

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 Respondent

Utah Supreme Court

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Edgar C. Jensen; John H. Snow; Robert John Jensen; Attorneys for Respondents;

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**No. 7339**

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**IN THE SUPREME COURT**  
**OF THE**  
**State of Utah**

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**RALPH CUTLER, HETTIE MAY  
BATES and WILLIAM S.  
YOUNG,**

*Respondents,*

— vs. —

**GRANITE HOLDING COMPANY,  
NEPHI J. HANSEN and WIL-  
LIAM L. HANSEN,**

*Appellants.*

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**RESPONDENTS' BRIEF**

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**Appeal from the Third Judicial District Court of the  
State of Utah, In and For Salt Lake County  
A. H. ELLETT, Judge**

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**EDGAR C. JENSEN  
JOHN H. SNOW  
ROBERT JOHN JENSEN**  
*Attorneys for Respondents*

**FILED**

**FILED**

# INDEX

	Page
1. STATEMENT OF THE CASE.....	4
2. THE FACTS .....	4
3. THE MATTER OF TENDER.....	15
4. THE MATTER OF FRAUD.....	19
5. THE ACCOUNTING .....	34
(a) William L. Hansen is a Constructive Trustee.....	34
(b) William L. Hansen, Being a Constructive Trustee, is Under the Duty of Making Restitution and An Accounting.....	36
(c) William L. Hansen, Being a Constructive Trustee and Having a Duty to Account, is Chargeable With the Income From This Property, i.e., the Rents Received....	38
(d) Credits to be Allowed William L. Hansen.....	42
Operation Costs .....	43
Improvements .....	47
Other Disallowances .....	51
6. CONCLUSION .....	56

## CASES

Allied Chemical & Dye Corp. v. Steel & Tube Co. (Delaware), 120 Atlantic 486.....	28
American Telegraph & Cable Co., 248 N.Y. Supp. 98.....	28
Beggs v. Myton Canal & Irrigation Co., 179 Pacific 984, 54 Utah 120.....	28
Baker v. Goodman, 57 Utah 349, 194 Pacific 117.....	40
Chadwick v. Arnold et al (Utah 1908), 34 Utah 48, 95 Pacific 527.....	36
Citizens Savings & Trust Co. v. Illinois Central Railroad, 183 Fed. 607, Reversing 173 Fed. 556.....	19
Cohall v. Lofland (Delaware 1921), 114 Atlantic 224 at 237.....	32
Decorso v. Thomas, et al (Utah 1935), 89 Utah 160, 50 Pacific (2) 951.....	38
Doyle v. West Temple Terrace Company, 47 Utah 238, 152 Pacific 1180.....	48
Ervin v. Oregon R. & Nav. Co., 27 Federal 625.....	27
Franklin v. Havalena Mining Company, 141 Pacific 727.....	17
Gaetke v. Ebarr (Minnesota, 1935), 263 N.W. 448.....	49
Hanrahan v. Anderson, et al, 90 Pacific 2nd, 494.....	17
Jensen et ux v. Probert et al (Oregon 1944), 148 Pacific (2) 248 .....	48
Lawley et ux v. Hickenlooper et al (Utah 1923), 61 Utah 298, 212 Pacific 526 (First appeal).....	35

	Page
Lawley et ux v. Hickenlooper et al (Utah 1924), 231 Pacific 821, 64 Utah 534, at 547 (Second appeal).....	39
Lindt v. Uihlein, 89 N.W. 214, 31 Corpus Juris 332.....	49
McIntyre v. The Ajax Mining Co. et al, 17 Utah 213, 53 Pacific 1124.....	26
Michaels v. Pacific Soft Water Laundry (Cal.), 286 Pacific 165, 1071.....	19
Noble Mercantile Company v. Mt. Pleasant E. Co-op Inst., 42 Pacific 869, 12 Utah 213.....	24 - 25
Old Mortgage & Finance Company v. Pasadena Land Com- pany, 216 N.W. 925, Michigan 1928.....	32
Peterson v. Weber County et al (Utah, 1939), 103 Pacific (2) 652, 99 Utah 281.....	49
Pollard v. Lathrope, 20 Pacific 251, 12 Colorado 171.....	46
Royal v. Royal, 47 Pacific 828, 30 Oregon 448.....	47
Royer v. Dobbins, 239 Pacific 157, 111 Oklahoma 156.....	46 - 56
Ryan v. Old Veteran Mining Company, et al (Idaho 1923), 218 Pacific 381.....	26 - 27
Salina Canyon Coal Co. v. Klemm et al (Utah 1930), 290 Pacific 161 76 Utah 372.....	36
Van Wagoner v. Whitmore, et al, 58 Utah 418, 199 Pacific 670....	40
Victor Mining Company v. National Bank, et al, 15 Utah 391, 49 Pacific 826.....	25

## TEXTS

American Jurisprudence, Vol. 54, page 167, Trusts, section 218	35
American Jurisprudence, Vol. 54, page 396, Trusts, section 497	37
American Jurisprudence, Vol. 54, page 398, Trusts, section 499	53
American Jurisprudence, Vol. 59, page 423, Trusts, section 538	45
Corpus Juris, Vol. 31, Improvements, section 28, page 320.....	42
Corpus Juris, Vol. 31, Improvements, section 44, page 332.....	49
Fletcher, Corporation, Revised 1943, Vol. 13, page 189.....	33
Pomeroy's Equity Jurisprudence, Vol. 3, section 1241.....	49
Restatement of the Law, Restitution, section 130.....	36
Restatement of the Law, Restitution, section 157.....	37
Restatement of the Law, Restitution, page 630-631 .....	45
Restatement of the Law, Restitution, page 632.....	48
Restatement of the Law, Restitution, section 158.....	43
Restatement of the Law, Restitution, section 166.....	35
Williston on Contracts, sections 1530 and 1531.....	16

## Miscellaneous

Rules of Civil Procedure, Rule 23.....	60
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# In the Supreme Court

## OF THE State of Utah

RALPH CUTLER, HETTIE MAY  
BATES and WILLIAM S.  
YOUNG,

*Respondents,*

— vs. —

GRANITE HOLDING COMPANY,  
NEPHI J. HANSEN and WIL-  
LIAM L. HANSEN,

*Appellants.*

No. 7339

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### RESPONDENTS' BRIEF

## 1. Statement of the Case.

This is an appeal from a judgment rendered by the Third District Court in an action commenced December 21, 1946 (R. 5) by stockholders of Granite Holding Company, the corporate defendant, to set aside a sale of the sole remaining assets of that corporation to the individual defendant, W. L. Hansen. The action was secondary for the benefit of the corporation and it was a class suit as it was initiated by plaintiffs for themselves and all others similarly situated.

During the course of the proceedings plaintiff Lewis F. Hansen withdrew as a plaintiff to which the defendants stipulated, (R. 75) and plaintiffs J. R. Jensen and Wm. V. Jensen, during the progress of the trial hearings, moved for a dismissal as to them which was granted (R. 102). The fact is that these latter two were never shown to be stockholders and of course they had no right in the action. The plaintiffs remaining are Ralph Cutler, Hettie May Bates and William S. Young, all stockholders of the corporation prior to bringing the action and at the time the case was tried (R. 149-274-292). The court so found (R. 104). They produced their stock certificates in court and defendants had ample opportunity to examine them.

## 2. The Facts.

We are not at all satisfied with the statement of

facts presented by the appellant. We feel that it will be extremely helpful to the court to make a complete statement of the facts with respect to the matter.

The defendant corporation was organized under the name of the Granite Lumber Company in 1901. By an amendment on June 18, 1927 the name was changed to Granite Holding Company. At one time the company owned considerable property in the Sugarhouse area in Salt Lake City. Prior to 1945 it had disposed of all its property except that involved in this law suit. For years no meetings of stockholders had been held nor had there been any meetings of the Board of Directors, except such as were held to satisfy mortgages. Nephi J. Hansen managed the Granite Holding Company (R. 209). The corporation was authorized to and had issued two kinds of stock, common and preferred, and under the Articles which are an exhibit in the case, holders of preferred stock had voting rights upon failure to pay preferred dividends when three years past due. The three stockholder witnesses, Hettie May Bates (R. 148), Ralph Cutler (R. 291) and William S. Young (R. 274) all testified that they had been associated with the company for many years, had never heard anything about its affairs, never been called to any stockholders meetings, but once in a while one of them would meet Nephi J. Hansen on the streets in Sugarhouse and Mr. Hansen would put them off with some statement that he was doing his best to keep things going. Mr. Young testified

that in August, 1945 he talked to Nephi J. Hansen about making a trade of some of his stock and Mr. Hansen did not say anything to him about the sale of the Sugarhouse property to his son, which had already been consummated, and in 1946 he and Mr. Bates called on Hansen and asked him about revenues and he made no reply except to state that his salary would eat everything up and on that occasion nothing was said about the sale of the Sugarhouse property; that he first learned about the sale of the property a little over a year before the trial; and that at no time did he ever receive any information by way of letters, reports or anything with respect to this company. Mr. Cutler testified that when he first became a stockholder he got some dividends but none had been paid for a long, long time; that he never received any notice of stockholders meetings; that he was well acquainted with Nephi J. Hansen; at one time Nephi J. Hansen told him he was operating the property under the direction of the mortgagee (R. 297) and upon one occasion when he asked Nephi J. Hansen about the property, although Hansen evaded, he did say, "if there is anything left out of this company I am going to see that my family gets it" (R. 298) and used cuss words to emphasize his statement. Upon another occasion Nephi J. Hansen advised Cutler that once in a while they held a stockholders meeting when they had some business and when occasion arose he would let Cutler know (R. 300). Cutler knew nothing about the officers



of the company except that Nephi J. Hansen was running it.

Clyde Hansen, a son of Nephi J. Hansen and secretary of the company, testified that his father always had managed the company (R. 209) and William Hansen stated that as far as he was concerned his father was the entire company (R. 412).

In 1945 the Granite Holding Company owned but one remaining piece of property (R. 311) (R. 430). This is situated at the corner of 21st South and Highland Drive in Salt Lake City, with a frontage on 21st South in excess of 80 feet and on Highland Drive of 207.5 feet. It is business property. On the ground floor were located many store rooms and upstairs were 24 to 26 apartments (R. 185, 186, 187). On July 18, 1945 this property was mortgaged to the Beneficial Life Insurance Company, and on July 18, 1945 the balance due on the mortgage was \$74,500.00 (R. 265). In 1941 this mortgage was \$82,528.13 (R. 267). In July of 1945 there had been \$1961.76 paid by mortgagor, the corporate defendant, for 1945 taxes. Interest payments had all been made, and on June 2, 1945 the interest was paid up to July 1, 1945, and on July 26, 1945 was paid to August, 1945. The mortgage originally had been for a sum of \$150,000.00, but that mortgage included other property which was sold off from time to time (R. 217). At the time of the trial in June of 1948 the balance due

on the mortgage was \$61,500.00 and there was a credit balance of \$2158.32 to pay taxes.

This property was income producing at the time of the sale. Mr. William L. Hansen purchased the property, investigated it and made up a statement with the help of his father (R. 78) which showed gross income of \$13,590.00 in the year 1943, \$17,501.00 in the year 1944, and for the first four months of 1945 of \$7,932.00 (Exhibits 2, 3 and 4). There was evidence by an exceptionally well qualified expert (witness Keipe) (R. 218) that the fair value of the property at the time of the sale, that is, July 16, 1945, was \$115,000.00 and this value was arrived at by averaging the cost of replacement new, less depreciation, capitalized earnings value, and by physically viewing the premises and appraising it.

In the spring of 1945 the defendant William Hansen had a conversation with the members of his family, including his brothers, about getting some portion of property in which his father was interested for "the rest of the family". This conversation took place at his house, and those present were his sister Mary (Mary Southwick), LaRue, Lew (Lewis F. Hansen), father (Nephi J. Hansen) and the witness. Thereafter his brother Lewis went down and checked on the Sugarhouse property and Lewis came back and stated that he wanted his portion out of other property (R. 307)

and William Hansen stated he was interested in getting his portion out of other property, that is, property other than the Sugarhouse property, that he never did get **anything** out of the other property and he then talked to his father about obtaining the property in Sugarhouse (R. 307) and that it was suggested by his father that he do something about buying it. He also testified (R. 398) his mother first approached him and asked him if he couldn't do something about the Sugarhouse property. There was testimony William made some cursory examination (R. 400) and finally took a deed to the property involved in this suit (Exhibit E) which was dated and acknowledged July 16, 1945 and recorded July 28, 1945.

William Hansen also testified that the only one he ever knew to have anything to do with the Granite Holding Company was his father (R. 409), that the property in Sugarhouse had been the main source of livelihood of his father and mother for many years; that his father was getting to be an old man, 77 at about the time of the sale (R. 410); that when he stated he talked to the Company about the sale that he really meant that he talked to his father (R. 412).

Lewis F. Hansen, a brother of William Hansen and one of the original plaintiffs, stated that he was present at a conversation on July 14th before the deed to William Hansen was acknowledged (R. 334), at which his

two sisters, his brother Clyde, his mother and father, and his brother William were present, at which time the matter of the proposed sale of the Sugarhouse property was under discussion and at which meeting Lewis F. Hansen stated in substance that he thought something should be done about the stockholders before the sale was made, and his brother William replied that it was none of the business of Lewis F. Hansen about the stockholders, their father (Nephi J. Hansen) had control and their father could do what he wanted.

On July 16, 1945 a deed was executed and acknowledged by the defendant Nephi J. Hansen, as president, and attested by Clyde Hansen, as secretary of the corporation, by which all the property involved in this law suit was granted to William L. Hansen. Two days thereafter, according to the record, a resolution was enacted by the Board of Directors of the Granite Holding Company authorizing and directing Nephi J. Hansen to execute and deliver a deed to the property upon payment of not less than \$10,000.00 over and above the amount of the mortgage. The minutes are Exhibit D. Nowhere in these minutes is the name of the purchaser of this property mentioned. The witness Clyde Hansen, secretary of the corporation, testified this was not done to cover up and that at the time the minutes were written up he was not sure his brother William was to be the purchaser, but that everyone knew the property was to be sold to his brother William (R. 192-193). When con-

fronted with the deed and his attention called to the fact the deed was dated and acknowledged two days before the minutes and the resolution, he stated he had no comment to make as to why William's name was not shown as the purchaser of the property (R. 196). When it came to paying the money the records show that on July 27th William L. Hansen delivered a check for \$5,000.00 made payable to Granite Holding Company, which check was endorsed Granite Holding Company, and six months later another check for \$3,780.24 was delivered and made payable to Granite Holding Company, which check was endorsed Granite Holding Company, N.J.H. and then Hansen Holding Company, N.J.H. (R. 194) Exhibit G. The first \$5,000.00 went to Nephi J. Hansen on the claim that that much money was owing him for back salary, although Clyde Hansen testified that he was secretary, was present at the meeting of the Board of Directors on July 18th, that the company had no books or records and that the company had no one on the payroll (R. 189); that he made no investigation to determine if there was any back salary owing and just took his father's word for it (R. 196); that his father voted for the resolution. He stated that the company had a bank account at the First National Bank in Sugarhouse (R. 200) and yet on the face of the check there is nothing to show but that the check was merely cashed by Nephi J. Hansen. He stated at R. 427 that the Hansen Holding Company was one of his father's companies, that the check for \$3,780.24 bears his father's

endorsement, the names on the check "Granite Holding Company" and "Hansen Holding Company" both being in his father's handwriting; that the corporation owed no debts that he knew of (R. 428) and that he never asked his father why he put the final payment of money in the Hansen Holding Company's account, and that he did not know why the proceeds of the check went to the Hansen Holding Company instead of being distributed to stockholders. William Hansen, among other things, testified that he was interested in holding this property in the family and he wanted to hold it together so that they would have it for themselves (R. 325). **Lewis F. Hansen**, with respect to the same matter, testified that upon the occasion of the family meeting when the matter of the sale came up, William made the statement he wanted to save the property for the family, to which Lewis countered that "he thought something ought to be done for the stockholders", which portion of Lewis Hansen's testimony has already been referred to (R. 336). Lewis F. Hansen testified that his sister, Mrs. Southwick, in his presence stated to William Hansen that William had gotten the property under false pretenses and that William ought to do something for the folks, and William replied that it was none of their business and that if they did not leave him alone he was going to sell it.

At the time of this sale the property was not listed with any real estate company nor were any attempts

made to solicit any offers from any person other than William Hansen, at least as far as William Hansen knew nothing like that had been done (R. 411). William Hansen testified that he did ~~not~~ talk to a Mr. Sid Nielson, a Mr. Harding and former Governor Mabey. There is some evidence that Nephi J. Hansen had made an attempt to borrow some additional money on the property (R. 417).

The testimony was that rents were up, that for the first time in years there was full occupancy, that tenants desired to renew their leases and were willing to pay additional rent, and the condition with respect to the property was improving (R. 352), and Exhibits 2, 3 and 4 furnished by the defense showed that rental income was on the up-grade until the time of the sale.

There seems to be some mystery about when the meeting of the directors was held which ostensibly authorized and directed Nephi J. Hansen to execute and deliver a deed and what action was there taken. There is no question but at that meeting the vacancies in the Board were filled by putting two members of Nephi J. Hansen's family on the Board, one his daughter and one his wife, and Hooper Knowlton, a real estate man in Sugarhouse, a long time friend of Nephi J. Hansen and for some time a tenant of Nephi J. Hansen (R. 181). Lewis F. Hansen testified he signed the minutes under protest some four months after July 18, 1945 at the office of counsel for appellant, and, as already stated,

his evidence was that at that meeting the only authorization given to Nephi J. Hansen was to look into the possibility of a sale (R. 342). Mary Southwick, a daughter of Nephi J. Hansen, testified that she had had no previous business experience, that she acted as a director at the request of her father (R. 261) and the first time she acted was upon the occasion when the resolution was made with respect to the sale of the property (R. 260). She said she never bought any stock and she does not know whether she ever saw Exhibit F (the certificate in her name) before or not; and that she was told that she was made a director and that she had a share of stock (R. 261). She testified her mother (Laura F. Hansen) was not at the meeting; (R. 262) that her father was getting along towards 80 years of age, that they were worried about him and that something had to be done to relieve him. The net results of the meeting of July 18, 1945 were these: A board of directors consisting of the following:

Nephi J. Hansen	Father
Laura F. Hansen	Mother
Clyde F. Hansen	Brother
Lewis F. Hansen	Brother
Mary H. Southwick	Sister
Hooper Knowlton	Tenant and lifelong friend of Nephi J. Hansen
Joseph E. Jensen	Dead at the time of the trial, about the same age as Nephi J. Hansen, a long time friend and acquaint-



ance of Nephi J. Hansen  
and an employee of Nephi  
J. Hansen from the time  
the business was started  
(R. 182)

apparently proceeded to authorize the sale of corporate property to a son and brother of the officers of this corporation and a son and brother of the majority of the directors of this corporation when that sale had already been consummated without putting in the resolution the name of the purchaser, although it was well known, and authorized the President of the corporation, the father of the family, to convert \$5,000.00 of the claimed purchase price to himself on a claim for back salary asserted by him to be owing and not backed up by the books and records and not investigated by any officer of the company, and that six months later Nephi J. Hansen, the father, without any protest or question by any of the other officers or directors of the company appropriated to himself the balance of approximately \$3800.00 paid by his son.

### **3. The Matter of Tender.**

Appellant raises the proposition that because the plaintiffs did not tender in court the amount of money paid by the defendant William L. Hansen, i.e., \$8,780.24, that they have no standing whatsoever.

In connection with this proposition it should be

borne in mind that in the first place this is a derivative action by stockholders for the benefit of the corporation as well as a class action by the plaintiffs for themselves and all others similarly situated, and it should also be borne in mind that the plaintiffs got nothing whatsoever of the moneys paid by William L. Hansen and, under the facts, neither did the corporation. The evidence was that this first \$5,000.00 went to Nephi J. Hansen for alleged back salary, the authority thereof being voted by a Board of Directors consisting of himself, the immediate members of his family and close personal friends, without any books and records or any investigation by the directors and officers including the Secretary and Treasurer as to the claim being valid, and the testimony by the Secretary that the company had no payrolls and owed no old bills; and that the balance of the sale price was appropriated by the president of the corporation without any apparent authority whatsoever. It also should be borne in mind that the trial court (No. 7) found that moneys paid were converted by Nephi J. Hansen, the president of the corporation, to his own use and that the defendant William L. Hansen knew that the moneys were not used for corporate purposes. As a general proposition we agree that ordinarily in a suit to rescind a sale and recover property one going into a court of equity must do equity and make a tender, but this rule has many and varied exceptions. Many of the exceptions are stated in *Williston on Contracts*, Sections 1530 and 1531. Some of the exceptions are

where claims are made by plaintiffs that moneys are due and owing from a person that has the property, where an accounting must be had between the parties, where the court can take care of any moneys found due the defendant and the decree can thus protect the rights of the defendant, and where stockholders bring a secondary action for the benefit of a corporation, to say nothing of where, as in this case, the corporation on whose behalf the action was instituted gets nothing out of the proposed sale.

With respect to one of these propositions, we refer the court to an Arizona case decided in 1914, *Franklin v. Havalena Mining Company*, 141 Pacific 727, where the court stated that in a complaint by stockholders seeking to set aside a lease of the corporate property, the plaintiff need not offer to return any moneys to the defendant which he had expended because that is a matter of defense and the court in making its decree will protect the rights of the defendant.

We also refer the court to a case in Montana, *Hanrahan v. Anderson, et al*, 90 Pacific 2d, 494, decided in 1939. This was a secondary action by stockholders, and we quote a portion of the court's decision appearing at page 505.

“We have saved until the last the questions as to plaintiff's right to relief, because they are

several and are based upon various fact situations. Defendants contend that, as plaintiff did not offer to restore everything of value received in the transactions attacked, his complaint failed to state a cause of action, and that defendants' objection to the introduction of any evidence should have been sustained.

"It is well settled that in a stockholder's suit in behalf of the corporation, he need make no offer to restore, for, not having himself received anything, there is nothing within his power to restore. *Anderson v. Scandia Mining Syndicate*, 26 S.D. 558, 128 N.W. 1016; *Edwards v. Mercantile Trust Co.*, C.C., 124 F. 381; *Stebbins v. Perry County*, 167 Ill. 567, 47 N.E. 1048; *McDermont v. Anaheim Union Water Co.*, 124 Cal. 112, 56 P. 779; 6 *Thompson on Corporations*, 3d ed., sec. 4578, and cases there cited. Obviously, it is not the stockholder, but the corporation, which must make whatever restoration, if any, the court may find equitable and upon which it may therefore predicate relief."

And we call the court's attention to the fact that the Montana Supreme Court cites a North Dakota case, a Federal case, an Illinois case, a California case and *Thompson on Corporations* in support of the language above quoted.

"Failure of minority stockholders, suing for the corporation to rescind an illegal sale of its stock, to offer to restore consideration received and retained by the company, is not fatal, since

the suit is in equity and the court may, by its decree, do full justice between the parties."

*Michaels v. Pacific Soft Water Laundry* (Cal.), 286 Pacific 165, 1071.

"Stockholders need not tender back consideration which they do not have, and where there was no real consideration passed."

*Citizens Savings & Trust Co. v. Illinois Central Railroad*, 182 Fed. 607, reversing 173 Fed. 556.

#### 4. The Matter of Fraud.

Here is a corporation that Nephi J. Hansen operated as if he were the sole owner and as if he had no duties to discharge except those he saw fit to impose upon himself, and without the slightest conception of the fiduciary relationship which he bore to the owners of this business. The records are complete with evidence that no stockholder at any time, except perhaps the immediate members of Nephi J. Hansen's family, knew anything about what was going on. Inquiries directed to Nephi J. Hansen elicited nothing except evasion and falsehood. There is no contradiction in the record with respect to the statements made by witnesses Young and Cutler as to the conversations with Nephi J. Hansen, and these statements alone show that Nephi J. Hansen recognized no right in anybody to question his handling of the property.

The family of Nephi J. Hansen regarded this property as the property of Nephi J. Hansen and ultimately the property of the family. The very first talk about any sale of this property was brought up at a family conference. The matter was introduced by the mother according to the defendant William L. Hansen. In 1945 the evidence is that the family, including the defendants Nephi J. Hansen and his son William Hansen, met and talked about dividing up their father's property, including the property in question, and when William Hansen was unable to get anything out of other property at that time owned by Nephi J. Hansen he asked his father about obtaining the property in Sugarhouse, the property involved in this action. Mary Southwick, a sister, testified in this case that her only concern with respect to this matter of business was to relieve her father, as he was getting along towards 80. No suggestion apparently was ever made by anyone that the proper method was to call the stockholders together, elect a new and proper board of directors and appoint someone to manage the property who was efficient and capable of doing so. Instead, by common consent of the family, they decided that the son William should now step in, and son William's idea about it was very aptly expressed when he stated at the family conference that it was no business of the stockholders and that his father could do with the property as he saw fit. Clyde Hansen, one of the brothers, was secretary and treasurer of this corporation in name only. His testimony is a complete

refutation of any argument that he had any interest to serve except as to act as a figure-head and carry out his father's interests and the interests of the Hansen family. He knew nothing about any books, he said there never had been any books as long as he had been secretary and treasurer, that he was not a bookkeeper, knew nothing about rental incomes, in fact, he knew nothing about anything affecting this corporation. Mary Southwick was given a share of stock a few days before an important meeting of the board of directors and sat down at that meeting according to her testimony and voted the alienation of all remaining property in this corporation without the slightest knowledge of what it was all about, without any conception of what her duties were and with no apparent desire to do anything except "relieve father". From all that appears from this record it is perfectly plain that when the board of directors met each and all of them were either acting through ignorance or through stupidity to do with the sole remaining assets of this corporation entirely in the interests of the family of Nephi J. Hansen in the dividing up of his property. The testimony is that this corporation had been the main support of this family for many years, that Nephi J. Hansen had run it, not like a czar, but as if it was his private personal property, to do with as he saw fit and with accountability to no one. It had been a good thing, and in the hands of some person younger in age with some get-up-and-go in his system it could be made into a much better thing. It was too

good a thing for the Hansen family to let out of its control by the untimely death or indisposition of Nephi J. Hansen.

Nephi J. Hansen and his son sat down and made a deal about this property without any attempt to get any offers from any other person, without any attempt to ascertain what it would bring on the open market by offering it for sale or making known to the public generally that it was for sale, and at a time when the fortunes of the corporation were on the up-grade and the property itself was bringing in more and more revenues.

There can be no argument about the latter statement despite the fact that brother William disputes the statement made by Lewis F. Hansen that the investigation made by Lewis F. Hansen produced the information that the property was for the first time fully rented, that rents were being paid promptly, that tenants were anxious to renew their leases and were not adverse to increases in rents. Out of the mouth of William Hansen comes the information that rents were on the increase, going from \$13,000.00 in 1943 to \$17,000.00 in 1944 and in excess of \$7,000.00 for the first four months of 1945, or, if the trend toward increase did not continue through 1945, of at least \$22,000.00 in 1945. Clyde Hansen testified that there were no bills owing as far as he knew, although as previously stated he kept no books



or records and did not know much about them. To say this corporation was in such a bad shape that a sale had to be consummated in order to protect the interest of the stockholders, particularly when the sale resulted in the stockholders absolutely getting nothing, under the facts and circumstances shown in this case, is to deny common sense. There is not one bit of evidence that the mortgage holder was about to foreclose and, even if it had foreclosed, the stockholders could suffer no greater loss than they did by reason of the sale that was attempted to be consummated. This corporation had no other property and any deficiency which might have been rendered certainly would not have affected the stockholders, and under the evidence a foreclosure sale probably would have been had for more than the mortgage. On a foreclosure sale the company might lose everything, even granting that its financial condition was in the worst of shape, and by this sale the corporation gained absolutely nothing.

Add to all the foregoing that the price paid did not amount of \$10,000.00 but only in round numbers \$8700.00. The court after having heard the evidence found the fair and reasonable value to be \$100,000.00 at the time of the sale. As previously stated, an exceptionally well qualified witness testified it was reasonably worth \$115,000.00. Add the fact that a so-called board of directors on the face of written minutes authorized a sale without putting in the name of the purchaser

when the name was already known and when in fact the deed had already been executed. Add Nephi J. Hansen's reluctance, nay, studied refusal to inform any stockholder about the sale long after it had been consummated. Add the uncontradicted fact as shown by this record that the entire amount received went into the personal pocket of the president of this corporation, a portion on a claim for back salary about which there is not the slightest proof, and a portion by endorsement of a check which was finally deposited to his personal company. Add the fact that William L. Hansen, despite his protestations, saw a copy of the resolution by which the board gave \$5,000.00 to his father, and yet six months later he turned over an additional \$3800.00 to his father, well knowing that his father had pocketed the previous \$5,000.00, and a mere cursory examination of the last check a few days later would reveal that his father had pocketed the final payment. Add the fact that after William L. Hansen got hold of this property rents of \$90,000.00 were collected in the next thirty-five months by William Hansen. This is an average of in excess of \$2570.00 a month or nearly \$31,000.00 a year. The result makes it impossible to say this property was disposed of by the officers of this corporation fairly, openly, in good faith, and for the best interests of the stockholders of this corporation and in a manner free from fraud and over-reaching as against the stockholders.

We quote from the language of this court in *Noble*

*Mercantile Company v. Mt. Pleasant E. Co-op Inst.*, 42 Pacific 869, 12 Utah 213:

“They are chosen by the stockholders, and are entrusted with the exclusive control of the property and the management of the corporate business. This creates a fiduciary relation between them and the stockholders, and the corporate property becomes impressed with a trust, which must be administered for the exclusive benefit of the stockholders while the corporation is solvent, and for the benefit of the creditors when it becomes insolvent, and ceases to longer pursue the objects of its creation.”

We also quote from two other Utah cases, *Victor Mining Company v. National Bank, et al*, 15 Utah 391, 49 Pacific 826:

“The law will not permit an officer of a corporation to act for the company and for himself in making any contract between them, or in any transaction to the subject matter of which they may have, or may thereby acquire, conflicting interests. In such case the agreement or assent of the officer will not bind the company. Officers of corporations are bound to exercise their official powers in the utmost good faith for the benefit of their principals, in making or consenting to any transaction, and the law will not allow them, as to the same transaction, to act for their own benefit. The agent cannot act for himself and his principal as to anything with respect to which their interests may vary. The reason is

that self-interest may prevent him from the performance of the duties he owes his principal."

*McIntyre v. The Ajax Mining Co. et al*, 17 Utah 213, 53 Pacific 1124:

"This is a controversy over the affairs of a corporation, in which the acts of the directors are involved, and the rights of the stockholders are to be determined. In such case the acts of directors, because of the fiduciary relations existing between the officers and stockholders, will be closely scrutinized in equity, and the directors held to a strict measure of care, duty, fidelity, and disability. Honest and faithful administration of corporate affairs, and fidelity of the trustee to the cestuis que trustent, are what the law aims at; and directors of a corporation will not be permitted to gain a pecuniary advantage over the stockholders because of their official positions, and consequent superior knowledge of the affairs of the company. 'That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others.' *Oil Co. v. Marbury*, 91 U. S. 587; *Peabody v. Flint*, 6 Allen 52; *People v. Township Board of Overysse*, 11 Mich. 222."

*In Ryan v. Old Veteran Mining Company, et al*,

(Idaho 1923), 218 Pacific 381, the Supreme Court of Idaho had this to say:

“Directors of corporations act in a fiduciary capacity. They hold the corporate property in trust, and any attempt on their part to divest the use of such property to their personal profit or interest, is a violation of the trust imposed by virtue of the office.”

Fairness and good faith are essential on the part of those acting under statutory authority in the sale of all of the corporate assets over the protest of minority stockholders. *Ervin v. Oregon R. & Nav. Co.*, 27 Federal 625:

“The right of the specified majority to sell all the assets is absolute in so far as the fact of sale, and whether one should be made, is concerned. Upon the question of terms and conditions, however, the expediency thereof and whether they are for the best interests of the corporation must be honestly and in good faith considered. While it is the right of the majority to practically desert the corporate venture by selling out its assets, and thereby, in the case of a highly profitable concern, deprive their associates of the opportunity to reap gains in the future by continuing in business, yet this right cannot be exercised except upon terms and conditions that are fair to the corporation. The price to be paid, the manner of payment, the terms of credit, if any, and such like questions, must all

meet the test of the corporation's best interest."

*Allied Chemical & Dye Corp. v. Steel & Tube Co.*,  
(Delaware) 120 Atlantic 486.

The question of price, where a minority stockholder is objecting to a sale of the corporate assets, is not purely a business matter, but the court must, in order to determine good faith, consider the fairness of the price paid.

Re *American Telegraph & Cable Co.*, 248 N. Y. Supp. 98.

This court, in *Beggs v. Myton Canal & Irrigation Co.*, 179 Pacific 984, 54 Utah 120, had before it a contract made by a corporation for the disposal of all its assets. The court says:

"In the case at bar neither bad faith nor deceit were proved by the plaintiffs. The evidence affirmatively shows good faith and honesty and probably good judgment by the directors of the company in making the Taylor contract, as also by the majority of the stockholders in ratifying the same. Apparently there was nothing for them to do save to dispose of the company's canal and ditch rights to the best possible advantage. The company was devoid of funds; its treasury stock was unsalable; unless it could convince state and federal officials that it had the financial ability

to proceed with its project, it could obtain no extension of time in which to continue and complete its plans and work. It could not furnish the required proof of financial strength; to save its water filings and other rights it was necessary to obtain financial assistance; the loss of the entire property was imminent; the proposed contract with Taylor offered hope and promise of saving a substantial sum to the stockholders. Under these circumstances it was not only within the power of the directors and the majority stockholders, but it was their duty, to take some action which in their judgment would avoid the threatened loss and wreckage."

Compare the present case with *Beggs v. Myton Canal & Irrigation Co.* Was the Granite Holding Company about to lose all that it had? Did the proposed sale offer hope and promise of saving anything for the stockholders? In the *Beggs* case by reason of the contract of sale the stockholders had an opportunity to get water through canals to be made available by the purchaser. In the *Beggs* case by making the contract valuable water filings theretofore made could be proved up, title obtained and the water made available to its stockholders. Was any like situation present here by reason of the proposed sale to William Hansen? Was the corporation in such a state that should the sale not be consummated the stockholders would be in a worse position than they would have been were the contract fully consummated? By the making of the contract and the transfer of the title the stockholders here lost

everything of any value they had. As already pointed out, foreclosure did not mean anything to these stockholders. For whose benefit was this contract made? As pointed out in the Beggs case, was it made for the *best possible advantage* of the company or was it made for the best possible advantage of Nephi J. Hansen, his family, and particularly his son William L. Hansen.

Appellant in its brief makes short reference to *Beggs v. Myton Canal & Irrigation Co.* From appellant's reference to this case one would think that the Beggs case involved rights of creditors. As a matter of fact, in the Beggs case the plaintiff was a minority stockholder and the rights of creditors were not involved at all. Aside from this proposition it is inconceivable to us that creditors would have any greater right in the corporate property than stockholders. If the corporation cannot dispose of its property so as to result in a fraud on creditors, it seems to us that it cannot dispose of its property so it will result in a fraud upon the stockholders. We recognize of course in the case of an insolvent corporation creditors must first be paid before stockholders participate in any of the remaining assets, but that is a question of priority and not a question of selling corporate property in a fraudulent fashion so as to cheat either creditors or stockholders.

There are many cases that any transaction by a corporate officer with the corporation by which he se-



cures corporate property are presumptively fraudulent and even though the price, terms of sale and everything else is fair, they are subject to cancellation at the request of the corporation.

There are many cases that transfers of corporate property to a wife of a corporate officer are in the same category, and in view of the family set-up here and this entire transaction there existed here as close a cohesion between these sons and daughters and this father as ordinarily exists between husband and wife, and under the circumstances we can see no good reason why in this case this court should not view the question here presented in the same fashion. But even the adoption of such a rule is not necessary for this court to affirm this judgment. Ample evidence is here present to sustain a finding that there was a fraud perpetrated by father, son and family upon this corporation and consequently upon the stockholders.

Appellant has much to say about the matter of price. Let there be no misunderstanding, we freely confess that some inadequacy of price is alone not enough to avoid a sale. To paraphrase some of the cases, inadequacy of price is not fraud, but certainly it is evidence of fraud. We do not rely upon the inadequacy of this price alone and we venture to say that had that been the only proof this appeal would not be taken. But coupled with all the other facts and circumstances in

this case, what is the answer? Was the contract openly and fairly arrived at? Did the officers of this corporation act for the best interest of the corporation and the stockholders? Did they perform the duties laid upon them by the law? Did William L. Hansen in dealing with the officers and agents of this corporation act frankly, openly and in good faith, or did he assist, advise and connive with his father and his brothers and sisters to fraudulently obtain corporate property in violation of all the ordinary concepts of decency and fair dealing?

With respect to William L. Hansen's participation, we present the following cases:

*Old Mortgage & Finance Company v. Pasadena Land Company*, 216 N.W. 925, Michigan 1928:

“ ‘If a third person joined with a corporate officer in dealing with the corporation, with knowledge that he is such officer, the contract may be set aside as to him as well as the corporate officer. This is upon the theory that, where a stranger participates with the officer of a corporation in the commission of an act of manifest bad faith or breach of duty to it, he, equally, with the officer, commits a wrong, and ought not to derive profit from it.’ ”

We quote from *Cohall v. Lofland*, (Delaware 1921), 114 Atlantic 224 at 237:

“One who participates with a trustee in the breach of trust may be held liable in a court of equity. If he still holds the trust property or its proceeds, he may be held as constructive trustee thereof; if he no longer holds the trust property, or its proceeds, he may be held liable in equity to account for the advantage derived.”

*Fletcher, Corporations*, Revised 1943, Vol. 13, page 189 states:

“Even if circumstances are such as to warrant a transfer of all assets or all corporate property by a majority of stockholders or by the board of directors, the transfer may be in fact fraudulent, oppressive or unfair to minority stockholders so as to warrant relief in their favor as representatives of the corporation, on the ground of a breach of trust, regardless of whether the property is transferred to the majority stockholders or managing officers themselves, \* \* \* *or to a third person*. And the breach of trust may consist in gains or advantages secured by the majority at the expense of the minority, or the exclusion of the minority from a fair participation in the fruits of the sale, or the grossly inadequate price paid for the property. (Italics ours.)

“In selling all of the assets, majority stockholders must exercise the highest degree of good faith toward minority stockholders. *Nave-McCord Mercantile Co. vs. Ranney*, 29 Fed. 2nd 383; *Hayden v. Official Hotel Red Book and Directory Co.*, 42 Fed. 875; *Cardiff v. Johnson*, 126 Wash. 454, 218 Pac. 269.”

The appellant argues that these plaintiffs have no right of action against William L. Hansen to set aside the deed. Let it be remembered this is a secondary or derivative action for the benefit of themselves and others similarly situated.

The appellant also argues that the majority of the stockholders could meet and satisfy this transaction and thus prevent the recapture of the property in an action of this sort. In his amended answer the appellant pleads such a meeting, but no proof was offered to support it and it was abandoned, probably because appellant himself had no faith in the claim. It seems foolish to make any reply to such an argument. The above citations answer it. But to put it more plainly, how can the many defraud the few any more effectively than a few defraud the many? Can four partners defraud their three associates when three cannot defraud the four? If the answer is in the affirmative, then a large corporation could defraud an individual when in a like case the individual would have to make restitution to the corporation. It seems to us the answers are so patent to require no further comment.

## **5. The Accounting.**

### **(a) William L. Hansen is a Constructive Trustee.**

“Where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the

property upon a constructive trust for the transferor.”

*Restatement of the Law, Restitution, Section 166.*

“A constructive trust, or, as it frequently is called, a trust ex maleficio, ex delicto, a trust de son tort, or an involuntary or implied trust is a trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.”

54 *American Jurisprudence*, page 167, *Trusts*, section 218.

“Where one procures the legal title to property from another by fraud or misrepresentation or concealment, or where one makes use of some influential or confidential relation which he holds toward the owner of the legal title to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained, equity will convert such a one thus obtaining property into a trustee of a ‘constructive trust.’ ”

*Lawley et al v. Hickenlooper et al*, (Utah 1923) 61

Utah 298, 212 Pacific 526. See also *Chadwick v. Arnold et al*, (Utah 1908) 34 Utah 48, 95 Pacific 527.

“A constructive trust, or as frequently called an involuntary trust, is a fiction of equity, devised to the end that the equitable remedies available against a conventional fiduciary may be available under the same name and processes against one who through fraud or mistake or by any means *ex maleficio* acquires the property of another.”

*Salina Canyon Coal Co. v. Klemm et al*, (Utah 1930), 290 Pacific 161, 76 Utah 372, at page 389 of Utah report.

**(b) William L. Hansen, Being a Constructive Trustee, is Under the Duty of Making Restitution and An Accounting.**

“A person who has tortiously acquired or retained a title to land, chattels or choses in action is under a duty of restitution to the person entitled thereto.”

*Restatement of the Law, Restitution*, section 130.

“(1) A person under a duty to another to make restitution of property received by him or of its value is under a duty

“(a) to account for the direct product of the subject matter received while in his possession, and

“(b) to pay such additional amount as com-

pensation for the use of the subject matter as will be just to both parties in view of the fault, if any, of either or both of them.

“(2) The rule stated in subsection (1) is applicable to an action brought solely to recover the income or value of the use of the subject matter, or interest upon the amount of its value.”

*Restatement of the Law, Restitution*, section 157.

“It is a *strict duty* of a trustee to keep and render a full and accurate record and accounting of his trusteeship to the cestui que trust, and the duty is strictly enforced by the courts. It is commonly governed by statutory provisions. Such duty of the trustee is not affected by the fact that he voluntarily assumed the trust. A trustee by operation of law—constructive or resulting—must account for and is chargeable with, subject to proper credits, property subject to the trust.”

54 *American Jurisprudence*, page 396, *Trusts*, Section 497.

“It is a general principle that one who acquires land by fraud, misrepresentation, imposition, or under any other such circumstances as to render it inequitable for him to retain the property, is in equity to be regarded as a trustee ex maleficio thereof for a person who suffers by reason of the fraud or other wrong (citing cases). It is elementary that one who holds property in trust for another may be required to render an

accounting of the rents and profits of property so held.”

*Decorso v. Thomas, et al.*, (Utah 1935), 89 Utah 160, 50 Pacific (2) 951.

**(c) William L. Hansen, Being a Constructive Trustee and Having a Duty to Account, is Chargeable With the Income From This Property, i.e., the Rents Received.**

We have already called the Court's attention to section 157 of *Restatement of Law, Restitution* (see ante, page 37). We wish to call the Court's attention to comment *d Land* under that section and *illustrations 3* and *4*. We quote:

“*d. Land*. If the recipient obtained land by fraud, duress, or other consciously tortious means, the claimant is entitled, at his election, to receive its income or the reasonable value of its use.  
\* \* \*

“*Illustrations*:

“3. A transfers Blackacre to B, being induced to do this by B's fraudulent representation that A owes B \$10,000. B takes possession of Blackacre and rents it for \$1000 for a year. At the end of the year, discovering the fraud, A brings a bill in equity to rescind the transaction and to obtain the land. A is entitled to retain the title to Blackacre and at his election to receive from B \$1000 with interest from the time



of its receipt to the time of the decree or the reasonable rental value of the land (less expenditures by B in accordance with the rule stated in Sec. 158).

“4. Same facts as in Illustration 3, except that at the end of the year B sells the land for \$12,000. A is entitled to receive from B \$12,000 or the reasonable value of the land, plus \$1000 or plus the reasonable rental value of the land for a year, plus interest on such amount to the time of the decree (less taxes and other expenses as stated in Sec. 158).”

A Utah case is in point. This Court in the second appeal of *Lawley v. Hickenlooper*, already referred to, said:

“\* \* \* There was testimony as to the reasonable rental value of the several premises; also, there was testimony that much of the time the premises had not been rented, and that the sum of \$250 was approximately the amount which had been received. Both counsel for plaintiffs and counsel for Sheya agree that Sheya held this property as a constructive trustee. ‘The liability of implied, resulting, constructive or other trusts which do not impose any duty of renting the property on the trustees is confined to the rents which they actually receive or the benefit which they have enjoyed from using the property themselves.’ 39 Cyc. 324.”

*Lawley et ux v. Hickenlooper et al.*, (Utah, 1924),

231 Pacific 821, 64 Utah 534, at 547.

The test is not the reasonable rental value of the property where the taking is tortious. One taking in bad faith is in a much different position than one acting honestly. One acting in bad faith is entitled to and receives much less consideration than one acting in good faith. Both law and equity are repleat with illustrations of this situation. Compare *Illustrations 3 and 4* of *Restatement, Restitution*, cited above with *Illustration 5*. Compare *Baker v. Goodman*, 57 Utah 349, 194 Pacific 117, where the taking and occupancy were in good faith, with *Van Wagoner, v. Whitmore, et al*, 58 Utah 418, 199 Pacific 670. In this latter case, an action in ejectment, defendant is ousted when his title fails; the plaintiff recovered the rental value as *increased* because of the defendant's improvements where the defendant failed to show color of title or *good faith possession*, and the defendant failed to recover anything by way of improvements.

The evidence is that rents paid were \$90,017.00 up to June 30, 1948 (R. 499). By exhibit 8 the defendant showed additional rental income to October 1, 1948, of \$7,699.00. (Received in evidence at R. 606). These figures produce a total \$97,686.00. There is no other evidence. No one was produced who testified as to reasonable rental value of these premises up to the latter date. Even if reasonable rental value was con-

trolling, in the absence of evidence except as to the amount of rents received, it seems to us the only conclusion to be drawn is that the reasonable rental value was the amount of rent received, i.e., \$97,686.00.

True, there was evidence rents were increased. This is business property and not subject to O.P.A. All rents were going up during this period. That is a matter of common knowledge. The very purpose of the Price Control Act was to prevent increases in rentals on housing property, but no controls were put upon commercial property.

Appellant argues an increase in rents was brought about by reason of improvements placed on the property by him, that rents were fixed by reason of the evidence as to what they were during the first four months of 1945, and then assumes the increase was brought about by improvements put there by him. There is no evidence of any kind as to the value of the improvements, how much they enhanced the value of the property or how much they increased the rents, except the stipulation at R. 515. The only evidence is as to how much the claimed improvements cost.

Appellant also contends he is only accountable for the *reasonable rental value* of the premises and not for the amount of rents received. But as previously stated the only evidence on the subject is the total of the rents

received. *Van Wagoner v. Whitmore* is to the effect that one occupying in bad faith must pay reasonable rental value with the improvements on, and the present case reasonable rental value and rents received are synonymous.

There is some authority for the proposition that a bad faith occupier is entitled to credit for the increase in the rent produced by the improvements. See section 28 of 31 *Corpus Juris*, Improvements, page 320. But he is not entitled to credit for increased rents *and* improvements. We show hereafter this appellant is not entitled to credit for improvements, and the case was tried on the theory that perhaps he should be allowed the increase in the rents, and that is the reason for the stipulation shown at R. 515.

Actually, Utah law is not in accordance with the statement in *Corpus Juris* above referred to, and is much harsher on a defendant in the position of William L. Hansen. *Van Wagoner v. Whitmore, supra*.

However, appellant has no just complaint on this item, because the trial court actually allowed a credit of \$4,240.87, the amount of the agreed increased rents, as will hereafter be shown.

**(d) Credits to be Allowed William L. Hansen.**

We concede that William L. Hansen is entitled to

credit for the following items, but those items alone, i.e.: Payments of principal and interest on the mortgage; taxes paid, reasonable and necessary cost of operation; reasonable cost of necessary repairs. We refer to Section 158 of *Restatement of the Law, Restitution*, which reads:

“A person is entitled to specific restitution of property from another or to the product of such property only on condition that he compensate the other for expenditures with reference to the subject matter which have inured to his benefit, to the extent that justice between the parties requires.”

We also call the Court's attention to the comments commencing at page 630. The comment is to the effect that one who takes property wrongfully is not entitled to recover the cost of the repairs but only the amount by which the repairs increased the value of the property; but at the trial we conceded that the cost of repairs was a proper credit and we still concede it except as to repairs shown on Exhibit 8. At the trial we also conceded various specific items, and we do not wish to be understood as attempting to withdraw those concessions, although the classification of the expenditure made by Hansen in many of those instances was not clearly shown.

### **Operation Costs.**

As before stated, we concede these should be al-

lowed, and they were allowed. Light, heat and water, hauling garbage, one-half total telephone expense (more than the monthly charge), damages paid to tenants all on exhibit 7, and the monthly telephone charge, heat, lights, water, and trash disposal expense on exhibit 8 were allowed. But by making that concession we do not wish to be understood as consenting to any allowance by way of salary and taxes thereon paid to Nephi J. Hansen or any allowance to William L. Hansen on his claim for services. Such items were disallowed.

Now, in the first place these two men collaborated together to defraud this corporation of the property. In addition the evidence is that Nephi Hansen did nothing at the office; he certainly kept no books and rendered no service of any value; nor was there any proof that his services were at all necessary for the preservation of this property. It would be strange indeed if two thieves were allowed salaries for looking after stolen property, and these two men are exactly in that position. The trial court, as we understand it, based his disallowance of these two items on that proposition.

At one time trustees with active duties under an express trust were not entitled to compensation unless the trustor so declared in his deed or instrument of trust. This has been changed, and he is now generally allowed reasonable compensation based upon the value

of his services to the trust, or to the beneficiary. We have made a diligent search and have been unable to find any case which holds that a constructive trustee is entitled to compensation, and we venture the opinion that the reason for the lack of such cases is that no such trustee ever yet has had the temerity to ask for it. "Thus if the recipient was tortious, he should bear any losses resulting from the transaction and should not benefit from profits." Pages 630 and 631, *Restatement, Restitution*. If a trustee gambles with trust funds, the losses are on him, and if a profit is realized the trust estate gets the profit, and no court would allow him anything for his misuse of trust property. To do otherwise would put a premium on improper and illegal actions of a trustee. Now, this trustee and his father combined and conspired together to defraud this corporation of its property, and to say that they should have compensation for looking after it during the time they kept it away from the corporation would put a premium on dishonesty; for the net result would be that two in their position could very well say, "if we do not succeed in our dishonesty, at least we will not lose as a court will compensate us for our services and we will be out nothing." Neither the law nor equity aids a wrongdoer, and these two men were wrongdoers.

There is plenty of law that a trustee who is right to start with and then goes wrong can be and should be denied compensation. We quote from 54 *American*

*Jurisprudence* 423, section 538 of Trusts, as follows:

“The general rule is that a trustee who repudiates the trust or violates or neglects his duty is not entitled to compensation or commissions. Certainly, the court, in its discretion, may in such case deny or reduce compensation, although no such power is given to it by statute.

“Wilfulness and bad faith in misconduct are grounds for completely depriving a trustee of compensation, and recklessness or gross negligence, without intentional violation of duties, effecting serious loss to the estate, justifies a court’s denial of compensation to a trustee; to allow compensation under such circumstances would be to put a premium on recklessness and negligence.”

We quote from a headnote of a Colorado case, *Polard v. Lathrope*, 20 Pacific 251, 12 Colorado 171:

“Where one in the possession of property, and sought to be charged as trustee, denies the trust, claiming title as absolute owner, he cannot, on judgment being rendered against him, claim any compensation for services in the management of the property.”

And from an Oklahoma case, *Royer v. Dobbins*, 239 Pacific 157, 111 Oklahoma 156:

“Trustee, who has denied trust and claims trust property as his own, is not entitled to be reimbursed for expenses incurred in manage-



ment of trust estate after such repudiation."

And from an Oregon case, *Royal v. Royal*, 47 Pacific 828, 30 Oregon 448:

"A trustee who occupies the land, and receives the income therefrom, for which he renders no account, is not entitled to compensation for services."

How can William L. Hansen claim and be allowed a credit for moneys paid to his father—a man who violated his trust to the corporate defendant—for doing nothing much particularly except now and then sitting around an office, answering the telephone and listening to an occasional complaint of a tenant. It appears more likely that William was paying his father a *quid pro quo* for his making it so easy for William to get possession of this property. There is no proof whatsoever that the father did anything to benefit this corporation after William took possession of the property, and trust funds cannot be charged with payments without proof either of specific authorization or benefit.

In his sound discretion the trial court denied credits for these two items; there is no proof of abuse of that discretion; there is ample evidence to support his decision. This court should not upset his ruling in view of the record here.

### Improvements.

At the trial we contended strenuously and still con-

tend that William L. Hansen under the circumstances of this case was not entitled to take any credit for anything by way of improvements. As to credit for improvements we refer to *Comment d, Improvements and additions of Restatement*, page 632 *Restitution*.

At law one who improved another's land could not recover anything for improvements. See *Jensen et ux v. Probert et al*, (Oregon, 1944), 148 Pacific (2) 248. The discussion starts at page 251. This applies to good faith holders as well as others, but as the case points out equity "borrowing from the civil law, would under some circumstances soften the harsh rule of the common law by allowing compensation by an occupier who in *good faith* improves land. \* \* \*"

Occupying claimants statutes were passed by many states to alleviate the harshness of the common law rule. Utah has such a statute. See sections 78-6-1 and 104-57-4, Utah Code. But under this statute this court has held that one not possessing the property in good faith cannot recover the value of the improvements. *Doyle v. West Temple Terrace Company*, 47 Utah 238, 152 Pacific 1180.

In equity a bad faith claimant cannot recover for improvements.

"In all cases where an occupant is entitled to recover for improvements made to the prop-

erty, the element of good faith and innocent mistake is essential; for, if a person lays out money on another's property, with knowledge or notice of the true state of the title, he has no claim to be reimbursed for improvements."

3 *Pomeroy's Equity Jurisprudence*, Section 1241.

"Where the deed is void because of a wrong or fraud of the grantee, it does not constitute such color of title as to entitle him to compensation for his improvements."

31 *Corpus Juris* 332, citing an Iowa case, *Lindt v. Uihlein*, 89 N.W. 214, an action to rescind and recover property.

In *Gaetke v. Ebarr*, (Minnesota, 1935), 263 N.W. 448, where misrepresentations which induced the plaintiff to exchange property were fraudulent and false and where the plaintiff brought suit to rescind the contract, it was held that no recovery for improvements would be permitted the defendant since he held the property transferred to him in bad faith.

In *Peterson v. Weber County et al*, (Utah, 1939), 103 Pacific (2) 652, 99 Utah 281, an equitable action where there was an answer asking for affirmative relief for the value of improvements put upon the property, this court held the possession was in good faith and allowed recovery of the value of the improvements. In a separate opinion Wolfe, J., states the action partakes of a bill *quia timet*, discusses whether or not a separate

action should have been maintained by the defendant for the value of the improvements, and says that it is inherent in equity to enter a decree on condition of an allowance for the value of the improvements, and we think implies that whether the relief prayed by the occupant is under the occupying claimants statute or in equity the *basis* of his recovery will be the same; i.e., whether or not he was and is a good faith occupier.

It strikes us that this case at least acknowledges that whether in law under this statute or in equity, the rule is, before improvements can be allowed, the claimant must be shown to have been a good faith holder of the title and to have made the improvements in good faith. A *bad faith* claimant cannot recover for improvements under this statute. Should he be any more favored in equity?

The trial court allowed defendant for each and every item of claimed improvements on the first page of Exhibit 7: elevator \$2100.00, stairway \$700.00, basement \$1440.00, a total of \$4240.87, and \$466.00 for architects' fees; and on the second page of Exhibit 7 all of the items, totaling \$2252.45, of which all but \$140.00 for office supplies, are listed by way of improvements. We think these allowances were contrary to the law of this state on the basis of the authorities above cited, and that was our position at the trial. Included in the amounts allowed was \$4240.87, referred to previously

at page 42 of this brief, and it does not make any difference whether the allowance was made by way of increased rents or by way of improvements. Certainly appellant is not entitled to have a double allowance made for that sum.

### **Other Disallowances.**

Other items disallowed on Exhibit 7 were a contribution of \$500.00 to the Sugarhouse Chamber of Commerce Centennial Program; \$600.00 claimed to have been spent at the Ambassador Athletic Club in wining and dining various persons; \$208.01 telephone tolls; \$443.96 claimed interest on loan made by defendant William L. Hansen; attorney's fees of \$1117.50, and \$35.70 for flowers. There is no proof of any kind that this corporation benefited by any of these expenditures or that they were at all necessary to protect this property. The fact of the matter is they are strictly personal expenditures made by the appellant. We do not think much further comment is necessary with respect to the disallowances of these items.

William L. Hansen was taking out of this property a great deal more money than he was putting into it, and even if he did borrow some money from the Davis County Bank, if he had not been so free in his expenditures, as the accounting shows during the period covered by Exhibit 7 he is \$24,788.96 short in his accounts, he would have had ample moneys to use for proper pur-

poses and no necessity would have existed to borrow money. As to attorney's fees, it is perfectly apparent from the evidence that those fees were in part for work done on this case by appellant's attorney and as to any other items, there was no benefit to the corporation. As to the item of telephone bills disallowed, by agreement \$287.61 as shown on the first page of Exhibit 7 was allowed. The evidence was that the monthly rate on the telephone was \$11.93 per month so the allowance was of an average in excess of \$12.00 per month, more than necessary to take care of the monthly telephone bill. The balance of the bill of \$208.01 was for long distance calls and other items not shown to be chargeable to the property.

The court also disallowed an item of \$5609.15 shown on the second page of Exhibit 7 as checks drawn to cash not otherwise included. With respect to this item and with respect to the accounting generally, it must be borne in mind that the duty to account was on the appellant. If he did not keep proper books and records so that the items could be classified it is too bad. It was his duty to keep clear and accurate accounts. From the way in which these accounts were kept one is led to the conclusion that they were purposely jumbled up so that the situation never could be properly unwound. The type of records kept was one of the reasons that at the trial we agreed to pass many of the items contained on the first page of Exhibit 7 without

proof, particularly the major portion of the items listed under repairs and improvements, as otherwise the hearing on the accounting would have been interminable. It is doubtful that William L. Hansen ever could justify any fair proportion of the \$22,859.41 allowed him therein. We quote from 54 *American Jurisprudence* at page 398, section 499 of Trusts:

“The refusal or failure of a trustee to account furnishes a good reason for adopting against him the most rigid rules of calculation, and if a trustee does not keep clear, distinct, and accurate accounts, all intendments and presumptions are against him. The rule is applicable to refusal to account for rents and profits. Inadequacy of his accounts may result in his being made to pay costs of an accounting and the expenses of an accountant. Certainly, uncertainty in the accounts of a trustee, which is due to his own gross negligence, does not necessitate acceptance as verities, and the allowance, of his unverified and unexplained claims for fees and expenses. Dereliction of the trustee in his accounting is a factor in charging him with interest or income.”

On Exhibit 8 the trial court disallowed \$715.43 labeled repairs as there was no proof that the same were necessary, and also because they were made subsequent to a finding by the court that this property belonged to the corporation, and after the court ordered a decree that the deed should be set aside. There is no justification whatsoever in the evidence for the allowing of any such sum under the circumstances.

The same is true with respect to the item of \$617.08 office expense. It is absolutely inconceivable that there would be that sum of money spent during a three month period in operating an office where the only item of business was the collection of rents.

Disallowance of a portion of the telephone bill was made and only that portion was allowed covering the monthly charge of \$11.98 a month for the three months covered by that exhibit.

The item of \$600.00 for office salaries, the same having been paid to Nephi J. Hansen, was disallowed as were all the balance of the items shown on that exhibit. These latter did not represent any expenditures of any kind, but were merely accruals in the accounts to take care of some prospective future expenditure and were items set up by the accountant. It will be time enough for a court to consider those expenditures when and if they are made.

For the information of this court, we will state that the pencilled and pen and ink figures on Exhibit 7 were made by the trial court. On the first page of Exhibit 7 the items disallowed were marked "out" and the ones allowed were marked "o.k." On page two of the exhibit the items marked with an X were disallowed and the items marked with a check or a dash were allowed. The items allowed and disallowed on Exhibit 8 are clearly stated to be either "allow" or "out".



Appellant contends that he is entitled to have allowed to him a sum of money, i.e., \$8780.24 which he paid in two installments, \$5,000.00 at about the time the deed was delivered, and the balance of \$3,780.24 some six months later. There is no proof that the corporation ever got this money. In fact the proof is otherwise. The trial court specifically found that the money went to Nephi J. Hansen personally. The facts about the situation have already been referred to in this brief. We see no reason to re-argue our position but so there is no uncertainty about it we wish to state in view of the entire record it is perfectly apparent this money was known to go to the appellant's father to take care of him and there was no attempt by anybody, corporate officers or William L. Hansen, to do anything about it except to let the father appropriate it. In many ways that payment is in the same category as payments made by William L. Hansen to his father after he had obtained the deed. We cannot see under the facts in the case how the trial court could give William L. Hansen credit for this sum. The board of directors apparently authorized Nephi J. Hansen to take the first \$5,000.00, but in view of the set-up on the board, that was the same as if Nephi J. Hansen authorized himself to take it. Nobody ever produced any evidence the money was owing, except the mere statement in the resolution; the secretary of the corporation on the stand knew nothing about any such debt; and in view of what happened to the subsequent payment it seems clear William L. Han-

sen and his father, and the family, used that method of getting some money to the father, knowing the same would go there and knowing the corporation would receive absolutely nothing.

Appellant makes no attempt to analyze the accounting features of this case. He generally levels a shot-gun blast at all of it. Remarks of the Oklahoma court in *Boyer v. Dobbins*, already referred to, are pertinent here. We quote from page 156 of 239 Pacific:

“We are simply invited to examine this long and complicated account and see whether we can discover some item or items which the court improperly disallowed. This we decline to do. If the defendant desired a review of the action of the trial court on this branch of the case, he should have pointed out in his brief the errors complained of. Besides all of the expenses claimed by the defendant were incurred after he had repudiated the trust relation, and it would not have been error for the court to have disallowed the entire claim. *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940; *Somerset Ry. v. Pierce*, 98 Me. 528, 57 A. 888; *Hanna v. Clark*, 204 Pa. 145, 53 A. 757; *Pollard v. Lathrop*, 12 Colo. 171, 20 P. 251.” \* \* \*

## 6. Conclusion.

Appellant makes many assertions in his brief, some of which we do not think require any comment. He states that Nephi J. Hansen was the only stockholder. There

is not one bit of proof as to how much stock Nephi J. Hansen or his family had or that he or they had any at the time of trial except Mrs. Southwick. We were going to put Nephi J. Hansen on the stand (R. 258) but counsel, particularly Mr. Rawlings, at a conference at the bench with the trial court, stated Nephi J. Hansen was in such a condition by reason of age and infirmities he could remember nothing and knew nothing, and so we abandoned him as a witness. (See also R. 519). Much stock is outstanding in this corporation in the hands of persons other than the Hansens and three stockholders appeared, produced their stock and were sworn and testified at the trial. Their rights and those of others similarly situated is the issue in this case, not the rights of Nephi J. Hansen, even though he is a stockholder.

The trial court from the bench made a statement that the corporation was Nephi J. Hansen's alter ego, or something to that effect, and a finding of the same character was made. The sense of the statement and the finding is that Nephi J. Hansen so regarded it and had always treated it as being himself, and there is no need to make any statement to support such a proposition except to say that his actions and the actions of his family as shown by this record is proof positive thereof.

Appellant at one point in his brief makes the statement that when the purported sale was being handled the corporation was being represented by competent counsel, intimating it was Edward W. Clyde. The fact

of the matter is that Edward W. Clyde had nothing to do with this transaction and only appeared on the scene when the suit was filed, filing a demurrer for the Granite Holding Company.

Appellant in effect claims the trial judge prejudged the case, and appellant's counsel makes a personal issue out of it by referring to another case involving a trust relationship tried by the same judge which is now on appeal to this court. The fact is that as shown by the record the defendants and each of them had a full, fair, and complete opportunity to be heard, and on the accounting the trial court was overly generous with the appellant, if in nothing else, at least with respect to the improvement items, and a fair reading of the record will disclose that many of the items allowed were supported by flimsiest pretexts of proof.

Three or four time in his brief appellant refers to the alleged refusal of one of plaintiffs' attorneys to answer as to "who hired him" and attempts to make something out of that, presumably on the theory that it was counsel who drummed up the case. The fact is that when that particular bit of by-play took place both Mr. Jones and Mr. Jensen were making some attempted jocular remarks, and although the cold record does not reveal it, the refusal by Mr. Jensen was made in an attempted humorous fashion without any desire to conceal anything. It is perfectly plain that the trial court so sensed the matter because if he had wanted to know

who hired counsel it would have been an easy matter for him to insist upon an answer and the same would have been freely given.

Appellant has much to say about the way plaintiffs came in and out of the case. This action was started by Lewis F. Hansen and his brother and by counsel other than the present counsel. Lewis F. Hansen quit on the eve of trial. It was a fortunate thing that other stockholders found out about the action having been brought and came in and had themselves made parties. It must be borne in mind that this corporation, in accordance with the testimony of the responsible officers, had absolutely no books and records of any kind, and even if some stockholders had gone and made an inquiry to determine who the stockholders were, it would have been without any result. It was well three stockholders were found by the people ultimately interested in this case who had stock certificates made out in their names and title to which certificates cannot be questioned. What difference does it make that the action was originally instituted by Lewis F. Hansen and apparently by his brother Clyde, and that they got out of the case before it was tried; when ultimately the case went to judgment with three bona fide stockholders as parties plaintiff. This is particularly true in view of the fact that the action is a class action for the benefit of the stockholder plaintiff and all others similarly situated. †

In a case of this sort courts themselves have an in-

terest, probably different from that in the ordinary case presented for decision, to see that justice is done and that the rights of stockholders are not frittered away. As indicative of that interest we call attention to the rules of civil procedure adopted and in force in the United States Courts. A portion of Rule 23 provides that an action of this kind shall not be dismissed without approval of the court. It is perfectly apparent that the reason for the rule is to prevent stockholders bringing such an action where they represent themselves and others similarly situated from being bought off and settled with without the rights of all who are effected being protected.

It would be strange indeed if the transaction here brought to light should be approved by any court. Modern legislation, and we have in mind among others the Securities Exchange Act, the Truth in Securities Act and the Holding Company Act, show an awakening demand by the public that corporate officers and others, in their dealings with respect to corporate property and stockholders present and prospective, must be fair, frank open and above-board, and they must make full and complete disclosures with respect to all of their transactions. At one time, perhaps, the inner workings of a corporation and the fact that only a few might be hurt thereby were apparently not the concern of anyone particularly, but that is no longer the rule of this day. A corporate office today partakes of the nature of a public trust, and corporate officers and agents cannot deal

with corporate property as was done here: parcel it out to a member of the family to the detriment of stockholders.

The trial court in this case, like every trial court, had an opportunity to and did observe these witnesses. The evidence had to be secured from the mouths of the persons who were "in on the deal". Those persons' attitude on the witness stand, their interest in the outcome of the case, their frankness and candor, or more aptly, the lack of them, all took place under his eye and in his hearing. There is no occasion to refer to any case or any authority on this proposition. In any case these are matters to be weighed in favor of supporting a judgment.

The evidence, and the inferences to be drawn from it, are all in favor of the judgment being a proper one. That it should be affirmed is

Respectfully submitted,

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