

1949

# Nick Chongas v. Paul C. Porcker : Brief of Appellant

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.

Wm. L. Beezley; W. R. Hutchinson, Jr.; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Chongas v. Porcker*, No. 7206 (Utah Supreme Court, 1949).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/923](https://digitalcommons.law.byu.edu/uofu_sc1/923)

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

1 of 2

7206

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF THE ES-  
TATE OF NICK CHONGAS, DE-  
CEASED,

—vs.—

PAUL C. PORCKER,

*Respondent,*

*Appellant.*

} Case  
No. 7206

---

## APPELLANT'S BRIEF

Appealed from the District Court, Probate Division,  
Weber County

---

JOHN A. HENDRICKS, *Judge*

**FILED**

SEP 15 1946 M. L. BEEZLEY

W. R. HUTCHINSON, JR.

CLERK, SUPREME COURT, UTAH

*Attorneys for Appellant.*

## INDEX

	Page
Statement of case .....	1
Assignment of error .....	10
Argument on Point No. 1 .....	10
Argument on Point No. 2 .....	15
Statement and Argument on Appellant's claim .....	16

### STATUTES CITED

Section 104-47-10, Utah Code Annotated 1943 .....	15
---	----

### CASES CITED

<i>Coombs vs. Witte</i> 140 A. 480 (N.J.Law), 104 N.J.Law 519 .....	14
<i>Cullom vs. Coldwill</i> 85 (Conn.) 459, 83 (A) 695 .....	13
<i>Ergang et al vs. Anderson, et al</i> 38 N.E. 2d 26 (Ill.) .....	10
<i>Etchen et al vs. Texas Co. et al</i> 199 Pac. 212 (Okla.) .....	14
<i>In re Ames</i> 67 Pac. 737 (Oregon) .....	14
<i>In re Bullard's Estate, McAllester et al vs. Rowland</i> 144 N.W. 412 Minn. ....	12
<i>In Canada's Appeal</i> 47 Conn. 450, 463 .....	13
<i>In re Sissill</i> 104 Mont. 306, 66 Pac. 2d 779 .....	13
<i>In re Van Houten's Will</i> 124 N.W. 886 (Iowa) .....	13
<i>Keenan vs. Scott et al</i> , 225 Pac. 906 (Okla.) .....	14
<i>Pinney's Will</i> , 27 (Minn.) 280, 6 N.W. 791, 7 N.W. 144 .....	11

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

IN THE MATTER OF THE ES-  
TATE OF NICK CHONGAS, DE-  
CEASED,

—vs.—  
*Respondent,*

PAUL C. PORCKER,

*Appellant.*

Case  
No. 7206

---

APPELLANT'S BRIEF

---

STATEMENT OF CASE

This appeal is prosecuted by Paul C. Porcker, brother of the deceased. See Will additional Trs. 6. This appeal is taken from a directed verdict granted by the trial court in favor of the respondent and against the appellant. "No cause of action", which verdict of the Jury directed by said court was duly entered of record. See Trs. 018. Thereafter Appellant moved said

Court for a new trial which motion was denied. See Trs. 022.

On the 3rd day of February, 1947, Nick Chongas, deceased, made his last Will and Testament, and among other things provided as follows, Paragraph 3 thereof:

“I give and bequeath to my Brother, Paul Chongas, also known as Paul Porcker, the sum of \$1.00.”

Paragraph 4—“All the rest and residue of my estate I give and bequeath to my sister Elaine Chongas, my brothers, George Chongas and Christ Chongas, and my friend William Lepas to share and share alike, but in the event that any of them die before my demise or cannot be found after diligent search, then his or her share shall go to the survivors in the same manner. See Will Additional Trs. 6.

That the said Nick Chongas died on the 26th day of March, 1948, in Weber County, State of Utah, leaving an estate of approximately \$20,000.00. That thereafter on the 27th day of March, 1948, J. Francis Fowles filed his petition for probate of will and praying that he be appointed as Executor of said Estate by virtue of being named as such in the Will of the Deceased. See Trs. 001. That thereafter on the 10th day of April, 1948, the appellant filed his petition by way of a contest upon admission to probate of Will and among other things alleged that at the time Nick Chongas, deceased, made and executed said Will, he was not of sound mind, and was of unsound mind and insane, therefore incompetent

to make said Will at the time of its execution. See Trs. 003. That the Respondent filed his answer to said Contest by way of General Denial. See Trs. 007. That thereafter Appellant made demand for Jury Trial, and on the 12th day of May, 1948, said Cause came on regularly for trial before a Jury.

That on the 11th day of March, 1946, the Deceased was committed to the State Mental Hospital, having been found insane by the Third District Court of Salt Lake County, and that on the 1st day of November, 1946, by order of the District Court, Salt Lake County, the Deceased was restored to capacity. See Appellant's Exhibit 2, Respondent's Exhibit "A". That on January 24, 1947, notice of release of patient was filed in the District Court of Salt Lake County stating "Condition improved". See File No. 7789. That the original commitment was based upon the Findings of the Attending Physicians, to-wit: DEMENTIA PRAECOX. See Physician's Certificate wherein respondent's objection thereto was sustained. File No. 5413; Trs. 78-80.

That subsequent to the execution of said Will on February 3, 1947, to-wit: On the 24th day of February, 1947, the friend of the deceased, William Lepas, who is named as a beneficiary under said Will, filed a petition in the District Court of Weber County for his appointment as the Guardian of the person and estate of said deceased, and among other things alleged that on the 13th day of February, 1947, the said deceased had been recommitted to the State Mental Hospital. See File No.

7549. That on February 13, 1947 the Judge of the Second District Court of Weber County signed an order recommitting the deceased to the State Mental Hospital upon the sworn testimony of the said William Lepas, and the said William Lepas waived any and all notice of the time and place for the hearing to be had upon said recommitment, and that no one was notified of said hearing other than the said William Lepas. See File No. 1049. That thereafter on the 14th day of April, 1948, notice of release of patient was filed with the Clerk of the District Court of Weber County wherein said discharge stated "Condition unchanged". That on the 20th day of March, 1947, the said William Lepas was appointed Guardian of the person and estate of Nick Chongas, Incompetent, and that on the 26th day of September, 1947, Nick Chongas, Incompetent, was restored to Mental Capacity by order of the District Court of Weber County, and it was further ordered that William Lepas as Guardian of the Estate of Nick Chongas turn over to him all property which he may have in his possession belonging to the said estate. See File No. 7549. Nick Chongas, Deceased, was paroled to William Lepas by the State Mental Hospital without notifying his then present and acting Guardian appointed by the District Court of Salt Lake County. See transcript, page 8-12.

That the Deceased, after being recommitted to the State Mental Hospital was thereafter released during the spring of 1948 and thereafter was lodged in the County Hospital of Weber County for Indigent Persons.

at which time he took ill and died. See Transcript, page 10, also page 17.

## EVIDENCE OF ANDREW MEINTASIS

I knew Nick Chongas for about twenty-eight years, and during that period of time I saw him from time to time. Transcript 81. I met him in my place of business and talked with him for nearly three hours about January, 1948.

Q. And will you describe his conversation as to whether or not it was coherent?

A. No, it didn't seem to be coherent at all.

Q. What?

A. It was incoherent. He couldn't stay on a subject at all.

Q. Explain to the Jury what you mean or how you come to the conclusion it was incoherent?

A. Well, when he starts talking about one thing, he answered about something else. I couldn't hold him to one subject at all, and I have talked to him on several occasions before, and he was pretty good; but this time he seemed to jump.

Q. In your opinion, based upon your conversation with him, and having known him all these years, and not having seen him for approximately three years, are you in a position to consider whether or not, in your opinion, his mind was normal?

A. My opinion is that he was insane.

Transcript 84.

## EVIDENCE OF WILLIAM PALITSAS

I have resided in Ogden forty years and knew Nick Chongas fifteen or twenty years prior to his death. During the year 1946, I operated a Hotel in Ogden, and Nick Chongas resided in my Hotel some four or five months in 1946. That during that period of time I helped him and took him to the Doctors.

Q. What seemed to be the matter with him?

A. His head. The Doctors tell me that he was sick in the head.

Q. Well did he ever discuss his sickness with you from time to time?

A. Lots of times.

Q. What did he say to you in regards to his head?

A. Well I seen him in my Hotel, and tried to talk with him. I talked to him right, and tried to take the Doctor's advice. I say (you fellow know)? He would strike head like that. He would say that he sick in the head. I took him to four or five Doctors. I contacted Doctor Brown. Dr. Brown examined Nick. I wanted to be good to him, take him to Dee Hospital for ten or fifteen days. Dr. Brown stated he could do nothing for him, and recommended that he be taken to hospital at Provo. Dr. Brown stated he needed a Doctor for his head. Four Doctors made that statement.

Transcript 87-88.

Q. Now what was his condition around the Hotel at night?

A. Well, he—lots of nights he go up the street and walk around, some times talk, but lots of nights he come and say, “Where you go?” and I say, “What do you want?” He said, “No move tonight. I am going to die. You are going to stay with me. You come into my room and stay with me,” and I state, “No, release me.” “No, I am going to die tonight. Call my brother.” I say, “What do you want of your brother?” “Oh just call him.” I call him two or three times, and he come and they have trouble. “What do you want me to fetch him here for?” I say. Transcript 88. I sent for his brother, and Mr. Lepas. Mr. Lepas talked with him in his room. His brother called two or three times. He walk up and down the hall in the Hotel most of all the night, and would talk and make noise through the doors of other roomers and I would hear a noise and grunts and the tenants complained that Nick was doing that during the nights. Transcript Page 89. He was later taken to San Francisco to the Hospital by a Railroad Company under guard and returned under guard to my hotel.

Q. Now after he was returned from San Francisco to your Hotel how long did he reside there?

A. Well I no tell you because it is a long time. He leave in a little while. As soon as I seen we can do nothing, I tell his brother to take him, and his brother come and get him. That was around April 1946.  
Transcript 90.

A. We had an argument and I said, “Go on with your brother. I don’t want you. I don’t

want you any more in my Hotel." He was mean because I sent for him. I feel sorry for him, because I promised to you—I know you fifteen years, and I didn't want to see him down like that. And I tried to protect him, and then I was wrong with him. I tell him the truth and no good. I went to the Doctor with him and Doctor give him 45c medicine, and I pay for it, and soon he go down on the street and throw that away. After Nick Chongas had sold his home for \$3,000.00, he tried to get me to sell the house and also tried to sell it to two or three other men after I knew he had already sold it. He also tried to rent the house to me, after it was sold.

See Transcript 91.

Q. Now, based on your association with him during the period of time you have testified to, and based upon his conversation with you and his conduct, would you say that during that period of time his mind was normal?

A. No mind at all.  
Transcript 92.

## EVIDENCE OF WM. L. BEEZLEY

I met J. Francis Fowles at the State Capitol and asked him how Nick was getting along, and he said he was crazy as a bedbug, and that he had been sitting on a stool down in Ogden in a restaurant gazing out through a window for long periods of time, sitting there all alone.

See transcript 24.

Regarding the above conversation, J. Francis Fowles testified as follows:

- A. Yes. I told Mr. Beezley that I thought I had made a mistake when I took him out of the institution down there, and he said, "Why?" I said, "Because I can't find a decent place for the old man to live, and he is sick. He runs around the street all day, and he doesn't have a decent place to live, and he eats in every old cafe around town, and that man needs somebody to take care of him." See transcript 25.

That William Lepas in the month of January, 1947, took Nick Chongas to the Law Office of H. A. Soderberg at Ogden, Utah, at which time Mr. Soderberg obtained certain information pertaining to the drafting of a will, and that thereafter on the 3rd day of February, 1947, Mr. William Lepas called at the office of Mr. Soderberg, and took him to the St. Benedict's Hospital in Ogden, Utah, where Nick Chongas was confined, which place the alleged last Will and Testament was executed.

See transcripts 28-32.

The Court admitted to Probate the said Will as the Last Will and Testament of Nick Chongas, Deceased.

See additional record on appeal.

## ASSIGNMENT OF ERROR

Appellant assigns as error the following upon which he relies for a reversal of the Judgment and Orders of the Court:

1. The Court erred in directing a verdict, No Cause of Action; admitting the Will of Nick Chongas, Deceased, to Probate and overruling Appellant's Motion for a new trial.

2. The Court erred in refusing to admit in evidence the Physician's certificate contained in Appellant's Exhibit 2, Case No. 5413.

## ARGUMENT ON POINT NO. 1

The evidence, testimony and documentary evidence introduced in this case going to the question of the decedent's mental status, at the time the will in question was executed should have been submitted by the Trial Court to the Jury for their final deliberation in the premises.

In the case of *Ergang et al vs. Anderson et al*, 38 N. E. 2d 26 (Ill.) lays down the rule that in determining whether the mind of a testatrix was sound at time a will was executed, it is important to know condition of her mind a reasonable length of time before and after execution of will. The Court states:

(1) "We have frequently held that in determining whether the mind of a testatrix is

sound at the time a will is executed, it is important to know the condition of her mind a reasonable length of time before and after the execution of the will."

(1) "It is well settled that, when the issue is the mental capacity of a testator or grantor at the time of making a will or deed, evidence of incapacity within a reasonable time before and after is relevant and admissible."

Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

Mr. Wigmore says:

"Courts are today universally agreed that both prior and subsequent mental condition within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential toward ascertaining the mental condition at the precise time of the act in issue.

"There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered, and in the nature of things no definition is possible. The circumstances of each case must furnish the varying criterion, and the determination of the Trial Judge ought to be allowed to control."

1. Wigmore on Evidence, Paragraph 233, and cases quoted in text and cited in note.

3. "Whether person's mental condition at the time covered by the Finding is evidence of his mental condition at a prior time would seem logically to be a question of the probative force or weight of the evidence or its tendency to prove

the fact in issue. It is difficult to see why the evidence should stand on any different footing than does the oral evidence of witnesses to prove the mental condition of the testator at a time after the will is made, and, as we have stated, the rule is uniform that such evidence may be received. There are, however, a number of cases that hold the finding of incompetence in the subsequent proceedings inadmissible. Cases cited. In none of these cases is the decision of the particular question fortified by either sound reasoning or authority.

“In the section of Wigmore on evidence, the author says, that whether the person’s mental capacity at the time of the inquisition is evidence of his condition, at the time in issue, is merely a question of relevancy of the fact, evidenced by the inquisition.”

In section 233 he says:

“The question whether an inquisition or adjudication of insanity is admissible at all raises a question of an exception to the hearsay rule. Supposing it admissible, then it evidences insanity at the time of the inquisition, and the question of the relevancy of insanity at that time is then the same as in cases where the insanity is otherwise evidenced, by conduct or the like.”

In re, Bullard’s Estate, McAllister et al vs. Rowland, 144 N. W. 412 (Minn.).

Two years after the will was executed, proceedings for the appointment of a guardian were instituted and resulted in a judgment that the testator was then mentally competent. It was held that the record of this adju-

dication should have been admitted in evidence. The decision is based upon the rule that such an adjudication is evidence of the mental condition of the testator at the time of the judgment, and upon the conclusion that this has a probative value on the question of the mental condition at the time of the will.

In re, Van Houten's Will, 124 N. W. 886  
(Iowa).

In Canada's appeal, 47 Conn. 450, 463, the Court said:

"In determining the question as to the mental capacity of a testator at the time of executing a will, the law admits proof of his words and acts prior and subsequent to that point of time, presumably the mind neither passes from light into darkness nor emerges from darkness into light instantly; presumably neither capacity nor incapacity is the condition of the moment. Only the acts and words at and nearest to the time of execution may have greater weight as evidence; diminishes in weight as time lengthens in each direction; the Jury to determine when they cease to have any", to the same effect see Cullum vs. Coldwill, 85 Conn. 459, 83 A. 695.

In re, Sissel, 104 Mont. 306, 66 Pac. 2d 779.

Upholding a denial of probate that evidence of the mental condition and acts and declaration of a testator within reasonable times before and after the date of the signing of the document were pertinent to the issue involved, and that it was for the trier of the facts to make the ultimate finding.

Adjudication of insanity of the grantor of the deed, a short time subsequent to the execution of same may be offered in evidence in an action wherein the deed is sought to be cancelled on the ground of incompetency on the part of the grantor at the time of the execution of same, but is not conclusive of that fact and may be rebutted, overcome by oral testimony of the mental condition of the grantor at the time he executed the deed.

Keenan vs. Scott et al, 225 Pac. 906 (Okla.).

Where the mental incapacity of a grantor is a material issue in an action to cancel the conveyance for incompetency, evidence as to his weakness of mind is not confined to the date of the conveyance, but may go to any period of his life, prior and subsequent to the conveyance.

Etchen et al vs. Texas Co. et al, 199 Pac. 212 (Okla.).

It has been held that the adjudication of insanity is prima facie evidence of insanity at the time of the execution of a subsequent conveyance, and that the presumption of mental infirmity arising from the appointment of the Guardian will prevail for at least a reasonable time thereafter.

Coombs vs. Witte, 140 A. 408 (N. J.) Law, 104 (N. J. Law) 519.

In re Ames, 67 Pac. 737 (Ore.).

## ARGUMENT ON POINT NO. 2

The documentary evidence as contained in Appellant's Exhibit 2, Case No. 5413 should have been allowed by the Trial Court in evidence in its entirety, and particularly the physician's certificate contained in said Exhibit. The Physician's certificate was the findings of said Doctors upon which the Court made its order committing the deceased to the State Mental Hospital, and without such findings, no order would have been made. Among other things the Physician's certificate showed that the deceased at the time of said hearing was suffering from Dementia Praecox, and in this connection the Appellant was prepared to prove by competent evidence the medical history of Dementia Praecox and its permanency, which proposed evidence was denied by the trial Judge by virtue of sustaining the objections made by Respondent to the Physician's Certificate offered by Appellant, and that upon this question involved, Appellant takes the position that the Physician's certificate was just as material in this case as the Court's order which was based thereon.

In connection with the above the Appellant complied with Section 104-47-10, Utah Code Annotated 1943, respecting the introduction of said certified record from the Third Judicial District Court, Salt Lake County.

## STATEMENT AND ARGUMENT UPON THE PARTICULAR QUESTIONS INVOLVED

The Deceased, Nick Chongas, in his lifetime was duly committed to the Utah State Mental Hospital as Insane by the Third Judicial District Court, Salt Lake County, on the 11th day of March, 1946, and thereafter a Guardian was duly appointed by said Court for the purpose of taking custody of his Person and Property. That thereafter by order of the said District Court, to-wit: The 1st day of November, 1946, the Deceased was restored to competency. That just prior to the restoration a friend, William Lepas, obtained the release of the said Deceased to him by way of parole, and after said order of restoration, William Lepas brought the deceased to the Law Office of H. A. Soderberg, Ogden, Utah, sometime in the month of January, 1947, for the purpose of drafting the last Will and Testament of the deceased. That on the 3rd day of February, 1947, the said William Lepas took said attorney and a subscribing witness to the St. Benedict's hospital in Weber County, at which place, the said deceased was then confined, for the purpose of executing said Will.

That in the course of ten days thereafter upon the sworn testimony of the said William Lepas, the deceased was duly recommitted to the Utah State Mental Hospital by order of the Second Judicial District Court, Weber County, and thereafter the said William Lepas was duly appointed by order of said Second Judicial Court as

Guardian of the Person and Property of the said Deceased.

That thereafter on the 4th day of April, 1948, said Deceased was released from the Utah State Mental Hospital, wherein said discharge stated "Condition Unchanged", and thereafter the said deceased was confined in the County Hospital of Weber County for indigent persons during which time he took ill and died.

The above statements set forth the salient facts as disclosed by the record coupled with the evidence of Wm. L. Beezley, J. Francis Fowles, Andrew Meintasis and William Palitsas, pertaining to the mental condition of the deceased at the times testified to. The record in this case discloses that the deceased was ailing mentally from on or about January 1, 1946 on down to his death.

That Respondent relies upon the Order of Restoration made on the 1st day of November, 1946, together with oral evidence as disclosed by the bill of exceptions, for the purpose of proving that Deceased was mentally competent on the 3rd day of February, 1947, the date of the Will, and Appellant relies upon the records herein pertaining to commitment, recommitment, releases of the Utah State Mental Hospital, Guardianship matters involving the person and property of the Deceased, the Deceased's confinement at St. Benedict's Hospital and County Hospital, Weber County, for the Indigent, together with oral evidence as disclosed by the bill of

exceptions, all going to the question of the Deceased's mental condition at the time of the execution of the Will.

Appellant sincerely contends that the records introduced in this case, together with the oral evidence of witnesses as contained in the Bill of Exceptions herein should have been submitted to the Jury for their deliberation, and that Physician's certificate of Record of the Third Judicial District Court, Salt Lake County should have been admitted in evidence as a material and vital part of the original commitment issued out of said court, and that said judgment should be reversed and Appellant should recover his costs and expenses incurred in this Appeal.

Respectfully submitted,

WM. L. BEEZLEY

W. R. HUTCHINSON, JR.

*Attorneys for Appellant.*