survey of the leading decisions on the subject will clearly show, we think, that, when the complainant comes into court with clean hands and guiltless of any charge of laches, waiver, or estoppel, equity will enforce restrictive covenants made for the benefit of his land, *if they remain of substantial value,* even though because of the changed conditions a hardship will be visited on the servient estate.'

69 (1896) 45 N.E. 145. Also, *Sandusky v. Allsopp* (1926) 131 Atl. 633.

used, and the plaintiff sought an injunction. For the defendant it was argued, *inter alia*, that there had been such a change in the circumstances as to render the restriction useless and of no value to the plaintiff: that the covenant was taken to avoid competition with the Bluff Saloon, and that although in 1891 there were only two saloons in the neighbourhood, at the time of the hearing this number had increased to eight. It was held that the change alleged could not have the effect of making compliance with the covenant unreasonable or oppressive. But Magruder C.J., in delivering the opinion of the Court, and citing the *Duke of Bedford's Case* and *Sayers v. Collyer*, said:

> There are authorities, referred to by appellant's counsel, which hold that if the character of the neighbourhood has so changed as to defeat the purpose of the covenant, and thus render its enforcement unreasonable, it will not be enforced. But, in most cases where this doctrine has been applied, it will be found that two elements exist which are not found in the present case, namely: First, the change in circumstances has resulted from some act or acts of the grantor in the deed, or of those holding under him; . . .
>
> It is true, as a general thing, where the acts of the grantor, or those deriving their title under him, have altered the character and conditions of the adjoining lands so as to make the restriction of the covenant inapplicable according to the intent and spirit of the contract, that courts of equity refuse to interfere by injunction to prevent a breach of the covenant, and leave the parties to their remedy at law . . . But in the present case the new saloons were not upon appellee's land; nor was appellee, nor anyone holding under him, responsible for their existence. The change produced by opening the new saloons was not his act, nor the act of any party claiming through or under him.[70]

In *Page v. Murray*[71] the plaintiff's conduct and the equity thereby created was discussed in a context which clearly shows that the Court considered it was dealing with a concept quite separate from the change of neighbourhood doctrine. Much the same can be said of *Brown v. Huber*, where the Court stated that the 'English rule would seem to be that . . . relief by injunction will be denied only on the grounds of equitable estoppel'.[72]

(iv) Accident of litigation

In both the *Columbia College Case* and *Jackson v. Stevenson* neither the plaintiff nor the defendant were in any way at fault, and

[70] (1896) 45 N.E. 145, 147-148.

[71] (1890) 19 Atl. 11, 14, *per* McGill Ch.: 'The complainant's acceptance of the conveyance last mentioned without a restrictive covenant, and his subsequent erection of the greenhouse and small dwelling, evince a disposition upon his part not to himself observe the spirit and intent of the covenant, and present an equity for the defendants of the character that induced Lord Eldon in *Duke of Bedford v. Trustees*, 2 Mylne & K. 552, to withhold the enforcement of a covenant essentially similar to that which is here considered.'

[72] (1909) 88 N.E. 322, 328, *per* Crew C.J.

this is the usual situation where the development has occurred outside the tract. In neither case was an injunction granted. As has been stated, both Courts stressed the defendant's conduct and were at pains to point out that the changed conditions were not the result of any fault on his part, but were due to lawful acts of third parties. Thus, in the *Columbia College Case* the Court talked of acts for which neither the defendant nor his grantors had been responsible.[73] In *Jackson v. Stevenson* the Court took care to note that the changed conditions had resulted from other causes than breach of the restrictions there sought to be enforced.[74]

This treatment of the issue differs vitally from that found in the *Duke of Bedford's Case*, where it was the plaintiff's conduct which was the subject of careful scrutiny by the Court.[75] The *Columbia College Case* and *Jackson v. Stevenson* blazed the trail for later American courts, and the question which seems to suggest itself is, to what extent the difference between the *Sayers v. Collyer* approach in England, and the reasoning discernible in these two cases, is but an accident of litigation. The facts presented to the respective Courts in the *Duke of Bedford's Case* and in the *Columbia College Case* differed. In the former, development had occurred upon the plaintiff's land, and as a result of his activity or that of his predecessors in title. In the latter, development had taken place outside the tract and independent of the plaintiff's conduct. There is a question as to what the attitude of the English Court would have been had it been faced with a fact situation similar in substance to that which was before the Court in the *Columbia College Case*. It would seem that the English Court would have found it necessary to eradicate from its judgment any reference to acquiescence. But this notwithstanding, would not injunctive relief still have been refused even having regard to the plaintiff's disconnection with the changed state of things? Might not the Court have reasoned in a manner not too dissimilar from that found in the *Columbia College Case*? Had this been so, the development of the law thereafter in the English courts would have been unfettered by any notion of the clean hands doctrine. As a corollary, had it been the plaintiff who had built the elevated railway in the *Columbia College Case*, it is possible that the Court, whilst reaching the same decision, would have accentuated the conduct, not of the defendant, but of the plaintiff.

73 (1892) 31 N.E. 691, 693.

74 In *Evans v. Foss* (1907) 80 N.E. 587, 589, Knowlton C.J., referring to *Jackson v. Stevenson*, stated: 'The facts of that case were very different from those of the present case. In the present case no use has been shown of any part of the property on which the restriction was put, that is in violation of the restriction.' The inference this suggests seems clearly inconsistent with the facts of *Jackson v. Stevenson*.

75 *Supra*.

3. THE BASIS OF THE DOCTRINE AND THE LIMITS OF ITS OPERATION

A. *Basis*

In *St. Lo Construction Co., Inc. v. Koenigsberger,*[76] in 1907 a subdivision was created, the several lots being subject to a covenant restricting the user to residential and expressly precluding the erection of an apartment house. In 1941 the predecessor in title of the present appellant brought an action for the cancellation of the covenant on the ground that the neighbourhood had so changed that the covenant was no longer applicable. This action was dismissed in December 1943 and thereafter, with knowledge of the suit, the present appellant company purchased the property. The appellant prepared plans and procured a permit to build an apartment house, and the plaintiffs sought an injunction to restrain such conduct. The trial court granted an injunction, holding that the issues there before it, so far as they related to conditions as at December 1943, were *res judicata* by reason of the judgment in the prior litigation, and that no evidence of a substantial change since that date had been presented. On appeal, the judgment of the Court below was affirmed by a majority. The appellant contended that the prior judgment went merely to the point that the covenant should not be invalidated, so that in the event of a breach, the owners of the servient property should be liable for damages, but that this did not prevent the Court from refusing an injunction, leaving the owners free to break the covenant and then pay damages. This argument was rejected in the majority judgment in these terms:

> To reach the conclusion suggested by appellant, it would be necessary to hold that the validity of this covenant is so different from its enforceability that judicial determination of the former is not determinative of the latter, even where the issue of fact upon which the two determinations rest is the same. We cannot so hold. The constitutional and statutory provisions involved in *Hurd v. Hodge,* which made the difference between validity and enforceability in that case, are not in this one.
>
> It seems to us that the issue whether this neighbourhood has so changed as to make the covenant invalid is exactly the same as the issue whether the neighbourhood has so changed as to make the covenant non-enforceable. It follows that the prior litigation was *res judicata* of the present action, as of December, 1943.[77]

As has been stated, the Court held that no evidence of a substantial change since 1943 had been presented. But had such been the case, it seems that conditions as they existed at the date of the prior judgment would have needed to have again been considered. For although

[76] (1949) 174 F.2d. 25, (*cert. den.* 338 U.S. 821).

[77] (1949) 174 F.2d. 25, 27-28, *per* Prettyman, Circuit J. *Cf. Cowling v. Colligan* (1958) 312 S.W.2d. 943. *Infra.*

the effect of such conditions, by themselves, was *res judicata,* the process of change is cumulative. The proper comparison would not, it is considered, have been the state of affairs as at the taking of the covenant as opposed only to changes which had occurred since 1943. The relevant comparison would have been between the situation in 1907 and the circumstances as at the date of the later proceedings, including changes both before and after 1943. This was brought out recently in *Normus Realty Corp. v. Gargano,*[78] where the Court considered proceedings for the discharge of a restrictive covenant. In 1954 the same plaintiff had sought the same relief with respect to the very same property and restrictive covenant as was then in issue. In the 1954 suit the Court found that the plaintiff had not established such a radical change as to render the covenant obsolete, though it recognized the possibility of future change. The New York Court rejected the plea of *res judicata,* pointing out that it was then presented with the issue of whether such future changes had occurred since 1954 as to render the covenant in question obsolete and inequitable. Of interest is the way Lyman J. posed the question:

> Presently presented to the Court is a factual issue, namely whether the changes occurring since 1954, *coupled with the changes between 1919 and 1954* have now rendered the covenant obsolete.[79]

There is a further point of more generality. It may be that the facts before the Court in the *St. Lo Construction Co. Case* would not, in any event, have justified the withholding of injunctive relief. But the equation by the majority of proceedings for cancellation of a covenant with proceedings for injunctive relief, seems to reflect a curiously imperfect appreciation of the basis of the change of neighbourhood doctrine and cannot, it is considered, be supported.

In many jurisdictions statute has conferred upon the courts power to grant positive relief (or such jurisdiction has been judicially evolved) and has enunciated as one of the prerequisites thereof a change in the character of the neighbourhood. As was very clearly said by Edgerton, Circuit J., in his dissenting judgment, proceedings of this kind do not, however, raise exactly the same issues as are involved in proceedings for an injunction which are resisted on the ground of change of neighbourhood:

> The character of the neighbourhood and the extent of change were relevant not only to the question whether the covenant was valid, which the court decided in the cancellation suit, but also to the question whether it would be equitable to enjoin the erection of an apartment house (or other violation of the covenant), which the court did not have to decide or have before it. But this does not make the two

78 (1963) 237 N.Y.S.2d. 648.

79 237 N.Y.S.2d. 648, 650. Italics supplied.

> questions one . . . In other words, to say that a proposed violation of a covenant should not be enjoined is not to say that the covenant is invalid and should be cancelled. Conversely, to say that a covenant should not be cancelled is not to say that a particular violation, or any other, should be enjoined.[80]

In a cancellation suit, or in proceedings for a declaration, affirmative judicial relief is sought which, if granted, operates to extinguish the covenant so that thereafter it no longer exists. But a plea of change of neighbourhood in an injunction suit operates as a defence.[81] If successful, it is merely that the particular remedy sought is refused. The obligation created by the covenant is in no way affected, so that if thereafter circumstances change, there is no reason why an injunction cannot be then issued. Therefore, a more radical change is required for a court to cancel a covenant, or declare it unenforceable, than is necessary to induce a court to refuse injunctive relief. The Supreme Court of Appeals of Virginia, in *Booker v. Old Dominion Land Co.*, put it this way:

> This proceeding, however, is, as stated, under the Declaratory Judgment Act, to secure a decree adjudicating that the restrictive covenants are of no force or effect. Such a proceeding differs from a suit to enjoin a breach of the restrictions. There equity might refuse an injunction and remit a plaintiff to an action at law for damages, basing the refusal on the ground that an injunction would do great injury to the defendant and be of little value to the plaintiff. The relief here sought, if granted, would nullify the covenants, at least in plaintiffs' title, for all time and all purposes, even though future changes might completely remove the ground for doing so. More is required to warrant such a decree than is necessary when only the injunctive powers of equity are exercised.[82]

A correct understanding of the basis of the doctrine is of importance where the limits of its operation are material. This will be here discussed in three contexts.

B. *Limits*

(i) Where the doctrine is invoked other than as a defence to an injunction suit

The issue here discussed has not been directly raised in any English case. The one which seems closest is *Iveagh v. Harris*.[83] There an action was brought to recover possession of land of which the defendant was the lessee. The plaintiff alleged a breach of a covenant not to occupy

[80] *St. Lo Construction Co. Inc. v. Koenigsberger* (1949) 174 F.2d. 25, 29 (*cert. den.* 338 U.S. 821).
[81] *Infra.*
[82] (1948) 49 S.E.2d. 314, 320, *per* Buchanan J. Also, *Bickell v. Moraio* (1933) 167 Atl. 722; *Hackett v. Steele* (1956) 297 S.W.2d. 63.
[83] [1929] 2 Ch.D. 142.

the premises other than as a private dwellinghouse and sought to enforce the right of re-entry contained in the lease. The defendant alleged that the conditions of the neighbourhood had so changed since the date of the lease that the restriction ought to be deemed obsolete. He asked for leave to make an application under section 84 of the Law of Property Act 1925 (which provides for affirmative relief by the discharge or modification of restrictive covenants) and for an order staying the present proceedings in the meantime, a procedure in accordance with section 84(9).[84] This sub-section, however, has application only when any proceedings, by action or otherwise, are taken 'to enforce a restrictive covenant'. Eve J. held that the remedy sought was not an injunction but the recovery of possession and mesne profits, and that in his suit for possession the plaintiff was not proceeding by action or otherwise to enforce the restrictive covenant, and section 84(9) accordingly had no application. The decision, therefore, turned upon this narrow ground. But there are several American authorities of more general application.

In *Welch v. Austin*[85] it seemed plain to the Supreme Judicial Court of Massachusetts that the change of neighbourhood doctrine had no application to proceedings at law under a statute to ascertain the limits of a restriction. In *Coudert v. Sayre*[86] the plaintiff commenced proceedings for a declaration that a covenant was without force insofar as it restricted the number of dwellings that might be erected upon his land. In holding the covenant to be valid, the Court considered the *Duke of Bedford's Case* and the *Columbia College Case,* and pointed out that neither went to the extreme length of holding that, because circumstances exist which might induce a court of equity to refuse injunctive relief, a covenant should, therefore, and in advance of a breach, be declared a nullity. To emphasize this the Court pointed out that the question whether, in view of the facts then before it, an injunction would be granted to the defendant should thereafter the plaintiff commit a breach of covenant, had not received the 'slightest attention'. In *Kountze v. Helmuth*[87] an action was brought to recover damages for breach of a contract for the sale and purchase of land. On examination of title, the purchaser discovered certain restrictions which he alleged to be defects in title. At first instance the Court refused to admit evidence offered by the defendant to show a change in the character of the neighbourhood. On appeal, this evidence was held to be properly excluded. Lawrence J. pointed out that, although in view of the change of neighbourhood a court might not sustain an action for specific enforcement of the covenant, such a fact did not exonerate one who violated a covenant from an action for damages.

84 *Supra.* 85 (1905) 72 N.E. 972. 86 (1890) 19 Atl. 190.
87 (1893) 22 N.Y. Supp. 204, affirmed on other grounds (1893) 35 N.E. 656.

Therefore, the plaintiff was not bound to take a title which could subject him to such a suit by adjoining owners. The case of most interest is *Strong v. Shatto*,[88] a decision of the District Court of Appeal of California. There the plaintiff brought an action to quiet title. Certain conditions subsequent limited the use of property to residential purposes only, and prescribed the nature and quality and cost of buildings to be thereon erected. The grantor, his heirs, successors and assigns, were given a right of immediate entry in the event of breach of condition. The trial Court gave judgment for the plaintiff, cancelling the restrictions, and the defendant appealed. It was admitted that the character of the property had changed, and the respondent contended that under such changed conditions equity would not enforce a covenant or condition for forfeiture of title. Sloane J., with whom Findlayson P.J. and Thomas J. concurred, after pointing out that no authorities had been cited by the respondent in support of this contention, stated:

> The doctrine that equity will not enforce restrictions on the use of property, we think, only applies to cases where it is sought to enforce such restrictions by equitable proceedings, where the reason and justification for them has failed through changed conditions. In other words, under such circumstances a court of equity may deny the relief sought. But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as circumstances change. *It is only the granting of equitable relief, and not the binding force of the restrictive covenant, that is affected by a change in the conditions.*[89]

Subsequent developments of the law should be noted. In 1921 California enacted a Declaratory Judgment Act. In *Strong v. Hancock*[90] the question was raised as to whether or not the enactment of this statute required an abandonment of the rule announced in *Strong v. Shatto,* that prior to the breach thereof an action would not lie to quiet title as against covenants and restrictions running with the land. The Court, however, for reasons not here material, found it necessary to pass upon this point, but Shenk J., in a special concurring opinion, expressed the view that the Act was sufficiently broad and comprehensive in its language to apply to such actions. This view was approved and adopted by the Supreme Court of California in *Hess v. County Club Park.*[91]

Relief by way of declaration or cancellation can now be obtained

88 (1919) 187 P. 159. And see *Strong v. Hancock* (1927) 258 P. 60.
89 (1919) 187 P. 159, 162. Italics supplied. But see, *Letteau v. Ellis* (1932) 10 P.2d. 496; *Koehler v. Rowland* (1918) 205 S.W. 217.
90 (1927) 258 P. 60. 91 (1931) 2 P.2d. 782.

in most jurisdictions and, indeed, is regarded as a well-established power of a court. Though the cases above discussed must be read subject to this affirmative jurisdiction, they remain of interest, for they do not represent some early view of change of neighbourhood that is now defunct. Their present importance is that they correctly adhered to the limits of the doctrine. Thereby they throw into vivid perspective the tendency, evident in the majority judgment in the *St. Lo Construction Co. Case*,[92] to blur the distinction between the more recent offshoot of the change of neighbourhood doctrine (that is proceedings for a declaration, or for cancellation of restrictions) and the doctrine itself. They emphasize that, today, to invoke change of neighbourhood in a context outside of a defence to an injunction suit is to transgress the boundaries of the doctrine as it formerly existed, and as it now continues to exist. This does not mean that any such application should be judicially rejected, but it should be appreciated that an application of this kind (not being proceedings for affirmative relief) may well raise issues not yet considered by the courts, issues which may demand careful reflection.

(ii) Claim for damages

Proof of special damage is not essential in proceedings for injunctive relief.[93] Indeed, where there is a breach of a restrictive covenant, it may be no easy matter to particularize with any degree of precision the exact loss involved, for the damages are usually not measurable in the terms of money.[94] In any event, the purpose of equitable jurisdiction is to prevent irreparable injury to comfort and enjoyment, although without damage.[95] If, however, damages can be proved, an injunction is now the only remedy available for breach of a restriction. As between the original parties to the covenant, an action may be instituted at law for the recovery of damages. Further, in some jurisdictions such a suit may also be available against subsequent purchasers.[96] Indeed, where because of changed circumstances it would be inequitable to enforce restrictions, courts not infrequently point out that equity will not enforce them, but will leave the plaintiff to

92 *Supra.*

93 *Cummins v. Colgate Properties Corp.* (1956) 153 N.Y.Supp.2d. 321; affirmed 153 N.Y.Supp.2d. 608; appeal denied 154 N.Y.Supp.2d. 845. Also, *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545.

94 This was well stated in *Cooper v. Kovan* (1957) 84 N.W.2d. 859 where, discussing a residential restriction, Edwards J., at 84 N.W.2d. 859, 864, said: 'Home owners seek, by purchasing in areas restricted to residential building, freedom from noise and traffic which are characteristic of business areas. How much in dollars the peace and quiet of this neighbourhood is worth, or how much the contemplated major business invasion would diminish that value, would be hard to establish. But it is clear in our mind that residential restrictions generally constitute a property right of distinct worth.' Also, *Greer v. Bornstein* (1932) 54 S.W.2d. 927.

95 *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652.

96 Casner, *The American Law of Real Property*, (1952), vol. ii.

whatever remedy he may have at law.[97] As stated in *Rombauer v. Compton Heights Christian Church*:

> This is not on the theory that the contract, as such, fails to cover the situation and does not apply to it, for, if that were true, it would be unenforceable even at law; but it is because the changed conditions forbid equitable intervention.[98]

This same result will follow in jurisdictions where equity is empowered to grant damages, for equity having assumed jurisdiction will grant complete relief.[99]

The propriety of a court to so uphold change of neighbourhood as a defence to an injunction suit, but, this notwithstanding, to nevertheless award damages for breach of covenant, has been questioned. Pound did not favour this procedure. His submission was that the sound course would be to hold that when the purpose of the restrictions could no longer be carried out the servitude should come to an end; that the duration of the servitude should be determined by its purpose. Pound said:

> If imposed for a fixed time, it will last no longer, but it may not last so long if the purpose becomes unattainable in the meantime. When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. There is then nothing left to protect by injunction and nothing for which to award damages.[2]

This would be a tidy solution to the problem. But it depends upon a court's construing a covenant as determinable with changed conditions, an interpretation seldom, if ever, expressed by the parties, and, as discussed above, rarely, if ever, implied by the courts,[3] and there is

[97] *Dolan v. Brown* (1930) 170 N.E. 425; *Greer v. Bornstein* (1932) 54 S.W.2d. 927; *Porter v. Johnson* (1938) 115 S.W.2d. 529; *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Welitoff v. Kohn* (1929) 147 Atl. 390; *Page v. Murray* (1890) 19 Atl. 11; *Weiss v. Cord Helmer Realty Corporation* (1955) 140 N.Y.Supp.2d. 95; *McClure v. Leaycraft* (1905) 75 N.E. 961; *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759; *Heitkemper v. Schmeer* (1934) 29 P.2d. 540, (*reh. den.* (1934) 30 P.2d. 1119); *Hysinger v. Mullinax* (1938) 319 S.W.2d. 79; *Stewart v. Valenta* (1962) 361 S.W.2d. 910; *Ault v. Shipley* (1949) 52 S.E.2d. 56; *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

[98] (1931) 40 S.W.2d. 545, 553, *per* Ellison C. Also, *Weiss v. Cord Helmer Realty Corporation* (1955) 140 N.Y.Supp.2d. 95, 99, *per* Benjamin A.J.: 'An action for damages for violation may be maintained although injunctive relief may be denied on account of the change of character of the neighbourhood, because the Court has no power to set at nought a binding contract, *Doyle v. John F. Olson Realty Co.*, 132 App.Div. 200, 116 N.Y.S. 834; see also *Dethloff v. Voit*, 172 App.Div. 201, 158 N.Y.S. 522; *Chesebro v. Moers*, 233 N.Y. 75, 134 N.E. 842, 21 A.L.R. 1270.' And see, *Porter v. Johnson* (1938) 115 S.W.2d. 529.

[99] *Heitkemper v. Schmeer* 29 P.2d. 540 (1934) (rehearing denied (1934) 30 P.2d. 1119). And see, *Jackson v. Stevenson* (1892) 31 N.E. 691; *Amerman v. Deane* (1892) 30 N.E. 741.

[1] 'The Progress of the Law, 1918-1919' (1920), 34 *Harvard Law Review*, 813, 821, discussing, *inter alia*, *Jackson v. Stevenson* (1892) 31 N.E. 691; *McClure v. Leaycraft* (1905) 75 N.E. 961; *Amerman v. Deane* (1892) 30 N.E. 741.

[2] 'The Progress of the Law, 1918-1919'. *Ibid.* 821.

[3] *Infra.*

good reason for the court's refusal to imply such a construction, for to so hold would involve acceptance of the view that frustration at common law and equitable frustration (that is circumstances in which equity will deny injunctive relief) are co-extensive in their operation. This does not appear so. The ambit of the operation of frustration at common law seems the more limited of the two. While circumstances may exist in which injunctive relief may be refused and yet frustration at common law not operate, surely equity would never grant an injunction where the common law would decree frustration.[4]

A further point was also referred to by Pound:

> But that course involves another difficulty. If the servitude still exists and the damages are not merely nominal, what authority has a court of equity to compel the dominant owner to sell it to his neighbour against his will for such sum as may be assessed as substantial damages? Surely when a court of equity is called on to protect a servitude from interruption it cannot say to the dominant owner in its discretion, sell out to the servient owner to whom the restriction has now become disproportionately inconvenient. Awarding substantial damages in such case to an unwilling dominant owner amounts to a condemnation of the servitude without legislative authority and for a private rather than a public use.[5]

This concept of a judicial sale is by no means peculiar to proceedings for the enforcement of a restrictive covenant. It has application to other suits where an injunction is sought and refused, noticeably nuisance actions.[6] An injunction, however, was fashioned by equity to supplement the common law remedy of damages, but only in situations where equity considered other available relief inadequate, for example, where a remedy at law would lead to a multiplicity of actions.[7] An injunction is a special remedy, and a plaintiff who seeks one must satisfy the court on several issues. From this it certainly does not follow that circumstances which give rise to an action for damages need necessarily be of the same order of intensity as those required to succeed in an injunction suit. In *St. Lo Construction Co., Inc. v. Koenigsberger*, the majority judgment pointed out that if the defendants' arguments were valid, covenants, including restrictions on building lines, minimum cost of buildings and use of land, would be of no effect, 'since any recalcitrant builder could violate them, and the other land owners would be left to the dubious recompense of provable damages'.[8] It may be that for this very reason such covenants are generally enforceable

[4] Derham and Mendes da Costa, 'Absolute Liability' (1963) 1 *New Zealand Universities Law Review* 37, 45, where the writers joined in making a similar statement in relation to specific performance. [5] (1918) 31 *Harvard Law Review* 876, 878.

[6] *Rose v. Socony-Vacuum Corp.* (1934) 173 Atl. 627. Generally, Haar, *Land-Use Planning* (1959) Ch. 2.

[7] *Reed v. Williamson* (1957) 82 N.W.2d. 18; *Hogue v. Dreeszen*, (1955) 73 N.W.2d. 159. [8] (1949) 174 F.2d. 25, 27 (*cert. den.* 94 L.Ed. 498).

by injunction. But to conclude from this the proposition that a restrictive covenant, if valid, must be enforced by injunction, involves, as Edgerton, Circuit J., vigorously asserted in his dissenting judgment, an error of law. As the learned judge said:

> Neighbourhood changes which may make it inequitable to enjoin a particular violation of a covenant at a particular time may not make it inequitable to impose damages for the same violation, or to enjoin a different violation, or even to enjoin the same violation at a different time.[9]

With these comments the writer, with respect, agrees.

Measure of damage:

If damages are recoverable, as to the measure of damage no doubt the ordinary rules of contract apply. In *Welitoff v. Kohn* the New Jersey Court had this to say:

> Obviously, the measure of such damage would be the difference in value of the benefited property as protected by the restriction, and as not protected thereby, at the time of the breach. The increase in the value of the restricted property resulting from a removal of the restriction is something in which the owner of the benefited property has no interest whatsoever. His sole concern in praying for the enforcement of the restriction is the protection of his benefit, and, if for equitable reasons that is denied him and he is relegated to an action at law for a breach of the covenant, his sole concern is the damage done to his contractual rights, namely, to his benefit, by the breach of the covenant.[10]

The increase in value of the restricted property by the removal of the restriction certainly seems irrelevant, and the occasion of the breach of covenant seems a more appropriate time to determine the loss to the owner of the benefited property than the date of judgment. But there is a question whether the measure of damage should be calculated on the general basis of the difference in value of the benefited property as protected by the restriction, and as not protected thereby. It has been suggested that the measure of damage is the depreciation in the value of the plaintiff's property by reason of the *particular* improper use of the restricted property.[11] This seems the preferable approach, for there appears no reason why a plaintiff should be compensated by an award of damages which exceeds the actual loss he has sustained, a result which could easily follow if the general test enunciated in *Welitoff v. Kohn* were applied. If subsequently a new use, more injurious to the plaintiff, is undertaken on the restricted property, then,

[9] *Ibid.* 174 F.2d. 25, 29.

[10] (1929) 147 Atl. 390, 392, *per* White J.

[11] *Heitkemper v. Schmeer* (1934) 29 P.2d. 540, (rehearing denied (1934) 30 P.2d. 1119); 29 P.2d. 540, 544-545, *per* Belt J.: 'How much less valuable as a home was plaintiff's property by reason of the use of the building erected for apartment house purposes?'

a restrictive covenant creating an obligation of a continuing nature, a fresh action could be instituted to recover the additional loss thereby caused.

(iii) Application of the doctrine to easements

In *Waldrop v. Town of Brevard*, the Supreme Court of North Carolina said:

> The plaintiff's contention that conditions have changed to such an extent, in the neighbourhood adjacent to the defendant's garbage dump, that the covenants in the defendant's deed should not be enforced, is without merit. Changed conditions may, under certain circumstances, justify the non-enforcement of restrictive covenants, but a change, such as that suggested by the plaintiffs here, will not in any manner affect a duly recorded easement previously granted.[12]

The action before the Court was one to have the defendant's garbage dump abated as a nuisance. It failed in view of the provisions of an earlier deed which was construed as creating a right in the nature of an easement, and also a covenant not to sue.

There was no reason why the change of neighbourhood doctrine should have had application in the *Town of Brevard Case*, for an injunction was not claimed. To extinguish an easement, legal or equitable, by the operation of changed conditions, in the same manner as restricted covenants are extinguished by declaratory proceedings or by proceedings for cancellation, would involve a substantial development of the law, though it may be noted that such a development has been accomplished by statute in at least one jurisdiction.[13]

Various means are available for the enforcement of an easement.[14] If, however, it is sought to prevent the infringement of an easement by way of an injunction (for example, to restrain building operations which, it is alleged, would interfere with an easement of light) the change of neighbourhood doctrine is surely capable of application. For what is here critical is not the nature of the *right* sought to be enforced, but the *remedy* by which this is to be accomplished. No reason is known why changed conditions should not apply in precisely the same way, as a defence to an injunction suit, whether the substance of the proceedings is the enforcement of a restrictive covenant or the enforcement of an easement, legal or equitable.

There is judicial authority in support of such application. In *Wilkins v. Diven*,[15] the plaintiff sought an injunction to restrain the defendant from digging across the plaintiff's property to repair and restore a

12 (1950) 62 S.E.2d. 512, 515, *per* Denny J.

13 Conveyancing Act 1919-1954 (New South Wales), s.89.

14 Casner, *American Law of Property* (1952) ii. ss. 8.105-8.108.

15 (1920) 187 P. 665. See, *Moll v. Ostrander* (1928) 262 P. 592. Also, see *Truax v. Corrigan* (1921) 257 U.S. 312, 375. Generally, Tiffany, *The Law of Real Property* (3rd ed. 1939) s.809.

connection between a well on the plaintiff's land and the defendant's house. The connection had been severed by the plaintiff when developing his property. At first instance an injunction was awarded, and from this the defendant, who claimed, *inter alia,* damages, appealed. The Supreme Court of Kansas said that there was no doubt that the defendant had an implied or quasi easement in the plaintiff's property to pump and use water from the plaintiff's well. The Court, however, considered significant that the community was a growing urban community, and that it would ill accord with ever advancing development and progress to give undue significance to old ways and old notions. Since the creation of the easement, water from the city plant had been installed in the defendant's house. It was pointed out that the findings of fact determined at first instance disclosed that the deprivation of the easement did not very seriously affect the defendant's full enjoyment of his property, and that in view of this it could not be said that the court below had erred in granting the plaintiff an injunction, nor in refusing the equitable relief prayed for by the defendant. Dawson J. continued:

> But this conclusion, however, does not altogether dispose of the case. The appellant pleaded substantial damages; his evidence tended to prove that the well water was more refreshing in the summer time for drinking purposes than the city water. He was also somewhat inconvenienced in watering his horses when the connection with the well was shut off. Appellant had a legal right to the well water; he had a legal right to have the pump connection with the well remain as it existed at the time the plaintiff established it and as plaintiff had sold it to appellant's grantor. The fact that plaintiff's offending is not so serious as to secure to appellant a restoration of the former status of the well by equitable interference takes nothing from a cause of action for damages. That issue interference takes nothing from appellant's right to a strict legal redress. He pleaded a cause of action for damages. That issue should be tried out. *Gaynor v. Bauer,* 144 Ala. 448, 39 South, 749, 3 L.R.A. (N.S.) 1082; *Philbrick v. Ewing,* 97 Mass. 133; 14 Cyc. 1224; 48 L.R.A. (N.S.) 387; 9 R.C.L. 819.[16]

End of Part 1

(Mr Mendes da Costa's article will continue in Volume 5 No. 3 of M.U.L.R.)

[16] *Wilkins v. Diven* 187 P. 665, 667.