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Jerry Sine and Dora T. Sine, his Wife v. Western Travel, Inc., a Corporation, Hyatt Chalet Motels Inc., a Corporation, and Harold Butler Enterprises, Inc. : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY SINE and DORA T. SINE,
his wife,

Plaintiff-Appellants,

vs.

WESTERN TRAVEL, INC., a corporation,
HYATT CHALET MOTELS INC., a corporation, and
HAROLD BUTLER ENTERPRISES NO. 115, INC., a corporation,

Defendants-Respondents.

Case No.
10633

UNIVERSITY OF UTAH

BRIEF OF APPELLANT

MAR 31 1967

Appeal from a Judgment of the Third District Court
for Salt Lake County
Honorable Stewart M. Hanson, Judge

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for injunction to enforce a restrictive covenant that a tract of land in Salt Lake City, Utah, will not be used for the erection of a motel thereon.

DISPOSITION IN LOWER COURT

Following trial before the Court without a jury, the Court ruled against the plaintiffs and entered a Memorandum Decision of dismissal and then made Findings of Fact and Conclusions of Law and denied the Motion of plaintiffs to amend the Findings of Fact and Conclusions of Law and Decree or alternatively, for a new trial.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment of the District Court for an interpretation of the restrictive covenant that erection of a restaurant under lease from the owner of all the land, coupled with erection of lodging rooms, office, swimming pool, parking space, and liquor dispensary is in its entirety the construction of a motel on the restricted land as to the restaurant portion, or alternatively, the reversal of the trial court for failure to amend Findings of Fact and Conclusions of Law requiring reversal of the judgment or a new trial.

STATEMENT OF FACTS

The plaintiffs and appellants will be referred to herein as plaintiffs, and the defendants will be referred to collectively as defendants or as Western Travel, Hyatt Motels, or Butler Enterprises where referred to individually.

The plaintiffs were owners in 1955 and 1956 of a piece of land 40 x 97 feet on North Temple Street between Second and Third West Streets in Salt Lake City, Utah (R. 86-87). Plaintiffs in those years and for several years prior thereto had been owners of a large motel three blocks west of the said property, known as Se Rancho Motel and consisting of 200 rooms with swimming pool, tennis court and playground, parking area and leased restaurant (R. 83-85), and also of Scotty's Travel Motor Hotel one block farther west with similar facilities except that a separately owned cafe adjoins the property (R. 85).

Plaintiffs were approached in 1956 by a real estate agent representing Wright-Wirthlin and seeking to purchase the said tract of ground 40 x 97 feet (R. 88). A bargain was made and there was presented to plaintiffs for signature an Earnest Money Agreement, Assignment of Contract and Quit-Claim Deed which are Exhibits P-5, 6 and 7 (R. 92-93). The purchaser Neilson transferred an interest to Messrs. Wright and Wirthlin and to Metropolitan Investment Company, a partnership (Exhibit P-9 and P-10) which then conveyed to defendant Western Travel (R. 94 and Exhibit P-11).

In making the purchase, A. P. Neilson was acting in behalf of himself and Messrs. Wright and Wirthlin which resulted in the holding of the land by the partnership of said persons and known as Metropolitan Investment Company (Exhibit P-9).

In 1960 an action was brought by Metropolitan

Investment against the plaintiffs to declare the restrictive covenant invalid which case was resolved in favor of these plaintiffs by this Court in Case No. 9622, *Metropolitan Investment Company, a partnership composed of W. Adrian Wright, W. Meeks Wirthlin and A. P. Neilson vs. Jerry Sine and Dora T. Sine*, 14 Utah 2d 36, 376 P.2d 940.

While the said action was pending, an action for rescission or for damages for breach of the covenant was brought by the plaintiffs against A. P. Neilson, Metropolitan Investment Company and Western Travel, Case No. 134154 in the Third District Court, of which file judicial notice is taken in this action.

This case was dismissed in February, 1964, following the decision in Case No. 9622, the Court stating:

“After a discussion of the facts and the law involved in the action, and it appearing to the Court that the Supreme Court has heretofore held the deed between the parties to contain a restrictive covenant and that the same is binding on all parties;

It was, therefore, held by the court as a matter of law that rescission cannot be had in this case, and that the Complaint does not state a cause of action as to any of the purported considerations set forth therein insofar as rescission is concerned.

And there being no evidence of a breach of covenant and of damage to the plaintiff, the Complaint in its entirety is dismissed with prejudice.”

In July, 1963, an action was commenced in the Third District Court by defendant Western Travel against these plaintiffs in an action of which judicial notice was taken in this case by which Western Travel sought a judgment that the construction of a proposed hotel utilizing the 40 x 97 foot tract of land as parking space incident to and in conjunction with a hotel-restaurant open to the public generally was sought. This action was dismissed on March 18, 1964, by Honorable A. H. Ellett, Judge, on the authority of *Metropolitan Investment Company v. Sine* as shown by the file which is before the Court as part of the record, the Order of Dismissal stating:

“After discussion of the facts and the applicable law including the decision of the Utah Supreme Court in the case of *Sine v. Metropolitan Investment Company*, 14 Utah 2d, 38, this Court stated that it was bound by the decision in that case which related to the property involved in this action and that construction of a parking lot in connection with a motel appeared to be within the covenant.”

On February 16, 1965, application for a building permit was filed with Salt Lake City by Bob B. Allred for Hyatt Chalet Motels (Exhibit P-12) with which were filed certain plans received in evidence as Exhibit P-14. These plans at Sheet 1-B show that the design of the entire property was by architect Pollack of Hyatt Motels and show the architectural style of the two buildings.

On March 5, 1965, application for building permit for Denny's Restaurant was filed by Richard G. Sharp and naming Hyatt Chalet Motel, Inc. of 1610 South Main, Bountiful, as General Contractor (Exhibit P-16).

The design and layout for the high-rise hotel referred to in Action No. 144500 is Exhibit P-18 which shows the proposed arrangement as of that time with reference to the tract of land involved in the action.

Exhibits P-35 and P-36 relate respectively to the area where the lodging units, office, swimming pool and parking and the area covered by the restaurant and parking are situated.

Western Travel conveyed the large area to Hyatt Motels on May 6, 1965, which gave a deed of trust on April 29, 1965, for \$450,000.00 with assignment of rents and income the same date, and deed back to Western Travel dated May 5, 1965, all recorded May 10, 1965 (Exhibit P-35).

The tract subject to the restrictive covenant and some additional land was conveyed May 6, 1965, by Western Travel to Harold Butler Enterprises which conveyed April 30, 1965, to Hyatt Motels, which gave deed of trust April 29, 1965, for \$120,000.00, with assignment of rents and income the same date and deed back to Western Travel May 5, 1965 (Exhibit P-35).

The Hyatt Motels lease to Butler Enterprises (Exhibit P-39) calls for construction of restaurant

building and reciting the restrictive covenant on the land at Page 8 of the lease.

The stock ownership of Western Travel is shown by Exhibit P-40 and is shown to include W. Adrian Wright, Weeks Wirthlin and A. P. Neilson.

The plaintiff Jerry Sine testified that he has been in the motel business for 20 years (R. 108) and testified as an expert that "a motel is an inn or a roadside hotel offering lodging, food, I would say, food, lodging and parking, a swimming pool, and many other services, and various entertainments in the rooms, such as TV, radio, independent music and the like" (R. 109). Most large motels have swimming pools, all have parking for automobiles, and not all serve food and beverage (R. 110). The additional facilities are necessary for motels of over 40 units (R. 110). A motel is a modern word first appearing in the dictionary in 1948 (R. 111). The advertising of motels draws attention to their facilities including service of food, parking, TV and swimming pools (R. 112). Such advertising, drawing attention to service of food, was illustrated by Exhibits P-19, a magazine called "Hospitality — Food and Lodging —" at Page 74, 85 and 106; P-20 the "Tourist Court Journal" at Page 20 to 26; "Newsweek" magazine for February 7, 1966, at Page 77, Exhibit P-21; Exhibit P-22, a publication of Hyatt Motels obtained from the Salt Lake office of the Hyatt Inn and the classified sections of the Phoenix, Salt Lake City and Provo telephone directories, being Exhibits P-23, 24 and 25.

Plaintiffs' Se Rancho motel has connected with it a restaurant called "Se Rancho Broiler" which is under lease and seats 90 or more people (R. 121). Scotty's Travel Motel adjoins the "Poor Boy Restaurant" which is under separate ownership (R. 122). The later Travel-Lodge Motels are building restaurants (R. 126).

Jerry Sine's testimony of conversation with the real estate agent in 1956 was that no motel or anything in connection with a motel would be built on the property (R. 133). It was his intention to prevent a pretentious motel fronting on North Temple (R. 136).

Hyatt Motels was putting in the footings when Mr. Sine referred the matter to counsel (R. 130).

Roy Menlove, part owner and manager of the World Motel testified that Exhibit P-26 shows the restaurant Teogra connected with the World Motel and that the corporation owns the building and leases out the restaurant (R. 139-140). In its advertising, the World Motel advertises the Teogra Restaurant (R. 140). It is important that the restaurant be connected with the motel (R. 143-145). A large part of the business of the Teogra Restaurant is from the public (R. 147).

Richard L. Webber, manager of Covey's America Motor Lodge in Salt Lake City testified that a reputation for good food aides in the sale of the main product which is guest rooms. A luxury motel includes a coffee shop or dining room and it is ideal to have the food

department on a lease basis with a first-class operator (R. 151-152). Covey's New America has a lease with the Hot Shoppes which is one of the large chain of restaurants comparable to Denny's (R. 155). Covey's New America has 330 rooms and the Hot Shoppes Restaurant will seat 350. The card advertisement of New America Motor Lodge and the Hot Shoppes Restaurant is Exhibit P-27.

Leon Dale Reed testified that he is co-owner of a 67 unit motel in Seattle and District Governor of Best Western, also National Director of the Motel Association (R. 158). Best Western is a referral organization of motels with an advertising program and group purchasing. Its travel guide shows the accommodations of motels including coffee shops, restaurants, lounges and swimming pools (R. 159). Motel is a coined word and is an umbrella which covers tourist courts, motor hotels, inns, chalets and their accommodations (R. 160). In cities where the best have restaurants, the public demands a facility which includes a restaurant (R. 161). It makes no difference to Best Western whether the restaurant is owned and operated or leased out (R. 162).

Exhibit P-28 is the Best Western Guide which shows whether each motel has a restaurant or swimming pool, parking being fundamental and assumed to exist. Motel chains are not included in P-28. About 60% of motels listed have restaurants including his of 67 rooms which has a coffee shop to seat 36 people (R. 164). Coffee shops usually cater to the public although this is

not necessarily indicated by the number of seats with reference to the rooms of the motel (R. 165).

The word "motel" is a changing concept with more things coming under the umbrella word all the time such as gift shops, bars, service stations (R. 167). A restaurant such as Denny's would be an asset to a motel (R. 171).

Based upon examination of Exhibits P-26 and P-27, it is his opinion that the World Motel and Covey's New America are motels with restaurants. (Exhibit P-28 so lists them.) Sheet 1-B of Exhibit P-14 shows a motel package and it would be an advantage to advertise it as a motel with a restaurant (R. 172). It makes no difference to the traveling public whether a restaurant is owned or is independent (R. 176).

Sherman Lowman testified that he is manager of the approved accommodation department of American Automobile Association (AAA) whose duties include inspection and rating of motels and cafes as good, excellent or outstanding (R. 177). The ratings are affected by swimming pools, adequate parking, food service and beverage service (R. 178). A really good restaurant receives a separate listing (R. 180). The World Motel in Salt Lake City is listed with its restaurant (R. 181). Commencing with 1966, hotels and motels are listed separately (R. 181). Three tour books issued by AAA are exhibits P-29, 30 and 31 which list motels not necessarily members of AAA (R. 182-183). They cover national chains including the Hyatt Royal Inn which

is the only one in Salt Lake rated excellent and shows a restaurant at this location.

AAA rating books show swimming pools (R. 186) and make no clear distinction between hotels and motels (R. 187).

Jesse M. Payne testified that the State Contractor's Licensing Department issued a license on May 5, 1965, to Bob B. Allred Construction Company limiting its contracts to \$75,000.00 (R. 189).

Barbara Sine, wife of Wesley Sine, son of the plaintiffs testified that she telephoned the Hyatt Hotels, Motels and Lodges and got the information shown on the Notice to Produce (R. 190-191). Exhibit P-32 is a list of the results of the calls she made.

Wesley Sine testified that the cards of several motels showing restaurants are included in Exhibit P-33 depicting motels he has seen. Exhibit P-34 is a picture of the Hyatt Royal Inn in Salt Lake (R. 196).

Denny's Restaurant and the Hyatt Motor Lodge were originally painted the same color, then the Denny's Restaurant was darkened (R. 197). The motor lodge was opened October 1, 1965, and has three convention halls the largest of which holds 100 to 150 people (R. 198).

Exhibit P-37 is a circular obtained from the Hyatt Motel desk and shows the variety of motels and hotels owned by the Hyatt Motel chain (R. 202).

The Hyatt Motel dispenses alcoholic beverages on the premises (R. 203). The Denny's Restaurant has an exit to the north toward the rooms of the motel (R. 204). Denny's Restaurant appears to have a capacity of about 143 (R. 205).

The circular obtained at the desk from the Hyatt Motel (P-37) mentions convention rooms (R. 206) and he was told that Denny's could set up a buffet in the convention rooms (R. 207).

Definitions of motel, hotel, restaurant and inn from Webster's New 20th Century Dictionary Unabridged Second Edition, copyright 1957 were read into the record (R. 208-209).

Pursuant to the Notice to Produce, there were produced Exhibit P-39, the lease agreement to the Butler Enterprises; P-40, a list of stockholders of Western Travel, and P-41, a lease on the restaurant in Provo by Western Travel of "certain property — in the motor-hotel known as the Royal Inn of Provo consisting of a dining room, kitchen, coffee shop —."

The Court was informed by counsel that Denny's is the advertised name of Butler Enterprises (R. 215).

The plaintiff Jerry Sine testified that his only effort to stop construction was to notify his attorney two or three times, the first time around April (R. 220-221).

Defendants offered Exhibit D-42 which is the Salt Lake City Zoning Ordinance Revised May 1, 1965, with

a stipulation that the property is zoned C-1 thereunder (R. 224-225).

Bruce Hartman, assistant operations director for Hyatt Motels testified that he helps the sales program and is a trouble shooter (R. 226). Out of 38 motels of the Hyatt chain, one in Indio has purchased a food operation (R. 227). The Hyatt Chalet Motel in Salt Lake with 100 units will not support the Denny's Restaurant of 160 seats. When the motel is not 100% occupied, it will supply not over 20% of Denny's gross (R. 228). Restaurants connected with motels can't exist on motel patronage only (R. 229). Exhibit P-38 shows the restaurant nearest the various Hyatt Chalet motels.

Motel advertising emphasizes things which will attract customers. Swimming pools produce no revenue but are a sales advantage. Parking is necessary but does not support an extra charge (R. 233).

Richard G. Sharp testified that he is the local architect for Butler Enterprises, supervised the construction of Denny's Restaurant in association with Colwell & Ray of Los Angeles. The construction started April 1, 1965, cost \$160,000.00 plus \$80,000.00 for the equipment and furnishings (R. 236). On July 18, he learned of an effort to stop construction. At that time the building was 80% complete (R. 237). He doesn't know what Butler Enterprises is. He built for Denny's which is the organization that has the restaurants (R. 239). Exhibit P-17 are the plans he worked from. He had no correspondence with Denny's Restaurant and

used the name Denny's Restaurant in obtaining the building permit (Exhibit P-16) which name he obtained from the plans (R. 240). The general contractor supplied to him the name Hyatt Chalet Motels (R. 241). Wayne Young was Allred's foreman on the job (R. 242).

Donald Daniel testified that he is the local manager of Denny's (R. 244). The majority of his business comes from the public. If the motel is full, 80% comes from the public (R. 245). He has worked at other Denny's Restaurants which were associated with motels (R. 246). He doesn't know whether there is a Denny's Restaurant corporation, but he was paid by Denny's prior to the opening of the restaurant (R. 250).

It was stipulated that in 1956 the property involved was zoned B-3 under the 1955 Salt Lake City Ordinances (R. 252).

Jackson B. Howard testified that he represented Western Travel in preparation of Exhibit P-39 (R. 254) and identified the letters in Exhibit P-43 as being to and from his office. Referring to the Harold Butler Enterprises as the Butler Enterprises was a human error (R. 256).

M. Byron Fisher testified that he was associated with the attorneys for the plaintiff. He knows the handwriting on Exhibit P-43. The information on P-44 was obtained from the Salt Lake City Building Permit (R. 258). He called the Secretary of State for "Butler Enterprises"

and for "Denny's" neither of which was qualified or listed (R. 260). Later, when he called for "Harold Butler Enterprises," he got the name of the process agent (R. 261). He visited the premises on June 10, 1965, talked to and served Mr. Young who was in charge of construction (R. 264-266).

Barbara Sine testified that she attempted to locate Bob Allred in Bountiful and that both the office and his home at 1030 Millbrook were deserted and the Christmas tree lights were still up at the home (R. 267-269).

POINTS TO BE ARGUED

1. The restriction against a motel covers all parts of a motel.

2. The lease to Harold Butler Enterprises does not circumvent the restriction.

3. Injunction is the appropriate remedy.

4. The Motion for New Trial should have been granted.

(a) Finding of Fact No. 5 erroneously states that Butler obtained a building permit.

(b) Finding of Fact No. 5 erroneously indicates that plaintiffs did nothing to serve Harold Butler Enterprises until July 15, 1965.

(c) Finding of Fact No. 6 is erroneous in finding independent construction and operation of the restaurant and the motel.

ARGUMENT

POINT I. THE RESTRICTION AGAINST A MOTEL COVERS ALL PARTS OF A MOTEL.

For purpose of analysis it is assumed in this point that all of the facilities shown at Sheet 1-B of Exhibit P-14 were built as the Hyatt Royal Inn, complete with lodgings, office, restaurant, swimming pool, liquor dispensary and parking areas.

It is admitted that motels do not necessarily have food service facilities and contended that most large ones do, in accordance with the evidence in this case.

The Court is asked to take judicial notice of the fact that the Hotel Utah, the Newhouse Hotel, and other large hotels have dining rooms, coffee shops and banquet facilities. These are all parts of a complete service hotel, regardless of whether an area where food is served is called the "Coffee Shop," the "Sky Room," "The Royal Room," the "Persian Room" or "The Roof Garden."

Likewise, food service is part of the operation of many motels by the definitions given by Mr. Sine (R. 109), Mr. Webber (R. 152), Mr. Reed (R. 160-161) and Mr. Lowman (R. 178).

A motel is defined to be a "roadside hotel for motorists, usually consisting of private cabins" (R. 209).

A hotel is "an establishment or building providing a number of bedrooms, baths, etc., and usually food,

for the accommodation of travelers, semi-permanent residents, etc.” (R. 209).

The combined definition of a motel, therefore, is: “A roadside establishment providing a number of bedrooms, baths, and usually food, for the accommodation of travelers, semi-permanent residents, for motorists and usually consisting of private cabins.”

An “inn” is an establishment or building providing food, drink, bedrooms, etc. for travelers; a hotel, especially one in the country or along the highway” (R. 209). The name “Hyatt Royal Inn,” therefore, emphasizes food service more than “motel” or “motor lodge” and gives the entire operation the atmosphere of good food.

Many motels serve “continental breakfasts.” Some advertise free breakfasts (Exhibit P-30, pp. 307-309). Presumably, such breakfasts do not involve a separate eating area and the place where the food is served would seem to be part of the motel.

Where a sit-down eating room is provided by the management and operate by it, the room would again seem to be part of the motel.

If motels construct separate buildings for lodging, for office, for changing into swim clothes, the result would seem to be the same. There seems to be no reason for a different conclusion if one of the separate buildings of the cluster handles eating requirements of the motel.

The facilities and services are collectively the "hotel" or "motel" and each is an integral part. This conclusion seems compelled by the way the motel industry itself holds itself and its members out to the public — its prospective guests.

In Mr. Sine's testimony and in the Supreme Court decision in No. 9622, it is noted that one purpose of the restriction was to prevent a pretentious or imposing motel fronting on North Temple Street. In other words, the impression that is created to the public is an important item. This appears from the testimony of all of the witnesses who testified that motels advertise those features which will attract customers and one of the features is food service. No distinction is made in advertising between restaurants under joint operation with the lodging as against restaurants under separate lease, and indeed there is no indication of a distinction where the restaurants are separately owned on separate parcels of ground.

Thus, Mr. Menlove testified that the Teogra was owned by the World Motel but was under lease; Mr. Webber testified similarly as to Covey's New America Motel and the Hot Shoppes Restaurant and further testified that in his opinion the lease was the ideal arrangement. The property under question involves common ownership with a lease to Butler Enterprises which operates Denny's Restaurant. And Exhibit P-41 shows that Western Travel made a lease to Vern C. White of the restaurant portions of the Provo property, the

commencing language in Paragraph 1 of that lease being as follows:

“The property leased includes *certain property* leased in Provo, Utah County, State of Utah, *in the motor-hotel* known as The Royal Inn of Provo, consisting of a dining room, kitchen, coffee shop, etc. *** on all of the adjacent motel premises owned by lessor*.” (Emphasis added.)

All of these motels are listed in the tour guides as being motels with coffee shops, and so are they depicted in their own post cards contained in Exhibits P-26 and P-27, and P-33.

In Exhibit P-29, which is the Tour Book of AAA covering the State of Utah, at Page 215, 216 and 217, Covey's America Motel and Coffee Shop is shown as having a restaurant, Hyatt Royal Inn is shown as having a restaurant, World Motor Hotel is shown as having a dining room and coffee shop and at Page 213, the Royal Inn at Provo is shown as having a restaurant and coffee shop. Nothing is said about separate operations and no names are given for the restaurants apart from the motels.

Also in Exhibit P-28, the Best Western Travel Guide, at Page 27, are listed Covey's America Motel and Coffee Shop and the World Motor Hotel Restaurant and Coffee Shop, the Western Travel places not being listed for either Provo or Salt Lake.

Exhibit P-41 shows in Paragraphs 20 and 21 that Western Travel was much concerned with retaining its

standing as a member of the Master Hosts Association of Motels. "Newsweek" for February 7, 1966, at Page 77 (Exhibit P-21) is an advertisement of "Master Hosts Motor Hotels." According to the ad there are 241 spread across the United States offering "best sleeping accommodations * finest food * complete recreational facilities, fully equipped for group meetings." The motor hotels are listed by states. There are a large number of motels, many hotels, and a variety of lodges, inns, manors and other names used. It is plain that each of these names is used to depict the aggregate of facilities described over-all by the word "motor hotel" or "motel." These are not motels plus restaurants, but motels which feature the service of food. It is plain that the word "motor hotel" or "motel" does not mean a motel with restaurant or with food service but that motel in the industry itself includes the facilities for service of food.

The importance of food service and its connection with motels is shown in Exhibit P-38 which was produced by defendant Hyatt Chalet. The big part of the folder relates to its hotels all of which have food service. The chalet and lodge facilities are shown on the inside sheets and each one shows the location of the nearest restaurant, including several Denny's Restaurants adjacent or adjoining. This exhibit seems to make no distinction between lodges and motels although Exhibit P-32 lists the same eight hotels and then divides the others into groups of chalet motels and lodges.

Indeed, the Hyatt Chalets are more anxious to

claim restaurant affiliations than is the AAA tour book to accord restaurant connections. Exhibit P-38 shows restaurants listed for the chalets or motels in Fullerton, Palm Springs, Pasadena, Pomona, Redding, Tarzana, Thousand Oaks, Santa Barbara and Hollywood, California; Las Vegas, Nevada; Eugene, Oregon; Phoenix and Yuma, Arizona; whereas, the AAA Tour Books (Exhibits 20 and 30) fail to mention restaurants as being available to those motels. And yet, the Hyatt Motels witness testified that none of these motels owns the food operation (R. 227).

It is interesting in passing to notice that Denny's has made a connection with the Hyatt Motels in Flagstaff and Yuma, Arizona; Modesto and Needles, California; Medford, Oregon; Amarillo, Texas, and Salt Lake City, Utah.

Advertising by motels in telephone directories also revealed that the industry itself plays up its included facilities, including food service, as part of the attractions the motel has to offer the public.

The Salt Lake City Directory (Exhibit P-24) at Page 278 of the classified section shows Covey's America Motel and Hot Shoppes as AAA and Best Western and advertises its heated swimming pool. At Page 279 is a large advertisement for the World Motel and Teogra Room with AAA and Best Western rating and heated pool; Se Rancho Motor Hotel and Broiler Restaurant and its heated pool; Holiday Inn with heated swimming

pool and 24-hour coffee shop; and the 'TraveLodge with heated pool.

The Phoenix classified directory is similar (Exhibit P-23). At Pages 458, 459, and 460 are large advertisements by eight motels or inns advertising their rooms with dining facilities and also cocktail lounges and swimming pools in most cases, with no identity for the restaurants except that they are available food facilities.

It is not for the office to say to the swimming pool, or the lodging facilities to say to the restaurant, or the liquor dispensary to say to the parking area: "I have no need of thee." All make up the institution and the umbrella word that embraces whatever facilities there are, is "motel."

The restrictive covenant against erection of a motel is applicable to each part of the motel.

This Court construed this restrictive covenant in *Metropolitan Investment Company, et al. vs. Sine*, supra, 14 Utah 2d 36, 376 P.2d 940. It appears in that opinion that the plaintiff Metropolitan Investment Company, has sold the property to Western Travel, Inc. for a large sum of cash and 12% of the stock of Western Travel (page 39) and as part of the sale had agreed to test the restrictive covenant in question on behalf of Western Travel (page 40). It therefore appeared that although Western Travel was not a party to that action, the action was brought in its behalf and Western Travel is charged with knowledge of it. In that case the Court noted that Western Travel planned "to construct a

motel development of approximately 130 units, together with a restaurant and swimming pool, on the entire tract, including the property in question, if allowed as a result of this appeal.” The Court’s opinion notes that Jerry Sine has testified “that an impressive motel front could not be built on North Temple Street without this property, and this fact would have a substantial effect upon his motel business” (page 42). And in answer to the contention that the covenant was personal to A. P. Neilson, the Court notes:

“A covenant to A. P. Neilson personally which could have been circumvented by mere transfer of title would have been worthless to the property intended to be protected. Such was not the intention of the original parties to the contract. *** We have no question of a bona fide purchaser without notice, which might free the land of that restriction.”

And the Court then held that the restrictive covenant was valid and enforceable.

This Court has previously indicated that a “motel development” including restaurant and swimming pool is within the covenant. Motel owners generally treat included facilities as part of motels. The definition of motel includes its various services and facilities. Hyatt Motels regarded this as a part of the motel by placing the deed of trust on the restricted property so as to enable construction of the restaurant buildings. And it would be logically unreasonable to consider that a motel does not include its parts.

Analogous cases and authorities have proved elusive. An annotation on restrictive covenants and related parking is 80 A.L.R. 2d, 1259, where it is said that in construing covenants:

“*** effect is to be given to the intention of the parties as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction and the object sought to be accomplished by the parties.”

In 20 Am. Jur. 2d, *Covenants and Conditions*, § 220, the treatise states that:

“Use of lots for parking purposes in connection with places of business located on adjacent premises unburdened by restrictions was held to violate a restriction against maintaining any trade or business on such lots, or a restriction limiting use of the property to residential purposes.” Citing two cases.

We relate this statement to the case at bar in this manner: This Court has held that the motel development involved in *Metropolitan v. Sine*, supra, included 130 rooms, a swimming pool, restaurant and parking facilities. Assuming that restaurant facilities and parking facilities are equally important to the welfare of the motel, a case concerning relationship of parking to the main business might be a precedent of relationship of restaurants to the main business.

In the cited case of *Bennett v. Consolidated Realty Company*, 226 Ky. 747, 11 S.W. 2d 910, 61 A.L.R. 453, there had been an existing roadhouse or night club across

an alley way from a residential area where the lots were restricted to residential uses. The owner acquired three of the residential lots and permitted his patrons without charge to park their cars on the lots. The question was whether this was use of the lots for a business purpose even though no charge was made and even though the business proper was on unrestricted land. In upholding the granting of an injunction against the free parking, the Court said:

“It was necessary to have a parking place for these automobiles. The parking place was an incident to the roadhouse, without which the roadhouse could not have been successfully operated under the circumstances. Bennett was carrying on the business of operating the roadhouse, and, in providing parking places for his patrons, he was simply performing an incident of that business.”

POINT II. THE LEASE TO HAROLD BUTLER ENTERPRISES DOES NOT CIRCUMVENT THE RESTRICTION.

All parties defendant knew or are charged with knowing of the restrictive covenant. It was recorded. It was incorporated in the lease to Butler Enterprises (Exhibit P-39) the income from which was assigned to reinforce the separate deed of trust on the small tract of land whereon, on that date, April 29, 1965, a restaurant building was already being constructed (Exhibit P-36).

Exhibit D-1 shows the property involved in the construction on a plat from the Salt Lake County Recorder's office. The large tract in Lots 1 and 8 are L-shaped and marked Western Travel, Inc. In the center of Lot 1 is an irregularly shaped piece approximately square also marked Western Travel, Inc. In other words, the property on which the lodgings themselves are constructed as well as the property on which the restaurant and the parking are constructed belong to Western Travel, despite a rather complicated set of documents designed to put liabilities for mortgages in certain places and still leave Western Travel as the owner and lessor with other corporations as lessees.

Exhibit P-35 relates to the outside or L-shaped tract. The first document dated May 6, 1965, is the Warranty Deed from Western Travel to Hyatt Chalet Motels, Inc. On April 29, 1965, Hyatt Chalet Motels executed a Utah Deed of Trust to Prudential Federal Savings and Loan in the amount of \$450,000.00 and on the same date made an assignment of rents and income to Prudential Federal Savings and Loan. Then, on May 5, 1965, Hyatt Chalet Motels by Warranty Deed conveyed the property to Western Travel, Inc., leaving Hyatt Chalet responsible for the mortgage which had become a first lien against the premises but on which Western Travel was not directly bound.

Exhibit P-36 contains a Warranty Deed from Western Travel to Harold Butler Enterprises of the smaller portion whereon the restaurant has been built

which deed is dated May 6, 1965, and recorded in Book 2325 at page 286. A Warranty Deed from Harold Butler Enterprises to Hyatt Chalet Motels dated April 30, 1965, was recorded at page 287 of the same book. The next recordation at page 288 was Utah Deed of Trust from Hyatt Chalet Motels to Prudential Federal Savings and Loan for \$120,000.00 and at 291 was recorded an assignment of rents and income from Hyatt Chalet Motels to Prudential Federal Savings to secure the \$120,000.00 deed of trust. The final document in the group recorded at page 292 was a Warranty Deed from Hyatt Chalet Motels to Western Travel. Thus, Hyatt Chalet Motels was again bound on the deed of trust and the property was then conveyed back to Western Travel, except that with reference to this property, deed had also gone through Harold Butler Enterprises.

Exhibit P-39 is a lease agreement between Western Travel and Harold Butler Enterprises dated May 26, 1964, produced by Western Travel in response to the Notice to Produce, the lease in effect between Western Travel and Harold Butler Enterprises. In Paragraph 7 of this lease, Western Travel agrees to subject the premises to such mortgage as may be requested by Butler up to \$130,000.00 and that the lessor shall not assume any personal liability for the payment of the mortgage, the lessor agreeing to subordinate fee simple title to the lien of the mortgage with provision that the deed back will be escrowed and that Butler will deposit the mortgage properly executed and a deed reconveying to the lessor the demised premises subject to the mortgage and

then providing that Butler or its assignee shall make all payments of principal and interest required under the mortgage.

The fact that Butler Enterprises did not execute the mortgage but Hyatt Chalet did, is contrary to the terms of this lease agreement and shows a closer connection between Butler and Hyatt Chalet than was contemplated by the lease from Western Travel to Butler.

Exhibit D-3 and Sheet 1-B of Exhibit P-14 are schematic drawings of what plaintiffs call the motel or Hyatt Royal Inn. These show a uniform style of architecture, or motif and of uses of stone. The effect of these is to make the two buildings a unit and parts of the same motel.

This unity is shown strongly by Exhibit P-37 which was obtained at the desk of the "Hyatt Royal Inn Motel" and is shown again by the four photographs marked Exhibit P-34.

Separate building permits were obtained for the large building and the restaurant building in February and March (Exhibits P-12, P-16) the lease to Butler Enterprises was made in May, 1964 (Exhibit P-29), construction was started about April 1, 1965 (R. 236), but it was May 10, 1965 before all the deeds, deeds back, deeds of trust and assignments of income were assembled and recorded simultaneously with consecutive numbers in the Salt Lake County Recorder's office (Exhibits P-35 and P-36).

The building permit for the restaurant building (Exhibit P-16) names Hyatt Chalet Motel, Inc. as general contractor. The receipt (Exhibit P-15) also lists Hyatt Chalet Motel, Inc. And the only schematic drawing of the restaurant building is Sheet 1-B of the Hyatt Motel plans (Exhibit P-14) which was and is in fact responsible for building both buildings as the signer of the deeds of trust and assignments of rent.

Western Travel, of course, was a party to the actions 134154 and 144500 which were decided on the basis of *Metropolitan Investment v. Sine*, decided by this Court.

This separation into two tracts, and running one of them through Butler Enterprises before the deeds of trust were made by Hyatt Motels leaves Western Travel the owner and a prior party to litigation involving the covenant. Its Warranty Deed to Butler Enterprises gives Butler a possible remedy against Western Travel. And the Warranty Deeds of Butler Enterprises to Hyatt Motels and Hyatt Motels to Western Travel charge the other defendants with knowledge of the recorded restrictive covenant. Section 57-3-1, U.C.A., 1953.

POINT III. INJUNCTION IS THE APPROPRIATE REMEDY.

Plaintiffs' purposes in selling the property subject to the restrictive covenant were not to prevent use of the land, but to prevent construction of a motel with

pretentious or imposing front on North Temple Street, thereby protecting their businesses against the competition of such a motel in this location. This Court has held the covenant valid for these purposes. *Metropolitan Investment Company v. Sine*, supra.

Consistent with this purpose the action which the Sines brought in the Third District Court (*Sine v. A. P. Neilson, et al.*, No. 134154) sought first rescission, and damages only if rescission were not available.

“It is well settled that injunctive relief is available as a remedy against the breach of a restrictive covenant. This may be either a restraining injunction against the violation of a covenant or, in the case of structures already erected, a mandatory injunction directing removal.” 20 Am. Jur. 2d, *Covenants*, § 312.

Perhaps the ordinary remedy is by action for damages, but in the proper cases, injunction lies, 20 Am. Jur. 2d, *Covenants*, § 16; Restatement of Property, § 528.

In *Thodos v. Shirk*, 248 Iowa 172, 79 N.W. 2d 733, it was held that restrictive covenant being primarily negative in character and for the protection of property values, the normal remedy sought for enforcement is an injunction in equity.

Whether laches or acquiescence should be considered as a possible defense in pursuing this remedy is considered under the next point.

If this Court should find that the covenant has been violated but that relief by mandatory injunction is not

appropriate, it may and should remand the case for relief in the form of action for damages, or otherwise, either in this action or in a different action. *Ludlow v. Colorado Animal By-Products Company*, 104 Utah 221, 137 P. 2d 347; *Oertel v. Copley*, 152 Cal. App. 2d 287, 313 P.2d 105; *Christensen v. Tucker*, 114 Cal.App. 2d 554, 250 P.2d 660.

POINT IV. THE MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED.

The Court's Memorandum Decision (R. 57) was simply that the Court "finds and concludes that the restaurant in question is not a part of the motel; and, therefore, finds and concludes that the restrictive covenant is not applicable and the defendants' Motions to Dismiss are hereby granted."

Counsel for the defendants then submitted and the Court signed Findings of Fact covering contingent questions which were, therefore, beside the point and unnecessary to the decision. If the holding of the Memorandum Decision was in error and the covenant broken, the case should be remanded for consideration of applicable remedy. However, if the Court considers all of the Findings as appropriately made, then there should be a new trial in the court below for errors in the Findings of Fact.

(a) FINDING OF FACT NO. 5 ERRONEOUSLY STATES THAT BUTLER OBTAINED A BUILDING PERMIT.

The building permit for the restaurant portion (Exhibit P-16) was obtained by the architect Sharp who listed as owner "Denny's Restaurant" which he obtained from the plans (R. 240 and see Exhibit P-17) and for which organization he built (R. 239). Denny's Restaurant is a separate corporation which paid its local manager up to the time the restaurant was completed (R. 250). This fact is important in the matter of service of summons and consideration of laches or acquiescence.

(b) FINDING OF FACT NO. 5 ERRONEOUSLY INDICATES THAT PLAINTIFFS DID NOTHING TO SERVE HAROLD BUTLER ENTERPRISES UNTIL JULY 15, 1965.

Plaintiffs obtained from the building permit the name "Denny's Restaurant" which was not filed with the Secretary of State (R. 258 and 260) and futilely attempted to serve Denny's as shown on May 5, 1965 (R. 9). Plaintiffs also served the foreman on the job on June 10, 1965 (R. 13). The "human error" (R. 256) of counsel for Western Travel gave the name "Butler Enterprises" to plaintiffs which also was not known by the Secretary of State (R. 260). And it was not until the correct name was learned to be Harold Butler Enterprises, No. 115, Inc., that the filing was obtained from the Secretary of State and the process agent served on July 20, 1965 (R. 19).

Since the building was in process of construction well before May 10, 1965, when documents showing an

interest in either Hyatt Motels or Butler Enterprises were recorded, and since the building permits do not disclose the name Harold Butler Enterprises, and since the architect employed to build the restaurant believed he was working for Denny's Restaurant, and since the manager on the job testified that he was paid by Denny's Restaurant until the building was completed and ready to be opened, it is submitted that plaintiffs acted reasonably in their efforts to include the builders of Denny's Restaurant when the initial action was filed May 5, 1965, after making inquiry of counsel for Western Travel, which was the owner of the Building, on April 1, 1965 (Exhibit P-43).

(c) FINDING OF FACT NO. 6 IS ERRONEOUS IN FINDING INDEPENDENT CONSTRUCTION AND OPERATION OF THE RESTAURANT AND THE MOTEL.

Our argument under this point has been made previously in connection with argument on other matters and is here summarized.

By previous litigation in its name and in its behalf, Western Travel has tried to invalidate the restrictive covenant. It is, therefore, not surprising that it should attempt to do by separate leases that which it could not do alone.

Western Travel divided the land into two parts so as to accommodate the restrictive covenant land, managed to convey both parts to Hyatt Motels, which put

two separate deeds of trust on the two separate properties and returned them to Western Travel. Hyatt Chalet might as well have placed a single mortgage on the whole tract. If the corporate liability is important, one deed of trust joined in by Western Travel excluding corporate liability of Western Travel beyond the property could have been made. The deed to Butler Enterprises followed by a deed to Hyatt Motels was apparently only for appearance' sake, unless it was for the very purpose of making Butler Enterprises responsible for violation of the restrictive covenant which is referred to specifically in its lease from Western Travel.

The lease to Butler was made in May, 1964, and one year later all of the papers were assembled and simultaneously recorded. The deeds of trust bore the earliest dates, the deeds from Western Travel the latest dates and these were later than the deeds back to Western Travel in both sets of papers. These circumstances make it plain that all of the defendants were aware of the separation of the land into two parts and the reasons for it. And in addition, by their conveyances, and by taking as grantees they are charged with the restrictive covenant and are parties to a series of transactions which they are charged with knowing could be in violation of the covenant.

Western Travel in its Provo lease refers to the restaurant facilities as part of the motel property. The joint advertising, the listing in the trade of the motel with restaurant facilities, the meaning of the term motel

and the significance of the title "Hyatt Royal Inn" as emphasizing food service all tie the two facilities together and make each part of the motel.

The design of the restaurant building by the Hyatt Motels architect and the obvious structural and architectural unity shown on Sheet 1-B of Exhibit P-14 and on Exhibit P-37, make plain the fact that the two buildings were one unit with the approval of all the defendants who were in the chain of title.

The application for building permit for the restaurant includes the name Hyatt Chalet Motels and is a candid recognition of the fact that the corporations were both interested.

CONCLUSION

Using the word "motel" in the restrictive covenant after the parties discussed intended use of the land for an apartment house, with Mr. Sine knowing that motel includes all of the services offered by his competitors are circumstances useful in construction.

Experts in the motel business uniformly regard the motel as including its parts and the persons who prepare data for the tour guides of AAA and Best Western recognize the importance to the public of the restaurant facility with the motel, of which Hyatt Royal Inn is taking full advantage. The defendants seek all the advantages of a luxury motel development and seek

to divide responsibility so that no one will have violated the restrictive covenant.

This Court observed in *Metropolitan v. Sine*, *supra* that the mere transfer of title could not circumvent the covenant.

Motel is an umbrella word and covers what this Court called a "motel development" embracing all of its parts. The construction on the interdicted land of a part of the motel development was a violation of the restrictive covenant.

The judgment of the District Court should be reversed and this Court should either hold that the restrictive covenant has been violated and should be enjoined or remand the case to the District Court with instruction that the restrictive covenant has been violated by these defendants and that the plaintiffs are entitled to relief.

Respectfully submitted,

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