

1952

Laura F. Hansen v. Hansen Investment Co. et al : Brief of Appellant

Utah Supreme Court

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

FILED

FEB 1 1952

LAURA F. HANSEN,

Plaintiff and Respondent, Clerk, Supreme Court, Utah

vs.

HANSEN INVESTMENT COMPANY, a
Utah corporation,*Defendant,*

WILLIAM L. HANSEN,

*Defendant and Appellant,*CONTINENTAL NATIONAL BANK &
TRUST COMPANY, Special Admini-
strator of the Estate of NEPHI J.
HANSEN, Deceased,*Intervenor and Respondent.*

7760

BRIEF OF APPELLANT

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Utah corporation,

Defendant,

WILLIAM L. HANSEN,

Defendant and Appellant,

CONTINENTAL NATIONAL BANK &
TRUST COMPANY, Special Admini-
strator of the Estate of NEPHI J.
HANSEN, Deceased,

Intervenor and Respondent.

Case No. 7760

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The parties will be designated as follows: Plaintiff and respondent as Laura Hansen or Laura. Defendant, Hansen Investment Company, as the Corporation. William L. Hansen, defendant and appellant, as William Hansen or William. Continental National Bank & Trust Company, Special Administrator of the Estate of Nephi J. Hansen, as Intervenor. Nephi J. Hansen as Nephi Hansen or Nephi. The children of Laura and Nephi Hansen will be designated by their surnames for the sake of brevity and convenience.

STATEMENT OF THE FACTS

This appeal arises out of certain transactions regarding stock of a family corporation known as the Hansen Investment Company.

The Hansen Investment Company was organized, and the Articles of Incorporation signed on the 16th day of April, 1947. The incorporators were Nephi J. Hansen and Laura F. Hansen, his wife, Clyde F. Hansen, LaRue H. Nebeker and Mary H. Southwick, children of Nephi and Laura Hansen. All of the stock of the corporation was fully issued on April 16, 1947, Nephi and Laura receiving 42 shares as joint tenants with full right of survivorship, and each of the children of Nephi and Laura, with the exception of Lincoln Hansen, received one share of stock in the corporation.

The officers of the corporation from the day of its inception have been Clyde F. Hansen, President; Nephi J. Hansen, Vice President, and LaRue H. Nebeker, Secretary and Treasurer. Laura Hansen and Mary Southwick were Directors. The Articles of Incorporation and the Oath of Office were both signed by Laura Hansen.

Stock certificates representing the stock interests were issued. The stock certificate issued to Nephi and Laura Hansen was marked Exhibit "1" and admitted in evidence in the above-entitled matter.

All of the shares of stock after their issuance were held by Shirley P. Jones, Esquire, the attorney for the corporation (R. 108). All of the property for which the stock of the Hansen Investment Company was originally issued was obtained through a suit brought in the name

of Nephi, Laura, William and Lewis Hansen. This property had been held and owned by a company known as the Foothills Development Company, and one of Nephi and Laura Hansen's children, Lincoln Hansen, obtained the title to the property and refused to return it to the Hansen family. The lawsuit was to obtain from Lincoln the Foothills Development Company real estate.

William Hansen financed the lawsuit and the other children of Nephi and Laura Hansen joined in the effort to obtain from Lincoln the Foothills Development Company property. A settlement of this lawsuit was effected and at the request of Nephi and Clyde Hansen, the Hansen Investment Company was organized to take title to the property being returned by Lincoln Hansen (R. 111, 112). Laura Hansen knew nothing of the incorporation nor the source of the property which was the consideration for the issuance of the stock of the corporation (R. 119), the stock having been issued in Nephi and Laura's name as joint tenants merely for the convenience of Nephi and with the thought that the stock was Nephi's to do with as he saw fit (R. 110). After the stock was issued, the shares were endorsed by Nephi and Laura Hansen and returned to Mr. Jones endorsed. Mr. Jones retained the certificate, which is Exhibit "1," at Nephi Hansen's direction for two years and thereafter at the request of Nephi Hansen issued the stock to Nephi Hansen as sole owner. The second stock certificate was issued to Nephi Hansen on the 16th day of May, 1949 and is marked Exhibit "2" (R. 113).

The change of ownership in stock certificate (Exhi-

bit "1") was made at the request of Nephi Hansen and Nephi stated that his reason for eliminating Laura Hansen's name from the certificate was to protect her against being imposed upon by her son, Lewis Hansen (R. 110, 111). Immediately prior to the issuing of Exhibit "2" in the name of Nephi Hansen only, there had been a number of difficulties arise which involved the conflicting interests of Lewis Hansen and his father and mother, Nephi and Laura Hansen (R. 111). There were lawsuits in which Nephi and Laura Hansen were plaintiffs and Lewis Hansen was the defendant, and which were brought for the purpose of cancelling and rescinding deeds which Lewis Hansen had obtained from his father and mother (R. 58, 59, 70). One reason for this change of ownership was to remove the incentive to Lewis Hansen to continually bring pressure to bear on Nephi and Laura Hansen for the purpose of obtaining their stock and real property (R. 61, 62, 71).

Exhibit "2" was issued to Nephi Hansen on the 16th day of May, 1949, and on the same day a stockholders' meeting was held and Articles VIII and IX of the Hansen Investment Company's Articles of Incorporation were amended (Exhibit "A"). The certificate as to amending Articles of Incorporation recites that the meeting was held at the office and principal place of business of the corporation and that all the stockholders entitled to vote were present and all of the issued and outstanding stock of the corporation was represented in person. The President, Clyde F. Hansen, and LaRue H. Nebeker, the secretary, both signed the amendment. The amend-

ment sets forth the new incorporators and eliminates as incorporators Laura F. Hansen and Lewis F. Hansen. In the amendment to the articles and in the issuance of Exhibit "2" there is no evidence whatsoever that William Hansen in any way participated.

After Exhibit "2" had been issued to Nephi Hansen he retained H. A. Rich, Esquire, as his attorney, and through Mr. Rich Exhibit "4" was prepared and executed. Exhibit "4" is a pledge by Nephi Hansen to William Hansen of all of the right, title and interest that Nephi Hansen owned in Exhibit "2". Exhibit "4" recites the various considerations which entered into the mind of Nephi Hansen in the making of the pledge. Exhibit "4" is dated the 19th day of September, 1949. The pledge was then forwarded by attorney Rich to Mr. Shirley P. Jones who, at that time had in his possession Exhibit "2", the stock of Nephi J. Hansen in the Hansen Investment Company. The pledge was for the purpose of securing and indemnifying William Hansen for moneys which had been loaned to Nephi Hansen, paid out on his behalf, or losses which William Hansen had sustained through association with Nephi Hansen in certain business transactions and family affairs. The amount which is set forth in the pledge is the sum of \$68,077.50.

The history of the transaction giving rise to a number of the considerations recited in the pledge is contained in *Hansen et al. v. Granite Holding Co. et al.*, Utah, 218 P. 2d 274. A few of the salient facts of the Granite Holding Company case will recall it to the Court's mind. In that case William Hansen and Nephi

Hansen were defendants and were sued by stockholders of the Granite Holding Company to set aside a sale of the corporate assets to William Hansen. The sale had been arranged by William with his father, Nephi Hansen, and the other members of his family. It appeared in the case that William Hansen had paid large sums of money as consideration for the property, but the consideration instead of being devoted to the interests of the stockholders, had been paid directly to Nephi Hansen. William Hansen was not a stockholder of the Granite Holding Company and the record shows was not engaged in the management of the Granite Holding Company. A large portion of the stock of the Granite Holding Company was held by Nephi Hansen and other members of the Hansen family and it was at their suggestion and request that William Hansen purchased the assets of the Granite Holding Company. The holding company and the Nephi Hansen family were in serious financial difficulties. The only substantial liquid assets were those which William Hansen held and which he had earned and obtained through his business at Ashton, Idaho (R. 140, 141). After William Hansen's investment in the Granite Holding Company and after the contract of sale had been approved by Nephi Hansen and the board of directors of the Granite Holding Company, a lawsuit was commenced. As a result, the sale to William Hansen was held to be invalid and a judgment was ordered against him.

At the time the pledge (Exhibit "4") was given by Nephi to William, the Granite Holding Company case

was in the Supreme Court on appeal. The exact amounts set forth in Exhibit "4" were those which the trial court had determined would be due to the Granite Holding Company from William. Those amounts were considerably affected by the decision of this court reported in 218 P. 2d 274. At the time of the trial of this matter the accounting, ordered by the Supreme Court in the Granite Holding Company case, had not been completely determined, and as a consequence the exact amount of the judgment against William Hansen and the amount for which he was to have indemnity through the pledge was not fixed. (See file No. 79299 of which the lower court took judicial notice, R. 139).

Exhibit "4" recites generally the history of the Granite Holding Company transaction between Nephi and William and in it Nephi states that William attempted to purchase the property of the Granite Holding Company by his inducement and because he, Nephi, felt that such a sale would be beneficial to him personally, and he further states in Exhibit "4" that he feels himself to be legally and morally responsible for the Granite Holding Company transaction and the resulting loss and damage which William suffered.

After the receipt of Exhibit "4" by Shirley P. Jones, Esquire, on September 19, 1949, he received a demand from William Hansen, dated March 10, 1950. William requested that Jones turn over Exhibit "4" and stock certificate (Exhibit "2") which it pledged to him (R. 127). In response to the demand the stock certificate

and pledge agreement were delivered by Jones to William Hansen (R. 128).

On June 29, 1950, Nephi Hansen was declared incompetent and the intervenor was appointed guardian of his estate. Nephi Hansen died on the 12th day of April, 1951. After the death of Nephi Hansen the bank was appointed special administrator.

Concerning the endorsement of Laura Hansen on Exhibit "1", Laura said that she never signed it and when asked if she recognized her signature she stated she thought it was a fraud, repeating that she never signed anything like that (R. 36, 37). At the same time Laura said she recognized the signature of Nephi J. Hansen. After a brief recess Laura returned to the witness stand and the following exchanges occurred between her counsel and her (R. 52) :

"Q. Mrs. Hansen, Mr. King asked you if you had ever signed this stock certificate and your answer was that you had never seen it to your recollection. Now I ask you, even if you had signed this at any time, did you ever intend to dispose of your stock or sell it?

A. No. If I sell it I might as well sell my life.

Q. Now, Mrs. Hansen, do you know why it is that you brought this case to court, what it is you are trying to do?

A. To get our stock back."

On cross-examination she had stated that the purpose of the lawsuit in which she was testifying was for mismanagement of the Hansen Investment Company (R. 51).

During her testimony Laura Hansen stated that she had participated in the Hansen Investment Company management and attended directors' meetings, both in her home and down at her husband's office (R. 36).

The signature which Laura Hansen did not recognize was obtained by Nephi Hansen. Regarding the signing, the only witness who had any memory of it, namely: Clyde Hansen, testified as follows: (R. 69, 70, 81, 82):

"Q. Mr. Hansen, will you look at what has been marked as Exhibit 1 and tell me if you recognize that document?

A. Yes, I do.

Q. Will you look on the back of it, Mr. Hansen, and tell me if you recognize any of the signatures that appear there?

A. Yes, I recognize all three of them.

Q. Mr. Hansen, I notice that your signature appears there as a witness to the other two signatures. Who signed the other two signatures?

A. Well, my mother signed the one and father signed the other.

Q. Were you present at the time your mother placed her signature on there?

A. Yes.

Q. And where was that?

A. It was in their home.

* * * *

Q. (By Mr. Snow) Now, you have said you were present at the time your mother signed the indorsement on the stock certificate, Exhibit 1, and that that took place in your mother's house. Is that your recollection?

A. Yes, that is right.

- Q. What was the occasion for that? Do you know if there was any particular occasion why they were all up at the house at that time?
- A. We weren't up at the house at that time. We took it up there and got an assignment and took it back. One of the attorneys suggested.
- Q. Which attorney was that?
- A. Mr. Jones.
- Q. Shirley P. Jones, he suggested that you do that?
- A. That is the way the thing worked out.
- Q. You went up there and put the certificate before her to sign, you did that?
- A. Yes, I did that.
- Q. Was your father there at that time?
- A. Yes.
- Q. Did both of them sign at the same time?
- A. That is right. Father knew about it and asked mother to sign and she signed it."

After the trial the lower court entered its Findings of Fact, Conclusions of Law and Decree. The effect of the court's findings was to give to William L. Hansen a lien on the 21 shares of stock of the Hansen Investment Company which were represented by Exhibits "1" and "2" in the sum of \$1,464.00, and to award the stock to Laura Hansen subject only to the lien. The court did not find that Nephi Hansen was incompetent at the making of either the pledge (Exhibit "4"), nor at any other time while engaged in any of the transactions, the subject matter of this lawsuit. The court found (Finding No. 10) that Nephi executed Exhibit "4" without appreciating the force and effect of the execution of such docu-

ment and only because he was persuaded so to do by William.

The judgment awarded to Laura Hansen was 42 shares of stock, subject to the lien in the sum of \$1,464.00. From the judgment of the court William Hansen prosecutes this appeal.

STATEMENT OF POINTS RELIED UPON

Point 1.

The following Findings of Fact by the Court are without support in the evidence and are contrary to the substantial evidence produced:

(a) That no stock certificate evidencing said ownership of said 42 shares of stock was ever issued and delivered to the plaintiff and her husband, Nephi J. Hansen.

(b) That the plaintiff at no time since said incorporation of Hansen Investment Company ever intended to or did transfer her interest in and to said 42 shares of stock. That on or about April 16, 1948, one Clyde Hansen, then the President of said corporation and one of plaintiff's sons, obtained plaintiff's signature to a stock certificate of Hansen Investment Company for 42 shares of stock thereof. That no consideration was paid to plaintiff and that said signature was obtained without any knowledge on her part as to the nature of the document she was signing or the effect of her signature thereon, and without

any intent on her part to transfer any of the interest she had in said 42 shares of stock of said corporation.

(c) That plaintiff was unfamiliar with any inner workings of the corporation known as the Hansen Investment Company and knew nothing about its affairs and what was intended to be done at any time when her signature was obtained by Clyde F. Hansen, her son, to said stock certificate and that had she been apprised that she was endorsing a certificate for her stock in said defendant corporation and the effect of her signature thereon she would not have signed said document.

(d) That the certificate for 42 shares (Exhibit "2") was issued without right or authority and was and is void and of no force and effect.

(e) That thereafter and on September 19, 1949, Nephi J. Hansen executed a document (Exhibit "4" in this case) purporting to pledge his interest in Certificate No. 1 for 42 shares of stock, which certificate is the same one mentioned in paragraph 6 hereof, to William L. Hansen, and one of the defendants herein, a son of Nephi J. Hansen and plaintiff, as security for the future payment of certain claimed obligations to his said son and as indemnity against losses which might arise out of transactions named therein, and said document was executed without any consideration, all of the named considerations being either illusory or moneys owing on past transactions.

(f) That at the time of the execution of Exhibit "4", the assignments and pledge, there was no legal obligation upon the part of Nephi J. Hansen to pay any of the items mentioned in Exhibit "4" except the items of \$877.00 and \$587.00 (Finding No. 7).

(g) That no demand was ever made by William L. Hansen for payment of any of the purported obligations set forth in Exhibit "4", and the delivery of Exhibit "2" (stock certificate) to William L. Hansen was without right whatsoever.

(h) That Exhibit "4", the pledge, was based on a written memorandum of items and amounts prepared by William L. Hansen (Finding No. 10).

(i) That in signing Exhibit "1" neither Laura F. Hansen nor Nephi J. Hansen intended at any time to part with their interests in 42 shares of stock and that no consideration was given for the execution of Exhibit "4" (Finding No. 10).

(j) That Nephi Hansen signed Exhibit "4", the pledge, without appreciating the force and effect the execution of said documents would have, and only because he was persuaded so to do by his son, William L. Hansen, one of the defendants herein (Finding No. 10).

(k) That William Hansen was not an innocent purchaser for value of the 42 shares of stock.

Point 2.

The following Conclusions of Law made by the Court are based upon erroneous concept of fact and/or misapplication of the principles of law governing this action:

(a) Conclusion of Law No. 1, which reads as follows, is entirely defective:

“That at all times since the formation of said corporation up until the time of the death of Nephi J. Hansen, the plaintiff and Nephi J. Hansen, as joint tenants with full right of survivorship, were the owners of all of the 42 shares of stock of the defendant corporation, Hansen Investment Company, shown in the original articles of incorporation of said company, as having been subscribed for by them and standing in their name. That upon the death of her husband, Nephi J. Hansen, as surviving joint tenant, said plaintiff became, was and now is the owner of all of said 42 shares of stock; and that of such stock 21 shares only thereof is subject to a lien for the sum of \$1464.00 in favor of the defendant William L. Hansen for moneys owing by Nephi J. Hansen to said William L. Hansen.”

(b) Conclusion of Law No. 5, wherein the court concludes that the pledge contained in Exhibit “4” is only effective for the sum of \$1464.00 and creates a lien only for the sum of \$1464.00, is

an erroneous Conclusion of Law and misapplication of the facts to the principles of law.

(c) Conclusions of Law No. 6 and No. 7 are both erroneous and involve the basic error of the court's deliberations.

Point 3.

The judgment of the court is based on misconceptions of fact and erroneous applications of the principles of law governing this case. Specifically that portion of the judgment limiting William Hansen's interest in the 42 shares of the capitol stock of the Hansen Investment Company to a lien for \$1464.00 is contrary to law and equity. The judgment is also erroneous in that portion of it which restrains and enjoins William Hansen from asserting a right, title or interest to the stock in excess of a lien of \$1464.00.

SUMMARY OF ARGUMENT

POINT I.

THE PLEDGE TO WILLIAM HANSEN OF THE INTEREST OF NEPHI HANSEN IN THE STOCK OF HANSEN INVESTMENT COMPANY IS A BINDING, EXECUTED TRANSACTION.

(a) Nephi Hansen was completely competent and in full possession of his understanding and mental faculties and acted under no disability, undue influence, fraud or coercion on September 19, 1949, when he executed Exhibit "4."

(b) There was substantial consideration for the giving of the pledge to William Hansen.

POINT II.

NEPHI HANSEN WAS THE OWNER OF 42 SHARES OF STOCK IN HANSEN INVESTMENT COMPANY AND HIS PLEDGE TRANSFERRED HIS INTEREST TO WILLIAM HANSEN.

ARGUMENT

POINT I.

THE PLEDGE TO WILLIAM HANSEN OF THE INTEREST OF NEPHI HANSEN IN THE STOCK OF HANSEN INVESTMENT COMPANY IS A BINDING, EXECUTED TRANSACTION.

(a) Nephi Hansen was completely competent and in full possession of his understanding and mental faculties and acted under no disability, undue influence, fraud or coercion on September 19, 1949, when he executed Exhibit "4."

The evidence produced during the trial of the case at bar was devoid of even the slightest proof that William Hansen coerced or unduly influenced his father, Nephi Hansen, to obtain from him the pledge of his stock in the Hansen Investment Company (Exhibit "4"). As a matter of fact, the court found that William Hansen did not even make a demand on his father that he pay the various amounts set forth in the pledge agreement. In this regard it would seem that the court's Findings of Fact are completely inconsistent. We have reference to paragraph 8 wherein the court finds as follows (R. 170) :

"* * * that prior to said delivery to William L. Hansen no demand was ever made by the de-

fendant William L. Hansen for the payment of any of the purported obligations set forth in said Exhibit 4.”

as compared with the court’s finding in paragraph 10 reading as follows (R. 171):

“* * * that in executing Exhibit 4 Nephi J. Hansen did so without appreciating the force and effect of the execution of such documents and only because he was persuaded so to do by his son William L. Hansen.”

The evidence concerning the preliminary negotiation leading to Exhibit “4” comes from completely unbiased and unimpeachable sources.

Henry Arnold Rich, Esquire, a prominent attorney of this state, with whom this court is familiar, testified that Nephi Hansen arranged the interview with him by telephone; that Nephi Hansen came in to see him alone; that on only one occasion was William Hansen present at a conference between attorney Rich and Nephi Hansen (R. 92). Mr. Rich had a number of interviews with his client, Nephi Hansen, prior to the 19th of September, the date on which Exhibit “4” was executed. Mr. Hansen had examined the document, had corrected it and brought it back. Some changes were made in the contract (R. 98). The only evidence of any dealings between Nephi Hansen and William Hansen concerning Exhibit “4” relate to a meeting between Nephi and William at which time Exhibit “C” was prepared. Exhibit “C” is in the handwriting of William Hansen, and concerning its pre-

paration William Hansen testified that his father came to his office and they went over the Granite Holding Company suit, discussed the outcome of it and the expense incurred by them in that suit, and made an accounting setting forth the various sums outstanding between them. After the accounting had been made, William wrote out Exhibit "C" at his father's suggestion. At the time of the making of the accounting Nephi discussed the items entering into the account with William and would not approve of some of the figures which William requested as a salary allowance, insisting that those amounts be cut down (R. 161, 162). After Exhibit "C" was prepared it was delivered to Mr. Rich and at a later date, at the only conference between Mr. Rich and Nephi Hansen at which William Hansen was present, the various figures were explained to attorney Rich.

The court in its findings could not find and did not find that William Hansen exercised undue influence on his father, or coerced him into preparing and executing Exhibit "4". The strongest that the court could make its findings was that Nephi J. Hansen executed Exhibit "4" "because he was persuaded so to do by his son William L. Hansen" (Finding 10, R. 171). But if persuasion will render invalid an agreement, we are entering into a field when no sales contract can ever be relied upon.

While the court finds that Nephi Hansen was an old man, and subject to domination and control of his sons and daughters and easily imposed upon by members of his family (Finding 10, R. 170), the court did not find that in the execution of Exhibit "4" Nephi Hansen was

under the domination of William or was being imposed upon by William. No such finding would have been supported by the evidence. The evidence does not even show, as the court found, that William Hansen persuaded Nephi Hansen to execute Exhibit "4". What the evidence demonstrates is that Nephi was greatly concerned about the losses and damages which his son William had suffered as a result of the Granite Holding Company transactions.

The crucial date as regards the mental state of Nephi Hansen is September 19, 1949. There was no evidence from any witness produced by plaintiff or the intervenor which pin-pointed Mr. Hansen's condition on that date or was probative of the general period in which the preparation of Exhibit "4" was underway. Defendant, William Hansen, produced as his witnesses two attorneys at law, whose vast experience before the Bar of the State of Utah well qualifies them to make observations concerning the competency and ability to understand the nature of transactions in which persons consulting them are involved. Both Shirley P. Jones, Esquire, and Henry Arnold Rich, Esquire, testified that in their opinion, at the time Nephi Hansen was engaged in the preparation of Exhibit "4" and consulted them concerning it, Nephi Hansen was fully possessed of the competency necessary to carry on his ordinary business affairs and relations and understood the nature of the instrument that he signed and intended the document to be the instrument which is embodied in Exhibit "4" (R.

106, 107, 114-116). Mr. Jones testified concerning Nephi Hansen's condition of mind as follows (R. 116):

“Well, he told me what he wanted to do. He knew. He told me. I had no difficulty in understanding what he wanted to do, and he knew what he was telling me, no question in my mind that he knew what he was doing.”

There was some evidence produced by plaintiff that on other occasions Nephi Hansen's ability to remember and understand was affected by his many years. That evidence from the mouth of Edward W. Clyde, Esquire, concerned other dates than September of 1949, and even Mr. Clyde stated that up to January, 1950 there were periods when Nephi Hansen was clear and understood what he was talking about and his memory seemed to be all right, and that the lack of memory got gradually worse and there was a period of time in January, 1950 when he seemed to have no lucid moments (R. 55, 56). From January, 1950 forward Mr. Clyde cannot remember of having coherent conversations with Nephi Hansen.

This court in the case of *Jimenez v. O'Brien et al.*, Utah, 213 P. 2d 337, 339, set down the rule of law governing capacity to contract and the degree of proof necessary to show incapacity. It held that the test is “were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences and to act with discretion in relation thereto, or with relation to the ordinary affairs of life?” The court cited

as the supporting cases *Hatch v. Hatch*, 46 Utah 218, 148 P. 433; *O'Reilly v. McLean*, 84 Utah 551, 37 P. 2d 770, and *Burgess v. Colby*, 93 Utah 103, 71 P. 2d 185. The decision then held that the evidence must be clear and convincing that the party to the contract was mentally incompetent to contract on the date which the contract was signed. In its holding the court stated (*Jimenez v. O'Brien et al.*, Utah, 213 P. 2d 337, 340) :

“We agree with the contention of the defendant that the jury could not have reasonably found by clear, unequivocal and convincing evidence that Jimenez was mentally incompetent to contract on both August 14, 1945, and on September 5, 1945. Therefore, it is necessary to detail and analyze the evidence relied upon by the plaintiff to support the verdict. It is to be remembered that ‘clear, unequivocal and convincing evidence,’ is a higher degree of proof than a mere ‘preponderance of the evidence,’ and approaches that degree of proof required in a criminal case, viz., ‘beyond reasonable doubt.’ ”

Wherein in this record is there any clear and convincing evidence that Nephi Hansen was incompetent to contract on September 19, 1949? Where is there *any* evidence that would support such a finding?

The court in its findings at no place finds that Nephi Hansen was not competent to understand the English language and the effects of the documents written in that language. However, the court does find that Nephi Hansen executed Exhibit “4” without appreciating the force and effect of the execution of such documents (Finding

10, R. 171). It is difficult to understand what exactly the court was attempting to say. Apparently the court did not believe that the lack of appreciation by Nephi Hansen in any way affected the validity of the pledge (Exhibit "4"), for in his Conclusions of Law, paragraph 5, he concludes that Exhibit "4" is effective as a pledge (R. 172), and by his Conclusions of Law adjudicates that Exhibit "4" is a good and valid pledge.

As to the amount of indemnity it secures William Hansen, the defendant cannot agree with the court's conclusion, but certainly the conclusion that the pledge is a valid and executed contract creating a lien on the estate and stock ownership of Nephi Hansen, is proper and is supported by the facts presented and law applicable.

Perhaps the court's finding is to be construed as a finding of a unilateral mistake of fact. Such a mistake does not make an agreement voidable. *A.L.I. Restatement of the Law of Contracts*, Vol. 2, Sec. 503, Comment a, pp. 966, 967. The evidence will not even support a finding of a unilateral mistake. The law of Utah also requires clear and convincing proof of a mistake of fact. Again we have no evidence of any kind. *Kirchgestner v. D. & R. G. W. R. Co.* Utah, 233 P. 2d 699; *A.L.I. Restatement of the Law of Contracts*, Vol. 2, Sec. 511, p. 981.

Even if Nephi Hansen were still alive it would be necessary to show an intent different from that which is found in the written pledge by clear and convincing evidence. *Greener v. Greener*, Utah, 212 P. 2d

194. After his death the intention shown by the written pledge agreement cannot be attacked by any means. It is conclusively presumed that the intent is shown by the writing in the intention of the deceased. *Holt v. Bayles*, 85 Utah 364, 39 P. 2d 715.

(b) There was substantial consideration for the giving of the pledge to William Hansen.

In the Findings of Fact the court finds that there was a substantial consideration given by William Hansen to his father for the pledge. The court finds that there was consideration with a value of \$1464.00. There was in addition to this debt, which was due and owing from Nephi to William, other good and valuable considerations, the exact extent of which at the date of trial had not been fully determined.

At the time of trial the Granite Holding Company lawsuit was still being processed and the exact amounts of loss which William ultimately would sustain was not then determined. The lower court in the Granite Holding Company case had not allowed William any credit at all for the amounts paid to Nephi Hansen as salary. This court allowed only a part of those and made the allowance depend on whether or not William Hansen could show that Nephi Hansen's services were worth the amount that had been paid to him.

As recited in Exhibit "4", and as this court after Exhibit "4" was executed held, William Hansen was legally and morally entitled to consideration for the amounts of money which Nephi had received. The lower

court found that all of these considerations were either illusory or moneys owing on past transactions (Finding 6, R. 169). There could be no doubt that the sums which were paid by William Hansen to his father in the Granite Holding Company case and for which the lower court had not on September 19, 1949 allowed William Hansen any credit, were not intended as gifts to Nephi Hansen, but were intended as payments on the purchase price of the Granite Holding Company property. For such of those payments as were not allowed as a credit to William Hansen in the accounting, Nephi Hansen legally and morally would be responsible to William Hansen. He could have been required to repay the sums which his son had paid to him. It has always been the law that a pre-existing debt or liability on contract is good consideration for a new promise or pledge. *Williams v. Peterson*, 86 Utah 526, 46 P. 2d 674; *W. T. Rawleigh Co. v. Dickneite et al.*, 99 Colo. 276, 61 P. 2d 1028, 171 C.J.S. p. 472, Sec. 123; *Eastlick v. Hayward Lumber & Investment Co.*, 33 Ariz. 242, 263 P. 936; *Olsen v. Hagan*, 102 Wash. 321, 172 P. 1173, affirmed 105 Wash. 698, 178 P. 451; *Woods v. Bennett*, 40 Cal. App. 34, 180 P. 25; *Hendrickson et al. v. Brannon*, 182 Okla. 637, 79 P. 2d 606. The rule is stated in *3 Ruling Case Law*, p. 934, par. 129, as follows:

“ ‘It is well settled that, where there is a pre-existing obligation to pay, either legal or equitable, which cannot be enforced, and the party executed a note therefor, notwithstanding he may be exempt from all liability by operation of

law, the former liability, in connection with the honesty and rectitude of the thing, form sufficient consideration to support the promise. And as familiar illustrations of this principle, and its application, the cases of promises to pay debts barred by the statutes of limitations, and those to revive debts discharged by the operation of bankrupt or insolvent laws, may be cited.' ”

On September 19, 1949, the date Nephi signed Exhibit “4”, the Granite Holding Company case was on appeal. Part of the consideration for Exhibit “4” had been given by William and part of the consideration was still being conferred. The exhibit recites as considerations items of attorneys’ fees for a case still being processed and for which William Hansen had borne the expense and would be required to bear the expense in the future. It goes without saying that an agreement founded partly on a past consideration and partly on executory ones is enforceable. *Central Hanover Bank & Trust Co. v. United Traction Co. et al.*, 95 F. 2d 50; *W. T. Rawleigh Co. v. Miller et al.*, 105 Mont. 456, 73 P. 2d 552.

It is a general rule also that even though the obligation forming the consideration for a promise is only moral, if the moral obligation was founded on a previous benefit received by promisor from the hands of the promisee it will support and be found adequate and sufficient consideration for the promise. *Brownfield v. McFadden et al.*, 21 Cal. App. 2d 208, 68 P. 2d 993; *Holland v. Martinson*, 119 Kan. 43, 79 A.L.R. 1339, 237 P. 902; *Olsen v. Hagan*, *supra*.

The fact must not be overlooked that William Han-

sen is the son of Nephi Hansen, and that here we are dealing with an executed contract. This pledge agreement had been made, delivered and completely executed by Nephi Hansen. There remained nothing more for him to do. There is no dissent under these facts from the rule that natural love and affection is sufficient consideration. *Brainard v. Commissioner of Internal Revenue*, 91 F. 2d 880. The rule is well stated in *Stewart v. Damron*, Ariz., 160 P. 2d 321, 325:

“The rule has been applied that where the relationship of parent and child exists, less evidence is required to establish a gift from a parent to a child than to a stranger. 39 Am. Jur. 742, Sec. 97, Parent and Child. It seems to us that for a far greater reason the rule is even more applicable where the gift is from a son to a mother. Love and affection have always been considered as a sufficient and valid consideration for an executed agreement. The rule is not based upon purely platonic principles, but on the theory that where a grantor conveys to a grantee for love and affection, the real consideration is largely for either past or expected future services such as association, care, mutual assistance, companionship, understanding, and support. The rule applies only where a near relationship exists. *Blount v. Blount*, 4 N.C. 389. Love and affection as a consideration applies only to executed contracts or gifts. *Brown v. Addington*, 114 Ind. App. 404, 52 N.E. 2d 640; *In re Brieese’s Estate*, 240 Wis. 426, 3 N.W. 2d 691.

“In the case at bar, when the son made provision for his mother, he undoubtedly felt, and the law assumes, that there was a full and adequate

consideration for the executed money gifts which he made to her. The services of a mother to a child are a sufficient consideration to sustain any reasonable completed transaction between them."

All of the benefits which Nephi Hansen received were given by William Hansen at the request of his father, and as is recited in Exhibit "4", at the special instance and for the use and benefit of Nephi Hansen. Even where all considerations are past, it is still the rule of law that where those considerations were given at the request of the recipient they support a promise to repay. *State v. Rusk*, 174 N. E. 142, 37 Ohio App. 109, 174 N.E. 142; *Jones v. Winstead*, 120 S.E. 89, 186 N.C. 536; *Haynes Chemical Corporation v. Staples & Staples*, 112 S.E. 802, 133 Va. 82, 17 C.J.S. p. 471, Sec. 117.

In reading Exhibit "4" one is impressed by the fact that the document seeks to accomplish what is morally and equitably a salutary purpose. The document is drawn in clear, understandable language, uncomplicated by any great length. Appellant finds it impossible to believe that Nephi Hansen could have failed to understand and appreciate the effect and purpose of Exhibit "4". There is no evidence that he was under any mistaken conception as to the facts, and the evidence clearly demonstrates that in his consultations with H. A. Rich he was free from any oppression or coercion.

The trial court's decision completely defeats and destroys the purpose which Nephi Hansen had sought to accomplish by Exhibit "4". Nephi Hansen's intentions are clear and unmistakable in the instrument, yet the

lower court in disregard of those intentions ignores a substantial part of the solemn, written and duly acknowledged instrument without any substantial or meritorious reason for so doing.

The court in its findings found that the pledge was a valid and subsisting document but by his Conclusions of Law has attempted to adjudge that only a part of the consideration should be repaid to William Hansen. In doing so, His Honor has violated a rule of law which is at the very foundation of the legal principles applied for centuries past to contractual obligations. It is Hornbook law that a court will not weigh the quantum of consideration and so long as there is something of real value in the eye of the law it is sufficient. Whether or not the consideration is adequate for the promise is immaterial in the absence of fraud and the slightest considerations have often been held sufficient to support the most onerous obligations. As has been said many times, if the parties consider the considerations adequate at the time of the making of the agreement, it is not for the courts to reweigh those considerations when the agreement is sought to be enforced.

The stock interests which are pledged have no fixed and determinable value. Exactly what was being pledged was uncertain in amount. It was the stock interest of Nephi Hansen. Nephi and William at the time believed it to be 42 shares of stock in the Hansen Investment Company. The lower court held it to be only 21 shares of stock of the Hansen Investment Company. What the value per share is no one can with any preciseness state.

The interest was pledged to indemnify against losses, expenses, moneys advanced and paid, and sacrifices which had been made at the instance and request of the pledgor. They too are uncertain as to the exact value, but they are real; they are both past and existing obligations; they are legal and moral; they are complicated, but they represent a just and existing obligation which Nephi knew was due and owing to his son William, and for which he secured him to the best of his ability by the execution of Exhibit "4".

The result reached by the trial court is shocking. To prevent, without any adequate reason, a father from indemnifying his son for losses, loans, advances and sacrifices, which have been made at his request, aids inequity, destroys wholesome obligations, both legal and equitable, and prevents burdens from being borne by the proper party.

POINT II.

NEPHI HANSEN WAS THE OWNER OF 42 SHARES OF STOCK IN HANSEN INVESTMENT COMPANY AND HIS PLEDGE TRANSFERRED HIS INTEREST TO WILLIAM HANSEN.

The court in its findings found that certain transactions concerning the corporate stock of the Hansen Investment Company were ineffectual. It found in Finding No. 2 that no stock certificate evidencing ownership of the 42 shares of stock which it later finds plaintiff and her husband, Nephi Hansen, owned, was never issued (R. 168). In the rest of the findings and in the Conclusions of Law and Decree the court then completely

ignores that finding. The only way that Laura Hansen could have any interest as a surviving joint tenant in the stock certificate (Exhibit "1") would be if that stock certificate was effectually issued and the ownership indicated on its face was given force and effect. The stock certificate was issued and delivered. On the certificate endorsements were made. Apparently the court by finding that no certificate was issued intended to find that the transfer evidenced by the endorsement of Laura Hansen was ineffectual. The evidence introduced at the trial shows without contradiction that Exhibit "1" was actually issued, delivered and endorsed by Laura Hansen. At that time Laura Hansen was a director of the Hansen Investment Company, had taken her oath of office and by her own testimony she indicates she was actually participating in the directors' meetings in the carrying on of the corporate affairs (R. 36).

Laura Hansen testified, under oath, that she did not sign Exhibit "1" and that the signature appearing on the stock certificate was a forgery and fraud. The court did not believe her and found that she did sign the certificate but that her signature was obtained without any knowledge on her part as to the nature of the document she was signing or the effect her signature thereon would have (Finding 3, R. 168).

It is difficult to understand just what the court is attempting to say by Finding No. 3. It appears that the court is saying that plaintiff, while not incompetent, did not possess the faculties possessed by every competent person.

The court made Finding No. 3 without any evidence of any kind concerning the mental state of Laura Hansen on April 17, 1947. Wherein is there any clear and convincing evidence that Laura was incompetent? *Jimenez v. O'Brien*, supra.

To understand properly transactions between Laura, Nephi and Clyde, their son, appellant believes the court must realize that Nephi took the stock certificate (Exhibit "1") in the name of he and his wife as joint tenants for his own convenience. As has been stated in the Statement of Facts, all of the consideration for the original issue of stock came to the corporation as a result of a lawsuit which originally was commenced by William Hansen against Lincoln Hansen. The property was conveyed to the corporation as a compromise settlement of a disputed matter.

Counsel for the investment company testified that Laura Hansen did not know anything about the original formation of the corporation and was not consulted on the matter. This seems to be the typical husband and wife holding in joint tenancy. The property is held for the purpose of giving to the wife protection in case of death and as is the case when a new and different use of the stock is intended, the signature of Laura Hansen was requested on the stock certificate.

Appellant can find no evidence which would support the court's finding that Laura Hansen did not know the nature of the document she was signing. The evidence shows that her signature was obtained on the stock by her husband and at his request. From the testimony of

a witness, who has no interest in the outcome of this lawsuit, it appeared that no pressure or undue influence of any kind was being exercised on Laura Hansen at the time she endorsed Exhibit "1". The court in this instance is again indulging in an unsupported conclusion that Laura and Nephi Hansen cannot understand the meaning of simple English language and do not recognize simple documents, such as a stock certificate, when they are endorsing the same. What happens then to the clear and convincing evidence rule which this court has so recently pronounced in *Kirchgestner v. D. & R.G.W. R. Co.*, supra? See also *A.L.I. Restatement of the Law of Contracts*, Vol. 2, p. 981, Sec. 511.

Laura Hansen testified that she participated as a director and attended certain meetings of the corporation during the early years of its formation. The court again ignoring plaintiff's own testimony found that she did not understand the inner workings of the corporation and knew nothing about its affairs or what was intended to be done with her signature on Exhibit "1" (Finding 3, R. 168, 169).

The court ignored all of the evidence both from Laura Hansen and from the other witnesses who had knowledge of the family problems that had confronted Nephi Hansen. The evidence shows that Laura Hansen was being imposed upon and was being unduly influenced by her son, Lewis Hansen. In order to relieve her from this harrassment it was planned to put beyond her control the Hansen Investment Company stock. Contrary to the court's findings Laura knew all about that plan

and stated there had been many differences between herself and Nephi concerning the Lewis Hansen operations. Again we see that the holding of the stock in Nephi and Laura's name as joint tenants was considered by all as merely a convenience for Nephi Hansen.

Laura endorsed the certificate and then the Board of Directors and stockholders undertook to have her eliminated as an incorporator. At the same time Lewis Hansen's name was to be stricken from the articles as an incorporator. The court held that the attempted amendment to the Articles of Incorporation, removing Laura and Lewis as incorporators, was ineffectual (Finding 4, R. 169). The failure to allow the amendment its intended purpose can in no way affect the stock ownership of Nephi and Laura Hansen. Exhibit "1" with the endorsements of Nephi and Laura Hansen was surrendered to the corporation and in its place a new certificate, also numbered Stock Certificate No. 1, which is Exhibit "2", was issued in the name of Nephi Hansen only. Exhibit "2" was issued on May 16, 1949 and was the certificate which Nephi Hansen believed represented his ownership in the Hansen Investment Company when the pledge, dated September 19, 1949, was executed and delivered to Shirley P. Jones. Whether or not the amendment was effectual could in no way affect the issuance of the second stock certificate and in exchange for the first one. Laura Hansen, by endorsing her stock certificate and giving it to her husband, clothed him with the power to transfer that certificate to himself or anyone else.

The transfer of stock is governed by statutory enact-

ment. *Utah Code Annotated, 1943*, Title 18, Chapter 3, Secs. 6 and 7, specifically cover the effect of endorsement on a certificate of stock. Section 6 provides that the endorsement is effectual, even though it was endorsed by fraud, duress or mistake, and even though the endorser has received no consideration.

Section 18-3-7 provides that the possession of a certificate may be reclaimed and transfer thereof rescinded if the certificate has not been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, and if the endorsement or delivery was procured through fraud or duress or was made under such mistake as to make the endorsement or delivery inequitable.

There is no evidence whatsoever that would indicate any fraud or duress practiced on Laura Hansen in the procurement of her endorsement or delivery of the certificate after she had endorsed it. There is no clear and convincing evidence of any mistake on her part which would make the endorsement or delivery inequitable (Finding 3, R. 168).

The court in its findings concerning the delivery of the certificate finds only that there was no consideration for Laura Hansen's endorsement. Lack of consideration under Sections 6 and 7 is specifically eliminated as a ground for rescission of the transfer and the reclaiming of the certificate. *Section 18-3-7, U.C.A. 1943*.

The court refused to believe Laura Hansen when she said that the endorsement on Exhibit "1" was not her signature. It found exactly the opposite in Finding

No. 10 (R. 171). While refusing to believe her testimony that she did not sign the certificate, the court then interpreted her testimony to mean that she did not understand the nature of the document she was signing.

There is no competent evidence that Laura Hansen did not understand the import or purpose of her signature on Exhibit "1", the stock certificate. The only evidence from which any inference to that effect could be possible is found at R. 52. There the following exchanges occurred:

"Q. Mrs. Hansen, Mr. King asked you if you had ever signed this stock certificate and your answer was that you had never seen it to your recollection. Now I ask you, even if you had signed this at any time, did you ever intend to dispose of your stock or sell it?

"A. No. If I sell it I might as well sell my life.

"Q. Now, Mrs. Hansen, do you know why it is that you brought this case to court, what it is you are trying to do?

"A. To get our stock back."

The answer which Mr. Snow so skillfully led Laura Hansen to make violates the parol evidence rule and is an attempt to vary the import and terms of a written instrument by oral evidence. As such it is completely incompetent evidence and would not provide any foundation for a finding by the court. *Upton v. Tribilcock*, 91 U.S. 45, 23 L.Ed. 203; *Inter-State Fidelity Building & Loan Ass'n. v. Hollis et al.*, 41 Ariz. 295, 17 P. 2d 1101; *West v. Prater, Sheriff, et al.*, 57 Idaho 583, 67 P. 2d 273;

Fidelity & Casualty Co. of New York v. Nichols et al., 124 Wash. 403, 214 Pac. 820; 9 *Wigmore on Evidence*, Sec. 2415, p. 43, and cases there collected.

A fair and impartial examination of Laura Hansen's testimony appellant believes will demonstrate that she was at the time of the trial completely confused; that she neither understood the purpose of the trial, the questions that were asked her nor the reason for the action which she had instituted. This utter confusion is demonstrated by the court's findings wherein he refuses to believe her when she testified that she did not endorse Exhibit "1", the stock certificate (R. 36, 37, 40, 41).

Assuming that the court did not and does not intend to find Laura Hansen incompetent, its finding of a failure by Laura Hansen to understand the effect of her endorsement on Exhibit "1" can be no more than a finding of a unilateral mistake on her part. There is no evidence that any of the parties involved, either Nephi Hansen or Clyde Hansen, had any knowledge whatsoever that Laura Hansen did not understand the nature of the transaction in which she was engaged, and a unilateral mistake of fact is no ground for equitable rescission by the Court. See *Kirchgestner v. D. & R.G.W. R. Co.*, supra; *A.L.I. Restatement of the Law of Contracts*, supra.

It appears from the record that Laura Hansen actively was participating in the business affairs of the Hansen Investment Company in its early years of existence and attended two or three directors' meetings and at the trial she stated that she was a director in the corporation (R. 36). A finding that a corporate director

did not understand the nature of the stock certificate and the effect of her endorsement thereon is nonsensical.

CONCLUSION

In conclusion appellant respectfully submits that there were no equitable grounds cited or demonstrated by the evidence which would justify the court setting aside either the stock transfer between Laura and Nephi Hansen, or the pledge given by Nephi Hansen to William Hansen, and appellant submits that this court should reverse the judgment of the lower court and order that it enter judgment in favor of defendant, William Hansen, and against plaintiff and intervenor and adjudge that the pledge of stock by Nephi Hansen to William Hansen is a valid and subsisting lien on the 42 shares of stock of the Hansen Investment Company, and that said lien is in the amounts set forth in the pledge.

Respectfully submitted,

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