The Restrictive Covenant in Xanadu

"In Xanadu did Kubla Khan

A stately pleasure-dome decree "

S. T. Coleridge, 1816

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Abstract

Legal scholarship is naturally inclined towards explanations and justifications of contemporary law. In the case of restrictive covenants and building schemes this has led to a distorted perception of the historical record, as revealed in recorded case reports dating from the nineteenth century. It is argued that the restrictive covenant had its historical genesis not in a response to industrialisation and mass urbanisation, but in the developments of resort towns in the eighteenth and early nineteenth centuries, as a response to the needs of land developers. Furthermore, it is argued that a better historical understanding of these origins illuminates contemporary problems concerned with the adaptability of law and the potential roles of law in development.

Key Words

Tulk v Moxhay; restrictive covenants; building schemes; urban history; resort towns; spa towns; leisure industry; Pittville; law and development

In the first half of the nineteenth century the law of England and Wales came to recognise promises to restrict the use of land that bound strangers to the promise, covenants that could bind third parties.[2] An interest that binds third parties is a property interest: as it operates beyond imposing personal obligations upon the parties to an agreement and affects strangers to the original transaction. Land has always been subject to some property interests effective against the holder of the land, such as easements including the right of way. However, the common law of England and Wales has always been wary of allowing too many such property interests, as they interfere with the development and alienation of land. For this reason the nineteenth century recognition of promises that bound third parties was remarkable,

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[2] The seminal case being *Tulk* v *Moxhay* (1848) 11 Beavan 571, 50 ER 937 at first instance; (1848) 1 Hall & Twells 105, 47 ER 1345; 18 LJ Ch 83; 2 Ph 774, 41 ER 1143. The following account is informed by: C Bell, '*Tulk* v *Moxhay* Revisted' (1981) 55 Conv 55; R. Griffiths, '*Tulk v Moxhay* Reclarified '(1983) 29 Conv 29; S. I. George, '*Tulk* v *Moxhay* restored – to its historical context' (1990) *Liverpool Law Review* 173; P. Borsay *Health and Leisure Resorts 1700-1840* in Peter Clark (ed), *The Cambridge Urban History of Britain* vol ii (Cambridge: Cambridge University Press, 2000); J.S. Anderson in W. Cornish, J.S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith (eds), *The Oxford History of the Laws of England XII 1820-1914 Private Law*. (Oxford: Oxford University Press, 2010) 159-178.

because it violated important legal doctrines and ran against powerful currents of contemporary opinion.

The novel property interest violated the doctrine of privity, the doctrine that restricted the effects of an agreement to the parties to that agreement. In this respect it went beyond the extended concept of 'privity of estate' that applied to leases, and which treated later tenants and later landlords as bound by the promises of the original tenants and landlords as contained in a lease.[3] It ran against the judicial animosity towards the creation of novel interests in land. This reluctance to clutter the title to land was in full operation in the nineteenth century.[4] It ran against the policy of freeing the effective powers of the landowner in possession in dealing with the land.[5] Over time the promises capable of binding third parties became new interests in land known as "restrictive covenants" or "building schemes". This article re-examines the origins of these legal developments and suggests that a faulty historical understanding is obstructing an understanding of the creative genius of the common law, a subject of some potential importance in the field of law and development.

The traditional view of the origins of the restrictive covenant that has been widely held amongst legal scholars can be illustrated easily enough. "The real starting point … *Tulk v Moxhay* in 1848, a time when the full effect of the vast expansion in industrial and building activities was being felt".[6] "The social context from which it emerged is generally understood, that at a time of increasing population and increasing building activity, when there was virtually no public control of land use, private control by covenant was the only method of preserving amenity available to those landowners wishing to release land for development."[7] " … a body of law which proved to be, if not an unmixed blessing, yet of very great importance in regulating the urban development of the country before the introduction of modern planning legislation … ".[8] All of these explanations seem to focus attention on 1848 and afterwards, the future at the time of the decision. However, the explanation for a novel practice, that has by 1848 become familiar to the cognoscenti, amongst conveyancers and Chancery judges, must lie in the past, and the social practices we need to attend to are more likely to be Regency than Victorian.

It was not in urban squalor, nor in industrial development, nor in protecting the residential nature of private housing estates, that restrictive covenants have their historical origins. Rather, it was in the pleasure gardens and developments for leisure of the eighteenth and

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[3] As recognised in the cases by stating that the covenant does "not run with the land [at law]" or that it falls outside of the "rule in *Spencer's Case*", i.e. covenants outside the operation of privity of estate.

[4] *Keppell* v *Bailey* (1834) 2 Mylne & Keen 517, 39 ER 1042 and *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51: see generally Anderson (2010) 159-178 at 160-171.

[5] A strong contemporary statement of the threatened fettering of freedom to develop and dispose of land by allowing land to be bound by covenants of previous owners is contained in the judgment of Lord Brougham in *Keppell v Bailey* (1834) 2 Mylnes & keen 517; 39 ER 1042.

[6] R Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed, (London: Stevens & Sons, 1984) 771, the sentence survived into the 6th edition: C. Harpum, *The Law of Real Property* (London: Sweet & Maxwell 2000) at 16-032.

[7] George (1990) 174.

[8] A.W.B. Simpson *A History of the Land Law* 2nd ed (Oxford: Clarendon Press, 1986) 256.

early nineteenth century.[9] Indubitable, the heyday of the restrictive covenant in the nineteenth century was tied up with "the best sort of urban development",[10] and conveyancing practice served to safeguard superior residential developments from social contagion.[11] However, it was the more entrepreneurial and speculative development of leisure resorts, that first led to the commercially significant use of covenants constraining the use of freehold land. The leisure resort industry took as its model the city of Bath, the paradigm leisure resort that encompassed facilities for:[12] "eating and drinking, shopping and chit-chatting, dancing and card playing, revelling and horse racing, bathing and reading, gambling and whoring." An idea of the scale of the early modern leisure industry is given by Neale's estimate that the capital invested in house building in Bath in the eighteenth century was equivalent to the fixed capital invested in the English cotton industry in the same century.[13] The restrictive covenant was the response of legal draftsmen to the demands generated by resort town development for a view, and "the general beauty of the … design" of the resort.[14]

The cases that were seminal for the judicial development of the law in this area were atypical of the commercial practice that drove the same legal development. Thus, the legal scholar is introduced to restrictive covenants through cases concerned with the use of industrial land and urban residential land: the two seminal cases being *Keppell v Bailey* and *Tulk v Moxhay*. This is despite the fact that the predominant character of the cases reported over the formative period for the restrictive covenant and building scheme were concerned with leisure developments. *Keppell* v *Bailey* was concerned with a covenant in a partnership deed. The covenant promised the other parties to the deed, on behalf of the "heirs, executors, administrators, and assigns" of a leasehold ironworks, to procure limestone from a specific quarry, and to use a specific railway, at a specific toll, to transfer stone from that quarry.[15] As such it was concerned with the co-ordinated running of industrial concerns, and finance of transport infrastructure; land use as far removed from the pleasure resort as can be imagined. *Tulk v Moxhay* was concerned with what we know as the central open space of Leicester Square in London. However, the covenant in *Tulk v Moxhay* was not merely to keep the area open and unbuilt upon.[16] The original covenant was for a private park or garden, termed a "square garden and pleasure ground". The garden was to be fenced, and the plants maintained, keys were to be available to the householders facing the Square for a fee, and certain features of the garden were prescribed. Thus, the case bears strong resemblance, on its facts, to the well known case of *Re Ellenborough Park*.[17] However, it is far more conducive to teaching and learning to forget the *positive* aspects of the actual covenant in *Tulk v Moxhay*, because

[9] Borsay *(*2000)
[10] W. R. Cornish and G. de N. Clark, *Law & Society in England 1750-1950* (London: Sweet & Maxwell, 1989) 150.
[11] See *Bramwell v Lacy* (1879) 10 CH 691 for fear of literal as well as social contagion.
[12] R.S. Neale, *Bath: A Social History 1680-1850 or a Valley of Pleasure, yet a Sink of Iniquity* (London: Routledge & Kegan Paul, 1981) 13.
[13] *Ibid*. at p. 6.
[14] *Schreiber v Creed* (1839) 10 Sim 9; 59 ER 515.
[15] (1834) 2 Mylne & Keen 517, 39 ER 1042.
[16] (1848) 11 Beavan 571, 50 ER 937 at first instance; (1848) 1 Hall & Twells 105, 47 ER 1345; 18 LJ Ch 83; 2 Ph 774, 41 ER 1143.
[17] [1956] Ch. 131

the case then serves as a more credible root for the *restrictive* covenant. The injunction upheld on appeal in *Tulk v Moxhay* was interlocutory, and aimed to preserve the status quo, and for this purpose was negative or restrictive in effect, being limited to:[18] "that which will protect these parties … [and] … not to impose any more restraints ... than is necessary for that particular purpose." Moreover, we cannot help imagining Leicester Square in the midst of a vast urban conurbation, and with or without its private garden the area was never a resort town.[19]

More typical of the underlying practice are the cases decided between the decisions in *Keppell v Bailey* and *Tulk v Moxhay*: *Whatman v Gisbson*,[20] *Schrieber v Creed*,[21] and *Mann v Stephens*;[22] each of which concerned resort towns. Not all of the intermediate cases were concerned with resort towns, *Bristow v Wood* concerned land near Liverpool.[23] Obviously, the legal practice of using covenants in resort town developments also led to cases post-*Tulk v Moxhay* such as: *Coles v Sims*,[24] *Western v Macdermott*,[25] and *Sheppard v Gilmore*.[26] The argument is that the flurry of cases that followed *Keppell v Bailey* are indicative of the earlier practices that Lord Brougham's judgment in *Keppell v Bailey* threatened. Furthermore, that a sampling of later cases confirms a vigorous earlier legal practice of covenanting to restrict land use connected to the development of resort towns, a practice that long preceded the judicial legitimisation of the restrictive covenant as an interest capable of binding property in *Tulk v Moxhay*.

The peculiarity of the seminal cases, and the more general use of restrictive covenants in the context of nineteenth century urbanisation, have created a misleading perception of the restrictive covenant as called into being to answer the problems of urban development. It is usual to imply or assert a rather odd future functional explanation for the recognition of the restrictive covenant: that in 1848 the courts condoned a practice responding to the problems of industrial urbanisation. However, the fact was that the litigation of the time (1834-1848) was primarily concerned with the conveyances of a generation before. It is the legal practice of the legal profession a generation before that needs explanation, not the legitimating action of the court of Chancery in 1848. It is legal practice that leads and case law that follows. Our familiar accounts reverse the locus of causality. It is not judges but lawyers who are generating the novel law. The judges either condone or condemn retrospectively. Also, it is

[18] (1848) 11 Beavan 571; 50 ER 937 at 586 and 944.
[19] Although this perception itself is something of an anachronism, see: T. Longstaffe-Gowan, *The London Square: Gardens in the Midst of Town (Paul Mellon Centre for Studies in British Art)*, (New Haven: Yale University Press, 2012).
[20] (1838) 9 Sim 196; 59 ER 333: a 1799 scheme in Ramsgate.
[21] (1839) 10 Sim 9; 59 ER 515: an 1827 scheme in Cheltenham.
[22] (1846) 15 Sim 377; 60 ER 665: an 1838 deed similar to *Tulk v Moxhay* in Gravesend.
[23] (1844) 1 Coll 480; 63 ER 508.
[24] (1853) Kay 56; 69 ER 25: an 1823 scheme in Cheltenham.
[25] (1866) LR 2 Ch App 72: a 1766 scheme in Bath.
[26] (1887) 57 LJ Ch 6: the same 1766 scheme as in Bath.

likely that the judges had more of an eye to the disruption that would be caused by unsettling earlier titles than to the potential future beneficial uses of the restrictive covenant.[27]

Certainly rhetorically at least the ordinariness of enforcing such covenants controlling land use against successors in title was stressed by Lord Cottenham LC in *Tulk v Moxhay*:[28]

> "I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. Where the owner of a piece of land enters into a contract with his neighbour, founded, of course, upon valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of this jurisdiction, to maintain that this Court has authority to enforce such a contract. It has never, that I know of been disputed."

Which established the binding nature of the promise to restrict land use between the parties, and:[29]

> "it [the Court of Chancery] has always acted upon this principle, that you, who have the property, are bound by the principles and law of this Court to submit to the contract you have entered into; and you will not be permitted to hand over that property, and give to your assignee or your vendee a higher title, with regard to interest as between yourself and your vendor, than you yourself possess."

Which tied the promise to title, by invoking the principle of *nemo dat quod non habet*. As George has pointed out this assertion of regularity would have been audacious if the practice was not accepted in the profession, and the Third Report of the Real Property Commissioners in 1832 is supportive of the argument that this was a common practice well before *Tulk v Moxhay*.[30]

A better candidate for the gestation of this legal practice than the problems of industrial and urban development, as suggested by the seminal cases, is the development of the resort town. The litigation between the legal milestones is illuminating.

Whatman v Gisbson concerned an eighteenth century development in Ramsgate.[31] In the words of Chalklin: "Primarily as resorts Brighton, Margate and Ramsgate were pre-eminent in 1801".[32] The case concerned a deed dated 1799, and drawn up prior to the sale of land in parts. The deed stipulated the site of future buildings, some requirements as to the form of the

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[27] See: George (1990) 183.
[28] (1848) 1 Hall & Twells 105, 47 ER 1345 at 111-112 & 1347.
[29] Ibid. at 114 & 1348.
[30] George (1990) 183; Parliamentary Papers 1832 (484) XXIII, 321.
[31] (1838) 9 Sim 196; 59 ER 333.
[32] C. W. Chalklin, 'South-East' in P. Clark (ed), *The Cambridge Urban History of Britain vol ii* (Cambridge: Cambridge University Press, 2000) p. 64.

buildings, maintenance of an open area between the buildings and the cliff edge, and restrictions on the use of the buildings, specifically as dwelling-houses or lodging houses and not, *inter alia*, as "family hotel and inn and tavern". The relevant clauses of the deed are reproduced in the report, and it is quite plain that the intention was to form a row of houses or lodging houses with a sea-view, and to exclude any industrial or public trade, thus keeping the row respectable. There was no dispute as to the terms of the deed, nor that the intended user by the defendant's lessee would be in violation of the terms of the deed, nor that the defendant and his lessee had notice of the deed and its terms. However, the defendant had not become a party to the deed, and the case was argued on the basis there was no privity that could bind the defendant. The judgment was for the plaintiff on the ground that: [33] "I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row". The row of houses, called Nelson Crescent, remains, and commands a view overlooking the Marina.

Schreiber v Creed concerned a famous leisure development in Cheltenham.[34] Cheltenham was a resort town that enjoyed spectacular growth in the early nineteenth century,[35] and the case was concerned with a development in the Cheltenham area that originated with a deed executed in 1827. It is worth dwelling upon *Schreiber v Creed* and the man whose schemes formed the basis for the case, one Joseph Pitt who founded Pittville in Cheltenham in the 1820s as a residential district and spa with pleasure gardens and a pump house.[36] Joseph Pitt had been an attorney in Cirencester, and Pittville was an investment of the wealth he secured from his legal practice. Pitt did not attempt to finance the building of the whole of Pittville. Rather, he undertook to build and maintain the infra-structure and pump room, and sold off building lots to investors, who bought subject to restrictions on what and where they could build. He structured the relationships between himself as developer and manager of the estate and the individual purchasers, and that between the purchasers *inter se*, through a deed executed in 1827 by Pitt and initial purchasers.[37] Later purchasers were made party to the deed upon purchase.

In *Schreiber v Creed* the plaintiff attempted to prevent the defendant from building forward of a building line his vendor had agreed to respect, claiming it would obstruct his view, and diminish the value of his house. Schreiber had purchased from Stokes, and Creed had purchased from Pitt. Originally Stokes had contracted to purchase both the plots owned by the parties to the action, and had entered into various covenants in a deed of 1833 with Pitt. However, he had been unable to fund the building and had given up all his rights to the plot eventually acquired by Creed. Unsurprisingly, Shadwell VC refused to enforce on Pitt the covenants made by Stokes to Pitt in 1833. The direction of the obligation was wrong. The

[33] (1838) 9 Sim 196; 59 ER 333, "respectability" is the word used by Shadwell VC at 207 & 339.
[34] (1839) 10 SIm 9; 59 ER 515.
[35] On the history of Cheltenham as a resort town see: Borsay, (2000) 779.
[36] *Ibid*. p. 791; (1839) 10 Sim 9, 59 ER 515 at 9 & 515.
[37] *Ibid*.

substance of the covenants Pitt entered into in the 1827 deed expressly gave him the power to vary the original plans, and did not actually give any assurance as to the building lines for any plots, including that of Schreiber. Therefore, the motion was dismissed, although not on any argument based on *Keppell v Bailey* or the impossibility of covenants running with the land. The pump room still stands in a small park, it is a Grade 1 listed building.

Before leaving *Schreiber v Creed* it is worth noting that the 1827 deed provided for the payment of service fees by the purchasers, and for the parties to the deed to "concur" with Pitt in seeking a Private Act of Parliament.[38] Pitt was using the 1827 deed, deliberately not following the precedent of joint-stock partnership deeds,[39] to provide for "the general regulation and management of the Pittville estate".[40] Pitt was willing to use the deed, but he was clearly aware of the risk that he would have to resort to Parliament if the 1827 deed was not fully effective. A Private Act would have been more secure, but also a lot more expensive. Pitt was clearly well aware of the contemporary facilitative options open to a land developer.

The final resort town case is *Mann v Stephens* which concerned land in Gravesend.[41] Gravesend was a major destination for day-trippers from London. Chalkin reports:[42] "By the 1820's the steamboat carried artisan day trippers on summer holidays numbering 30,000 – 300,000 to Gravesend. Sleeping in the open began here and there were over a million passengers by 1840." The report is very brief but *Mann v Stevens* appears to be a clear example of an injunction awarded to enforce a covenant against an assignee of the covenantor in favour of a person who derived title from a covenantee; a decision only explicable by the obligation running with the two plots of land. The original land was divided into four plots, upon which three houses were built and an open area preserved for their amenity. The action was by an owner of one of the house against the purchaser of the open area, who was building a beer-shop and brewery upon the open area in breach of the covenant. The first instance decision by Shadwell VC was confirmed by Cottenham LC.[43]

The sole remaining case of note between 1834 and 1848 was *Bristow v Wood*, which is poorly reported and did not concern a resort town.[44] The case concerned a field near to Liverpool. Notice of the existence of a covenant which restricted the value of buildings to be erected upon the field was treated as raising sufficient doubt that the purchaser was able to escape the contract which was expressly made "free from incumbrances".[45]

Thus, three out of four cases concerned with the enforcement of covenants constraining the use of land following *Keppell v Bailey* originated from resort towns. In none of the four cases was *Keppell v Bailey* applied, and they all proceeded on the basis that covenants may

[38] Ibid. at 13 & 518.
[39] *Ibid*. at 33-34 & 526.
[40] *Ibid*. at 15 & 519: the quote is from the recital of the 1833 deed.
[41] (1846) 15 Sim 377; 60 ER 377.
[42] Chalklin (2000) 65.
[43] *Ibid*.
[44] (1844) 1 Coll 480; 63 ER 508.
[45] *Ibid*.

be enforced in equity against subsequent owners. However, all except *Bristow v Wood*, which was decided by Knight-Bruce VC, were decided at first instance by Shadwell VC, and we cannot be sure how representative his views were of the general legal community. That the practice of imposing covenants that purported to bind land was common before 1834 is demonstrated by the findings of the Third Report of the Real Property Commissioners, who noted that: "These covenants being of frequent occurrence, and of great importance" were problematic because: "It does not very clearly appear under what impression as to their effect such covenants have been introduced or sanctioned by practitioners".[46] The Commissioners recommended that the covenants should be enforceable in equity. Following *Tulk v Moxhay* such covenants were enforced in equity. Subsequently the law was developed in such a way that the restrictive covenant and the building scheme came to be treated as different in nature, and the restrictive covenant was limited in various ways, and was eventually recognised as a full interest in land.[47]

Resort towns also featured in reported litigation subsequent to *Tulk v Moxhay*. It is worth noting *Western v MacDermot*[48] and *Sheppard v Gilmore*[49] which are both concerned with the same deed of 1766 dealing with an eighteenth century development of land in Bath. Also *Cole v Sims*[50] is of some interest, being concerned with another scheme in Cheltenham, and a deed from 1823. Thus they confirm the importance of covenants in deeds drawn up to regulate the uses of land in resort town developments prior to the judicial legitimisation of the practice. The case for the development of resort towns being a significant, if not predominant, factor in the growing practice of imposing limitations and obligations upon the use of land has been made out. As is apparent from the quotations above (nn. 6-8); that traditional accounts of the origins of the restrictive covenant place emphasis on the importance of the interest in the face of industrialisation, and pressures upon residential urban spaces due to mass urbanisation. From the review of the reported cases it is clear that this emphasis is anachronistic, and that it was the development of urban space for leisure that was the source of the practice that led to judicial recognition of the restrictive covenant.

This shift in attention highlights an often neglected feature of the early law and practice that led to the recognition of the restrictive covenant and the building scheme. Considered in the context of the land developments that gestated the covenant binding upon subsequent owners of land we are not concerned with the protection of amenity under threat from burgeoning urban and industrial development. We are concerned with ambitious and speculative entrepreneurial activity, pushing the traditional boundaries of law. Leisure resorts demanded protected views, despite the well established legal authorities that denied the possibility of an easement for a view,[51] and the legal draftsmen wrote deeds designed to preserve views.[52] The

[46] Parliamentary Papers 1832 (484) XXIII, 321 at p. 55, quoted by George (1990) 173
[47] *Re Nisbet and Potts' Contract* [1906] 1 Ch 386 crossed the legal Rubicon for recognition of restrictive covenants (and equitable interests generally) as property interests.
[48] (1866) LR 1 Eq 499.
[49] (1887) 57 LJ Ch 6.
[50] (1853) Kay 53; 69 ER 25.
[51] *William Aldred's Case* (1610) 9 Co Rep 57b; 77 ER 816.

law is developed dialectically. An easement for a view threatened to smother land development. However, with the new social and economic forces developing in the leisure industry, land development needed to secure the visual amenities of an area. A view was no longer merely a thing of delight:[53]

> "Wray, Chief Justice, then said, that for stopping as well of the wholesome air (b) as of light, an action lies, and damages shall be recovered for them, for both are necessary … But he said, that for (c) prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof (D), and yet it is a great commendation of a house if it has a long and large prospect … But the law does not give an action for such things of delight."

A view was now a commercially necessary feature of the leisure development. A legal rule that had promoted development now threatened to undermine development. The conveyancers used covenants to meet the needs of the clients. The Court of Chancery legitimised the practice because it was sensible and limited. The form of the covenant guaranteed that there was no prescriptive threat, that the land subject to the covenants was identifiable, and that the extent of the restrictions was express in the covenants. When conveyancers drafted deeds that were executed by numerous parties with all due formality, and money was spent in reliance of the efficacy of the deeds, then the Chancery assumed that the deeds were intended to have a significant effect upon the legal relations of the parties. Hence in *Schreiber v Creed* one argument raised and considered was that the deeds must have intended to give Creed an action, as otherwise the whole documentation would be "a bubble". The judgment devotes a long paragraph to this argument, concluding:[54]

> "I do not think that this deed can be justly characterised as a mere bubble, there being sufficient in the *corpus* of it to enable all those who should have an interest in the land to prevent Mr. Pitt, his heirs and assigns, if they should be so foolishly inclined, from perverting this Pittville estate to any other purpose than that to which the mere contemplation of the plan shews it was intended to be appropriated."

The court is seeking to give effect to the commercial intentions informing the deed upon which the parties to the deed have relied. The assumption is that a legitimate intention will be given effect to, if possible, by the equity court.

The origins of the restrictive covenant and building scheme are more similar in this respect to the familiar commercial pressures on legal forms than to planning law. In the late twentieth century legal draftsmen were pushing the boundaries of company security with the fixed

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[52] *Whatman v Gibson* (1838) 9 Sim 196; 59 ER 333; *Schreiber v Creed* (1839) 10 Sim 9; 59 ER 515; *Western v MacDermot* (1866) LR 1 Eq 499 and *Sheppard v Gilmore* (1887) 57 LJ Ch 6 (same scheme). *Gilbert v Spoor* [1983] Ch 27 confirms the continuing vitality of the covenant for a view.

[53] (1610) 9 Co Rep 57b; 59 ER 816 at 58b & 821.

[54] (1839) 10 Sim 9; 59 ER 515 at 36-37 & 527.

charge over book debts.[55] Eventually the courts refused to give judicial sanction to the use of the fixed charges, after a period of doubt.[56] This process is analogous to the one evidenced by the history of the restrictive covenant, except the courts validated the restrictive covenant after a period of doubt. The processes are also ones of relatively small numbers of experts in the field resolving issues over time. It has the marks of an expert community converging on a solution over time, rather than the imprint of any dominant mind determining the outcome. This process of incremental and tentative change is, of course, the genius of the common law. In the nineteenth century it is also an aspect of the generational renewal of the chancery bench.

One noteworthy feature in the reported cases is the social roles that were filled by the same individuals across time. Thus, Joseph Pitt was both attorney and land developer. Knight-Bruce, counsel in *Schreiber v Creed*,[57] was later judge in *Bristow v Wood*.[58] E. B. Sugden was counsel in *Keppell v Bailey*.[59] He was also the writer of *Vendors and Purchasers*, an influential work that maintained a faith in the validity of using covenants to control land use despite the decision of Lord Chancellor Brougham in *Keppell v Bailey*.[60] He eventually became Lord Chancellor himself, as Lord St Leonard. Thus the entrepreneur was providing legal services before moving into land development, his counsel who argued for the validity of covenants became a judge who upheld the validity of covenants. The unsuccessful counsel in *Keppell v Bailey* kept the faith in his writing (and presumably in his legal practice, by way of advice and when drafting deeds for clients) and eventually himself became the preeminent equity judge of his time. One reason this system of entrepreneur, lawyers, and equity judges was responsive to the demands of land developers was the close relationship, approaching at times identity, of the various social actors.[61] Having lawyers who act for commercial clients and eventually become judges (rather than separate career paths for counsel and advisers and judges) greatly facilitates the transmission of information from economic actors to legal decision makers. The advisors and drafters of one generation become the judges who rule upon the validity of those drafts in the next generation.[62]

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[55] *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142.
[56] *Agnew v Comr of Inland Revenue* [2001] 2 AC 710, *In re Spectrum Plus (in liquidation)* [2003] 2 AC 680: *In re Brightlife Ltd* [1987] Ch 200 and *In re New Bullas Trading Ltd* [1994] 1 BCLC are from the period of doubt.
[57] (1839) 10 SIm 9; 59 ER 515.
[58] (1844) 1 Coll 480; 63 ER 508, and in *De Mattos v Gibson* (1859) De G & J 276; 45 ER 108.
[59] (1834) 2 My & K 517; 39 ER 1042.
[60] 10th ed 1839 ii, 495-506, cited by Anderson (2010) 171.
[61] Y. Dotan 'The Global Language of Human Rights: Patterns of Cooperation between State and Civil Rights Lawyers in Israel' in A. Sarat and S. Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford: Oxford University Press, 2001) 244; and P. J. Woods, 'Cause Lawyers and Judicial Community in Israel: Legal Change in a Diffuse Normative Community' in A. Sarat and S. Schiengold (eds), *The Worlds Cause Lawyers Make* (Stanford, Ca: Stanford Law and Politics, 2005) 307 illustrate similar effects of close legal communities with alternating memberships over time on legal development in a contemporary setting, and similar legitimacy problems being generated.
[62] Obviously, the habit of appointing judges from the most highly paid (successful) advocates of their generation who are overwhelmingly acting for commercial interests generates a legitimacy problem that is familiar. The classic analysis is J. A. G. Griffiths, *The Politics of the Judiciary* (London: Fontana Press, 1997).

This institutional tradition, of raising advocates from the legal profession to the Bench, rather than having differential training for advocates and judges is an often overlooked possible source for the developmental successes of the common law.[63] It is also one potential source for the differential developmental outcomes found when one looks closely at common law jurisdictions, differences as wide as those between civil law and common law systems.[64] It is the type of complexity that Douglass C. North alerts us to in his work on economic change.[65] A legal system is rules and courts and enforcement mechanisms; thus, it includes formal institutions. However, it is also informal understandings, knowledge communities and social rituals; it includes informal institutions. The problem law has to overcome is uncertainty, and law itself can generate uncertainly.

In general terms the problem addressed by use of covenants was a classic problem of uncertainty, uncertainty regarding the possible behaviour of future owners of neighbouring land. The problem was aggravated by the prior development of relatively unrestricted rights of ownership and relatively free land markets, the institutional solutions in turn for past uncertainties, the classic situation described by North. The problem was most keenly felt when developing land for leisure use. However, the general nature of the problem is not restricted to resort towns. Once the character of a neighbourhood is established, and supported by the personal obligations of the neighbours to each other, then a newcomer is in a position to hold his neighbours to ransom unless the newcomer can be bound by the obligations that bind the existing landowners. Thus, we have a hold out problem whenever a plot of land is sold. One possible solution would be to prevent the transfer of ownership without the agreement of the neighbourhood. However, this would impose serious transaction costs and interfere with the principle of free alienation of land. If the limitation on land use can be imposed on the land, so that it will bind a newcomer to the neighbourhood, then the community can protect itself from the risk of being held to ransom by any newcomer without interfering with the transferability of the plots of land.

The importance of the institutional forces at work which are not at the level of formal institutions is brought home by the ultimate ineffectiveness of *Keppell* v *Bailey*. North informs us that these features of the development of the law are of interest and indeed may be amongst the most important aspects of the story. It was the relationship between the lawyers and their clients, and the relationship between generations of lawyers and judges, and the experience of the equity jurisdiction that together provided the institutional features of the situation in which the law developed.

However, the problem here is that not all social interests are represented adequately or at all, rather than that some overwhelmingly are represented

[63] John Reitz, *Legal Origins, Comparative Law, and Political Economy* (2009) 57 Am. J, Comp. L. 847; Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right* (2001) 30 J. Legal Studies 503.

[64] Ronald J Daniels, Michael J. Trebilcock, and Lindsey D. Carson, *The Legacy of Empire: The Common law Inheritance and Commitments to Legality in Former British Colonies* (2011) 59 Am. J. Comp. L. 111.

[65] D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); D.C. North, *Understanding the Process of Economic Change* (Princeton & Oxford: Princeton University Press, 2005).

From the point of view of analysis based on North an essential advantage of this close relationship between today's lawyers and tomorrows judges is that an awareness of the informal institutional features of the system will be present in the guardians of the formal institutions. Rules will be formed in the light of effectiveness in practice because they are being propounded by judges who are familiar with that practice. George concluded the same from her review of the history of the doctrine in *Tulk* v *Moxhay*:[66]

> " It is submitted that, while there may have been some legal foundation for the rules which developed, they were essentially formulated as a matter of public policy to give "business efficacy" to long standing arrangements. It matters not what the foundation is thought to be; if the result is desirable the injunctions will be awarded."

In this passage she recognised one of the great strengths of the common law system in terms of economic development illustrated by the history of the restrictive covenant. The very idea of 'business efficacy' is one that looks to the interplay of informal and formal norms in practice, and that prioritises support of reasonable expectations over elegance of legal rule or systemic orderliness. The common law is remarkable because it holds the tensions: between commercial interests and the public interest; between principle and pragmatism; between respect for the past and openness to novel demands; the history of the restrictive covenant reveals how these tensions are mediated into a creative impulse; we might say:[67]

"It was a miracle of rare device,

A sunny pleasure-dome with caves of ice!"

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[66] S.I. George, Tulk v Moxhay *restored – to its historical context* (1990) Liverpool Law Review 173, 183-184. She also notes a "similar pragmatic approach" in relation to Mareva injunctions as explained by R. Goode *Commercial Law* (London: Penguin, 1982) 964-966.

[67] S. T. Coleridge, 1816 (reputedly written 1797), see: Samuel Taylor Coleridge, *The Complete Poems*, ed. William Keech (London: Penguin Books, 1997).

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