

1958

## Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Brief of Respondents

Utah Supreme Court

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George B. Stanley; Richard L. Maxfield; Attorneys for Plaintiffs and Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED  
AUG 25 1958

Clerk, Supreme Court, Utah

MAX E. BIRCH and FONTELLA  
BIRCH, his wife,

Plaintiffs and Respondents,

vs.

FORREST W. FULLER and JUDITH HYDE  
FULLER, his wife, KENNETH W. JUDD  
and RUBY F. JUDD, his wife,

Defendants and Appellants.

Case  
No. 8822

BRIEF OF RESPONDENTS

GEORGE B. STANLEY

and

RICHARD L. MAXFIELD

Attorneys for Plaintiffs  
and Respondents

## INDEX

	Page
STATEMENT OF FACTS .....	1
ARGUMENT .....	7
ANSWER TO APPELLANTS' POINT 1 .....	7
ANSWER TO APPELLANTS' POINT 2 .....	9
CONCLUSION .....	10

## CASES AND AUTHORITIES CITED

33 American Jurisprudence 319 - Section 359 .....	7-8
Cawse v. Signal Oil Company, 103 P. (2d) 729 .....	8
Dowse v. Doris Trust Company (Utah), 208 P. (2d) 956, 958 .....	8
Beezley v. Beezley (Utah), 296 P. (2d) 274, 277 .....	9

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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vs.

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**BRIEF OF RESPONDENTS**

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**STATEMENT OF FACTS**

Appellants, in their brief, omit most of the pertinent facts of the case, and for this reason, the Respondents object to the Appellants' facts and make the following statement of facts:

In the fall of 1956 the Defendant Appellant, Forrest W. Fuller, was employed by the Plaintiff Respondents to sell real property owned by them in Duchesne County. In the spring of 1957 the said real property was to be sold for taxes unless the back taxes were paid, and inasmuch as the

Appellant Fuller had not found a buyer for the property, he agreed to attempt to borrow money on the property for the Respondents, and in order to borrow the money he advised Respondents that if they would sign a Real Estate Contract on the property with someone with a good credit rating, he would be able to borrow a couple of thousand dollars for them in order to pay off the taxes and save the property from being sold. The Respondents were dubious of this matter but upon being assured by the Appellant Fuller, who was representing them as their attorney at this time, that all was legal and that there would be no complications, the Respondents signed a Real Estate Contract to sell the property to one Robert R. Sather, the Defendant, which is shown as Plaintiffs' Exhibit "A". This contract was never to have been a binding contract, but only for the purpose of borrowing money for the Respondents to pay taxes and other outstanding bills. On or about March 31, 1957, the Defendant Sather and the Respondents executed a mortgage in favor of Security Loan and Finance Corporation at Duchesne, Utah, and turned the same over to the Appellant Fuller to borrow the funds, and at the same time, authorized the Appellant Fuller to receive the \$2,000.00 for the Respondents with directions that he was to pay certain obligations then outstanding against the Respondents as their attorney. At the time of executing said mortgage, the Appellant Fuller gave the Respondents his personal check in the sum of \$891.87 to pay the taxes on the property before the same became delinquent, which sum was to have been deducted from the \$2,000.00 which

the Appellant was to receive on the loan. The check of the Appellant Fuller was given to the Duchesne County Treasurer the following day to pay the taxes. However, the check was returned about April 5th with the notation that there were not sufficient funds to pay the same. On or about April 10th, the Respondent Max Birch called to the office of the Appellant Fuller and advised him that the check had not been paid and the Appellant Fuller gave him a new check with an additional \$2.50 as protest fees to cover the check that had been returned and advised the Respondent that there were sufficient funds in the bank to cover the check at this time; that the Respondent Max Birch called the Continental Bank and was advised that no funds were available to pay the check at that time. The Appellant Fuller was to have paid payments to Wheeler Machinery Company of Salt Lake and to J Harold Call of Heber, Utah, on judgments rendered against the Respondents; that checks were made by Fuller to pay these two accounts but were returned marked "Insufficient Funds" and a check was also given to Respondent for the sum of \$50.00 which was marked "Insufficient Funds" when presented for payment and which check was not paid until after the Respondent signed a complaint for issuing a check against insufficient funds. The checks to J Harold Call and Wheeler Machinery were finally made good approximately thirty to sixty days after the mortgage was signed. There is still \$50.00 outstanding which the Appellant Fuller charged as title option fee for handling the transaction for the Respondents.

### 3.

On or about April 20, 1957, the Respondents rented the oil rights in said land to the Standard Oil Company of California and the Appellant Fuller was informed of this lease by the agent of Standard Oil Company and the Appellant Fuller immediately then made a payment of \$290.00 on the mortgage to the Security Loan and Finance Corporation and sent the Uniform Real Estate Contract of January 31, 1957, to the Defendant Robert R. Sather to be notarized and recorded, which was done.

At a later date, Respondent Max E. Birch and Defendant Sather entered into an option agreement for the same land as described in the prior Uniform Real Estate Contract except that Respondents' home was not to be included, and within a day or two thereafter, Defendant Sather executed a release of the Uniform Real Estate Contract, (Plaintiff's Exhibit "B").

Subsequent to the execution of the Sather-Birch option, the Appellants Kenneth W. Judd and Forrest Fuller as partners (transcript, Judd D-62-16) personally and by and through their agents, entered upon the property of Respondents, tore down buildings and corrals located thereon and erected new corrals and fences and took over farming of said premises, the Respondents retaining possession of their home.

The Appellants, personally and by and through their agents, continued farming the premises and doing other work thereon until the early part of July, 1957, when a dispute arose among the Respondents and the Appellants

as to the use of the ground, inasmuch as the option had not been exercised by Sather, and as a result of said dispute, a notice of Lis Pendens was filed in the County Recorder's office on July 9, 1957, by the Appellants, and the following day, the Defendant F. A. Hatch served a notice to vacate upon the Respondents, which notice claimed that the Appellants Forrest W. Fuller, Judith Hyde Fuller, Kenneth W. Judd and Ruby F. Judd were owners of the property and that unless the Respondents paid to the Appellants the sum of \$510.00 within five days, they would be evicted (transcript Birch D-43-8, 9 and Plaintiffs' Exhibit G).

The Appellants never filed an action as alleged in their Lis Pendens and so on or about July 29, 1957, the Respondents filed a complaint naming Appellants as Defendants and asking damages for slander of title and unauthorized trespass.

That the Appellants and Defendants continued farming and in possession of said premises during the month of August to the detriment of the Respondents, and therefore, it became necessary for an order to show cause and temporary restraining order to issue, which was done on the 13th day of August, 1957, which matter was heard on the 17th day of August, 1957, before the Honorable Maurice Harding at the Courthouse in Duchesne County without a reporter, at which time the several Appellants and Defendants and Respondents testified as to the facts set out hereinabove and the Court ordered that a bond in the sum of \$375.00 be posted by the Appellants before allowing their



livestock to feed any further on the premises of the Respondents and before they continued to harvest any of the crops thereon; that said bond was subsequently filed and the Appellants allowed their livestock to graze upon the Respondents' ground and harvested the crops thereon.

That after several delays at the request of the Appellants, the matter finally came to trial on November 25, 1957, at 11:15 o'clock A. M., in the County Courthouse at Duchesene, Utah, at which time a stipulation was entered into by the attorneys for the parties to the effect that the Court, having previously heard the testimony as to the above facts upon the order to show cause and having discussed the same in pre-trial, agreed that the trial would proceed from the standpoint of damages for the entry of any Defendants onto the land and any damages that may have been sustained because of slander of title (Birch, D-5-23).

During the trial, several witnesses for the Plaintiff Respondents were called and testified as to the damages sustained by the Respondents. Upon stipulation of the parties, the Court and counsel recessed to view the premises at which time the Court was shown the actual damages sustained by the Respondents. Upon the Court's convening, it was stipulated that the Appellants had filed a Lis Pendens upon the property and that no suit had been filed by the Defendants, Forrest W. Fuller and Judith Hyde Fuller and Kenneth W. Judd and Ruby F. Judd upon which a Lis Pendens could be based. (transcript, page 77).

That in order to save time and so that the matter would not have to be continued to some later date, the parties stipulated to the Court as to the testimony they would offer if their witnesses were called, and after said stipulations were read into record, the Court considered all the testimony offered, the stipulations as made, the Exhibits as offered and all the facts presented, and the Court found that the Lis Pendens had been filed without just cause and with malice and entered judgement against the Defendants, Forrest W. Fuller and Judith Hyde Fuller, his wife, and Kenneth W. Judd and Ruby F. Judd, his wife in the amount of \$128.00 actual damages and \$500.00 attorney's fee from slander of title and \$877.00 less \$435.00 set off for trespass.

## **ARGUMENT**

**Answer to Point 1:** Appellants, in their argument, attempt to show that there was no bad faith in filing the Lis Pendens, and therefore, no basis for damages. However, the facts of this case clearly show that there could be no other basis for filing the Lis Pendens other than malice on the part of the Appellants.

“While malice is not necessarily presumed from the falsity of the statement of the defendant, it may in certain cases be inferred therefrom, or from other facts or circumstances, as where the attendant circumstances convincingly point to the inference that the party charged with the slander of title was not in good faith endeavoring to uphold or assert a supposedly valid claim of

title in himself." 33 American Jurisprudence, 319, Section 359.

"It was not incumbent upon plaintiff to establish malice by direct evidence. It is sufficient if a reasonable inference of malice may be drawn from the evidence. Of course, if the defendant at the time of making such statement knew it had no lease or had no probable cause for believing it had one, it acted maliciously. Where different reasonable inferences can be drawn from the evidence on such issue, the question is for the jury to decide. In this connection, we ask, why did the defendant remove its advertising signs from the premises if it honestly believed it had a lease? We think the good faith of the defendant is challenged by the evidence." *Cawrse v. Signal Oil Company*, 103 P. (2d) 729.

"As we have shown above plaintiff had pleaded that the claim set forth in the instrument recorded by defendant was false. That was sufficient averment of falsity. The instrument claimed that the land apparently owned by plaintiff in reality belonged to defendant because it had been purchased by plaintiff as agent for defendant. This claim was false. It is not necessary, as argued by defendant, that all the words be false, it is sufficient if the statement which disparages the plaintiff's interest in his property is false." *Dowse v. Doris Trust Company* (Supreme Court of Utah) 208 P. (2d) 956, 958.

The Appellants never claimed any right or interest in Respondents' premises by filing a counter-claim to Respondents' complaint, but just filed an answer admitting possession. Further, the Appellants never objected to the Court's

quieting title in the Respondents (Paragraph 4 of Judgment) which further shows that they had no interest in the property and no basis for filing the Lis Pendens.

Such fact of malice or lack of just cause was amply found by the Court, which finding will not be disturbed.

“Therefore, in accord with the holdings of this court, that the judgment of the trial court will not be disturbed, unless the evidence clearly preponderates against its findings; or there has been a plain abuse of discretion, or where manifest injustice or inequity is present, we affirm the court’s ruling \* \* \*” *Beezley v Beezley*, 296 P. (2d) 274, 277. (Utah Supreme Court, 1956).

**Answer to Point 2:** The Appellants, Judith Hyde Fuller, Ruby F. Judd and Forrest W. Fuller, attempt to claim that there is no evidence introduced to show that they had ever entered upon the land of the Respondents, whereas paragraph 2 of their answer to the Plaintiffs’ complint, which was filed in this matter on August 20, 1957, fully admits this as follows:

“2’ Defendants deny each and every allegation contained in Plaintiff’s SECOND CAUSE OF ACTION except that they admit they are in possession pursuant (sic) to an agreement made by the Plaintiffs to sell the property which the Defendants are occupying to the defendants Forrest W. Fuller and Kenneth W. Judd.”

Inasmuch as the Defendants by their answer had admitted possession of the premises and as a result of the

discussion at pre-trial wherein the Defendants fully admitted possession, the Court decided to hear only testimony concerning the measure of damages that the Respondents had suffered. (Birch, D-4-27, 28, and Birch D-5-23, 24 and 25).

All pre-trial discussions on this matter showed that the Appellants, Forrest W. Fuller and Judith Hyde Fuller, his wife, and Kenneth W. Judd and Ruby F. Judd, his wife, were partners in operating and farming the Birch premises. This is clearly shown by the letter from Appellant Fuller to the Respondents, Plaintiff's Exhibit "F", and by the testimony of Appellant Judd to the effect that he and Fuller were partners. (transcript, Judd D-62-16).

The Respondents allowed the Appellants to come onto the premises and farm the same because of the option they had entered into with Defendant Sather, (transcript, Birch D-9-1, 2) whereas the Appellants went into possession of the property under guise of the said Uniform Real Estate Contract or under some other guise and without any right, title or authority whatsoever, (transcript Judd D-61-1-22).

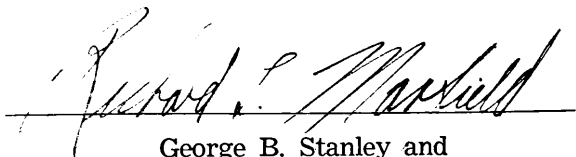
### **CONCLUSION**

The facts in this case show a brazen attempt on the part of the Appellants to occupy and farm the property of the Respondents without any right, title or authority whatsoever, or at the most, under the guise of a fraudulent real estate contract without any intention whatsoever to pay for the feed and crops removed therefrom, and further, that

the Lis Pendens was filed against this property solely for the purpose of maliciously causing the Respondents great trouble and expense and to prevent them from freely disposing of their property. Further, the Appellants by admitting in their answer that they had possession of the property and were occupying the same and by their failure to file a counter-claim alleging title or right to the property and not objecting to the findings and decree quieting title in the Respondents are now estopped to deny that said Lis Pendens was filed without just cause and that they "ever entered upon the land of the Respondents."

The Court's denying Appellantss' motion to dismiss and granting judgment against the Defendants was therefore proper under the facts and circumstances of this case.

RESPECTFULLY SUBMITTED:

A handwritten signature in cursive script, appearing to read "George B. Stanley and Richard L. Maxfield", is written over a horizontal line.

George B. Stanley and  
Richard L. Maxfield  
Attorneys for Plaintiff Respondents  
54 North Main  
Heber, Utah