

1962

Metropolitan Investment Co. v. Jerry Sine and Dora T. Sine : Brief of Appellants

Utah Supreme Court

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Brant H. Wall; Jackson B. Howard; Howard and Lewis; Attorneys for Plaintiff-Respondent;
Richards, Bird and Hart; Attorneys for Appellants;

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IN THE SUPREME COURT

of the
STATE OF UTAH **E D**

MAY 21 1962

METROPOLITAN INVESTMENT
COMPANY, a Partnership composed
of W. ADRIAN WRIGHT, W.
MEEKS WIRTHLIN, and A. P.
NEILSON,

Plaintiff-Respondent,

vs.

JERRY SINE and DORA T. SINE,
his wife,

Defendants-Appellants.

Court, Utah

Case No.
9622

BRIEF OF APPELLANTS

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, UTAH

RICHARDS, BIRD AND HART
Attorneys for Appellants
716 Newhouse Building
Salt Lake City, Utah

Brant H. Wall, and
Jackson B. Howard
Attorneys for Respondents
Judge Building
Salt Lake City, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE....	1
DISPOSITION OF THE LOWER COURT....	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINTS URGED FOR REVERSAL	3
ARGUMENT	6
POINT I—THE EVIDENCE OF RECORD DOES NOT SUPPORT THE DISTRICT COURT'S FINDING (NO. 18) THAT SINCE OCTOBER, 1956, THERE HAS BEEN A GREAT AND SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD AND AREA SUR- ROUNDING THE "SUBJECT PROPERTY"	6
POINT II—THE FINDINGS OF THE DIS- TRICT COURT (NO. 14, NO. 22) THAT THE RESTRICTION WAS LIMITED TO CON- STRUCTION BY A. P. NEILSON PERSON- ALLY IS NOT SUPPORTED BY THE EVI- DENCE OF RECORD.	7
POINT THREE--THE DISTRICT COURT'S DECISION THAT MR. AND MRS. SINE, THE APPELLANTS HEREIN, AND ALL WHO MAY CLAIM UNDER THEM, HAVE NO RIGHTS WHATSOEVER IN THE SUB- JECT PROPERTY IS NOT SUPPORTED BY THE APPLICABLE LAW.	8
(a) <i>A legally enforceable promise may be made that the promisor will not engage in a busi- ness in competition with a business to be car- ried on upon land of the beneficiary of the promise.</i>	8

	Page
(b) <i>The promise of A. P. Neilson is binding upon Metropolitan Investment Company, the appellant, which took title to the property with full knowledge that the promise had been made.</i>	10
(c) <i>The promise is enforceable even though it is indefinite as to the duration of the obligation created.</i>	12
(d) <i>Change of neighborhood of the subject property has not occurred to the extent that the enforceability of the covenant is affected.</i>	12
(e) <i>The promise does not tend toward producing a monopoly of trade or business in the area which includes the restricted land.</i>	13
SUMMARY AND CONCLUSION	14

INDEX OF AUTHORITIES, CASES AND STATUTES CITED

14 American Jurisprudence, Section 205, Page 615..	12
American Law Institute, Vol. 5	
Restatement of the Law of Property	9, 11
American Law Institute, Vol. 2,	
Restatement of the Law of Contracts	13
85 ALR 985	13
95 ALR 458	12
Hayes et al. vs. Gibbs (1956) 110 U. 54,	
169 P. 2d 781	11
Humphrey's et al. vs. Ibach (1932) 110 N.J.	
Eq. 647, 160 Atl. 531	13
Oliver vs. Hewitt (Supreme Court of Appeals of	
Va. - 1950), 191 Va. 163, 60 S.E. 2d 1.....	9, 11
Whitney vs. Union Railway Company, 11 Gray	
359, 71 American Decisions 715	9

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METROPOLITAN INVESTMENT
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of W. ADRIAN WRIGHT, W.
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Plaintiff-Respondent,

vs.

JERRY SINE and DORA T. SINE,
his wife,

Defendants-Appellants.

Case No.
9622

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action initiated by respondent, a partnership, to quiet title to real estate originally conveyed by appellants to Albert P. Neilson, a partner, subject to the provision as contained in the instruments of conveyance which were recorded that the subject property should not be used for the erection of a motel thereon.

DISPOSITION OF LOWER COURT

The case was tried to the Court. From a judgment by the District Court for plaintiff defendants appeal.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment and judgment in their favor as a matter of law.

STATEMENT OF FACTS

The Metropolitan Investment Company, respondent herein, is a partnership composed of W. Adrian Wright, W. Meeks Wirthlin and A. P. Neilson. (Complaint, para. 1; R. 19).

On October 26, 1956, A. P. Neilson signed an Earnest Money Receipt and Offer to Purchase Property from appellants situated at 324 West North Temple Street, Salt Lake City, for a price of \$16,500 with the written stipulation that "This property shall not be used for the erection of a motel thereon" (Exhibit 6). Upon this property stood an apartment house having a front size of approximately 40 feet and a depth of 90 feet, consisting of eight rental units (R. 106). On October 30, 1956, Jerry and Dora Sine executed an Assignment of Uniform Real Estate Contract, whereby they assigned and set over to A. P. Neilson all their interest in the subject property in consideration of cash and of the covenant by A. P. Neilson that the

subject property "shall not be used for the erection of a motel thereon" (Exhibit 7). Jerry Sine and his wife also executed a Quit-Claim Deed dated October 29, 1956, to A. P. Neilson covering the subject property with the stipulation that "This property shall not be used for the erection of a motel thereon" (Exhibit 1). By Quit-Claim deed executed on November 5, 1956, A. P. Neilson and his wife conveyed to W. Adrian Wright and his wife, as joint tenants, an undivided one-third interest in the subject real estate, and to W. Meeks Wirthlin and his wife, as joint tenants, an undivided one-third interest in said property (Exhibit 2). Finally on November 21, 1956, the said three partners and their wives conveyed said property to Metropolitan Investment Company, the respondent herein (Exhibit 4). The Quit-Claim Deed signed by the Sines was recorded in the Office of the County Recorder of Salt Lake County, Utah, October 30, 1956 (Exhibit 1).

Jerry and Dora Sine were in October, 1956, conducting a motel business as a partnership. The partners opened and operated Se Rancho Motor Lodge, a large motel at 640 West North Temple, and Scotty's Romney Motel situated on North Temple between Sixth and Seventh West. Se Rancho and Scotty's Romney are both situated on the north side of North Temple Street. Se Ranch is about three and one half blocks west of the subject property (R. 63, 65, 67, 100) and Scotty's Romney is one block further west (R. 67).

Mr. Jerry Sine was cognizant of the fact that A. P.

Neilson was interested in motel properties, and he was not willing to sell the subject property to anyone who intended to use it in conjunction with other properties to construct a large motel. His motive for preventing a motel from being constructed on the subject property was to protect his motel business conducted as SeRancho and Scotty's Romney. Mr. and Mrs. Sine advertised by numerous road signs which, in part, attract guests originating from regions outside of Salt Lake Valley. If a large motel was erected, in part, on the subject property, appellants feared that the business of Se Rancho and Scotty's Romney would be adversely affected. Guests, especially those traveling from the north and south and turning onto North Temple Street, would be diverted into such motel, to the detriment of Se Rancho and Scotty's Romney situated to the west thereof (R. 5, 52, 68, 79, 90, 99, 100).

Jerry and Dora Sine would not have transferred the subject property to A. P. Neilson for the cash consideration received without the incorporation in the agreement of the covenant running to him and his assignees against the use of the property as a motel (R. 67).

Metropolitan Investment Company, the respondent, on September 30, 1960, agreed to sell the subject property to Western Travel, Inc. This company has planned to build a motor hotel on the subject property, and adjacent and surrounding properties. This corporation desires that the covenant against construction

of a motel on the subject property be avoided. The three partners of Metropolitan Investment Company own large blocks of stock in Western Travel, Inc. (R. 47, 58, 49, 80, 82, 83, 84).

POINTS URGED FOR REVERSAL

POINT I

THE EVIDENCE OF RECORD DOES NOT SUPPORT THE DISTRICT COURT'S FINDING (NO. 18) THAT SINCE OCTOBER, 1956, THERE HAS BEEN A GREAT AND SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD AND AREA SURROUNDING THE "SUBJECT PROPERTY."

POINT II

THE FINDINGS OF THE DISTRICT COURT (NO. 14, NO. 22) THAT THE RESTRICTION WAS LIMITED TO CONSTRUCTION BY A. P. NEILSON PERSONALLY IS NOT SUPPORTED BY THE EVIDENCE OF RECORD.

POINT III

THE DISTRICT COURT'S DECISION THAT MR. AND MRS. SINE, THE APPELLANTS HEREIN, AND ALL WHO MAY

CLAIM UNDER THEM, HAVE NO RIGHTS WHATSOEVER IN THE SUBJECT PROPERTY IS NOT SUPPORTED BY THE APPLICABLE LAW.

- (a) *A legally enforceable promise may be made that the promisor will not engage in a business in competition with a business to be carried on upon land of the beneficiary of the promise.*
- (b) *The promise of A. P. Nielson is binding upon Metropolitan Investment Company, the appellant, which took title to the property with full knowledge that the promise had been made.*
- (c) *The promise is enforceable even though it is indefinite as to the duration of the obligation created.*
- (d) *Change of neighborhood of the subject property has not occurred to the extent that the enforceability of the covenant is affected.*
- (e) *The promise does not tend toward producing a monopoly of trade or business in the area which includes the restricted land.*

ARGUMENT

POINT I

THE EVIDENCE OF RECORD DOES NOT SUPPORT THE DISTRICT COURT'S FINDING (NO. 18) THAT SINCE OCTOBER, 1956, THERE HAS BEEN A GREAT AND SUBSTANTIAL CHANGE IN THE NEIGHBOR-

HOOD AND AREA SURROUNDING THE “SUBJECT PROPERTY.”

The evidence on the other hand establishes that on and prior to October, 1956, motel properties were being operated and others planned for the area. Respondent's witness Meeks Wirthlin testified that several motel properties were prior to October, 1956, operated in the general area, such as City Center, Sea Gull, Mission, and Bob's. Mr. Sine testified that prior to October, 1956, the newspapers of Salt Lake City published reports of the planned construction of a large motel by Utah Motor Lodge in the near area (Exhibit 13-P), and that he and many others were cognizant of plans which had been drawn to construct another large motel in the general area to be known as City Center Motel (Exhibit 9-P). The character of the neighborhood was set by 1956, and the subsequent changes followed the set pattern (R. 34, 102, 107).

POINT II

THE FINDINGS OF THE DISTRICT COURT (NO. 14, NO. 22) THAT THE RESTRICTION WAS LIMITED TO CONSTRUCTION BY A. P. NEILSON PERSONALLY IS NOT SUPPORTED BY THE EVIDENCE OF RECORD.

The reading of the covenant as contained in the instruments of conveyance proves that Mr. and Mrs.

Sine sought protection against acts of A. P. Neilson and his assignees. Mr. Wirthlin testified that it was not the intent that the property could be purchased and sold free of the covenant to third person (R. 29). A covenant by A. P. Neilson personally which could have been circumvented by mere transfer of title would have been entirely worthless. Mr. Sine did not want the property developed as a motel by Mr. Neilson nor those taking title from him with knowledge of the restriction (Exhibits 1 & 7, R. 28-29, 44, 59).

It is unquestionably true that Mr. Neilson intended to transfer the property to the partnership at the time he purchased it.

POINT III

THE DISTRICT COURT'S DECISION THAT MR. AND MRS. SINE, THE APPELLANTS HEREIN, AND ALL WHO MAY CLAIM UNDER THEM, HAVE NO RIGHTS WHATSOEVER IN THE SUBJECT PROPERTY IS NOT SUPPORTED BY THE APPLICABLE LAW.

- (a) *A legally enforceable promise may be made that the promisor will not engage in a business in competition with a business to be carried on upon land of the beneficiary of the promise.*

In the instant case, A. P. Neilson acquired the subject property from the Sines for a consideration in

cash plus a promise that the acquired property would not be used for the erection of a motel. The motive of the Sines in exacting this promise was to shield their motel business carried on upon property located on the same street as the subject property from competition.

Oliver vs. Hewitt (Supreme Court of Appeals of Va., 1950) 191 Va. 163, 60 S.E. 2d 1, involved the owner of a grocery store who conveyed two lots a short distance from his store by a deed which contained a provision that neither the grantees nor their assigns should sell groceries or bottled soft drinks in any building to be erected on the lots. The original grantees, after the dede was recorded, transferred the property to another who leased it to a person who commenced selling groceries and soft drinks on the property. The Court held that the sale of groceries and soft drinks should be enjoined so long as the promisee conducted his store for the sale of drinks and soft drinks.

In Whitney vs. Union Railway Company, 11 Gray 359, 71 American Decisions 715, the Court held that an owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which would impair the value of diminish the pleasure or enjoyment of land which the grantor retains.

In Restatement of Property by American Law Institute, Vol. 5, the following statement is found:

“ * * Thus a promise may be made that the promisor will not personally engage in a business in competition with the business intended to be carried on upon the land of the beneficiary of the promise.” (Page 3152).

- (b) *The promise of A. P. Nielson is binding upon Metropolitan Investment Company, the appellant, which took title to the property with full knowledge that the promise had been made.*

Mr. A. P. Neilson, as a partner, owned a one-third interest in Metropolitan Investment Company. Mr. Neilson acquired the property with the intent of conveying it to the partnership and the conveyances to the partners occurred soon after Neilson's acquisition. Without question all of the partners were cognizant of the covenant in question. Mr. Wirthlin testified that Neilson acted for the partnership in making the purchase (R. 38-39, 46).

The promise respecting the use of the subject property was not intended to be purely personal with A. P. Neilson. Mr. Sine incorporated in both the Earnest Money Receipt and Offer to Purchase and the Quit-Claim Deed the statement precluding the construction of a motel on the subject property. Mr. Stanger was acting for all of the partners (R. 38-40). It was Mr. Sine's presumed purpose that recorded instruments should give notice to grantees of the restrictive covenant (R. 60).

In the Restatement of the Law of Property by

American Law Institute, Vol. 5, the following comments are found:

“ * * Thus the failure to use the word ‘assigns’ in the making of the promise to erect and maintain a fence where none was in existence at the time of making the promise does not necessarily prevent the drawing of an inference that the promise was intended to bind the successors of the promisor. * * *

“ * * * The probability that a promise respecting the use of land is intended to bind the successors of the promisor is enhanced by the permanency of the situation apparently sought to be produced by the performance of the promise. The more permanent the situation intended to be produced, the more likely that successors of the promisor were intended to be bound by his promise since the control of the land by the promisor himself may be but temporary.” (Pages 3197-3198).

In this case, the sole control of the property by Mr. Neilson was indeed but temporary.

In *Hayes et al. vs. Gibbs* (1956) 110 U. 54, 169 P. 2d 781, it was held that one was chargeable with notice of restrictive covenants in deeds in his chain of title.

The Court in *Oliver vs. Hewitt*, *supra*, held that regardless of whether a covenant not to use land for a certain purpose runs with the land, a court of equity will, nevertheless, enforce it against a grantee taking through a deed reciting the covenant and subject there-

to, or against a grantee taking title with full knowledge of its existence.

- (c) *The promise is enforceable even though it is indefinite as to the duration of the obligation created.*

The fact that the promise respecting the use of the subject land was indefinite with reference to its intended duration calls for an ascertainment of the intention of the parties. This may be found from purpose intended to be accomplished. Mr. Sine sought to shield from competition. The duration of the covenant might be limited to the period of time during which he operates Se Rancho and Romney Motels.

The cases are not in accord as to the duration of covenants where its duration is not specified.

One view is that such covenants are presumed to continue for the duration of the estate created, and another is that such covenants will be limited to a reasonable time. The latter view appears preferable. (Covenants, Conditions and Restrictions—14 American Jurisprudence, Section 205, Page 615. See annotation 95 ALR 458.)

- (d) *Change of neighborhood of the subject property has not occurred to the extent that the enforceability of the covenant is affected.*

The neighborhood when the promise was made was fast running commercial, and it was predictable from facts then known that many properties would be de-

veloped as motels. The need of protection from competition by other motels was then apparent.

The fact that the trend toward motel construction has accelerated does not constitute such a change of neighborhood as to nullify the promise here questioned.

In *Humphrey's et. al. vs. Ibach* (1932) 110 N.J. Eq. 647, 160 Atl. 531, the Court held that a change in neighborhood to afford relief must be so great as clearly to neutralize the benefits of the restriction to a point of defeating the object and purpose of the restrictive promise. See annotation 85 ALR 985.

The increase of motel properties in the neighborhood made the promise here given of more value to Mr. and Mrs. Sine and did not defeat its object.

- (e) *The promise does not tend toward producing a monopoly of trade or business in the area which includes the restricted land.*

The mere fact that a promise restricts the use of land is not enough to render the promise illegal. In this case the restriction on use of the land cannot be held to create a monopoly. The evidence of record clearly indicates that the motel business is increasing in the neighborhood, even though the subject property has not been so developed.

The question here posed is treated in Restatement of Law of Contracts by American Law Institute, Vol. 2 as follows:

“A buyer may make a reasonable contract restricting himself from using the property which he bought in a way that would compete with or harm the seller. The only limits imposed by the law on the owner of property restricting his power to exact contracts from a purchaser to refrain from using the property in a certain way are those imposed by public policy, and though public policy forbids unreasonable restraint of trade, and therefore forbids attempting to control prices on resale by a system of agreements, it does not forbid contracts which reasonably protect a business of either the buyer or the seller without tending to affect the public harmfully by monopoly or enhancement of prices.

“Illustration

“A sells Blackacre to B who promises as part of the transaction not to use it for mercantile purposes in competition with A. The promise is not illegal.” (Para. 516, Page 998).

The promise here involved could not possibly limit competition or control prices to a point of monopoly. In fact it was admitted by a witness for respondent that the property immediately adjoining the subject property could be used even though the subject property was omitted. This witness, however, expressed the opinion that the incorporation of the property in the motel project would be desirable from an architectural point of view.

SUMMARY AND CONCLUSION

This is a case where a person purchased land for use for motel purposes in connection with other motels

in the vicinity which he and his wife owned (R. 63, 67). A. P. Neilson had a real estate agent approach the appellant; and in order to induce the appellants to sell the property, promised that it would not be used for motel purposes (R. 66-67). Except for these representations and the restrictions in the deed and contract, appellants would not have made the sale (R. 66). Now the partnership for whom the land was originally purchased asks the Court to free it of the restriction as an unenforceable covenant. Such should not be the ruling if it can be avoided.

This brief shows the law to be that such covenants are enforceable, at least by the person who was the original covenantee. There is no question of a bona fide purchaser in this case, which might free the land of the restriction, and the evidence is that the purpose of Mr. Sine was consistent with his ownership of property at that time and the development of the neighborhood has been exactly along the line of the contemplated use, namely, for motel purposes. Appellant should have the benefit of the contract which the plaintiffs through its agent offered to the appellants when the contract of sale was entered into. Enforcement of the covenant would not be contrary to any public policy, and the judgment of the District Court should be reversed, and the restrictive covenant upheld.

Respectfully submitted,

RICHARDS, BIRD AND HART
Attorneys for Defendants and Appellants