Kentucky Law Journal

Volume 45 | Issue 2 Article 8

1956

Covenants--Termination Resulting From a Change of Conditions

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NOTES

COVENANTS—TERMINATION RESULTING FROM A CHANGE OF CONDITIONS

The doctrine of change of conditions is a fairly recent innovation of the equity courts. It recognizes a certain public policy that land should not be unnecessarily burdened with permanent or long-continued restrictions where there has been such a fundamental change in the character of the property or neighborhood that it is no longer possible to carry out the purpose of the grantor. The doctrine arose as a result of two conflicting policies: first, the desire to permit persons to do as they wish with their property and to have reasonable security in their residential investment, and second, the policy against permitting persons to tie up land for too long a period. The rule against perpetuities applies merely to the *ownership* of property and not to covenants restricting the *use* of real property; also there are no statutes in most states to cut off restrictive covenants. However, restricting the use of property for a long period of time is just as undesirable as tying up the ownership. For example, consider our large cities. If subdivisions restricted to residential purposes had encircled our cities 100 years ago, as they are doing today, this would have choked off the growth and development of the cities. To alleviate such a situation the equity courts developed a rule that restrictive covenants are unenforceable where there has been such a change in the character of the property that enforcement of the restrictions would be oppressive and inequitable and the purpose of the grantor cannot be substantially carried out. This rule is very desirable and is of ever-increasing importance due to the expansion of business and industry into suburban areas during the past few decades. The rule is still in the formative stage and has been applied differently in the several states. It has usually been applied only to negative covenants,[1] but there seems to

[1] Even as to negative covenants the doctrine of change of conditions has been limited in Kentucky by Bewley v. Stieff, 273 SW 2d 833 (1954). In this case there was a covenant prohibiting the defendant from using his property for the storage or sale of spirituous, vinous or malt beverages. Although the area had become seventy per cent (70%) commercial, the covenant was upheld. After stating the general rule regarding the termination of restrictive covenants on the ground of a change of conditions, the Court added that the usual restriction in such cases was against the use of the property for other than residential purposes, but "the present case is a clear and specific restriction against a particular kind of business or the handling of products which many persons regard as inimical."

be no reason why it could not be applied to affirmative covenants as well.

The first part of this note is concerned with the question of whether Kentucky accepts the doctrine of change of conditions where commerce is encroaching upon a residential area, while the second part is devoted to the factors the courts should consider in determining whether there has been such a change of conditions in a particular case so as to render the restrictive covenant unenforceable. The third part analyzes some recent Kentucky cases in terms of these factors.

I

Does the Kentucky Court recognize the doctrine of change of conditions? In answering this question three recent Kentucky cases will be discussed. The first is *Cochran* v. *Long*,[2] where the plaintiff brought an action for a declaration of rights to determine whether a covenant restricting his lot to residential purposes would bar him from converting it to a business purpose. He was the owner of lot No. 28 in Block 2 and the defendants owned lots 1, 2, 3, 4 and 5. Of the 28 lots in the subdivision, only the six lots mentioned were restricted to residential purposes. The plaintiff's theory was that there had been such a change of conditions that the restrictions were inapplicable. His contention was based upon the fact that a heavily traveled state highway had recently been constructed through the restricted property. The facts recited by the Court show, further, that several business establishments had recently located both within the subdivision and in close proximity thereto, although no portion of the restricted lots had yet been diverted to business. The Chancellor found for the plaintiff on the ground that

> . . . there had been such a complete change in the territory under scrutiny that the restriction as to residential use applicable to lots 1 through 5 and to lot 28 in Block 2 was no longer of any substantial value to these lots. This conclusion was reached, primarily, because of the location of the new highway through this block, over which much traffic proceeds and from which considerable noise ensues. . . .[3]

On appeal, the Kentucky Court of Appeals reversed and held that there was not such a change in the "character" of the property as to release the plaintiff from the burden of the restrictive covenant.

In determining whether there has been such a change in the restricted property, did the Kentucky Court look solely to changes within the restricted property or did it consider changes outside the

[2] 294 SW 2d 503 (Ky. 1956).
[3] Id. at 506.

restricted property as well? It appears that the Court in this case merely considered changes within the restricted property and not in the surrounding neighborhood. In support of this approach the Court quoted the following language from a Michigan case, saying it "is in every sense applicable here":

> *Those owning property in a restricted district or neighborhood,* and especially those who have their homes there and, have been led to buy or build in such locality by reason of restrictive covenants running with the land imposed upon the street, block, or subdivision in which they have purchased, *are entitled to protection against prohibited invasion regardless of how close business may crowd around them on unrestricted property, provided the original plan for a residential district has not been departed from in the restricted district,* street, or block and the restrictive requirements have been generally enforced, or accepted and complied with by purchasers.[4] (emphasis added)

This broad language rejects the entire doctrine of change of conditions in the neighborhood and indicates that only abandonment of the restrictions by the owners of the restricted property would be sufficient to terminate restrictive covenants. The distinction between change of conditions and abandonment is clearly pointed out in the American Law of Property:

> . . . This problem of change of conditions arises where the complainant's and defendant's lots lie within a restricted subdivision, but the area surrounding the restricted subdivision has been so changed by the acts of third parties that the building scheme of the subdivision has been frustrated through no fault of the lot owners themselves. It is usually the result of growth and expansion of the city bringing business and industry into the unrestricted surrounding neighborhood. Where the change of conditions results through violation within the subdivision itself, a problem of abandonment rather than change of conditions is involved.[5]

The failure of the Court to give due regard to changed circumstances outside the restricted area may have been due to the failure of counsel to argue it, because the Court stated:

> . . . Appellants do not claim that the approach of business on either side of the restricted lots along the highway has affected the restricted area's desirability for residential purposes or materially changed its character as a residential district.[6]

The second case which tends to show Kentucky has rejected the doctrine of change of conditions is *Franklin* v. *Moats,*[7] where there was a 69 lot subdivision with lots 1-19 fronting on Taylor Boulevard

[4] Swan v. Mitshkun, 207 Mich. 70, 173 NW 529 at 530 (1919).
[5] II American Law of Property 445-46 (1953).
[6] 294 SW 2d 506 (1956).
[7] 273 SW 2d 812 (Ky. 1954), commented upon in 43 Ky. L. J. 569 (1955).

in Louisville. Lots 3-19 were the only lots of the 69 with residential restrictions. Fifty of the remaining lots, however, had "certain other restrictions". On lots 1 and 2 was located a drive-in ice cream stand. Across Taylor Boulevard from the restricted property was what had been a residential area at the time the subdivision was opened in 1924, but which had now become a line of commercial buildings. Lots 11 and 12 which were owned by the plaintiff were zoned for "Commercial E", and he sought to have the building restrictions thereon declared unenforceable. Further, the petition alleged that "some" of the owners of property in the subdivision signed a petition asking that certain of the lots numbered 3-19 be zoned for commercial use and that owners of other lots made no protest to such zoning. The lower court sustained a motion to dismiss, and the Court of Appeals, in affirming, stated that none of the owners of lots 3-19 had abandoned or waived this covenant and the fact that several commercial establishments had located across the street did not neutralize the benefits of the restrictions. The Court distinguished the case of *Goodwin Bros.* v. *Combs Lumber Co.*,[8] because in that case the change was brought about by the owners of the restricted property disregarding the restrictions themselves, while in the *Franklin* case none of the owners of the restricted property had disregarded the covenant and the change of conditions was outside the subdivision. The Court added that the action of the Zoning Commission indicated a substantial change in the district from residential to commercial purposes, but that it did not have the force of destroying the restrictive covenant.

The Court also cited two Kentucky cases, *Mechling* v. *Dawson*[9] and *Greer* v. *Bornstein*,[10] for the proposition that the changes must take place within the subdivision and be acquiesced in by the property owners therein. In the *Greer* case, the Court enforced the restrictive covenant on the ground that the restrictions had not been violated within the restricted area, although several businesses and billboards were located outside the restricted property. In the *Mechling* case, the Court also enforced the restrictive covenant, but the language of the court has significance in that the Court did not require a change *within* the subdivision necessarily, but said:

> . . . the slight business development on Frankfort Avenue contiguous to the territory in question had not worked so substantial and fundamental a change as to make the restriction bear unequally upon the various lot owners; that it was still possible to maintain the residential character of the subdivision; . . .[11]

[8] 275 Ky. 114, 120 SW 2d 1024 (1938).
[9] 234 Ky. 318, 28 SW 2d 18 (1930).
[10] 246 Ky. 286, 54 SW 2d 927 (1932).
[11] 234 Ky. 320, 28 SW 2d 19 (1930).

One cannot conclude from such language that the changes must take place within the subdivision, because the Court in *Mechling* merely stated that the slight changes outside the subdivision had not brought about such a change as to render the covenant unenforceable. A further factor in the *Mechling* case was that a church had been erected inside the subdivision, but the Court stated that this was a mere technical violation and was too "slight and inconsequential" to terminate the restrictive covenant.

A third recent case which may seem to indicate that the Kentucky Court requires the changes to be inside the restricted area in order to terminate the restrictive covenant is *Anness* v. *Freeman.*[12] This case was an action for specific performance with the purchaser setting up the defense that the vendor could not furnish a title meeting the terms of the contract which provided that the property was to be free for business purposes. The restrictive covenant limited the use of the property to single family dwellings. The land in question was lots 2 through 6 in Unit 2 in Rosemill Subdivision, Lexington. The plat was recorded in 1940, and between 1949 and 1951 a major traffic by-pass was constructed across several lots in Unit 2 and subsequently there was a substantial commercial development in the neighborhood. South of the lots in question and covering a portion of lots 5 and 6 was a plant nursery which was a violation of the restrictive covenant. Also, the property in controversy had been zoned for an office building which was the purchaser's intended use. Further, both the owner and the purchaser had talked with people in the neighborhood and no one had objected to the proposed use. The Court concluded that the evidence amply supported the finding of the lower court that the change of conditions was such as to defeat the purpose of the covenant.

Although these cases may seem to indicate that restrictive covenants may be terminated in Kentucky only if they are abandoned, a more critical analysis leads to the conclusion that a change of use within the restricted area is not solely determinative of the question of termination but is only one factor. Nowhere has the Court explicitly rejected the doctrine of change of conditions. On the contrary, in the *Cochran* case the Court said:

> We believe the principle of law relating to such covenants that must be considered in disposing of the inquiry raised in the case at bar is expressed in the Restatement of the Law of Property, Vol. 5, Sec. 564, p. 3313, in this language: 'A change of conditions which will bring into operation the (annulment of a restrictive covenant) is a change of such a character as to make it impossible longer to secure in a substantial degree the benefits sought to be realized

[12] 294 SW 2d 77 (Ky. 1956).

> through the performance of a promise respecting the use of the land. If it is still possible, despite a change in conditions, to secure the anticipated benefit in a substantial, though lessened, degree, the change of conditions will not alone be sufficient to warrant the refusal of injunctive relief against breach of the obligation arising from the promise.'[13] (Insertion by the Court).

The principle of law expressed in the Restatement is the doctrine of change of conditions. Apparently the Court did not realize that the language of the Michigan Court which it quoted with approval, supra, was inconsistent with the Restatement, for in determining whether it is "impossible longer to secure in a substantial degree the benefits sought to be realized", changes outside as well as inside the restricted area have to be considered. This is of the essence of the doctrine of change of conditions. The Maryland Court has put this point succinctly:

> [W]hile the restrictions themselves may be limited to a single block, when the Court examines the reason for their imposition to determine whether that reason continues or has ceased to exist, its consideration should not be confined to the area restricted . . . .[14]

As stated previously, the failure of the Court to consider changed circumstances outside the restricted area in the *Cochran* case may have been due to the fact that it was not argued by the respondents' counsel. But in any event there is not enough evidence to conclude that the doctrine of change of conditions has been consciously rejected by the Kentucky Court. There is only evidence that it has been confused with waiver or abandonment and that the factors involved in its application have not been carefully articulated.

II

In the words of the Restatement, when is it "impossible longer to secure in a substantial degree the benefits sought"? What factors ought the courts to consider and what factors do the courts consider important in determining whether the benefits sought can be substantially secured? Among the pertinent factors are these: (1) size of the area; (2) type of the change; (3) extent of the change; (4) location of change; and (5) zoning ordinances. The above factors all relate to the question of whether the benefits sought can be substantially secured. Not directly related to that question but related to the broader question of whether an equity court in good conscience should enforce the restrictions are three other factors: (6) the persons who have caused the change; (7) the number of persons with the

[13] 294 SW 2d 505 (1956).
[14] Talles v. Rifman, 189 Md. 10, 53 A 2d 396 at 398 (1947).

benefit who object to termination; and (8) the length of time the covenant has been in effect.

These factors will be discussed in the order named. First, the size of the area is one of the most important factors in determining whether the grantor's purpose may be substantially carried out. In the usual situation of residential covenants the grantor wants to secure a quiet area in which to live and rear children free from the noise, congestion, traffic, and dirt resulting from business and commerce. In order to secure these benefits, an area of substantial size is required. It is obviously easier to maintain a residential area if it is composed of fifty one-half acre lots rather than five one-half acre lots; the larger the area the greater the possibility of securing the benefits. This is a recognized principle in zoning. Zoning boards will not zone a small area residential in the middle of a commercial area, for it is clear that the benefits of a residential neighborhood cannot be achieved there. It is true that under this line of reasoning owners of a few acres cannot develop a restricted subdivision on their land which can withstand encroaching commerce, but as a practical matter they cannot reasonably expect to do so when the surrounding area is unrestricted. The community has a vital interest in having land put to its "highest and best" use as conditions change. When private individuals cannot secure the values of a residential neighborhood because of the small size of the area or for any other reason, community welfare ordinarily demands that the land come back in commerce unrestricted.

The second factor the courts should consider is the type of change. Are the encroaching businesses light commerce or are they at the other extreme, heavy industry? It is one thing to live near a florist shop but quite another to live near a large factory. In regard to the type of the change many cases have involved highways or railroads being constructed through or near restricted areas. Many courts have held covenants unenforceable primarily on the ground that there was a widened street,[15] increased traffic and congestion,[16] or a railroad near the restricted subdivision.[17]

The third factor is the extent of the change. The possibility of securing residential benefits originally planned will vary with the extent (or amount) of the change within *and* without the restricted area. Is the restricted property encircled by business and commerce or is it merely encroaching on one side of the property? If there are

[15] Klug v. Kreisch, 246 Mich. 14, 224 NW 339 (1929). See also Austin v. Van Horn, 255 Mich. 117, 237 NW 550 (1931).

[16] Hurd v. Albert, 214 Cal. 15, 3 P 2d 545 (1931). See also Wolff v. Fallon, 44 Cal. 2d 695, 284 P 2d 802 (1955).

[17] Kneip v. Schroeder, 255 Ill. 621, 99 NE 617 (1912); Cushing v. Lilly, 315 Mich. 307, 24 NW 2d 94 (1946).

merely *two* or *three* businesses located in close proximity to the restricted property this should not ordinarily be sufficient to terminate a restrictive covenant; neither should the fact that a *couple* of businesses have located within the restricted area itself. As mentioned previously in the *Mechling* case, the Kentucky Court enforced the restrictive covenant although there were some business establishments across the street from the restricted subdivision and there was a church located inside the restricted area. On the other hand, in the *Anness* case, the covenant was not enforced where there was a shopping center adjacent to the restricted lots, a highway was constructed through the restricted property and a plant nursery had been built on a restricted lot.

A fourth important factor is the location of the business establishments. Are they in close proximity to the residential area? Are they located *inside* or *outside* the restricted area? While both are important, obviously changes inside the restricted area itself will tend to make it more difficult to maintain an integral residential area. An example of where a court looked solely outside the restricted area to determine whether the benefits sought could be secured is *Talles* v. *Rifman*.[18] In this case there were several blocks which had been restricted to detached dwellings, but time limitations had expired on all except one block. Subsequently, the blocks on which the restrictions had expired developed as row houses. In terminating the restrictions on the remaining block the Maryland Court considered the location of all the changes in the neighborhood.

A further consideration should be the fact that in many cases the property in controversy has been zoned for commercial use by the city zoning board. While a zoning ordinance should not per se supersede restrictive covenants, it is a factor that the courts should consider, for the zoning commission is a group of experts who represent the community interest and have had experience with commercial expansion, trends of commercial development, and whether the benefits of a residential community may be achieved in a particular area. This factor was present in the three principal cases *(Cochran* v. *Long, Franklin* v. *Moats, Anness v. Freeman),* and it has been considered by the courts in several jurisdictions.[19] As the Kentucky Court stated in *Goodwin Bros.* v. *Combs Lumber Co.*:

> . . . The action of the Zoning Commission, though not having the force of destroying the covenants . . . shows the substantial transformation of this district into a commercial one.[20]

[18] Supra, note 14.

[19] Wolff v. Fallon, supra note 16; Gulf Oil Corp. v. Levy, 181 Md. 488, 30 A 2d 740 (1943); Austin v. Van Horn, supra note 15; Hayslett v. Shell Petroleum Corp., 28 O. App. 164, 172 NE 888 (1930).

[20] 275 Ky. 116, 120 SW 2d 1025 (1938).

The following three factors are not concerned with whether the benefits of a residential area may be achieved, but with whether the courts, on other grounds, should terminate the covenant. The first such factor is determining who caused the change. Was the change brought about by the party seeking to terminate the covenant? The change must come about as a result of independent action, and if an owner of a restricted lot purchased all the adjoining unrestricted property and established businesses thereon, he should be precluded from alleging a change of conditions.

Another factor is the number of persons with the benefit who object to the termination of the restrictions. Obviously those who have violated the restrictions themselves are estopped from objecting, and if they acquiesce there is no valid reason to uphold the restriction. This was probably the critical factor in the *Anness* case. There the restrictions had been continuously violated for ten years and the owners of the other lots in the subdivision did not object to termination of the restrictions on the lots in question.

The final factor is the element of time. Kentucky and the great majority of states have no statutory provision cutting off restrictive covenants.[21] However, since restrictions on use take property out of the stream of commerce, public policy demands that the use as well as the ownership of land should not be controlled for an unreasonable length of time by one person.[22] In applying the doctrine of change of conditions courts may require less evidence that the grantor's purpose

[21] The recent case of Hoskins v. Walker, 255 SW 2d 480 at 482 (Ky. 1953), involved a possibility of reverter, but the language of the Court is applicable here: "The case at bar focuses attention on a troublesome and growing problem in real estate law as to what steps, if any, should be taken to clear titles in situations like this, where an old express clause of forfeiture or reversion is involved. Several suggestions have been made which, while they do not do away with such conditions altogether, curtail them very sharply. We have no statutory provision in Kentucky which is helpful in a case like this, and the present proceeding is not an action to clear title. . . . Several states have statutes which limit the time within which a condition may work a forfeiture—thirty to fifty years, for example. In two states frivolous conditions—conditions which have no purpose other than to create an arbitrary right to enforce a forfeiture—are deemed void. As summarized in the American Law of Property, Section 2.8, at page 109: 'Despite the fact that there may be instances where the condition may be a useful and effective device, as, for example, in leases, where the right to re-enter may be used to protect the landlord against an objectionable tenant, the condition subsequent is outmoded insofar as freehold estates are concerned. For the reasons already adduced, therefore, it would seem that the present trend to restrict the effectiveness of conditions is highly desirable and that states still burdened by the harsh common law of conditions should be encouraged to adopt any one or more of the methods heretofore discussed which minimize the evil effects of conditions'."

[22] Judge Clark favors a definite period of thirty years for restrictions and servitudes, but a shorter period if there has been a change of conditions and the restrictions are of no actual or substantial benefit to the parties in whose favor they have existed. See Clark, "Limiting Land Restrictions," 27 A.B.A.J. 737 (1941).

cannot be carried out where the restrictions have been on the land for many years.[23]

III

The courts often consider only one factor such as zoning or a highway or a railroad. Would the result of a case be different if the Courts considered all of the eight factors listed above? The *Cochran, Franklin,* and *Anness* cases are three recent cases to which to apply these factors.[24] First, *Cochran* v. *Long*: (1) size: six lots were restricted out of a twenty-eight lot subdivision; (2) type of change: service station, electrical appliance store, contractor's office and a highway; (3) extent of change: three businesses and a highway plus "several" business establishments outside the subdivision; (4) location of change: the contractor's office and appliance store are located on lot 6 opposite a standpipe[25] which is a short distance south of the plaintiff's lot, and on the third lot south of the standpipe is the service station, and running through the plaintiff's lot is a sixty foot wide state highway, and the other businesses are located about a block north of the restricted lots; (5) zoning: the area in controversy had been zoned for commercial purposes; (6) persons who caused the change: owners of unrestricted lots in the subdivision and owners of property outside the subdivision and not the plaintiff; (7) the number of persons who object: "some" of the owners of lots 1 through 5 objected; (8) length of time the covenant had been in effect: ten years. The Court's conclusion: enforceable.

Such factors were not adequately considered by the Court in this case. It stated that the Chancellor's conclusion was reached primarily because of the location of the heavily traveled highway, and then it concluded:

[23] Even where the restrictions are for a definite time, they may be terminated prematurely where the greater portion of the period had expired. For example, in Norris v. Williams, 189 Md. 73, 54 A 2d 331 at 334, 4 A.L.R. 2d 1106 (1947), where there was a fifty year covenant and thirty years had elapsed, the Maryland Court stated: "We now hold that, even though the duration of a restrictive covenant is expressly limited, equity will not enforce the covenant where a considerable part of the life of the covenant has elapsed and where, owing to a change in the character of the neighborhood, not resulting from a breach of the covenant, the reason for enforcement of the covenant no longer exists, and such enforcement would merely encumber the land and injure or harass the covenantor without benefiting the covenantee."

[24] Some of the facts of the Franklin and Anness cases do not appear in the Court's opinion, but are taken from attorneys' briefs and plats of the areas.

[25] The standpipe which is mentioned several times by the Court should not be considered a "change" since it was erected about forty years prior to the restrictive covenant, and changes must develop subsequently to the covenant or obviously there is no "change". This was pointed out in Parris v. Newbury, 279 SW 2d 229 (Ky. 1955) where there was a railroad on one side of the restricted property and a highway on the other side. The Court stated that these were present eight years previously when the restrictions were created, and therefore, there was no change of conditions.

> It does not follow that the mere presence of a highway that has become one of the principal arteries of travel through the city of Harrodsburg automatically alters the character of property involved here to the extent that this property is released from the restrictions that adhere to it.[26]

The Court then cited *Bickell* v. *Moraio*[27] as "strikingly similar" to this case, but in the *Bickell* case the highway was merely widened while in the *Cochran* case a sixty foot wide thoroughfare over which traveled 400-500 vehicles every hour was constructed through the restricted property where previously there had been no traffic or congestion, but a mere alley that was open only along one-half of the frontage of lot 28. Perhaps a more important distinguishing factor, however, is that in the case cited by the Court there were twenty-six restricted lots while there were only *six* in the *Cochran* case. This number is obviously too small to achieve the benefits of a residential area.

Whether there has been such a change of conditions as to terminate the restrictive covenant is principally a question of fact and should not be reversed on appeal unless the lower court was "clearly erroneous".[28] It appears that the lower court's conclusion was entirely reasonable in this case when all factors are considered, and therefore, it should not have been reversed.

The second case is *Franklin* v. *Moats*: (1) size: seventeen lots out of a sixty-nine lot subdivision were restricted to residences and fifty of the remaining lots had "certain other restrictions"; (2) type of change: there was an ice cream stand, a gasoline filling station, liquor store, doctor's office, pool room, dry cleaning shop, shoestore, drug store, five and ten cent store and a partly completed structure designed to contain two storerooms;[29] (3) extent of change: there were many business establishments near the restricted lots; (4) location of change: the ice cream establishment was located on lots 1 and 2 inside the subdivision (but without the restricted area), and the other businesses were located across the street from the restricted property; (5) zoning: the plaintiff's lots had been zoned commercial; (6) persons who caused the change: owners of unrestricted property and not the plaintiff; (7) the number of persons who objected: sixteen out of twenty-five owners of property in the subdivision who would be affected signed a petition asking that certain lots on the east side of Taylor Boulevard be zoned for commercial use and owners of other lots made

[26] 294 SW 2d 506 (1956).
[27] 117 Conn. 176, 167 A 722 (1933).
[28] See Kentucky Rules of Civil Procedure 52.01 (1953). See also the dissent in the principal case.
[29] See Appellant's Brief, page 12.

no protest to such zoning;[30] (8) length of time the covenant had been in effect: thirty years. The Court's conclusion: enforceable.

In the *Franklin* case it is true that the changes were outside the restricted lots, but on the other hand there were only seventeen lots restricted to residences, the plaintiff's lots had been zoned for commercial use and the area definitely was developing as a commercial district. Further, the restriction had been on the land for thirty years and many of the owners did not object to termination. It appears that the Court had reasonable grounds upon which to hold that the covenant was no longer enforceable. Be this as it may, the Court employed unfortunate language when it stated that none of the owners within the subdivision had waived or abandoned the covenant and that changes must occur and be acquiesced in by the owners of other lots within the subdivision, thus rendering the changes permanent and materially defeating the purpose of the covenant, before equity will declare the restriction inapplicable. As stated in the first part of this note, such language refers to waiver or abandonment while the doctrine of change of conditions includes changes outside as well as inside the restricted area.

The third and final case is *Anness* v. *Freeman*: (1) size: twenty-five lots (adjacent to a larger restricted residential area); (2) type of change: plant nursery, shopping center and highway; (3) extent of change: many businesses, including a large shopping center; (4) location of change: the highway and shopping center were at the east boundary of the lots in question and the plant nursery was south of the plaintiff's property and covered a portion of lots 5 and 6; (5) zoning: the property had been zoned for business offices which was the purchaser's intended use; (6) persons who caused the change: persons inside the restricted property had violated the restrictions and persons outside the restricted property had built businesses adjacent thereto, but there is no evidence that the litigants had violated the restrictions or brought about the change in any manner; (7) the number of persons who object: the Court stated that "the owner and the purchaser had talked to people in the neighborhood and no one had objected to the proposed use"; (8) length of time the covenant had been in effect: sixteen years. The Court's conclusion: unenforceable.

The Court stated that the fact that other property owners had disregarded the restriction tended to show that any previously existing benefits had disappeared. From this language and the facts of this

[30] Id. at 2.

case, it appears that, as in most other Kentucky cases, the Court, while paying lip service to change: of conditions, applies the doctrine of abandonment. In this case and the *Goodwin* case, supra, which are apparently the only two Kentucky cases that have terminated the restrictive covenants,[31] there was abandonment of the restrictive covenants by the owners inside the restricted property. In the *Cochran, Franklin, Mechling, Greer,* and all other Kentucky cases where the covenant was enforced there was a substantial change outside the restricted property, while inside the restricted property there was a minor change or no change at all. These cases tend to prove that the Kentucky Court will enforce restrictive covenants even though a substantial amount of commerce has moved into the neighborhood, provided the restrictions in the subdivision have not been violated.

In conclusion, it appears that the Kentucky Court verbally recognizes the doctrine of change of conditions but in application it has been made almost synonymous with abandonment. It is hoped that in the future the Court will clearly distinguish between abandonment and change of conditions in the neighborhood. And even though one factor may be decisive in a particular case, it is urged that the Court adequately consider all factors in determining whether there has been such a change of conditions as to warrant a termination of the restrictive covenant.

G. Wayne Bridges

CREDITORS' RIGHTS—ENFORCING A JUDGMENT—WHEN IS A LIEN CREATED ON PROPERTY OF JUDGMENT DEBTOR?

The Kentucky Rules of Civil Procedure provide that judgments for the payment of money shall be enforced by writs of execution.[1] Kentucky Revised Statutes section 426.120 (1) (1953) provides: "An execution against property shall bind the estate of the defendant only from the time of its delivery to the proper officer to execute." In a broad sense the purpose of this note is to explain the effect of this statute on the judgment enforcement process in Kentucky. More

[31] In Bagby v. Stewart's Ex'r., 265 SW 2d 75 (Ky. 1954), the grantor restricted one lot to residential purposes and the deeds to the remaining three lots had no such restrictions. Later the grantor conveyed his own residence on part of the remaining tract to a party to be used for commercial purposes. The Court held that the grantor's right to enforce the covenant on the first lot was lost by abandonment and waiver as well as by a change in the character of the neighborhood. The latter clause was merely thrown in by the Court and the case is definitely one of abandonment or waiver of the restrictive covenant by the grantor.

[1] Rule 69.