

1962

Vern C. Strand and Eleanor A. Strand v. Fred Mayne and Detta Ann Mayne : Brief of Respondents

Utah Supreme Court

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CASE NO. 9707
IN THE
SUPREME COURT **E**
OF THE **P 5-1962**
STATE OF UTAH Supreme Court

VERN C. STRAND and ELEANOR A. STRAND,
Plaintiffs-Appellants,
vs.
FRED MAYNE and DETTA ANN MAYNE,
Defendants-Respondents.

Respondents' Brief

On Appeal from the Judgment of the Second District Court
for Weber County, Honorable Charles G. Cowley, Judge.

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TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINTS OF ISSUE	11
Point 1: Whether or not appellants were induced by the alleged fraud and misrepresentations of respondents into purchasing the premises in question	11
Point 2: Whether or not appellants are entitled to recover anything whatever from the respond- ents on their theory of unjust enrichment	12
LAW	12
ARGUMENT	18
CONCLUSION	22

CASES CITED

Cole vs. Parker, 5 U. 2d. 263, 300 Pac. 2d. 623	17
Dupler vs. Yates, 10 U. 2d. 251, 351 Pac. 2d. 624	20
Frailey vs. McGarry, 116 U. 504, 211 Pac. 2d. 840	12
LeVine vs. Whitehouse, 37 U. 260, 109 Pac. 2, Ann. Cas. 1912-C 407	12
Malmberg vs. Baugh, 62 U. 331, 218 Pac. 975	13
McKeller Real Estate and Investment Co. vs. Paxton, 62 U. 97, 218 Pac. 128	12
Peck vs. Judd, 7 U. 2d. 420, 326 Pac. 2d. 712	12
Pender vs. Alix, 11 U. 2d. 58, 354 Pac. 2d. 1066	20
Taylor vs. Moore, 87 U. 493, 51 Pac. 2d. 222	12

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OF THE
STATE OF UTAH

VERN C. STRAND and
ELEANOR A. STRAND

Plaintiffs-Appellants,

vs.

FRED MAYNE and
DETTA ANN MAYNE

Defendants-Respondents.

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action brought by vendees under a uniform real estate contract by which they purchased a dilapidated commercial motel property (contrary to expert advice not to do so) for the purpose of making "extra money," made repairs and put a false front on it, sold it for a substantial profit, lost it through mismanagement and neglect, and by this action seek to recover their alleged losses from the vendors.

DISPOSITION IN LOWER COURT

From a judgment dismissing the plaintiffs' complaint with prejudice upon motion of the defendants for summary judgment, the plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the judgment and permission to go to trial upon the merits. Defendants-Respondents seek affirmation of the summary judgment granted by the trial court.

STATEMENT OF FACTS

The facts as they appear from the pleadings and from the deposition of the appellant, Vern C. Strand, and from the appellants' answers to the respondents' interrogatories on file herein, are stated at some length to save the Court the time and trouble of ferreting them out, as follows:

On or about April 1, 1955, appellants purchased from respondents the motel and premises described in that Uniform Real Estate Contract attached to appellants' complaint (R. 5) and referred to therein as Exhibit "A", consisting of 17 units and a house and a new, uncompleted vacant building (Dep. p. 37) for the sum of \$41,500.00, payable \$7,578.58 down (the agreed value of contracts assigned and transferred to the respondents by the appellants) and the balance payable according to the terms of that contract, pursuant to which appellants took possession of the premises and operated them through a hired manager, who lived in the house on the premises (Dep. p. 37), for a period of approximately two years (Dep. p. 27) until they sold it to F. C. Watterson and Mae Watterson by Uniform Real Estate Contract dated March 20, 1957, attached to respondents' amended answer and counterclaim (R. 22) and referred to therein as "Exhibit 1," for the sum of \$63,000.00, at a profit of \$21,500.00, on which sale they received as a down payment the sum of \$500.00 cash plus an equity in a cafe in Nephi of the acknowledged value of \$12,662.00, or a total down payment of \$13,162.00.

The premises were observed by appellants to be in

a run-down condition at the time appellants purchased them from respondents (Dep. pp. 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 24); all of the units were not occupied (Dep. pp. 22, 23); two new units were unfinished (Dep. p. 23); respondent Mayne recommended that the new units be completed into a double unit, (Dep. p. 24) and so did appellant's wife, (Dep. p. 25), but appellant Strand made it into a cafe which appellants "rented" at first and then "leased" (Dep. p. 25); the units were not the over-night type for transients but were occupied for the most part by permanent residents, one tenant having been there for seven years (Dep. p. 23); the repairs made by appellants did not appreciably increase the rental income (Appellants' answer 91 to the respondents' interrogatory 91, R50); appellants kept the rates "pretty much the same" as they were before (Dep. p. 26).

Before appellants made the purchase, appellant Strand brought one Beth Roberts, a successful motel operator in Salt Lake City and Las Vegas, Nevada, (Dep. p. 35) to look at the premises and advise with him about it, (Dep. p. 12); was told he was going to have to put a lot of money and time and a lot of work "to put them in shape to rent out" (Dep. pp. 12, 13, 23, 24); but appellants did not take the counsel and advice of their experienced and "competent" adviser (Dep. pp. 13, 35); appellant Strand admitted that "she was sure right" and that he "should have listened to her" (Dep. p. 24), and admitted that afterwards she (Beth Roberts) said "I told you so." (Dep. p. 35). Appellant Strand said it was the "biggest mistake" of his life (Dep. p. 20), said he didn't think he needed a builder to check it for him and that that was his fault and his wife's (Dep. pp. 18, 64), said he would have been a lot better off if he had not sold to Wattersons (Dep. p. 31), admitted he "could have made the payments" if he had not sold to Wattersons (Dep. p. 31), admitted that he could have "paid the property out" if he had not sold to Wattersons (Dep.

p. 31), admitted that if the Wattersons had "been good purchasers and had paid out" appellants would have made a "nice profit" (Dep. p. 34), and "could have got" his "money out of it" and "wouldn't have lost anything" (Dep. p. 34) and would have "got rid of one more headache, the trouble of going out there every night." (Dep. p. 34).

Appellants stated that they believed the premises had a value of \$35,000.00 at the time they purchased them and had a value of \$63,000.00 at the time they sold them. (Appellants' answer 85 to respondents' interrogatory 85, R. 50). At the bottom of page 32 and top of page 33 of appellant Strand's deposition, he states that the repairs and improvements placed upon the premises, as alleged in paragraph 4 of his complaint, increased the market value of the premises by \$25,000.00, although he did not have any appraisal made (Dep. pp. 33, 34), saying "that was just a figure that I figured", merely his own "personal estimate" (Dep. p. 33). The cost of \$41,500.00 and the alleged increase of \$25,000.00 would equal \$66,500.00. Appellant Strand tried to sell the premises to Wattersons for \$75,000.00, but finally took Wattersons' offer of \$63,000.00, because of the fact that appellant was tired of "going out there and back every dog-goned night" and because his "wife was hollering about it." (Dep. p. 33). The inflated sale price realized by appellants on their sale to the Wattersons was not the true value of the premises. Competent appraisers fixed the value at \$35,000.00 when they appraised the premises on April 18, 1962, (See Affidavit attached to Respondents' Brief in support of their Motion for Summary Judgment, R. 97) which corresponded to what appellant Strand said it was worth when he bought it.

Wattersons sold the premises to "some people by the name of Goldsby" (Dep. p. 44); Goldsbys got a divorce and appellants couldn't find anyone to "collect the money

from” (Dep. p. 29); Goldsbys had a partner named Clinger who at one time was “making a deal with a Verda Lind.” (Dep. p. 45).

It does not appear from appellant Strand’s deposition (or elsewhere in the record) what the terms of the subsequent sales were. However, it is clear from the deposition that appellants or their counsel would furnish respondents with “the total amount of all the rents received” by appellants while they were in possession and “all the payments” received “from the people to whom” the premises were sold. (Dep. p. 65; also pp. 66 and 67.) This they did not do.

Appellants said they were unable to account for any sums which may have passed hands on the subsequent sales of the premises, (Appellants’ answers 9 and 10 to respondents’ interrogatories 9 and 10, R. 47) and were unable to account for any income or disposition of income or furnish any information concerning the operation of the motel units or cafe from and after the time appellants sold to Wattersons. (See appellants’ answers to respondents’ interrogatories 13, 14, 15, 17, 18, 19, 25, 26, 27, 33, 34, 35, 37, 38, 39, 41, 42, 43, 49, 50 and 51, R. 47, 48, 49.)

Appellants’ first default under their contract with respondents was in the fall of 1955 when they failed to pay the taxes and the respondents applied the monthly payment on the taxes (Dep. pp. 38, 39). With that exception, although they were “late on several occasions”, appellants evidently never missed a payment until after they sold to the Wattersons (Dep. p. 39). There were numerous defaults on the part of appellants in the terms of their contract of purchase from respondents after appellants sold to Wattersons (Dep. pp. 30, 31, 38, 39, 41, 42, 43), and appellants were getting demands from the Bank which held the escrow agreement (Dep. p. 38).

Respondents gave them additional time to make payments and to pay the taxes (Dep. pp. 40, 41, 42).

Appellants never did notify respondents that they had sold to Wattersons, nor did respondents have any notice of any of the subsequent sales beyond the Wattersons. "Nobody notified anybody," admitted appellant Strand. Appellants recognized their responsibility to see that respondents got paid so they (appellants) would not lose the premises, and appellant Strand went to Clinger and told him he had "to pay" or he (appellant) would take the loss, and three days later called Clinger and "really bawled him out." (Dep. p. 48).

Clinger had evidently been appellants' real estate agent. Appellant Strand said: "He was the one that sold it to the Wattersons from me, but somehow he came back into the picture and when I went out to try and get some money from Goldsby she told me to collect from Clinger. I was supposed to collect from him. And he is the guy I started hounding." (Dep. p. 30). By the time appellants had sold to Wattersons, they were at least \$2,000.00 in default to respondents (Dep. p. 43).

Appellants were only required to pay respondents \$375.00 per month, besides the two \$1,000.00 payments due July 1, 1956, and July 1, 1957. (See Contract marked Exhibit "A" attached to appellants' complaint, R. 5). But their contract of sale to Wattersons required Wattersons to pay them \$600.00 per month for the months from April through September, and \$375.00 per month for the months October through March, and in addition \$1,000.00 on August 1, 1957. (See contract marked "Exhibit 1" attached to respondents' amended answer and counterclaim, R. 22). Appellants collected at least some of the larger \$600.00 payments from Wattersons (Dep. pp. 44, 45). In August appellants learned that Wattersons had sold to Goldsbys, and informed them of the delinquent payments (Dep. p. 44). Goldsby said Clinger was

to make the payments, and appellants went to Clinger and got \$500.00, (Dep. pp. 45, 46) and a promise of more later (Dep. p. 46). When appellant Strand called Clinger later, he was told that Verda Lind had bought the place from Goldsbys; that Goldsbys were getting a divorce; that they had the place "tied up in court and didn't know who was 'going to get the Motel' ". Appellant admitted saying to Clinger: "Yes, and in the meantime I am in a bad spot here because I will be losing the place and I am going to get some money to pay," adding: "I can't wait while they are fighting in court and everything." (Dep. p. 46). When Verda Lind backed out later, Clinger told appellants they had nothing to worry about, that he (Clinger) was "going to take it and see that" appellants got "taken care of". (Dep. p. 48). Appellant Strand quoted Clinger further as saying: "The thing is I sold the place to Verda Lind and I can go up and pay off all these payments and put us both in good shape." (Dep. p. 50).

Appellant Strand stated that if the Wattersons had paid him in accordance with their agreement, or had the Goldsbys paid in accordance with their agreement, or had Clinger or Verda Lind paid, he would have turned that money in on his contract and paid the escrow out "as fast as possible." (Dep. p. 50).

Appellant Strand admitted that he was in arrears at least \$1,000.00 plus two monthly payments (\$375.00 each) when he got a letter from the Bank saying if he could catch up by December, 1957, it would be all right; then said he was given until January, 1958. (Dep. p. 52). But appellants' complaint alleges that the last payment was made by appellants on October 3rd, 1957. There is nothing in the record to indicate that appellants ever made tender or attempted to renegotiate the contract, or to refinance or dispose of the property. On January 8, 1958, the escrow holder (Bank) returned the escrow

papers to respondents. (Dep. p. 58).

As a result of the successive defaults, of non-payments, late payments and failure to pay taxes, respondents were compelled to and did, after legal notice, commence a civil action for repossession of the premises, on or about January 13th, 1958, in the Weber County District Court (Civil action No. 33330, Department No. 2) against the persons then in possession, namely: one Lucy Semora and one Verda Lynn (Lind). The premises were restored to respondents by the judgment and decree of the Weber County District Court on February 10th, 1958.

Thereafter on May 13, 1958, the present action was commenced by appellants against respondents.

The complaint (R. 1) contains two causes of action: (1) the first alleging that plaintiffs-appellants had paid and expended a total of \$29,020.95, and sought to have the Court award to them an equitable portion of that sum on the theory of unjust enrichment; and (2) the second alleging misrepresentations on the part of the defendants-respondents as an inducement to persuade appellants to enter into the contract, claiming damages of \$29,020.95.

The amended answer and counterclaim (R. 15) of the defendants denies generally the allegations of the complaint and sets up affirmative defenses thereto. Respondents affirmative defenses and denial of both unjust enrichment and fraud formed the basis for respondents motion for summary judgment. The fourth defense alleges that plaintiffs carefully inspected the premises prior to purchase, sought independent counsel and advice, did not take the advice received, were not misinformed or misled by defendants, made their own decision to purchase, and were bound by their contract under which they agreed to accept the property in its

then condition and agreed that no representations were made other than those set forth in the contract itself. The fifth defense denied fraud and alleges that plaintiffs-appellants elected to remain in possession after their alleged discovery and made repairs and did not elect to rescind or repudiate the contract or demand the return of their down payment, and having so elected were estopped to do so. The sixth defense alleges that plaintiffs-appellants not only made the elections referred to in the fifth defense, but made the further election to sell the premises to the Wattersons for a profit and were estopped to make any claim against the defendants-respondents. The seventh defense alleges that plaintiffs-appellants repeatedly defaulted under their contract of purchase, and sold to others, and continued to default, and were in default when the premises were returned by decree in Civil action No. 33330 of the Weber County District Court, Department No. 2, on February 10th, 1958. The counter-claim is not an issue on this appeal.

A summary and brief analysis of the figures stated in the appellants' pleadings, answers to interrogatories, deposition and admissions, disclose that appellants operated their business venture entirely on respondents' money and property and their (appellants') profit on the re-sale of the property to the Wattersons, or had opportunity to do so but for their own mismanagement and neglect:

Appellants' complaint alleges:

Down payment to respondents of	\$ 7,578.58
Monthly payments to respondents of	10,875.00
Claimed repairs, improvements, additions and equipment of	9,567.37
Bonus payment to respondents of	1,000.00
	<hr/>
Total	\$29,020.95

Appellants' complaint also alleges that the property had a reasonable rental value of \$450.00 per month.

Respondents' position is that Appellants operated on Respondents' money and property, and on their profit from their sale to Wattersons, and but for their own mis-management, etc., had none of their own money in the venture:

Appellants bought premises for	\$41,500.00
and sold them to Wattersons for	63,000.00
thereby making a profit of	21,500.00

Appellants received on that resale cash of \$500.00 and an equity in a cafe in Nephi (still being operated by appellants, Dep. p. 10) of the agreed value of \$12,662.00, or a down payment from Wattersons of \$13,162.00

(In addition, appellants acquired a claim against Wattersons of \$8,338.00 for loss of an advantageous bargain when Wattersons defaulted, being the difference between their profit of \$21,500.00 and the down payment of \$13,162.00).

Appellants collected rents in excess of their alleged reasonable rental value of the premises (\$450.00 per month), or could or should have done so, which, calculated on the minimum basis of their own valuation of \$450.00 per month for 33 months, amounts to the minimum sum of\$14,850.00

Total money not appellants own\$28,012.00

In addition appellants had the use of respondents' property, for which their contract called for interest at 5.5%. Deducting appellants' alleged down payment of \$7,578.58 and their alleged monthly payments of \$10,875.00 (\$18,453.58) from the purchase price of \$41,500.00, would give the minimum constant unpaid principal balance of \$23,046.42, which at 5.5% interest per annum, unpaid, amounts to the further asset use value of\$ 3,485.68

Total money, property and interest not their own, available to and used by appellants ..\$31,497.68

From this it is apparent that if the appellants have lost any money whatever they have no one to blame but themselves. Appellants have failed to furnish evidence of their collections or the collections of their transferees and successor transferees or evidence of the consideration passing between the Wattersons and the successor transferees from the Wattersons. It must, therefore, be presumed that it would have been to the disadvantage of their claims had they done so. The appellants had every opportunity to make money on their venture, and may very well have made money so far as the record is concerned.

POINTS OF ISSUE

From the pleadings it is apparent that there are but two main points of issue to be considered on this appeal:

Point 1: Whether or not appellants were induced by the alleged fraud and misrepresentations of respondents into purchasing the premises

in question.

Point 2: Whether or not appellants are entitled to recover anything whatever from the respondents on their theory of unjust enrichment.

LAW

Point 1: Whether or not appellants were induced by the alleged fraud and misrepresentations of respondents into purchasing the premises in question.

In view of the facts in this case, it is apparent that appellants contentions on their allegations of fraud are contrary to the holdings of this Court. In the case of *Peck vs. Judd*, 7 Utah 2d 420, 326 Pac. 2d 712, the Court said in part, on page 714 of the Pacific citation:

“It should be observed that as to the premises being unfit for habitation as rental units, the defendant, upon discovery of such conditions, failed to offer to deliver up the premises and demand the down payment. If defendant intended to rely upon fraud as alleged, such action would have been essential.”

To the same effect are *Frailey vs. McGarry*, 116 Utah 504, 211 Pac. 2d 840; and *Taylor vs. Moore*, 87 Utah 493, 51 Pac. 2d 222; *McKeller Real Estate and Investment Co., vs. Paxton*, 62 Utah 97, 218 Pac. 128; and *LeVine vs. Whitehouse*, 37 Utah 260, 109 Pac. 2, Annotated Cases 1912-C page 407.

In the case at bar, appellants not only held the property for 33 months after discovering the alleged fraud, but never did elect to rescind. The claim of fraud is an after-thought.

Point 2: Whether or not appellants are entitled to recover anything whatever from respondents on their theory of unjust enrichment.

We are not unmindful of the rule laid down originally in the case of *Malmberg vs. Baugh*, 62 Utah 331, 218 Pac. 975, or of the subsequent cases which affirmed that doctrine. But our examination of the Utah cases has failed to disclose any case where the Malmberg doctrine has been applied to facts like those here on this appeal. Basically, the theory of the Malmberg case, as we understand it, applies to a situation between an original vendor and an original vendee, where the vendee through some misfortune perhaps has defaulted, and is allowed to recover the excess of his payments over the vendor's damages.

That is not the case here. In our case we have the situation of vendees (husband and wife) engaging in a commercial or business transaction for the expressed purpose of "earning a little extra money." (Dep. p. 68). Appellant Vern C. Strand was gainfully employed at Hill Field at the time of the purchase. Appellant Mrs. Strand had previously worked during the marriage, operating a beauty shop of her own, and thereafter had worked at the Ogden Arsenal (Dep. p. 9), and at the time of Mr. Strand's deposition (July 23, 1958) Mrs. Strand was operating the cafe owned by Appellants in Nephi, Utah (Dep. p. 10). They did not move onto the premises to live, but operated it as a commercial or business venture through a hired manager (Dep. p. 37).

Appellants were shrewd enough to make "some repairs" and put "knotty pine on the front, put a false front on it." (Dep. p. 59). And were business-like enough to find buyers (Wattersons) and try to sell them the place for \$75,000.00. Failing to get that nice round figure, they took Wattersons' offer of \$63,000.00, thereby earning themselves a comfortable profit of \$21,500.00, more than half again what they had paid for it, of which they received an acknowledged \$13,162.00 in money and property for a down payment. Now no one would be

naive enough to think for a moment that if the Watter-sons had remained on the premises and paid out their contract the appellants would have divided their profit with the respondents. That just isn't done in the business world. Nor, in the business world, does an entrepreneur ordinarily expect to be so highly favored by the law that he can purchase property, put a false front on it, sell it for more than 50% more than he paid for it, and then, if market conditions change, or bad luck ensues, or the new purchaser defaults, or he misjudges his abilities as a manager, or neglects his business, fall back upon his vendor with a claim for losses. We think this Court never intended the Malmberg doctrine to go that far. And yet that is what appellants are asking the Court to do on this appeal.

In this case appellants made several bad decisions. They got competent advice from a successful Motel operator but acted contrary to that advice (Dep. pp. 13, 24, 35); decided they didn't need a builder to advise them on the construction of the building (Dep. pp. 18, 64); and "would have been a lot better off" if they had never sold to Wattersons at all. (Dep. p. 31). Had appellants not sold to Wattersons they "could have made their payments" and "could have paid the property out" and would likely be in possession of the property to this day. To make matters worse for appellants, they got tired of the responsibility of the Motel. Appellant Strand said, in speaking of his negotiations with Wattersons: "but when they made that offer and I was killing myself going out there and back every dog-goned night and my wife was hollering about it, I took this offer." (Dep. p. 33). Later in his deposition he added: "I would have got rid of one more headache, the trouble of going out there every night." (Dep. p. 34). In other words appellants got tired; the Motel was too much trouble; it was a headache; they wanted out. And after they got out, even though appellant Strand's training and experience was

in the field of accounting, auditing and record keeping (Dep. pp. 3, 5, 6, 7) he neglected to follow Wattersons, Goldsbys, Clinger, Verda Lynn (Lind) or Lucy Semora to see that the rental income came to him in the form of payments. Illustrative of appellant Strand's weakening attitude was his statement about going after Clinger to get him to make the payments due him. He said of Clinger: "He told me he couldn't pay me anything and I started going out to the car and my wife came in and she said by-golly she just had to have that money so then he wrote out a check for \$500.00 for the payment on the place." (Dep. pp. 45, 46). And again, relative to the same incident appellant Strand was asked whether or not his wife were with him when he went after the Goldsbys and Mr. Clinger and Verda Lind (Lynn). He answered: "No, the only time she was with me is when I went up to Clingers to collect money and he didn't have it for me and she was there and squeezed it out of him. She went in and said, 'you had better get some money, we can't go on without money.' She bawled me out in front of him . . . She was out in the car and when I went out she wanted to know what was holding me up so long and I told her I couldn't get any money and she jumped all over me and him too, and he went and wrote this check". (For the \$500.00). (Dep. p. 69). Then appellant Strand volunteered another significant statement. He said: "Yes, she is blaming me for all of this." (Dep. p. 69). And well she might. Her husband had weakened on the Motel deal; he had gotten tired. He should have taken his wife with him more often, and should have gone more often himself to collect his payments, to see that the rental income got into his hands. Again, appellant Strand's attitude is apparent from the following:

Q. Then referring to January 8, 1958, the day when the escrow holder turned the papers back to Mr. Mayne, how many tenants were

in the Motel?

A. I don't know. I wasn't operating it.

Q. Did you check at all to see how many tenants were in there?

A. No. That was Mr. Clinger's place at that time.

Q. You hadn't operated it since the 20th of March, 1957, when you sold to Wattersons.

A. Yes, it changed hands there and changed hands and I was just the guy out here on the limb that wasn't getting any money and was being threatened, hurry and make these payments and robbing my family of money to make the payments when I didn't get them from those people.

Q. You don't know what the tenancy situation was then?

A. No. (Dep. p. 58).

He set up no system for checking on the rental income from Wattersons or any of the other operators of the Motel; made no arrangements to insist on collecting it himself for his own protection. He just let the matter drift, hoping for his payments, complaining because he did not get them. Evidently it was too much trouble for him.

Interestingly enough, he had his worst difficulties before he sold to Wattersons. It was during that time that the soldiers all moved out, the 451st group, "leaving the units empty so to speak." (Dep. pp. 40, 60). It took him about two months to get the tenancy back up to normal. (Dep. p. 61). Likewise, it was before he sold to Wattersons that he had "some bad luck" with his tenants and couldn't collect from them, gave some of them "sheriff's notice and everything, and I couldn't get them

out.” (Dep. p. 61). Yet with all this trouble he managed to keep up his payments and was, with one exception, up to date with his payments until he sold to Wattersons.

It was when he let down, got too tired to go out there and back every night, and neglected to follow up with the successive owners and operators to see where the rents went, that the business went from bad to worse, and, without the rental income, he couldn’t meet his payments to respondents.

Now, whose fault was this? Certainly it was not respondents’. Appellants must accept full responsibility for their failure.

It would seem apparent that this case falls squarely within the rule of *Peck vs. Judd*, *supra*, where this Court said in part:

“We fail to see where the defendants have any ground to complain unless it be in having overestimated the value of the property or in overestimating their ability as operators. * * *

“It is not our prerogative to step in and renegotiate the contract of the parties. * * * There is no reason why we should consider the vendee privileged and entitled to our intervention unless the conditions sought to be imposed on the vendee are unconscionable.”

and equally within the rule stated by Chief Justice McDonough in *Cole vs. Parker*, 5 Utah 2d 263, 300 Pac. 2d. 623, quoted in *Peck vs. Judd*, when he said:

“. . . In the absence of fraud or imposition the parties are bound by the price or measure of value they have agreed on, and such price must be paid notwithstanding it may be excessive. The courts cannot supervise decisions made in the business world and grant relief when the bargain proves improvident.”

ARGUMENT

From appellants' admission, there was no increase in the rental value of the motel and premises involved in this suit even though appellants allegedly spent \$9,-567.37 in repairing and improving the premises. To award appellants judgment for moneys spent for improvements and repairs which did not increase the rental value or rental income of the property would be unjustly enriching the appellants by requiring respondents to reimburse them for a bad or unwise investment.

Appellants' contention is that the property was worth \$35,000.00 when they bought it. Using the income approach to ascertain the value of the property, then by appellants' admission that whatever improvements they may have added did not increase the rental value or rental income, the property is still worth only \$35,000.00. Certainly the value of the property could not have doubled while the income remained the same. Any decision to make a vendor in an arms-length transaction reimburse a vendee for money expended on repairs or so-called improvements which do not produce any additional income, would be most unconscionable.

When appellants sold to Wattersons they elected to take their chances on a new transaction which then offered them a substantial profit, and in so doing elected to cut themselves off from all recourse against their vendors (respondents herein) and from a possible claim for unjust enrichment. By selling the property at a profit of \$21,500.00, appellants have a cause of action against their vendees for loss of an advantageous bargain. To give them also a cause of action against respondents for unjust enrichment would seem neither reasonable nor realistic, but wholly unconscionable. Thus, if appellants were to succeed in this cause, where would appellants and respondents stand in relation to the appellants' transferees:

Wattersons, Goldsbys, Clinger, Verda Lind (Lynn) and Lucy Semora? If the appellants can be said to have a cause of action against respondents for unjust enrichment in addition to a cause of action against Wattersons for loss of an advantageous bargain, where is the Court going to stop in its effort to be paternalistic towards these appellants as vendees?

As indicated, appellants sold to the Wattersons for a profit of \$21,500.00; and the Wattersons thereafter sold to Goldsbys and Clinger for some undisclosed advantage or profit. Then Goldsbys and Clinger evidently sold to Verda Lind (Lynn) and Lucy Semora for some undisclosed advantage or profit. Where, as here, a vendee (appellants) sells for a substantial profit and upon default of his transferee would have a right of action for loss of an advantageous bargain against that transferee, justice would seem to dictate that, if anyone, the last vendee should be the only one permitted a right of action against the original vendor. To hold otherwise, the Court would be going beyond the bounds of reason to over-protect a party to a contract who has made a bad bargain. Certainly the decisions of this Court, as we read them, do not give evidence of favoring any such a paternalistic attitude. In the instant case, the last vendee, Verda Lynn (Lind), has had her day in court, and the matter is *res adjudicata*.

Appellants are unable or unwilling to account for the operational income while others were in control of the motel and premises, and, in fact, unable or unwilling to account for their own operational income. In *Peck vs. Judd*, *supra*, the Court put some emphasis on the fact that the vendee in that case received \$51,741.49 as rentals, and paid \$36,767.56 to the vendors. In the present case the appellants, being unable or unwilling to account for moneys that changed hands in subsequent sales and in being unable or unwilling to account for

rents received from operations of the motel and premises during the time they and their transferees were in possession, should not be heard to complain that there has been unjust enrichment when they themselves cannot or will not account for moneys they and their successors have received in operation of the property. They should be estopped in equity from claiming unjust enrichment where such an accounting cannot be or is not made by them. To hold otherwise would encourage parties to such a contract to destroy their records or fail to keep them, in order that they might one day sue for unjust enrichment and not have to account for the money received from such an operation. Thus by appellants' own dereliction they have not only made it "impractical or extremely difficult" to fix any actual damage one way or the other, they have made it impossible. Without that accounting the Court cannot possibly make any mathematical calculation which might otherwise aid it in arriving at a conclusion with reference to the true facts. Having failed to account or specify in an affidavit their reasons for not accounting, the ruling of this Court in Dupler vs. Yates, 10 U. 2d 251, 351 Pac. 2d 624, would seem to be applicable. At page 637 of the Pacific volume this Court said:

"Upon a motion for summary judgment, the courts ought to recognize as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so."

See also Pender vs. Alix, 11 U. 2d 58, 354 Pac. 2d 1066.

If appellants' position in this case were to be upheld or declared valid, then all pending escrow contracts are insecure, and all persons holding any interest in any escrow agreement, whether as the original vendor or as the purchaser or successive purchaser of the vendors' in-

terest, would be either buying a lawsuit or be under the constant threat of a lawsuit while the original vendee and his transferees tested the market for a profit or a succession of profits until the escrow was paid out. A Pandora's box of legal troubles would engulf the field of escrow contracts.

It seems absurd to us to think that purchasers could buy real property under contract for \$41,500.00, and then sell it for \$63,000.00 for a profit of more than 50% of the original cost, and be able, if their sale matured as expected, to keep their profits; but, if their \$63,000.00 sale did not mature properly, be able to fall back on their vendors and claim a refund to minimize any possible loss. This would be a "heads I win and tails you lose" proposition. It is wholly inconsistent with the law of sales and entirely inconsistent with the theory of free enterprise and capitalism generally. When one takes and assumes a risk in business he takes the profits or the losses as they occur, and as his foresight and business acumen dictate. Otherwise, one could gamble with the property of another, profiting if successful and returning the property if unsuccessful.

There is another insidious side-light to such a proposition. It would permit reckless or unwise or imprudent individuals to take the property of their conservative vendor and expend unwise sums on repairs or so-called improvements, and then demand all or a substantial part of his rash expenditures back if his improvements added nothing to the income of the property. This is exactly what has happened in the case at hand. The real value of the property here lies in the land, not the buildings. Of what value were or are the so-called improvements to the respondents when appellants admit that their alleged improvements did not appreciably increase the rental income (Appellants' answer 91 to respondents' interrogatory 91, R. 50) and when appellants kept the

rates “pretty much the same” as they were before. (Dep. p. 26).

Certainly this is not what this Court contemplated in the Malmberg case, *supra*, or has contemplated in cases subsequent to it. Appellants would have this Court embark upon a new revolutionary path through the legal wilderness by giving approval to a theory which is completely radical from all previous notions of property rights and contracts for the sale of land.

CONCLUSION

In conclusion, we submit that appellants have no possible claim against the respondents either for fraud or for undue enrichment, and that the decision of the trial court in granting respondents’ motion for summary judgment was correct and should be affirmed.

Dated this 31st day of August, 1962.

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