

1959

# Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Petition for Rehearing, Brief of Appellants

Utah Supreme Court

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Gordon I. Hyde; Forrest W. Fuller; Attorneys for Appellants;

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UNIVERSITY UTAH

AUG 6 1959

IN THE SUPREME COURT OF THE STATE OF UTAH

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E. BIRCH and FONTELLA BIRCH,  
wife,

Plaintiff-Respondents,

v.

EST W. FULLER, JUDITH HYDE  
ER, KENNETH W. JUDD and  
F. JUDD,

Defendant-Appellants.

Case No.  
8822

PETITION FOR REHEARING

BRIEF OF APPELLANTS

GORDON I. HYDE and  
FORREST W. FULLER,

Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAX E. BIRCH and FONTELLA :  
BIRCH, his wife, :

Plaintiff-Respondents, :

Case No.  
8822

v. :

FORREST W. FULLER, JUDITH  
LYDE FULLER, KENNETH W. :  
JUDD and RUBY F. JUDD, :

Defendant-Appellants. :


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PETITION FOR REHEARING

---

Come now the defendant-appellants and respectfully petition  
Court for a rehearing of the above entitled matter and for  
consideration of the matters set forth in the opinion of The  
Court filed April 21, 1959.

Dated this 24th day of May, 1959.

  
Forrest W. Fuller  
Attorney for Appellants

## BRIEF OF APPELLANTS

It is not the desire of petitioners to unduly belabor points of only slight economic consequence but as has been said by Justice Brandeis: "Every mind (has) its choice between truth and repose. You can never have both." Petitioners feel that there are three errors within the opinion of The Court which are not consistent with the law or with the record in this case upon which they like the opportunity to express themselves further.

### STATEMENT OF POINTS

I. THE EARLIER OPINION OF THIS COURT FILED DECEMBER 2, 1958, INADVERTENTLY EXTRACTED FROM THE BRIEF RESPONDENTS FACTS WHICH ADMITTEDLY WERE NOT IN THE RECORD. THESE FACTS WERE OF SCANDALOUS NATURE AND THE COURT SHOULD CORRECT THE DAMAGE DONE BY ITS EARLIER OPINION.

II. THE COURT ERRED IN UPHOLDING THE FINDING OF THE COURT BELOW THAT THE APPELLANTS HAD NO CONTRA RESPONDENTS AND IN AFFIRMING THE JUDGMENT FOR LOSS OF TITLE.

III. THE COURT ERRED IN AFFIRMING THE JUDGMENT OF THE COURT BELOW FOR TRESPASS BY CONSTRUCTIVE EGRESS.

### ARGUMENT

POINT 1. THE EARLIER OPINION OF THIS COURT FILED

EMBER 12, 1958, INADVERTENTLY EXTRACTED FROM THE  
OF RESPONDENTS FACTS WHICH ADMITTEDLY WERE NO  
RECORD. THESE FACTS WERE OF SCANDALOUS  
NATURE AND THE COURT SHOULD CORRECT THE DAMAGE  
BY ITS EARLIER OPINION

Since the same erroneous facts do not appear again in the  
recent opinion of The Court, it may be assumed that the  
Court concedes the error of their inclusion within its first opinion,  
and having thus conceded the error, should grant defendants still  
its motion to strike these facts from the brief of respondents  
and should further, strike them from the minds of those to whom  
its original opinion was distributed by some modest corrective  
amendment in their final opinion. Defendants do not demand the  
disqualification of counsel for plaintiffs, although there is considerable  
basis for such demand, but merely request that the damage done  
be repaired.

## POINT II

THE COURT ERRED IN UPHOLDING THE FINDING OF THE  
COURT BELOW THAT THE APPELLANTS HAD NO CONTRACT  
WITH RESPONDENTS AND IN AFFIRMING THE JUDGMENT FOR  
LOSS OF TITLE.

In reply to the argument of defendants that the evidence does  
not establish bad faith or malice the Court in its opinion states. "It

difficult to discern what other motive defendants had in filing  
his pendants, particularly in view of the transmission by one  
he defendants of a rather insulting letter to the plaintiffs some  
months earlier." This language it is feared apparently sub-  
stitutes the test of anger and insult for the element of malice which  
has been oft defined by this Court as "the want of probable cause"  
(cf. of Appellants, pages 3 and 4, and op. cite.) While the anger  
loudly expressed by one of the defendants in his letter, Ex-  
"F", might demand an apology it is certainly not sufficiently  
strong to demand that the heretofore existing legal definition of  
malice in slander of title actions be changed by judicial decision.  
In the instant case, under the definition of malice obtaining at the  
time the defendants could not be liable if they had probable  
cause to believe they had a bona fide claim and were asserting the  
same in good faith. This test must be applied as at the time the  
slandering was done for even though they later abandoned their  
claim and failed to file their complaint no damage was done. In  
such states no damage could be assessed even if no contract  
was made and even if the slanderer lacked probable cause for the  
slandering, for the plaintiffs made no effort to sell the property

manuscript, Birch REC 81) and hence lost nothing by the recording of the lis pendens. But in Utah attorneys fees may be granted and it is necessary to determine whether the defendants had probable cause for filing the lis pendens.

The Court in its opinion finds competent evidence in the record that Sather was not to be bound by the series of transactions the matter is not particularly germane for the cause against Sather was dismissed upon the motion of plaintiff. (Record, page 66) however, the Court has treated the matter and defendants likewise. The competent evidence referred to must appear in the exhibits or in the testimony of Judd for this matter is not elsewhere. Judd indicates that he knew Sather was trying to get Birch's place from tax sale, was a friend of his (Judd's) and he (Judd) asked Sather to see if he could get a loan on the property. Judd D 71. This testimony, even taken out of context, for Judd identifies Exhibit 11 later (Transcript, pages 66 and 67) does not raise the inference that the loan was only consideration or that Sather was not to be bound by the agreements referred to. Indeed, the safety of Sather and



iffs demands a contrary result as does the fair significance  
e testimony for if Sather was not bound by Exhibit "A", then  
fair inference remaining is that Birch and Sather defrauded  
ity Loan and Finance for their joint mortgage to this com-  
Exhibit "C", mortgages the Uniform Real Estate Contract  
in Exhibit "A", at page 2, paragraph 2, of such mortgage  
is considerable doubt that this was their intent. If Sather  
ot bound by Exhibit "A" per se he must have ratified it when  
signed it, Exhibit "I", or when he revised it, Exhibit "E".  
Defendants urge that any man armed with Exhibits "A" and  
ould have probable cause to file a lis pendens or other pro-  
e affidavit after learning of Exhibit "B", the release and  
nation of the contract found in Exhibit "A". That these  
ants did honestly believe they had a contract is best evinced  
fact that they, Judd at least, entered upon the property and  
onsiderable improvements without objection by Birch. If  
ther doubt exists that they honestly felt they had a claim  
serted the same in good faith it may be forever disposed of  
rence to Exhibit "F", where, no matter how insultingly,  
asserts the claim, demands that the title be cleared. notes

payment has been made, and requests that the same be  
led upon the contract balance. Significant in this respect  
is the fact that the notice served, Exhibit "G", names Sather  
as co-defendant with Birch. No more than this honest assertion  
of an apparently bona fide claim is needed even though the claim  
is later nullified. See Brief of Appellants pages 3 and 4,  
and cite.

However, since the court below ruled that no contract existed  
the Court affirms such finding, and, further since if a con-  
tract did exist the position of defendants can only be strengthened,  
the matter is treated here, briefly. The exhibits introduced on  
behalf of the plaintiffs create such a contract. No other possibility exists.

The exhibits and the matter therein contained is absolutely bind-  
ing on plaintiffs (and hence the court) for they are their own  
acts and they cannot be impeached or modified by parole.  
See Utah Code Annotated, 1953, 78-25-13, 78-25-11, and 78-25-16.

If the witnesses comment upon these exhibits and the contract  
they contain except Judd. While his testimony is at best con-  
fusing he does identify Exhibit "I" and recalls that it was executed

at Salt Lake City, Utah, on June 1, 1953. The testimony of

was not the basis for the trial court's finding for the court

"It is quite evident to me that he (Judd) doesn't know. He thinks there was a contract between the parties entered into here but he doesn't know which one it was. He probably never saw it. . . He said he didn't know anything about that (Exhibit "A"). It is quite apparent he doesn't. . . I don't think he knows anything about it personally. . . Somebody told him he could go in there is probably what happened." Transcript, Judd-D-67, 68 and 69.

quite obvious, in view of such comment, that the court below not and did not base its finding that no contract existed upon testimony of Judd, and no other basis for such finding exists. Court, in its opinion, comments that no one objected to this of the court below. Such is not the case for having based entire defense to the slander of title action upon Exhibit "A", ants objected as best they could. They appealed. And h they did not make such finding the subject of a separate i their brief they very carefully pointed out the record con- othing justifying such or any similar finding. Brief of nts, page 4. This is sufficient. erhaps, the confusion generated and the finding was based hibits "B" and "E". If so, this can be cleared up by only  
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Library Services and Technology Act, administered by the Utah State Library.*  
comment. The release and termination of Uniform Real

Contract, Exhibit "B", ex parte as it were, without the  
ce and/or consent of Judd and Fuller could not bind them nor  
manner lessen their equity for both Sather and Judd signed  
"I" and had actual knowledge of the assignment of Exhibit  
erein contained. Neither could the revision and attempted  
sion to an option contained in Exhibit "E" for the same reason  
ding was therefore completely reasonable when applied to  
but completely unfounded when extended to include Judd  
ler.

short, Judd and Fuller, had probable cause to believe  
la contract, armed as they were with Exhibits "A" and  
d to state the matter even more strongly, they in fact  
ha contract and the plaintiffs proved this beyond any  
This, then, was their "other" motive for filing the lis

### POINT III

THE COURT ERRED IN AFFIRMING THE JUDGMENT OF  
URT BELOW FOR TRESPASS BY CONSTRUCTIVE  
SION.

the Court, in discussing this matter, says: "We do not be-  
endants contention that it was error to give judgment for

pass is sustainable. Defendants said they had never been on property, but the answer admits that they were in possession pursuant to an agreement made by plaintiff to sell to defendants. This is a landmark in the law of trespass merits comment, for if one concedes the allegation in defendants answer this will be the first departure in the case law treating trespass quare non where one in possession has committed a wrong to possession. Heretofore the gist of a trespass to realty lies in disturbance of another's possession. Brief of Appellants, on for Rehearing, page 6. While this possession was only constructive possession as follows title in the case of Est. W. Fuller, Judith Hyde Fuller, and Ruby F. Judd, it was not possession in the case of Kenneth W. Judd. This possession of defendants is the most compelling single argument for reversing the court below, but others are legend. The plaintiffs did not sustain the burden of proof necessary to establish that the defendants or any of them were trespassers. None, is fatal. The court found that the defendant F. A. Hatch was not a trespass and if this be the case neither are his co-

lants. While it would lie ill in the mouths of defendants to  
in that their co-defendant was awarded the remedy and  
that they demanded, it must be noted that the evidence  
Hatch is stronger than it is against any of the other de-  
s. He was actually upon the premises many times. Tran-  
Birch-D-7, 8, 14, 21, and 23, etc. Shortly after July 4,  
he following conversation took place upon the premises in  
sence of Mrs. Birch, Transcript, Birch-D-15,: Question:  
that conversation...?", Answer: "I told him (Hatch)  
didn't have any right on the place, that they had failed  
ise the option, and that he was a willful trespasser and  
'We are going to keep this hay deal.' I said, 'You know  
a willfull trespasser' and he said, 'I admit it but I am  
''' In spite of this the Court found no money judgment  
Hatch. These defendants urge, that if credible justifica-  
ed for this result, that same reason, excuse, or what  
ends to all other defendants to a much greater degree  
of them were never on the property at all. This should  
int.

The defendants are not liable for trespass for the plaintiffs' entry of them into possession. Transcript, Birch-D-7, 8, and 9, etc. made no objection to the entry of Hatch, Judd, one Smith, the employees and several Indians. Although Birch is quick to point out that he did so because of the May 4(?), option with Sather, Exhibit E and those who did go on the property went on pursuant to Exhibit I. It matters little that each had his own reason for being on, they were on for all purposes, and in possession. Once in peaceful possession they could not trespass against their possession (constructive and/or actual) and the plaintiffs. In order to terminate possession and make continued possession unlawful must rely upon the statutory remedy of unlawful detainer. To serve their notice to quit since the contract forfeiture provisions of the Uniform Real Estate Contract and/or the termination of the lease (?), are not self operative. Carstensen v. Hansen, 107 U.S. 152, 2d 954; Leone v. Zuniga, 84 U.S. 417, 34 P. 2d 699; L.R. 1232, Lambert v. Sine, 256 P. 2d 241; and King v. ..., 3 U (2d) 419, 285 P. 2d 1114, 1118. While defendants have been liable under such a cause of action for such trespasses as occurred, they are not liable for trespass for their

session was never terminated or made unlawful as by law provided.

The defendants Ruby F. Judd, Forrest W. Fuller and Judith Fuller cannot be liable for the wrongful acts of Judd and Hatch, if any, for, "Where several persons are engaged together for a common purpose (and even this was not proven here) and a trespass is committed by one or more of them, assent thereto by the others is presumed only if the common design is unlawful. Where the object to be accomplished is a lawful one, assent is a question of fact to be proved. 52 AMERICAN JURISPRUDENCE 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000. Sections 75, 76 and 77. Italics and parenthetical comments by writer. Defendant Forrest Fuller was at best a tenant in common and certainly tenancy in common and the entirely agrarian life was conducted by the defendants Judd and Hatch are not per se unlawful, and no other common design or purpose and/or assent was proved. In fact quite the contrary was evinced. Certainly Ruby F. Judd, and Judith Hyde Fuller, who were not parties to the contracts and were never on the premises were not trespassers.

Even if the defendants were trespassers, and such is not



ase, no damages could be assessed, for no attempt was made  
e plaintiffs to apportion or set forth with any certainty just  
acts were done by Judd and which acts were done by Hatch,  
hich acts were done by their servants and employees, and  
empt was made to establish which acts were done prior to  
, 1957, and which acts were done after July 4. "While the  
iff need not prove his case beyond a reasonable doubt, evi-  
affording only a basis for mere speculation and conjecture  
he cause of plaintiff' injuries is wholly insufficient as a  
upon which to rest a verdict for damages.". and, "... when  
more tort-feasors acting independently of each other inflict  
..one cannot be held liable for the trespasses of the other..  
AMERICAN JURISPRUDENCE, Trespass, 861, 892, sections  
80.

One remaining area of confusion exists. The Court in its  
states: "The trial court indicated that only testimony re-  
o damages suffered because of the trespass need be adduced  
ven if this were the case it should be reversed for there  
some showing other than that the damages occurred for  
ndants must have entered, and such entry must have been

ngful for if such is not proven or stipulated to, no matter how  
ve the damages, the defendants are not liable for them. Defen-  
s never stipulated that they were trespassers, or that they  
ed any damage and the record bears this out. Plaintiffs never  
ed such to be the case and the record bears this out. Even so  
rial court never (in context) indicated that the only testimony  
heard was that relating to damages. Transcript Birch-D-4.

COURT: "I thought we were going into the question of damages  
ot into a lot of these preliminary matters."

MR. MAXFIELD: "If it could be stipulated and just have the  
mony as to them, we would be willing to do that."

THE COURT: "And that it was wrongful."

MR. HYDE: "No, we won't stipulate that it was wrongful."

THE COURT: "No, I say that they must establish that it was  
ful."

This exchange, made right at the beginning of the trial is  
and convincing. The frame of mind of the court was that the  
es must be proven and that they (plaintiff) must establish  
e acts were wrongful. Again at page 54 of the transcript,

rch-C-54, words of similar protent are repeated:

THE COURT: Just a moment, we are going far afield, Mr. de. I thought we wanted to confine this to the matter of tres- is and damages and I think we ought to do that.

MR. HYDE: Isn't it relevant whether or not they are operat under some agreement when they were on the property?

THE COURT: "He stated they were. There is no question ut that - during May, at least, until the latter part of June, rding to his testimony."

It is obvious that on the one hand defendants claimed under contracts and on the other that plaintiffs claimed they were not ing and that for this reason the court attempted to limit the th of the trial by excluding testimony other than as to damages is to the wrongful character of the acts creating them. Trans pages 107 - 110, inclusive. The only reason he was not letely successful is that the plaintiffs insisted on going into tatters sought to be precluded, at great length and the Judge y let them do so. They introduced as their own, Exhibits hrough "I" and the court let them in. Once in evidence they for all purposes and their content and purport binds the

intiffs conclusively.

## CONCLUSION

The defendant-appellants concede that The Supreme Court, where the circumstances compel such a result, over-rule existing case law, and change it accordingly. However, if such one, the facts which compel such action and the defects in the existing law should be pointed out in the opinion in order that defended counsel when they find themselves on the other side of the question, and others concerned with the law, may cite the decision favorably or distinguish it as the case may be.

In the instant case defendant-appellants respectfully urge that such compelling reason in the fact situation presented or defect in the existing law exists. Plaintiff-respondents fell woefully short of sustaining the burden of proof that the defendant-appellants trespassed, in fact they proved that some of them were on the property and that all others entered and remained there at their own consent and without objection on their part. Plaintiff-respondents proved beyond the shadow of any doubt that the defendant-appellants had a contractual agreement to purchase the property of plaintiff-respondents, and that they relied upon

nd asserted such claim honestly and openly. The lower court  
ould be reversed in both matters and the action dismissed.

It should not lessen the strength of the argument of all  
endants to point out that the wives, Ruby F. Judd, and Judith  
de Fuller, were not parties to any of the contracts, nor did  
ey enter upon the premises. Their only wrong was to be  
med as plaintiffs in the abortive notice to quit or pay rent,  
hibit "G", and to be named as defendants in the complaint of  
intiffs. No greater wrong can, or has been attributed to  
n. Certainly in their case the court below should be reversed.

Respectfully submitted,

FORREST W. FULLER

Attorney for Appellants