

1949

Lewis F. Hansen, W. V. Jensen, Mrs. J. E. Jensen,
Ralph Cutler, Hettie May Bates and Robert Young
v. Granite Holding Company, Nephi J. Hansen and
William L. Hansen : Brief of Defendant and
Appellant, William L. Hansen : Brief of Defendant

Utah Supreme Court

Follow this and additional works at: 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.

Shirley P. Jones; Attorney for Defendant and Appellant, William L. Hansen;

Recommended Citation

Brief of Appellant, *Hansen v. Granite Holding Co.*, No. 7339 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1110

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.

Case No. 7339

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

LEWIS F. HANSEN, W. V. JENSEN,
MRS. J. E. JENSEN, RALPH CUT-
LER, HETTIE MAY BATES and
ROBERT YOUNG,

Respondents and Plaintiffs,

vs.

GRANITE HOLDING COMPANY, a
corporation, NEPHI J. HANSEN
and WILLIAM L. HANSEN,

Appellants and Defendants.

**BRIEF OF DEFENDANT AND APPELLANT,
WILLIAM L. HANSEN**

SHIRLEY P. JONES,

*Attorney for Defendant and
Appellant, William L. Han-
sen.*

FILED

6 1949

CLERK, SUPREME COURT, UTAH

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.*

I N D E X

	Page
STATEMENT OF FACTS	2
FOREWORD	2
I. THE PLEADINGS AND THE PARTIES.....	3
II. THE TESTIMONY	13
Plaintiff's Witnesses	13
Defendants' Witnesses	13
(A) The Validity of the Deed.....	13
(B) The Alleged Accounting	72
III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT	89
STATEMENT OF ERRORS	94
ARGUMENT	99
MAXIMS OF EQUITY	99
I. THE PLAINTIFFS, THEIR PLEADINGS AND CONDUCT	101
II. THE DEED SHOULD HAVE BEEN DECLARED VALID	109
(A) Under any view of the Facts the Deed was the Valid Act of the Corporation.....	109
(B) These Stockholders Have no Cause of Action against W. L. Hansen	127
A FEW OF THE UTAH CASES.....	141
(C) The Findings of Fact, Conclusions of Law and Judgment	143
III. THE ACCOUNTING WAS WRONG.....	149
CONCLUSION	154
NOTE	156

INDEX—Continued

Page

CASES

Beggs vs. Myton Canal & Irrigation Co., 54 Utah 120, 179 Pac. 984.....	142
Buchwald Transfer Co. vs. Hurst, 111 Maryland 572.....	140
Carlquist vs. Quayle, 62 Utah 266, 218 Pac. 729.....	143
Chestnut Street Trust & Savings Fund Co. vs. Record Publish- ing Co., 75 A. 1067.....	126
Ellison vs. Pingree, 64 Utah 468, 477, 231 Pac. 826.....	143
Geary vs. Cain, 79 Utah 268, 273, 9 Pac. (2) 396.....	132
Holy Cross Gold Mining & Milling Co. vs. Goodwin, 223 Pac. 58....	122
Orme vs. Salt River Valley Water Users Association, 217 Pac. 935, 940.....	140
Singer vs. Salt Lake Copper Manufacturing Co., 17 Utah 143, 155..	141
Skeen vs. Warren Irrigation Co., 42 Utah 602, 132 Pac. 1162.....	142
Smith vs. Knauss, 52 Utah 614, 176 Pac. 621.....	142
Smith vs. Stone, 128 Pac. 612, 621.....	101, 138
State Exrel Blackwood vs. Brast, 127 S.E. 507.....	140
Utah Assets Corporation vs. Dooley Brothers Association, 92 Utah 577, 586, 70 Pac. (2) 738.....	134

TEXTS

9 Am. Jur., 353, Sec. 5, 384, Sec. 39, 388, Sec. 44 & 45.....	130, 138
13 Am. Jur., 923, 924, 925, 1114, 1115.....	115, 116, 121, 134
19 Am. Jur., 319, Sec. 462; 320, 321, 323, 324, 325, 330, 331, 332, 333, 334, 337, 356.....	100, 101
19 Am. English Annotated Cases, 619.....	140
Ballantine on Corporations, 1946, pgs. 140, 246, 247, 361, 503, 667, 674, 675, 712.....	116, 117, 122, 130, 131

INDEX—(Continued)

	Page
Black on Rescission, Vol. 3, p. 1482.....	149, 150, 153
Cook on Corporations (6th Ed.).....	101, 139
Fletcher Cyclopedia on Corporations, Vol. 2, p. 2156.....	116, 138
Fletcher Cyclopedia on Corporations, Vol. 3, pgs. 2631, 3049, 3077, 3100, 3101, 3104, 3105, 3114, 3204, 3205	122, 123, 124, 125, 131
Fletcher Cyclopedia on Corporations, Vol. 4, p. 3395.....	141
Fletcher Cyclopedia on Corporations, Vol. 6, pgs. 6012, 6797, 6798, 6804, 6842, 6899, 6900, 6934, 6948, 6950, 6951, 6955.....	101, 128, 130, 133, 136, 137
Noyes on Intercorporate Relations.....	101, 139
U.C.A. 1943, Sec. 18-2-16.....	115

IN THE SUPREME COURT
of the
STATE OF UTAH

LEWIS F. HANSEN, W. V. JENSEN,
MRS. J. E. JENSEN, RALPH CUT-
LER, HETTIE MAY BATES and
ROBERT YOUNG,

Respondents and Plaintiffs,

vs.

GRANITE HOLDING COMPANY, a
corporation, NEPHI J. HANSEN
and WILLIAM L. HANSEN,

Appellants and Defendants.

Case No.
7339

BRIEF OF DEFENDANT AND APPELLANT,
WILLIAM L. HANSEN

This case is an appeal from a judgment and decree made and entered by the District Court of Salt Lake County, Judge A. H. Ellett, December 24, 1948, setting aside a deed from the Granite Holding Company, one of the defendants, to William L. Hansen, another of the

defendants, and dated July 16, 1945, (T. 112). The judgment also awarded the Granite Holding Company judgment in the sum of \$29,246.05 against William L. Hansen. In stating the facts we shall divide the statement into three parts: I. The Pleadings and the Parties; II. The Testimony, (A) The Validity of the Deed, (B) The Accounting; III. The Findings, Conclusions and Judgment of the Court.

STATEMENT OF FACTS

FOREWORD

We attempted to summarize the evidence into a more concise statement than follows in this brief. We abandoned the effort, however, because it was not possible to make a more brief summary and at the same time present clearly to this court the utter lack of support in the evidence for the findings of fact, conclusions of law and judgment herein. Our research has failed to disclose one single authority to support the trial court in this case, and a less complete summary of the evidence than we have given herein might lead this court to wonder if we had not omitted to state some of the evidence. Therefore, we concluded to attempt to state the substance of the evidence of every witness. We have also set forth as briefly as possible the substance of the pleadings and the court's findings, conclusions and judgment. We hope that this will give in the pages of this brief a complete picture of the record to each member of the court.

I. THE PLEADINGS AND THE PARTIES

The identity of the parties and the dates of the pleadings have a material place in this action. The action is one in equity and was commenced by Lewis F. Hansen and Clyde Hansen as plaintiff's against the defendants by a complaint filed December 21, 1946, and summons served December 23, 1946, (T. 1-9). The complaint in substance alleges that the plaintiffs are stockholders of the defendant corporation and "bring this action for and in behalf of said corporation" and for themselves and other stockholders who are interested and desire to join and share the costs; that the defendant, Nephi Hansen, since and prior to 1928 has presumed to act as the president and general manager and director of the corporation, and that since said time no legal or regular meetings of stockholders or directors of said corporation have been held and "no one has been legally authorized to manage or direct the affairs and business of said corporation, and the defendant, Nephi J. Hansen, has presumed to use the corporation and its property for his own interest and benefit"; that the corporation has failed to keep books and records; that the stock of the corporation is divided into 3500 shares of common and 3500 shares of preferred stock with cumulative dividends for the preferred stock; that in 1919 a new board of directors was established and that of this board all but three of the directors are dead, and that those three are the defendant, Nephi J. Hansen, and the plaintiffs, Clyde Hansen and Lewis F. Han-

sen, and that for a number of years last past there has been no legally constituted board of directors; that the corporation for many years has been the owner and entitled to the possession of certain property, describing it, (this property is situated at the southwest corner of 11th East and 21st South in Salt Lake City); that the said property has been producing substantial rental income but plaintiffs cannot state the amount, and on information and belief state that it is in excess of \$2500.00 per month; that plaintiffs have no knowledge as to the handling and disposition of the income but allege on information and belief that the corporation is insolvent or in danger of insolvency, and that the assets and property have been and are now being dissipated, and the corporation is unable to pay its obligations or protect the investment of the stockholders unless the court appoints a receiver.

The complaint then alleges that on or about the 16th day of July, 1945, a deed to the above described property was made, executed, delivered and recorded in the office of the County Recorder of Salt Lake County, purporting to convey the property from the defendant corporation to the defendant, William L. Hansen, for a purported consideration of \$10,000.00; that the deed was not authorized or executed by the corporation pursuant to resolution of the board of directors and without authority of the board of directors or the stockholders or any authority of the company or its officers or stockholders to the president of the corporation or any other officer to sell or dispose of the property, and that

the property is all of the assets of the corporation; that the consideration was grossly inadequate; that the property was worth in excess of \$200,000.00, and that the consideration of \$10,000.00 was not fully paid by the defendant, William L. Hansen, and the corporation never did receive the money therefor. These allegations are upon information and belief. Continuing, the complaint alleges that the defendant, Nephi Hansen, is in practical control of the corporation and dominates its affairs, and that an appeal to the corporation to protect the stockholders would be futile and useless. The complaint then asks for the appointment of a receiver; that the court enter a decree adjudging the defendant corporation to be the owner of the aforesaid property clear of any claims of defendant, William L. Hansen; that defendants, Nephi Hansen and William Hansen, be required to render an accounting in favor of the corporation, and for general relief.

Clyde Hansen was joined as a plaintiff without his authority and approval and his name was stricken as a plaintiff April 21, 1947, (T. 22), when the demurrers to the complaint came on for hearing.

An amended complaint was filed August 14, 1947, (T. 26-32), at which time more than two years after the deed was given, the court permitted to be added as plaintiffs W. V. Jensen, Mrs. J. E. Jensen, Ralph Cutler, Hettie May Bates and Robert Young, (T. 23). The amended complaint alleged essentially the same matters as the original complaint and also that Nephi J. Hansen

controlled the corporation, failed to call stockholders' meetings, prevented the holding of stockholders' and directors' meetings, and that year after year he represented to the stockholders that there were no items of business except the liquidation of the mortgage indebtedness, "and that by his said representations said defendant discouraged inquiry into the affairs of the corporation and lulled the stockholders into inaction"; that Nephi Hansen since 1928 has presumed to make all the decisions and do all of the corporate acts; that he has not kept any records, and that since 1928 he has treated the corporation as his individual property, that in 1919 the articles of incorporation required the establishment of a sinking fund, but that no such fund has ever been established for the retirement of preferred stock, and that no dividends have ever been paid since shortly after 1919; that during all of said years Nephi Hansen has failed to consult any other directors or hold directors' meetings or "to permit vacancies to be filled on the board of directors"; that Nephi Hansen had repeatedly told the preferred stockholders that dividends could not be paid, and that he was liquidating the real properties of the corporation, and that he has failed and neglected during all the years to furnish the stockholders with any information; that two years prior to the commencement of this action Nephi Hansen informed the plaintiff, Lewis F. Hansen, that it would be wise to sell the property, and that he sold the property to defendant, William L. Hansen, for \$10,000.00 by deed in the name of the corporation, and that that was an at-

tempted disposition of all of the assets of the corporation, and that during the period Nephi Hansen advised the stockholders that a sale was being negotiated. The amended complaint asked for the same relief as the original complaint.

The complaint and amended complaint with Clyde Hansen eliminated, thus in substance allege: 1. That plaintiffs are stockholders of the defendant, Granite Holding Company, and that plaintiff, Lewis F. Hansen, since 1919 has been and at the time of the transaction complained of was a director; that no dividends have been paid for a period of more than twenty years; that during all that time Nephi Hansen has operated the corporation as his own property, given the stockholders no information, liquidated its properties without their consent and approval, and advised the stockholders that he was doing so, held no directors' meetings and conducted the business of the Granite Holding Company as he personally saw fit. 2. That on or about July 16, 1945, he gave a deed in the name of the Granite Holding Company to defendant, William L. Hansen, his son, for a recited consideration of \$10,000.00 for the property in question at 11th East and 21st South, the last remaining asset of the corporation. Based upon such allegations the plaintiff asked that the deed be set aside and the property declared to be that of the Granite Holding Company, and that the defendants Hansen account to the Granite Holding Company. There is no offer or tender on the part of the plaintiffs to do equity or to return

any consideration received by the corporation to William L. Hansen.

Defendants demurred to both complaints, particularly on the ground that the complaints show upon their face that all the plaintiffs are estopped to secure the relief prayed for; that there is no offer or tender to do equity; that the plaintiffs have acquiesced in the acts of Nephi J. Hansen for upwards of twenty-five years, and that the complaints themselves do not show or allege that \$10,000.00 was the actual consideration because the complaints show that there was a mortgage upon the property and do not recite the amount of the mortgage. The defendant, William L. Hansen, also at the beginning of the trial objected to the plaintiffs proceeding at all upon the grounds that the action actually is one by the corporation to rescind its deed, and the complaint shows upon its face that the corporation received \$10,000.00 in addition to an assumption of its mortgage by William L. Hansen, and is making no offer or tender to return what it received, (T. 142, 143), and that the complaint affirmatively sets forth allegations which show an estoppel against the corporation and the stockholders so far as William L. Hansen is concerned. This defendant also asked for a non-suit at the close of plaintiffs' case, (T. 359).

At the beginning of the case the court asked counsel for the plaintiffs if they were in a position to make a tender.

“MR. JENSEN: Well, I am not in a position to answer that question right now.

“THE COURT: If you are not in position to do it, there wouldn't be any need of taking a lot of other evidence and finally come around to the situation where you would have to make your tender in order to get this thing set aside.

* * * *

“MR. JONES: In view of the statement that counsel just made to Your Honor, I renew the motion I made.

“THE COURT: Well, I'll take care of that later. I have ruled on that motion heretofore at this stage, and you may proceed, Mr. Jensen.” (T. 151, 152).

During this same episode efforts were made to get Mr. Jensen to admit or deny that he was the attorney for the plaintiff, Mr. Cutler, which question he evaded by refusing to answer directly as to Mr. Cutler and replied: “I represent all the plaintiffs”, (T. 151, 152).

The answers and amended answers deny that the plaintiffs, W. V. Jensen and Mrs. J. E. Jensen, are stockholders, assert that the Granite Holding Company is improperly joined as a defendant; that full consideration was paid by William L. Hansen for the property; that the stockholders of defendant corporation for years acquiesced in the management of the corporation by Nephi Hansen, and they are estopped to assert any lack of authority, and that they held out to the public generally and to this defendant that they were not concerned or

interested in the corporation or in its business or affairs, and that Nephi Hansen had absolute authority to act on behalf of the corporation including the right to sell and mortgage its real property; that the defendant corporation represented to defendant William L. Hansen that there was a regularly constituted de jure board of directors properly selected and qualified, and that they unanimously adopted a resolution authorizing the sale to the defendant of the property, and that the property was sold to the defendant, William L. Hansen, for \$10,000.00 cash and the assumption of a \$75,000.00 mortgage; that the Granite Holding Company still retains the money and has made no tender of it to the defendant, nor have the plaintiffs; that the property was in a dilapidated and run down condition, and that defendant has put in approximately \$20,000.00 additional of his own money, and that it will be necessary to expend another \$100,000.00 in order to make the property self-supporting, (T. 54, et. seq.). The defendant, Granite Holding Company, and Nephi J. Hansen also set up that the plaintiff, Lewis F. Hansen, was one of the directors who consummated the transaction; that W. V. Jensen and Mrs. J. E. Jensen, plaintiffs, have only a representative interest through J. E. Jensen, a director, who participated in the transaction and voted affirmatively for the delivery of the deed; that the transaction was regular, and that the plaintiffs are estopped to question the deed.

The amended complaint was signed with the name of LeGrand Backman as one of the attorneys for the

plaintiffs, (T. 32). LeGrand Backman never was an attorney for plaintiffs, (T. 147, 148), and before the case came on for trial Lewis Hansen withdrew as a plaintiff and Benjamin Spence withdrew as his attorney, and E. C. Jensen was entered as counsel for the plaintiffs, (T. 74, 75, 76). Prior to the trial defendants, Granite Holding Company, and Nephi J. Hansen, served notice that they would ask to amend their answers so as to deny that the plaintiffs as then constituted were stockholders in the Granite Holding Company, (T. 78). During the trial (June 22, 1948, three years after the deed) it appeared that the plaintiff, Robert Young, had been dead for years before the filing of the complaint, and that William S. Young is the distributee of the stock of Robert Young, (T. 274), and the complaint was thereupon amended during the trial to show William S. Young as a party plaintiff instead of Robert Young, (T. 280). Later on December 16, 1948, and after the trial was ended J. R. Jensen and W. V. Jensen moved for an order dismissing them as plaintiffs in the action, (T. 102), and on the same day these persons were dismissed as plaintiffs, (T. 101). The heading of the motion reciting the names of the plaintiffs states Mrs. J. R. Jensen, whereas all the other pleadings refer to her as Mrs. J. E. Jensen which is correct. While the motion itself and the order of dismissal refer to some person named J. R. Jensen, there never was any one in the case named J. R. Jensen. Apparently, counsel at that late date did not know who his

clients were, and as a matter of fact during the trial the following occurred:

“MR. JENSEN, (counsel for plaintiffs): Your honor, I notice that the complaint, or the amended complaint, rather, which I didn’t draw, for the record, shows Robert Young as a plaintiff. Of course, Robert Young is dead, and I don’t think that is proper plaintiff. Dead man can’t sue.

“THE COURT: Which one of these men hired you.

“MR. JONES: These plaintiffs are like the weather.

“MR. JENSEN: I refuse to answer.” (R. 279).

So of the two original plaintiffs who started the action one was joined without his authority and withdrew immediately, while the other was a director who affirmatively approved the deed in question. The later plaintiffs, two of them, W. V. Jensen and Mrs. J. E. Jensen, were not stockholders at all and one was the son and the other the wife of the director J. E. Jensen who voted for the deed in question. These two were apparently later dismissed as plaintiffs, while the plaintiff, Robert Young, was dead and never did join as a plaintiff, and his son, William S. Young, was substituted during the trial. The plaintiffs were in a constant state of flux, joining and then withdrawing, some with no capacity whatever, others affirmative participants in the conveyance of the property sought by such participants to be voided on the ground of alleged fraud which they

themselves had perpetrated. When the action was finished, none of the original plaintiffs remained, neither of the attorneys who signed the complaint were in the case, those who started the action had disappeared, and it was carried on by others who entered the picture nearly three years after the deed had been given and the property transferred, (T. 74). Plaintiffs never did bring the case on for trial. All they did was file a harassing action and let it rest there. The case was brought on for trial only upon motion and demand of the defendant, Granite Holding Company, (T. 52). It may be that plaintiffs were unable to determine who they were or who was their attorney, they were in and out and shifting around so frequently.

II. THE TESTIMONY

PLAINTIFF'S WITNESSES

(A) *The Validity of the Deed*

The plaintiffs offered in evidence the Clerk's file of the original articles and the various amendments and oaths of office of the defendant, Granite Holding Company, (Exhibit "A", T. 144). These articles show that originally the company was called the Granite Lumber Company at the time of its incorporation in 1901; that the name was changed to Granite Holding Company in 1927. Originally the corporation had 200 shares of the par value of \$100.00 each. Nephi J. Hansen, the defendant herein, and Joseph E. Jensen, one of the directors

who authorized the deed to the defendant, W. L. Hansen, were two of the five original incorporators in 1901 and apparently continued as directors during the entire period under consideration up to 1945. The articles were amended in 1919 to provide for 3500 shares of common stock and 3500 shares of preferred stock. Nephi J. Hansen was then president of the company. In 1927 the articles were amended, as above indicated, to change the name to Granite Holding Company, and at that time under the required "Statement of Domestic Corporation" the corporation represented that Nephi J. Hansen was the president and general manager, Joseph E. Jensen, the vice-president, and Clyde Hansen the treasurer, and that at that time all of the common stock, to-wit, 3500 shares and 740 shares of the preferred stock were subscribed and apparently issued. Only in the event dividends on the preferred stock were not paid for three consecutive years did the preferred stock have any voting power and then only one vote for each share of stock. In 1932 the State of Utah forfeited the charter of the corporation for non-payment of license taxes.

From the beginning the articles have provided by article 9 that there shall be a general manager appointed by the board of directors to hold his position at the pleasure of the board, and by article 12 that the board of directors in their discretion "and without notice to or authority from the stockholders" shall have power "to sell, mortgage, exchange, assign or dispose of, in any way or manner they may deem best, any or all the real and personal property of the corporation." Article 11

has always provided that the board of directors are authorized to fill all vacancies in the board of directors occurring from any cause whatever, and that any director including the persons so appointed shall serve until the next annual election and until his successor is elected and qualified.

The plaintiffs produced ten witnesses, six of whom were stockholders—Hettie May Bates, Clyde F. Hansen, Mary Hansen Southwick, William S. Young, Ralph Cutler and Lewis F. Hansen. Keith Bates, a son of Hettie May Bates, also testified, apparently as the representative of his mother.

Mrs. Bates testified that she is the owner of 50 shares of the preferred stock, issued to her in 1921, (Exhibit "B", T. 149), and that she is the widow of Ephraim Bates, who was the owner of 55 shares of preferred stock, (Exhibit "C", T. 150). There is no way of determining whether or not she is the owner of the 55 shares, Exhibit "C", except her conclusion and no way of determining when the endorsement on the back of the shares was made. We objected to the introduction of Exhibit "C", and it was received over our objection, (T. 153). It should not be considered.

Mrs. Bates testified that she had never received any reports or information at all about the condition or affairs of the company at any time since she has been a stockholder; that she never had notice of meetings, and that she never knew anything about any sale or proposed sale of the property at 21st South and Hyland

Drive (11th East); that it was just recently that she learned that it had been sold, and that was about a year ago. She learned of it from Mr. Vivian Jensen. She has never had any information with respect to the financial condition of the defendant corporation or of any of its properties, nor of any change in directors, nor any information of any kind, nature or description with respect to any of the affairs of Granite Holding Company since 1921, (T. 155), although she has resided in Salt Lake City all of the time and has had the same address since 1923. Her husband, Ephraim Bates, the record owner of Exhibit "C", died 17 years ago, (T. 155, 156). She has known Nephi J. Hansen personally, but only on one occasion since she got her stock has she ever spoken to Mr. Hansen. The stock she has was given to her by her husband. She never knew any of the officers or directors of the company. She knew the company was located in Sugarhouse, but she didn't know what it did nor what property it owned, nor what business it was engaged in, and never knew anything about it at all, (T. 157, 158). The only persons she ever inquired about concerning the company was from Mr. Rob Young after her husband died, but she can't remember what the inquiry was about, and D. E. Judd, here brother-in-law, of the Utah Savings & Trust, (T. 160). She never went to the company's place of business and never communicated with the company, never attended a stockholders' meeting, never knew anything about the affairs of the company, and never tried to find out anything from the company itself about its affairs, and never pro-

tested to any officers of the company about her lack of information or notice of meetings or the conduct of the business of the company. There was nothing so far as she knew that was any different in the sale in 1945 than in other sales of property that had been made. She knew Nephi Hansen and she understood that he was the owner of Granite Holding Company. She never asked Mr. Hansen anything about the company, (T. 161, 162). Mr. Vivian Jensen is the one who solicited her to be a plaintiff in this action. She doesn't know whether or not the property was about to be sold or whether it had been sold. She didn't tell him to file suit. He and her son, Keith, went ahead and made her a party, but she was willing for them to do so, (T. 164). She received dividends for two or three years, but for at least the last 17 years has never received nor made any inquiry. She was told that the company was bankrupt and she couldn't get anything. Her brother told her this, (T. 167). The only other stockholders she talked to about the company was Mr. Rob Young, and he didn't seem to know much about it, (T. 168, 169).

Keith Bates, son of the foregoing witness, testified that in May of 1947, nearly two years after W. L. Hansen took over the property, a meeting of the stockholders whom they could locate was held in the home of Vivian Jensen in Salt Lake City. Clyde Hansen was there, and L. F. Hansen, both of whom he understood to be directors of Granite Holding Company, (T. 170). They asked if the sale of the property in question had been made and they stated it had; that the consideration was

\$8500.00 or \$10,000.00 which had been paid to the corporation (T. 173). Clyde stated that he didn't know what was done with the money. L. F. Hansen didn't say anything, (T. 176). Clyde told them that they were off on the wrong track, there was nothing there (T. 177). Vivian Jensen called the meeting, and his mother authorized him to act in her name. This was the first time he had heard about the sale of the property. He knew his mother had been a stockholder for years, (T. 178), and that he had heard rumors of other sales. He knows nothing about the other sales, (T. 178, 179).

Clyde F. Hansen testified that he was the secretary and director of Granite Holding Company until January 12, 1948. He was secretary and director on July 18, 1945 and had been a director since 1924. Nephi J. Hansen is his father and president of the Granite Holding Company. Laura F. Hansen is his mother, and she was a director of the Granite Holding Company at the time the sale was made. Mary H. Southwick is his sister, and she was a director at the time the sale was made. L. F. Hansen, plaintiff, is his brother and he was a director at the time the sale was made. Hooper Knowlton, another director, is a real estate man in Sugarhouse. He is around forty years old, and is a tenant of his fathers and is in business in Sugarhouse. Joseph E. Jensen was a director and a resident of Sugarhouse, and he is now dead. He died about two years ago, and he was an employee of his father right from the time the business was started, (T. 181, 182). There were several meetings of the directors at the company office around July 18,

1945. He wrote the minutes of the meeting of July 18th (T. 181, 182). These minutes are Exhibit 'D', (T. 183), which was received in evidence, (T. 200). These minutes are as follows:

“MINUTES OF THE MEETING
OF
DIRECTORS OF
GRANITE HOLDING COMPANY

“A meeting of the Board of Directors of Granite Holding Company was held July 18, 1945, at 6:00 P.M. at the office of the company, 2108 South 11th East, Salt Lake City, after due notice and upon call of the president.

“All members of the board, there being only four, were present, the same being Nephi J. Hansen, president and director; Clyde F. Hansen, secretary and director; L. F. Hansen, director, and Joseph E. Jensen, director. President Hansen presided and Secretary Hansen acted as secretary of the meeting.

“The president announced that the purpose of the meeting was to fill vacancies in the Board of Directors. Thereupon, upon motion of Director Nephi J. Hansen, seconded by Director Clyde F. Hansen, the following persons were elected and appointed to the office of director to hold office until the next annual election or until their successors are elected and qualified; Hooper Knowlton, Mary H. Southwick, and Laura F. Hansen. All directors thereupon signed the oath of office and were declared directors of the company, including those newly elected.

“The president announced the purpose of the meeting was to dispose of the company’s property, consisting of the real estate and buildings located at 21st South and 11th East (Highland Drive), Salt Lake City, Utah, subject to the existing mortgage in favor of the Beneficial Life Insurance Company. President Hansen stated that the company had an opportunity to realize the substantial amount of approximately \$10,000.00 for said property over and above the mortgage. The president gave a brief history of operations since the depression, and stated that all stores between the Granite Mart and the Theatre building had been sold to reduce the mortgage.

“After a discussion upon motion of Director Hooper Knowlton, seconded by Director Laura F. Hansen, the following resolution was unanimously adopted:

“RESOLVED, That the company’s property at 21st South and 11th East (Highland Drive), Salt Lake City, Utah, consisting of all of its real estate and buildings at said location, be sold subject to the existing mortgage in favor of Beneficial Life Insurance Company for not less than \$10,000.00 over and above the present amount due on the mortgage, taxes to be prorated as of date of deed, and that the president and secretary be authorized to issue warranty deed as aforesaid to the purchaser and to receive payment therefor, the amount of the company’s taxes, the revenue stamps, and legal expenses, to be deducted from and credited upon the amount to be received for the property.

“AND BE IT FURTHER RESOLVED, That \$5,000.00 be paid to President Nephi J. Hansen in full for back salary heretofore authorized

by the Board of Directors but never paid to or collected by President Hansen, and that said sum be deducted from the amount received upon the purchase of said property.

“There being no further business to perform, upon motion duly made and seconded the meeting adjourned.”

(s) CLYDE F. HANSEN
Secretary and Director

GRANITE HOLDING COMPANY

(s) NEPHI J. HANSEN
President and Director

(s) HOOPER KNOWLTON
Director

(s) LAURA F. HANSEN
Director

(s) JOSEPH E. JENSEN
Director

(s) MARY H. SOUTHWICK
Director

(s) L. F. HANSEN
Director

There were several meetings held just about that time and prior to that within about a month, but prior to that there hadn't been any meetings for a long time, (T. 183). At the time of this meeting there were several vacancies in the board. The first thing done was to fill the vacancies. The directors present before the vacancies were Nephi J. Hansen, Clyde F. Hansen, Lewis F. Hansen and Joseph E. Jensen, and at that meeting there

were added to the board Hooper Knowlton, Mary H. Southwick and Laura F. Hansen, who executed their oaths of office at that time, (T. 184). There was no one present besides these seven directors. Mr. Rawlings was not there. Mr. Jones was not there, nor was William L. Hansen there. William L. Hansen never was present at any directors' meetings (T. 419). At that time the company was the owner of the property at the southwest corner of 21st South and Highland Drive. (T. 184, 185). On the ground floor are located many store rooms, and it is a two-story building in the main building where a number of apartments are located, something around 24, (T. 186, 187). There was a mortgage on the property of around \$74,500.00 with the Beneficial Life Insurance Company which as near as he can remember originally was for \$82,500.00 in 1941 after the sale of some other parcels of property that the mortgage had formerly covered, (T. 187). Previously the Granite Holding Company had owned all the property now held by the Southeast Furniture Company, and also owned the property on 21st South now owned by the Granite Mart and west of the property in question, and those properties were sold off and arrangements were made with the Beneficial for partial releases, and the mortgages in that way dropped down, (T. 187, 188). There were no books or records of the company under his supervision. The records had all been lost before he became secretary. He had no books and records. The company had some income by way of rentals, but the company had no payroll, (T. 189). He signed the deed to William L. Hansen

as secretary of the company. Whenever property was transferred that's about the only time he came into the picture to sign as the secretary. He had signed as secretary for other transfers before the one in question, (T. 190).

After the election of the additional directors in July 1945, the directors proceeded with the business of the sale of property in question which was all of the remaining property of the Granite Holding Company to William L. Hansen. He had previously talked to William L. Hansen about the sale and to his father on numerous occasions. This was not the first time that the matter had been brought to the attention of the board of directors. He had talked to the board on previous occasions, that is the four people who were then directors. He signed the minutes which contained a resolution authorizing him as secretary and the president as president to execute a deed for the sale of this property. Everyone knew that the purchaser was William L. Hansen, although anybody could have bought it then, and they asked Nephi J. Hansen to see if there was a possibility of other sales, and he reported that there wasn't and this was the best deal he could get. William L. Hansen was the only person interested in the purchase of that property, (T. 193). He doesn't recall the date the deed was executed, although the date, July 16, appears on the deed which was not recorded until July 28. It contains the signature of his father as president and acknowledgment before

Hooper Knowlton that it was executed on July 16, (T. 194). He doesn't remember the deal as having been consummated that way, that is the deed on the 16th and the meeting on the 18th, (T. 195). (Later Mr. Clyde Hansen testified that the date of either the deed or resolution was wrong because the deed was signed after the board had adopted the resolution, (T. 285). So there must be a mistake in the deed, (T. 287). The resolution recites that \$5,000.00 of the \$10,000.00 was to be paid to Nephi J. Hansen as back salary.) (No one disputed and there is nothing in the record that this was not a just debt of the company to Nephi Hansen). The board took his father's statement that the company owed him that much, and he, the witness, knew what his father had been getting and what the board of directors had formerly authorized him to take. The other \$5,000.00 he doesn't know definitely what became of it, although he knows part of it went for expenses and taxes which had to be taken care of. The deal contemplated the proration of the taxes between the buyer and the seller, (T. 196, 199). (Exhibit 5 shows that none of the second \$5,000.00 went for taxes). His father made all the deposits which were checked out on his father's signature, and always have been. On his father's signature alone the money could be checked out, (T. 201).

Exhibit "E" is the deed transferring the property from Granite Holding Company to William L. Hansen,

(T. 201). Exhibit “E”, eliminating the description of the property, reads as follows:

“WARRANTY DEED

“GRANITE HOLDING COMPANY, a Utah corporation, grantor of Salt Lake City, County of Salt Lake, State of Utah, hereby CONVEYS and WARRANTS to WILLIAM L. HANSEN, grantee of Salt Lake City, County of Salt Lake, State of Utah, for the sum of TEN and no/100 (\$10.00) Dollars and other good and valuable consideration, the following described tract of land in Salt Lake County, State of Utah:

* * * *

“Subject to a Renewal Mortgage in favor of Beneficial Life Insurance Company dated November 1, 1941, recorded November 10, 1941 in the office of the County Recorder, Salt Lake County, Book 292, Page 31.

"1945 Taxes to be prorated.

“WITNESS the hand of said grantor, this 16th day of July, A. D. 1945 by its proper officers thereunto duly authorized.

GRANITE HOLDING COMPANY

By N. J. HANSEN

ATTEST:

President

CLYDE F. HANSEN

Secretary

STATE OF UTAH,)

) ss.

COUNTY OF SALT LAKE)

“On the 16th day of July, A. D. 1945 personally appeared before me Nephi J. Hansen and

Clyde F. Hansen who being first duly sworn did say: That they are the President and Secretary respectively of Granite Holding Company, a corporation, and that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors and said Nephi J. Hansen and Clyde F. Hansen acknowledged to me that said corporation executed the same.

HOOPER KNOWLTON

Notary Public

Residing at Salt Lake City,
Utah

(SEAL)

My Commission Expires:

February 28, 1948"

The signatures are those of his father and himself. The deed shows it was recorded July 28, 1945.

The witness testified that he gave the minutes, Exhibit "D", to Mr. Jones, the attorney for William L. Hansen, and at that time it was signed by all the directors (T. 422). W. L. Hansen, as it will appear from his testimony, got the deed from Clyde and then authorized Mr. Jones to pay the first \$5,000 to Nephi Hansen which was done upon receipt of the resolution, (T. 314). There had been a meeting on July 11 at which the whole proposition was discussed and decided, and there was a meeting on the 16th when the same matter was discussed. The minutes, Exhibit "D", were first taken in his own handwriting in long-hand and then transcribed, and all

those ~~meetings~~^{meeting} were held at the company office when this matter was discussed. He doesn't remember when the deed was delivered to W. L. Hansen, but it was sometime a week or so after the date of it and after the meeting of the board of directors and after it was signed.

The witness then identified Exhibit 1 which bears the signatures of his father and Lon Fisher with which he is familiar, and contains a resolution of the board of directors of Granite Holding Company which has never been rescinded. The exhibit was received in evidence, (T. 205). Exhibit 1 is the minutes of a special meeting of the board of directors of Granite Holding Company held May 15, 1939, at which all five directors were either present or had executed waivers and consent for all business to be transacted. At that time the minutes recite that the president reported on the condition of the property, and that it was desirable to liquidate as much of the real estate as possible and apply the proceeds to the Beneficial Life mortgage. A resolution was adopted that the president and secretary be authorized "to proceed at once to sell all or any part of the real property and premises of this corporation, at either public or private sale, upon the best terms obtainable, and they are hereby authorized to make, execute and deliver any and all necessary and proper deeds, contracts, and other instruments in order to consummate such sale on behalf of this corporation, and any such sale made by them as herein provided shall be final and binding upon this corporation." The resolution further provided that all proceeds from any sales shall be applied on the mortgage of the

Beneficial Life. After this resolution Granite Holding Company sold property in Sugarhouse to the Southeast Furniture Company which is the property next south to the one in question. That property was the last building built, and the construction was better than it was on any of the other buildings. The floor space would be greater than the property sold to William L. Hansen. An offer was made by counsel for defendant, William L. Hansen, to show by this witness sales of all the remaining property of the Granite Holding Company from a period starting August 11, 1939, down to March 20, 1942, for the exact amount of the mortgage, and that the Granite Holding Company received none of these sums except by way of credit on the mortgage. This offer the court refused, (T. 209).

The witness has been familiar with the property of Granite Holding Company ever since 1923 or 1924, and all that time his father has managed it, and he never recalls a stockholders' meeting or a directors' meeting in recent years except when necessary further to satisfy the mortgage. His father handled the bank accounts, paid the rent, paid the interest on the mortgage, and so far as he knows there were never any inquiries by any stockholders over the years about the way the business was run, (T. 210, 211). There were never any objections about his father selling the property, and there were a number of sales. The physical condition of the property in question when it was sold to William L. Hansen was bad. The buildings on the corner were built in 1900, and it was a common occurrence for his father to have

to pay for some stock that was ruined because of water leaking and pipes breaking. The next building was built in about 1916, and the third building was built a little later. They were all very badly run down. The Granite Holding Company was in bad financial condition—the payments on the mortgage were not kept up. The income was not sufficient at all to keep up the expenses of operating the property including the interest on the mortgage. There wasn't any money to keep up the payments on the mortgage, (T. 212, 214).

At this point an episode occurred which indicated to us that the trial court had already determined his decision in this case. The witness had stated that the company simply didn't have the money to keep up the property. This was objected to, and the court made the following observation, (T. 215):

“THE COURT: I think the objection ought to be sustained. I don't want to limit counsel in getting information before me. Some inference might be had about irregularities in this quick sale, filling vacancies, and so forth, and I let some in, but this detail here doesn't interest me. I don't think it will help me any.

“MR. JONES: Is Your Honor's ruling based upon the ground of conclusion?

“THE COURT: All grounds stated by counsel.

“MR. JONES: If it is on the ground that it is not proper cross examination, that is one thing.

“THE COURT: All grounds you can think of now and all grounds he can think of between now and the end of the appeal, Mr. Jones.

“MR. JONES: Because I intend to renew the question in the main case because I don’t think it is a conclusion.

“THE COURT: As to why they didn’t have money enough or why they didn’t pay that, I don’t care to hear more of that, if there is any way to avoid it, and by seizing on his objection I can at this time.”

There had been no evidence and no inference can be drawn from the evidence that there was a quick sale or irregularities, and the court indicated he wasn’t interested at all in why the company had to sell this property, whether it was in financial distress or not, and that he expected us to have to appeal from his decision.

“MR. JONES, (continuing),: Well, how long had this deal been under consideration. The court just made a statement about a quick sale. How long had this deal been under consideration for the sale of this corner?

“A.: About two months at least.

“THE COURT: The statement I made, Mr. Jones, was a quick sale after the appointment of the three additional directors.”

There was no quick sale after the appointment of the three additional directors. The matter had been discussed for weeks.

Plaintiffs next called the defendant, William L. Hansen, who testified that he was furnished an operating statement of the revenues and expenses and financial statement of the Granite Holding Company for the years 1943, 1944 and 1945, and that his father made up these statements. They were received in evidence as Exhibits 2, 3 and 4, (T. 216). These exhibits show that in 1943 with nothing allowed for depreciation or renovation and payments on principal not fully met, the property produced only \$41.74 more than the bare actual expenses; that in 1944 the revenue was \$527.30 more than the bare expenses, and in 1945 for the first four months the revenue was \$115.80 less than the bare expenses. So for the 28 months in 1943, 1944 and 1945 the property produced \$453.24 with no provision whatever for depreciation, replacement, renovations, and with constantly increasing deficiencies on the mortgage payments. These exhibits also show the names of the tenants, the dimensions of the property, and the date the buildings were constructed, to-wit, 1900, 1907, 1909 and 1917. These exhibits were offered and received without objection. It appears from them that in the 28 months in 1943, 1944 and 1945, that the company paid in salaries for 1943 \$1864.00, or approximately \$155.00 a month; in 1944 \$2266.00, or \$188.00 a month; and in 1945 for the four months \$1274.00 ~~XXXXXX~~, or \$318.00 or an average for the period of \$204.00 per month and a total amount for salaries of \$5404.12. It already appears that there was no payroll, and Nephi Hansen was the only one receiving anything from the corporation, and his salary, as we have

thus shown, averaged \$204.00 a month. It appears thus from the plaintiff's case that the company was paying a management fee of \$204.00 a month as the necessary expense under its own management. This is important in considering the action of the court in refusing to allow William L. Hansen anything paid his father or for his own management and all the advantages that accrued to the property as a result thereof.

Mr. W. L. Hansen further testified at a later time as a part of plaintiffs' case that early in 1945 he had a conversation with members of his family about the Foothills Development property, a different property than the one in question, and that the Sugarhouse property was mentioned only incidentally. The discussion was with reference to dividing up the Foothill Development property between Sid Mullcock and Lincoln Hansen and the possibility of getting some of that property for the family, (T. 304, 305). At that time the witness made a suggestion to his brother, Lew, (plaintiff, L. F. Hansen), that Lew go down to Sugarhouse and spend a little time and see what could be worked out with respect to the Sugarhouse property, which Lew did. Lew reported back that there was no value in the Sugarhouse property, and he would much prefer the Foothills Development property, (T. 306, 307). Witness was also interested in securing a part of the Foothills Development property. His father suggested that he, the witness, do something about the Sugarhouse property, and that he buy it.

The witness got the deed to the Sugarhouse property, but it was not until after the sale, when he saw the minutes, that he understood that his father got \$5,000.00 of the purchase price of the Sugarhouse property, (T. 308). After the sale he was shown the minutes which had been approved, but he had no such understanding prior to that time. His only understanding about his father prior to the sale was that he would try to put the property upon a paying basis, and if he could, he would give his father a job. As far as the allocation of the down payment, he had nothing to do with it. The original check for \$5,000.00 was given at the time of the delivery of the deed, and he had no understanding whatsoever with regard to the operation of the Granite Holding Company or anything about the \$5,000.00 down payment. He knew nothing about the action of the board of directors, (T. 309). All he knew about the financial condition of the company were the statements up to May of 1945, which had been made up from the check stubs in his father's possession and with his father's help. There was no talk then of the purchase of the property, (T. 310). He regarded the Granite Holding Company as his father's company, and the Sugarhouse property was the last of the properties Granite Holding Company had accumulated in all the years in Sugarhouse. His father built the company, and it was his understanding that he owned most of the stock. He felt free to deal with his father with respect to the property if the same was approved by a resolution of the board of directors, (T. 311). When the deed was delivered, he gave the

check for \$5,000.00 but did not get a copy of the resolution at that time. He did not receive the deed and did not have possession of the deed until the day it was recorded. He recorded the deed the same day. The check is Exhibit "G" and is dated July 27, 1945, to Granite Holding Company for \$5,000.00, and is endorsed Granite Holding Company. He delivered the check to Mr. Jones who delivered it to Nephi Hansen, (T. 312, 314). The deed was delivered to the witness from the secretary of the company, Clyde F. Hansen, and the witness notified Mr. Jones to deliver the check. At that time he had not seen the resolution, but he insisted upon a resolution of the board of directors. He assumed that the board of directors had been filled, but he had no idea who was going on the board, and he didn't talk to his father about filling up the board except that it would be necessary to have a complete board, (T. 316, 318). The endorsement on the back of Exhibit "G", the check, looks like his father's. The check cleared through the witness's account in the Yellowstone Banking Company, and he parted with the money represented by it which was actually paid to the company, and he knows nothing about where it went afterwards. Exhibit "G" was received and offered in evidence, (T. 320). Witness paid another \$5,000.00, and since he went into the property he spent better than \$14,000.00 more of his own money and about three years of work for which he has taken nothing, (T. 320). Exhibit 5 also identified by the witness which is a check for the ^{remainder of} ~~purchase~~ \$5,000.00 of the purchase price, dated December 26, 1945, and to which is attached

a statement of December 28, 1945, being a receipt from Granite Holding Company for the purchase price in full, and from the second \$5,000.00 are deducted items which W. L. Hansen had paid which were the obligations of the Granite Holding Company in the amount of \$1219.76. Nothing from the purchase price was applied to payment of taxes, the taxes having already been set aside by the Beneficial Life from the payments made on the mortgage by the Granite Holding Company. The second check is for \$3,780.24 which with the \$1,219.76 already paid by W. L. Hansen makes the total of \$5,000.00. This check is also endorsed Granite Holding Company in his father's handwriting. The check cleared through his bank account at Sugarhouse and came out of his funds, and he parted with the full \$5,000.00, and he received no return of cash from either payment, (T. 321, 322). Exhibit 5 is also endorsed Granite Holding Company and initialed "N. J. H." in, he thinks, his father's handwriting, (T. 323). He is not familiar with the Granite Holding Company. The exhibit 5 was received in evidence, (T. 324). He had nothing to do with filling the board of directors of the Granite Holding Company. He has never been a stockholder or a director of the Granite Holding Company or had anything whatsoever to do with it. He paid everything he thought the property was worth, and the Exhibits 2, 3 and 4 represent to the best of his ability the information as to the actual income and expenses of the property before he bought it, (T. 325).

W. L. Hansen also testified later that he was never at any meeting at his father's house when he made the statement that all he wanted was to save the property for the family. He never made any such statement, nor was he at any meeting of the family when Lew said that he (Lew) wanted to save the property for the stockholders. "Lew has never been interested in saving for the stockholders." He was never present on any occasion when Lew ever protested his purchase of the property, (T. 433, 434).

Mary Hansen Southwick was called by the plaintiffs and testified that she is the daughter of Nephi Hansen and that she attended several meetings; that she signed Exhibit "D"; that she acted as a director because her father requested her to; that she was a director and had a share of stock. She assumes that it came from her father as her father owned most of the stock of the corporation. She recalls the occasion when the matter of the sale of the property to William was discussed which she had heard of prior to that time. There were two or three meetings. Her father was getting along towards 80. They were worried about him and felt that he had too much to carry and something ought to be done to relieve him, (T. 262). She knew that they were considering selling the property to William; that her father was having a time paying the mortgage and interest, and that he needed help. She doesn't remember whether her mother was at the meeting or not, but she would recognize her mother's signature if she would see it. The sale of the property was discussed with

her mother. Her memory is indistinct because she didn't have any occasion to remember any of these matters. She never thought that any of these matters would be questioned, (T. 263, 264).

William S. Young testified that he is the son of Robert Young, named as a plaintiff, who in his lifetime was a stockholder of Granite Holding Company, and that he, the witness, is now the owner of Robert Young's stock by virtue of a decree of distribution; that said stock amounts to 45 shares of preferred stock. Counsel for plaintiff stated that he had the certificates bearing the endorsement of the administrator of the estate of Robert Young, and that there is a decree of distribution distributing the stock to the witness.

“MR. JENSEN: * * * Is that true?

“MR. JONES: Well, you say there is. I have never seen it.

“MR. JENSEN: Well, I haven't seen it either, but Mr. Young was one of the administrators, and he tells me—was there such a decree, Mr. Young?

“A. Yes. Mr. P. H. Neeley of Coalville can furnish all that.” (T. 274, 275).

That is all there is as to this witness or his father being a stockholder. Witness stated that he had known Nephi J. Hansen since 1918, and that from time to time he has talked with him. He used to meet him on the streets in Sugarhouse; that he met him in the early part of August, 1945, after this stock was distributed to him,

because Nephi Hansen had contacted the witness's sister to get in touch with him. He went to Mr. Hansen's office on Hightland Drive and they talked about different things. The conversation was objected to and sustained as to William L. Hansen, (T. 276). The witness said Mr. Hansen offered some holdings in Parley's Canyon in lieu of witness's stock in Granite Holding Company, and the witness told him he wasn't interested. The witness asked him if he were ever going to receive anything, and Mr. Hansen did not answer the question. He didn't tell Mr. Young that he had disposed of the property on 21st South and Highland Drive. Witness didn't tell Mr. Hansen anything about being a stockholder. He had his stock with him, but didn't show it to Mr. Hansen, (T. 278). He had a conversation with Mr. Hansen in 1946 when Mr. Fay Bates was present. This was in his office on Highland Drive. Again this was objected to and sustained as to W. L. Hansen. This was in the summer of 1946, and they didn't get anything out of Mr. Hansen. They told him they wanted to find out about the Granite Holding Company, what the rentals and revenues were, and he made no reply except to say that his salary would eat up everything, and he didn't mention the fact that William L. Hansen had purchased the property. At this point the court asked plaintiffs' counsel which one of the men hired him, and the counsel replied: "I refuse to answer." (T. 279). The witness said he wanted to be made a party plaintiff; that he thought all the time he was a party plaintiff, and William S. Young was thereupon substituted by the

court for Robert Young as a party plaintiff, (T. 280). A little over a year ago Keith Bates told him the property had been sold. The witness never got notice of stockholders' meeting, never attended a stockholders' meeting, never got any information of any sort from the company, although his father knew Nephi J. Hansen prior to 1920. They were interested in the Sugarhouse Bank together. His father died in 1930. Nothing was ever said in either of the foregoing conversations with respect to the books or records of the company, and witness never asked anything about them. He has been the owner of the certificates since 1937, and they were in the safety deposit box from 1930 until that date. They didn't get around to having the father's estate straightened out until 1934, although he knew the stock was in the box all the time. He and his father had holdings in Sugarhouse, and they used to see Mr. Hansen who was also interested in the Sugarhouse Bank, (T. 282, 284). Witness only knows in a general way what the Granite Holding Company owned in Sugarhouse. He understood they owned the Granite Mart, (one of the buildings sold by Mr. Hansen prior to the present sale). Witness wasn't much interested. He thought they owned the Southeast Furniture Company. He only knew in a general way, (T. 284, 285). There was never any dividends turned in by his father, and he never saw any dividends from the Granite Lumber or Granite Holding Company. Nephi J. Hansen ran the Granite Holding Company. He didn't know who the directors were except Lon Fisher, and he didn't inquire as it was none

of his business, (T. 286, 287). The witness evaded a direct answer as to whether after his father died he ever attempted to find out anything about the Granite Holding Company, (T. 287, 288). He never did anything about the Granite Holding Company, (T. 289). Nephi Hansen was running it, and he let him run it without objection as he saw fit. He never knew what his rights were in the event dividends were not paid, (T. 289).

Ralph Cutler was the next witness. He testified that he was the owner of 35 shares in the Granite Lumber Company, and that he has owned the shares since October 2, 1920, September 16, 1921 and December 4, 1923. The certificates are for common stock. He also has owned since October 2, 1920, 10 shares of preferred stock. He received preferred stock dividends for two or three years. He has forgotten the amount of dividends in percentages, (T. 293, 294). He has never been informed of any stockholders' meetings, never received notice of any stockholders' meetings or actions taken by the board of directors, although he was well acquainted with Nephi Hansen and lives in Salt Lake City, (T. 294). He has never talked to him about the Holding Company. His contacts with Nephi Hansen ceased around 1924 or 1925, (T. 295). When the holding company took over, he often met Mr. Hansen after the insurance company, the mortgagees, had taken over the property, and he was operating it under their direction. This was around 1930 and 1935. He has seen him several times but never talked business with him. Last year was the first time he heard that the remainder of the pro-

perty had been disposed of. He is a plaintiff, and his name is on the complaint with his consent. After the holding company took over, he realized that it had gone broke. Mr. Hansen told him he was operating under the direction of those who held the mortgage and was taking care of the buildings and collected the rents and so forth, (T. 295). The witness had the impression the property was taken out of Mr. Hansen's hands, and he was just operating it under the direction of others who controlled the property. He never knew the situation exactly. Mr. Hansen never told him anything. Whenever he would ask about the affairs, Mr. Hansen would evade a direct answer, although at one time he said: "If there is anything left out of this company, I'm going to see that my family gets it." This statement was made between 1930 and 1935 when Mr. Hansen was in charge of the buildings, (T. 298, 299). He never made any effort to remove Mr. Hansen as president. He didn't know anybody else who held any stock. He felt that his investment was not a good one and he didn't want it advertised around. He never made any effort to change the method of operation of the Granite Holding Company. He knew Nephi Hansen was running it and intended to run it, (T. 299). Witness just let things slide, (T. 300). From the early 20's until the time this property was sold in 1945 he made no effort concerning the Granite Holding Company to go to stockholders' meetings or change the management or control the property. Vivian Jensen is the one who contacted him about this action.

He hadn't paid any attention to his stock holding until Vivian Jensen came to see him, (T. 203).

Lewis F. Hansen testified for the plaintiff that he is a brother of William L. Hansen and was one of the original plaintiffs in this action, but that he was dismissed as a plaintiff by order of the court; that he was one of the board of directors at the time the resolution was passed, Exhibit "D", on July 18, 1945. He signed the minutes but claimed he signed them four months after the date and under protest, (T. 327). He didn't know anything about the purchase of the property by Bill until after the deed was signed. He had conversations with Bill before the purchase of the property but not about the property, but in the latter part of 1945 he had a number of conversations and had some difficulties with his brother, and he brought this suit against him. There was a meeting at his father's house. At that meeting his father and mother were there, his sister and her husband, Clyde and himself. That was when Bill was trying to get the approval of the family for him to take over the property. At this meeting as far as he knew the sale had not been consummated. It was the same week that the board of directors' meeting to discuss it, (T. 329, 330), was held. At this point in the testimony Mr. Jensen, attorney for plaintiffs, and the witness became confused about which meeting they were talking about, and witness stated after examining Exhibit "D" that he wasn't at this meeting, but that he signed the minutes as indicated thereon under protest four or five months later. There was a meeting at Bill's

house after the resolution of July 18 was passed when the two sisters and three brothers met to arbitrate a settlement between his brother, Lincoln, and the rest of the family. This was after the deed to Sugarhouse had been given. The witness here changed his mind about the meeting and said it was at his father's house, (T. 332, 333), and that it was before the deed was given. The deed wasn't acknowledged on the 16th of July as it states. The meeting the witness is now talking about took place before the deed was acknowledged, and the meeting was on the 14th of July at the folks' house, and there were present his two sisters, his brother, Clyde, and his brother-in-law, Southwick, himself, his mother and his father and Bill, (T. 334, 335). At this meeting, which according to the witness was before the deed was delivered or before the resolution was made, the witness, although he had already stated that he knew nothing about the transaction until it was consummated, stated that Bill had made an offer on this property and at this meeting, he said: "I think we ought to do something about the stockholders", and Bill caused more or less of a scene, and he thought it was none of the witness's business about the stockholders; that his father had control and could do what he wanted and that was all that was said about it, (T. 336). (Note: the witness, however, signed the resolution with no reservation contained thereon), and continuing the witness stated that he signed the minutes, which according to him would be later, authorizing the sale of the property, and he signed them as a member of the board of directors. Several

months after Bill took over the property, between three and seven months, in Bill's office in Sugarhouse, Bill told them that if they didn't leave him alone he was going to sell the property. It wasn't long after that that he filed the complaint, (T. 337, 338).

On cross examination the witness stated that he was very antagonistic to his brother, admitted that he had sued his brother and the jury found in favor of his brother, denied that he threatened in Mr. Jones' office that if Bill didn't kick Lincoln out of the beer parlor located in the Sugarhouse property, that he would see that Bill didn't get the property, and denied that that was the reason he filed the lawsuit, (T. 340, 341). There was a formal meeting of the board of directors in the middle of July. His father and Clyde and Knowlton and himself were there, and at that meeting they authorized his father to check the possibility of a sale of the Sugarhouse property. No purchaser or purchase price was mentioned, (T. 342). The court refused to allow counsel to test the credibility of this witness on his statement that he desired to save the property for the stockholders, and the tender was made by Mr. Jones, counsel for the defendant, William L. Hansen, to show that this witness knew there was nothing in the property for the stockholders, and so stated. Even counsel for the plaintiffs agreed with the court that such evidence was material, but the court refused to permit it, (T. 343, 344). The witness admitted that Bill had offered \$10,000.00 for the property, and when he said that he wanted to save the property for the stockholders, he

meant all the stockholders including his father, and that it was for his father's protection because he was a heavy stockholder, (T. 344). The witness had just stated that Hooper Knowlton was at the meeting where he, the witness, was, and the record already shows that Hooper Knowlton was made a director at the same meeting when the resolution, Exhibit "D", was adopted. The board of directors meeting that he attended was when they authorized the father to check into the advisability of selling the property and to see what he could obtain, That was between the 10th and the 20th of July, and the date shown on the deed, July 16, is the day before the meeting in Sugarhouse when this authorization to the father was made. He was present at the meeting, (T. 345). He doesn't recall whether he signed his oath of office as a director the same day he signed the minutes. He doesn't remember whether he signed them both at the same time, and upon being shown his oath of office which was signed July 18, he stated he didn't sign the minutes the same day, (T. 346, 347). The witness admitted that the condition of the Sugarhouse property was going down and how it could be saved from foreclosure by somebody purchasing it had been discussed for months before the actual sale to the defendant, William L. Hansen, (T. 347, 348), and that the physical condition of the property was going down. Witness stated that he was collecting most of the rent most of the time and that "all tenants were anxious to have a longer lease and raise their rent." (T. 348, 352). When asked if that's why they wanted to sell

the property because the rents were going up and tenants were asking for increases and longer leases, the witness evaded an answer, (T. 352, 353), although he had just testified that the meetings between himself and his father and other members of the family were to try to salvage something out of the property if possible, (T. 349). Bill was not a director or a stockholder. The witness had testified that he never knew about the sale of the property until after it was consummated, although he attended meetings prior to the sale at which the matter was discussed, and that Bill had offered \$10,000.00 for the property, (T. 344), and the board of directors had authorized his father to look into the advisability of selling the property, (T. 345), because something had to be salvaged from it. He then testified that the tenants were urging that their rents be doubled and their leases lengthened, but refused to answer the question as to why when the property was going up and everything was fine and lovely and tenants were asking that the rents be doubled, the directors wanted his father to check into the advisability of selling it. Upon being pressed for an answer to this question, he then admitted that he knew or assumed that Bill was figuring on buying the property and had been talking to his father about it, (T. 353). On further cross examination the witness admitted that the upstairs is rented in apartments at \$25.00 each, and that these are under O. P. A., and the rents couldn't go up and were frozen and couldn't be increased, and that the tenants couldn't be put out, (T. 354, 355). Mr. Jensen, counsel for the plaintiffs,

objected that regardless of the O. P. A. regulations you could put them out, but the court said: "You could down here. I never could get the Supreme Court to tell me whether—". The court apparently changed his mind on finishing this sentence, but it is obvious that he was about to say that he could never get this court to tell him what was to be done, so he was granted the motion to strike out what was said about the O. P. A., (T. 355). Although the witness had testified that he was there most of the time and collected most of the rents most of the time, on cross examination when asked if he discussed with the tenants about expanding on the lower floor and giving room upstairs, the witness said: "I had nothing to do with that", (T. 355).

The plaintiffs offered Werner Kiepe as an expert on real estate values. Mr. Kiepe testified that he was a real estate broker engaged in the business of real estate appraising since 1928, and generally gave his qualification including the fact that he was the first man to qualify in the State of Utah for the American Institute of Real Estate Appraisers, (T. 218, 220); that he appraised the property and improvements at the southwest corner of 21st South and Highland Drive in Sugarhouse with special reference to its market value in the month of July, 1945, and that he was familiar with real estate values in Sugarhouse, (T. 220); that he made as much of an inspection of the building as he could get into and also examined the data contained in the deposition of Mr. W. L. Hansen which are Exhibits 2, 3 and 4, the financial statements for 1943, 1944 and 1945. He

made only one inspection, and that was yesterday, (T. 222). The witness was testifying on Monday, June 21, 1948, so the day he made the inspection was Sunday, June 20, 1948, (T. 256). When all the stores were closed but one, and he wasn't able to get into any of the stores, and all he was able to get into in the building was the boiler room in the basement and upstairs, and in none of the stores downstairs. He made his appraisal from what he saw from the outside, (T. 256, 257). His appraisal was made on the assumption that the figures in Exhibits 2, 3 and 4 were true, (T. 222). He measured the exterior of the building and noted the construction. They are brick buildings with frame interiors, stone foundations with some concrete. He didn't have a chance to view the entire foundations. The buildings evidenced that they were of average construction, and he took Mr. Hansen's testimony that there was 293,000 cubic feet, or about 16,500 square feet on the ground floor, and he doesn't remember the second floor. (T. 222, 223). From this examination made as above indicated three years after the sale he arrived at a market value of the building of July, 1945, at a replacement cost of \$115,000.00, (T. 228), the land being valued on the corner piece 48x85 at \$500.00 a front foot, and the remainder \$350.00 a front foot, making a total value of the land without improvements, of \$80,000.00, then the cost of the buildings new at \$117,200.00 with the depreciation factor of 70 per cent or \$82,040.00, or a depreciated value of the buildings of \$35,160.00 or a total value of \$115,160.00 for land and buildings. (T. 226, 227). \$115,000.00 is

the ultimate figure he wants to give, (T. 228). There has been nothing sold in the immediate vicinity to his knowledge that is comparative and nothing in that vicinity that would give him a direct bearing, (T. 230). It was agreed that a part of the description included in the *lis pendens* from which the witness measured the land was incorrect because it didn't belong to the Granite Holding Company, and Mr. W. L. Hansen had to quit-claim it back to the original owner, (T. 234). On cross examination the witness stated that the \$500.00 a foot value covered all of the property on 21st South to its full depth and the balance on 11th East is the \$350.00. These figures are based on his judgment, and his judgment comes from a valuation of the property in order to have it pay a return, and secondly on sales of vacant property; that there have been no sales in Sugarhouse for quite a long time, but this month there was a sale at 10th East and 21st South at \$400.00 a foot, but that that property is not comparable and that the values would be 20 per cent higher today than they were in 1945, but the property that sold for \$400.00 a foot would probably be a little more than 20 per cent, (T. 236, 237, 238). The witness admitted that in July, 1945, the market was depressed. We were still in a war economy. Some merchants were expanding as fast as they could, others were having difficulties in securing materials and merchandise. There were buyers anxious to make investments. There was apprehension about the extension of O. P. A. to commercial property and freezing of rents on business property, (T. 238, 239). He doesn't know of any sales

in Sugarhouse or in that vicinity for \$500.00 a foot even today. The sale of the property on the notheast corner of 21st South and Highland Drive (11th East) in 1936 or 1937 was for \$75,000.00. He understood that the Southeast Furniture Company bought their property from the Granite Holding Company. He hasn't looked at it from the point of view of an appraisal. He doesn't know that it was sold for \$65,000.00 in 1939. He knows where the Granite Mart is, and it is on 21st South right adjoining this particular property. He thinks there is about 77 feet there. He doesn't know how deep it is and doesn't know that in 1941 that property sold for \$43,000.00. It is a two story building and is about the same age as the south building on the subject property built probably before 1920. He only knows the condition of the property in question here in 1945 in a general way. He took into consideration the figures of income and expenses for the three years, 1943, 1944 and 1945 and took into consideration that those were the actual figures without anything for depreciation, and he didn't find that the property operated at a loss, (T. 243). A purchaser if he didn't have \$115,000.00 would be quite interested in the mortgage, and that would enter into his idea of values regardless of theoretical figures of \$500.00 a foot and \$350.00 a foot. He would want to know whether the property would pay for itself, and if the property wasn't paying for itself and wasn't paying the interest and wasn't paying the mortgage, it would be worth a good deal less than \$115,000.00, (T. 244).

The witness on further cross examination admitted that when he had stated that the Granite Mart with 77 feet at a purchase price of \$43,000.00 was \$600.00 a foot, that the \$600.00 a foot was not the value of the land; that it included the building, so that without the building on it it would be about $\frac{1}{2}$ of the \$600.00 a foot value, (T. 245). The witness further admitted that the property in question when he inspected it yesterday showed that there had been improvements made of recent origin, and that it would be improper to include them in arriving at a reproduction cost as he had done; that he has no way of knowing what has been spent on this property on improvements since 1945 and that his replacement figures are replacement of the building as he saw it yesterday, (T. 247). He thought the salary paid Mr. Nephi J. Hansen as shown by Exhibits 2, 3 and 4, was fair, (T. 249), and he also thought that his judgment as to replacement cost would be changed by a better knowledge of improvements which had been made between 1945 and now, and that replacement costs are higher today than they were in 1945, and that improvements done since 1945 would cost more than they did in 1945, (T. 250). He tried to depreciate the property by replacement costs in 1945 without knowing what the new improvements were since that time, (T. 252), and the witness finally admitted that if the corporation had operated the property so that for the three preceding years it did not produce revenue sufficient to pay for itself that it would be worthless because "some-

thing that doesn't produce any profit is worthless'', (T. 253).

On behalf of plaintiff Eugene P. Watkins testified that he was the secretary of the Beneficial Life Insurance Company, the mortgagee of the property in question; that on December 1, 1945, the mortgage was \$75,000.00; July 18, 1945, it was \$74,500.00; September 8, 1945, \$73,938.30; that the mortgage in 1941 was \$82,528.13; that in the year 1945 up to July only \$500.00 had been paid on the mortgage, (T. 265, 266); that under the mortgage after January 1, 1943, until October 1, 1951, there was due under the mortgage \$500.00 per month plus accrued interest, and then all of the unpaid balance and interest were due, (T. 267, 268). For 1945 up to July there had been paid on taxes a total of \$1961.76 made in several payments, and interest was paid August 1, 1945, (T. 268); that the Beneficial Life in November, 1945, paid taxes in the amount of \$2770.38. The mortgage provides that the mortgagor must make a deposit each month during the life of the mortgage for the payment of taxes. Their custom was to appropriate the money first for the interest, then for the taxes, (T. 270). The total amount of taxes paid in 1945 was paid from deposits made by the mortgagor, (T. 271). On December 1, 1944, the mortgage was considerably delinquent and even more delinquent in July of 1945, and the mortgagee had not waived payment of the \$500.00 monthly payment on the principal, (T. 271). The renewal mortgage in 1941 of \$82,000.00 was a renewal of a previous renewal of \$127,500.00 which in turn was a renewal of a

previous mortgage of \$200,000.00, and that mortgage was in turn a renewal of the previous mortgage of \$150,000.00. The original mortgage was made April 22, 1926, to the Granite Lumber Company for \$150,000.00, then increased in 1927 to \$200,00.00, and in December, 1939, renewed for \$127,500.00. The principal payments on the mortgage were made by conveyance of the properties and the purchase price applied on the mortgage, (T. 271, 273). The balance due on the mortgage on June 1, 1948, was \$61,500.00, (T. 273).

At the conclusion of the plaintiffs' case defendant, William L. Hansen, made a motion for a non-suit upon the ground that plaintiffs' evidence showed that William L. Hansen paid a valuable consideration for the property; that the board of directors formally passed a resolution authorizing the sale; that the sale was made in compliance with the resolution; that the corporation took his money and still has it; that there is no evidence of fraud. William L. Hansen wasn't a director or stockholder, and that he dealt with the company in the same manner as the public had dealt with it for at least 25 years; that in 1939 the board of directors authorized the president and secretary to sell all of the properties as became necessary in their judgment and as the secretary and president had done on numerous occasions; that none of the plaintiffs and no stockholder at any time had complained of the manner in which the business of the company was transacted or made any complaints of any kind; that there was no collusive agreement, no unfair advantage taken of the corporation;

that the evidence shows that the property was not even meeting expenses, was deteriorating, the company was delinquent on the mortgage, and that it had lost all of its other properties merely for the amount of the mortgage, whereas, this sale was the only sale ever made where any money was actually received by the company over and above the amount of the mortgage. What became of the money after it was paid to the company was no concern of this defendant, and he had no right to exercise any control over its disposition; that this defendant had no knowledge of any defects, if any there were, in the resolution or the minutes, and that the Granite Holding Company and the stockholders are bound as against this defendant, whether the directors were de facto or de jure. There was nothing unusual in this transaction except that the company got more out of it than it had in other sales; that Nephi Hansen according to the plaintiffs had always operated the company as his own without objection from them. The court denied the motion for non-suit. Motion for non-suit was also made on behalf of Granite Holding Company and denied.

DEFENDANTS' WITNESSES

On the question of the value of the premises at the time of the purchase the defendant, William L. Hansen, offered two witnesses—Richard F. Harding and S. R. Nielson, (T. 364, 384).

Mr. Harding is executive vice-president of the Salt Lake Real Estate Board and former manager for eleven years for the real estate department of First Security Trust Company; also secretary of the Real Estate Board's Appraisal Committee, experienced throughout these years in the appraising and managing of all types of property, a civil engineer and associated with all phases of real estate, (T. 364, 365). In 1945, particularly in June and July, he was personally familiar with the property under consideration, had been on the property, knew its physical condition, had considered a statement that had been submitted to him with reference to the income and expenses, and he had at that time made an examination of this property for the specific purpose of determining its valuation. He does not recall at whose request but does know that he wrote a letter to Nephi Hansen with respect to the valuation, and that he took into consideration the income, the rents, the age of the building, the location, the physical condition of the property; that he had a general knowledge of property values in that vicinity, together with the real estate board's official publication fixing front foot value of land throughout the entire city regardless of whether or not there is a building on such land, and that valuation is still in use and was in use in June and July of 1945, (T. 367, 368). Land values in Sugarhouse have changed very little since 1936 because the traffic is not properly channeled through the streets there. There is no parking available, particularly along the south side of 21st South and along Highland Drive. This is forcibly

brought out by O. P. Skaggs moving out of the district. As a result of his experience and personal examination at the time, he came to two conclusions—that in view of the fact that the owner of the property had been unable to show any net return, that the property from a financial basis was not worth more than the mortgage. In fact, they were not making principal payments on the mortgage. He also secured a current cost of reproduction after breaking the property into four parcels, each with a different age, and depreciated them to the current life from the estimated ages furnished and reached a conclusion of \$90,000.00 as a total value of the property. He qualified this value by the condition that it was worth that much only if the postwar retail market was as anticipated by the optimistic economists. Under the management of the Granite Holding Company the property was not worth more than the mortgage itself, (T. 368, 369). The roof was in bad shape, fire walls showed considerable disintegration, the store fronts were obsolete, the apartments were in bad condition and frozen at an uneconomic rental. In fact, the property would have been better off without the operation of the apartments. In his judgment it would have cost at that time upwards of \$50,000.00 to do anything to put the property in competition with property across the street. Exhibit 6 was offered which is Mr. Harding's letter to Mr. Nephi Hansen, was objected to and objection sustained. Exhibit 6 establishes the date and the circumstances and should have been received in evidence. It is here before this court for examination and shows that

Mr. Harding's report to Mr. Hansen was made June 12 and made no allowance for depreciation. This should have been received in evidence as it shows that there was a basis both on the part of the defendant, Granite Holding Company, and the defendant, William L. Hansen, for the purchase price paid for this property, (T. 369, 372).

On cross examination Mr. Harding stated that at the time he examined the property his recollection is that the occupancy was complete. He knew from his experience in property management for many years that the statement furnished him as to expenses of operating the property would be approximately correct. He definitely charged to the expense of operation interest on the indebtedness against the property. If you don't make the interest payments, you don't have any property, (T. 372). He recalls that the mortgage was approximately \$72,000.00 to \$74,000.00. The Salt Lake Real Estate Board is made up of real estate agents and people engaged in the real estate business in Salt Lake City and also has a division of apartment house owners, and the witness is also executive vice-president of this division. The fee for managing property is in some instances higher than 5 per cent and in some instances as low as 3 per cent of the gross income of the property. He was not interested in what Mr. Hansen thought of the property. He reached his own conclusion. Mr. Hansen did not ask him to depress his appraisal, and you can't say generally that there was or was not an increase in real estate values in 1945 or 1942 or 1943 with-

out analyzing the specific property in question. You can't make a generalization about it, (T. 380, 381).

Mr. Nielson testified that he is the executive vice-president of the First Security Bank of Utah in charge of the Real Estate Department and the mortgage loan appraisals, and that he has been appraising property for mortgages with that company and its predecessor since 1921. He has been salesman, salesmanager, assistant in the mortgage department, assistant vice-president, preceding his present position as executive vice-president. His business is appraising business and residential property for mortgage purposes and occasionally for sales purposes. He was familiar with the property under consideration in Sugarhouse in June and July of 1945. He had been in several of the buildings at various times and had inspected it for the bank and appraised it. In June and July of 1945 he went all through the property, familiarized himself with the income and expenses. He was familiar with the values in Sugarhouse. His own company has a branch there. He is familiar with values in Sugarhouse, (T. 384, 387). After his examination for the bank, he quickly decided it wasn't a property upon which the bank would loan money, and he told Mr. Nephi Hansen that the bank would not entertain a loan. He came to the conclusion that if the buildings were managed more efficiently and some money was available to make some repairs and improvements that were necessary, the property might be worth \$90,000.00, but it was necessary to make improvements in many places in order for it to be worth that amount,

(T. 387). The roof was in bad condition, and you could see evidences of leakage in the apartments upstairs and in the stores downstairs. The fire walls and cornices were deteriorated to a point where it was dangerous. The store fronts were not modern, (T. 388). On cross examination he reiterated that he made his examination for the purpose of appraising the building to see whether it was desirable for the bank to make a loan on it, and the bank as a result declined to make the loan, (T. 390). He thought the property was worth \$90,000.00 only if some money was spent on it and good management was secured for it. He was qualified to express an opinion on the value. \$90,000.00 was not the fair market value of the property. It would only be the market value if those things were done. He measured the buildings, and from a cubicle measurement you can get quite an inflated idea of value if you want to. You can build it up or knock it down, and he was influenced in declining the loan to some extent by the way the property was managed and operated and all the rest of the factors that he has stated, (T. 392). Nephi J. Hansen is the one who asked him to come out and look at the property for the purpose of getting a loan on it. On redirect, he again stated that his value of \$90,000.00 was not based upon the management the property then had, but upon future good management, plus the needed repairs. He has an opinion as to front footage value on that property, and using Mr. Kiepe's map, instead of \$500.00 a foot, he valued the property at \$350.00 a foot, probably nearer \$300.00, and the balance of it at \$225.00 a foot,

which would be a total of either \$50,000.00 or \$55,000.00 for the real estate, depending upon whether you use \$350.00 a foot or \$300.00. This was its value for either loan or sale purposes, (T. 394). He and his company are pretty fair about values. He understands market value to be what a willing purchaser is willing to pay a willing seller, (T. 395).

The defendant, W. L. Hansen, testified that he became interested in the property in May of 1945, because he had raised some money to buy a hotel in Oregon, and the deal fell through. He had about \$20,000.00 and was looking for a place to put it. He was asked if he would consider working out some kind of a program on the Sugarhouse property which was very much run down. His mother was the first one who asked him if he couldn't do something about it, and later he was asked by his father. His father and mother asked him. He did not ask them, (T. 397, 398).

He was not in Sugarhouse for a good many years. From 1936 until 1942 he operated his hotel in Ashton, Idaho. In 1942 he leased his hotel and was trying to get a dehydration plant started in Idaho. Then he spent some time on his wife's folks' farm in Farmington. He was not in Sugarhouse but a very few times before the actual deal for this property was made. He had nothing to do with the management of the property and nothing whatever to do with his father's business at all. He had not been close to his father. They had had differences on other property, and they were just not very

close. He had no business connection with him whatsoever, (T. 399, 400). When his mother and then his father asked him to make an investigation of the property, he went down and looked it over to see what could be done. He understood his father was the principal stockholder and didn't even know there was any preferred stock or anything about the operation of the business, (T. 400). The physical condition of the property was very bad. One building was built about 1900. There was a lot of lead pipe fixtures for drainage that were breaking very often. The apartments upstairs were not kept up. There was a low O. P. A. rent fixed on them. On the ground floor there was one place not occupied. The rents were all low. There were no basements under about half of it, and some of the bricks on the base of the corner property which was built about 1900 had begun to decompose next to the stone foundations, which created a very hazardous condition. He examined the income, and the sheets, Exhibits 2, 3 and 4, in evidence were compiled from that examination. He consulted with persons who had knowledge of values in Sugarhouse, to-wit, Governor Mabey, George Cannon, Vice-President of the Beneficial Life Insurance Company, Junius Romney, who is administrator for Barnard Stewart's estate. He knew the values that Harding and Nielson had fixed on the property, and he made all these investigations and examinations before he made any offer. He made the company his offer for the property, and they had it under consideration for approximately six weeks. He never had any meeting with the board

of directors or attended any directors' meetings. He said nothing to any of the directors with reference to his purchase except to his father, and all he did to him was to submit the offer to accept or reject as the board saw fit. The board accepted it, and he paid his money and got his deed. His father showed him a letter from the Beneficial Life showing what the sales were for the various other pieces of property and how they had been applied on the mortgage. He had this in mind he recalls at the time of the purchase, (T. 400, 404). He knew what the sale price of the property to the Southeast Furniture was, and the Southeast Furniture property was \$65,000.00. Those buildings were comparatively new, built of fire brick, had good cement and steel reinforcements for foundations, and had much more square footage than the property he bought, and at least twice or maybe three times more ground than the property he bought. He made a calculation at that time as to what it would cost to make needed repairs, and that was \$10,000.00, (T. 405). Governor Mabey is in California. He had tried to get him here for this hearing. Plaintiff's counsel objected to witness testifying whether Governor Mabey advised him to buy or not. The witness conferred with Governor Mabey who had been in business in Sugarhouse for many years in real estate loans and building finance company, (T. 405, 406). He had not had any meetings with the family with reference to purchasing the property until one meeting immediately prior to the day before the deed was granted, (T. 406).

He talked to his brother, L. F. Hansen, about the property and the condition it was in in the early spring of 1945 and suggested that L. F. Hansen go down and help their father and see if there wasn't a possible chance of saving anything out of the property. Later L. F. Hansen reported there wasn't any value there. It wasn't worth the mortgage, and L. F. Hansen refused to have anything to do with it, (T. 407, 408). The witness made no efforts whatsoever to influence the directors of the company one way or another. Since he bought the property he has put in it of his own money a minimum of \$14,000.00, (T. 408).

His father has operated the Granite Holding Company as long as he can remember. He never remembers anyone else having anything to do with it or the sale of its property. In his deal with the Granite Holding Company the company was represented by Attorney Ed. Clyde. He didn't talk to merchants in Sugarhouse as to what they thought the property was reasonably worth, but he talked to people who were familiar with business conditions there, (T. 410). He does not know whether any offer had been made through any real estate companies placing this property up for public sale. As far as he was concerned his father was the entire company subject to the approval of the board of directors.

On behalf of defendant, Nephi Hansen, Clyde F. Hansen was recalled and testified that he is the oldest member of the Hansen family; that he was a stockholder

in the Granite Lumber Company and the Granite Holding Company; that he has about \$4,500.00 in the company and is very interested in it, has been secretary since 1929 until the first of this year, (until the first of 1948), (T. 414). During the winter and early spring of 1944 and 1945 he discussed with his father the situation so far as this property was concerned. It was when there was snow on the ground. His father called at his home in his car and took him up to Ft. Douglas, and they parked there and talked for an hour or more, (T. 415). Objection was made to relating the conversation and in the course of the discussion the court said to counsel for plaintiffs:

“I suppose you have got to show some kind of collusion in here between this corporation, the alter ego of Mr. Hansen, and William L. Hansen in the purchase of the matter. * * * I think I ought to hear it. The objection will be overruled.” (T. 416).

The witness continued to relate the conversation. The property was getting in such bad shape, and they had to have money to build it up and to build up the rental or there was no use fighting for it any more. His father as president of the company had made efforts to borrow money from the R. F. C. The witness was with him. His father made a trip to San Francisco in 1944, and it was impossible for him to get a loan any place. At the time of this conversation neither the defendant, William L. Hansen, nor anybody else to his knowledge

had made any overtures or had come into the picture to give new money to the company, (T. 418).

During the last ten or twelve years, and particularly in 1944 and 1945 relations were strained between W. L. Hansen and his father. They had had difficulties and misunderstandings, and there were strained feelings during that time until just before this sale in Sugarhouse was made, (T. 418, 419). The witness testified that Lewis Hansen (L. F. Hansen) was the one who got his father and mother together with Bill in the first instance on this deal. Upon objection the court struck this evidence, and we submit that the evidence was competent. (Lewis Hansen was a director of the defendant corporation and had already testified on direct examination that he knew nothing about the deal). Bill was present at none of the directors' meetings. When the witness's father talked to him about the company being in difficulty and needing new money, he, the witness, contacted several people to find out the value of these premises. He also talked to several people after Bill made his proposition of purchase. L. F. Hansen never made any objection or opposition to this deal with Bill, and all the directors were satisfied with Bill's proposition, (T. 420, 421). There was no trouble over the deal until Lew, (L. F. Hansen), had disagreement with Bill. They were in the real estate business together, and there was some trouble developed there. Lew left the company and immediately started this action. Until that time he had not raised his voice against the transaction. At no directors' meeting did L. F. Hansen ever mention anything about stock-

holders, (T. 421, 422). The witness took the resolution, Exhibit "D", signed by all directors, into Mr. Jones, attorney for W. L. Hansen. The witness gave the minutes to Mr. Jones. Witness discussed the Sugarhouse transaction on several occasions with L. F. Hansen, and it was the subject of conversation for some time prior to the time the deed was signed, was discussed at a meeting on July 11, and the deed was not signed until after the board of directors took formal action. The minutes show the deed to be executed on the 16th and the meeting of the board on the 18th of July. This is a mistake in date. The witness doesn't know how the mistake came about, but he is sure that the deed was not made out until the day following the meeting. At the time he took the minutes to Mr. Jones they were signed by all of the board of directors. It already appears from prior witnesses that the first check of \$5,000.00 was not delivered to the company until the minutes were brought to Mr. Jones, (T. 424). The first check is dated July 27, 1945, and was cashed July 28, 1945, Exhibit "G", and the deed was recorded July 28, 1945, which is the same day that it was delivered to W. L. Hansen.

No attempt was made to list the property with a real estate man or offer it to the public. Witness talked to others about it though, and when his father told him the property was run down and couldn't be sold and the company was about to lose it, he believed what his father said, (T. 425). Witness never talked to any lawyer about bringing this action. He had nothing to

do with being put in as a party plaintiff. Lew did that. Witness can't explain the discrepancy in dates between the deed and the minutes, but it is very evident that all it is is a mistake in date, (T. 426). Witness understood that \$5,000.00 of the \$10,000.00 purchase money was to go to his father, (T. 427). The second payment check for \$3800.00 is endorsed in his father's handwriting. The Hansen Holding Company is a company that was organized to operate some real estate up on Center Street, (T. 427). Granite Holding Company had a bank account in Sugarhouse. He doesn't know why the second payment check was put in the Hansen Holding Company. His father made all the checks and deposits, (T. 429). As a director, witness's first interest was always for the company. The money received from Bill for the purchase of the property was the first real money the Granite Holding Company had received in fifteen years, except from rents. The sale to Bill was for the sale of all the remaining assets of the Granite Holding Company. After the witness heard of the offer from Bill, he consulted with Sid Mullcock, Newell Dayton of Tracy Loan & Trust Company, Governor Mabey, and Junius Romney about the value of this property, and it was after those conversations that the deed was executed, (T. 430, 431).

On re-cross examination witness stated that he was present at a meeting of the stockholders at which Lew and Keith Bates were present. At that meeting he did not say that he and Lew had started the lawsuit and that now he realized they were entirely wrong, nor did

he say that the stockholders had been cheated. What he actually said was that there was nothing in the property; that he had as much interest in it as anybody, (T. 432).

The defendants served notice that they desired further to cross examine Lewis F. Hansen. Counsel for the plaintiffs objected, and the court sustained the objection, stating that defendants could reopen by using Lewis F. Hansen as their witness. Defendants then made a tender of cross examination to ask Lewis F. Hansen the names of the tenants who were anxious to have their rent raised at the time this property was sold to Bill, Lewis F. Hansen having testified "I was there more than anybody else, and all the tenants were anxious to have longer leases and raise their rents", and that the rents be doubled, (T. 348, 352), (pages 209, 213 of the reporter's transcript), and we further offered to show that Lewis F. Hansen couldn't give the name of one tenant who had made such a request. The court refused to permit this procedure, but did permit reopening for the purpose of questioning G. M. Southwick who testified that he is the husband of Mary Hansen Southwick and a son-in-law of Nephi J. Hansen; that he was at a meeting at the home of Nephi Hansen in June of 1945 when the sale of the property in Sugarhouse to Bill was discussed; that at that meeting there were present besides himself N. J. Hansen and wife, the daughters, LaRue Nebeker and Mary Southwick, his wife, Clyde Hansen, Lewis and Bill. At that meeting which is the only meeting he attended Lewis Hansen did not say, "I think we ought to do something about the stock-

holders before we do anything like this'', nor did Bill blow up and cause a scene. Nothing of the kind occurred. He was not on the board of directors and didn't have any stock in the company, (T. 443, 446).

Clyde F. Hansen testified that he knew Joseph E. Jensen, one of the directors who signed the resolution, Exhibit "D", and that he is the father of W. V. Jensen, referred to throughout the testimony as Vivian Jensen, and the husband of Mrs. J. E. Jensen, both plaintiffs in this case, and that those two plaintiffs have no stock in the Granite Holding Company, (T. 494).

Keith Bates was re-called by the plaintiffs and was asked if at a meeting of the stockholders shortly after this lawsuit had been filed at which Clyde and Lew Hansen were present, Clyde Hansen stated in substance and effect that he had been instrumental or had started this lawsuit, and that he now realized that he was wrong, or anything like that. Although counsel for the plaintiff called Mr. Bates as his witness, and asked him this question, he refused to let Mr. Bates answer it as he desired. The following appears:

"Q. Did he make that statement?

"A. Yes. May I make one qualification?

"Q. Well, did he make the statement I asked?

"A. Yes, in effect."

There is no way to determine what the witness desired to testify to, and there is thus no other evidence in the record to dispute Clyde Hansen's testimony.

At the conclusion of W. L. Hansen's testimony, (T. 408, 409), his counsel was prepared and about to proceed with an account of the expenditures Mr. Hansen had made and the work he had done on this property. Thereupon counsel for plaintiff remarked that if there was going to be an accounting, then such testimony should be part of the accounting. There was some discussion with the court, which is not reported in the record, merely the word "discussion," (T. 409), at which it was decided in the interest of time to omit this testimony of work and labor and money spent until it was determined whether or not an accounting would be heard. But immediately after the conclusion of the defendant's testimony, the court held that the reasonable and fair market value at the time of the sale was \$100,000.00; that the \$14,000.00 Bill Hansen had put into the property should be deducted from Mr. Kiepe's appraisal of \$115,000.00, and that the testimony of Harding and Nielson that the value was \$90,000.00 depreciated the property "a little". As to the defendant's evidence as to the fair value ascertained at the time of the sale, the court said:

"One was by the man who puts mortgages on and who wants to make sure there is security, and I have forgotten who gave the other figure." (T. 436).

The other figure was given by Mr. Harding, the most competent and qualified witness of all of them and the man who since has been called by the national organiza-

tion to occupy an executive position in the National Real Estate Organization. In that frame of mind the court held that the deed should be set aside.

“I find that there was a collusive arrangement between William Hansen and his father, Nephi J. Hansen, with the intent to defraud these preferred stockholders of any equity that might be there, and I find that there was some \$15,000.00 equity involved at the time of the transfer. Therefore, I order that the deed be set aside and the property restored to the corporation.

“Now, the matter of accounting, I suppose we have got to set that down. William L. Hansen will have some accounting against this corporation.” (T. 437, 438).

This quotation from the court is given here because later in argument we shall discuss the utter lack of basis for the decision of the court. The last statement of the court is interesting, that William L. Hansen will have an accounting against the corporation, in view of what the court actually did in giving the corporation a judgment of substantially \$30,000.00 against William L. Hansen. At this time and in view of the fact that the court said that there was a \$15,000.00 equity between what was paid and the value of the property, and that during the period Bill Hansen had the property there was a \$30,000.00 net profit, it will be interesting for plaintiffs' counsel to explain how income taxes would have been paid on this \$30,000.00 from this property as it was operated by the corporation and at the same time save

the \$15,000.00 equity. There was no such profit, and there was no such equity. Both the state and the government permitted the complete depreciation of the corner building during this period.

(B) *The Alleged Accounting*

Some of the testimony given on this feature of the case is also applicable to the merits of the main case and was before the court before any findings, conclusions or judgment was entered herein. Four of the persons who were tenants of the Granite Holding Company and who remained tenants after the property was sold testified substantially the same. Walter O. Peterson occupies the property farthest south on 11th East, (T. 447). Adelbert W. Hart is just north of Mr. Peterson's location, (T. 456). L. J. Batchelor has the next location north, and he operates a barber shop, (T. 479). Then north of him is Melvin L. Brain who operates Bud's Mens' Duds, (T. 471). Each witness stated that at the time W. L. Hansen took over the property August 1, 1945, he was paying all the rent that the property was worth; that none of them ever asked Nephi Hansen to raise their rent. They were unwilling to have their rent raised; that the property was in bad condition from the leaking roof. The plumbing would leak through and destroy merchandise, and that Nephi Hansen never did anything to fix up the property, (T. 448, 449, 459, 463, 471, 472, 474, 481). Each witness also testified that after W. L. Hansen took over the property he made extensive

improvements, gave the tenants more space, fixed up the property so that the leaks were corrected, and for the new space and repairs and new leases charged them additional rents. He also agreed in consideration of the higher rents to put in new fronts and do other remodeling and renovating which he had not yet done, and that they were unwilling to pay the new rents unless the additional work was completed, and that since Bill took over they have had no dealings with anybody except W. L. Hansen. They have had no dealings whatever since that time with Nephi J. Hansen, (T. 448). It was agreed that the new leases contain provisions for remodeling the store fronts "to be done as soon as deemed advisable", "to remodel the front of said property in a high class manner", (T. 619, 620).

Defendant offered to show (T. 621) that the work of remodeling and renovating commenced in 1945 and was to be done over a period of three years, (T. 624); that the twenty-six apartments upstairs rented for a total of \$490.00 a month when he took over the property; that the rent of the first store to the south was \$150.00, and under his management the rent was increased to \$300.00 on condition that the remodeling was done, and that since the court had announced that the property was to be returned to Granite Holding Company, the tenant has insisted on the rent being adjusted to \$225.00 a month, and that these premises include in addition to what they had at the time Mr. Hansen took over three of the upstairs apartments; that part of the Hart Music Company, (Adelbert W. Hart), was occu-

pied by Lincoln Hansen as a beer parlor paying \$75.00 a month; that defendant terminated his occupancy and Harts' were given additional space with a basement with promises of remodeling, which has not been done, at a rental of \$375.00 a month which has now been reduced since the court's announcements to \$250.00; that the barber shop occupies space formerly occupied by Southeast Camera Company and additional space, and the rent was fixed at \$125.00 which has now been reduced to \$100.00; that Brain, (Bud's Mens' Duds), was paying \$125.00 when defendant took over. This was raised to \$175.00 and has now been reduced to \$125.00. Where the Ideal Furniture now is was a restaurant which went bankrupt. The restaurant was paying \$300.00. Ideal Furniture moved and were given seven apartments upstairs with provision for improvements. Their rent was raised to \$575.00, and their rent has now been reduced to \$550.00. The cleaning company occupies the next space and are paying the same rent. The dress shop of Mrs. Stucki was paying \$125.00. She was given additional space formerly occupied by Seagull Drug Company. The rent was raised to \$310.00 and is now \$250.00, and she is doing her own remodeling. Pehrson Hardware Company occupies the space formerly occupied by the barber shop and another barber shop on 21st South, Kemp's Child Clothing Company and Dr. Lanmasser, in addition to their own space, all of which space was paying \$560.00. Their rent was raised to \$650.00, then Pehrson was given 2 apartments upstairs and additional space and his rent was raised to \$750.00,

and he did all his own remodeling. His property was in very bad condition. His basement was full of refuse which he had to clean out. He had about one-third of the space he now has, and has a written agreement with the defendant to remodel the front of the building and completely renovate it, probably build a new building; (defendant paid him \$500.00 approximately towards the remodeling,) (T. 488, 489). The Seagull Drug Store occupies three of the apartments at \$70.00 a month for their office which was formerly on the ground floor. Three of the apartments are still rented to tenants and one of them is occupied by the janitor; that the improvements contemplated by the leases and which were not done were submitted to Ashton & Evans, architects, and to Garff Brothers and to the Nielson Construction Company, and that they submitted estimates for the contemplated repairs to the front and the repair of the roof, and at that time when they were to commence in 1945 and to be finished in three years the cost was estimated at \$90,000.00 and would now cost \$115,000.00.

A statement had been prepared showing all the work that had been done by the defendant, and the court stated that instead of reading that why didn't we offer it in evidence. It was marked Exhibit 9, was offered, objected to, and the objection sustained, (T. 624, 629). This was offered to support the expenditures which have been described and the work and labor performed by the defendant on this property. The exhibit is too long to quote but shows extensive remodel-

ing and renovating, redecorating and repairing and major improvements done by the defendant personally and under his personal supervision and direction and responsibility for which the court refused him any allowance for his own work and labor or superintendence and only partial allowance for actual expenditures. We offered to show by S. R. Nielson who had already testified that he is executive Vice-President of First Security Trust Company, that for the work Mr. Hansen did in managing this property, increasing the rentals and working along with the people, the reasonable value of his services would be \$400.00 a month, and that Sid Mulcock, a constructor of a great many apartments and buildings, appraiser for Prudential Savings and Equitable Life, would testify to the same thing, and the court sustained the objection to this evidence and refused to allow anything to Mr. Hansen, (T. 629, 630).

The parties had agreed that Mr. Goddard (of Goddard-Abbey Company) and Mr. Wood (of Beesley-Wood & Company), certified public accountants, examine the operations of this property so far as they were ascertainable from August 1, 1945, to June 30, 1948, (T. 497, 498), and Exhibit 7 was ultimately worked out as a resume of the items of expenditure and the character of them and the status of them as they are at the present time, and received in evidence as illustrative of the testimony, (T. 603).

Most of volume two of the testimony is taken up with details of the expenditures, and Exhibit 7 shows

that Mr. Wood and Mr. Goddard had agreed on items of expenditures of \$69,093.84, but included in those items were other items which it was contended by the plaintiffs were not allowable, totaling \$11,156.81. From some green pencil figuring on the exhibit apparently \$6,450.00 of these questioned sums were not allowed because they are deducted from the \$69,093.84 item, leaving total expenditures of \$62,643.84. The eliminated items apparently are salary paid by the defendant to Nephi J. Hansen of \$5,950.00, for which he worked about 40 hours each week, (T. 518, 519), and contribution by the defendant to the Sugarhouse Chamber of Commerce for the Centennial program of \$500.00, both of which should have been allowed, as we shall hereafter point out. As heretofore noted from Exhibits 2, 3 and 4, Nephi J. Hansen in 1943, 1944 and 1945 was paid by the company \$5,404.12 in 28 months. Under W. L. Hansen's ownership in 35 months he was paid only \$5,950.00. Yet the court held the sale was for the benefit of Nephi J. Hansen and refused to allow W. L. Hansen any credit. Nephi got less than when he managed the property, and Bill was allowed nothing. The defendant testified that the Sugarhouse Chamber of Commerce assessed all the merchants in Sugarhouse for the Centennial program, and that the \$500.00 was the amount assessed to this property. It would have been assessed no matter who the owner was and was a legitimate item of expense. Page 2 of Exhibit 7 is a schedule of expenditures actually made, as agreed upon by the auditors, but contested by the plaintiffs, though they were actually made on the

property. Some of them are cash payments for which receipts were available, and the remainder were represented by checks or verified by the testimony of W. L. Hansen and are undisputed as actual expenditures. These items on page 2 bring the total expenditures for the period as shown by the testimony to the sum of \$79,692.36. On pages 1 and 2 are some green pencil crosses and check marks and some writing in ink, which were not on the exhibit when it was received and apparently indicate that \$2,584.20 of the amount specified on page 2 were added to the \$62,643.84 shown in green pencil on page 1, making a total of \$65,228.04. This apparently would exclude \$8,014.32 of the items shown on page 2, and the total of the figures with the cross after them total this amount, so that excluded are \$600.00 paid by the defendant for entertaining contractors, tenants and employees with reference to the new leases and repairs. The defendant testified that these items were less than $\frac{1}{2}$ of his bill at the Ambassador Club or at the rate of \$20.00 a month for 30 months, and that he incurred these expenses for conferences, and to promote good will and get the new leases and to get the repairs accomplished, (T. 531, 536); \$208.01 telephone bill based upon the monthly rate of \$11.93 plus $\frac{1}{2}$ of the long distance telephone calls; \$443.00 which was interest paid on a loan from the Davis County Bank, all of the loan being used on the property; \$1,117.50 attorney's fees which were paid for legal services on the leases, income tax statements, which included securing permission from both the state and the federal government to depre-

ciate the entire property on the corner, and \$5,609.15 which represents checks drawn to cash, (T. 605, 615), which the defendant testified went into the property in payment of laborers, materialmen and others who required cash payments. He kept no record of the exact items since he figured the property was his own and it all came out of his own pocket, (T. 637).

It is to be conjectured, therefore, since there is no finding of specific items, that from the actual expenditures made by the defendant, \$14,464.32 were stricken and that no allowance whatever was made for defendant's management or services, nor for the \$10,000.00 in cash with interest he paid to the defendant corporation. So this defendant was deprived of credit for at least \$26,264.32 he paid out in actual cash.

The figure \$90,017.00 appears in ink on Exhibit 7, and this was the figure that the accountants agreed upon as the total rent received during the period of August 1, 1945, to June 30, 1948, but does not take into consideration the reductions in rent that were made due to the court's announcement that he was going to cancel the deed. The rents were paid upon defendant's agreement to make extensive improvements which the company could not make while it operated the property. However, we did not agree that this figure was proper. The rents were collected not through the efforts of the plaintiffs or the defendant corporation, but solely through the efforts of the defendant, W. L. Hansen, (T. 498). Our position was that the defendant was not chargeable to the

corporation for the \$90,000.00. "All that William L. Hansen is chargeable to the corporation for is the reasonable rental value of the property in the condition in which he took it", (T. 503). If this property is to be returned, both parties must be placed in status quo, and if the defendant corporation gets the property back better than it was before, they must pay for the improvements, (T. 507). As shown by Exhibit 2 in 1945 before the defendant took over the property, the corporation was receiving in actual rents \$1,983.00 a month and were paying N. J. Hansen in that year \$318.50 a month salary for doing the same thing he did while the defendant was in possession of the property; that for the previous two years the rentals averaged \$1,132.50 a month for 1943 and \$1,459.00 a month for 1944, and Mr. Hansen's salary for the two years was approximately \$175.00 per month, so that we could not be charged more than the corporation itself was receiving and were entitled to the same payments to Mr. Hansen as it had been making itself.

After the court announced the property was to be returned to the corporation, the tenants, as shown by Exhibit 10 and the testimony of the tenants and Mr. W. L. Hansen, insisted on their rents being reduced because the improvements which were a major consideration for the increase in their rents were not to be made.

Exhibit 8 shows rentals for July, August and September of 1948 in the total sum of \$7,669.00 and expenses actually paid of \$4,577.73 with the proportion of

accrued expenses applicable to those three months in the sum of \$2,412.51, leaving a net for the three months of \$678.76. The figures in ink on Exhibit 8 which were not there when it was offered and received apparently show that \$715.43 of the repairs were not allowed, although they were actually made, (T. 608, 613). Nearly $\frac{1}{2}$ of the telephone bill was not allowed, nor none of the office expense actually paid, which included the customary expenditures for office supplies allowable by good accounting practices, (T. 609), including a desk and filing cabinets, and none of the chargeable expenses for the three months which had accrued but not been paid, totaling \$2,412.51, nor none of the office salary of \$200.00 per month. These accrued expenses were required, as appears from Exhibit 8, and have since been paid, but none of them were allowed apparently, and while the defendant was charged with all the rent which was due to his own efforts, he was given credit for none of these expenditures and there appears on Exhibit 8 a deduction from the rental of \$3,211.91, leaving a figure of \$4,457.09 which is added to a figure of \$24,788.96, making a total of \$29,246.05. Where the figure \$24,788.96 comes from, we do not know, except that on Exhibit 7 on the 2nd page at the bottom the figure appears apparently as a deduction over the whittled down expenses over the exaggerated income, so that apparently \$29,246.05 is computed as the net income of the property for the period August 1, 1945, to September 30, 1948, disallowing all the items indicated, including Nephi J. Hansen's salary which was actually paid. No

allowance for W. L. Hansen's management which was responsible for producing the amount he was charged with, and nothing for his \$10,000.00 purchase price, and nothing for interest on it.

Practically all of volume 2 of the reporter's transcript is taken up with a detail of the expenditures as summarized on Exhibits 7 and 8, and a detailed recital of the methods by which the rent was increased. Exhibit 8 was received in evidence, (T. 606). No useful purpose could be served in a detail of this evidence since the summary of it appears on the two exhibits, and all of the expenditures are supported by the testimony, and as shown in the offer of proof, Exhibit 9.

During the discussion on the motion for a non-suit the court in answer to our assertion that there was not one single word of fraud or proof of fraud in this case, stated: "I have the testimony of the last witness, L. F. Hansen, that the father was 80 years old; that he was under the influence of Bill." (T. 361). This same witness in the same testimony also stated that he was the one who wanted to protect the stockholders because all the tenants were asking that the rent be doubled. The father was not 80 years old at the time of the transaction in question. He was 76, (T. 519). He was not under the influence of Bill but had been estranged from Bill for years. Bill had not even been here for years prior to the transaction, and the court later himself indicated that L. F. Hansen was not worthy

of belief as did counsel for the plaintiffs who called him as a witness. The following appears:

“THE COURT: Mr. Jones, are you calling each tenant here to have him to say that he wasn’t willing and anxious to have his rent raised?

“MR. JONES: That he never said anything about it.

“MR. JENSEN: I will stipulate that they will so testify. I never saw a tenant yet who was willing to have his rent raised. (T. 453).

* * * *

“THE COURT: Did you say you want to show that they were not willing to or didn’t pay?

“MR. JONES: That they were not willing to. They paid all the property was worth all through the years.

“THE COURT: I understand Mr. Jensen has stipulated that none of the tenants will say they were willing to pay more rent.

* * * * I just supposed no tenant in his right mind is anxious and willing to have his rent raised. I can’t conceive of it.” (T. 454).

The following appears: (T. 617).

“MR. JONES: Now, Your Honor, you announced at the time when we concluded that you were not going to consider the work that Mr. Hansen did out there, and I can shorten this by making a tender of proof.

“THE COURT: I understand Mr. Jensen wasn’t going to object to it. He was of the opinion that his recovery was permissible.

"MR. JONES: Oh.

"THE COURT: And, certainly, I'm not going to stand against both of you.

"MR. JONES: Okeh.

"MR. JENSEN: Well, wait a minute. I didn't hear what You Honor said. Read that, will you, Miss Parker?
(Reporter reads the Court's statement.)

"THE COURT: You mean you have had a change of heart?

"MR. JENSEN: You mean I was going to allow that?

"THE COURT: Yes.

"MR. JENSEN: Oh, yes. They had Sid Nielson down the last time and went to put him on, and Mr. Jones told you what he was going to prove by him, the reasonable charge for supervision and property management duties, and I objected to it on the ground it wasn't allowable, and Your Honor sustained it. I have already changed my mind if I ever needed to.

* * * *

"THE COURT: Is it in the record?

"MR. JONES: No. There was discussion about it, and Nielson was here, and I said I was going to show what Mr. Hansen had done there and the work he had done.

"THE COURT: All right make your tender now, Mr. Jones." (T. 618).

The tender was made and refused that experts would testify that Mr. W. L. Hansen's services were reasonably worth \$400.00 a month. (T. 629, 630).

In disallowing any salary to N. J. Hansen the court did it in the face of testimony that Mr. Hansen worked at least 40 hours a week, took care of the office, answered the phone, did about the same work as an office girl or stenographer, collected the rents when William L. Hansen was out, gave receipts for them and turned them over to Mr. W. L. Hansen, and for his services he was paid about \$170.00 a month, when the corporation itself had paid him more than double that amount in the period just preceding the sale of this property to W. L. Hansen, (T. 518, 520). The \$500.00 disallowed as the assessment for the Centennial program, is the same as the property on each corner was assessed by the Sugarhouse Chamber of Commerce. The assessment was not a personal assessment but was an assessment against the property. All the merchants were requested to make a like contribution, and under those circumstances the \$500.00 was paid for this property, (T. 524). With reference to the \$600.00 disallowed as Ambassador Club charges, the total bill at the Ambassador Club was \$1376.18. During this period when defendant Bill Hansen was trying to get the rents increased and the program of improvements inaugurated, he would take the people to lunch or dinner to discuss the question, build up the good will, and the \$600.00 he charged does not quite approximate \$20.00 a month for the period. He figured that this was a proper charge for

building up good will in business and public relations, especially in view of the results obtained, (T. 531, 532, 534). Disallowance was made in the telephone bill in the face of the testimony that it was used exclusively for the benefit of the business with the exception of a few long distance calls, (T. 540). Disallowance was made of the interest paid to the Davis County Bank in the face of the testimony that it was interest on money borrowed from the Davis County Bank that all went into improvements on the property, (T. 563, 564). With reference to the attorney's fees disallowed, the testimony was undisputed that they were for legal services in arranging the leases and preparing income tax returns and negotiating for depreciation on the property and securing approval of the state and the government, which directly benefited the corporation, except \$500.00 which was paid for services in connection with the purchase of the property. (T.569). In explaining the checks to cash representing a total of \$5,609.15, W. L. Hansen testified that practically all of it went into the property, paying for help and paying for material.

“A. Well, at that time we had labor that was a little hard to get along with, using to begin with Union help, and then their work wasn't very satisfactory, and finally hired some farmers and other people who we found were willing workers, but they requested they be paid in cash, so we paid them in cash.

“Q. How many of those people did you have?

“A. About three different ones.

“Q. Well, now, how long did they work?

“A. Well, they worked in—one of them in ’45 a lot of work, a lot of hours in ’45 and right on through up until about July of ’47 or August of ’47, approximately.

“Q. Now, were there any supplies represented in there?

“A. Yes, there was some supplies. I couldn’t say exactly just what they were because I was operating my own business, and I didn’t keep track of the things. If we needed money to buy things where we didn’t have accounts, we just cashed a check and would buy them and pay cash for them and let them go at that.” (T. 615, 616).

* * * * *

“A. I didn’t pay any attention to the checks. I made them out and just operated my own business, and I figured it was all my property, and I made out the checks. I didn’t—from one month to the next I didn’t even check to see what they were, really.” (T. 637).

Mr. Hansen also stated that the work of putting in the new store fronts has yet to be done, as above indicated, at an expense estimated at \$115,000.00 for which he had obligated himself and received rental payments in consideration thereof for which the court charged him for the benefit of the defendant corporation. The court also charged him with rental paid for the last three months accounted for in 1948 and refused to allow him anything for the accrued expenses which he was obligated to pay, (T. 612, 613).

After the case was submitted and after the court had made an entered order of judgment against defendant, William L. Hansen, for \$29,246.05, (T. 100), the court without consulting the defendants or any of them, and upon motion of plaintiffs' counsel dismissed J. R. and W. V. Jensen as plaintiffs, (T. 101, 102). There was no J. R. Jensen as a plaintiff, and W. V. Jensen is the Vivian Jensen who appears throughout the record as the active instigator of this litigation in connection with Lewis F. Hansen. No notice of this dismissal was ever given defendant, so that as the case stands it is dismissed as against the instigators of the lawsuit with the resulting responsibility for costs in the event this case is decided in favor of the defendant.

On December 24, 1948, the day before Christmas, plaintiffs served on defendants proposed findings of fact and conclusions of law, (T. 103), and immediately thereafter and without opportunity for the defendants to propose any amendments the court on the same day signed the findings of fact and conclusions of law and judgment, (T. 104, 113), and the judgment was immediately entered on the same day. There never was any opportunity for the defendants to be heard, nor were they heard with reference to the findings of fact, conclusions of law. This was a proceeding strictly between counsel for the plaintiffs and the court.

III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

The court affirmatively found that this action is a secondary one for the benefit of the corporation brought by the above named plaintiffs against the corporation, Finding 2, (T. 105). (Note: None of the original plaintiffs remain in the case, and only two, Ralph Cutler and Hettie May Bates, of the six who began the action. Robert Young, an original plaintiff, was dead when the action was brought. W. V. Jensen and Mrs. J. E. Jensen were not stockholders, but were son and widow respectively of J. E. Jensen, one of the directors who signed the resolution for the transfer of the property, as did Lewis F. Hansen, another director, plaintiff). The findings further find that Nephi J. Hansen since 1928 has been a director and president and general manager and wholly in control of the corporation; that no meetings of the stockholders have been held, vacancies in the board of directors were not filled, no information was given to stockholders with respect to the financial situation of the corporation. Nephi Hansen had represented that there was nothing to do except liquidate the mortgage, and that he has had full charge of all activities of the corporation, kept no books or records, during all the period discouraged the stockholders and refused to give them any information, made all decisions with respect to the corporation, repeatedly told the stockholders that he was liquidating the mortgage and indebtedness, and at all of the times treated and acted towards the cor-

poration as if it was his own. He made no accounting to any stockholders and generally conducted the affairs of the corporation as his own personal property, "and as his alter ego", (T. 105); that the articles were amended in 1919 to provide for the issuance of preferred stock, with voting power if dividends were not paid; that Nephi Hansen had informed the preferred stockholders that no dividends could be paid and had refused to give any information to the stockholders with reference to the nature and condition of the business except to assure them that everything was in good hands and properly taken care of; that the corporation in 1945 owned the property in question which had buildings on it facing 11th East and 21st South, occupied by tenants in apartments upstairs and business houses on the ground floor; that from August 1, 1945, to September 30, 1948, it had a total income of \$97,686.00, an average of approximately \$2,500.00 a month; that on July 18, 1945, there was a mortgage of \$74,500.00 on the property, payable at the rate of \$500.00 a month, plus interest; that on said date the interest payments were up to date but the principal payments were in arrears; that the mortgage was placed on the property November 1, 1941, in the sum of \$82,528.13, and that in July, 1945, the property was reasonably worth \$100,000.00.

That in July, 1945, vacancies in the board of directors were caused to be filled by Nephi J. Hansen, "and there was appointed directors so that the board of Directors of said corporation at said time consisted of said Nephi J. Hansen, Laura F. Hansen, his wife, Mary

H. Southwick, his daughter, L. F. Hansen, his son, Clyde Hansen, his son, Hooper J. Knowlton, a business friend of Nephi J. Hansen, and one Joseph E. Jensen, there being added to said Board of Directors at said time Mary H. Southwick, L. F. Hansen and Hooper J. Knowlton." (T. 107). (Note: L. F. Hansen was always a member of the board of directors, as already appears heretofore). That in July, 1945, Nephi J. Hansen in the name of the corporation caused the property to be deeded to his son and caused the board of directors to adopt a resolution authorizing and confirming the sale to William L. Hansen for \$10,000.00; that the corporation never received the money, but the same was paid by William L. Hansen to his father and by his father used for his own purposes, and the sale by Nephi J. Hansen was never approved or ratified by the stockholders. "That in making said sale said Nephi J. Hansen did not attempt to obtain any offers from any other person whomsoever, nor did he list the same with any real estate agent or broker, and thereafter caused a deed in which said corporation appeared as grantor to be delivered to the defendant William L. Hansen, which deed was thereafter recorded in the office of the County Recorder of Salt Lake County." That the property was all the remaining assets of the defendant; "that no stockholder was ever advised by said Nephi J. Hansen with respect to said sale; that said Nephi J. Hansen had always regarded said property as his own personal property, and that in so selling to his son William L. Hansen he maintained that said property should be

taken away from said corporation and should pass to a member of his family and that said property should become in fact the property of the family Nephi J. Hansen by and through said William L. Hansen, and said William L. Hansen, in taking title to said property, did so in order to keep complete control thereof to gain for himself the rents, issues and profits thereof and to insure income to his father, Nephi J. Hansen, and to defraud said corporation and the stockholders of said corporation." That William L. Hansen knew the money he paid would not be used by the corporation but would be used by Nephi J. Hansen for his own use, (T. 108).

That the board of directors at the time of the sale and the resolution approving the sale was illegally constituted and acted improperly for the reason that the directors were either members of Nephi Hansen's family, or his friends, and as such were subject to the control of Nephi Hansen, and signed the resolution without any independent knowledge of the facts and solely upon reliance on statements and information of Nephi J. Hansen and without an independent judgment and without knowledge of the terms of said sale and at a time when the deed to the property had been executed and delivered. (Note: The record is undisputed that the deed was not delivered until July 28, 1945. The record is also undisputed that regardless of the date on the deed it was not executed until the day after the meeting of the board of directors). The findings of fact also find that Nephi J. Hansen prepared a resolution dated July 18, 1945, which was in fact prepared and

signed after that date and thus prepared and signed in order to falsify corporate records. The sale was made without any authority or bona fide ratification of the board of directors or of stockholders; that the resolution was signed by the board of directors of the corporation individually, and not as a part of any regular or special meeting of the board, (T. 109).

The findings then assert that on August 1, 1945, defendant, William L. Hansen, went into possession and collected rents to and including September 30 in the sum of \$97,686.00, and that during that period he expended money for the preservation, operation and maintenance of the property and is entitled to a credit against said rents in the sum of \$68,439.95. (Note: This is the only finding with reference to expenditures. There is no itemization or other finding with reference thereto). The court further found that the plaintiffs are not estopped; that the sale of the property was not an act of the corporation; that the directors acted outside of their authority; that the sale was not made in the usual course of business; that the possession of William L. Hansen was wrongful "and he took possession thereof as a trustee for said corporation and for the plaintiffs, and he then and there become a trustee of all moneys and rents," etc., and was charged with accounting to the corporation.

The court thereupon concludes that the deed is void; that William L. Hansen was a trustee for the benefit of the Granite Holding Company, and indebted to the cor-

poration in the sum of \$29,246.05, and judgment was entered adjudging that the deed "is void and of no force and effect, and that Granite Holding Company, a corporation is the owner in fee of the following described property situate in Salt Lake County, State of Utah." (T. 112). The property is then described and judgment is entered in favor of the Granite Holding Company against William L. Hansen in the sum of \$29,246.05 with costs to the above named plaintiffs. No judgment whatever was entered with reference to Nephi J. Hansen, and judgment was entered in favor of the Granite Holding Company, (T. 113), in the face of the finding that the case had been vigorously opposed by the corporation, (T. 110).

As heretofore shown, the judgment was entered on the day before Christmas without notice to the defendants, and immediately after the Christmas holidays plaintiffs made a motion for the appointment of a receiver, (T. 116), and on February 3 the court made an order appointing a receiver, (T. 123), which order was revoked February 15, 1949, because the defendants had already posted stay bond on January 20, 1949, (T. 127), which stay bond defendants were compelled to post in the sum of \$30,000.00.

STATEMENT OF ERRORS

1. The court erred in holding that this action was brought by the above named plaintiffs, Ralph Cutler, Hettie May Bates, and William S. Young, against the

Granite Holding Company for the benefit of the Granite Holding Company, (T. 103).

2. The court erred in holding that since 1928 no information was given to stockholders with respect to the financial situation of the corporation, and that Nephi J. Hansen at all times refused to give information to any stockholders with respect thereto, except to assure them that everything was in good hands and being properly taken care of, (T. 105, 106).

3. That the court erred in failing to find what the income and expenses of the property were during the period the same was in the control and management of the defendant corporation, and in finding that from August 1, 1945, to and including September 30, 1948, the property had a total income of \$97,686.00, (T. 107).

4. That the court erred in failing to find that at the time of the sale of the property it was in a badly run down and deteriorated condition, was not paying its way, was operating at a loss; that no additional financing for the property could be secured; that independent appraisals by competent persons were made of the property at the time of the sale appraising the property at less than the sale price and at approximately the sale price, and that the court erred in finding that in July of 1945 the property was reasonably worth \$100,000.00, (T. 107).

5. That finding of fact No. 6 is ambiguous and contradictory in that it finds that the board of directors

was filled and was complete at the time of the sale in question, and that there were appointed to the board of directors the persons named, and then finds that Nephi Hansen caused all the acts to be done therein recited, in the face of the finding that the board of directors was completed and acting, and that the court erred in finding that the corporation never received the money paid by William L. Hansen, and that finding of fact No. 6 is a conclusion of law unsupported by any findings of fact or by any evidence.

6. The court erred in making finding of fact No. 7, and particularly that Nephi Hansen sold the property to William L. Hansen so that it should be taken away from the corporation and passed to a member of his family, and that the property in fact became the property of the family of Nephi Hansen, and then finding that William Hansen took the property in order to keep complete control thereof for himself and to insure an income to his father, and said finding is further in error in finding that William L. Hansen knew that the purchase money would not be used for corporate purposes, (T. 108).

7. The court erred in finding of fact No. 8, and the same is entirely unsupported by any evidence and is contrary to the evidence and forms no basis of any finding against defendant, William L. Hansen.

8. The court erred in finding No. 9 that William L. Hansen is accountable for \$97,686.00 and entitled only to a credit of \$68,439.95.

9. That finding No. 10 is a conclusion of law based upon no evidence and is against the evidence that plaintiffs are not estopped.

10. That finding No. 11 that the defendant corporation vigorously defended this action and thus opposed it is contrary to finding No. 2 that the action is for the benefit of the corporation, and is contrary to the judgment in favor of the corporation.

11. That finding No. 12 is a conclusion of law not supported by any evidence and is contrary to and against the evidence.

12. That finding No. 13 that William L. Hansen was a trustee and took possession wrongfully is a conclusion of law and is against the evidence, not supported by any evidence, and is contrary to law.

13. That the conclusions of law and each of them are erroneous and against the evidence in concluding that the deed to William L. Hansen is void, and that William L. Hansen is indebted to the corporation, and that the corporation is entitled to judgment against William L. Hansen.

14. That the judgment is contrary to the evidence, is not supported by the evidence, is contrary to the findings, and is against the law in adjudging that the deed to William L. Hansen is void and that Granite Holding Company is the owner of the property in question and that Granite Holding Company recover judgment against William L. Hansen in the sum of \$29,246.05.

15. That the court erred in finding in favor of the plaintiffs and against the defendant, William L. Hansen.

16. That the court erred in giving judgment in favor of the plaintiffs and in favor of the Granite Holding Company and against the defendant, William L. Hansen.

17. That the court erred in dismissing without notice one of the instigators of this litigation, W. V. Jensen, and in attempting to dismiss his mother, Mrs. J. E. Jensen, (T. 101, 102).

18. That the court erred in signing the findings of fact, conclusions of law and judgment on the same day they were served on defendants and without an opportunity on the part of the defendants to object to the same.

19. That the court erred in failing to find that all of the acts and conduct of the defendant corporation and Nephi J. Hansen were acquiesced in throughout the years by all of the plaintiffs, and that some of the plaintiffs were active participants in the consummation of the transaction sought to be repudiated, and in failing to find that plaintiffs sought to repudiate the affirmative action on the part of some of them and the acts of the corporation so far as all of them are concerned made in the usual and ordinary manner that all acts of the corporation had been performed for more than twenty years without objection on the part of any of the plaintiffs.

ARGUMENT

This being an equity action, it becomes relevant to scrutinize the identity of the plaintiffs and their own acts and conduct and to ascertain whether or not they are free from blame and if in seeking equity they are ready and able to do equity. It also becomes material for and this court may review the evidence to determine whether or not equity has been done. Therefore, it probably will aid this court if we discuss the problem under three headings: I. The Plaintiffs, Their Pleadings, and Conduct; II. The Deed Should have been Declared Valid; III. The Accounting is Wrong. Necessarily the question of estoppel arises both against the plaintiffs as individuals and as stockholders under heading I, and against the plaintiffs as stockholders and the corporation itself under heading II, and under heading III must necessarily be discussed the erroneous principles used by the court throughout the case as well as in the so called accounting.

MAXIMS OF EQUITY

It may be advantageous briefly to mention some of the controlling maxims of equity. The trial court seemed to be unaware of their existence. They require that the conduct of one who seeks relief shall have been of such a character as to entitle him to ask the court's assistance. If not, relief will be denied. "Nothing can call this court into activity but conscience, good faith, and reasonable

diligence.” 19 Am. Jur. 319, Sec. 462. (Note: All references under this head are from 19 Am. Jur. by page).

1. One of the most frequently invoked maxims of equity declares that he who seeks equity must do equity. At the least, an offer must be made to make restitution by one seeking rescission or the bill will be dismissed. A complainant seeking to have a transaction cancelled or a deed set aside must return or offer to return whatever he has received, pgs. 319, 320, 321.

2. He who comes into equity must come with clean hands. Where it appears that the right upon which the complainant relies has grown out of a wrong or a breach of duty, relief will be denied. In other words, a complainant will not be permitted to take advantage of his own wrong, pgs. 323, 324, 325.

3. Where the wrong of one party equals that of another, the defendant is in the stronger position. Relief will be denied where the parties have acted with the same degree of knowledge as to the transaction. Relief may also be barred by the fact that the complainant has been influenced by bad motives, pgs. 330, 331, 332.

4. Equity aids the vigilant, p. 333.

5. Where it appears that one party was in the better position to avert the loss, injury or prejudice which now must be borne by the one or the other, equity favors the one who has the inferior opportunity, p. 334.

6. Where equities are equal, the law will prevail, p. 337.

7. Laches. The bill will be dismissed where it appears that the complainant stood by and permitted the defendant to expend sums of money in improving the property, p. 356.

The foregoing maxims are generally so well known and understood that discussion of them seems superfluous. Every one of them was violated by the trial court in this case.

We come now to a consideration of the three headings of this argument.

I. THE PLAINTIFFS, THEIR PLEADINGS AND CONDUCT

This is a suit by a corporation to set aside a deed given to a third person who is neither a stockholder nor a director. The suit is brought allegedly by stockholders for the benefit of the corporation. The authorities are uniform and without dissent that actions of this kind although brought by the stockholders are in fact actions by the corporation. It is also true that because the action is equitable the plaintiffs even though they sue as stockholders must themselves be in a position to invoke the aid of equity, *Smith vs. Stone*, 128 Pac. 612, 621, (To be discussed in more detail later), citing Noyes on Intercorporate Relations and Cook on Corporations (6th Ed.) See also, Fletcher Cyclopedia on Corporations, Volume 6, page 6934. (All citations in Fletcher are to the 1919 edition, including both the 1921 and 1930

supplements, both of which reaffirm the principles announced in the main edition.)

The action was originally commenced by Lewis F. Hansen and Clyde Hansen (T. 1), to set aside a deed to the defendant, William L. Hansen, dated July 16, 1945, and delivered to him July 28, 1945. Both plaintiffs were directors who voted (Exhibit "D"), to sell the property, and authorized the president and secretary to execute and deliver the deed, (Exhibit "E"). The resolution authorizing the deed was adopted after several meetings of the directors, including meetings on the 11th and 16th of July, (T. 202, 203), and was delivered by the secretary of the company, signed by all of the directors, to the attorney for the defendant, W. L. Hansen, (T. 422). Clyde Hansen never did authorize the use of his name as a plaintiff, (T. 426). He was dismissed as a plaintiff at the hearing on the first demurrers to the complaint, April 21, 1947, (T. 22). The deed in question was delivered and the money paid, (T. 313, 314), July 28, 1945, but the complaint was not filed until December 21, 1946, seventeen months thereafter and the summons was not served until the 23rd of December, 1946. The plaintiff, Lewis F. Hansen, waited nearly one and one-half years to bring this action, and then based the action upon what he alleged was his own fraud as a director, so that he could benefit therefrom as a stockholder. He knew that the defendant, W. L. Hansen, had made many changes and improvements and had spent substantial sums of his own money on the property. Neither the corporation nor the plaintiff di-

rector came into equity with clean hands; both of them were guilty of laches; both of them were in the superior position to know whether their conduct was right or wrong; both of them were seeking to take advantage of their own wrong, and neither of them offered to do equity. Neither Lewis F. Hansen nor his attorney chose to submit themselves to the trial of this matter as a party and attorney, and on May 18, 1948, a month before the case came on for trial, Lewis F. Hansen withdrew as a plaintiff, and Benjamin Spence withdrew as his attorney, and both were dismissed from the case, (T. 74, 75, 76).

The first complaint was signed by Benjamin Spence as attorney for the plaintiff. After the demurrers to the complaint were sustained, and on August 14, 1947, more than two years after the execution and delivery of the deed, an amended complaint was filed by Benjamin Spence and LeGrand Backman as attorneys for the plaintiffs with five additional plaintiffs. LeGrand Backman never did sign the complaint and never was an attorney for the plaintiffs and never did make any appearance for them, (T. 148). The new plaintiffs, W. V. Jensen and Mrs. J. E. Jensen, were never stockholders. They are respectively the son and widow of Joseph E. Jensen, one of the directors, who authorized the deed in question, (T. 494, 495). W. V. Jensen is referred to throughout the case as Vivian Jensen. He and Lewis F. Hansen stirred up all this litigation. W. V. Jensen contacted the plaintiff, Hettie May Bates, her son Keith Bates, and plaintiff Ralph Cutler, and Keith Bates

in turn stirred up plaintiff William S. Young, as appears from the evidence of these witnesses. In other words, the litigation was instigated and stirred up by Lewis F. Hansen, Vivian Jensen and Keith Bates. Neither Vivian Jensen nor Keith Bates were ever stockholders, and Lewis F. Hansen, as we have shown, had no standing in equity by reason of his own conduct.

At the time Lewis Hansen and Benjamin Spence withdrew, E. C. Jensen entered his appearance as counsel for the plaintiffs, but when the trial court asked him who hired him, he stated that he refused to answer, (T. 279).

After the case had been tried and submitted and the court had announced its decision (with no foundation in the record to support such a decision), J. R. Jensen and W. V. Jensen, upon motion of plaintiffs' attorneys, were dismissed without notice to defendants, as plaintiffs in this action. There is no J. R. Jensen in the case, and the motion is headed Mrs. J. R. Jensen. She is in fact Mrs. J. E. Jensen, although she appears as Mrs. J. R. Jensen, (T. 102). Thus, as the case stands, the persons who stirred up this litigation and who are responsible to the defendant, W. L. Hansen, for any costs and damages he may sustain have been eliminated from the case. One of the main instigators in this case was dismissed without the consent of the defendants. The court had no right to release this plaintiff from his responsibility herein, and it was error to do so.

Robert Young appears as a plaintiff, but he had been dead for years when this action was filed. His son, William S. Young, was substituted as a plaintiff stockholder at the trial of the case. He didn't get into the case until three years after the deed had been given, and his standing as a stockholder is extremely questionable, as also is Mrs. Bates' standing as a holder of her husband's stock, he having died years ago, (T. 150, 155, 156). Mrs. Bates is the owner in her own right of fifty shares of preferred stock. Cutler is the owner of ten shares of preferred stock and thirty-five shares of common.

There were subscribed in the company in 1929, as shown by the certificate attached to the amendment of the articles, 3500 shares of common stock and 740 shares of preferred stock. Cutler, therefore, owns 1% of the common stock, and he and Mrs. Bates together own 60 out of 740 shares of the preferred stock.

Thus, none of the instigators of the litigation remain in the case, and of the three remaining plaintiffs Robert Young is dead and is questionably represented by his son. Robert Young was, and Hettie May Bates and Ralph Cutler have been stockholders since 1920 or thereabouts, and for at least 25 years knew of the manner in which the defendant corporation's business was conducted. It was conducted without protest or objection on the part of any of them. Hettie May Bates some 16 or 17 years ago when her husband died tried to find out through her brother-in-law, D. E. Judd, cashier of

the Utah Savings and Trust Company, (T. 160), something about the company, but he couldn't find out very much about it, and she was told that it had gone bankrupt, (T. 167). She knew the company had some property in Sugarhouse, but never knew what it was. She never received any dividends after two or three years, and she never protested or objected to any thing the company did or did not do. She thought Nephi J. Hansen owned the company, (T. 162), but she did not know what business the company was engaged in, (T. 159). She never talked to Mr. Hansen about the business of the company or anything about it, (T. 162, 163). She has resided in Salt Lake City since 1921, (T. 156), and all the years she has owned the stock she has never known anything about the company, (T. 159). Ralph Cutler has owned his stock since 1920; has never received notice of or attended a stockholders' meeting; never knew anything about action of the board of directors; has lived in Salt Lake City all the time; was acquainted with Nephi J. Hansen; never has talked to him about the Holding Company, nor about the company since it was changed from the Granite Lumber Company, and that was around 1924 or 1925 (T. 294, 295). After the Holding Company took over, the insurance company that had the mortgage on the property had taken over the property, and Hansen was operating it under their direction. This was after 1930, (T. 296). He realized that the company had gone broke, (T. 297), but he didn't know whether Hansen was operating for the bank or what not. Mr. Hansen never told him any-

thing about the affairs of the company except on one time he said, "If there is anything left out of this company, I am going to see that my family gets it." This statement was made between 1930 and 1935, (T. 298, 299). He never made any effort to remove Nephi as president. He felt that his investment was a bad one, and he made no effort to change the method of operation of the Granite Holding Company, and he knew that Nephi J. Hansen was running it and intended to run it, (T. 299). He never got dividends after the first few years and supposed they were in a condition where they couldn't pay, and he just let things slide, (T. 300). He never read the Articles of Incorporation; has never made any efforts to go to stockholders' meetings, or to change the management or control of the company. He never took any interest until Vivian Jensen came down to see him, and until that time had never paid any attention to his stock. It was just locked in his box, (T. 302). William S. Young is the son of Robert Young, whose stock dates from 1920, (T. 274, 275). At one time he asked Mr. Hansen what the revenues and rentals were, and he made no reply except that his salary would eat up everything, (T. 279). His father has been dead since 1930, and he has been the administrator ever since. The estate wasn't straightened out until after 1934, (T. 283). He only knew in a general way what the company owned. He knew they owned the Granite Mart property. He wasn't much interested in the company until after the estate was straightened out some time after 1934, (T. 284). He knew that they owned the Southeast Furni-

ture Company property at one time, (T. 285). He doesn't know of any dividends received from the company, (T. 286). Nephi J. Hansen ran the company, but he didn't know who the directors were except Lon Fisher; never inquired because it wasn't any of his business. Up to August, 1945, he made no effort to find out anything except to meet Mr. Hansen on the street, (T. 287). He knew nothing about the company and never did anything about it. Nephi Hansen was running it, and he let him run it without objection as he saw fit, (T. 289).

These matters all appear also from the complaints, as does the fact that the corporation didn't keep records, and that all of them knew all the time for upwards of 25 years that there were no meetings of stockholders or directors and no dividends; that Nephi Hansen was running the company as he saw fit; that it was being liquidated; that it had gone broke, and was in the hands of the mortgagee. They made no effort to change the form of management or the method of doing business and sat back during all the years until they were stirred up by outsiders who had no stock holdings. They were not vigilant and they made no offer to do equity. Yet they seek equity in their behalf. They had absolute right to obtain full knowledge, and they were in a better position than the defendant, W. L. Hansen, to obtain knowledge of the affairs and condition of the company, and they did nothing. Every maxim of equity would deny them relief in this case, as would also their own pleadings. It is also true that their holdings and any share they might receive in any recovery herein are insignificant

compared to the money the defendant, William L. Hansen, has invested in the property. The demurrers to the complaint should have been sustained, and certainly the motion for non-suit should have been granted.

It is interesting to note that the same trial judge who presided in this case held in another case now before this court, (Behm Estate), that a father, who, as administrator, brought an action against one responsible for his daughter's death, was guilty of champerty, and yet, in the case at bar, allowed persons to stir up litigation who had no interest in it and then permitted them to withdraw from the case and a judgment to be secured through their intermeddling and in favor of stockholders who had slept upon their alleged rights for a quarter of a century.

We will be interested to read any cases that counsel on the other side can cite that will support the trial court in this action. We have found none, and while we are not infallible, we are satisfied there are none.

II. THE DEED SHOULD HAVE BEEN DECLARED VALID

(A) *Under any view of the Facts the Deed was the Valid Act of the Corporation.*

We shall not attempt to cite many of the numerous cases or authorities, and they are legion, to show that the trial court was completely in error from the beginning to the end of this case.

As we have already pointed out, early in the case, in fact on the first day, the trial court indicated that we were going to have to appeal his decision, and that he had already concluded that there were irregularities and a quick sale of the property, (T. 215). He had heard practically none of the evidence at that time. This, in spite of the fact that shortly before that time early in the testimony of the first witness, he said to counsel for the plaintiffs that we should go into the question of whether or not plaintiffs should make a tender because he thought there was merit in that contention. The trial court said to plaintiffs' counsel:

“Are you in position to make a tender if it appears that you would have to do so in order to do equity?

“MR. JENSEN: Well, I am not in a position to answer that question right now.

“THE COURT: If you are not in position to do it, there wouldn't be any need of taking a lot of other evidence and finally come around to the situation where you would have to make your tender in order to get this thing set aside.” (T. 151).

Then, in spite of that statement of the correct rule, the court refused to require the plaintiffs either to make a tender or to show their ability to do so, (T. 152). At the conclusion of the plaintiffs' case, in overruling the motion for non-suit, the court said as a ground for overruling the motion for non-suit, that Nephi Hansen was under the influence of William L. Hansen because “I

have the testimony of the last witness that the father was 80 years old; that he was under the influence of Bill, and that Bill was with him all the time", (T. 361). The last witness referred to was Lewis F. Hansen, the self confessed prevaricator and diligent director, who had testified that he, himself, was present all the time with his father and was collecting the rents, etc. "I was there more than anybody else", (T. 348, 353). Later in the case the court said that this witness was not worthy of belief when he stated that the tenants were trying to get their rents doubled.

At this point, it may be well to add another word with reference to Lewis F. Hansen. He claimed to have signed the resolution, Exhibit "D", three or four months after the date of the meeting and not to have been present at the meeting. Yet, when confronted with his oath of office and shown that the date on that was July 18, 1945, he said he couldn't say whether or not he didn't sign both the minutes and the oath of office at the same time. "I wouldn't say. I don't remember." (T. 346). As a matter of fact, he signed them both at the same time, but it makes no difference when he signed them or whether he signed the minutes one day or one year later. Minutes are seldom written up and signed at the same meeting to which they refer. The fact of the matter is that there was a meeting, and he was present at it and his signature no matter when executed attests the fact that there was such a meeting; that he was present and assented to the action taken. If he signed them four months later, he is even more at fault if they

were wrong, than had he signed them immediately following the meeting. No one disputed that there was a meeting of the board of directors. In fact, the evidence is clear that there were several including the meeting authorizing this transaction. It is immaterial when the resolution was signed. The important thing is when was it adopted? As we shall later show, even had there been no meeting and had the directors signed the resolution individually in the absence of a meeting, these plaintiffs could not complain.

At the conclusion of the entire case the trial court had abandoned the undue influence theory as, of course, that could not be sustained under any of the facts in this case, and adopted another and entirely different but still untenable theory directly in contradiction to the undue influence idea. At that time the court would have Bill under the influence of his father to save this property for the father. The court said that no one ever looked upon this corporation as other than the property of Nephi J. Hansen; that the court would fix the value of the building at \$100,000.00, on the basis of the expert who had never examined the inside of the building and had made his examination on a Sunday when it was closed and three years after the sale. He ignored the experts who examined the property at the time of the sale. In fact, he had even forgotten the name of one of them who was the most skilled and competent of them all. The trial court said also that he believed Nephi Hansen wanted to salvage something out of the property, although the evidence showed at that time that Nephi

Hansen after the sale got less than he was getting before the sale. In contradiction to that the court then said he thought that William L. Hansen wanted to save the property for the family, when the evidence showed that the family were getting nothing from it except the meager salary of Nephi Hansen for forty hours of work a week, and that Lewis Hansen, a son of Nephi and a brother of W. L., was the instigator of the whole lawsuit. The court said the deed "should be set aside on the ground that Will Hansen and the father both were attempting to save this thing for Mr. Hansen", (T. 436); that the company could have put it in the hands of a real estate company, and that there was a collusive arrangement between William Hansen and Nephi Hansen, although there was not one word of evidence of any such collusive arrangement, nor one word of evidence that W. L. Hansen ever did anything except make a bid in accordance with the price fixed by experts for a run-down, failing property.

This case, as we have indicated, was decided against us before it had hardly commenced. As one ground of deciding against William L. Hansen was eliminated, another was advanced by the trial court. The record shows that the trial court first announced that Nephi Hansen was under the influence of Bill Hansen; then that Nephi Hansen was determined to save the property for himself, and Bill helped him. Thus, Bill would be under the influence of Nephi; then that there was a collusive arrangement to save it for the Hansen family. The court's reasons are so at variance with each other

and so contradictory that we can gain only one conclusion from them, and that is that regardless of the facts we were doomed from the day we stepped into the court room.

The record shows without contradiction, as we have already indicated, that this company was in failing circumstances; that it was heavily in debt; that it could not pay its bills; that the principal payments on the mortgage were way in arrears; that the property was disintegrating and producing no profit; that the company had lost all of its other properties merely for their proportionate amount of the mortgage; that Nephi Hansen was the only stockholder who took any interest in the property; that he could not refinance his obligations; that he couldn't raise money for needed repairs and maintenance; that these matters had all been discussed long before the transaction in question here. There was no help to be secured from anyone to save this property.

In 1939 the board of directors authorized, "Exhibit 1", the president and secretary to sell all or any part of the real estate at public or private sale upon the best terms obtainable and to deliver deeds which shall be final and to apply the proceeds on the mortgage. Under this authorization, and without any objection on the part of any stockholder the company sold the Southeast Furniture and the Granite Mart properties for the bare amount of the mortgage. We learn from the testimony of the secretary, Clyde Hansen, that regardless of this

resolution these sales were approved by the directors. The directors had the right to sell all of the property of the company without the consent of the stockholders under the Articles of Incorporation. These stockholders when they became stockholders were charged with knowledge of the fact that the board of directors could sell the property without their consent, and by becoming stockholders they agreed to this provision. Under our statute the board of directors may sell all of the property of the corporation if the Articles so provide.

“When the Articles of Incorporation provide that the property of the corporation may be sold, * * * by the directors, * * * sales, made in accordance therewith shall be binding upon the company.” 18-2-16, U. C. A. 1943.

This may be done even by a solvent corporation.

“but the directors of the solvent corporation may sell all its property without the consent of its stockholders, where such sale is expressly authorized by the charter.” 13 Am. Jur. 923.

Even without charter authorization the directors of this failing company had the right to sell all of its property.

“By the weight of authority, in the absence of statute requiring consent of the stockholders, the directors of the corporation in failing circumstances may sell either part or all of the corpor-

ate property without the consent of the stockholders." 13 Am. Jur 923.

To the same effect is Fletcher, Volume 2, page 2156 at 2158:

"while there is no question but that minority stockholders cannot object where the corporation is insolvent or is doing a losing business or can no longer make a reasonable profit, there is no objection to a corporation's selling out at any time for any good reason provided there is no fraud or misconduct on the part of the officers or majority stockholders."

See also Ballantine on Corporations, 1946, p. 667, to the effect that if a corporation is insolvent or in failing condition, the board of directors have authority to sell the entire assets, and there is no obligation resting on a corporation to pursue its business when it becomes evident that the enterprise will in all probability result in a loss. This is true whether the minority shareholders object or not, and even if there is a grossly unfair or fraudulent sale of assets, the right to equitable relief by rescission will not be granted where there is laches or a delay during which conditions have changed, so that undue hardship would be caused by the rescission. Even if there is an unfair or even fraudulent sale the courts tend to give small minority stockholders compensation in money rather than upset a transfer which would be unjust to others by way of rescission. (Ballantine, p. 674, 675).

In fact, Ballantine states that in case of a sale of the entire assets—

“wide latitude is allowed to the discretion of the management and the majority. This is particularly true where the disposition of the assets is made to third parties rather than to the majority themselves, * * *. In general, as we have seen, courts refuse to review the motives of the majority or the fairness or expediency of these fundamental changes at the suit of minority shareholders, on the ground that they are questions of business policy and judgment on which the majority shareholders have the right of determination. It can hardly be said that majority shareholders are fiduciaries in making these decisions as they are entitled to decide, if they act in good faith, *according to their own enlightened self interest.*” Ballantine, p. 712. (Italics added)

The undisputed evidence shows that the transactions involving the Southeast Furniture and Granite Mart properties were consummated without objection from anyone, stockholders or directors, and that the defendant, W. L. Hansen, knew of these transactions and the method by which they were accomplished. Early in 1945 W. L. Hansen was contacted by his mother and father, Nephi J. Hansen, to try and save the remaining assets of the company—the property in question. After investigation he made the corporation an offer. At that time the mortgage was delinquent, and there was still due upon it \$74,500.00 principal. W. L. Hansen made the corporation an offer of \$10,000.00 cash, subject to

the mortgage. Several directors' meetings were held. The company had the offer under consideration for more than six weeks. Clyde Hansen, the secretary, conferred with numerous individuals. W. L. Hansen also conferred with numerous individuals concerning the sale. Nephi Hansen had already tried to refinance the property and knew intimately and exactly its worth and condition. He had the letter from Mr. Harding, the executive secretary of the Real Estate Board. Bill Hansen also had the information as to Mr. Harding's opinion, and also the opinion of S. R. Nielson. After these efforts, investigations and meetings, the final meeting was held at which W. L. Hansen was not present, nor had he been present at any other directors' meetings. The board of directors was filled. The offer was accepted, and the deed was authorized. The company had the advice of competent legal counsel. There is no dispute in the record that there was a meeting of the directors. Even Lew Hansen admitted this. The overwhelming evidence is to the effect that there was a meeting of the board of directors at which the new directors were elected and the deed authorized. A resolution was adopted, and there is no dispute in the record that this resolution signed by all of the directors was given to the attorney for the defendant, W. L. Hansen, by the secretary, and the money was paid by the attorney to the president of the company. The secretary delivered the deed to W. L. Hansen July 28, 1945, and it was recorded the same day. This was more than a week after the meeting of the directors. If there had been anything irregular

in the election of directors or in the meeting, which there was not, W. L. Hansen knew nothing about it; had nothing to do with filling the vacancies on the board, and nothing to do with the action of the board. He paid his money to the person who had been operating the property for a quarter of a century without objection on the part of any stockholder. No one had more right to receive the purchase money on behalf of the company than did its president, Nephi J. Hansen. The stockholders, including these plaintiffs, had held him out to the public as their agent and representative all through the years. Both checks for payment of the purchase money were made to the Granite Holding Company and delivered to the president of the company. There was no one else to whom these checks could have been delivered or to whom payment could have been made.

Not only was the sale made to W. L. Hansen in the customary manner in which other sales had been made, but it was also made in accordance with the usual business custom of the corporation and was made by authority of the board of directors. The trial court says that the board of directors was a dummy board because it was selected by Nephi J. Hansen. It is conceded that Nephi J. Hansen owns the great majority of the stock of this corporation. In fact, some of the plaintiffs thought that he owned the entire company. As a majority stockholder, he not only had the power, but the right to elect any directors he desired. Certainly no one can successfully contend that a majority of the stockholders do not have the right to elect directors.

The Articles of Incorporation here provide that the directors may fill vacancies, which the directors did do in this case. The fact that the majority stockholder was also a director cannot invalidate the election simply because the directors were friends or relatives of his. There is no law ~~which~~ ^{which} requires him to elect enemies or strangers or people who are not friends. As a matter of fact, the record does not show that Nephi Hansen selected the directors, but even had he done so, there is nothing in the law that prohibits it. Under the Articles of Incorporation the board of directors had the right to fill up the board, which they did. The board was lawfully constituted. Some inference has been made that because the deed is dated July 16 and the resolution authorizing it July 18, the deed is invalid. That does not follow at all. The deed itself is a warranty deed by which this corporation warranted its right to sell the property. The deed itself recites that it was done by resolution of the board of directors. With these recitals it was delivered to the defendant, W. L. Hansen, 12 days later. Even had the meeting been held on the 18th, it would have been merely a ratification of the deed. The board can ratify action previously taken if it is within the powers of the corporation. Clyde Hansen, however, cleared up this discrepancy and testified positively that the deed was signed after the board of directors' meeting, and that the date, July 16, on the deed is a mistake, (T. 285, 287). Be that as it may, W. L. Hansen was not required to question the warranty and verification in the deed itself nor the resolution. The

deed had been executed and the resolution passed when the deed was delivered to him. Even had Nephi Hansen sold the property without a meeting of the board of directors, under the authority of Exhibit 1 these stockholders could not complain because the thing was done in accordance with the usual custom of doing business. Nor can these stockholders complain or contend that there was no meetin or that the directors signed the minutes individually. Nor can these stockholders contend that the directors were not de jure directors. The authorities are uniform that de facto directors may bind the corporation in favor of third persons, and that a corporation may act by means of an officer de facto as regards third persons as fully and effectually as if the officers were de jure in all matters within the scope of the corporate business. (Fletcher, Volume 3, p. 3039)

Under modern authorities there is no question that the board of directors may delegate the transaction of business to any number less than the whole board and may clothe the smaller number with the entire authority of the whole board. The directors have the power without statutory authority to delegate not only ordinary and routine business, but business requiring the highest degree of judgment and discretion, 13 Am. Jur., 924, 925. Ballantine states the modern rule as follows:

“As presidents of corporations very frequently exercise, with the knowledge and tacit asquiescence of the directors, wider powers than those given them by the articles and by-laws of the corporation, courts recognizing this fact, have

usually adopted a very liberal rule in favor of persons contracting with such officers, whenever there was evidence reasonably tending to show that it had been the custom for the president or other officer to exercise such powers." Balantine, p. 140, citing cases from Iowa, Minnesota and Wisconsin.

Where there is a custom for the directors to act separately and not as a board, the corporation and the stockholders are estopped to deny the validity of their action.

"In other words, 'a corporation, its board of directors and shareholders, may waive any necessity of a meeting of its board of directors for the transaction of the business of the company. * * * by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way.' " Fletcher, Volume 3, p. 3049.

Holy Cross Gold Mining & Milling Co. vs. Goodwin, (Colo.) 1924, 223 Pac. 58 for instance cites the rule as follows:

"a board of directors may act individually and the act be binding on the corporation if it has become a practice of the directors to act that way." Citing C. J. and Thompson on Corporations.

Even had there been no meeting of the board, which there was, it is undisputed that it was not the custom to hold directors' meetings, and this had continued over a long period, so that these plaintiffs as stockholders could not have objected to the directors approving this transaction individually. However, there was a meeting at which the action was taken, and it is immaterial when the minutes were signed. In its business with W. L. Hansen this corporation did more than it usually did. However, even if the action had been as contended by the plaintiffs it is still valid because it would be in accordance with the usual custom and business. All the plaintiffs testified that Nephi Hansen always managed the corporation as his own, and that to this they made no objection.

Lew Hansen is the only person who raises any question about the meeting of the board. Even he admits there was a meeting. The minutes recite that there was a meeting, and the rule is:

“whenever an act purports to have been done or authorized by the board of directors, it will be presumed, until the contrary is shown, that they acted at a meeting, that proper notice of the meeting was given to all the directors, that a quorum of the directors was present, that the meeting was held and conducted in accordance with any special provision in the charter or by laws, and that the act was done or authorized by a majority, etc.” Fletcher, Volume 3, p. 3077.

This is particularly true when the minutes of the corporation also recite that the meeting was held.

If this were not the rule no one could safely do business with a corporation. Fletcher also says, Volume 3, p. 3100, 3101, that a corporation is bound by the apparent authority it gives its officers; that because a large part of the business of the country is carried on by corporations it is the practice to deal with their agents, and that "the authority of an agent to do certain acts in behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them, if unauthorized." p. 3104. The public is compelled to rely upon the apparent authority of the officers of the corporation, and if over the years they have done certain acts as the one in question, the corporation "is bound thereby to the same extent as if authority were conferred in the most formal manner." Apparent authority does not require any formal resolutions, and if there is apparent power, then actual power is immaterial so far as liability of the corporation is concerned, p. 3105. Missouri states the rule as follows, according to Fletcher at p. 3114:

"a customary act by an official may be treated as valid and within the exercise of an actual authority, not necessarily because the company is estopped to deny its validity from having invested the officer with apparent authority to per-

form it, but because the inference can be drawn that he was, in truth, authorized."

And according to Fletcher, even in Minnesota where it is held that knowledge is necessary when apparent authority is relied on, it is not necessary to have knowledge in order for the authority of the agent to be implied, p. 3115. Fletcher also says at pages 3204 and 3205:

"Furthermore, the president may have all the powers of the board of directors where they abandon the management of the corporation and leave the conduct of its business to him. Thus, if the president is in full charge of the corporation, and has been permitted by both stockholders and directors for a long time to exercise unrestrained control, he has prima facie authority * * *. Moreover, if the corporation is in effect a one-man corporation, and the directors have held no meetings for years, and such one man is the president who absolutely dominates, manages and controls its property and affairs as his own, any contract made by him is binding on the corporation."

A point was made that the president did not turn the purchase money into the corporation. That is no argument against W. L. Hansen. He paid the money to the president of the corporation, with checks payable to the company, and what became of the money afterwards is no concern of his.

"It is no defense that the officer misappropriated the money and that the corporation never re-

ceived any benefit from the loan.” *Chestnut Street Trust & Savings Fund Co. vs. Record Publishing Co.*, 75 A. 1067.

As a matter of fact, the corporation did get the benefit of this money. The resolution, exhibit “D”, recites that the corporation owed Nephi Hansen back salary which he settled with the corporation for the amount of \$5,000.00. There is no dispute that the corporation did ~~not~~ owe this money, and salary is a preferred debt. The record also shows without dispute that \$1200.00 of the remaining \$5,000.00 went to pay corporate obligations. The balance of \$3,800.00 was represented by the check of W. L. Hansen payable to the Granite Holding Company and was delivered to the Granite Holding Company.

Certainly, the court had no right to return this property to the Granite Holding Company and allow it to keep the purchase money. No case sustains that sort of thing. Nor can these stockholders complain that it was not paid to the corporation when it was paid to the individual they permitted to do all their business for a quarter of a century — the individual they held out to the public as the proper one to represent them and to conduct all of the corporate business.

The deed was the valid act of the corporation. It was authorized at a meeting of the board of directors legally constituted, as provided for in the Articles of Incorporation, acting with authority given them by the Articles of Incorporation. The minutes presume regular-

ity, and there is no evidence whatever that the meeting was not held. Even had there been no meeting and had the directors signed individually, and had they been only de facto directors, their act still binds the corporation, as we have pointed out. Under any view, the deed was the valid act of the corporation and transferred title to W. L. Hansen. The deed itself warrants the title of the company and the regularity of the proceedings and recites that it was properly given by resolution of the board of directors. The defendant needed to go no further than the deed so far as the corporation is concerned. The defendant had no part in the issuance of the deed and no part in the proceedings leading up to it, and these stockholders, in view of their past conduct, their acquiescence and inaction, cannot now as against W. L. Hansen say the deed is not valid.

(B) *These Stockholders Have No Cause of Action
Against W. L. Hansen*

There is a well known principle of law that without any other and standing alone is fatal to the plaintiffs' entire case herein. It is settled without dispute—

“A stockholder cannot maintain a bill in equity to set aside an act or transaction which was done irregularly or illegally, but which a majority of the stockholders are entitled to do regularly or legally. Nor can a stockholder sue to set aside a transaction on the part of the directors on the ground that it was fraudulent, irregular, illegal or in excess of the powers conferred

upon the directors, where the transaction is within the powers of the corporation, and such, therefore, as a majority of the stockholders may ratify, unless, as may sometimes be the case, it is impossible to procure a meeting of the stockholders to pass upon the transaction." Fletcher, Volume 6, pages 6899, 6900.

This is just common sense. The majority of stockholders could have authorized or later ratified this transaction. The corporation had the power to sell the property. Likewise, even had there been no meetings of the board of directors, the stockholders could have ratified Exhibit "D". The principle just stated is the corollary of another principle that courts of equity do not seek to do useless things. Of what avail this entire litigation? The property has been returned to the Granite Holding Company which is still controlled by the majority stockholders. They can still do exactly what already has been done. They can still sell the property to W. L. Hansen, and this entire lawsuit is a complete futility. Another complexity in this case is that the court has returned the property to Nephi J. Hansen and allowed him to keep the \$10,000.00 and has given him a judgment for \$30,000.00, and at the same time stated that his fraud was responsible for the original transaction and the basis for the rescission. Nothing could be more absurd and when it is done in the name of equity it is astounding. How these stockholders are to benefit by this judgment does not appear and is beyond our imagination to conjecture. As above indicated, these plaintiffs have not been

injured because the majority can still do exactly what already has been done.

We have made no attempt in this brief to do more than cite elementary principles, recognized so far as we are able to determine by all the text writers and authorities. As already stated, we have found no case that would justify the action of the trial court herein under the facts present. There are certain principles of law that prevent majority stockholders from using the corporation to defraud minority stockholders, but even those rules of law require the minority stockholders to bring themselves within the principles of applicable law. The right is not unlimited, and there is nothing in the law that prevents majority stockholders or directors from acting as stated by Ballantine, *supra*, in their own enlightened self interest. In other words, majority stockholders have the right to conduct the business of the corporation as they see fit, provided they act in good faith, and minority stockholders have no right to complain of action of the majority merely because such action may be in the interest of the majority. The minority stockholders cannot run the corporation. They cannot elect the directors. They cannot control the management.

Minority stockholders or any stockholders for that matter must bring themselves within well recognized and established rules in order to rescind a deed given

by the corporation. As we have shown, they must restore the defendant to the status quo.

“Certainly the plaintiff will not be allowed to derive any unconscionable advantage from the cancellation, and usually he will be denied relief when it is not possible substantially to restore the defendant to the status quo. The mere inability of the plaintiff to make restoration does not relieve him of his obligation to do so, or permit the court to grant him relief.” 9 Am. Jur., p. 384.

The fact that these plaintiffs hold some preferred stock does not change their status. Preferred stockholders are not creditors of the corporation. They are merely stockholders with a preferred right to dividends. Fletcher, Volume 6, p. 6012, Ballantine, p. 503.

The cases where minority stockholders may resort to the courts as stated above are limited. They cannot question the act of the majority unless the acts are—(1) ultra vires; (2) illegal, or (3) fraudulent. Stated in another way, a court will not interfere in the suit in regard to matters intra vires, unless there is fraud or oppression. “The majority rules” is the basic rule as to the internal affairs of the corporation so far as the acts of the corporation are within its express or implied powers. It is of no moment that the acts of the majority are unwise or inexpedient so long as they act in good faith, Fletcher, Volume 6, pages 6797, 6798. In the case at bar the acts were not ultra vires, as we have shown, but even had they been ultra vires, these plaintiffs cannot complain. It is well settled that even an

ultra vires contract with a corporation cannot be set aside if it has been fully performed on both sides.

“When an ultra vires contract with a corporation has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with.” Fletcher, Volume 3, p. 2631, Ballantine, p. 247.

Also a majority of the courts hold that the party who has received benefits from the performance is estopped to set up that the contract is ultra vires.

“Ultra vires” is applied to an act that is beyond the scope of the specified corporate business. An illegal act is one that is contrary to some public policy, or statutory regulation. Ballantine, pages 246, 247. The giving of the deed was not an ultra vires act, nor was it an illegal act. The contract having been fully executed on both sides, these plaintiffs cannot raise the question of ultra vires, nor the question of illegality, as above indicated. They are thus left with only one ground, and that is that the deed was fraudulent.

All of these directors were stockholders. None of them profited personally from this transaction, unless it can be said that Nephi J. Hansen profited personally. He got \$5,000.00 which the corporation owed him for salary. He had a right to this. He was later employed by W. L. Hansen at a less salary than he had been receiving from the corporation. He had complete authority before the sale over the property. He had no authority

over it after the sale. The only question is what became of the \$3,800.00, and as we have already pointed out, that is a matter between Nephi Hansen and the corporation. It is no concern of the defendant, W. L. Hansen, who had no control whatever over either the corporation, its president or its money. The record fails to show how this sale deprived the minority stockholders of anything. Had the property continued as it had been managed in the past, it would have gone for the amount of the mortgage. Stockholders never received anything from prior sales, and they did ~~not~~ receive an extinguishment of Nephi Hansen's debt and other debts of the corporation by this sale in addition to the amount of the mortgage.

The trial court found that the corporation was the alter ego of Nephi Hansen. While the corporation was controlled and managed by Nephi Hansen, it was not his alter ego under any of the authorities. In order to be his alter ego it must appear that Nephi J. Hansen owned all or substantially all of the outstanding shares of the Granite Holding Company, or that the persons in whose name such shares stand held the same in trust for him, *Geary vs. Cain*, 79 Utah 268, 273, 9 Pac. (2) 396. If this corporation had been the alter ego of Nephi Hansen, these stockholders certainly could not complain because they wouldn't have been stockholders. Nephi Hansen and the corporation would have been identical, and if the corporation was the alter ego of Nephi Hansen, he had a right to do with his property as he saw fit except as to the rights of creditors. As we have shown,

these plaintiffs are not creditors, nor was the corporation the alter ego of Nephi J. Hansen. Even though the finding of the court that the corporation was the alter ego of Nephi J. Hansen destroys the entire case for the plaintiffs, we still do not wish to rely upon that error of the court.

As indicated above, there was no personal advantage to these directors at the expense of the stockholders by reason of the sale to W. L. Hansen. Even a stockholder or director might have purchased the property instead of W. L. Hansen and still not have been liable in a suit for rescission, provided there was no fraud or unfair dealing, Fletcher, Volume 6, p. 6842. So plaintiffs must show that the transaction was fraudulent, and the only evidence that they can point to is the evidence of Mr. Keipe and the finding of the court that at the time of the sale the property was worth \$100,000.00, and that it was not sold by a real estate company through solicitation for bids. The plaintiffs failed to allege or prove that at the time of the sale there were other persons willing to pay more for the property than it was sold for. This itself, as we will point out in a moment, is fatal to their case if based on the ground of inadequate consideration. Aside from that, is the question of their own laches, estoppel, possibility of ratification and general uselessness of this lawsuit. Coming, however, to the question of consideration, nothing is better settled than the rule that inadequacy of price, standing alone, with nothing else to support the charge of fraud and collusion, is not in itself any evidence of fraud and is not

sufficient to set aside a sale, 13 Am. Jur pages 1114, 1115. This court in the case of *Utah Assets Corporation vs. Dooley Brothers Association*, 92 Utah 577, 586, 70 Pac. (2) 738, quotes with approval from Wait on Fraudulent Conveyances, as follows:

“Mere proof of inadequacy of price by itself has been considered insufficient to implicate the vendee in the fraudulent intent or to impeach his good faith, and inadequacy of consideration, unless extremely gross, does not per se prove fraud. It must appear that the price was so manifestly inadequate as to shock the moral sense and create in the mind at once, upon its being mentioned, a suspicion of fraud.”

In that case this court pointed out that while the experts had said that the value of the property might be as much as \$25,000.00 and others had said that it was not worth more than \$10,000.00, the fact was that it would not sell for more than \$12,500.00; that was the highest price at which it would actually sell, so the court refused to set aside even at the instance of a creditor, who was in a far stronger position than these plaintiffs, a sale of the property for \$10,000.00. The difference between \$10,000.00 and \$12,500.00 is 25% of the purchase price of the property. That was not sufficient to establish fraud. In the case at bar there was no offer whatever of \$100,000.00 for this property. The only person shown by the record who was willing to take the property was the defendant, W. L. Hansen, and he paid \$10,000.00 and assumed a \$74,500.00 mortgage, knowing that he would

have to expend many thousands of dollars in addition in order to make the property pay. Aside from the fact that there was no offer of \$100,000.00, it is apparent from the findings of the court that the corporation would not have received \$100,000.00 because the trial court wanted the property sold through a real estate company which would have charged a commission of 5%, or \$5,000.00 in order to sell the property for \$100,000.00, leaving a fictitious net of \$95,000.00, and a theoretical and fictitious profit to the corporation of \$10,000.00, or slightly more than 9%, over and above what it actually received from the defendant, W. L. Hansen.

Under the theory adopted by the trial court this property could never be sold so long as the trial court did not agree with the judgment of the board of directors. In other words, the trial court assumed that he had the right to control this corporation against the wishes and desires of the majority stockholders and the board of directors. We know of no rule of law that permits this to be done. There was no evidence whatever that in 1945 this property would have sold for \$100,000.00. This property sold for the highest offer that was made for it. This sale price was upon the basis of the judgment of the executive secretary of the Salt Lake Real Estate Board and its Board of Appraisers, and the judgment of the Executive Vice-President of one of the largest banks in the intermountain country whose special business it is to value property not from a theoretical

point of view, but from what it would produce. As against these two men who made their examination at the time of the sale, the court took the opinion of a man who did not appraise the property until three years after the sale when extensive improvements had been made, who did not go inside but merely looked at it from the outside, and who at the conclusion of his testimony admitted that if the property was not producing a profit, it was worthless. We submit that neither law, equity, good conscience or morals justifies the action of the trial court in this case. Where the price of property is fixed upon the basis of an independent appraisal by competent and disinterested persons, it can never be subject to the charge of fraud.

“where a sale is necessary because of the exigencies of the case, the fact that the property is sold for less than its value does not of itself show fraud on the part of the majority stockholders as against the minority.” Fletcher, Volume 6. p. 6804.

This property was sold for all it was worth at the time of sale.

This suit was not commenced until 17 months after the sale. It was then commenced by one who has no standing whatever in equity and has since been dismissed from the case. The additional plaintiffs were added two years after the sale, with the exception of William Young who was added three years after. In the meantime, the defendant, W. L. Hansen, had

proceeded to spend his own money on the property, he had made agreements with tenants to make greater improvements, and his position had been materially changed. These stockholders had not only remained silent and acquiescent throughout the years concerning the methods by which the business was transacted and the corporation operated and thus lulled the public into a belief that Nephi J. Hansen was the proper person to represent the company, but they had also waited to bring this action until W. L. Hansen had substantially changed his position. Under this state of facts the rule is:

“Even when a stockholder would otherwise be entitled to maintain a suit in equity under the principles stated in the preceding sections, his right to relief may be barred by laches, or he may be estopped to complain by reason of acquiescence, consent or participation in the acts complained of. The essential basis of all these is equitable estoppel.” Fletcher, Volume 6, p. 6948.

They cannot be heard to say that they did not know because they are required to know when seeking to place at a disadvantage a third person who has dealt with the corporation as they, the stockholders, have led the public to believe is proper.

“There must be knowledge, but knowledge may be presumed from opportunity to know. * * * No fixed time can be defined beyond which delay will amount to laches. It is a question of fact, and the intervention of rights is an important test.” Fletcher, Volume 6, pages 6950, 6951.

As already stated, Lewis Hansen, the original plaintiff, was estopped to bring the action and it should have been dismissed. He had no right to sue on behalf of himself and other stockholders. Fletcher, Volume 6, p. 6955. When the new plaintiffs were brought in, there had been such a material alteration of status on the part of Bill Hansen that they should have been denied access to equity. 9 Am. Jur, 353, Sec. 5, 384, Sec. 39, 388, Sec. 44 and 45; Ballantine, 361, 674, 675.

A very illuminating case and one that discusses many of the principles with which we are here concerned is *Smith vs. Stone*, (Wyo. 1912) supra, 123 Pac. 612. In that case action was brought to avoid a sale of the assets of the corporation. It was claimed that the sale by the corporation was to a second corporation which was controlled by the same officers and stockholders and for an inadequate consideration, and that by reason thereof the sale was fraudulent and void. The Supreme Court of Wyoming discussed the applicable principles, most of which are relevant in this case. There it was alleged that the property had a value of \$125,000.00 and was sold for \$76,500.00. The court held that a bill founded upon fraud or misconduct which does not allege with certainty and definiteness tangible facts to sustain its general averments of such fraud and misconduct is insufficient and cannot be sustained. The court also called attention to the fact that it was not alleged or proved that any greater price than \$76,500.00 could have been obtained, either at public or private sale; that no one had offered or was willing to pay more for it.

Therefore, it was a matter of corporate policy and management as to the price at which the land would be sold, and that the mere discrepancy between the alleged value of the land and the purchase price wasn't any proof of fraud. The court further said that a minority stockholder cannot be aided by the court to control the action of the directors and themselves be allowed to fix the price. The court also stated that the action could not be sustained because there was no offer to refund the purchase price; that the action was not for the benefit of the stockholder, but for the benefit of the corporation; that the stockholder does not bring the suit because his rights have been directly violated or because the cause of action is his, and that he may be estopped where he has participated or acquiesced in the conduct of the corporation or failed for an unreasonable time to take steps to set the deed aside. The company there was heavily indebted, and the Wyoming court called attention to the fact that a minority stockholder cannot prevent the sale of all of the property of the corporation when the corporation is an unprofitable and failing enterprise, citing Cook on Corporations and Noyes on Intercorporate Relations. The fact that the two corporations had the same officers and stockholders did not prevent them from dealing with each other, and the mere fact that there might have been an inadequate consideration was not sufficient to charge either corporation with fraud.

To the effect that a director cannot deny the legality of a directors' meeting at which he was present and in

which he participated, see *State Exrel Blackwood vs. Brast*, 127 S. E. 507, (W. V.).

On the question of these stockholders lack of standing in equity see, also *Orme vs. Salt River Valley Water Users Association*, (Ariz.) 1923, 217 Pac. 935, 940:

“long-continued acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the courts to refuse him relief upon his subsequent complaint of it.”

and *Buchwald Transfer Co. vs. Hurst*, 111 Maryland 572, 19 Am. English Annotated Cases, 619 and Note which holds that the corporation cannot complain that the president who exercised entire control over the affairs of the corporation used the money from a mortgage for his own benefit, and that where directors held no meetings the courts would not relieve the corporation where innocent persons are likely to be made to suffer, and if corporations permit officers to exercise such control over its affairs as an individual does his own, it cannot deny the authority of its officers.

“To allow a person publicly to proclaim himself authorized to act in a certain capacity, and to seek to avoid his acts when such avoidance would work to the advantage of the corporation, would be but to authorize the perpetration of frauds on an unsuspecting community.”

In the Note at page 625 the cases are collected under the following:

“The power of the president of a corporation to sell or mortgage its property may be inferred from the manner in which the business of the corporation is conducted with the knowledge and acquiescence of the corporation or its directors.”

Although the deed was not executed prior to the meeting of the board of directors, even had the resolution been adopted subsequent to the execution of the deed the corporation could not here complain because directors may ratify any act of one of their own number that they could have authorized in the first instance, and directors at a regular and legal meeting may ratify a contract or act done or authorized by them at an illegal meeting, and thus render it valid, Fletcher, Volume 4, p. 3395.

A FEW OF THE UTAH CASES

This court in an early case, *Singer vs. Salt Lake Copper Manufacturing Co.*, 17 Utah 143, 155, held in line with the authorities that where meetings of the directors have been held and business transacted the presumption is that such meeting was regularly called and held for the transaction of such business, and that where the validity of an act done at the meeting of the board is drawn in question, the burden is on the party attacking to show that such meeting was not held or that it was irregular. The only person questioning the meeting

is Lewis Hansen, and he doesn't question the fact that a meeting was held at which the sale of the property was decided. He only questions the time as to which he signed the minutes which is entirely immaterial since he did in fact sign them and cannot now attempt to repudiate his conduct upon which another has already acted.

We briefly refer to a few of the other Utah cases announcing principles applicable to the case at bar—*Skeen vs. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162, holding that an act authorized by the charter cannot be ultra vires, and that a court of equity will not interfere with the management of the corporation or with the determination of matters of policy made by the board of directors; that minority stockholders cannot control the discretion of corporate directors. In the absence of fraud courts of equity will not interfere with the suit of the dissatisfied minority merely to overrule and control the discretion of the directors on questions of corporate policy or business.

Smith vs. Knauss, 52 Utah 614, 176 Pac. 621, that an officer of the corporation participating in a meeting is estopped to question the regularity of the meeting or the legality of actions taken thereat.

Beggs vs. Myton Canal & Irrigation Co., 54 Utah 120, 179 Pac. 984, to the effect that when the Articles of Incorporation provide that the property may be sold by the directors or by the stockholders, sales so made will be binding on the corporation, and that failing or

unsuccessful corporations may sell and dispose of their property provided only the transactions are not on fraud of creditors. There is no question in the case at bar of the rights of creditors.

Carlquist vs. Quayle, 62 Utah 266, 218 Pac. 729, holding that authority of officers of a corporation may be implied from conduct and acquiescence and that express authority is not indispensable under such circumstances, but if a corporation did not repudiate within a reasonable time even if the transaction was unauthorized, it would be held to have been ratified.

This court in *Ellison vs. Pingree*, 64 Utah 468, 477, 231 Pac. 826, quotes with approval Page on Contracts as to the definition of duress. Duress, however, was apparently abandoned by the trial court as a basis for holding against the defendant, so we will discuss that question no further other than to say that no reasonable mind could spell duress from any part of this record.

(C) *The Findings of Fact, Conclusions of Law
and Judgment*

The findings of fact disclose that these stockholders knew of the manner in which the corporation was run; that Nephi J. Hansen operated it without meetings; that there were no books and records. In fact, the findings assert that Nephi refused to give any information to the stockholders, and that he treated and acted towards the corporation as if it were his own property. Had the findings stated the additional fact that this was all done

without protest or objection by the stockholders, such findings would have been a complete defense to this action, as we have indicated at length heretofore. The findings hold that Nephi never made any accounting to the stockholders with respect to the affairs or money of the corporation; that the Articles were amended to provide for the preferred stock 26 years before the transaction in question, and that no dividends were paid to the stockholders on account of the preferred stock, and that Nephi Hansen refused to account to them "except to assure them that everything was in good hands and being properly taken care of." We have looked in vain in the evidence for any support for the statement we have just expressed in quotation marks. According to the plaintiffs one of them never talked to Nephi Hansen at all, while Nephi Hansen according to another one told him some 10 or 15 years ago that there was nothing left except his salary, and if there was anything left that it would go to his family, and the third never talked to Nephi at all and said he couldn't get anything out of him. The findings purport to describe the property in question, but are silent as to its condition. There is nothing in the findings to show that the property was badly run down and disintegrating, and that it could not pay operating expenses. Nor is there anything in the findings that prior to this sale, as shown by Exhibits 2, 3 and 4, the income was far less than it was after the sale and after the defendant had spent his own money in making substantial and valuable improvements and had by his own efforts and by obli-

gating himself for heavy expenses secured increases in rents. The findings state that Nephi J. Hansen caused vacancies to be filled in the board of directors. There is nothing in the evidence that Nephi Hansen did this. Exhibit "D" says that the board of directors filled the vacancies. Even had Nephi Hansen filled the vacancies, we know of nothing that prohibits him from doing so where he is the majority stockholder, nor do we know of anything that requires him to eliminate members of his family from the board of directors. The findings recite that Nephi Hansen caused the property to be deeded to his son and caused the board of directors to adopt the resolution. This is entirely contrary to the record. The record shows that the board of directors acted and not Nephi Hansen alone. However, even had Nephi Hansen acted alone, under the authorities we have heretofore set forth the corporation and these plaintiffs would be bound because they had held him out to the public for years as having that authority. The findings further recite that the corporation never received the money, which is not true. They find that Nephi Hansen used it for his own purposes, which is not true. As to what became of \$3800.00, we do not know, but that cannot be held against this defendant, W. L. Hansen. The findings say that the sale was never approved or ratified by the stockholders, which is immaterial because it was not required to have the stockholders ratify it. The findings recite that Nephi Hansen didn't attempt to obtain offers from any other person nor did he list the same with a real estate agent. We know

of no rule of law that required him to list it with a real estate agent, and had he done so, it could only have resulted in an additional charge against the property. But it does appear affirmatively that both Nephi Hansen and Clyde Hansen attempted to refinance the property and failed, and that they talked to numerous persons, and secured the advice and services of a competent attorney. There was nothing clandestine or secret about the thing at all. The findings further state that no stockholder was ever advised by Nephi Hansen with respect to the sale. This is not true. All the directors are stockholders. In fact, Joseph E. Jensen, is shown by the original articles to be one of the heaviest stockholders, and at the time of his death he was the second largest stockholder in the corporation. The insignificant amount of stock owned by these plaintiffs compared to the total capitalization indicates that so far as the remaining stockholders are concerned they are entirely indifferent to this suit or else they realize that they are in no position to complain. The findings recite that Nephi J. Hansen maintained that the property shall be taken away from the corporation and become the property of the family of Nephi J. Hansen. Nothing is further from the fact. The property did not become the property of the family of Nephi J. Hansen, and in truth the findings so show because they immediately thereafter assert that William L. Hansen in taking the property did so to keep the complete control thereof for himself and to insure an income to his father. As we have already pointed out, Nephi Hansen personally

lost by the transaction. He lost control of the management, and he lost in income. The findings assert that William L. Hansen knew that the money would not be used for corporate purposes. There is nothing in the record to support any such allegation. The findings recite that the board of directors was illegally constituted because they were members of the family of Nephi Hansen or his personal friends. How this constituted illegality does not appear, and the finding is a conclusion of law which finds no support in the authorities. The findings assert that the directors signed the resolution without any independent knowledge of the facts and solely in reliance upon statements and information furnished by Nephi Hansen. Suppose they did rely upon Nephi Hansen. They had a right to do so, and unless what he told them is false, they did have information, and they had a right to rely on it. In truth, the directors knew exactly what was going on. They all knew that the company was failing. They all knew the condition of the property. They all knew that it could not go on as it had done, and that something had to be done or it would go merely for the amount of the mortgage. The findings assert that the deed to William L. Hansen was illegal because it was executed July 16 and recorded July 28. We know of nothing in that recital that would make it illegal, and that thereafter Nephi Hansen prepared a resolution dated July 18 which was prepared and signed after that date. There is nothing in the record to show that Nephi Hansen prepared the resolution or that it was prepared after July 18. How-

ever, it is immaterial when it was prepared or signed. The testimony shows that Clyde Hansen prepared it from the minutes taken by him and according to Clyde Hansen the resolution is correct, but there is a mistake in the date of the deed. The findings state that this was done in order to falsify the corporate records. How it would falsify the corporate records to have a deed dated prior to the resolution authorizing it, is beyond our comprehension. Even had the deed been given on the 16th and authorized on the 18th, such authorization would have been a ratification, as we have heretofore pointed out in detail. Nor would it be material that the resolution was signed individually, which it was not. If it was the custom of the corporation to do this, the stockholders may not complain as against a third person. Even if the directors did sign individually, that would not be unusual because that's the way they usually sign minutes. Minutes are not written up and signed at the time of the meeting. The findings state that the plaintiffs are not estopped. Had the findings stated the facts, they would clearly have disclosed not only an estoppel but laches, and a complete failure of the plaintiffs to bring themselves within any of the rules of equity authorizing the decision. The court purports to find as a fact that William L. Hansen took the property as a trustee for the corporation and that, therefore, he is liable for all the rents he collected, but not apparently to be credited with his contributions to the property. The court should have found how the business had been managed and conducted all through the years, should

have found that the corporation had sold other properties in the same manner as it had sold this; that there was an independent appraisal of this property at the time of the sale; and that the purchase price was even more than the independent appraisal; should have shown that the corporation was failing; that the property was disintegrating; that none of the plaintiffs had ever lifted a finger to aid the corporation or to take an interest in its affairs; that they had left its conduct and management solely to Nephi Hansen without objections, and that some of them didn't even know what property it had or where it was. The findings should have shown that the defendant, William L. Hansen, paid \$10,000.00 to the company, and that he had not had it returned. Then a judgment against plaintiffs would be compelled.

The conclusions and judgment are fantastic. They conclude that this corporation by making a fraudulent sale should benefit by the same, keep the money it received, get the property back with all the improvements and \$30,000.00 in addition. By its own fraud the corporation is changed from a failing activity to one that has a chance to survive; gets its property improved, and a judgment against the one who did the improving, and all this in the name of equity. It is shocking and against all principles of right and justice.

III. THE ACCOUNTING WAS WRONG

Black on Rescission, Volume 3, 1929, has a whole chapter to the effect that in rescission there must be a

restitution or restoration of the status quo, commencing at page 1482:

“Rescission of a contract does not involve the claim or award of compensation to the injured party on account of fraud or other vice inherent in the contract, nor does it imply a readjustment of the rights of the parties after a recognized breach of the contract, but it means the undoing of the contract, the making of it as if it had never been. Hence the first and prime essential of rescission is the ‘restitutio in integrum’, that is, the restoration of each of the parties to the position, with reference to his property and his rights, which he occupied immediately before the making of the contract.”

This is good sense as well as good law. If this contract should have been rescinded, which we have shown it should not have been, then the court should have followed the rule just stated. W. L. Hansen should be accountable only for the reasonable rent of the property in the condition in which he received it. He is not a tenant of the vendor, nor is he in the position of having occupied as a tenant, “and consequently he is not chargeable with ‘rent’, properly so called, but only to the extent of the benefit actually derived from the use of the land during his occupation of it. This amount, however, as it appears from the cases, is usually reckoned as being equivalent to the fair or reasonable rental value of the land, * * *. But if the improvements were made by the vendee after taking possession, and the land had no rental value outside of such improvements,

the vendor will not be entitled to claim the value of the use of the premises as so improved, unless perhaps from the date of bringing his suit to rescind." Black, p. 1536. Placing the parties in status quo and charging the defendant with the rental of the property as he received it, would not permit the corporation to demand more rent than the corporation itself was receiving at the time of the transaction. Exhibit 2 shows that for the first four months of 1945 the corporation received \$7,932.00 as rent, or \$1,983.00 a month. The trial court required the defendant to account from August 1, 1945, to September 30, 1948, a period of 38 months, which at the rate of \$1,983.00 a month would total \$75,354.00 instead of the \$97,686.00 found by the court. The court found that William L. Hansen had expended on the property \$68,439.95. Before the sale the corporation paid Nephi Hansen a salary for operating the property. The trial court disallowed the salary paid Nephi Hansen by William L. Hansen for doing the same thing. It should have been allowed. Had the corporation kept the property it would have paid Nephi Hansen, according to Exhibit 2, approximately \$300.00 a month instead of the \$170.00 a month paid him by W. L. Hansen. The court should also have allowed the other items shown on Exhibits 7 and 8 because they were all proved. The court should have credited W. L. Hansen with \$79,692.36, plus \$2,412.51, plus his \$10,000.00 purchase payment with

interest for 38 months, plus a reasonable management of \$400.00 a month, for raising rents and improving the property and managing it, or a total of \$109,204.87, and required the corporation to pay him \$33,850.87 as restitution for the rescission. This would have been in accordance with equity and would have placed the parties in status quo because the corporation has got its property back with the rents raised, the property improved, and the whole enterprise placed where it may eventually get on a going basis, by the efforts of the defendant, W. L. Hansen. The corporation could not have done this on its own account. W. L. Hansen by the expenditure of his time, efforts, money and skill has done what the corporation could never have done as it was being operated, and W. L. Hansen cannot be restored to a status quo without remuneration as indicated. Had the court made a proper accounting, it would have ended this litigation. None of these stockholders would be found willing to advance this sum or any of it, particularly in view of the small holdings they have compared with the total capitalization.

What a travesty it is to hold that this corporation fraudulently disposed of the property, then permit the corporation to receive the fruits of its fraud. If there was fraud, which there was not, it was the fraud of Nephi J. Hansen, and yet Nephi J. Hansen will be the

chief beneficiary of the judgment of the trial court since he is the principal stockholder, even to the extent, so says the trial court, of being a sufficient owner that the corporation is his alter ego. Look at the case any way you will, either Nephi J. Hansen or the corporation itself, which is Nephi J. Hansen, is rewarded by a court of equity for his fraudulent conduct at the expense of one who relied upon him.

In fact and in law there should have been no accounting. There should have been no rescission. The accounting, however, as it was made is entirely erroneous. W. L. Hansen was entitled to an allowance for the cost of keeping and an allowance for the restoration. He should have been allowed for his improvements and repairs, for taxes and encumbrances paid, his purchase money with interest, Black, pgs. 1538-1544.

The only way William L. Hansen could be a trustee would be as a constructive trustee by reason of his fraud and the innocence of the vendor. Even according to the trial court both parties were *pari delicto* and consequently should have been left where the court found them, but certainly there is no case that holds that a vendor who is guilty of fraud equal to or in excess of that of the vendee, can hold the vendee as a constructive trustee for him.

CONCLUSION

It, therefore, appears from the record that the original plaintiff, Lewis F. Hansen, had no right to sue. The case should have been dismissed then and that would have ended it. The other plaintiffs have been guilty of laches, and they are estopped to question the transaction in question. This appears from their own pleadings and without dispute in the record. It also appears that the board of directors had the right to do what they did, and even had they done so irregularly or without authority, equity will not set aside the transaction because they could have ratified what they did, and equity will not do a futile thing. However, there was no irregularity or illegality in the transaction. The Articles of Incorporation gave the directors the right to sell the property. They gave the directors a right to fill the board. The board was filled, the meeting was held, and the transaction authorized and consummated. Even had there been no meeting of the board, it was in accordance with long practice to allow Nephi Hansen to manage the corporation and sell its property, and these stockholders cannot question such action. The sale was for an adequate and proper consideration. The stockholders cannot complain for a further reason that William L. Hansen has materially changed his position due to their delay in bringing an action, and they cannot be heard

to say they had no notice of the transaction because they were required to have knowledge of the method in which their corporation had been managed and its business conducted for 25 years preceding the transaction in question. There should have been no accounting, and the accounting as made is completely wrong. Furthermore, there still is no offer from these plaintiffs to do equity. They have been allowed to harass and embarrass and annoy the defendant when they had nothing to gain and could gain nothing ultimately from this lawsuit. Had they been required in the beginning to make a tender to return to W. L. Hansen what the corporation had received from him, the lawsuit would have ended at that time. This whole proceeding was erroneous, inequitable, in violation of all the applicable principles of equity. The judgment should be reversed, and the trial court should be directed to find for the defendant, William L. Hansen, that the deed is valid and binding. The trial court should also be directed to reinstate W. V. Jensen and Mrs. J. E. Jensen as plaintiffs in order that they may be liable for the defendant's costs in this case. The trial court gave no judgment against Nephi Hansen so there is nothing to consider so far as he is concerned. The trial court gave judgment in favor of the Granite Holding Company which it vigorously opposed so there is no reason to hold the Granite Holding Company for

costs. Costs should be awarded against these plaintiffs, and W. V. Jensen and Mrs. J. E. Jensen.

Respectfully submitted,

SHIRLEY P. JONES,

*Attorney for defendant,
William L. Hansen*

N O T E

Since there was judgment in favor of the Granite Holding Company and no judgment against Nephi Hansen, those parties have submitted no briefs, but they both insist that the judgment of the trial court was wrong in the particulars and for the reasons specified in the foregoing brief.

E. W. CLYDE

Attorneys for Granite Holding Co.

RAWLINGS, WALLACE & BLACK

Attorneys for Nephi J. Hansen