

2000

# Marvin W. Hansen v. Reuel S. Kohler : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bryce E. Roe; Attorney for Respondents.

Golden W. Robbins; Attorney for Appellants; David J. Knowlton; Attorney for Intervenors.

---

## Recommended Citation

Brief of Appellant, *Marvin W. Hansen v. Reuel S. Kohler*, No. 14099.00 (Utah Supreme Court, 2000).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/175](https://digitalcommons.law.byu.edu/byu_sc2/175)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

---

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MARVIN W. HANSEN AND BEVERLY M.  
HANSEN

Plaintiffs and Appellants

vs.

REUEL S. KOHLER AND DOLORES M.  
KOHLER, his wife

Case No.  
14099

Defendants and Respondents

EARSEL G. PIERCE AND PATRICIA B.  
PIERCE, his wife

Intervening Defendants  
and Cross Claimants

---

BRIEF OF PLAINTIFFS AND APPELLANTS

---

APPEAL FROM JUDGMENT OF DISTRICT COURT OF BOX ELDER COUNTY, HONORABLE  
VE NOY CHRISTOFFERSON, JUDGE

---

GOLDEN W. ROBBINS  
Attorney for Plaintiffs and  
Appellants  
455 East 400 South, Suite 50  
Salt Lake City, Utah

BRYCE E. ROE  
Attorney for Defendants and Respondents  
ROE AND FOWLER  
340 East 4th South  
Salt Lake City, Utah

DAVID J. KNOWLTON  
Attorney for Intervenors and Cross  
Claimants  
VLAHOS AND GALE  
Suites 312-315 Eccles Building  
Ogden, Utah

FILED

AUG 7 - 1975

---

---

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MARVIN W. HANSEN AND BEVERLY M.  
HANSEN

Plaintiffs and Appellants

vs.

REUEL S. KOHLER AND DOLORES M.  
KOHLER, his wife

Case No.  
14099

Defendants and Respondents

EARSEL G. PIERCE AND PATRICIA B.  
PIERCE, his wife

Intervening Defendants  
and Cross Claimants

---

BRIEF OF PLAINTIFFS AND APPELLANTS

---

APPEAL FROM JUDGMENT OF DISTRICT COURT OF BOX ELDER COUNTY, HONORABLE  
VE NOY CHRISTOFFERSON, JUDGE

---

GOLDEN W. ROBBINS  
Attorney for Plaintiffs and  
Appellants  
455 East 400 South, Suite 50  
Salt Lake City, Utah

BRYCE E. ROE  
Attorney for Defendants and Respondents  
ROE AND FOWLER  
340 East 4th South  
Salt Lake City, Utah

DAVID J. KNOWLTON  
Attorney for Intervenor and Cross  
Claimants  
VLAHOS AND GALE  
Suites 312-315 Eccles Building  
Ogden, Utah

## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE.....	1
DISPOSITION IN THE LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	3
STATEMENT OF FACTS.....	3-10
PART II OF THE STATEMENT OF FACTS.....	10-13
ARGUMENT.....	14-27
PART I, POINT I, PROPERTY CONVEYED IN TRUST AS SECURITY. THAT IF KOHLER KEEPS THE PROCEEDS FROM THE HOWELL PROPERTY, HE HAS BEEN UNJUSTLY ENRICHED.....	14-22
PART I, POINT II, STATUTE OF FRAUDS HAS NO BEARING UPON THIS CASE.....	22-27
PART II OF THE BRIEF.....	28-42
POINT I, THE LIS PENDENS IS PRIVELEGED BECAUSE IT IS PART OF THE JUDICIAL PROCEEDINGS.....	28-32
POINT II, LIS PENDENS HAS NO EFFECT ON CONVEYANCES MADE PRIOR TO THE FILING OF THE LIS PENDENS .....	32-36
POINT III, THAT THE PROCEEDINGS WOULD HAVE TO BE FALSE AND CONTAIN FALSE ALLEGATIONS. TO HAVE SLANDER OF TITLE THE INSTRUMENT OR THE WORD SPOKEN HAS TO BE FALSE.....	36-38
POINT IV, FOR THERE TO BE A CAUSE OF ACTION, THERE MUST BE MALICE. ....	38-42
PART III DAMAGES .....	43-47
POINT I, ATTORNEY FEES AND COSTS OF DEPOSITION.....	43-47
RENT .....	47
CONCLUSION .....	48-49

# TABLE OF CONTENTS -- Continued

## AUTHORITIES CITED

CASES	Page
Acott v. Tomlinson, 337 P. 2d 720, 9 U. 2d 71 .....	25
Albertson v. Raboff, 295 P. 2d, 405 .....	31,32
Anderson v. Cercone, 180 P. 586 .....	22
Barrett v. Vickers, 116 P. 2d 772, 100 U. 534 .....	26
C. Ed. Lewis v. Dragos, 266 P. 2d 499, 1 U. 2d 328 .....	40
Chadwick v. Arnold, 34 U. 48, 95, P. 527 .....	16,22,23,24
Chambers v. Emery, 13 U. 374, 45 P. 192.....	22
Child v. Child, 332 P. 2d, 981, 8 U. 2d 261.....	27
Corey v. Roberts, 25 P. 2d 940.....	19
Dowse v. Doris Trust Co., 208 P. 2d 956, 116 U. 106 .....	45
George R. Taylor v. Eva Turner, 492 P. 2d 1343, 27 U. 2d 39.....	23,24
Hawkins v. Perry, 253 P. 2d 372 .....	15,16
Haws v. Jensen, 209 P. 2d 229, 116 U. 212.....	16,17,18
I.X.L. Stores v. Moon, 162 P. 622, 49 U. 262.....	46,47
Kitt v. Kitt, 294 P. 2d, 791, 4 U. 2d 384 .....	26,27
Lawley v. Hickenlooper, 212 P. 526 .....	20,21
Newel v. Halloran, 250 P. 986 .....	20
Olsen v. Kidman, 235, P. 2d 510 .....	40,45
Pender v. Dowse, 265 P. 2d 664 .....	37
Renshaw v. Tracy Loan & Trust Co. 49 P. 2d 403, 87 U. 364.....	18
Skeen v. Marriott, 22 U. 73, 61 P. 296.....	22
Sproul v. Parks, 210 P.2d 436 .....	45,46
Wheelwright v. Roman, 165 P. 513.....	25

TABLE OF CONTENTS -- CONTINUED

INDEX TO TEXT AND STATUTES

	Page
38 C. J. Lis Pendens, Section 1, page 4, 6 .....	33,34,35
38 C. J. Lis Pendens, Section 9, page 11.....	35,36
53 C. J. Section 273, page 393 .....	36
53 C. J. S. Libel & Slander, Section 274, page 394 .....	38
53 C. J. S. Libel & Slander, Section 277, page 397 .....	29,30
Utah Code, 21-5-4.....	46
Utah Code, 78-40-2 .....	33

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - - ooo0ooo - - - - -

MARVIN W. HANSEN AND BEVERLY )  
M. HANSEN

(  
Plaintiffs and Appellants  
)

vs.

(  
REUEL S. KOHLER AND DOLORES M. )  
KOHLER, his wife

(  
Defendants and Respond- )  
ents

Case No. 14099

(  
EARSEL G. PIERCE AND PATRICIA )  
B. PIERCE, his wife

(  
Intervening Defendants )  
and Cross Claimants

- - - - - ooo0ooo - - - - -

BRIEF OF PLAINTIFFS AND APPELLANTS

---

STATEMENT OF THE NATURE OF CASE

This case has two parts. The first part involves a house on 2.36 acres located in Howell, Box Elder County, Utah, which was owned by the Plaintiffs. The Plaintiffs traded the property as a down payment upon the Robinson property located in Salt Lake County, a four-plex. The agreed value of the property in Howell was \$7,500.00. The Howell property was deeded to Reuel S. Kohler the real estate agent, and his wife, at the request of the Robinsons,

the owner of the four-plex because of a deal involving the Kohlers and Robinsons.

All of the papers pertaining to the four-plex and the Howell property were prepared and left with Mr. Kohler to be held by him, the real estate agent, until the deal was consummated. It developed that the house and lot had been included in a mortgage upon Mr. Hansen's farm at Howell, so Mr. Robinson and Mr. Hansen entered into a new agreement by the terms of which Hansens conveyed to Robinsons a Thunderbird automobile and made a payment as provided by the contract in advance and agreed to pay the Kohlers' commission and that Mr. Kohler was to hold the Howell property as security, for his commission.

The second part of the case involves the Pierces who purchased the Howell property from the Kohlers and the Deed from Kohlers to Pierces was put on record the day before the Lis Pendens was filed against the Kohlers. The Pierces appeared and requested permission to be made Intervening Defendants and Cross Claimants at the time of the pre-trial, claiming damages because of the filing of the Lis Pendens.

#### DISPOSITION IN THE LOWER COURT

The Court found in favor of the Defendant, Kohler, and against the Plaintiff, no cause of action (R. 490-491)

The Court awarded damages in favor of the Pierces and against the



Plaintiff in the sum of \$4,166.05 plus interest and costs. (R. 464)

That on a Motion for a New Trial, (R. 467-468), the amount was reduced by \$1,500.00, making a new Judgment of \$2,596.75. (R. 499).

#### RELIEF SOUGHT ON APPEAL

Plaintiffs ask for reversal of the Judgment in favor of Kohlers and against Plaintiffs, Hansens.

That the Judgment in favor of the Intervening Defendants, Pierces, be reversed and their Counterclaim be dismissed.

#### STATEMENT OF FACTS

I am dividing the Statement of Facts into two portions. The first one pertaining to the deals between Hansen and Kohler as to the Howell property and the second part is the claim for damages of Pierces against the Hansens for filing a Lis Pendens.

Marvin W. Hansen, Plaintiff, owned the property at Howell, Utah worth \$7,500.00, which was the agreed sales price. Mr. Kohler, a real estate agent, had a listing on a four-plex in Salt Lake County owned by Mr. Kent Robinson. Negotiations were carried on and an Earnest Money Agreement was entered into between Mr. Hansen and Mr. Robinson, (Exhibit 1, R. 9-10).

By the terms of the Earnest Money Receipt, the four-plex was to be conveyed to Marvin W. Hansen by Kent Robinson and Kent Robinson

was to pay the commission to Mr. Kohler of 6 percent on \$39,400.00, total purchase price as provided in the Earnest Money Receipt, (Exhibit 1, R. 9-10), amounting to \$2,364.00. The down payment was \$7,500.00, which was the agreed value of the land and home belonging to the Hansens at Howell, Utah. Hansens also agreed to pay on Robinsons' equity at the rate of \$310.00 per month with a balloon payment of \$2,000.00 on May 15, 1969.

That thereafter on April 1, 1969, a Uniform Real Estate Contract, (Exhibit 2), was entered into and two Deeds were made out at the request of Robinson to and in the name of Reuel S. Kohler and his wife and delivered to Mr. Kohler as the closing agent and real estate agent of the parties. (Exhibit 3 and 4). A closing statement was given to the seller and the buyer and on the Hansens closing statement, they were given credit for \$7,500.00 for the Howell Property, (Exhibit 5), the contract being in accordance with the Earnest Money Receipt.

There was a side deal between Mr. Kohler and Mr. Robinson, by the terms of which Mr. Kohler was to receive the Howell property as part payment of his commission and in addition thereto, Mr. Kohler was to pay to Mr. Robinson, \$2,000.00, for the Howell property. (R.5), and that was why the Deed was made out from the Hansens to Kohlers.

It developed that the house and the 2.36 acres was included in a mortgage on the 450 acre farm owned by Mr. Hansen. When Mr. Robinson and Mr. Hansen found out about the mortgage, they signed a memorandum that inasmuch as the lien could not be cleared at that time, the Hansens authorized the advance of \$1,000.00 of the \$2,000.00 balloon payment of the 15th day of May, to be paid to Robinson to show his good faith.

Mr. Robinson proposed to take an automobile owned by Mr. Hansen a new Ford Thunderbird, (R. 13 and 14), valued at \$5,000.00 to \$5,300.00 (R. 28-29). Mr. Robinson proposed to Mr. Hansen that he give him the Thunderbird and pay the sales commission to Mr. Kohler in place of the Howell property (R. 13, 27-37), and that Mr. Hansen could pay Mr. Kohler the sales commission at a later date and that there would be \$1,000.00 of the \$2,000.00 balloon payment paid immediately to Mr. Robinson. That Mr. Robinson was to take the Hansen car and shop it to see what it was worth. Mr. Robinson proposed to take the car, Mr. Hansen was to assume the commission and that Mr. Kohler retained the possession of the Warranty Deed as security to pay his commission.

On June 12, 1969, Mr. Kohler prepared (Exhibit 8), which provided: "Sellers agree to accept as part of down payment a 1967 Ford Thunderbird automobile. Buyer agrees to pay any and all indebtedness

off against said vehicle and transfer clear title to sellers.

Possession of automobile to be transferred on May 10, 1969. This is a condition of the completion of the sale of four-plex located at 562 North 7th West, Salt Lake City, Utah. Failure to comply with this agreement constitutes a default in above said property."

Paragraph No. 2 provided: "Buyers agree to transfer title to home and acreage in Howell, Utah, to Reuel S. Kohler and Dolores M. Kohler, his wife. Warranty Deed was executed April 1, 1969."

This Deed was being held in trust at that time by Mr. Kohler.

There was no agreement to change the status.

That under the terms of the original listing agreement, Mr. Robinson was to pay the commission to Mr. Kohler. There is nothing said in the Exhibits 7 and 8 as to who was to pay Mr. Kohler's commission, but the uncontradicted testimony of Mr. Hansen is that he was to pay the commission and that the property heretofore conveyed to Mr. Kohler in trust was to be held as security for the payment of Mr. Kohler's commission. Mr. Hansen asked why the Deed was made to Kohler and they told him that they had a little deal of their own pertaining to this property and for him to convey it directly to Mr. Kohler and they would handle the Warranty Deed themselves, which did not change Mr. Hansen's basic program (R. 23).

There was a very friendly relationship among the three of them. Mr. Hansen had delivered the car to Mr. Robinson on May 10, 1969, and the new agreement was not signed until June 12, 1969, and during the entire period of this readjustment, the Deed to the property was being held by Mr. Kohler, which was always in trust.

Mr. Hansen testified pertaining to this transaction as follows:

"Well, this is the conversation that took place in the office between Kent Robinson, Mr. Kohler and Myself, and this is where we agreed that I would pay the sales commission and that Mr. Kohler would hold the Warranty Deed. (R. 16)

Q. Is there anything in the agreement in regard to the commission?

A. The way this was worded is what I questioned at the time of the wording, and then it was right then it was stated, "We all agree to that."

Q. What was stated at the time?

A. That I was to pay Mr. Kohler the commission. He was to hold my property for collateral."

That the assuming of the commission and the transferring of the car was to be the \$7,500.00 down payment. Mr. Hansen did not intend to give property of \$7,500.00 for the commission (R. 28)

Mr. Robinson told Mr. Hansen that the blue book value of the automobile was \$5,300.00 (R. 28) The Thunderbird automobile was not paid for and Mr. Hansen agreed to make payments, which he did.

Mr. Hansen offered to get the cash on his insurance policy to pay the real estate commission, but Mr. Kohler stated that he would be very secure holding the property for his collateral on the commission and that he would continue to try to sell the Howell property and that Mr. Kohler was to get his commission on the Howell property when he sold it. (R. 30).

That the keys were given to Mr. Kohler when they completed the first deal, (R. 32), before they found the encumbrance against the entire farm. Hansen talked to Kohler as to what he owed him and he owed him \$7,500.00 less sales commission. They talked before and after they signed the agreement. The arrangement was never dropped. It was talked about at every conversation between Kohler and Hansen. (R. 33 and 34).

If Mr. Kohler is allowed to retain the Howell property, then he is being unjustly enriched.

That after the deal was closed, Mr. Kohler came to where Mr. Hansen was working and wanted to know about the sewage system and he said he was very small when it was laid out and he drew a diagram.

Mr. Kohler said that he had someone on contract, a prospective buyer for the house. At that time, and he did not tell Mr. Hansen who, that if they get the sewer system working satisfactorily for the prospective buyer, then he felt that he had it sold and we could get together on a settlement. This conversation occurred about the middle of August or the middle of September. (R. 17). About two weeks after that, Mr. Hansen and Mr. Kohler had a conversation in which Mr. Kohler said he had not settled anything absolutely on the place, but he would be in touch with Mr. Hansen. Mr. Kohler was going to try to sell the Howell property for Mr. Hansen. (R. 18).

Sometime thereafter, about six or seven months later, Mr. Hansen went to the office of Mr. Kohler and Mr. Kohler then told Mr. Hansen he was not going to make any settlement. He said, "You will just have to sue me. I am not going to make a settlement. " (R. 18-19).

Then Mr. Hansen got in touch with the Department of Business Regulation, Real Estate Division, and filed a Complaint by sending them a letter (R. 19, Exhibit 9).

Mr. Kohler answered the Complaint and the Real Estate Board notified Mr. Hansen that he should bring a suit. (R. 20) and (Exhibit 24), Minutes of Board Meeting.

That the mortgage to the First Security Bank was paid as a result of the provision in the agreement of the sale. Mr. Hansen sold the property with the understanding that the mortgage would be paid off. That the mortgage to the bank on the farm was paid on November 9, 1970. (R. 36)

That Mr. Hansen's version of the transaction was stated in response to the Court's question to him on Page 37 as follows:

"THE COURT: I had one question. Why did you agree to transfer your 1967 Ford Thunderbird automobile to Mr. Robinson as part of the down payment?

A. Well, in other words, that takes the place of the Howell property. That and the sales commission on the four-plex, which Robinson would normally pay to Mr. Kohler, I was to pay that and the car constituting the \$7,500.00 down payment."

#### PART II OF THE STATEMENT OF FACTS

THIS IS THE SECTION OF THE BRIEF WHICH DISCUSSES THE FACTS WHICH PERTAIN TO THE CLAIM OF THE PIERCES AGAINST THE HANSENS.

After Hansen and Robinson consummated the deal, Mr. Hansen would ask for a report from Mr. Kohler and he told him that it looked like he was going to make a sale of the Howell property. Finally, Mr. Kohler told Mr. Hansen he would not make settlement with him and



he would have to sue him. (R. 18. 19). The following transactions occurred pertaining to the Howell property:

September 5, 1969, a Lease was entered into between Kohlers and the Pierces. (R. 91, Exhibit 10).

October 1, 1970, a Uniform Real Estate Contract was entered into between the Kohlers and Pierces. (R. 93, 94, Exhibit 11).

November 9, 1970, the mortgage on the farm which included the house was paid to the First Security Bank. (R. 36).

April 2, 1971, Complaint letter of Hansen to the State of Utah, Department of Business Regulation, Real Estate Division. (R. 19, Exhibit 9).

May 4, 1971, letter from Kohler to Real Estate Division, offered in evidence, not received. (R. 138, Exhibit 25).

Minutes of Division of Real Estate consisting of minutes of June 16, 1971, June 17, 1971, June 24, 1971, and August 18, 1971, at which meeting the Board recommended, "that Mr. Kohler pay Mr. Hansen \$4,686.00 (this is the difference between the \$7,500.00 value placed on the home and the commission of \$2,364.00 and the commission to Mr. Kohler of \$450.00 for selling the Howell Home). Mr. Kohler is to inform the Real Estate Division within ten days if this matter has been satisfactorily concluded." (R. 136, Exhibit 24).

October 7, 1971, Complaint in this case was filed.

October 18, 1971, Deed from Kohler to Pierces, (Exhibit 12) and Real Estate Mortgage to the Farm Home Administration. (Exhibit 14).

October 18, 1971, two title insurance policies, one to protect mortgagor, Farm Home Administration and one to protect the Pierces. (Exhibit 14 and 15)

October 19, 1971, Lis Pendens was filed. (Exhibit 16)

March 12, 1971, Marv Hansen and his attorney talked to Mrs. Pierce at Howell, Utah. Conversation at Howell, Mrs. Pierce said that they had a Deed and the Hansens informed Mrs. Pierce that they had a lawsuit against Kohler, but that the Pierces had nothing to worry about as long as they had title insurance because they would be protected by the title insurance.

March 28, 1972, Earnest Money Receipt. (R. 105, Exhibit 17), Nicholas to Pierce. Sales Price \$12,300.00.

April, 1972, Pierces moved to Texas. (R. 99, 168).

May 30, 1972, Letter from Mr. Roe to Attorney Hadfield setting out that Mr. Roe did not consider that the Lis Pendens was an encumbrance on the property and a letter from Hadfield to Roe in which he stated that he did not consider the Lis Pendens an encumbrance. (Exhibit 21).

November 13, 1972, conversation of Mr. and Mrs. Pierce and Mr. Robbins in his office. Mr. Robbins advised them that they should get in touch

with their title insurance company and if the title insurance company would not do anything, then they should consult an attorney.

December 11, 1972, Pre-trial, Pierces attorney orally asked to file Motion. The first written notice that Hansens had of a claim being made by the Pierces was Answer and Motion to Intervene and Counterclaim filed on January 2, 1973.

We have re-read the Cross Complaint and Counterclaim, (R. 319-320, 321-322, 324) and there is nothing in the pleadings which asks that the Lis Pendens be removed. The entire pleadings and the case pertain to collection of damages.

March 6, 1973, Judgment of D & B Electric against Pierces was abstracted in the District Court of Box Elder County. (R. 228, 232).

The sale of the property in the sum of \$12,500.00 from the Griffiths which deal was not consummated because of the taxes and the Judgment against the Pierces. (R. 228, 229, 231).

June 19, 1973, Preliminary title report of O. Dee Lund of the sale to the Griffiths, (R. 227, 228), which report sets out that the Lis Pendens was not a lien and he advised the Griffiths that they could buy the property because the Lis Pendens only affected after acquired property.

ARGUMENT  
PART I  
POINT I

PROPERTY CONVEYED IN TRUST AS SECURITY. THAT IF KOHLER KEEPS THE PROCEEDS FROM THE HOWELL PROPERTY, HE HAS BEEN UNJUSTLY ENRICHED.

Plaintiffs ask in their Complaint that the defendants be required to reconvey the property to the Plaintiffs or if they cannot reconvey the property, then they pay to the Plaintiffs the difference between \$7,500.00 and the commission together with interest at the rate of seven percent, and the said amount be declared to be a lien upon the property and for such other and further relief as the Court deems just and equitable and costs.

The original deal and the original Deed was made out from Hansens to Kohlers. Kohler was a real estate agent and the closing agent and was to hold the Deed to the Howell property and all instruments in trust until the deal was consummated. There was nothing in the subsequent writings which changed the relationship of Kohler as Trustee.

The property in a regular deal should have been deeded to Mr. Robinson, but because of a side deal between Kohler and Robinson, it was deeded to Mr. Kohler. Mr. Kohler never at any time had any interest in the property except his real estate commissions.

If Mr. Kohler is to retain the property, he has been unjustly enriched in the approximate sum of \$5,000.00.

Therefore, there is either a resulting trust or a constructive trust.

Mr. Kohler only had in the Howell property his sales commission. In the first deal, he was to pay \$2,000.00 to Robinson and his commissions before he got the Howell property.

We have numerous cases in Utah pertaining to resulting and constructive trusts. In the case of Hawkins vs. Perry, 253 P. 2d, page 372, it cites other Utah cases. I will discuss the Hawkins vs Perry case for the general rule of law and make short comments about the cases cited therein. The Plaintiff, Hawkins, was a boy sixteen years of age who had saved \$300.00. He gave this money to his uncle, who was a minister and asked him to buy a piece of property and the title to the property was taken in the name of his uncle and his uncle's wife. The Court discusses in this case the distinction between a resulting or constructive trust and on page 375 of the Pacific the Court states:

"The constructive trust \* \* \* is to be distinguished from a resulting trust. Where A's money is used by B with A's consent in purchasing property in the name of B, a resulting trust arises in favor of A. Where A's money is used by B without A's consent in purchasing property in B's name, B holds the property upon a constructive trust for A. In the former case, the resulting trust arises because of the presumed intention of the parties. In the latter case, the constructive trust is imposed upon B to prevent his unjust enrichment."

We contend there was an agency between Kohlor and Hansen and there

was a confidential relationship and that Mr. Kohler was unjustly enriched. He got a \$7,500.00 house at Howell, Utah, which ultimately was mortgaged for \$10,500.00. for his commission of \$2,364.00 and on page 375 of the Hawkins v. Perry case which quotes from a Utah case of Chadwick v. Arnold, 34 Utah 48, 95 P. 527, note [4] states:

"[4] Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. The Utah decision of Chadwick v. Arnold declares \* \* \* that a trust ex maleficio [constructive trust] arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and having thus obtained the title, retains and claims the property as his own." It is now well recognized that actual fraud is not necessary, but may be presumed where there is a relationship of confidence between the parties to a transaction and there are "other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence."

In Haws v. Jensen, we quote:

"A constructive trust will be imposed even though at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. The abuse of the confidential relation consists merely in the failure of the transferee to perform his promise."

In the case of Haws v. Jensen, 209 P. 2d 229, 116 U. 212, a mother conveyed property to her daughter for the purpose of the property being maintained for the rest of her brothers and sisters. The daughter died and her husband claimed the property. He maintained that the

statute of frauds applied, but the Court on page 231 states:

"[1,2] Admittedly there is no writing evidencing Mrs. Haws' intention that the property conveyed by her be held in trust by Amber. However, under certain circumstances existing at the time a conveyance in trust is made, no writing evidencing an intent to create a trust is required. In those instances, equity will impress a constructive trust upon the property in favor of the person or persons designated by the grantor as the beneficiary or beneficiaries of the oral trust. A constructive trust, being an equitable remedy to prevent unjust enrichment, arises by operation of law and is not within the statute of frauds. Section 45(1) (b), of the Restatement of the Law of Trusts is applicable to the facts of the instant case:

' (1) Where the owner of an interest in land transfers in inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for third person.'"

And further, on Page 232, the Court says:

"[5] the defendant's second contention that the lower court erred in admitting parol testimony tending to establish an oral trust must also fail. Restatement of the Law of Trusts, Sec. 38 (3) states:

'If the owner of property transfers it intervivos to another person by a written instrument in which it is not declared that the transferee is to take the property for his own benefit or that he is to hold it in trust, intrinsic evidence may be admitted to show that he was intended to hold the property in trust either for the transferor or for a third party.'

"We similarly held in Cory v. Roberts, 82 Utah 445, 25 P. 2d 940; Peterson v. Peterson, 105 Utah 133, 141 P. 2d 882; and in Barrett v. Vickers, 100 Utah

534, 116 P. 2d 772, that a deed absolute on its face can be shown to have been intended to be in trust."

In the case of Renshaw v. Tracy Loan & Trust Co., 49 P.2d 403, 87

U. 364, on Page 404, second paragraph, first column, line 8, it says:

"While the fiduciary relationship is a prerequisite to the creation of a constructive trust, such as we are here considering, yet the trust does not arise until that relationship has been betrayed or violated. It is the confidential relationship plus the abuse of the confidence thus imposed, that authorized equity to construct a trust for the benefit of the party whose confidence has been abused." (citing cases)

"It is not the nominal, but the actual relation of the parties which must be examined in order to determine whether there has been a breach of trust. The fact that the parties may have been long standing friends or neighbors (which is adverted to by some of the text-writers) may be one of the elements to be weighed, but in its last analysis the test is the reposing of confidence--in the sense of trust-- and its abuse, which must determine the result."

We quote further from Page 404, paragraph [3]:

"[3] It is true that upon the establishment of certain fiduciary relationships and transactions between the parties to that relationship, equity will presume fraud, the abuse of confidence, and place the burden of proving good faith and fairness upon the dominant party in the relationship. In such cases the presumption of fraud may be based upon the relationship alone and relieves the party from proving the fraud, but the fraud is nevertheless an essential element. By the presumption equity supplies that element. The relationships wherein such presumption has been indulged are parent and child, principal and agent, attorney and client."



There is a relationship of principal and agent between Hansens and Kohlers and Kohler was bound not to take advantage of Mr. Hansen by having the real estate in his name.

In the case of Corey v. Roberts, 25 P. 2d, Page 940, second column bottom of page, paragraph 3, the Court says:

"3. Mortgages, Key 32(6)

In determining whether deed absolute on face is intended as mortgage, court should consider existence of continuing obligation to pay debt; relative values; contemporaneous and subsequent acts and declarations of parties; form of written evidences of transactions and character of testimony; relationship of parties; and apparent purposes to be accomplished."

On Page 947 of the Pacific, first column, last paragraph, the Court says:

"Whether the instrument should be treated as a deed or mortgage of course depends upon the facts and circumstances of the transaction, the object and purpose for which it was given and received, and whether it was given as security or for a bargain and sale of the land." Duerden v. Solomon, 33 Utah 468, 473, 94 P. 978; Thomas v. Ogden State Bank (Utah) 13 P. 2d 636, 639."

On Page 948, second column, bottom of first paragraph, the Court says:

"Any marked undervaluation in price will vitiate a release or conveyance of the mortgagor interest."

This case is a long case detailing a lot of facts and holds that the deeds which were given in the case were merely mortgages and not

a conveyance.

In this case, we have a case in which the property was of greater value than the debt which was to be paid to Mr. Kohler.

In the case of Newel v. Halloran 250 P. 986, on page 988, paragraph 3, second paragraph, we quote:

"Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority, that the principle extends to every possible case in which a fiduciary relation exists as a fact in which there is confidence reposed on one side, and the resulting superiority and influence on the other. the relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal."

In the case of Lawley v. Hickenlooper, 212 P. 526, this was the case involving the promotion of a mining claim and certain property was conveyed by the plaintiff as his share of the money to be used in the promotion. That the defendant was to raise further money which he did not do. He conveyed the property and the court held it was a resulting trust. On page 529, paragraph No. 3, we quote:

"Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of such influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it,

equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity in order to administer complete justice between the parties will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him, into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts."

The same principle is enunciated in almost the same language in 3 Pomeroy Eq. Jur. (4th Ed.), Section 1044.

The second headnote to *Henderson v. Murray*, 108 Minn. 76, 121 N.W. 214, 133 Am. St. Rep. 412, announces the same general principle as follows:

"Where, however, a party obtains the legal title to land from another by fraud, or by taking advantage of confidential or fiduciary relations, or in any other unconscientious manner, so that he cannot justly retain the property, equity will impress a constructive trust upon it in favor of the party who is equitably entitled to it."

This general equitable principle is recognized by all of the authorities. This court is committed to it. See *Chadwick v. Arnold*, 34 Utah, 48, 95 Pac. 527. See, also 39 Cyc. 172 et seq.; *Pollard v. Mc Kenney*, 69 Neb. 742, 96 N. W. 679, 101 N.W. 9."

In this case there was confidence reposed in Kohler by Hansen giving him the Deed to his property before the deal was closed. Of course, he was holding the property as escrow agent. Also, Hansen had conveyed the title to the car to Mr. Robinson prior to the time of signing any papers.

PART I  
POINT II

STATUTE OF FRAUDS HAS NO BEARING UPON THIS CASE.

They had raised in this case, the question of the statute of fraud. We have a number of Utah cases which hold that the Statute of Fraud does not apply to resulting or constructive trust. Anderson v Cercone at 180 p. 586 on page 588, fourth paragraph, the Court says:

"[4] Appellant's plea of the statute of frauds is not supported by authority. The single case cited (Skeen v. Marriott, 22 Utah, 73, 61 Pac. 296) related to an express trust and therefore is not in point. The trust in this case is a resulting trust, to which the statute of frauds does not apply. Chambers v. Emery, supra."

Also, see Chambers v. Emery, 13 Utah, 374, 45 P. 192, Skeen v. Marriott 22 U. 73, 61 P. 296.

Also see Chadwick v. Arnold 95 P. 527, at page 532, where the Court says:

"In Bispham's Principles of Equity (7th Ed.) Section 218 in speaking of the enforcement of trusts ex maleficio, the rule is stated that "the ground of these decisions is that the statute of frauds is not to be used as a shield for fraud; and that

where a party has by his promise to buy or hold or dispose of real estate for the benefit of another, induced action or forbearance by reliance upon such promise it would be a fraud that the promise should not be enforced; and the method of enforcement will be through the machinery of a trust."

In the case of George R. Taylor v. Eva Turner, 492 P. 2d 1343, 27 U. 2d 39 they hold that the deed that was given was in fact a security transaction and held that there was a trust and on page 1346, the Court discusses the question of the statute of frauds and says as follows:

"Defendant contends that the trial court erred in its determination that the plaintiffs were the owners of the real property in Salina, Utah, and the defendant held the property in trust to secure certain funds which were paid to plaintiffs. Defendant pleaded the Statute of Frauds, Section 25-5-1, U.C.A. 1953; he urges that there was no instrument in writing concerning this alleged trust relating to real property."

Section 25-5-2, U.C.A. 1953, provides:

"The next preceding section [25-5-1] shall not be construed \* \* \* to prevent any trust from arising or being extinguished by implication or operation of law.

In Wasatch Mining Co. v. Jennings<sup>2</sup> this court construed the foregoing statute and stated that trusts arising by implication or operation of law are expressly excluded from the effects of the Statute of Frauds and a deed of conveyance, though absolute in form, if given to secure a debt, is in equity treated as a mortgage--a trust by operation of law.

The Restatement, Trusts (2d) Section 44, provides:

(1) Where the owner of an interest in land transfers it inter vivos to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, as required by the Statute of Frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

\* \* \* \* \*

(c) the transfer was made as security for an indebtedness of the transferor.

[4] The trial court did not err in its determination that the deed, although absolute in form, was in fact executed as security for a loan of money. Defendant was a constructive trustee, who held title to secure the funds advanced to plaintiffs.

Chadwick v. Arnold, 95 P. 527, 34 U. 48, on page 532 of the Pacific,

the Court says:

"The relief granted by courts of equity, where a trust ex maleficio is raised, is not founded on the specific performance of the oral contract, but upon the principle that equity turns the fraudulent procurer of a legal title into a trustee to get at him. That is to say, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of the circumstances and relations and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title and order him to hold it for the benefit of the owner or to execute the trust in such manner as to protect the rights of the defrauded party. The rule is well stated in Pomeroy's Equity Jurisprudence, supra, that "equity does not pretend to enforce verbal promises in the face of the statute, it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial far-reaching doctrine of constructive trusts."

In the case of *Wheelwright v. Roman* 165 Pacific 513, on Page 516, second column, second paragraph the Court says:

"In *Cooney v. Glynn*, supra, in the course of the opinion the law is stated thus:

It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom, the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated."

In the case of *Acott v. Tomlinson* 337 P. 2d 720, and 9 U. 2d 71, the Court held on page 724:

"From the summary of facts just stated, there is ample basis for the determination made by the trial court that the defendant agreed to hold the property under an express trust; or alternatively, that the transaction was so unfair and lacking in disclosure of material facts to plaintiffs to require the imposition of a constructive trust on the property for their benefit."

And also on Page 724, second column, second paragraph sixth line:

"The gist of his contention is that the plaintiffs trusted him when they should not have done so. It does not lie in his mouth to thus claim advantage of his own wrong and reap a reward for deception. The very essence of trust is that confidence may be reposes in the trustee."

In this case, Hansen should certainly have not trusted Kohler.

Barrett v. Vickers 116 P. 2d 772, 100 Utah 534. This is the case in which the father owned the property in his lifetime. The property was foreclosed. The father died. He owned a ranch, but it was mortgaged to the State of Utah. The State of Utah foreclosed on it. After the foreclosure, one of his sons purchased the property. The contention is made that he purchased it for all the Vickers children. They held it to be a trust on Page 775, first column, paragraph No. 2, which reads as follows:

"It excepts from the requirement of writing, trusts arising by "act of operation of law." There is no question in this State about that matter. Parol evidence is admissible to show a trust relationship by operation of law. Cory v. Roberts, 82 Utah 445, 25 P. 2d 940."

In the case of Kitt v. Kitt, 294 P. 2d 791, 4 Utah 2d, 384, which was the case involving an appeal from a Judgment imposing a resulting trust on land acquired in the name of appellant father from the State in 1939 for \$3,500.00 in favor of respondent sons.

The contention was that they had the following defenses and we quote second paragraph, page 792, and the first part of paragraph 1 and 2 as follows:

"Counsel for appellant earnestly urges that 1) respondents did not contribute enough to the purchase price as would justify a resulting trust in their favor, and that 2) respondent's



evidence was indefinite and conflicting as to negate such a trust, and 3) that anyway, any claim that respondents asserted was barred by a) the statute of frauds and b) the statute of limitations.

[1,2] There appears to be sufficient clear and convincing evidence in the lengthy record, which if believed by the lower court, would justify a declaration of trust in favor of respondents and the conclusion that neither of the defensive statutes mentioned would apply."

Child v. Child 332 P. 2d 981, 8 Utah 2d 261, states that the father bought a piece of property and borrowed money from his son and put the title in the boy's name. The Court held that there was a resulting trust and that the father was entitled to the property.

On page 987, paragraph 11, the Court says:

"(11) Upon the basis of the facts as found, equity and good conscience would not permit one in Eugene's position to reap the benefits of his father's foresight, planning and efforts simply because his father placed title in him to assure him that his loan would be repaid. It was to avoid any such injustice that the device of resulting trust had its origin. Under the agreement as determined by the trial court a trust resulted in favor of Plaintiff Harry Child."

Hansen expected Mr. Kohler to make a settlement with him, which he didn't do and when he didn't make a settlement, he went to the real estate board and then the real estate board told him that he would have to determine the matter by suit because Kohler would not pay him.

Hansen was the person who caused the mortgage to be paid after

closing the deal.

## PART II OF THE BRIEF

IN PART II OF THE BRIEF WE WILL DISCUSS THE LIABILITY IF ANY OF THE HANSENS TO THE PIERCES.

IT IS OUR CONTENTION THAT THERE WAS NOT SUFFICIENT FACTS PROVEN TO CONSTITUTE A CAUSE OF ACTION FOR SLANDER OF TITLE. TO HAVE SLANDER OF TITLE, THERE ARE FOUR NECESSARY ELEMENTS. IF ANY ONE IS LACKING, IT WOULD PREVENT RECOVERY. IT IS OUR CONTENTION THAT ALL FOUR ELEMENTS ARE LACKING. THE FOUR ELEMENTS ARE AS FOLLOWS:

### FIRST

THE LIS PENDENS IS PRIVILEGED BECAUSE IT IS PART OF THE JUDICIAL PROCEEDINGS.

### SECOND

LIS PENDENS HAS NO EFFECT ON CONVEYANCES MADE PRIOR TO THE FILING OF THE LIS PENDENS.

### THIRD

THAT THE PROCEEDINGS WOULD HAVE TO BE FALSE AND CONTAIN FALSE ALLEGATIONS.

### FOURTH

FOR THERE TO BE A CAUSE OF ACTION, THERE MUST BE MALICE.

We will discuss each of these points separately numbered Point I, Point II, Point III, and Point IV.

### POINT I

THE LIS PENDENS IS PRIVELEGED BECAUSE IT IS PART OF THE JUDICIAL PROCEEDINGS.

That the Deed from the Kohlers to the Pierces was filed on the 18th day of October, 1971, at 3:30 p.m. and the Lis Pendens was filed on the 19th day of October, 1971, at 10:30 a.m., which was mailed from Salt Lake City, to Brigham City. That the filing of the Complaint and the filing of the Lis Pendens is a judicial proceeding and is therefore privileged. The Complaint was filed October 7, 1971.

At 53 C.J.S. under Libel and Slander, Section 277, Privilege,

Page 397, it states:

"277. Privilege

Defamatory matter published in due course of a judicial proceedings, pertinent to the inquiry, is absolutely privileged and will not sustain an action for slander of title; also in such actions the defendant may be immune from liability on the ground that the communication is qualifiedly privileged.

As in case of defamation against the person, discussed supra <sup>§</sup> 104, it has been held that defamatory matter published in the course of a judicial proceeding, pertinent or material to the inquiry, is absolutely privileged, and will not sustain an action for slander of title.<sup>96</sup> Also in these actions defendant may be immune from liability on the ground<sup>97</sup> that the communication is qualifiedly privileged. and it has been stated that the rules governing communications qualifiedly privileged are the same in slander of title as in ordinary libel and slander.<sup>98</sup> A communication disparaging another's title or property is qualifiedly privileged if the publication was honestly made by defendant, believing it to be true, and there was a reasonable occasion or exigency in the conduct of his own affairs in matters where his interest was concerned, which fairly warranted the publication.<sup>99</sup>

Thus an assertion by the defendant that he has some right, title or interest in the property, made in an honest belief of its truth, defendant supposing that he is entitled to the interest he asserts, is qualifiedly privileged and no action for slander of the title can be maintained, although the statements are in fact untrue.<sup>1</sup> If defendant, believing himself to have an exclusive patent, issues a notice of an alleged infringement by plaintiff in good faith as a warning against an invasion of his rights, a mistake on his part as to the validity of his claim will not render him liable to an action.<sup>2</sup> So the discontinuance or loss of a suit with respect to property will not render the person bringing it liable for slander of title where he had reasonable grounds<sup>3</sup> for believing that he had a good cause of action.

Applying the privilege doctrine as set out above to the present case, the Lis Pendens, is part of the judicial proceedings and there is nothing in this record or the pleadings that is false. (Complaint 256, 257, 258). That the Complaint states that the property was sold. That all the facts in the Complaint have been determined to be facts, except the conclusions of ownership and in the prayer of the Complaint it sets out that if the property cannot be reconveyed, then the amount of damages was to be determined.

We submit that there is nothing in the pleadings or the testimony of any of the parties that the facts are untrue. We alleged in the Complaint that the plaintiff has offered to pay Mr. Kohler the commissions, but that Mr. Kohler has refused to reconvey the property and that

the Plaintiff is informed that he has sold the property.

When this case was filed and when the Lis Pendens was filed, the Plaintiffs nor their attorney had any knowledge that the title had been conveyed out of the Kohlers. Mr. Kohler had told Mr. Hansen that he had a contract to sell. The Lis Pendens is for the sole purpose of giving notice that there was a suit of Hansen v. Kohler.

In the case of Albertson v. Raboff, 295 P. 2d, 405, which is a California case, the California statute is almost identical to ours, on page 406, head note #5, 6, and 7, are as follows:

"5. Lis Pendens key 18.

The sole purpose of recording a notice of lis pendens is to secure the same result as actual notice by giving constructive notice of pendency of proceedings. West's Ann. Code Civ. Proc. <sup>SS</sup> 409, 1908, Subd. 2.

6. Lis Pendens key 22 (1)

Notice of lis pendens is purely incidental to action wherein it is filed, refers specifically to such action and has no existence apart from it. West's Ann. Code Civ. Proc. <sup>S</sup> 1908, subd. 2.

7 . Libel and Slander key 136

The recordation of a notice of lis pendens is in effect a republication of the pleadings and hence is clothed with absolute privilege in action for disparagement of title. West's Ann. Code Civ. Proc. <sup>SS</sup> 409, 1908, Subd. 2."

And on page 408, paragraphs 3 4, bottom of paragrph, is as follows:

"Thus, subdivision 2 of section 47 states, the long-established rule that publications made in the course of a judicial proceeding are absolutely privileged, Gosewisch v. Doran, 161 Cal. 511, 513-515, 119 p. 656; Donnell v. Linforth, 11 Cal. App. 2d 25, 28-29, 52 P. 2d 937; Moore v. United States Fid. & Guaranty Co. 122 Cal. App. 205, 210, 9 P. 2d. 562; Rest., Torts, <sup>ss</sup> 635-639."

And on page 409, in the middle of head note 8, 9, it states:

"If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches. See Rest. Torts, <sup>s</sup> 587; Youmans v. Smith 153 N.Y. 214, 220, 47 N. E. 265 Karushaur v. Lavin, Sup. 39 N.Y.S. 2d 880, 882-883; Zirn v. Cullom, 187 Misc., 241, 63 N.Y.S.2d 439, 440-441; Inselberg v. Trosty, 190 Misc. 507, 77 N.Y.S. 2d 457, 458; of 39 A.L.R. 2d 840, 861. It therefore attached to the recordation of a notice of lis pendens, for such publication is permitted by law, and like other documents that may be filed in an action, it has a reasonable relation thereto and it is immaterial that it is recorded with the County Recorder instead of being filed with the County Clerk."

It is our contention that the Lis Pendens is part of the legal proceedings under the common law and the common law was not changed by our statute a Lis Pendens is privileged, the same as a lawsuit.

## POINT II

LIS PENDENS HAS NO EFFECT ON CONVEYANCES MADE PRIOR TO THE FILING OF THE LIS PENDENS

Our statute pertaining to the Lis Pendens provides that it only affects the property and title of the property after the filing of the

Lis Pendens. Lis Pendens has no effect on conveyances prior to the filing of the Lis Pendens.

We quote from Section 78-40-2, U.C.A. 9, as follows:

"From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

In the instant case, the Lis Pendens had no effect on the Deed from Kohler to Pierces that was filed prior to the filing of the Lis Pendens.

The following quotations pertain to Lis Pendens, its definition and its origin in history.

In 38 C. J. under Lis Pendens, Section 1, on page 4, gives what Lis Pendens was and I quote:

"A. IN GENERAL. Lis means a suit, action, controversy, or<sup>2</sup> dispute,<sup>1</sup> and "Lis Pendens" means a pending suit.<sup>2</sup> It is maxim of the commonlaw that pendens lite nihil innovetur--pending the suit nothing should be changed<sup>3</sup>--and, subject to certain limitations and qualifications hereinafter stated,<sup>4</sup> one who acquires from a party to the proceeding<sup>5</sup> an interest in property,<sup>6</sup> which is at that time<sup>7</sup> involved in a litigation in a court<sup>8</sup> having jurisdiction of the subject matter and of the person of the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree,<sup>10</sup> and is as conclusively bound by the result of the

Litigation as if he had been a party thereto from the outset.<sup>11</sup> This rule with the principles governing its application and limitations is technically known as the doctrine of lis pendens.<sup>12</sup>"

We are quoting the above because it shows that under the common law that a person subject to a suit was bound to find out what suits, if any had been filed affecting the title to real property. The Utah statute provided that the Lis Pendens had to be filed in the Recorder's Office, but under the common law there was no notice necessary to be given. At 38 C. J. Page 6, paragraph No. 2, the Court says:

"B. ORIGIN AND HISTORY. While the doctrine of lis pendens is commonly referred as having first been formulated by Sir Francis Bacon, in 1618 as the twelfth of his "Ordinances in Chancery"<sup>17</sup> its exact origin is difficult to determine.<sup>18</sup> It was not peculiar to courts of equity,<sup>19</sup> and it was common to courts both at law and in equity before it was promulgated in the "Ordinances in Chancery."<sup>20</sup> It has been said that the doctrine of lis pendens was older in law than in equity<sup>21</sup> and was adopted from the common law courts in analogy to the rule existing in real actions to the effect that if "defendant aliens after pendency of the writ, the judgment in the action will overrule such alienations."<sup>22</sup>"

C. REASONS FOR, AND FOUNDATION OF DOCTRINE --1.PUBLIC POLICY. It is commonly stated that the doctrine of lis pendens is based upon considerations of public policy and convenience,<sup>23</sup> the rule being necessary to the administration of justice in order that decisions in pending suits may be binding and may be given full effect,<sup>24</sup> that there may be an end to litigation,<sup>25</sup> and that the purpose of a pending suit may not be defeated by successive alienations and transfers of title.<sup>26</sup>



2. NOTICE. While the doctrine of lis pendens is frequently spoken of as one implied or constructive notice,<sup>27</sup> the accuracy<sup>28</sup> of this statement is denied by many authorities, its true foundation, according to such authorities, resting as has already been stated, upon principles of public policy and necessity,<sup>29</sup> which forbid a litigant party to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party. For practical purposes, it is ordinarily immaterial whether the doctrine of lis pendens be considered as based on constructive notice or on public policy,<sup>30</sup> although if the doctrine is based on the theory of necessity<sup>31</sup> and public policy, it may prevent its extension.

3. RES JUDICATA. Under the view that the doctrine of lis pendens is based upon the necessity that there may be an end of litigation,<sup>32</sup> it is in fact a phase of the law of res judicata,<sup>33</sup> being an exception to the rule that<sup>34</sup> a judgment is conclusive only upon parties thereto to the effect that, in certain actions and suits involving<sup>35</sup> property, purchasers pendente lite are also concluded, and privies to the judgment rendered so far as the consequences are concerned, if not technically so.<sup>36</sup> Since the operation of the doctrine of lis pendens may be harsh in particular instances<sup>37</sup> and is arbitrary,<sup>38</sup> it will not be given effect when the reasons which give rise to it do not require its enforcement,<sup>39</sup> and the limitations to the rule will be observed with the same rigidity as exists in the application of the rule itself.<sup>40</sup> On the other hand, the rule admits of but few exceptions.<sup>41</sup>

To the common law, it was not necessary to give notice. They were just bound by the Judgment. Our statute has changed this rule so that to give notice to any subsequent party dealing with the property that you must file it in the Recorder's Office.

And further on in the same works, 38 C. J. Section 9, page 11, it says:

"Where the lis pendens statute has no negative words or repealing clause, it is regarded as supplemental to the common law and not as repealing it, so that the common law will govern in all cases not covered by the statute.<sup>65</sup> Where a statute does not require a notice to be filed the common-law rule of notice arising from the commencement of the action itself prevails.<sup>66</sup>"

Our Utah Lis Pendens statute only gives notice after it is filed but if it had been filed a few hours earlier, it would have given notice that any interest that Mr. Kohler tried to convey after the filing of the Lis Pendens would have been subject to Plaintiffs' lien.

#### POINT III

THAT THE PROCEEDINGS WOULD HAVE TO BE FALSE AND CONTAIN FALSE ALLEGATIONS. TO HAVE SLANDER OF TITLE THE INSTRUMENT OR THE WORD SPOKEN HAS TO BE FALSE.

At 53 C. J. Section 273, page 393, it states:

"273. FALSITY.

The falsity of the words spoken is an essential element of a cause of action for slander of title.

The falsity of the words published is a necessary element to maintain an action for slander of title.<sup>68</sup> If the alleged defect or infirmity in title or property exists, the action will not lie.<sup>69</sup> However malicious the intent to injure may have been.<sup>70</sup> Indeed, it has been held that in order to constitute malice there must be a false statement.<sup>71</sup>"

In the instant case, there is no false statement. Everything that was said in the Complaint is true.

We have a Utah case which holds that if the allegations are true

there is no grounds for slander of title. It is the case of Pender v.

Dowse, 265 Pacific 2d. 664 on page 649, the Court says:

"For one to be liable for slander of title he must publish 'matter which is untrue and disparaging to another's property in land.' (Emphasis ours) See Restatement of the Law on Torts. Vol. 111, Sec. 624, and in Section 634 it is stated thus:

'The publisher of matter disparaging to another's property in land, chattels or intangible things or to the quality thereof is not liable under the rule stated in secs. 624 and 626-7 unless the disparaging matter, if a statement of fact, is untrue, or if an expression of opinion is dishonestly made.'

Here Dowse had a valid judgment for costs against Pender. His acts in having the execution issued, levying on the property and having it sold at sheriff's sale all reflected the true nature of the claim, that is that these actions were taken to satisfy a judgment for costs in the sum of \$22.80 and expenses incurred. These facts appeared upon the record and were all true. Being true, they could not be the basis for a suit for slander of title and the court therefore erred in granting attorney fees as special damages for slander of title and punitive damages for the malice involved."

We submit that the basis for slander of title would have to be the allegations in the Complaint. We submit that everything in the Complaint was borne out by the evidence and by the facts even to the allegation that he understood the property had been sold. That there should be no

question that Mr. Hansen had the right to assume that he was entitled to recover from Mr. Kohler because he had a decision from the real estate board that he was entitled to recover \$4,686.00 from Mr. Kohler. (Exhibit 24).

That there has been a complete disclosure to counsel and counsel is the one who prepared the complaint and prepared the Lis Pendens.

#### POINT IV

FOR THERE TO BE A CAUSE OF ACTION, THERE MUST BE MALICE.

We submit to this court that there is nothing in the record that shows that there was any malice.

At 53 C.J.S. under Libel and Slander, Section 274, Page 394, it states:

##### "274. MALICE

Malice is a necessary ingredient in order to entitle the plaintiff to recover for slander of title.

Malice is a necessary ingredient in order to entitle the plaintiff to recover for slander of title.<sup>72</sup> Indeed, it has been said that malice is the gist of the action.<sup>73</sup> Such malice, however, may be express or implied.<sup>74</sup> The action cannot be maintained if the claim was asserted by defendant in good faith, and if the act complained of was founded on probable cause or was prompted by a reasonable belief although the statement may have been false.<sup>76</sup> Thus the action cannot be maintained if the claim was asserted by defendant in good faith on the advice of counsel,<sup>77</sup> especially where defendant had revealed the material facts fully and correctly to counsel,<sup>78</sup> and bad faith on the part of counsel is immaterial.<sup>79</sup>

In this case, not only did the Hansens make a full disclosure to counsel, but they filed a Complaint before the Real Estate Board (Exhibit 9), and the Real Estate Board held that Kohlers should make a settlement by Kohlers paying to the Hansens \$4,686.00, (Exhibit 24), which the Kohlers refused to pay.

The complaint (letter) of the Hansens to the Real Estate Commissions (Exhibit 9), has substantially the same allegations that are set out in the Complaint.

The opening statement of defendant's counsel (R. 5,6, 7) and the Kohlers' Answers to Plaintiff's Interrogatories, (R. 268), have the same facts with the exception that Kohlers and their counsel contended that Hansen only had a thirty-day period to get the property back.

That the Complaint and the Lis Pendens were prepared by counsel and the evidence sustains the facts alleged in the Complaint. However, the Court concluded that the plaintiff did not have a cause of action.

The suit in which the Lis Pendens was filed was the case of Hansen v. Kohler and there was nothing said in regards to the Pierces. and whether or not they had good title. If the Pierces got their

Deed on record before the Hansens' Lis Pendens, then they were first in time, and under our statute, their title was not affected by the Lis Pendens.

That under the Lis Pendens Statute, 78-49-2, the Lis Pendens may be filed at the time of or after the filing of the Complaint. The filing of a Lis Pendens before the filing of a Complaint or without a Complaint could be actionable. Counsel inquired (Exhibit P. 30), before the filing of the Complaint and sending the Lis Pendens to see if the property was still in the name of Kohler.

In the Utah case of Olsen v. Kidman, 235 P. 2d 510, allowed recovery, but it did not change the law that we are contending for and on page 521, it states:

"The Defendant and appellant, Leslie Kidman, contends that the Utah Cases and the law generally regarding slander of title require that before liability can be found the recorder of the slanderous document must have known that he asserted a false claim without any foundation or right."

We cited the case of C. Ed. Lewis v. Dragos, 266 P. 2d. 499, 1 U. 2d, 328. This is the case where the defendants made statements that the Motel was on his property, but the case to determine this fact was on appeal to the Supreme Court and the Court on page 500 states:

"Under the circumstances, we feel that such statements made by one of the litigants concerning the subject matter of litigation are not and should not be construed as a slander of title nor a tortious interference with a possible contractual right of stranger to the title."

There is nothing in this record that shows any malice or any meanness on the part of the Hansens. They were acting honestly.

We have set out in the Brief, the letter of Mr. Roe, (Exhibit 21) the letter of Mr. Hadfield (Exhibit 22), and the opinion of Attorney O. Dee Lund, (R. 228, Exhibit 23), all of whom were of the opinion that the Lis Pendens was not a cloud on the title.

The Farm Home Administration, for some reason not disclosed by the record, did not want to release their mortgage and take a second mortgage, although the opinion of three attorneys was that the title was marketable. This did not matter anyway because there was a subsequent deal in which the Pierces were to be paid more money than they were to be paid under the Nicholas deal.

Plaintiff's attorney has always been of the opinion that the Lis Pendens would not be a cloud on the title. (R.248 ) All the effect it would have would be is if the Lis Pendens had been filed before Kohler's interest in the property was conveyed. Then it would have been a lien on his interest. That there was no actual request ever made of plaintiff to remove the Lis Pendens or telling what trouble they were having with their title. There was no prayer in the Cross Complaint and Counterclaim that a cloud should be removed. The reason is not clear, but the second insurance company did not want to insure the title, but there was never any reason given.

At the time of this deal there was never anything said to Hansens or their attorney about the troubles that Pierces were having. The alleged conversation with the Hansen's attorney occurred after that and after the Pierces had taken back the property.

That in the Contract to Purchase between Kohlers and Pierces, (Exhibit 11), it sets out in paragraph No. 6: "It is understood that there presently exists an obligation against said property in favor of First Security Bank of Tremonton with an unpaid balance of \$        as of Date 6/21/67." That the Pierces knew at the time they entered into the contract to purchase that there was not a clear title, and if there had been any inquiry made at that time, they could have found out about the troubles that Kohler and Hansens were having.

A Motion for Summary Judgment against the Intervenors and Counter-claimants was made, (R. 362), supported by Affidavit of Marvin W. Hansen. (R. 360-361). A supplemental Affidavit was made (R. 365 to 372), and a Memorandum of Authorities was filed (R. 373 to 377).

This raises the same questions that we have raised in part II of the Brief and we submit that the Motion for Summary Judgment should have been granted and that the evidence at the time of the trial did not vary the evidence as set out in the affidavits and exhibits.



### PART III

#### DAMAGES

The Court awarded damages for (1) attorney fees, (2) damages for travelling expenses for the taking of the deposition and other expenses connected with taking the deposition and (3) loss of rent. (R. 458).

We will argue the damages for attorney fees and the damages for travelling expenses for taking the deposition together because we think these elements come under the same rule that a person would be entitled to their attorney fees and their costs only in removing a cloud, no award of attorney fees in a damage suit for slander of title.

#### POINT I

##### ATTORNEY FEES AND COSTS OF DEPOSITION

Damages can only be awarded for the removal of the cloud from the property not for the recovery of damages for the slander of title. There was no motion filed in this case asking that the cloud be removed. There was no written notice, no written letter to the Hansens asking that the purported cloud be removed. No Complaint was filed to remove the cloud. Nothing was done by the firm of Vlahos and Gale or Mr. Knowlton to remove the cloud. Everything that was done was to recover damages.

The Cross Complaint (R. 319 to 324) is entirely a suit for damages. There is not one sentence or one word in the Cross Complaint which asks for the removal of a cloud on the title.

The expenses of deposition and attorney fees were incurred for the purpose of recovering damages, not for the removal of any alleged cloud. The deposition of the Intervenors was taken because of the suit for damages.

We know of no case in Utah which gives attorney fees in a damage suit. No litigant is entitled to attorney fees if it is not provided by statute or by written instrument or when there has been money expended to remove a cloud or for the release of a wrongful attachment or garnishment and then only that portion which is used for the removal of the cloud or release of the wrongful attachment or garnishment, not the main case.

There is no evidence of any attorney fees being incurred or any depositions being taken for the purpose of removing the cloud. There was no conversations by the Pierces attorney with the Hansens or their attorney asking that the cloud be removed. There is no written demand upon plaintiff Hansens to remove the alleged cloud nor were there any pleadings alleging a cloud or asking that it be removed. We submit that the only thing in the Cross Complaint is allegations

for damage. There was nothing in the depositions pertaining to the removal of the cloud, it all pertained to damages.

We have Utah cases which hold that a person is entitled to attorney fees for removing a cloud but not for attorney fees for damages for slander of title.

In the case of Dowse v. Doris Trust Co., 208 P.2d 956, 116 U. 106, this court holds that for the removal of the cloud an allowance of attorney fees is proper and the court on page 957 says:

"\* \* \* and was compelled to commence a suit to remove the cloud from his title and to employ counsel to do so at a cost of \$250.00."

This clearly holds that they would be entitled to attorney fees for removal of the cloud, but not entitled to attorney fees in a general damage suit for slander of title.

To the same affect is the case of Olsen v. Kidman, 235 P.2d 510. The same doctrine applies to a suit to dissolve an attachment. The attorney fees for dissolving the attachment would be proper damages, but not for defending the main suit.

The Court says in the case of Sproul v. Parks, 210 P.2d 436, on page 439:

"True, the release of the mortgage by the loan company was not executed until after the filing of the defendants' counterclaim; but no suit had been prosecuted by defendant to clear the title

to the realty, nor was there any prayer for such relief in the counter-claim. \* \* \* that in circumstances where collateral proceeding were prosecuted to judgment to clear title to property from an encumbrance, and a subsequent action for disparagement of title were successfully maintained there should properly be allowed as compensatory damages in the latter suit, an amount for attorneys' fees reasonably incurred in both actions. The authorities will not support such an award."

Pierces are asking for damages for the costs of coming to Salt Lake City to take their depositions and travelling expenses when the Pierces filed the counterclaim, they were not residents of Utah. That they are in substance the plaintiffs in the action for damages and they being the plaintiffs in the action are not entitled to their expenses of taking their depositions because it is a damage case, and certainly they were not entitled to witness fees during the time of the trial.

We have the statute 21-5-4 which allows the recovery of witness fees, but the case annotated under that section specifically holds that the Plaintiff is not entitled to a witness fee. In the case of I.X.L. Stores Co., vs Moon, 162 P. 622, 49 U 262, at page 624, the Court says:

"As a matter of course it is generally held that a party to an action, although he may testify in the case, is not to be classified as a witness within

the purview of the foregoing section, and is therefore not entitled to include costs for himself as a witness as part of the taxable costs."

#### RENT

The Hansens at no time interfered with the use, access or possession of the property and so the Pierces would not be entitled to damages for rent. The property was entirely under the control of the Pierces as to what was done with it.

The Pierces had no cause of action nor did they attempt a cause of action for the possession and control of the property. They still had the control of the property at the time of the trial. They had a deal to sell the property if it was not for their own actions in not paying the taxes and allowing a judgment to be docketed against the property, the deal would have been consummated.

Hansens did no act and there is no act claimed that prevented the Pierces from renting the property, or use it in any manner they saw fit.

## CONCLUSION

The Hansens relied upon Mr. Kohler, the real estate agent, to close the deal between him and the Robinsons and executed the deeds to Mr. and Mrs. Kohler at the request of Mr. Robinson. Kohler was to hold the deeds as trustee, until the deal was closed.

That in the second deal, the Howell property was to be held as security for the payment of the Kohlers commission by Hansens or until the property was sold. Then the Kohlers were to make an accounting to the Hansens. Kohlers breached this confidential relationship and told them they would have to sue. Mr. Hansen filed a complaint with the real estate board and the real estate board held that Mr. Kohler should pay Hansens the sum of \$4,686.00. The Kohlers have been unjustly enriched.

The Hansens had a perfect right to sue Kohler and were so advised by the real estate board.

That Hansens made a full disclosure to counsel and counsel prepared the Complaint and the Lis Pendens against the Kohlers. The Pierces were not a party to the lawsuit and their title was in no manner questioned.

Under the Utah Statutes, the Hansens had a right to file the Lis Pendens so if there was any interest in the property still in

the Kohlers, that it would be subject to any Judgment that the Hansens may recover. At no time did they do any act which cast any cloud upon the Pierces title or ownership to the property. The lawsuit was against the Kohlers not the Pierces and the statute specifically gave them the right to file a Lis Pendens.

The Hansens were never asked to release the Lis Pendens or told that it was a cloud on their title or of any difficulties Pierces were having.

That there was no notice, no pleadings, no work done by the attorneys, Vlahos and Gale or Knowlton, or any expenses incurred to remove the cloud. The only act that was taken by Vlahos and Gale and Knowlton was to file a cross complaint for damages. No expenses were incurred by Pierces to remove any alleged cloud. No damages or expenses were incurred or any act done to remove any cloud. That nothing was done by the Hansens which in any way interfered with the possession of the property by the Pierces. The only expenses incurred were the expenses incurred by the Pierces to obtain a Judgment for damages from the Hansens.

Respectfully submitted,

GOLDEN W. ROBBINS  
Attorney for Plaintiffs and  
Appellants  
455 East 400 South, Suite 50  
Salt Lake City, Utah