

1966

# 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 Respondent

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## Recommended Citation

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# In the Supreme Court of the State of Utah

JERRY SINE and DORA T. SINE,  
his wife,

*Plaintiffs-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

## BRIEF OF RESPONDENTS

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

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FILED

OCT 21 1966

Clk. Supreme Court, Utah

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# In the Supreme Court of the State of Utah

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JERRY SINE and DORA T. SINE,  
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vs.

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

*Defendants-Respondents.*

Case No.  
10633

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE KIND OF CASE AND DISPOSITION IN LOWER COURT

The Appellants brought suit to restrain the various Respondents from continuing with the construction of a restaurant building on a piece of property 40 feet by 97 feet located on North Temple in Salt Lake City. There was a hearing on an order to show cause before the Honorable Marcellus K. Snow, who, after counsel had entered into stipulations, dissolved the temporary restraining order which had been placed on the property incident to the order to show cause (R. 35).

The case was tried on its merits before the Honorable Stewart M. Hanson, sitting without a jury, who signed

judgment on the 25th day of March, 1966, dismissing the action on the merits (R. 64).

### STATEMENT OF FACTS

The facts stated in Appellants' brief are generally correct. An understanding of the facts, however, requires the following further statement:

This action involves a parcel of land situate in Salt Lake City, Salt Lake County, State of Utah, more particularly bounded and described as follows:

Commencing 141.5 feet west of the southeast corner of Lot 1, Block 97, Plat "A", Salt Lake City survey and running thence west 40 feet; thence north 97 feet; thence east 40 feet; thence south 97 feet to the point of beginning, together with a right of way over land to the east thereof.

At the time of trial, the above described parcel of land was owned in fee by Respondent Western Travel, Inc., herein termed "Western." Respondent Western, prior to the filing of Appellants' complaint, had leased said premises to the Respondent Harold Butler Enterprises No. 115, Inc., herein termed "Butler." (R. 59)

Prior to 1958 Appellants were purchasing the above described parcel of land under a contract and prior to 1960 had transferred their ownership in said parcel to the predecessor in interest of Western. In connection with such transfer Appellants executed and delivered a quitclaim deed wherein a restrictive covenant was imposed upon said premises in language as follows:

"This property shall not be used for the erection of a motel thereon." (R. 59)

In March, 1965, Respondent Butler acting in accordance with the provisions of its lease obtained a building permit for the construction of a restaurant upon the above described property and immediately thereafter commenced the construction of a restaurant building upon said premises. Notwithstanding the fact that Appellants knew of the commencement and prosecution of said restaurant construction no notice of any intention to prevent such construction was served upon or given to Respondents until on or about the 15th day of July, 1965. At the time of the service of such notice the exterior portions of the structure of said building had been completed with the exception of a small portion of the roof. The appliances were in the building but not in place, and there had been expended or incurred, including appliances for the restaurant, the sum of approximately \$200,000.00, representing approximately three-fourths of the total cost of the restaurant. (R. 60)

Respondent Western at the time of trial owned a parcel of land adjoining the above-described premises. This adjoining parcel has been leased by Western to Respondent Hyatt Chalet Motels, Inc., herein termed "Hyatt." On the adjoining parcel Hyatt has constructed and at the time of trial was operating a motel. There is no physical connection between the restaurant structure and the motel structure on the adjoining premises. The operation of the restaurant by Butler is separate and independent from the operation of the motel by Hyatt. The leases by Western to Hyatt and Butler are separate and independent transactions, and the businesses of Hyatt and Butler are distinct enterprises con-

ducted separately by these two Respondents and there has been no concerted action or conspiracy between them in connection with such operations. (R. 60)

While the motel and restaurant were constructed by the same general contractor, the structures were erected under separate contracts, each independent of the other and the structures were designed by separate independent architects. (R. 60-61)

The restaurant has a seating capacity for 160 patrons and the motel has a capacity for 100 units. The restaurant was completed and opened for operations in the early fall of 1965, and has been in continuous operation up to the time of trial. At the time of trial, approximately 90% of the persons patronizing the restaurant came from the general public, independent of guests of the motel. When the motel is fully occupied it is estimated by the restaurant operator that not more than 20% of the restaurant patronage will come from guests at the motel, and that the remaining restaurant patronage will come from the general public. (R. 61)

The premises above described upon which the covenant above set forth is imposed are completely occupied by the restaurant structure and no part of the motel is located thereon. The restaurant constructed and operated by the Respondent Butler upon the premises hereinabove described is not a part of the motel constructed and operated by Respondent Hyatt upon adjoining premises. (R. 61) The only question is whether or not this restaurant building and the use thereof violates the restrictive



covenant which prohibits "the erection of a motel thereon."

Appellants, of course, could not show that a restaurant is a motel; therefore their evidence was geared to the proposition that inasmuch as the restaurant was constructed in conjunction with the construction of the adjacent Hyatt Chalet Motel, that it was a part of the Motel Complex and therefore, by association, a motel. The trial court, over the continued objection of counsel for all of the Respondents permitted the Appellants to introduce hearsay evidence from magazines, tourist court journals, telephone books, etc., describing motels, hotels, restaurants, and complexes of various kinds. It also permitted "expert" witnesses to describe the nature of the motel business. The best characterization and summation of this "evidence" was in the testimony of Mr. Leon Dale Reed who is District Governor for Best Western Motels in Washington and the Province of British Columbia. He testified that under the "motel umbrella" are many businesses which increase in number as motels develop throughout the country. His conclusion was that it would be difficult to conceive of any business that might not be under this "motel umbrella." An example given was Covey's Little America, which is actually "a little city" under the "motel umbrella" (R. 167).

Respondent Butler's evidence consisted primarily of testimony given by Richard G. Sharp and Donald Daniel. Mr. Sharp testified that he is an architect and supervised the construction of the restaurant building which was designed by architects who had nothing to do with designing of the Chalet Motel. The restaurant plans were

in accordance with other restaurants design for the Denny chain, which chain is entirely independent of the Hyatt Chalet. (R. 238-243)

Mr. Daniel testified that he had managed the restaurant in question since its opening on October 29, 1965. The restaurant has a seating capacity for 160 people. The majority of its business comes from the general public — not from the motel guests. (R. 245) He estimated that in the tourist season about 80% of the restaurant's business comes from the general public, and in the winter months about 90% to 95%. (R. 245-6)

Other evidence which the Court had came from his visit to the premises in company with all counsel representing the parties.

After considering all of the evidence the Court granted Respondents' motion to dismiss.

## ARGUMENT

### POINT I.

THE RESTRICTIVE COVENANT WHICH PROVIDES: "THIS PROPERTY SHALL NOT BE USED FOR THE ERECTION OF A MOTEL THEREON" DOES NOT APPLY TO THE ERECTION OF A RESTAURANT.

It would seem to counsel that the very statement of Point I answers itself. Appellants, however, argue otherwise, and by a liberal use of the word "motel" apply it as an "umbrella" which covers other businesses, including Butler's restaurant. Such an interpretation is exceedingly liberal, to say the least, and contrary to the strict

rule of construction applied by the courts to restrictive covenants.

(a) *Restrictive covenants are strictly construed.*

The courts have almost universally stated the rule that they do not favor restrictions upon the utilization of land, and that such covenants are strictly construed in favor of the free and unrestricted use of the property.

In *Gardner v. Maffitt*, 74 S.W. 2d 604 (Mo., 1934), there was an appeal from a judgment of the lower court in favor of the plaintiff in a proceeding to remove the cloud of a building line restriction. The Court stated:

“The intention of the parties is the paramount and controlling question. That intention is to be ascertained from the terms of the deed considered in the light of the circumstances surrounding the parties. Restrictions, being in derogation of the fee conveyed, will not be extended by implication to include anything not clearly expressed. \* \* \* Doubts arising as to the intention of the parties must be resolved in favor of the free and untrammelled use of the land.” *Id.*, 74 S.W. 2d at 607.

In *Sporn v. Overholt*, 262 P. 2d 828 (Kan., 1953) there was involved an action to construe a restrictive covenant in each of two warranty deeds against the erection of any dwelling costing less than \$3,000.00 and containing less than four rooms. The plaintiffs had erected an apartment on the parcel of land in question. The Court in holding that the covenant did not prohibit the erection of the apartment, stated:

“The rules governing the construction of covenants imposing restrictions on the use of

reality are the same as those applicable to any contract or covenant, including the rule that, where there is no ambiguity in the language used, there is no room for construction, and the plain meaning of the language governs." *Id.*, 262 P. 2d at 830.

The Supreme Court of Kansas further stated in the *Sporn* case, *supra*, its rule of strict construction as follows:

"Another well-settled rule is that 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." *Id.*, 262 P. 2d at 830.

*Moore v. Stevens*, 106 So. 901 (Fla., 1925) involved a case in which the appellant erected a vocal studio on a parcel of land with a covenant stating that the land should be used only for residential purposes. The Supreme Court of Florida in upholding the covenant stated:

"Covenants restraining the free use of real property, although not favored, will nevertheless be enforced by courts of equity where the intention of the parties is clear in their creation, and the restrictions and limitations are confined to a lawful purpose and within reasonable bounds. \* \* \* Such covenants are strictly construed in favor of the free and unrestricted use of real property, but effect will be given to the manifest intention of the parties as shown by the language of the entire instrument in which the covenant appears when considered in connection with the circumstances surrounding the transaction \* \* \*.

Words used must be given their ordinary, obvious meaning as commonly understood at the time the instrument containing the covenants was executed \* \* \* or unless it clearly appears *from the context* that the parties intended to use them in a different sense." *Id.*, 106 So. at 903. *Wing v. Forest Lawn Cemetery Assn.*, 15 Cal. 2d 472, 101 P. 2d 1099 (1940), is to the same effect.

Writers in the field are in agreement with the cases cited herein. Tiffany states:

"The courts do not favor restrictions upon the utilization of land, and that a particular mode of utilization is excluded by agreement must clearly appear." Tiffany, *Real Property*, Vol. 2 (2d ed. 1920), sec. 394 at p. 1427.

Thompson on Real Property states:

"Covenants restraining the use of real estate are strictly construed in favor of the free and unrestricted use of such property, with due regard for the purpose contemplated as well as the circumstances surrounding the transaction. Pursuing the philosophy that lands should be free and unencumbered whenever possible, courts have developed a strong tendency to construe restrictive covenants very strictly." Thompson, *Real Property*, Vol. 7, sec. 3160 at p. 106-107.

Thompson further states:

"All doubts should generally be resolved in favor of the free use of the property and against restrictions." Thompson, *op. cit.*, at p. 108.

The Utah Supreme Court appears to be in agreement with the cases cited, and has so declared in *Parrish v. Richards*, 8 Utah 2d 419, 336 P. 2d 122 (1959). That case involved a restrictive covenant which provided that

there shall be erected on the land in question no "structure" other than a garage and one single family dwelling not to exceed one story in height. This Court held that this restriction did not forbid the erection of a tennis court surrounded by a wire fence. The Court stated:

"The trial court followed the correct doctrine that *in the construction of uncertain or ambiguous restrictions the courts will resolve all doubts in favor of the free and unrestricted use of the property*, and that it 'will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties'." *Id.* at 421.

- (b) *The ordinary and approved usage of the term "motel" does not include "restaurant," even though the restaurant may be used in conjunction with a motel.*

The question then arises as to what is the "ordinary" or "approved usage" of the term "motel." There are several cases bearing upon this point.

The Court stated in the *Parrish* case, *supra*, that: "The same methods used for construing statutes can be applied to restrictive covenants." *Id.*, at 421. Therefore, use may be made of Section 68-3-11 of the Utah Code, which states as follows:

"Rules of construction as to words and phrases. — Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."

In the case of *Schermer v. Fremar Corp.*, 114 A. 2d 757 (N.J., 1955), the New Jersey court in construing the meaning of the word "motel" stated:

"The word 'motel' generally denotes a small hotel where lodgings are available for hire, with a minimum of personal service being furnished by the proprietor."

The New York courts have been in line with the decision stated above, but discounting more than most of the jurisdictions the idea that motels involve more than just sleeping quarters. In *Von Der Heide v. Zoning Board of Appeals*, 123 N.Y. Supp. 2d 726, 204 Misc. 746 (1953), the Court stated:

"But a motel is commonly understood to be an establishment essentially different from an inn or hotel in design, purpose, and use. From early times, an inn or hotel was \* \* \* 'a house where a traveler is furnished, as a regular matter of business, with food and lodging while on his journey'. \* \* \* On the other hand, a motel, as one generally understands the terms, and as typified by the building sought to be erected by the petitioner, merely furnishes the transient guest with sleeping quarters and bath and toilet facilities, with linen service and a place to park his car." *Id.*, at 730.

The *Von Der Heide* case, *supra*, seems to clearly indicate that, using the rule of ordinary meaning, the word "motel" means no more than a place to sleep and park one's automobile.

A Pennsylvania appellate court seems to clearly separate motel facilities from restaurant facilities. In

*In Re Longo's Appeal*, 132 A. 2d 899 (Pa., 1957), the Court stated:

"Sophistry and semantics to the contrary notwithstanding, the words 'motel' and 'hotel' have different connotations. *A motel may be operated with or without restaurant facilities.* Certainly a motel without a restaurant is not a hotel." *Id.*, 132 A. 2d at 901. (Emphasis supplied).

In *Metropolitan Investment Co. v. Sine*, 14 Utah 36, 376 P. 2d 940 (1962), the Utah Supreme Court upheld the covenant restricting the erection of a motel itself, in an action brought against the Appellants in this case.

On the basis of the *Metropolitan case*, *supra*, the Court limited itself strictly to the question of the erection of a "motel," and therefore there has been no circumvention of the case by the building of a restaurant on the premises in question. The Court has used language supporting this proposition, i.e.:

"To prevent an imposing *motel* on North Temple Street as far as possible was the main reason defendants purchased the property from Fendrelakis in the first place, and they carried out this purpose in requiring the restriction as a condition of sale to Mr. Neilson \* \* \*." *Id.*, at 42.

The Court also used the term without any reference to a restaurant or any motel complex:

"If a large *motel* was erected, in part, on the subject property \* \* \*." *Id.*, at 42.



## POINT II.

THE APPELLANT IS PRECLUDED FROM  
THE EQUITABLE RELIEF HE SEEKS BY  
REASON OF LACHES.

The Court in its Findings of Fact found that in March, 1965, the Appellants knew of the commencement of the construction of a restaurant on the premises in question but that no action was taken to prevent further construction until on or about the 15th day of July, 1965, when the Respondents had expended approximately \$200,000.00 on the building and equipment. This finding was amply supported by the evidence.

The Court, however, in its Memorandum Decision (R. 57) did not base its determination on laches. The point is argued here because it was incorporated in Respondents' motion to dismiss. The general rule of law is that:

“A complainant seeking equitable relief against the violation of a building restriction must act promptly on discovery of the ground for complaint, as otherwise his laches may bar his right to relief.” 26 C.J.S. Deeds, Sec. 172, p. 1182.

Several cases are cited in support of the above text but none of them are Utah decisions. A complete search of the Digest System has disclosed no Utah case on the point in question. An annotation at 12 A.L.R. 2d, p. 396, entitled “Building Covenant-Laches or Delay” collects many cases on the subject. The following two cases are illustrative of the foregoing rule and are pertinent here.

*Coates, et al. v. Young Women's Christian Assn. Philadelphia*, 91 Atl. 863 (Pa., 1914), involved an action to restrain the erection of a building in violation of a building restriction prohibiting the erection of houses fronting on a certain street. It appeared that a contract for a building fronting on the street, and to cost \$19,281.00, was let September 18, 1913, and its construction began shortly thereafter. All passing by could see that it fronted on the prohibited street, and that the work was steadily progressing. The plaintiffs learned in September and early in October that the work was going on but made no objection until November 8, and gave no notice until November 11, when the building was nearly completed and substantially all the subcontracts had been let. The court on appeal found that the lower court had properly held that the plaintiffs' right of action was barred by laches.

*Mercer, et ux. v. Keynton, et ux.*, 127 So. 859 (Fla., 1930), involved a situation where restrictive covenants as to the construction of buildings upon real estate did not appear in the immediate deed of conveyance, but were contained in the Muniments of Title of Record so as to bind a purchaser. An injunction to restrain a violation of the restrictive covenants was denied without prejudice. It was held upon appeal that the denial would be affirmed where there was delay in seeking injunction pending which the construction of the building progressed so far as to make it inequitable to grant an injunction. The plaintiffs had knowledge of the construction of the building on or about March 22, 1928, but made no complaint until the filing of an action on April 30, 1928,

when the framework of the entire building had been completed.

## CONCLUSION

For the foregoing reasons the Judgment of the Trial Court should be affirmed.

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