

1978

# Searle Brothers, A Partnership, Diamond Hills Motel, A Partnership, Rance W. Searle, Rhett A. Searle and Randy B. Searle : Brief of Defendant and Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SEARLE BROTHERS, a partnership, :  
DIAMOND HILLS MOTEL, a partnership, :  
RANCE W. SEARLE, RHETT A. SEARLE :  
and RANDY B. SEARLE, :

Plaintiffs and  
Appellants, :

Case No 15604

vs. :

EDLEAN SEARLE, :

Defendant and  
Respondent. :

---

BRIEF OF DEFENDANT AND RESPONDENT

\* \* \* \* \*

APPEAL FROM FINAL ORDERS OF THE FOURTH DISTRICT  
COURT OF THE STATE OF UTAH IN AND FOR UTAH  
COUNTY, DISMISSING PLAINTIFF'S AMENDED COMPLAINT  
WITH PREJUDICE, HONORABLE DAVID SAM, JUDGE

\* \* \* \* \*

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# 15604.

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### STATEMENT OF CASE

The Respondent concurs in the statement of the case as set forth by the Appellant.

### DISPOSITION OF LOWER COURT

Respondent concurs in the statement of the disposition of the case as set forth by Appellant.

### STATEMENT OF FACTS

The above case was presented to the Court upon stipulated facts as set forth by the Appellant with which the Respondent basically agrees with certain notable exceptions which are set forth below:

The title to the "Slaugh House" was at all times, since its purchase in 1967 in the name of her former husband, Woodey B. Searle, (Civil 5790, T.R. 243, lines 15-20). The rents and profits from the "Slaugh House" were deposited in the Searle Cattle Company, a company owned wholly by Woodey B. Searle's bank account (deposition of Woodey B. Searle, page 21). There have never been prepared any Articles of Partnership of the Diamond Hills Motel nor any Articles of Partnership of Searle Brothers (deposition of Woodey B. Searle, page 16). No inventory has ever been made of the

particular assets of either partnership; only accounts have been kept where all rents, etc., were comingled and lumped together. Nothing was broken down (deposition of Woodey B. Searle, page 18).

Woodey B. Searle, the father of the plaintiffs Rance, Rhett, and Randy Searle, and the defendant in the divorce action, has at all times been the agent of the plaintiffs, Rance Searle, Rhett Searle, and Randy Searle and as such he received the sum of \$500 per year. He is still acting in that capacity (deposition of Woodey B. Searle, page 4-5; also deposition of Randy Searle, page 12; also deposition of Rhett Searle, page 3).

The Fourth Judicial District Court by order of the Honorable Judge George E. Ballif, after a full hearing and a presentation of evidences, ruled that the "Slaugh House" was property belonging to Woodey B. Searle along. Following motions to amend and motions for new trial, Judge Ballif reaffirmed his original order which awarded the "Slaugh House" to Edlean Searle, the former wife of Woodey B. Searle and the defendant in this case. See: "Amended Decree of Divorce and Findings of Fact and Conclusions of Law," Civil 5790. Noteworthy is the statement of Judge Ballif in his ruling, as late October 1974, denying a motion for further

proceedings re the "Slaugh House" because the title to it had been fully legated previously.

#### ARGUMENT

The lower Court did not err in holding that the Decree of Divorce in Civil No. 5790 was binding upon the Appellants.

#### POINT I

THE LOWER COURT CORRECTLY RULED THAT THE TITLE TO THE SLAUGH HOUSE HAD BEEN PROPERLY DETERMINED IN CIVIL NO. 5790.

As indicated, the lower Court, after considering the matter determined that the title to the "Slaugh House" had been fully litigated in Civil No. 5790 (Searle vs. Searle). This case was the divorce case and was the subject of long and extended inquiry by the Court. The Court there determined that the "title to the Slaugh House" was in the father of the plaintiffs, Woodey B. Searle, (see amended Decree of Divorce and Findings of Fact and Conclusions of Law, Searle vs. Searle, Civil No. 5790, Uintah County, State of Utah). The Honorable Judge George E. Ballif awarded the said "Slaugh House to the wife in the divorce action, Edlean Searle, she now is the defendant in this action. Subsequently, motions were made by Woodey B. Searle to have the Court reconsider the title to the "Slaugh House" and the Court in its ruling

dated October 10, 1974 reaffirmed its original position set forth in the Amended Decree, dated May 17, 1973 and denied the motion stating that the matter had been fully litigated. Civil No. 5790 (Searle vs. Searle) was appealed to the Utah State Supreme Court where the decision of the trial court was affirmed unanimously, Edlean Searle, plaintiff and respondent, vs. Woodey B. Searle, defendant and appellant, 522 P2d 697.

Thus insofar as either Woodey or his former wife Edlean were concerned the question of the title to the "Slaugh House" was fully decided and regardless of how the Court would have ruled, they or either of them would have been bound.

Respondent contends that no title ever was in the names of the plaintiffs in this suit. The scant record available shows that since its purchase in 1967 there never was title to the "Slaugh House" was never in the name of anyone except Woodey B. Searle, till the Court by its decree awarded it to the Defendant in this suit. She immediately possessed the premises and improved them and treated them as her own. Respondent submits that unless the Court can, from the facts presented, find that ownership was in someone other than Woodey B. Searle at the time of the divorce decree the order

of the divorce decree must stand. It is admitted that the plaintiffs are nowhere to be found in the chain of title to the "Slaugh House", nor is there anything extant to so indicate by way of memorandum or document their ownership. The only thing available is account records which are inconclusive, incomplete and are comingled with other properties (deposition of Woodey B. Searle, page 18).

We are asked to believe that by some strange manner title to the "Slaugh House" or a part of it got into the names of the plaintiffs in this case, merely by virtue of a check that was apparently issued to pay for it. This is absurd, when Woodey B. Searle in his deposition states that the Searle Cattle Company, and other accounts, were not broken down and especially when rents from the "Slaugh House" were paid to the Searle Cattle Company which he alone owned, (deposition of Woodey B. Searle, pages 18 & 21).

The Court below based upon the facts presented to it found that the title to the property (Slaugh House) had been fully litigated in the divorce action.

Respondent further submits that the decision of the lower Court, was based upon the facts before it should be sustaining by the appellate Court.

## POINT II

THE LOWER COURT CORRECTLY HELD THAT THE APPELLANTS PLAINTIFFS WERE COLLATERALLY ESTOPPED BY REASON OF RES JUDICATA IN THE DIVORCE CASE IN SEARLE VS. SEARLE FROM CLAIMING TITLE TO THE SLAUGH HOUSE.

Appellants argue that they should not be bound by the lower Courts order since they were not parties to it -- though it is readily admitted that they were all of the age of majority at the time of the divorce action; that they were partners with Woodey B. Searle and that Woodey B. Searle was their agent (manager). They further contend that the rule of mutuality and privity were not present and that would foreclose their right to be heard -- though they admit that the res of the law suit (title to the Slauch House) was decided by the previous Court. All of the pleadings, motions, admissions, etc., and the inferences to be derived therefrom must be considered by the lower Court (Fredrick May and Company vs. Dunn, 13 Utah 2nd 40, 368 P2d 266) not just the complaint as stated by the Appellant. It is submitted that the decision of the lower Court in this action was based upon all of the information before it in this matter. Thus, the appellate Court is faced with the question, did the lower Court have information and facts

sufficient before it to find that the issue raised (title to the Slauch House) was litigated and that res judicata forbids a relitigation of the title, and are the plaintiffs estopped from pursuing this actions? Respondent submits the answer is in the affirmative.

The general rule relative to res judicata and estoppel is stated, as follows:

In determining the plea of res judicata, three questions are pertinent: Was the issue decided in the prior judication identical with the one presented in the action in question? Was there a final judgment on its merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (Bernhard vs Bank of America, 122 P2d 892)

This is the better reasoned rule and the foregoing case has become the generally accepted statement of the law in the majority of jurisdiction in the United States.

In the instant case, applying the question of the Bernhard case, the answers are all in the affirmative. Civil No. 5790, (Searle vs. Searle) decided the title to the "Slauch House" which is raised by this case; the judgment in Civil No. 5790, (Searle vs. Searle) was final and was a judgment on its merits; and again the parties to the action, the plaintiffs, were and are still in privity with the defendant, their father, in the prior action, Civil No. 5790, (Searle vs. Searle).

Woodey B. Searle was and continued to be the agent of the plaintiffs at all times before and after the initiation of the present litigation, in fact he managed all their affairs (see depositions of Woodey B. Searle, pages 4-5; deposition of Randy Searle, page 12; and deposition of Rhett Searle, page 3).

Speaking of privity and mutuality, there are some cases explaining these principals and why privities are bound; these are where the parties sought to be bound by the judgment are principal and agent, master and servant, indemnitor and indemnitee, and lessor and lessee. (See, Taylor vs. Barker, 70 Utah 534 262 2P 266) Thus, in the instant case the agency being established between Woodey B. Searle and his sons, the plaintiffs, this agency precludes the relitigation of the title to the "Slaugh House" in a subsequent action. (See Tietelbaum Furs Inc. vs. Dominican Insurance Co. 375 P2d 439) where a decision in a criminal case was held res judicata the right to legitimate a question decided in the criminal case. (See also, Paulos vs. Janetakos, Ex of Estate of 142 ALR 1237, and subsequent annotations of same volume.)

The Court is directed to weight of authority which permits the use of the doctrine of collateral estoppel and



more over holding the rule of mutuality inoperative and deed letter (see DeWitt vs. Hall 1967 NY case 19 NY 2d 141, 225 NE 2d 195, 31 ALR 3rd 1035).

### POINT III

THE LOWER COURT RULED CORRECTLY THAT THE PLAINTIFFS WERE ESTOPPED FROM LITIGATING THE TITLE OF THE SLAUGH HOUSE.

In addition to the doctrine of collateral estoppel or judgment by estoppel which invokes the doctrine of res judicata above mentioned, the plaintiffs are and should be debarred from asserting any claim to the property (Slaugh House) awarded to the defendant in the prior divorce action. The rule is well established that one who stands by and sees another expend money or land under a belief that he has the right or title thereto will not be permitted setup or assert his claim to said land, or as otherwise stated, "If a person maintains silence when he ought to speak equity will debar him from speaking when conscience requires him to be silent." (See, Allen vs. Cameron 8 Utah 8; Murphy vs. Humphrey 23 Utah 633; Tanner vs. Provo Reservoir Company, et. al 99 Utah 158 103 P2d 234; Saylor vs. Kentucky Cardinal Coal Corp. 205 Ky 724 266 S.W. 388, 50 ALR 666 with annotations 50 ALR 668 to 973.)

In the present case all of the plaintiffs were of the age of majority at the time of the divorce action. They had

every reason to know the status of the Court decree entered by Judge Ballif. They were partners with their father Woodey B. Searle. They emphasized that their father, agent and manager, at all times considered them and discussed with them the status of their property, (see deposition of Randy Searle, Page 12-13; deposition of Rhett, page 3). Now to permit these plaintiffs to, claim the property from their mother, the defendant, who has improved it, possessed it, and rented and used it for years, would be an unconscionable wrong. By their silence the plaintiffs are now estopped from asserting any claim to the "Slaugh House." Their silence has been pronounced from 1974 till the commencement of this action.

As pointed out above, the failure of the plaintiffs to disaffirm the transfer of the "Slaugh House" to defendant, their mother, constituted ratification of what was done. Note, the Supreme Court stated in Zeese vs. Estate of Siegel 534 P2d 85, as follows:

"Ratification relates back to the time when the unauthorized act was done; and although the act may have [been] without any precedent authority, ratification creates the relation of principal and agent."

Thus, the plaintiffs had a duty to disaffirm their father's statement, under oath, that the "Slaugh House" was

his, if indeed it wasn't, at the time of the statement or at least at the time the divorce was granted.

Again, note the statements of the Utah Supreme Court quoting from Williston Contract in Moses vs. Archie McFarland & Sons 230 P2d 571 at page 573:

"Even silence with full knowledge of the facts may manifest affirmance and thus operate as ratification."

Also from the Utah case of Lowe vs. April Industries, Inc. 531 P2d 1297:

"Ratification is expressed or implied. Implied where it arises under circumstances of acquiescence or where a duty to disaffirm is not promptly exercised."

#### POINT IV

THE LOWER COURT RULED CORRECTLY BECAUSE A PARTNERSHIP IS LIABLE TO A THIRD PERSON FOR REPRESENTATIONS OR ACTS OF ANOTHER PARTNER.

The statutes of the State of Utah provide as follows:

§48-1-8, Partnership bound by admission of partner  
An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership.

§48-1-10, Partnership bound by partners wrongful act  
Whereby any wrongful act or omission of any partner acting in the ordinary course of business of the partnership or with the authority of his copartners loss or injury is caused to any person, not being a

partner in the partnership, or any penalty is incurred, the partnership is liable therefore to the same extent as the partner so acting or omitting to act.

§48-1-12, Nature of partnership liability all partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11....

In the present case there is no dispute as to the existence of a partnership between the Searle boys, Rance, Rhett and Randy and their father, Woodey B. Searle: the boys together owning fifty per cent and the father owning fifty per cent. The defendant Diamond Hills Motel was likewise a partnership owned in the same proportion. Woodey B. Searle was the general manager for the boys and he conducted the affairs of the partnerships, as such he enjoyed and exercised almost unlimited authority to deal and do as he chose relative to the partnership assets. He received remuneration for his services and by virtue of his being manager, was clothed with more authority than is the case in usual agency relations. The general rule is stated that the powers of an agent are particularly broad in the case of one acting as a general agent or manager; such a position presupposes a degree of confidence reposed and investiture with liberal powers for

the exercise of judgment and discretion. (See, Ackerman vs. Jennings 140 A 760, 56 ALR 1127, Restatement Agency (2d ed) §73, Scholz vs. Lever 7 Wash 2d 76, 109 P2d 294; Monarch Lumber vs. Wallace 132 Montana 163 314 P2d 884)

Woodey B. Searle testified in the divorce trial that he owned the "Slaugh House" (transcript in Civil No. 5790). He stated on inquiry as to whose name it was in. "It is in my name solely." Such a statement made by Woodey was either the truth or it was a falsehood being perpetrated upon the partnerships of which he was a fifty per cent owner. If he did falsely testify, then he, because of his broad power as manager and general agent of the partnerships bound the partnership by his representation. Thus, the defendant in the present case may not be challenged in her ownership of the "Slaugh House" by the principals to the partnership. The partnership is bound by the admission of the managing partner §48-1-8 UCA. For arguments sake, the partnership is bound by the wrongful act of the managing partner representing his sole ownership in the "Slaugh House" and by the managers failure or omission to set the record straight, §48-1-10 UCA. The partnership is bound by the breach of trust of the managing partner wherein the third party (Edlean Searle, the defendant) received the property as part

of her distributive share in the divorce, §48-1-11. This because Woodey B. Searle knowingly did testify in the divorce case about property which he now alleges is partnership property. It was certainly within his authority and responsibility to tell the truth about the partnership. The partnership should stand the loss rather than a third party such as the defendant, plaintiffs mother.

Further, it is an obligation on a partnership and particularly upon the managing partner to render full and complete accounts of the partnership. Discovery by way of disposition indicates that the only accounting was a cursory account of income which was comingled by the manager with his own separate companies, all was lumped together (see deposition of Woodey B. Searle, page 18). Under the general partnership, statute of Utah, Title 48, Chapter 1, there is an obligation, as above-mentioned, to inventory the assets for the benefit of the partnership, this has not been done which further detracts from any creditability the partnership may have. It would indeed appear that these were merely entities of convenience and had no real basis in fact since the assets, profits, rents, etc. could move apparently with rapidity from one to another at the convenience of the parties, particularly the manager.

#### POINT V

THE LOWER COURT CORRECTLY RULED THAT BECAUSE THE DEFENDANT NEVER RELINQUISHED HER STATUTORY INTEREST IN THE SLAUGH HOUSE.

As mentioned above, the defendant received from Woodey B. Searle certain real property part of which was the "Slaugh House." Now plaintiffs and their father claim an interest in the "Slaugh House" asserting it was partnership property. It is admitted that title was solely in the name of Woodey B. Searle and that he held title to it in that capacity during his marriage to Edlean, the defendant, and further it is admitted that she at no time ever made a relinquishment of her distributive share to which she is entitled under the provisions of §74-4-3 UCA 1953. In fact the Court in its decision in Civil No. 5790 decreed certain lands part of which was the "Slaugh House"; these lands are at least properly part of the property she would be entitled to receive under §74-4-3 UCA and had Woodey died prior to the divorce, her claim to the one-third of the real estate to which she had made no relinquishment would have become hers (see In Re Oslters Estate 286 P2d 796).

POINT VI

THE PLAINTIFFS ARE BARRED BY THE STATUTE OF LIMITATION FROM CLAIMING TITLE TO THE SLAUGH HOUSE.

Utah Code Annotated §78-12-5 provides:

No actions shall for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.

The plaintiffs cannot claim any ownership to the "Slaugh House" since they never at anytime had any ownership therein nor in the chain of title. The present defendant ties her title, through the court order to her former husband, Woodey B. Searle, who took title in 1967 well over seven years ago. Plaintiffs cannot claim through their father, since the court order acted as a conveyance vesting title in defendant Edlean Searle. Also, there is no ancestral relationship claimable till the ancestor dies and the claimants can claim as his heirs, (see Bailey vs. Bailey 25 Mich 185; McCarthy vs. Marsh 5 NY 275; Springer vs. Fortune 2 Handy (Ohio) 52; Wheatcraft vs. Hall 106 Ohio St 21, 138 NE 368).



### CONCLUSION

Respondents assert that the decision of the lower Court should be sustained and it should stand because of the following:

(1) The facts before the Court sustain its judgment and the appellants tribunal should not disturb the decision based upon facts.

(2) Arguendo if there is any basis, though not admitted by respondent, the plaintiffs are debarred from resisting the ruling of the lower Court holding that Civil No. 5790 is res judicata to the present case because of collateral estoppel.

(3) The principals of equity forbid and further estop the plaintiffs from challenging the decision when they failed to timely raise any objection to the divorce courts ruling.

(4) The statutes and rules of partnership hold the plaintiffs who are partners liable to third parties who might have been injured, in this case their mother.

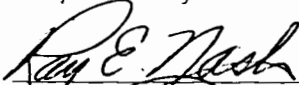
(5) The defendant here received the property in question and she has made no relinquishment of her statutory share.

(6) And that plaintiffs are barred by the statute of limitations from claiming the "Slaugh House."

(7) And, an over the shoulder observation, not supported by authority on the part of defendant, is that this case has been brought and instigated on the part of a disappointed former spouse who knowing that there was no further avenue open in the divorce case has sought to retrieve some of his lost property.

The order dismissing the complaint with prejudice should be sustained and affirmed.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I did mail two copies of the foregoing Brief, postage prepaid, to Mr. Cullen Y. Christensen, Attorney for plaintiffs and appellants, 55 East Center Street, Provo, Utah 84601, on this 17 day of May, 1978.

  
Gladys M. Baker, Secretary