

1955

# Thomas F. Kirkham v. Orien A. Spencer and Viola Spencer : Appellants' Reply Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Jackson B. Howard; Sandgren, Howard & Frazier; Attorneys for Defendants and Appellants;

---

## Recommended Citation

Reply Brief, *Kirkham v. Spencer*, No. 8291 (Utah Supreme Court, 1955).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2324](https://digitalcommons.law.byu.edu/uofu_sc1/2324)

This Reply Brief 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

MAR 27 1956

LAW LIBRARY  
U. of U.

---

## In the Supreme Court of the State of Utah

---

THOMAS F. KIRKHAM, Administrator of the  
Estate of William Kirkham, Deceased,  
Plaintiff and Respondent,

vs.

DRIEN A. SPENCER and VIOLA SPENCER,  
his wife,  
Defendants and Appellants.

CASE  
NO. 8291

---

## APPELLANTS' REPLY BRIEF

---

JACKSON B. HOWARD  
SANDGREN, HOWARD & FRAZIER

Attorneys for Defendants  
and Appellants

## INDEX

	Page
FACTS .....	1
POINT I .....	2
POINT II .....	2
POINT III .....	3
CONCLUSION .....	5

## AUTHORITIES CITED

Corpus Juris Secundum, Vol. 88, P. 222.....	3
Holm v. Pauly, 106 P. 266.....	3

# In the Supreme Court of the State of Utah

---

THOMAS F. KIRKHAM, Administrator of the  
Estate of William Kirkham, Deceased,

Plaintiff and Respondent,

vs.

ORIEN A. SPENCER and VIOLA SPENCER,  
his wife,

Defendants and Appellants.

**CASE  
NO. 8291**

---

## APPELLANTS' REPLY BRIEF

---

### FACTS

In respect to the facts there are a number of mis-statements in the respondent's brief which the appellants feel it necessary to correct.

First (P. 7 of respondent's brief) the trial court merely allowed Mr. Hinton to testify that he wrote a letter to the defendants; its contents and purpose were not admitted.

Secondly, respondent implies by the second paragraph on P. 8 of his brief that it was the appellants' desire to allow the respondents to take further testimony, and that sub-

sequently counsel for appellants changed his mind and objected. The actual fact is that counsel for appellant was unable to notify his client, because of his client's absence from his home, that the court had re-opened the case and had set the time for hearing on the date indicated. Rather than inconvenience the court and respondent's counsel, suggested that they proceed but had no intention of waiving formal objection. Objection was made properly and timely.

## ARGUMENT

### POINT ONE (Respondent's Brief)

The respondent suggests on P. 13 of his argument that he complied with the order of the court and made a thorough and complete search of the premises, and yet the court said in its order: "and a more detailed search of the premises wherein deceased lived after August 21, 1953, and any other locations known to the heirs and representatives of the decedent wherein the said decedent might have made temporary disposition of \$4800.00 paid to him prior to plaintiff's return from vacation on August 22, 1953." Yet Mr. Hinton testified that no such search was made because he didn't think it was necessary, and in fact all that was offered was a more detailed and better fabricated re-telling of the former search. In other words, the testimony offered by the plaintiff was of the same search previously testified to; however, the re-telling was tailored to meet the expressed requirements of the court.

### POINT TWO (Respondent's Brief)

The respondent continues to argue "Facts" that were never admitted as part of his case. For example, on P. 18

of his brief, there was no evidence that demand was ever made for payment by the plaintiff, and yet the respondent desires that the Court come to a conclusion that the appellants' failure to reply to this fictional or hypothetical demand is evidence of the indebtedness. That unknown evidence not being before the Court it is clear that there is no evidence to refute or contradict the receipt.

As a matter of fact, the respondent finds himself on both sides of his own argument. He cites cases to show that the trial court's expressed conclusions are not evidence, and yet he cites them on P. 19 as such. There is no evidence whatsoever that the receipt was written by different pencils, but I would say that if it were that would even more so prove its authenticity.

### POINT THREE (Respondent's Brief)

The respondent cites the case of Holm vs. Pauly, 106 P. 266, as authority for the proposition that the court on its own motion can re-open. The case is hardly in point, for it states none of the facts surrounding this issue, but merely states that the court "suggested the re-opening of the case" which is a great deal different than re-opening it on its own motion. The probable reason for such action is that one of the parties moved the court to re-open this case. Another distinguishing feature about this case is that it was commenced in 1902, partly tried on the 6th day of December, 1905, and completed on the 16th day of December, 1906, and the evidence introduced was not of a prejudicial nature, in fact, was irrelevant and immaterial.

On Page 22 the respondent cites 88 Corpus Juris Secundum 222; however, he has failed to recite the first portion of the said citation, which clearly shows that this ci-

tation is not authority for the court on its own motion to re-open a case, and which also shows the reason for allowing such re-opening.

**"Although it has been held that when parties have afforded an adequate opportunity to present their respective sides of the case, ordinarily they will be compelled to abide by the determination to rest, whether or not a case shall be reopened for the introduction of evidence after both parties have rested their cases in chief, or after the close of the evidence is within the discretion of the trial court. The discretion however should be reasonably exercised so as not to prejudice the rights of the parties. The court may permit the case to be re-opened to admit evidence which, through inadvertence or mistake, was not introduced at the proper time, and ordinarily it should do so, but it is generally wholly within the discretion of the court whether it will do so."**

There was not one scintilla of evidence introduced by the respondent upon re-opening that could not have been introduced at time of trial, and there was absolutely no showing or even a contention raised by the respondent of inadvertence or mistake. If the court can re-open as it did in this case, then the appellants cannot imagine a situation where a re-opening would even be an abuse of discretion.

Respondent's other citations in support of his argument are merely footnotes in *Corpus Juris Secundum* which do not even carry an editor's note. Because they are to foreign reports the appellants do not have the opportunity to refute them; however, they can hardly be taken as authority.

**CONCLUSION**

For the reasons stated, the decision of the trial court should be reversed.

Respectfully submitted,  
JACKSON B. HOWARD  
SANDGREN, HOWARD & FRAZIER  
Attorneys for Defendants  
and Appellants