

1957

# Lowell V. Parrish et al v. Harlow G. Richards : Brief of Respondents

Utah Supreme Court

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Thomas & Armstrong; Edward M. Garrett; Attorneys for Defendants and Respondents;

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In the  
**Supreme Court of the State of Utah**

**FILED**

LOWELL V. PARRISH, EMILY L.  
PARRISH, his wife, VADAL PET-  
ERSON and MELVA PETERSON,  
his wife, *Plaintiffs and Appellants,*

vs.

HARLOW G. RICHARDS and MRS.  
HARLOW G. RICHARDS,  
*Defendants and Respondents.*

SEP 4 - 1957

Clerk, Supreme Court, Utah

Case No.  
8690

**Brief of Respondents**

THOMAS & ARMSTRONG,  
EDWARD M. GARRETT,  
*Attorneys for Defendants  
and Respondents.*

511 Walker Bank Building  
Salt Lake City 11, Utah

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# In the Supreme Court of the State of Utah

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HARLOW G. RICHARDS and MRS.  
HARLOW G. RICHARDS,  
*Defendants and Respondents.*

Case No.  
8690

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## Brief of Respondents

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### STATEMENT

In Utah, as elsewhere:

“The writ of injunction is issued by the courts as a matter of *grace* and not because the applicant has a right to it. (Citations.) The application for injunctive relief is in the form of a prayer, addressed to the conscience of the chancellor, who may, *in the exercise of a sound discretion*, either grant the prayer or deny it, as the facts and circumstances of the case may seem to require.” (Italics added.) *Melrose vs. Low*, 80 Utah 356, 15 P. 2d 319, 320.

“The power to issue injunctions should be exercised with great caution and only where the reason and necessity therefor are *clearly established*.” (Italics added.) 43 C. J. S. Injunctions §15.

Equitable principles govern suits to enforce restrictive covenants. 14 Am. Jur., Covenants §338.

“Whether injunctive relief will be granted to restrain the violation of building restrictions is a matter within the sound legal discretion of the chancellor, to be determined in the light of all the facts and circumstances. \* \* \*” Id.

The text continues:

“The complainants right to insist on the covenant and to invoke the injunctive power of the court *must be clear and satisfactory*.”

C. J. S. says:

“However, *not every violation* of a building restriction will entitle plaintiff to injunctive relief. The granting or refusal of relief is a matter of *discretion* with the court and not a matter of absolute right, and is to be governed by equitable considerations.” 43 C. J. S. Injunctions §87. (Italics added.)

Applying these principles, Judge Ellett concluded:

“7. The court concludes that plaintiffs have failed as a matter of law to establish that defendants’ tennis court and fence is a structure within the prohibition of said Restrictive Covenant or that plaintiffs have any clear right to any injunction against the same. On the other hand, the court concludes the same is not such a prohibited structure and that such right is not clear and that plaintiffs

are not so entitled. Furthermore, the court concludes *that in the exercise of sound discretion, such injunction should and would be denied herein*" (R. 203).

Restrictive Covenants must be construed *against* limitations and in favor of free use of property.

"Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction. Doubt will be resolved in favor of the unrestricted use of property." 14 Am. Jur., Covenants §212.

"\* \* \* all doubts should generally be resolved in favor of the free use of the property and against restrictions." Thompson on Real Property, §3569.

Accordingly, Judge Ellett also concluded:

"5. That defendants' tennis court and fence is not a structure as forbidden and prohibited in and by the Restrictive Covenant of Northcrest Subdivision set out in the complaint and the Findings of Fact herein. In construing the Covenant, the court concludes that as a matter of law, the restriction therein must be, and the same is hereby construed against limitations on the free use of defendants' property and all doubts and ambiguities are hereby resolved in favor of such free use" (R. 202).

Moreover, the plaintiffs themselves are in violation of both (1) the Restrictive Covenant, and (2) the fence-height Ordinance:

— Plaintiffs Parrish maintain a high, board fence or "structure" at the North side of their prop-



erty over the permitted 6-foot height (10 feet by their admission, R. 20) and some 35 feet long (Finding 10, R. 200) anchored to their house by high beams. This fence or structure is 1 inch inside their side line (R. 20) which violates also the City Sideyard Ordinance against building closer than 8 feet from a side line<sup>1</sup> in this Residential "A" District. (The court took judicial notice of the City Ordinances. R. 85. City Ordinances, §51-18-4, §51-12-3.) See Photo Exhibits 16, 17, 18. (Sideyard Ordinance, R. 144.)

- Plaintiffs Peterson<sup>2</sup> maintain a high 10 foot wall and fence along the West end of their property which violates the permitted 6 foot height of fences. (Finding 11, R. 200.) See photos, Exhibits 12 and 13.

Furthermore, other high walls and fences over 6 feet high abound in the area (Finding 12, R. 201). And, swimming pools with flood lights, patios and dressing rooms, etc., are maintained by at least two owners in the Subdivision. (R. 69, 75, 199. Photo Exhibit 24. View of trial judge, 81.)<sup>3</sup>

As to plaintiffs' own violations, the court concluded:

"2. Plaintiffs Parrish by erecting and maintaining said high board fence and plaintiffs Peterson by erecting and maintaining said high wall and fence have themselves violated said Zoning Ordin-

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<sup>1</sup>This court upheld the 8 foot side-line Ordinance recently (1955) in *Hargraves vs. Young*, 3 Utah 2d 175, 280 P. 2d 974.

<sup>2</sup>Plaintiff Vadal Peterson testified he has no objection to athletic games. "I even coach tennis" at the University. He has coached there 32 years (R. 110-11) and plaintiffs admit the court is not a nuisance *per se* (R. 185).

<sup>3</sup>In fact, plaintiff, Mrs. Parrish, and her daughter sometimes swim and sun at one of the pools (R. 180).

ance and, being in violation thereof, are thereby estopped to and may not maintain any action against defendants in regard to the alleged violation of said Ordinance respecting the height of defendants' fence or fences" (R. 201).

And, for their failure to object to other fences and walls maintained by their neighbors in violation, the court concluded:

"3. The court concludes also that for failure to take any action to prevent or remove the high walls and fences in the surrounding area above mentioned, plaintiffs are estopped to and may not maintain any action against defendants in regard to the alleged violation of said Ordinance in respect to the height of defendants' fence or fences" (R. 202).

To complicate matters, the West end of defendants' tennis court (and property)—the West 15.2 feet—is *not* in Northcrest Subdivision at all, but lies beyond that Plat in another Section altogether (R. 10) and, of course, is not subject to the Restrictive Covenant (Finding 3. R. 196). What should a trial court do in that circumstance? Judge Ellett decided thus:

"8. The West 15.2 feet of defendants' tennis court and fence being wholly outside of Northcrest Subdivision is, therefore, not subject to said Restrictive Covenant and the court could not order any injunction in regard to same. To order the remainder of said court and fence removed would still leave the same standing on said 15.2 feet portion and would be of no benefit to plaintiffs and would result only in punishment to defendants and leave the 15.2 feet of fence standing as an eyesore, and the court

concludes as a matter of equity and sound discretion that injunction should and would be denied herein against the portion of said court and fence lying within said Northcrest Subdivision" (R. 203).

Judgment was against the plaintiffs, no cause of action (except for prohibiting overhead floodlights on defendants' tennis court (R. 204), which their answer had already denied they would ever erect)<sup>4</sup> and plaintiffs appealed.

## STATEMENT OF POINTS

### POINT I.

THE TENNIS COURT IS NOT A STRUCTURE  
FORBIDDEN BY THE COVENANT.

### POINT II.

THE FENCE SURROUNDING THE TENNIS  
COURT DOES NOT VIOLATE THE CITY  
FENCE HEIGHT ORDINANCE.

### POINT III.

PLAINTIFFS BEING IN VIOLATION OF THE  
FENCE-HEIGHT ORDINANCE MAY NOT SUE  
FOR INJUNCTIVE RELIEF. THE COURT  
PROPERLY HELD THEY WERE ESTOPPED.

### POINT IV.

AS THE TRIAL COURT RULED, IF THE TEN-  
NIS COURT IS A STRUCTURE, THE PARRISH

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<sup>4</sup>Defendants' answer said: "Deny they intend to or will erect or place on any retaining wall, or at all, any overhead lights" (R. 11).

HIGH BOARD FENCE IS A STRUCTURE ALSO.

POINT V.

THE WEST PORTION OF RESPONDENTS' LOT LIES OUTSIDE OF NORTHCREST SUBDIVISION AND IS NOT SUBJECT TO THE COVENANT.

POINT VI.

ESTOPPEL OF APPELLANTS BY OTHER HIGH WALLS AND SWIMMING POOLS.

POINT VII.

CUTTING AND FILLING IS INEVITABLE IN THE STEEP HILLSIDE AREA INVOLVED.

ARGUMENT

POINT I.

THE TENNIS COURT IS NOT A STRUCTURE FORBIDDEN BY THE COVENANT.

The Northcrest Restrictive Covenant mentions, "structure". Plaintiffs' Memorandum below admits (R. 40) the word "does not have one meaning for all times and all places". We agree. Its meaning cannot be found in ordinary lexicography. The dictionary cannot give the answer. Webster does not deal with Northcrest's private meaning.

So the meaning must be sought in the setting of the language employed by the Covenant itself. The Covenant, after declaring the residential character of the lots, their

use for single family residence purposes, and forbidding flats and apartment houses says:

“\* \* \* and no *structure* shall be erected or placed on any of said lots other than a one, two or three car garage, and one single family dwelling, not to exceed one story in height \* \* \*” (R. 196).

We think construing a *covenant* is like construing a *statute*. In construing statutes, words associated together “take color” from each other. The rule of *ejusdem generis* applies. And *ejusdem generis* applies also in construing covenants. 14 Am. Jur., Covenants §213.

“*Limitation of General Words by Specific Terms.* — General and specific words in a statute which are associated together, and which are capable of an analogous meaning, *take color from each other*, so that the general words are restricted to a sense analogous to the less general. Under this rule, *general terms* in a statute may be regarded as limited by *subsequent more specific terms*. Similarly, in accordance with what is commonly known as the rule of *ejusdem generis*, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only things or persons of the same kind, class, character, or nature of those specifically enumerated. The general words are deemed to have been used, *not* to the wide extent which they might bear if standing alone, but as related to words of more definite and particular meaning with which they are associated. In accordance with the rule of *ejusdem generis*, such terms as ‘other’, ‘other thing’, ‘other persons’, ‘others’, ‘otherwise’, or ‘any other’,

when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described. The rule of ejusdem generis has been declared to be a specific application of the broader maxim of 'noscitur a sociis', which is discussed in other sections of this subdivision." 50 Am. Jur., Statutes §249.

Northcrest's Covenant contains two things: (1) a general word, and (2) specific words. The general "structure"; the specific "one, two or three-car garage, and one single family dwelling, not to exceed one story in height". Under the rule, "structure" takes *color* from "garage and single family dwelling". They (the words) are associated together. And, by ejusdem generis, the *general* word "structure" is restricted and relates to things of the same kind, class or nature as the *specific* words "garage and single family dwelling".

Hence, Northcrest who imposed the Covenant on all grantees, must be presumed to have intended that the kind of "structure" forbidden was something more than a simple *enclosure* for playing tennis, but rather something *like a garage or one story house*, for example, a shed, a store, a kennel, a horse barn, a mortuary, a private mausoleum, an extra house, an extra garage, a private museum building, a private theater building, a heating plant building, a laundry building, etc., etc.

If we turn to the *residential* character referred to in the Covenant, this view, we think is strengthened for it is quite common for owners to have tennis courts at their residences, even *swimming pools*, as two of them in North-

crest Subdivision across the street do.<sup>5</sup> The only *tennis court* case we have been able to find (and appellants have found no others) is *Kern vs. Murphy*, (Ohio 1936) 40 Ohio Supp. 365. 23 A. L. R. 2d 949. That covenant forbade “buildings except necessary out buildings”. The tennis court involved was an “enclosure consisting of steel poles about nine feet high carrying chicken wire netting, it being in the nature of a high, open wire fence surrounding the tennis court”. It was held not to be a “building” as contemplated by the covenant. Nor is the tennis court in our case, we submit, a “structure” within the Northcrest Covenant involved.

Judge Ellett properly concluded:

“5. That defendants’ tennis court and fence is not a structure as forbidden and prohibited in and by the Restrictive Covenant of Northcrest Subdivision set out in the complaint and the Findings of Fact herein. In construing the Covenant, the court concludes that, as a matter of law, the restriction therein must be, and the same is hereby, construed against limitations on the free use of defendants’ property and all doubts and ambiguities are hereby resolved in favor of such free use” (R. 202).

Also:

“7. The court concludes that plaintiffs have failed as a matter of law to establish that defendants’ tennis court and fence is a structure within the prohibition of said Restrictive Covenant or that plaintiffs have any clear right to any injunction against the same. On the other hand, the court concludes the same is not such a prohibited structure

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<sup>5</sup>Pretrial (R. 69, 74-75). Photo Exhibit 24.

and that such right is not clear and that plaintiffs are not so entitled. Furthermore, the court concludes that in the exercise of sound discretion, such injunction should and would be denied herein" (R. 203).

## POINT II.

### THE FENCE SURROUNDING THE TENNIS COURT DOES NOT VIOLATE THE CITY FENCE HEIGHT ORDINANCE.

The trial court heard the evidence. He even took a "view" of the three properties—Parrish, Richards and Peterson—and the surrounding area (R. 81, 137). A mass of testimony was involved about how the properties (each fronting Eastward on I Street) sloped steeply from North to South along their width 15% in grade (R. 88, 158). So, every owner along the hill had to cut and fill to average or "equalize" his North and South property lines. (R. 139) ; thus, each property owner "terraced" his yard in two levels, as plaintiff Peterson did (R. 122).<sup>6</sup> Parrish did likewise (R. 94, 96). That is the usual problem on steeply sloping properties (R. 139). Dr. Richards built a retaining wall along the South of his property to hold the terracing and keep the earth from sloughing down hill, while Parrish and Peterson "battered their earth back". In fact, Parrish raised his lower (South) terrace 3 feet and Peterson did a comparable thing (R. 142). "We built a wall. They battered the earth. That is the only difference" (R. 142). Judge Ellett found that the parties each "terraced" their

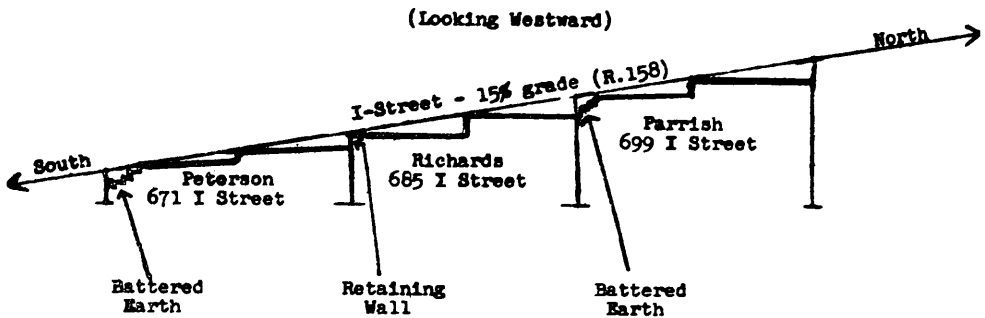
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<sup>6</sup>In fact, the Peterson retaining wall was found to be over on Respondent Richards' property at the East end (front) but Dr. Richards told Peterson "it was all right to leave it the way it was" (R. 124).



respective properties into two levels or terraces, that cutting and filling was necessary to level off each terrace and make the same useful and suitable and that retaining walls were built "in order to hold the earth in place and prevent its washing and sloughing away" (R. 198).

A rough result of the required terracing of these properties might be indicated by the accompanying sketch.



Note: Excellent views of the steep slope of the land and the "terracing" required in this hillside area are shown by the photographs in the record:

- (1) Parrish' property (upper left) Exhibits D-3 and 11; (upper right) Exhibits 16, 17 and 19 (earth battered back). (R. 67, 117-18, 146, 147.)
- (2) Peterson's rear (West) fence. Exhibits 12, 13. (R. 118-20.)
- (3) E. B. Kuhe property, 629 Aloha Road. Exhibit 22. (R. 168.)
- (4) Von Holbrook property, 652 Aloha Road. Exhibit 23. (R. 170.)
- (5) Clifford O. Gledhill property, 625 Northcrest Drive. Exhibit 24. (R. 71, 172.) Note the terracing and "earth battered back" of this property around the swimming pool.

The burden was on plaintiffs to prove the Richards' tennis court fence actually violated the Ordinance. That it was over 6 feet high. Six feet from where? The sidewalk level cannot govern. That walk is at least 2 and even as much as 4 feet *below* the original land level in places. Plain-

tiff Parrish, an architect, said so (R. 92, 93). And what constitutes the “fence”, the metal posts and wire or the latter and the base or wall on which they rest? Remember, in injunction cases, plaintiffs (1) have the burden of proof as in other actions, and (2) their right must be clear — *clearly* established.<sup>7</sup>

Appellants claim some evidence about the Richards retaining wall on which the fence rests, being at one point some 36 inches higher than the “natural grade” (whatever that is). Appellants’ Brief, 10. But, plaintiff Peterson explained the “low point” on the terrain (which must have created the corresponding high point on the retaining wall between his property and Richards’) resulted from floods which had coursed across the Richards lot before the homes were built (R. 101-02) following a “natural, low ravine that had been there” (R. 115).

The Ordinance talks about “average grade”, saying fences must not exceed 6 feet above the “average grade of adjoining properties”. Section 51-4-4. Where is that? Appellants have not shown that. Nor, clearly so, as they must. Average grade is not defined. Do we measure 6 feet on the ground as now exposed (or at an assumed level) at the corner posts and then shear off everything above a straight line extending between the two? Or, do we do that between sections or posts or levels, cutting one down, leaving the next up, another down, another up, etc., etc.? The clarity of that is something to dwell upon. After *viewing* the properties and the surrounding area and hearing all

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<sup>7</sup>Page 2 herein. 43 C. J. S., Injunctions §15. 14 Am. Jur., Covenants §338.

of the confusing evidence, and considering the Ordinance, Judge Ellett finally concluded, as he only could, from that mass of confusion and uncertainty, that the fence surrounding the tennis court "does not violate the Zoning Ordinance" (R. 201). That conclusion was inescapable upon this record.

### POINT III.

PLAINTIFFS BEING IN VIOLATION OF THE  
FENCE-HEIGHT ORDINANCE MAY NOT SUE  
FOR INJUNCTIVE RELIEF. THE COURT  
PROPERLY HELD THEY WERE ESTOPPED.

"Where the one requesting the injunction has himself violated the restriction upon his own property, he will be held estopped by his own violation, and the remedy will be refused." 57 A. L. R. 340.

That thread runs all through the decisions. *One violator may not sue another violator.* That is only common sense. So, if the Richards fence actually reaches above the 6 foot Zoning Ordinance in spots (and we deny it does), plaintiffs are barred. Why? Because Parrish's high board fence (on the North—Photo Exhibits 16, 17 and 18) and Peterson's high wall and fence (along the West—Photo Exhibits 12 and 13) both violate the fence-height Ordinance. (And, Parrish's also violates the 8 foot side-line Ordinance, besides. See Page 4 herein.)

Thus, the A. L. R. quote above has reference to co-violators of restrictive *covenants*; but there can be no difference in reason or in law between co-violators of a *covenant* and co-violators of a city *ordinance*. They simply may not

sue each other for the same violation. On this subject Tiffany, Law of Real Property, §873 says:

“One cannot obtain relief in equity against the violation of a restrictive agreement \* \* \* if he himself is guilty of a substantial breach of the same restriction.”

And look at the following court decisions:

*Kneip vs. Schroeder* (Ill.) 99 N. E. 617. (1912) : Building line case. Injunction denied. The head note reads: “Owners of lots who have encroached upon a building line along a street are not entitled to complain of an encroachment to be constructed by another owner.”

*Balcom vs. Normile* (Mass.) 150 N. E. 885. (1926) : Injunction denied against a six-car garage where plaintiff maintains a two-car garage. “the plaintiff is not in a position to claim \* \* \* that his neighbor should be enjoined from using her premises for a garage \* \* \* plaintiff is violating such restriction as much as his neighbor and is not \* \* \* in a position where he can equitably claim that she should be enjoined \* \* \* it is settled that because of her own acts she cannot invoke the aid of a court of equity to prevent the defendant from erecting and maintaining the garages.”

*Smith vs. Spencer*, (N. J. 1913) 87 A. 158. Suit to enjoin 2 foot 2 inch building projection beyond the set-back line. Injunction was denied “\* \* \* for the reason that they (plaintiffs) are guilty of the same kind of violation of the covenant \* \* \* It is well settled that one who violates a mutual covenant cannot complain to a court of equity of a similar violation by his neighbor.”

*Moore vs. Adams* (Ark. 1940) 140 S. W. 2d 49. Trailer Camp Case. Injunction denied because: "the parties here complaining of its violation have themselves violated the general plan in the respects herein stated, and they are in no position to complain."

*Wischmeyer vs. Finch* (Ind.) 107 N. E. 2d 661. Trailer Camp Case. Injunction denied because: "injunctive relief will be denied where complainant has substantially violated the restrictions \* \* \*" The court also said, "the granting or refusing of relief in the violation of a building restriction is a matter within the *discretion* of the trial court and is to be governed by equitable principles." (Italics added.)

*McGovern vs. Brown* (Ill. 1925) 147 N. E. 664. Suit to enjoin violation of 30 foot set-back building line by six porches of an apartment house extending 10 to 12 feet over the line. *Several* of the plaintiffs had violated the building line themselves. Injunction denied. "\* \* \* three of the plaintiffs have themselves violated it in constructing their buildings. Under the previous decisions of this court, complainants cannot and will not be allowed to enforce the restrictions against defendants."

*Curtis vs. Rubin* (Ill. 1910) 91 N. E. 84. Building line encroachment case. Injunction denied. "In this case the complainants, who had themselves disregarded the building line, were asking a court of equity to enforce the restriction \* \* \* we do not think that the complainants who had disregarded the restriction \* \* \* could be heard to object that defendants were violating the condition to a greater extent than they were."

Appellants' Brief (P. 14) asserts the Richards fence *depreciates* Appellants' property but that the Parrish-Peter-

son high fences (each admittedly well over 6 feet) actually “enhance” values of the surrounding properties. The assertion is amazing and how it could result is not explained. Appellants wonder also if the Parrish fence should estop the Petersons. But, Parrish and Peterson, having made common cause together in the complaint against Respondents, we submit that each must suffer the consequences of his co-plaintiff’s violations. Having joined as plaintiffs, their cause of action “if not good as to one plaintiff, is bad as to all of them”. 71 C. J. S., Pleading §72.<sup>8</sup>

Peterson claims his violative fence is only “temporary”. Appellants’ Brief (P. 13). He so claimed below (R. 119). But, the Ordinance allows no exception for temporary fencing. It is addressed to all fences. Moreover, Judge Ellett “viewed” this fence himself. From the evidence and the view, he rejected the contention. The photographs in evidence support his rejection and show the permanent character of the Peterson fence. (Exhibits 12 and 13.) It has been standing since the summer of 1954 (R. 128).

#### POINT IV.

AS THE TRIAL COURT RULED, IF THE TENNIS COURT IS A STRUCTURE, THE PARRISH HIGH BOARD FENCE IS A STRUCTURE ALSO.

This proposition is clear enough to the court, we think. The trial court took a “view” October 4, 1956 (R. 81, 137)

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<sup>8</sup>That proposition is akin to the rule that a joint exception to a jury instruction must be good as to all who join or it will be bad as to each. 88 C. J. S., Trial §420; and that joint assignments of error, if not good as to one, are bad as to all. 4 C. J. S., Appeal & Error §1248. *McGuire vs. State Bank*, 49 Utah 381. 164 P. 494.



and saw this high board fence. It is over 10 feet high. And it is braced with two large, heavy beams across the top anchored to the Parrish roof. It is fully shown in the photographs in evidence. (Exhibits 16, 17 and 18.) Clearly, if the tennis court is a structure, this high board fence is *also* a structure. And, in that event, plaintiffs having violated the Covenant themselves by maintaining their own structure, are barred from enforcing the Covenant. One violator may not sue another violator to enjoin a similar violation of a covenant. (Please turn to Page 14 herein.)

The trial judge ruled:

“6. That if defendants’ tennis court and fence be construed to be a structure within the prohibition of said Restrictive Covenant, plaintiffs Parrish’ high board fence and beams anchored to the Parrish house must likewise be construed as a structure; and plaintiffs, by so maintaining said high board fence, are thus estopped to and may not maintain any action against defendants in regard to the alleged violation of the Covenant respecting a structure” (R. 202).

#### POINT V.

#### THE WEST PORTION OF RESPONDENTS’ LOT LIES OUTSIDE OF NORTHCREST SUBDIVISION AND IS NOT SUBJECT TO THE COVENANT.

As the answer shows (R. 10) and as Appellants admitted in response to Respondents’ interrogatories (No. 3, R. 21), the West 15.2 feet of the Richards property lies wholly outside of Northcrest. The trial court so found, as he was bound to do (R. 196). Of course, then, that outside portion (and the tennis court thereon) is not subject to

the Restrictive Covenant, as Judge Ellett concluded (R. 203). To order the balance of the court removed (the part within Northcrest) would be to leave the West 15.2 feet of the tennis court in place. That would result in a dangling eyesore. That injunction would simply serve as punishment and reprisal to Dr. Richards and his wife. Furthermore, it would also be harmful and damaging to plaintiffs, particularly Peterson, whose residence would then abut the useless remains. The trial court so concluded (R. 203).

But, since sound discretion is the touchstone, it must be clear, we think, that injunctions do not lie simply to vindicate one litigant as against another, nor to punish or oppress.

“Since an injunction should not be made an instrument of oppression and injury, it will not be granted when good conscience does not require it, where it will operate oppressively or contrary to justice, where it is not reasonable and equitable under the circumstances. \* \* \*” 43 C. J. S., Injunctions §12.

We submit that it would have been most unreasonable and inequitable to order Dr. Richards to remove that part of the tennis court *within* the plat when the West 15.2 feet beyond would be left. Sound discretion, we think, could not possibly arrive at such result. The trial court properly so ruled.

## POINT VI.

### ESTOPPEL OF APPELLANTS BY OTHER HIGH WALLS AND SWIMMING POOLS.

It was shown on the trial and the court found (R. 201) that the Northcrest Subdivision area abounds with high



fences and walls. Photographs are in evidence showing some of these. (Exhibits 22, 23. R. 167, 168, 170.) Dr. Richards testified to at least three high walls or fences which are well over 6 feet—in fact, far above his reach, as shown by the photographs: (1) Kuhe's high retaining wall, 629 Aloha Road (Exhibit 22), across the street North from the Freed residence and swimming pool which the trial court saw, (2) Holbrook's high wall and fence, 652 Aloha Road (Exhibit 23), next to the Freed residence, and (3) Montague's high wall next door South of Petersons' property. Failure to take action against these fences and walls, the trial court held, estopped Appellants from challenging Respondents' fences (R. 202).

Then, there are the swimming pools: (1) the Freed pool, shower and dressing rooms (where Mrs. Parrish and her daughter sometimes swim and sun (R. 180), and, (2) the Gledhill's pool and bath houses just East of Petersons (Photo Exhibit 24). The evidence (undisputed) was that both pools necessitated dismantling of the West section of each owner's fence in construction; that trucks, workmen and machinery came and went and operated for months right under Appellants' noses, so to speak, in constructing the two pools and that none of Appellants objected (R. 173-76). They thereby accepted, impliedly at least, the pools and dressing rooms as not being structures banned by the Covenant. The tennis court, we submit, is even less such a structure, being far less fixed and permanent than the swimming pools.

## POINT VII.

CUTTING AND FILLING IS INEVITABLE IN  
THE STEEP HILLSIDE AREA INVOLVED.

The area involved is a steep hillside one. Steep slopes require cutting, filling, retaining walls, etc. That is just common sense. It is common knowledge. The California court recognizes this. It said in *Beck vs. Bell Air Properties* (Cal.) 286 P. 2d 503, 509:

“\* \* \* it is a matter of common knowledge that retaining walls, hillside terracing, planting and similar methods have been extensively and successfully used to hold fills in place. This is particularly true in the territory surrounding Los Angeles; and is evidenced by the extensive building operations made possible by hillside fills in the Baldwin Hills, the Hollywood Hills and the Santa Monica Mountains.

“Moreover, the creation, construction and maintenance of hillside fills is a matter of common usage. Cutting, leveling and filling are the inevitable, constant and ordinary methods pursued in the development of hillside areas.”

Plaintiffs conceded that cutting and filling is necessary.<sup>9</sup>

## CONCLUSION

We have seen that injunction is by grace, alone, issuable only in the sound discretion of the court. What court?

“*The court which is to exercise the discretion is the trial court and not the appellate court.*” 43 C. J. S., Injunctions §14.

<sup>9</sup>“\* \* \* plaintiffs concede that property owners whose property is located on hilly terrain must, to a certain extent, cut and fill, and that the original grade should not necessarily govern. \* \* \*” (Plaintiffs’ Pretrial Memorandum. R. 30.)

And,

“Generally, in the absence of manifest abuse of discretion, an appellate court will not review, modify or revise discretionary rulings as to the grant, dissolution, continuance or modification of an injunction or restraining order.” 5 C. J. S., Appeal & Error §1591.

Throughout the trial court’s conclusions, it is stated that the injunction was denied “in the exercise of a sound discretion” (R. 202, 203). That sound discretion was exercised and arrived at after a full hearing of all the facts regarding these properties and a “view” thereof by the Judge.

Error is never presumed. On the contrary, all reasonable presumptions are indulged in favor of the judgment below and against error—

“\* \* \* and the burden of affirmatively showing error is on the party complaining thereof.” 5 C. J. S., Appeal & Error §1533.

Appellants have failed to show error in and by the trial court. They have failed to show the exercise of its discretion was abused. Consequently, the judgment refusing the injunction must stand.

And:

“One seeking to enforce a restriction has the burden of demonstrating that his version of it should be sustained or is sustained by the plain and natural interpretation of its language, or that the activity objected to is within the terms of the restriction.” 26 C. J. S., Deeds §163.

Appellants have failed to demonstrate that their version of the tennis court (that it is a structure prohibited by the Restriction) is sustained by the restrictive language. Restrictive covenants are to be construed *against* limitations and in favor of free use of the property, as the trial court decided.

Respondents submit:

1. The tennis court is not a structure forbidden by the Covenant. The term structure therein must be given color by the words "one, two or three car garage and one single family dwelling". The rule ejusdem generis applies.
2. The fence surrounding the tennis court does not violate the City fence-height Ordinance. Appellants failed to prove that it does.
3. Being in violation themselves of the fence-height Ordinance, Appellants were estopped, as the trial court held, to sue for injunctive relief. Their fences violated the Ordinance. One violator may not sue another violator.
4. If the tennis court were ruled to be a structure, the Parrish high, board fence is a structure also. Again, one violator may not sue another violator to enjoin a similar violation of a restrictive covenant.
5. The West portion (15.2 feet) of Respondents' property lies wholly outside of Northcrest. It is not subject to the Restrictive Covenant. The trial court's refusal—*discretionary refusal*—in that circumstance to enjoin the tennis court was correct.
6. Appellants were estopped by their failure to oppose or object to the numerous high walls and

the swimming pools in the surrounding North-crest area.

7. Cutting, filling, terracing and retaining walls are inevitable in the steep hillside area involved.

The trial court heard the evidence. It also “viewed” the premises and area involved. In the exercise of “sound discretion”, it refused the injunction and dismissed. Abuse of discretion has not been shown. Appellants have not established any error. The judgment below was correct and must be affirmed, with costs to Respondents.

Respectfully submitted,

THOMAS & ARMSTRONG,  
EDWARD M. GARRETT,  
*Attorneys for Defendants  
and Respondents.*

511 Walker Bank Building  
Salt Lake City 11, Utah

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