

1955

# H. William Nalder, Catherine Nalder and H. William Nalder, Jr. v. Kellogg Sales Company : Brief of Appellant

Utah Supreme Court

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Ray, Quinney & Nebeker; Albert R. Bowen; Attorneys for Defendant and Appellant;

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# IN THE SUPREME COURT of the STATE OF UTAH

H. WILLIAM NALDER, CATHERINE  
NALDER and H. WILLIAM NALDER,  
JR.,

Plaintiffs and Respondents,

vs.

KELLOGG SALES COMPANY,  
a corporation,

Defendant and Appellant.

Case No. 8313

## APPELLANT'S BRIEF

RAY, QUINNEY & NEBEKER  
ALBERT R. BOWEN

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Appellant

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# IN THE SUPREME COURT of the STATE OF UTAH

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Plaintiffs and Respondents,

vs.

KELLOGG SALES COMPANY,  
a corporation,

Defendant and Appellant.

Case No. 8313

## APPELLANT'S BRIEF

## STATEMENT OF FACTS

The plaintiffs in this action (respondents herein) filed suit against defendant (appellant herein) alleging that they had been damaged in their business as turkey raisers in the years 1952, 1953 and 1954 because of defendant's failure to release real estate and chattel mortgages executed by the plaintiffs and delivered to defendant in connection with certain financing agreements between the parties in the years 1949, 1950 and 1951. The plaintiffs' contention is to the effect that the existence of the mortgages upon the records in Davis County, Utah, prevented them from securing turkey financing from other companies, interfered with their credit and pre-

vented them from raising the number of turkeys during the years of 1952, 1953 and 1954, they claim they intended to and were capable of raising, which, had plaintiffs been able to secure the necessary financing, would have resulted in profits of \$129,700.80. (R. 1-2)

The defendant denied the material allegations of the wrong alleged and of the damages claimed and counter-claimed to foreclose a real estate mortgage from the plaintiffs, H. William Nalder, Sr. and Catherine Nalder, his wife. (R. 4-11)

Issues were framed and the case proceeded to trial before the court without a jury and resulted in a judgment, findings of fact and conclusions of law by which plaintiffs were awarded the sum of \$90,950.10 after deducting the sum of \$6,584.10 which the court found was owing by plaintiffs to defendant upon the note and mortgage alleged in defendant's counterclaim. (R. 22-25)

Within the required time after judgment, defendant filed its motion for new trial, which, after argument, was denied and the case is now before this court on appeal both from the judgment and the order denying the motion for new trial.

It should be observed at this point that plaintiffs' complaint contained a second cause of action, which at the trial was voluntarily dismissed by plaintiffs with prejudice and upon their own motion. (R. 44) Consequently, matters relating to the second cause of action are not before this court.

The record in this case shows without dispute that prior to 1949, plaintiff, H. William Nalder, Sr., made plans and preparations for going into the turkey raising business. Neither Nalder, Sr. nor Jr. had ever engaged in

that business before that time. (T. 80-81) Among other preparations which Nalder Sr. had made was to build and equip a brooder house capable of receiving about 6,000 turkey poults. (T. 18) In 1949, H. William Nalder, Sr. made a partnership arrangement with his son, H. William Nalder, Jr. and they jointly launched their turkey business. (T. 16-17, 138)

It should here be noted that plaintiff, Catherine Nalder, wife of H. William Nalder, Sr., was not a member of the partnership, and had no interest in the enterprise. Notwithstanding this fact, the trial court entered judgment in Mrs. Nalder's favor. Concerning this action of the trial court, we shall have more to say hereafter.

Because Nalder Sr. and Jr. were financially unable to carry on the turkey business without credit for each of the years 1949, 1950, 1951, they entered into a contract with the defendant whereby, in exchange for their agreement to use defendant's feed preparations, defendant agreed to advance the cost of turkey poults and the necessary feed to grow and mature them for market. Turkey finance agreements for 1949, 1950 and 1951 are involved in this case. All were the same except for variation in amount and year, and defendant's Exhibit 1, which is the contract for 1949, is typical of the other two. To secure the defendant for these advances, and in addition to signing the turkey finance contracts, Nalder Sr. and Jr., each year for the three years in question, signed and delivered to defendant promissory notes for the estimated amount of their requirements and secured the notes with chattel mortgages upon the turkeys and their machinery and equipment used in the business. The promissory notes are not in the record, but the chattel mortgages are part of the

record as Exhibits "A-1," "A-2," and "A-3." It will be specifically observed that neither the turkey finance contracts nor the chattel mortgages were signed by plaintiff, Catherine Nalder. Here again it is pertinent to point out that notwithstanding this fact, judgment was entered by the trial court in Mrs. Nalder's favor for damages for defendant's failure or refusal to release these chattel mortgages, which she never signed. This action of the trial court can only be accounted for upon the theory that she sustained damage because they were not released. The only proof of damage in the record relates solely to the turkey business in which Mrs. Nalder had no interest. Our comments with regard to this most startling action of the trial court will likewise be discussed hereafter.

The financing provided by defendant for 1949 was about \$26,000.00. This was made up of an initial estimate of \$24,000.00 which proved to be insufficient. Sometime before September 14, 1949, it was determined that an additional \$2,000.00 would be needed and defendant was requested to and did advance this additional sum. This advance was secured by a real estate mortgage upon the home of Mr. and Mrs. Nalder, Sr. (Ex. "C-2"; T. 21-22, 86-87, Ex. 2-1, Ex. 2-2, T. 90, 259, 267)

Plaintiff, H. William Nalder, Jr., did not execute this mortgage or any other real estate mortgage involved in this case. Entirely inconsistent with this fact, the trial court proceeded to award him damages for defendant's alleged refusal to release real estate mortgages and added a penalty in a like amount to the actual damages found to have been sustained.

Late in the year 1949, the turkey crop raised to maturity by Nalder Sr. and Jr. was processed and placed in

storage. Between April, 1950 and July, 1950, this crop was sold with a resulting loss of over \$6,000.00. Out of the original 6,000 poults with which the Nalders began operations, they matured 3,400 birds. They lost 1,400 birds in the brooder and 1,000 more during the season. (Ex. "D", Tr. 22, 26, 46, 41, 81, 86, 121)

In spite of the 1949 loss the defendant agreed to and did finance the Nalders' 1950 operations. Under the 1950 chattel mortgage (Ex. "A-2") defendant advanced \$23,300.00. As in 1949 the estimate for the 1950 crop proved inadequate and responsive to the Nalders' request, defendant made additional advances of \$3,600.00. To secure the additional advance Nalders gave defendant another real estate mortgage (Ex. "C-9") which included the unpaid 1949 debt totaling \$6,555.12 of which \$5,627.39 was principal and \$927.73 was accrued interest. (Exs. "C-9", 4, "C-8", "D", "Y"; Tr. 86, 93, 94, 258, 259, 267, 268).

In April, 1950, Mr. and Mrs. Nalder, Sr. executed a real estate mortgage (Ex. "C-3") which was recorded but under which no advances were ever made. The real estate mortgages of April 1, 1950 and August 15, 1950 (Ex. "C-3" and "C-9") contained the specific provision that they were given to secure any and all debts owing by Mr. and Mrs. Nalder, Sr. and Jr. to defendant. The promissory notes secured by the mortgage of August 15, 1950 (Ex. "C-9") were dated July 28, 1950 (Ex. "C-8" and Ex. 4).

The result of the 1950 operation was that Nalders were able to pay off all advances made for that year with a surplus of about \$1,000.00 which was applied to pay accrued interest on the 1949 debt owing defendant. (Tr.

27; Exs. "E-5", "D") Something like 5,000 birds were raised and marketed that year.

In 1951 the Nalders raised about 6,000 turkeys. (Tr. 33, 110; Ex. "D") From the 1951 operation the Nalders made about \$400.00 over and above the costs and expense incurred in raising and marketing. (Ex. "D", "F-9-15", Ex. "I-8"; Tr. 35, 40, 41, 44-46) They operated that year under a financing program calling for 125% of estimated cost and gave their note and chattel mortgage securing the financing for \$42,825.00. (Ex. "A-3")

The record clearly reflects that defendant made all of the advances that were required to enable Nalder, Sr. and Jr. to raise turkeys in 1949, 1950 and 1951 (Tr. 83, 88-9, 262, 268-69)

The portions of the record above referred to also reflect the results of the Nalders' turkey operations. In addition, it is significant to add plaintiffs' own appraisal of the success which they had achieved, made prior to the time that they asserted any claim that defendant had destroyed their business for which it should pay them \$129,700.80. They clearly acknowledged without equivocation their complete failure to operate their business successfully. (Ex. "F-4", "F-21", Ex. "I")

At the end of 1951 defendant declined to finance Nalder, Sr. and Jr. any longer. They had failed to substantially reduce the amount of their indebtedness to defendant which had been carried over from 1949. In addition, irregularities were discovered in Nalders' dealings with defendant. They had sold turkeys covered by defendant's 1951 chattel mortgage and had not accounted for the proceeds (Ex. "F-4", "F-16"; Tr. 36, 38, 43-45, 111, 112) In fact they never did account for all the

turkeys which they raised that year though repeated demands for an accounting were made.

Late in the fall of 1951 a conference was held between the Nalders and Mr. Williams and Mr. Aust representing the defendant for the purpose of discussing the liquidation of the amount owing defendant. H. William Nalder, Sr. and Mrs. Nalder, Sr. met Mr. Williams and Mr. Aust at the Hotel Utah. It is their contention that when the subject of financing for 1952 was raised Williams not only refused to extend further credit but went further and threatened that he would prevent the Nalders from getting credit elsewhere. (Tr. 47, 107-8, 113-16, 177-79, 182, 184-5) This is emphatically denied by Williams. (Tr. 265-67, 269) Far more persuasive than Nalders' claims are letters and documents which reflect that no such threat was ever voiced, much less carried out. (Ex. "F-16-25", Ex. 3, Ex. "G-2") Nalder, Jr. did not think that defendant had displayed a threatening attitude for he voiced his understanding in language the exact opposite of such a situation. (Ex. "F-16") Furthermore, he states that his father had told him the exact opposite of what his parents testified to at the trial. (Tr. 156) Instead of making threats defendant made repeated offers to give any company willing to finance plaintiffs a subordination of its claim provided plaintiffs in return would account for and pay \$352.00 which was the sum plaintiffs had received from the sale of turkeys illegally sold in violation of the terms of the 1951 chattel mortgage. (Tr. 115-17, 135, 195, Ex. "F-16-25," 3, "G-2") The plaintiffs recognized their obligation to make this accounting and attempted to comply.

In their testimony at the trial plaintiffs contended

that they had the facilities and intended to raise 14,000 turkeys each year for 1952, 1953 and 1954 had financing been available to enable them to do so. It is of utmost importance to point out that notwithstanding such claims in the prior years of 1949, 1950 and 1951, their operation had never exceeded 6,000 birds and they never, at any time, raised or marketed more than that number. (Tr. 81, 27, 33; Ex. "D") Furthermore, in the years 1950 and 1951 they had exactly the same facilities available to them as were available in 1952, 1953 and 1954 when both of them working together never exceeded 6,000 birds in their joint operation. (Tr. 18, 50, 60, 48, 132 and 153)

During the trial the matter of the efforts of plaintiffs to secure other financing for 1952, 1953 and 1954, after defendant refused to extend further credit at the end of 1951, was testified to at great length. Several applications made by either Nalder, Jr. or Nalder, Sr. were introduced and received in evidence. (Exs. "G", "H", "I" and "Q") None of these applications received favorable action and no credits were advanced under them. Plaintiffs contend that they were never able to find out the reasons for the rejection of their applications until just prior to the time this action was brought when they finally learned that the mortgages described in their complaint were unreleased. (Tr. 76-7, 102, 158-9, 163-4, 180) They asserted that they had been led to believe all of those mortgages had been released but finally conceded on cross examination that since the debt represented by the real estate mortgage (Ex. "C-9") had never been paid they were not entitled to a release of that particular mortgage. (Tr. 108, 164) With respect to all other mortgages, both chattel and real estate, they asserted they were entitled to releases either be-



cause of promises made by the defendant or because the sums advanced had been repaid. The record does not support plaintiffs' contention and especially with respect to the real estate mortgages of April and August, 1950 (Exs. "C-3" and "C-9") because both mortgages expressly provided that they were to secure all indebtedness then existing or accruing thereafter by all the plaintiffs to defendant until the same was paid in full. The indebtedness represented by these mortgages was never in fact paid. These two real estate mortgages totaled on their face the sum of \$13,276.92.

In testifying concerning the execution and delivery of the real estate mortgage of August 15, 1950 (Ex. "C-9") Nalder, Sr. made the statement that it was given to defendant with the promise that the chattel mortgage for 1949 (Ex. "A-1") would be released. This promise on defendant's behalf was attributed to a salesman in defendant's employ, and testified to over the repeated and strenuous objections of defendant as to its competency. There was no evidence of authority or agency in said salesman to make such a promise. Furthermore, the undisputed record is to the effect that he had no such authority. (Ex. "Y", Tr. 217, 256-8, 263-5)

Plaintiffs further contended that they were entitled to and promised releases of the chattel mortgages for 1950 and 1951. (Exs. "A-2", "A-3") No such promise was ever made or if made there was no showing that it was binding on defendant. (Ex. "E-5" and "E-6") Defendant, in retaining all of the mortgages of record, was acting upon the instruction and advice of counsel not to release any mortgages so long as prior existing indebtedness was not paid for the reason that in the opinion of such counsel

defendant would be jeopardizing its rights by doing so. (Tr. 211-12, 266, 270)

At the very time that plaintiffs contend their business was being harmed by defendant's unreleased mortgages, the record is without dispute that in addition to the real estate mortgages held by defendant (Ex. "C-3" and "C-9") totaling \$13,276.92, Nalder, Sr. had a real estate mortgage for \$9,000.00 on the same property described in defendant's mortgage with Deseret Federal Savings & Loan Association which was of record in Davis County, Utah. (Exs. "H" and "Q") And at the same time there was of record in the same county against Nalder, Jr. a real estate mortgage for \$2,500.00 and a chattel mortgage for \$2,500.00 (Ex. "I"). These various mortgages totaled \$27,276.69.

Furthermore, there is evidence in the record that the plaintiffs were regarded as poor financial risks. (Ex. "I-6") In addition there was no evidence offered to show that defendant's various applications would have been accepted even though all defendant's mortgages had been released. (Tr. 243, 246, 249-51)

Finally, no demand for release of real estate mortgages was ever made by plaintiffs and no demand for the release of chattel mortgages was made until the end of 1953 or early 1954. (Ex. "J-3", Tr. 104, 106, 140-43, 113, 163, 179, 182) The chattel mortgages were all released on March 11, 1954. (Ex. "B-1", "B-2" and "B-3")

During the trial numerous objections to the introduction of evidence and the propriety of counsel's questions were raised to no avail. These matters will be referred to and argued hereafter.

## STATEMENT OF POINTS

## Point 1

IN AWARDING DAMAGES TO THE PLAINTIFF, CATHERINE NALDER, THE TRIAL COURT COMMITTED ERROR BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHES THAT SAID PLAINTIFF HAD NO INTEREST IN THE BUSINESS CLAIMED TO HAVE BEEN INJURED BY THE ACT OF DEFENDANT.

## Point 2

THE TRIAL COURT COMMITTED ERROR IN AWARDING DAMAGES TO PLAINTIFF, H. WILLIAM NALDER, JR. FOR DEFENDANT'S ALLEGED WRONGFUL FAILURE TO RELEASE REAL ESTATE MORTGAGES TO WHICH HE WAS NEVER A PARTY.

## Point 3

THE TRIAL COURT ERRED IN AWARDING PUNITIVE DAMAGES IN DOUBLE THE AMOUNT OF ACTUAL DAMAGES FOUND BY HIM TO HAVE BEEN SUSTAINED BY PLAINTIFFS BECAUSE OF DEFENDANT'S ALLEGED WRONGFUL FAILURE OR REFUSAL TO RELEASE CHATTEL MORTGAGES AND ERRED FURTHER IN AWARDING DAMAGES TO PLAINTIFF, CATHERINE NALDER, FOR DEFENDANT'S FAILURE TO RELEASE SUCH MORTGAGES.

## Point 4

THE TRIAL COURT COMMITTED ERROR IN AWARDING DAMAGES TO PLAINTIFFS BECAUSE

OF DEFENDANT'S ALLEGED FAILURE OR REFUSAL TO RELEASE REAL ESTATE MORTGAGES BECAUSE NO DEMAND OR REQUEST FOR SUCH RELEASES WAS EVER MADE, AND FOR THE ADDITIONAL REASON THAT PLAINTIFFS NEVER PAID OR OTHERWISE DISCHARGED THE OBLIGATION SECURED BY SAID MORTGAGES.

Point 5

THE TRIAL COURT COMMITTED ERROR IN AWARDING DAMAGES FOR THE ALLEGED WRONGFUL FAILURE OF DEFENDANT TO RELEASE CHATTEL MORTGAGES:

(A) BECAUSE NO DEMAND FOR THE RELEASE OF SUCH MORTGAGES WAS MADE UNTIL THE END OF 1953 OR EARLY 1954, AND

(B) BECAUSE EACH CHATTEL MORTGAGE SECURED THE PRIOR UNPAID DEBT OF PLAINTIFFS, H. WILLIAM NALDER, SR. AND JR. WHICH WAS NOT PAID, HENCE NO RELEASE COULD BE DEMANDED, AND

(C) BECAUSE THERE IS NO EVIDENCE FROM WHICH IT WOULD APPEAR THAT PLAINTIFFS, H. WILLIAM NALDER, SR. AND JR. COULD NOT HAVE SECURED 1954 FINANCING AFTER RELEASE OF SAID MORTGAGES WAS DELIVERED BY DEFENDANT ABOUT MARCH 11, 1954.

Point 6

THE TRIAL COURT COMMITTED ERROR IN APPLYING AN IMPROPER RULE OF DAMAGES TO PLAINTIFFS' CLAIM OF LOSS OF ANTICIPATED PROFITS FOR THE YEARS 1952, 1953 AND 1954.

## Point 7

THE TRIAL COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE, OVER DEFENDANT'S OBJECTION, PLAINTIFFS' EXHIBITS "M," "N" AND "O" FOR THE REASON THAT SAID EXHIBITS WERE INCOMPETENT, IRRELEVANT AND IMMATERIAL TO ESTABLISH PLAINTIFFS' CLAIM OF LOST PROFITS.

## Point 8

THE TRIAL COURT'S JUDGMENT MUST BE REVERSED BECAUSE THERE IS NO COMPETENT EVIDENCE THAT DEFENDANT'S FAILURE OR REFUSAL TO RELEASE EITHER ITS REAL ESTATE OR CHATTEL MORTGAGES WAS THE PROXIMATE CAUSE OF ANY LOSS TO PLAINTIFFS, H. WILLIAM NALDER, SR., AND JR.

## Point 9

THE TRIAL COURT'S JUDGMENT MUST BE REVERSED BECAUSE THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT DEFENDANT ACTED IN GOOD FAITH.

## Point 10

THE TRIAL COURT ERRED IN PERMITTING INTRODUCTION OF EVIDENCE OVER DEFENDANT'S OBJECTIONS THAT SCOVILLE, EREKSON AND SCHINKER PROMISED OR AGREED ON BEHALF OF DEFENDANT TO RELEASE MORTGAGES WITH NO PRELIMINARY SHOWING OF AGENCY OR AUTHORITY OF SAID PERSONS TO MAKE SUCH PROMISES, AND FOR THE FURTHER REASON THAT UNCONTROVERTED TESTIMONY

ESTABLISHES THAT SAID PERSONS HAD NO SUCH AUTHORITY.

Point 11

THE TRIAL COURT ERRED IN THE ADMISSION OF HEARSAY EVIDENCE AND IN NUMEROUS RULINGS ON OBJECTIONS TO LEADING AND OTHER IMPROPER QUESTIONS PROPOUNDED BY COUNSEL.

ARGUMENT

POINT 1

IN AWARDING DAMAGES TO THE PLAINTIFF, CATHERINE NALDER, THE TRIAL COURT COMMITTED ERROR BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHES THAT SAID PLAINTIFF HAD NO INTEREST IN THE BUSINESS CLAIMED TO HAVE BEEN INJURED BY THE ACT OF DEFENDANT.

The whole theory of plaintiffs' case rests upon the proposition that a business was damaged because of a failure of defendant to release the mortgages described in plaintiffs' complaint. It should require no citation of authority to support the contention that before such damage could ever be recovered it would have to be first shown that the party claiming such damage owned an interest in the business claimed to have been injured. Notwithstanding such elementary requirement, the trial court not only proceeded to award to the plaintiff, Catherine Nalder, such damages without proof of her ownership of an interest therein, but even more startling awarded her damages in the face of her husband's testimony that the busi-

ness in question belonged to him and his son exclusively. (Tr. 16-17) That this is true is apparent from the fact that Mrs. Nalder never signed any of the chattel mortgages involved in this case or the turkey finance contracts which were a part of each transaction between defendant and plaintiffs, H. William Nalder, Sr. and Jr. (Exs. "A-1", "A-2", "A-3")

We shall cite cases hereinafter which clearly rule that before damages for loss of future or anticipated profits may be recovered, it must be shown that such a business is in existence and is well established. To award damages for injury to property not belonging to the claimant is so palpably erroneous that such judgment cannot possibly stand.

## POINT 2

THE TRIAL COURT COMMITTED ERROR IN AWARDING DAMAGES TO PLAINTIFF, H. WILLIAM NALDER, JR. FOR DEFENDANT'S ALLEGED WRONGFUL FAILURE TO RELEASE REAL ESTATE MORTGAGES TO WHICH HE WAS NEVER A PARTY.

Sec. 57-3-8, UCA 1953, is a highly penal statute providing that a mortgagee shall be liable to a mortgagor for double the amount of actual damage sustained by him because of the mortgagee's failure to discharge or release a real estate mortgage after the same has been fully satisfied. That statute was the basis of an award of \$48,767.40 actual damages, plus an equal amount of punitive damages to the plaintiff, H. William Nalder, Jr., upon the ground that defendant did not release certain real estate mortgages executed and delivered to defendant by plaintiffs,

H. William Nalder, Sr. and his wife. It will be observed that the statute is explicit in its terms in allowing such damages only to a mortgagor. The record in this case shows upon its face that plaintiff, H. William Nalder, Jr. did not execute any of the real estate mortgages described in plaintiffs' complaint and was therefore not a mortgagor.

There is no evidence in the record from which the trial court could possibly find whether damages, if any, flowed from the failure to release the real estate mortgages or from the failure to release chattel mortgages. And the trial court made no finding whatsoever upon this vital aspect of the case. If damage flowed from the real estate mortgages, then H. William Nalder, Jr. could be awarded nothing because he was never a mortgagor in any real estate mortgage. On the other hand if damage flowed only partly from defendant's failure to release real estate mortgages and partly from its failure to release chattel mortgages, there is nothing in the record from which a determination can be made as to how much flowed from each cause. The trial court made no attempt to segregate or separate the damages either as to the cause or to apportion the damages between the plaintiffs. This omission is fatal to the affirmance of the judgment which was rendered.

It is earnestly submitted that the action of the trial court was a flagrant violation of defendant's rights and demands the reversal of the judgment rendered. By his intemperate and ill-considered judgment, the trial court awarded damages (1) to Catherine Nalder, who was entitled to no damages at all, and (2) awarded punitive damages to H. William Nalder, Jr. for an alleged act of defendant for which he was not entitled to invoke the



statute relied upon to support this judgment, and (3) made no proper finding as to the cause of plaintiff's damage.

### POINT 3

THE TRIAL COURT ERRED IN AWARDING PUNITIVE DAMAGES IN DOUBLE THE AMOUNT OF ACTUAL DAMAGES FOUND BY HIM TO HAVE BEEN SUSTAINED BY PLAINTIFFS BECAUSE OF DEFENDANT'S ALLEGED WRONGFUL FAILURE OR REFUSAL TO RELEASE CHATTEL MORTGAGES AND ERRED FURTHER IN AWARDING DAMAGES TO PLAINTIFF, CATHERINE NALDER, FOR DEFENDANT'S FAILURE TO RELEASE SUCH MORTGAGES.

Notwithstanding plaintiffs did not invoke the provisions of Sec. 9-1-4, UCA 1953 in their complaint which provides a penalty against a chattel mortgagee, who, after demand, refuses to release a chattel mortgage which has been fully performed by the mortgagor, plaintiffs nevertheless grounded their claim to damages against defendant upon that statute as well as upon Sec. 57-3-8, supra. Under Sec. 9-1-4, supra, a different rule of damages applies than governs the case of an unreleased real estate mortgage. Under the first statute, punitive damages are limited to \$50.00.

In addition to the error of awarding damages to Mrs. Nalder upon the ground of defendant's failure to release both real estate and chattel mortgages, to which she was plainly not entitled, as hereinbefore pointed out, the error was further compounded when an award of double damage was made to all plaintiffs, for the failure of defendant

to release chattel mortgages. In his findings the trial court determined that damage was caused by defendant's failure to release "satisfied" mortgages. This clearly implies damage from chattel mortgages. How much of the damage arose from this cause we are left utterly in the dark to speculate upon. But whatever the damage from such cause, the trial court was not at liberty to double the amount arising from that cause. Thus, the trial court applied the penal provisions of the statute governing real estate mortgages in favor of all plaintiffs, and ignored entirely the rule of damages applicable to chattel mortgages. Furthermore, the remedies of Sec. 9-1-4 are available only to a mortgagor but those remedies were applied to award damages to Mrs. Nalder who was not a chattel mortgagor. These errors are of such basic importance that their commission vitiates the judgment regardless of any meritorious characteristics which it might otherwise possess.

#### POINT 4

THE TRIAL COURT COMMITTED ERROR IN AWARDING DAMAGES TO PLAINTIFFS BECAUSE OF DEFENDANT'S ALLEGED FAILURE OR REFUSAL TO RELEASE REAL ESTATE MORTGAGES BECAUSE NO DEMAND OR REQUEST FOR SUCH RELEASES WAS EVER MADE, AND FOR THE ADDITIONAL REASON THAT PLAINTIFFS NEVER PAID OR OTHERWISE DISCHARGED THE OBLIGATION SECURED BY SAID MORTGAGES.

In 56 A.L.R. at page 337 it is stated:

"A notice or request to the mortgagee that he enter a satisfaction or execute a release of the mortgage is a condition precedent to a right of action for the penalty." (Citing cases)

In the record now before the court there is no evidence that defendant was ever requested by the plaintiffs to release its real estate mortgages. In fact, no such demand was ever made by plaintiffs. The cases are well settled on the proposition that such a demand must be made. See 56 A.L.R. 337 *supra*. See also *International Harvester Co. v. Simpson*, (Ala.,) 133 So. 4, applying this rule to chattel mortgages.

Statutes of the kind similar to 57-3-8, UCA, 1953, relied upon by plaintiffs, are highly penal in character and are to be strictly construed. The courts are practically unanimous in their reluctance or refusal to enforce such statutes until mortgagees have had every reasonable opportunity to comply with their provisions. This court has construed the Utah statute in the case of *Shibata v. Bear River State Bank*, 115 Utah 395, 205 P. 2d 251, and has held that the section is penal and must be strictly construed.

A fact of even greater significance, which the trial court totally ignored, is that the record shows that the real estate mortgages of August 1 and August 15, 1950 (Exs. "C-3" and "C-9") were never satisfied, hence plaintiffs at no time had a right to demand releases. In both mortgages referred to, this provision was inserted:

"In addition to the foregoing amount of \$6,721.80 (\$6,555.12) this mortgage shall secure all other sums due and to become due from H. William Nalder, Sr. and Catherine Nalder, his wife, and H. William Nalder, Jr., and Mrs. H. William Nalder, Jr., his wife, in favor of Kellogg Sales Company."

At the time these mortgages were executed, plaintiffs, H. William Nalder, Sr. and Jr. were indebted to defendant for the amount recited in said mortgages. It should, therefore, be evident that by the express terms of these mortgages the plaintiffs could not require a release until all indebtedness owing to the defendant had been paid in full. Never, at any time, have the plaintiffs attempted to deny that they owed the amount recited in these mortgages and the trial court so found. (See Finding #9, R. 23) The Nalders themselves recognized the validity of those mortgages and admitted the right of the defendant to retain them of record. (Tr. 108, 164) In addition, the 1949 real estate mortgage was never satisfied because the debt owing, which was secured in part by that mortgage, was never paid. Hence, the plaintiffs were not entitled to demand its release. It must, therefore, be apparent that the judgment awarded by the court for the failure to release real estate mortgages cannot stand, because the conditions which would have entitled the plaintiffs to the relief under the statutes relied upon did not exist.

#### POINT 5

THE TRIAL COURT COMMITTED ERROR IN  
AWARDING DAMAGES FOR THE ALLEGED  
WRONGFUL FAILURE OF DEFENDANT TO RE-  
LEASE CHATTEL MORTGAGES:

(A) BECAUSE NO DEMAND FOR THE RE-  
LEASE OF SUCH MORTGAGES WAS MADE UNTIL  
THE END OF 1953 OR EARLY 1954, AND

(B) BECAUSE EACH CHATTEL MORTGAGE  
SECURED THE PRIOR UNPAID DEBT OF PLAIN-  
TIFFS, H. WILLIAM NALDER, SR. AND JR. WHICH

WAS NOT PAID, HENCE NO RELEASE COULD BE DEMANDED, AND

(C) BECAUSE THERE IS NO EVIDENCE FROM WHICH IT WOULD APPEAR THAT PLAINTIFFS, H. WILLIAM NALDER, SR. AND JR. COULD NOT HAVE SECURED 1954 FINANCING AFTER RELEASE OF SAID MORTGAGES WAS DELIVERED BY DEFENDANT ABOUT MARCH 11, 1954.

Section 9-1-4, UCA, 1953, provides:

“After the full performance of the conditions of the mortgage any mortgagee, agent, assignee or legal representative who shall willfully neglect, for the space of ten days after being requested, to discharge the same shall be liable to the mortgagor or his assigns in the sum of \$50 punitive damages and also for all actual damages sustained by such neglect or refusal.”

The record in this connection is without dispute that no demand was ever made for the release of chattel mortgages until the end of 1953 or early 1954. By the unequivocal terms of the statute which this court has said, in ruling upon the companion statute, requires strict construction, there can be no penalty assessed for failure to release until after demand. *Shibata v. Bear River State Bank*, supra. Notwithstanding this fact, the trial court awarded to the plaintiffs a judgment for purported loss of profits sustained in 1952 and 1953, which losses, if sustained at all, were suffered prior to any demand for a release having been made. It must be apparent, therefore, that the judgment in this respect is fatally defective.

Releases of chattel mortgages were executed on the 21st of January, 1954, and were recorded in the office

of the Clerk of Davis County, Utah, March 11, 1954. (Ex. "B") It is submitted that there is no evidence that these plaintiffs sustained any damage for failure to release these chattel mortgages between the time when the demand was made and the time when the releases were placed of record. The releases were filed before the beginning of the 1954 turkey season and there is no scintilla of evidence by which it was shown that they were not released in time for the plaintiffs, in the exercise of reasonable diligence, to have secured financing for their 1954 operations. The record shows (Ex. "W") that the plaintiffs 1951 turkey poults were not delivered until April 3, May 4, and May 11, 1951 respectively, and Exhibit "D-1" shows that the turkeys raised in 1949 were not hatched until April 29, 1949, and Exhibit "D-3" shows that the turkeys raised that year were hatched March 1 and May 7 respectively, and Exhibit "D-5" shows that the turkeys raised in 1951 were hatched March 9 and May 10 respectively, and Exhibit "P" shows that in 1953 the Nalders started on April 3, 1953. Furthermore, assuming that there is any liability for the failure to release chattel mortgages in relation to damages claimed for 1954, in the absence of evidence to show that damage was actually sustained by reason of that fact, the awarded damages could not in any event exceed \$50.00.

In the face of what has just been pointed out, the trial court awarded these plaintiffs its judgment for alleged losses in 1954 of \$10,116.00 and assessed a like amount as a penalty. Each of the chattel mortgages under consideration contained this provision:

"Provided that if the mortgagor shall pay or cause to be paid unto Kellogg Sales Company or

its assigns the indebtedness above set forth on demand as evidenced by his note or notes, together with interest as therein provided and shall further pay or cause to be paid such other further and future indebtedness whether evidenced by promissory note or not as the mortgagor may hereafter incur to the mortgagee, *it being the intent hereof to secure the said mortgagee any advance or credit now made or hereafter made \* \* \* or any other advancement or credits extended \* \* \*.*"

Thus, by the very terms of these chattel mortgages they were given to secure existing indebtedness no matter how originating. It is undisputed in the record that there was unpaid indebtedness going back to the inception of the business relationship between the parties. The law is well settled that taking a new chattel mortgage in the absence of intent does not satisfy a pre-existing indebtedness. *Pacific Nat. Ag. Credit Corp. v. Wilbur*, Cal. 42 P. 2d 314:

"The acceptance of the new note and mortgage as a renewal of the former note and mortgage in the absence of evidence of any agreement that the new note and mortgage should be accepted in payment and satisfaction of the old does not operate as an extinguishment or discharge of the latter."

*McGown vs. Fuller*, (Wyo.) 266 Pac. 124 involved a whole series of chattel mortgages given over a period of many years, and the Supreme Court of Wyoming held in that case that each new mortgage was a renewal or continuation of the previous one and was intended to secure the original debt which was never paid, even though the amount varied from time to time. Likewise, see *Lupe Discount Corp. v. Holleb & Co.*, (Ill.) 47 N.E. 2d. at 337.

It is the position and contention of defendant that each new chattel mortgage taken by it included the past due and unpaid debt of Nalder, Sr. and Jr., and that consequently no right to demand a release of any chattel mortgage existed, even assuming that a proper demand for release was made, until the debt secured by those mortgages was paid in full, including the amount still unpaid from the 1949 operations of the mortgagors. Certainly, in view of the record, there never existed any right to a release of the 1949 chattel mortgage and we contend the same construction must be applied to the chattel mortgages given in 1950 and 1951 as well. Plaintiffs attempted to escape the consequences of their failure to pay the amount due under the 1949 chattel mortgage by contending that defendant promised in exchange for their agreement to execute the real estate mortgage of August 15, 1950 (Ex. "C-9) that the 1949 chattel mortgage would be released. Defendant denied any such agreement and we shall discuss under another heading of this brief why plaintiff's contention is untenable. Plaintiffs knew that defendant did not accept this real estate mortgage in payment and discharge of the 1949 chattel mortgage. (Tr. 24)

#### POINT 6

THE TRIAL COURT COMMITTED ERROR IN APPLYING AN IMPROPER RULE OF DAMAGES TO PLAINTIFFS' CLAIM OF LOSS OF ANTICIPATED PROFITS FOR THE YEARS 1952, 1953 AND 1954.

In order to sustain a judgment in their favor, the plaintiffs were required to show that as a result of defendant's wrongful conduct they sustained damage. They



contended that this damage was in loss of profits during the years 1952, 1953 and 1954, after the defendant declined to furnish any further financing of their operations, and as they stoutly contend, resulted because defendant's mortgages prevented them from obtaining financing elsewhere. Loss of profits, like any other damage, must be proven before any recovery may be had for such a loss. The same rules of certainty and definiteness apply to future profits as apply to any other type of damage. Also, conjecture, speculation and guessing are as objectionable in proving such losses as they would be in any claim for damages.

It is conceded that a loss of future or anticipated profits due either to breach of contract or tort may be recovered in an action for damages. The following authorities are in accord with this rule:

*States v. Durkin*, (Kan.) 68. Pac. 1091.

*Schultz v. Wells Butchers' Supply*, (Wash.)  
275 Pac. 737.

*Outcault Advertising Co. v. Citizens' Nat.  
Bank of Emporia*, (Kan.) 234 Pac. 988.

However, that does not permit the claimant to recover such a loss by merely claiming that except for the interference of defendant his profits would have been so much money. He must establish a basis for his claim in order to recover. The requirement is that of proof with reasonable certainty.

Claims for loss of anticipated or future profits by their very nature are speculative and uncertain. The general rule applicable to damages is that damages in order to be recoverable must be certain. The rule is stated in the *Restatement of the Law of Torts*, Sec. 912 as follows:

"A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if, but only if, he establishes by proof the extent of such harm and the amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit."

The rule is further stated in the case of *Steiner v. Long Beach Local No. 128*, (Cal.) 123 P. 2d 20, page 27 as follows:

"Generally speaking, the principle underlying the right to damages for injury is that the person injured is entitled to compensation commensurate with his loss. It is not sufficient to prove the infringement of a legal right; to recover more than merely nominal damages, the injured person must prove the amount or items of the damage suffered by them. As stated in 25 C.J.S., Damages, Sec. 144, P. 788, 'As noted in Sec. 6 supra, a presumption of at least nominal damage follows from proof of a legal wrong. However, the amount and items of pecuniary damage are not presumed, but must be proved; and if there is no evidence as to the extent of the pecuniary loss there can be no recovery of substantial damages, at least where the elements of damage are such as to be susceptible of pecuniary admeasurement.' *The rule is applicable to a tortious interference with a business* \* \* \*."

And in *Grupe v. Glick*, (Cal.) 160 P. 2d 832, the following is stated:

"An award of damages for the detriment occasioned by the loss of future profits is subject to the general rule that the amount which, except for the defendant's wrongful act, would have come to

the plaintiff, must be certain and must have been within the contemplation of the parties when they contracted."

In the abstract opinion to *Blakely Printing Co. v. Fort Dearborn Mercantile Co.*, (Ill.) 53 N.E. 2d at page 55, the headnotes are as follows:

"In action for breach of contract, a party seeking damages for loss of profits must show reality of loss and that breach was proximate cause thereof."

And in *Krikorian v. Dailey*, (Va.) 197 S.E. 442 at page 448, the rule is stated thus:

"Profits may only be recovered where they can be ascertained with reasonable certainty."

The above cases amply demonstrate that even in cases involving loss of future profits the rule of certainty must be met to sustain a judgment for damages. Defendant concedes that with the proper proof recovery can be obtained for the loss of such profits. Even though in such cases certain elements of speculation and uncertainty exist, the courts will permit a recovery in spite of such uncertainty if, but only if, some reasonable formula or basis is sustained upon which recovery may rest. Succinctly stated, the rule applying to such cases is that any loss of future profits must be related to the experience of the claimant prior to the time of the commission of the wrongful act. The rule is stated in the *Restatement of Torts*, Sec. 912, page 578 as follows:

"As a condition to recovery for loss of earnings, the person harmed must offer evidence, convincing to the trier of fact, that a substantial

amount of earnings has been lost. To do this he must introduce evidence of the amount of earnings received *prior* to the time of the injury, or the amount which he was capable of obtaining, and at least some evidence having a tendency to show that he could have earned something during the period in which loss of earnings is claimed."

And with respect to the same rules of law applicable to loss of profits resulting from breach of contract, the *Restatement on Contracts*, Sec. 331, P. 515 states the rule as follows:

"Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty."

A leading case on this subject decided by the Supreme Court of Oregon is *Williams v. Island City Mercantile & Milling Co.* 37 Pac. 49. That case involved a claim for loss of future profits growing out of breach of contract. That court stated the following in the course of its opinion:

"We are aware the authorities are not uniform on this question but it seems to us the rule we have indicated is more likely to do justice between the parties to this record than the one adopted by the trial court. The anticipated or expected profits from the operation of a flouring mill are proverbially uncertain and contingent, and to allow them, as such, to be recovered as damages in an action for a breach of contract to furnish machinery and appliances for such mill is to allow the jury to enter into the realm of speculation and uncer-

tainty. As said by Mr. Justice Cooley in *Allis v. McLean*, supra, a case similar to the one at bar: 'Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and, if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held, in cases like the present, that the party complaining of a breach of contract must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be' \*\*\*."

"We are of the opinion, therefore, that the true measure of damages for the failure to complete the contract within the time stipulated, and for the loss of time occasioned by the attempts of the plaintiffs, after September 20th, to comply with the terms of their contract, is the reasonable value of the use of the mill during such time, as *ascertained from the past experience of the defendant*. \*\*\* The ruling announced by the court as to the measure of damages for the difference between the actual and guaranteed capacity of the mill was, we think, correct, *because it was based upon past transactions*; and it is a mere matter of mathematical calculation to determine the difference between the actual output of a 45 barrel capacity mill and what the output would have been during the same time, had the mill been up to the guarantied capacity."

And in the case of *Chain Belt Co. v. U. S.*, (United States Court Claims), 115 F. Supp. 701, a quotation is made from the *Restatement of the Law of Contracts*, Section 331 (2) (d):

"If the defendant's breach has prevented the plaintiff from carrying on a well established busi-

ness, the amount of profits thereby prevented is often capable of proof with reasonable certainty. *On the basis of its past history*, a reasonable prediction can be made as to its future.”

The same section quoted from the *Restatement of Contracts* quoted above is reiterated.

And in the case of *William H. Rankin Co. v. Associated Bill Posters of the United States*, 42 Fed. 2d 152, the recovery of such damages was permitted upon the testimony of the treasurer of the plaintiff comparing the business net profits in one year with the treasurer’s knowledge of business conditions when the company was free from unlawful interference and from this the plaintiffs’ probable yearly earnings was estimated. In *Shell Oil Co. v. State Tire & Oil Co.*, 126 Fed. 2d 971, it was held that the jury could consider evidence concerning the plaintiff’s profits for a reasonable time *before* any wrongful conduct by the defendant and compare those profits with reduced profits or losses ensuing as a direct result of the wrongful action of defendant.

This court in the case of *Jenkins v. Morgan*—Ut.—, 260 Pac. 2d 532 at page 535 quotes with approval the case of *Carolene Sales Co. v. Canyon Milk Products Co.*, 122 Wash. 220, 210 Pac. 366, 367, as follows:

“\* \* \* before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated.”

In *U. S. v. Griffith, Gornall & Carman, Inc.*, (10th Circuit), 210 Fed. 2d 11, the Circuit Court of Appeals said:

"The loss of future profits from a regularly established business may in proper cases be established by showing that *the profits after the wrong are less than past profits*. 25 C.J.S. Damages, Sec. 90 (citing other cases) \* \* \*."

"Mathematical exactness as to the amount is not required but the evidence must form a basis for a reasonable approximation. The court must have before it such facts and circumstances to enable it to make an estimate of damage based upon judgment, not guesswork. *Palmer v. Connecticut Ry. & Lighting Co.*, supra. 'Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves.'"

Turning now from this array of authorities to the facts in this case, what do we find? The evidence is undisputed that in the years prior to 1952, when there was no interference from the defendant and when in fact the defendant was financing the plaintiffs to the full extent of their operations, their business was a failure. We quote from the plaintiffs' own statements regarding their business operations. On November 21, 1951, they wrote defendant as follows:

"\* \* \* It surely looks bad for us again \* \* \*  
You also know without me telling you, that we

have made nothing since we went into the turkeys \* \* \*.

"If we had sold them here when processed we would have been able to pay Kellogg all we owed him and had \$800.00 over, but as it was we went \$6,000.00 in the hole. \* \* \*

"The next year (last year) we were able to pay Kellogg Company all of last year's bill and \$1,000.00 on interest.

"Mr. Williams, this year the way we had to feed was also a very costly lesson to us. Our feed bill this year will be more than \$6,000.00 above what it was last year \* \* \*." (Ex. "F-4")

Again on April 5, 1952 they wrote the defendant as follows:

"\* \* \* You may say rightly that they have not been good years \* \* \*." (Ex. "F-21")

In those three years they were unable to pay off the 1949 debt owing to the defendant. Did they show as this court in *Jenkins v. Morgan*, supra, states they must show "that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated?" It is certain that the record shows exactly the opposite. The turkey raising business, to paraphrase the case of *Williams v. Island City Mercantile & Milling Co.*, supra, is even more speculative than the milling business and to permit these plaintiffs to come into court and to testify that in 1952, 1953 and 1954 they would have raised 14,000 turkeys and marketed the same at so much profit per bird was the purest kind of speculation and was in no way related to their past experience of earnings. It is consequent-



ly submitted that the judgment rendered cannot stand or be sustained and the same should be reversed.

Furthermore, the rule is that there can be no damages recovered for anticipated or future profits to be derived from a business only in contemplation in the owner's mind or which is unestablished. In *Jenkins v. Morgan*, supra, this court stated:

"All the authorities are unanimous in holding that prospective profits to be derived from a business which is not yet established but one merely in contemplation are generally too uncertain and speculative to form a basis for recovery."

And the same rule is announced in the *Chain Belt Co. v. United States*, supra, in this language:

"Anticipated profits from a business which is contemplated but not established are too remote and speculative to form a basis on which to recover for damages for the reason that there are no facts from which the amounts of the proceeds can be determined by the degree of certainty required by law."

And to the same effect see *Grupe v. Glick*, supra, where the court says:

"On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative."

And quoting further:

"For the reason that Grupe's exclusive sales agency was a new venture, the record does not

contain any evidence of a past volume of business in the sale of the particular machine in controversy, showing with reasonable probability that a fairly certain number of additional sales could have been made in the future.”

And in *Krikorian v. Dailey*, *supra*, the court announced this rule:

“If the business is new and without background, there is no base from which profits may be determined \* \* \*.”

And in *Steiner v. Long Beach Local No. 128*, *supra*, the California court said the following:

“Where an established business is wrongfully interrupted and injured, the proper measure of damages is the diminution in value of business traceable to the wrongful act as reflected by loss of profits, expenses incurred, or similar concrete evidences of injury.”

See following cases and authorities:

- 15 Am. Juris. page 573, Sec. 157.
- 25 Corpus Juris Secundum, P. 518, Sec. 42 (b).
- Eastman Kodak Co. v. So. Photo Material Co.*,  
295 Fed. 98.
- Ellerson v. Grove*, Circuit Court of Appeals,  
4th Circuit, 44 Fed. 2d 493.
- Andreopulos v. Peresteredes*, (Wash.) 163 Pac.  
770.
- Goebel v. Haugh*, 2 N.W. 847, (Minn.)
- Blankenship v. Lanier*, (Ala.) 101 So. 763.
- Central Coal Co. v. Hartman*, 111 Fed. 96.
- Whitehead v. Cape Henry Syn.* (Vir.) 68 S.E.  
263.
- Shreveport Laundries, Inc. v. Red Iron Drill-  
ing Co., Inc.* (La.) 192 So. 895.

*Mensing v. Wright*, (Kan.) 119 Pac. 374.  
*Landon v. Hill*, 29 Pac. 2d 281, (Cal.)

It is submitted that from the evidence in this record there was no established business damaged by the actions of the defendant, even admitting for the purpose of argument only, that they were wrongful and consequently there can be no damages awarded in favor of the plaintiffs in this case.

Bearing these propositions in mind a reading of the record discloses that the required tests were not met by plaintiffs' proof. The plaintiffs testified that in 1952 they had capacity to handle and care for 14,000 turkeys and that they would have raised that many birds if the financing had been available. They asserted that for 1953 and 1954 they would have duplicated 1952 by raising the same number of birds. They next proceeded to show that in those years, instead of raising 14,000 turkeys, Nalder, Sr. had only raised 1,000, 1,500 and 2,000 respectively. They introduced in evidence, over defendant's timely objections, exhibits purporting to show how much profit was made on the turkeys actually sold in those years, and that the profit had been so much per bird. They then took this figure and computed the difference between the actual profit and what it would have been if they had raised all the turkeys which they claimed and insisted they had capacity and intention to raise. The trial court went along with this theory and based upon the evidence described, awarded the damages complained of.

It is contended by defendant that by so doing the trial court committed further serious and reversible error.

In the first place, it must be most obvious that any

such proof is highly speculative and uncertain. It is likewise self-serving. For example, what was there to prevent the plaintiffs from asserting that they would have raised 20,000 or 25,000 turkeys? They could have made such a claim just as easily as they asserted they would have raised 14,000 turkeys. Such proof entirely ignores the possibility that plaintiffs might have quit the turkey business, that they might have had prohibitive losses, or that market conditions might have been unfavorable so that granted they actually raised all the birds they claimed they wanted to raise, the whole operation might be a loss and not a profit.

The foregoing abundant authority shows the way in which loss of future or anticipated profits are to be proven.

#### POINT 7

THE TRIAL COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE, OVER DEFENDANT'S OBJECTION, PLAINTIFFS' EXHIBITS "M", "N" AND "O" FOR THE REASON THAT SAID EXHIBITS WERE INCOMPETENT, IRRELEVANT AND IMMATERIAL TO ESTABLISH PLAINTIFFS' CLAIM OF LOST PROFITS.

Under Point 6 of this brief we have already argued that the court erred in awarding damages to plaintiffs for loss of anticipated or future profits because there was no relationship between the damages awarded and the plaintiffs' experience in the turkey business prior to the alleged interference by defendant. We now wish to make comment upon the exhibits which the court received over the objection of defendant from which the court purportedly made his findings and determination of damages.

In this connection, Exhibit "P" was offered to prove the competence of the Nalders as turkey raisers. Objection was made because the exhibit was immaterial hearsay evidence taken from books kept by other persons. This objection was summarily overruled by the trial court. Exhibits "T" and "U" were offered to show the amount and cost of feed used by H. William Nalder, Sr. in 1953 and 1954. Exhibit "X" was offered to prove the number of turkeys purchased from Nalder, Sr. in 1953 by the Lee Brown Co. Exhibit "W" was offered to show the number of turkey poults purchased in 1953 and 1954 by H. William Nalder, Sr. and Exhibit "V" was the written offer of Lee Brown Co. to purchase H. William Nalder, Sr.'s 1954 turkeys. All of the alleged facts shown by said exhibits were supposedly summarized in Exhibits "M", "N" and "O", which were offered to prove the damages sustained by all the plaintiffs based upon H. William Nalder, Sr.'s operations in 1952, 1953 and 1954. In none of those years did Mrs. Nalder or H. William Nalder, Jr. raise turkeys so that at the outset we are faced with a situation from which it is impossible for anyone even to speculate on how much profit they might have made in those years in the turkey business, even adopting the theory of damages used by plaintiffs. By some mental process unfathomable to defendant, the experience of the plaintiff, H. William Nalder, Sr., was translated into the non-existent experience of H. William Nalder, Jr. and Mrs. Nalder and adopted by the court as the experience of H. William Nalder, Jr. and Mrs. Nalder in raising turkeys in 1952, 1953 and 1954. On no other hypothesis could any claim to damages in favor of H. William Nalder, Jr. or Mrs. Nalder be postulated. If their past experience in 1949,

1950 and 1951 had to be relied on as a basis for damages there could be no finding of damage in their favor because there was no profit made during those years. Furthermore, H. William Nalder, Jr. abandoned the turkey business in 1952 and never went back to it. (Tr. 146-148) Mrs. Nalder never engaged in the business, much less abandoned it.

An examination of Exhibits "M", "N" and "O" shows that in computing the expenses for 1952, 1953 and 1954 Nalder, Sr. charged himself for turkey poults, feed, brooder expense, i.e., electricity, herder (wages) and processing. He deducted these items from the amounts he claimed he received from the sale of the turkeys and he then designates all the rest as profit. It seems strange indeed that overnight beginning in 1952, Nalder, Sr. was by some mysterious necromancy transformed from a failure to an outstanding success, without any logical explanation for the sudden and swift change. Apparently he had the same facilities in the earlier years, the same know-how and astuteness, but somehow could not make his enterprise a success. In November, 1951, the Nalders confessed themselves as failures and the results of their operations confirmed their confession. A critical examination of Exhibits "M", "N" and "O" perhaps will reveal at least some of the reasons why Nalder, Sr. looked better in 1952, 1953 and 1954 than in those earlier years. In the first place, he was handling a much smaller flock of turkeys and perhaps could handle them better. A much more reasonable explanation, however, lies in the fact that these exhibits do not reveal the whole picture. Nalder, Sr. fails to charge his turkey operations with many proper expenses which in all conscience must be charged in every

properly conducted business enterprise. For instance, there is no charge made for taxes, loans, interest on borrowed money, depreciation, insurance, maintenance or the reasonable value of his own labor and time expended in raising the turkeys. Everyone of such items was undoubtedly incurred. We know he borrowed money from First Security Bank with the endorsement of Mr. Rasmussen. (Tr. 171) It would be naive to believe that the loan was made without interest or that Nalder, Sr. was not required to repay the principal. (Tr. 162, 171, 219) The materiality and competence of these exhibits was destroyed by these omissions and they are worthless for the purpose of arriving at the profits which were made in 1952, 1953 and 1954. Defendant objected to the introduction of the exhibits and the objections were overruled. These objections were well taken and the court's action in overruling them and admitting the exhibits was seriously prejudicial to the defendant.

### POINT 8

THE TRIAL COURT'S JUDGMENT MUST BE REVERSED BECAUSE THERE IS NO COMPETENT EVIDENCE THAT DEFENDANT'S FAILURE OR REFUSAL TO RELEASE EITHER ITS REAL ESTATE OR CHATTEL MORTGAGES WAS THE PROXIMATE CAUSE OF ANY LOSS TO PLAINTIFFS, H. WILLIAM NALDER, SR., AND JR.

The judgment awarded by the trial court in this case rests upon the unsupported conclusion of plaintiffs that the reason for their inability to obtain turkey financing for 1952, 1953 and 1954 was that the record in the County Recorder's Office in Davis County, Utah showed the real

estate and chattel mortgages, pleaded in plaintiffs' complaint, unsatisfied and unreleased. Plaintiffs' asserted their complete ignorance of the condition of this record until notified by Mr. Rasmussen of this fact in 1954. (Tr. 163-164, 76-7, 102, 105-6, 158-9, 180) The record will not support plaintiffs in this claim of ignorance. They were notified in writing by defendant that the mortgages were not released twice in 1950. (Ex. "E-5", "E-6") Furthermore, the plaintiffs carried on correspondence with defendant in 1952 and 1953 requesting subordination of defendant's debt. (Ex. "F-16-25") They could hardly be ignorant of the fact that the requirement of a subordination agreement by General Mills Co. was for the purpose of clearing the record of these mortgages and to constitute the General Mills obligation a first lien. Furthermore, Nalder, Jr., in his application to General Mills, listed as one of his liabilities a mortgage payable to defendant. (Ex. "I-1") In a memorandum dated December, 1951, reference is made to unreleased chattel mortgages which would have to be released or subordinated. (Ex. I-4) Presumably this subject was discussed with Nalder, Jr. for he made several attempts to get defendant to give him such a subordination. (Tr. 106-108) See also Exhibit "I-8". Furthermore, the plaintiffs well understood the purpose of a subordination agreement. They requested defendant in 1950 to subordinate defendant's debt to the first mortgage on their home, which request defendant granted. (Tr. 21) This pretended lack of knowledge by plaintiffs is unconvincing and not very significant except that it gives a good insight into plaintiffs' willingness to slant testimony to their own advantage.

Returning now to the more important question of the



reason why plaintiffs could not get financing for all the turkeys they assert they wished to raise after 1951, the record is clear that none of the companies to whom they made application ever told them that they were so denied because defendant did not release mortgages. It is clear that Ralston-Purina did not. (Tr. 169, 177, 180) Neither did General Mills (Ex. "I") nor Farmer's Grain (Tr. 158) nor Pillsbury. (Tr. 159) No one authorized to represent and speak for any lending agency testified directly or indirectly that his company, except for the mortgages referred to, would finance the Nalders, all or any of them, to such extent as to raise 14,000 or any number of turkeys. In the absence of such testimony there is no basis for any award against defendant.

Nalder, Jr. stated that the General Mills credit manager, Stevens, told him that the application to that company would be approved if subordination of the Kellogg debt was obtained. (Tr. 159) However, Stevens, plaintiffs' own witness, when asked if such was the fact, definitely refused to confirm that statement. (Tr. 250-52) Stevens made it clear that the application would have required further consideration by the credit manager in California. Exhibit "I-6" attests eloquently to the fact that matters relating to plaintiffs' business ability, credit rating and general reputation were in serious question. Furthermore, the General Mills application, if granted, would have limited Nalder, Jr. to 5,000 turkeys, not 14,000.

Rasmussen, a Ralston-Purina feed dealer, testified that plaintiffs' applications were not approved because of defendant's unreleased mortgages, but that statement was nothing but his own unsupported conclusion. (Tr. 136) He was not an agent of the company and had nothing to

do with its credit policies. (Tr. 169) If any statement made by him could have been attributed to Ralston-Purina it was only hearsay and consequently was inadmissible as a statement of fact.

It is submitted, therefore, that nothing in the record will support plaintiffs' contention that had defendant released its mortgages credit would have been available to them from other sources. If such a contention could be supported at all, it is only an inference from the fact that these mortgages were unreleased. The testimony of Stevens and Exhibit "I" destroy even that inference. But, in addition, there are other facts also in the record which further weaken or destroy any such inference, if it would otherwise be permissible at all. None of these other factors related to defendant's unreleased mortgages. It is defendant's contention that they were quite as much responsible for plaintiff's unsuccessful attempts to get financing as were the unreleased mortgages of defendant. In fact, we go further and contend that even in the absence of any mortgage of record in defendant's name, there is sound support for the argument that plaintiffs probably could not have obtained credit elsewhere. We submit that these other facts, being such as might have prevented plaintiffs from obtaining such credit, the burden of proof was upon the plaintiffs to show that the other facts to which we shall now refer were not an obstacle to plaintiffs' financing.

First of all we repeat that the reference in Exhibit "I-6" to plaintiffs' unsuccessful turkey operations before 1952; to plaintiffs as "poor financial risks; the deficit from the 1949 operations, pending litigation, past record of poor pay, including collection suits, mortgaging of household

goods, etc.” all pointing to a “strapped” financial condition, are of more than passing significance on this question of whether defendant’s unreleased mortgages was the only cause of plaintiffs’ difficulty. Furthermore, as we have already pointed out, two of defendant’s real estate mortgages, Exhibits “C-3” and “C-9”, were subsisting, valid and unpaid obligations totaling over \$13,000.00, even if it were admitted that all other mortgages should have been released. These two mortgages certainly could be maintained of record until paid because they expressly recited that they were to secure all of plaintiffs’ obligations to defendant. In addition, the Deseret Federal Savings & Loan Association held a \$9,000.00 real estate mortgage on the home of Nalder, Sr. and his wife. The mortgage was referred to in both applications made by plaintiff to Ralston-Purina. (Ex. “H” and “Q”) It may be presumed that this mortgage was of record because in 1950 defendant subordinated its then existing real estate mortgage to that debt. (Tr. 21)

Young Nalder, in his application to General Mills, (Ex. “I”) referred to a chattel mortgage of \$2,500.00 and a real estate mortgage of \$2,500.00 and to \$2,500.00 of obligations to defendant. This showed then a total of \$7,500.00 owed by Nalder, Jr. by his own admission. We believe it may be fairly assumed that these mortgages were likewise of record. Even eliminating all of defendant’s mortgages, plaintiffs were owing valid obligations of \$16,500.00 to other creditors at the very time they claim it was only due to defendant’s misconduct that their business was destroyed. There is nothing in the record to show that General Mills, Ralston-Purina, Pillsbury or Farmer’s Grain were not influenced by this credit picture. It is

only reasonable to assume that at least they might have been very much influenced by these facts.

That plaintiffs were required to prove defendant's acts the proximate cause of their damage is elementary.

The case of *Ebbert v. First National Bank of Condon*, (Ore.) 279 Pac. 534 is closely analogous to this case in that in the Condon case the plaintiff likewise was claiming damages because of the alleged wrongful refusal of the defendant bank to release some chattel mortgages. The court makes these observations:

"The recovery of the item of \$37,808.08 was ventured upon the contention that the defendant wrongfully and purposely failed to satisfy the mortgage records and thereby caused the Oregon-Washington Joint Stock Land Bank of Portland to reject his application for a mortgage loan in the sum of \$25,000. Before that incident could become an element of damages, it was necessary that the evidence should show (a) that in the absence of the wrongful act there was a reasonable likelihood that the loan would have been made, and (b) that the defendant's neglect caused the rejection of the application."

The court then goes on to recite that in the application for the loan the plaintiff had listed certain mortgage obligations and had omitted others, including the existence of the mortgages which it was claimed the defendant should have released. (Parenthetically, it is most interesting to observe that in their applications to the Ralston-Purina Company these plaintiffs omitted any mention of the existence of the mortgages or debt owing to the defendant.) Also, there was evidence that the applicant had misrepresented certain facts and that was given as a reason for

turning down the plaintiffs' application. There was a whole series of chattel mortgages which the plaintiff had failed to mention in his application, including unpaid taxes. There was evidence concerning a prospective buyer of the plaintiffs' property which the court discusses. It was pointed out that at the time the property was in the process of foreclosure that there was no summer fallow and that the prospective buyer discovered other mortgages on the record and that various factors were discovered by him which persuaded him to discontinue his negotiations, and then the court says:

"\* \* \* Such a remote possibility of injury is too uncertain to be recoverable as damages. Sutherland on Damages (4th Ed.) 53; Sedgwick on Damages (8th Ed.) Sec. 170. The following apt language of Mr. Justice McBride in *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 153 P. 470, 475, Ann. Cas. 1917E, 1104, is applicable: 'When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.'"

In the case of *Shealy's Inc. v. So. Bell Tel. & Tel. Co.*, 126 Fed. Supp. 382, the plaintiff claimed damages for loss of business due to the failure of the defendant to publish an advertisement in its directory. The court held that the element of damage claimed was so remote and uncertain under the evidence that no recovery could be allowed. The plaintiff actually showed that its profits for a nine months period prior to the breach of contract were greater when the advertisement appeared in the directory, than they were during the period when it had been omitted.

In other words, the plaintiff followed the correct theory of comparison between past experience and profits during the period when the wrong was committed. Nevertheless the court had this to say:

“The injury suffered, if any, by the plaintiff was the loss of such profits as would have resulted from the publishing of the advertisement. Whether the plaintiff’s gross profits would have increased if the advertisement had been published is a matter of mere speculation and conjecture. Since the plaintiff has failed to introduce any evidence even tending to show that its gross sales would have been increased had the advertisement been published, the mere fact that the gross profits for a preceding period were in excess of the gross profits for the period during which the advertisement was omitted from the directory is insufficient to show that the decrease in gross profits was the proximate result of the defendant’s failure to publish the advertisement. Their causal relation to the breach is purely speculative.”

A strikingly similar case to the one under consideration is *United States v. Huff*, 175 Fed. 2d, 678 where a plaintiff claimed damages for lost sheep and goats because the defendant had destroyed fences. In commenting on the evidence the court said:

“It therefore becomes patent that the evidence as to the loss of these animals in each case fails to rise above mere speculation and guess.

“While it may be inviting to approve the trial court’s findings and allow at least a partial recovery for such losses, it remains our solemn duty under this evidence to disallow these unproved claims, as it is well settled that speculative damages are not

recoverable. It was incumbent upon these plaintiffs to adduce some clear and convincing proof of specific losses resulting *solely* from the Government's failure to repair and maintain the fences and this they have signally failed to do."

See also *Addison-Miller, Inc. v. U. S.*, 70 Fed. Supp. 893; *William H. Schwanke, Inc. v. Wis. Tel Co.*, (Wis.) 227 N.W. 30; *Tribune Co. v. Bradshaw*, (Ill.), 20 Ill. App. 17; *Stevens v. Yale*, (Mich.) 72 N.W. 5; *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, (N.C) 53 SE 885; *Murray v. Texas Co.*, (S.C.) 174 S.E. 231; *Harman v. Western Union Tel. Co.*, (S.C.) 43 S.E. 959.

As long as there are factors involved in this case which just as effectively could have prevented these plaintiffs from securing their financing in 1952, 1953 and 1954 as the existence of defendant's recorded chattel mortgages and unless there is evidence in the record which eliminates those factors as a possible reason for the rejection of their applications, there is no showing of proximate cause and the judgment rendered by the court rests upon speculation and guess and cannot be permitted to stand. See also *Blakely Printing Co. v. Ft. Dearborn Mercantile Co.*, supra; *Jenson v. S. H. Kress Co.*, 87 Utah 434, 49 Pac. 2d 958; *Tremelling v. So. Pac. Co.* 257 Pac. 1066 70 Utah 72; *Virend v. Utah Ore Sampling Co.*, 48 Utah 398, 160 Pac. 115 and *Quinn v. Utah Gas & Coke Co.*, 42 Utah 113, 129 Pac. 362. Notwithstanding the utter lack of causation to support plaintiffs' claim, the judgment complained of was rendered by the trial court which, in the interest of justice, now requires reversal.

## POINT 9

### THE TRIAL COURT'S JUDGMENT MUST BE

# REVERSED BECAUSE THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT DEFENDANT ACTED IN GOOD FAITH.

Evidence supporting the above proposition is found in the testimony of the witness, Williams, appearing on pages 211, 212, 216, 277 and 270 of the transcript. There is nothing in the record contradicting this testimony. This being the only evidence on the question, the trial court could not ignore it or make a finding contrary to it. Any finding made by the court contrary to this testimony unsupported by evidence impeaching its credibility is against the evidence and hence is reversible error. On the question of good faith as a defense for failure or refusal to release a mortgage, this court has spoken in *Shibata v. Bear River State Bank*, supra. In that case the plaintiff was denied recovery because defendant in not releasing a mortgage was acting upon the advice of its attorney in good faith. This court uses this language referring to Sec. 57-3-8:

“The above statute is penal in nature and should be strictly construed. It is not meant to penalize one who honestly, though mistakenly refuses to discharge or release a mortgage of record because he believes there has been no full satisfaction. Under the facts and circumstances of this case where the bank, relying upon the advice of an attorney, honestly thinks that it had valid and subsisting mortgages against appellant which had not been satisfied, refused to release the mortgages, it was acting in good faith and was therefore not liable for damages under the above section.”

See also *International Harvester Co. v. Simpson*, supra.



There is proof in the record from which it conclusively appears that the defendant was relying on the advice of its counsel. It must be presumed that defendant acted in good faith when it was following a policy with regard to releasing mortgages laid down by its counsel as a business procedure to protect the best interests of the defendant. The policy was, to retain all mortgages as long as there was unpaid indebtedness owing to the company. It is submitted that the court could not ignore the testimony of the witness Williams and refuse to give it any credit whatsoever without some evidence in the record which would indicate that the defendant was not acting in good faith.

#### POINT 10

THE TRIAL COURT ERRED IN PERMITTING INTRODUCTION OF EVIDENCE OVER DEFENDANT'S OBJECTIONS THAT SCOVILLE, EREKSON AND SCHINKER PROMISED OR AGREED ON BEHALF OF DEFENDANT TO RELEASE MORTGAGES WITH NO PRELIMINARY SHOWING OF AGENCY OR AUTHORITY OF SAID PERSONS TO MAKE SUCH PROMISES, AND FOR THE FURTHER REASON THAT UNCONTROVERTED TESTIMONY ESTABLISHES THAT SAID PERSONS HAD NO SUCH AUTHORITY.

The court permitted the plaintiffs to testify to promises or agreements supposedly made by Scoville, Erekson and Schinker relating to release of the 1949 chattel mortgage and to defendant's agreement to accept the real estate mortgage of August 15, 1950 as payment of said chattel mortgage and other alleged promises related to

the release of the chattel mortgages of 1950 and 1951. (Tr. 101-103, 105, 108, 149-53) The witness Ereksen denied that he made any promise on defendant's behalf. On the contrary he specifically and categorically denied that he had any authority to do so. (Tr. 256-58, 263) There is nothing in the record showing that Scoville, a salesman of the defendant, had such authority. The same observation applies to Schinker. Mr. Williams specifically testified that none of these individuals had such authority. (Tr. 211-12, 215-17, 267, 270) The documentary evidence relating to releases (Ex. "E-5" and "E-6") written by Schinker, do not contain any promissory language, but on the contrary state that no mortgages could be released until Mr. Williams, the general manager, gave his approval. Exhibits "Y", "C-6" "C-7" conclusively show that the extent of Scoville's authority relating to one mortgage was to take it after it was prepared by Mr. Quinney to H. William Nalder, Sr. and get it signed.

This court has many times passed upon the question of the proof required to establish agency to bind a principal. In *Witherow v. Mystic Toilers*, 42 Utah 360, 130 Pac. 58, this court makes this statement:

"Of course agency cannot be shown by declarations of the agent. And, before declarations of the agent may be received as admissions against his principal, the agency and the authority of the agent must first be shown. Here neither was shown. Nor is it true, as the court seems to indicate in the charge, that declarations of an agent, to show agency, go merely to the question of sufficiency of the evidence to show such relation, and hence may be considered for such purpose, in connection with other evidence. The authorities, we think, are to

the effect that such evidence is incompetent for such purpose, and that the fact of agency must be established by evidence dehors the declarations of the agent.

In *Jenson v. S. H. Kress Co.*, supra, plaintiff was permitted to testify to a hearsay statement of a former employee of the defendant without a showing that the statement made was binding on the defendant because made in the course of employment or under authority. It was held that the statement testified to by plaintiff was hearsay and was not binding upon the defendant. See *Booth v. Nelson*, 61 Utah 239, 211 Pac. 985, and 20 *Am. Jur.* P. 508, Sec. 598, and *Cole v. Myers*, (Conn.) 21 Atl. 2d 396.

It is submitted, therefore, that all of the evidence in this case relating to the question of promises or agreements made to release the chattel mortgages or to accept the real estate mortgage (Ex. "C-9") in satisfaction of the 1949 chattel mortgage were inadmissible, and should have been stricken from the record when motion to strike the same was made by the defendant.

#### POINT 11

THE TRIAL COURT ERRED IN THE ADMISSION OF HEARSAY EVIDENCE AND IN NUMEROUS RULINGS ON OBJECTIONS TO LEADING AND OTHER IMPROPER QUESTIONS PROPOUNDED BY COUNSEL.

During the course of the trial, Exhibit "P", which had been prepared by the witness Boothe, a Ralston-Purina salesman, was offered in evidence. (Tr. 70-73) As a foundation for the exhibit Boothe testified that the information from which it had been compiled had been furn-

ished by plaintiff Nalder who had obtained it from the books of the Lee Brown Company and Rasmussen Grain Company. The admission of this exhibit was objected to by defendant upon the ground that it was hearsay. It is submitted that the objection was well taken and should have been sustained. The exhibit was damaging to the defendant because it purported to show plaintiffs as competent turkey raisers.

Throughout the trial, counsel asked leading and suggestive questions in direct examination of the plaintiffs. Repeated objections were made to such questions which were denied by the court. It is submitted that all such objections should have been sustained. The trial court apparently proceeded upon the assumption that since no jury was involved in the trial of the case it was immaterial what form the questions of counsel might take. Nevertheless, all such questions were highly improper and their repeated asking should have been ordered discontinued.

## CONCLUSION

The evidence in this case establishes that plaintiffs are indebted to defendant for the amount demanded in defendant's answer and counterclaim. On the other hand, the record clearly demonstrates that defendant was fully entitled to retain all mortgages of record, and that it did so acting in good faith and upon advice of counsel. There is a complete failure of proof that the existence of defendant's mortgages upon the records was the cause of plaintiffs' alleged losses and the judgment in plaintiffs' favor is founded upon incompetent evidence of damage. Furthermore, judgment was rendered in favor of plaintiff, Catherine Nalder, to which she was clearly not entitled, and like-

wise, judgment was granted in favor of H. William Nalder, Jr. for failure to release real estate mortgages not signed or executed by him and he was awarded punitive damages under a statute which he had no right to evoke.

For all of the reasons referred to in this brief the judgment should be reversed with directions to enter judgment for defendant for the amount due upon its mortgage and to enter a decree of foreclosure and order of sale and dismissing the complaint of plaintiffs.

Respectfully submitted,

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