

1955

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Nalder v. Kellogg Sales Co.*, No. 8313 (Utah Supreme Court, 1955).
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Case No. 8313

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In The Supreme Court of the State of Utah

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

*Plaintiffs and
Respondents,*

—vs—

KELLOGG SALES COMPANY,
a corporation,

*Defendant and
Appellant.*

FILED
JUN - 4 1956
Utah

RESPONDENT'S BRIEF

RICHARDS, BIRD & BUSHNELL,

*Attorneys for Plaintiffs and
Respondents.*

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III

In The Supreme Court

of the State of Utah

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

*Plaintiffs and
Respondents,*

—vs—

KELLOGG SALES COMPANY,
a corporation,

*Defendant and
Appellant.*

Case No.
8313

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The Statement of Facts in appellant's brief is not objective and is, in many instances, misleading and argumentative and Not supported by evidence. Attempt will not be made at this point to refute appellant's Statement of Facts; however, instances of disagreement will be noted, and reference to the page of respondent's brief wherein the detailed facts are set out will be included in parentheses.

A. Statements belittling the plaintiffs:

1. App. p6: "Their complete failure to operate their business successfully" (Res. p 83-85)

2. App. p6: "Irregularities * * in Nalder's dealings" (Res. p 16-18)
3. App. p7: "turkeys illegally sold" (Res. p 16-18)
4. App. p10: "poor financial risks" (Res. p 83-85)
5. App. p6: "defendant had destroyed their business for which it should pay them \$129,700.80." (Res. p 66)
6. App. p5: "out of * * 6,000 poults * * they matured 3,400 birds." (Res. p 62)

B. Statements not objectively made:

1. App. p10: "no demand for release of real estate mortgages was ever made * * no demand for the release of chattel mortgages was made until the end of 1953 or early 1954." (Res. p 30)
2. App. p10: "no evidence offered to show that defendant's various applications would have been accepted * *. (Res. p 52)
3. App. p9: "no evidence of authority or agency in said salesman * *. (Res. p 49)

Argumentative statements were made concerning the judgment being awarded Mrs. Nalder (pages 3 & 4) and to Bill Nalder, Jr. (page 4), and that the defendant acted in good faith because of acting under advise of counsel.

The respondents submit the following statement of facts:

During the years, 1949, 1950 and 1951 to facilitate the raising of turkeys by the Plaintiffs and the sale of the products of the Defendant the following chattel and real estate mortgages were executed and recorded.

Chattel Mortgages

Exhibit A-1, March 9, 1949	\$ 24,000.00
Exhibit A-2, January 22, 1950	23,300.00
Exhibit A-3, March 26, 1951	42,825.00

Real Estate Mortgages

Exhibit C-2, September 14, 1949	4,000.00
Exhibit C-3, April 1, 1950	6,721.80
Exhibit C-9, August 15, 1950	6,555.12

Total	<u>\$107,401.92</u>
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The first year that Plaintiffs raised turkeys was 1949. Plaintiffs testified they were required by Defendants to let the dealer of the Defendant dispose of the turkeys financed by Kellogg which resulted in considerable freight and storage charges. If the Plaintiffs had been permitted to sell the turkeys, as they desired, they would have paid the 1949 account in full and would have received approximately \$1,000.00 (Tr. 121) Due to a combination of the freight and storage charges, a depressed market, and 29,000 pounds of turkeys allegedly becoming green struck (Tr. 84-86) because of improper transporting or storing of turkeys, the Plaintiffs were only able to repay \$17,891.24 of the \$23,518.63 advanced by the Defendant.

In 1950 and 1951 the Plaintiffs were able to repay the amounts advanced on the chattel mortgages and applied a small balance from each of those years to the obligation secured by the last real estate mortgage. (Ex. D-4, 7) To increase their volume and thus their profits, the Plaintiffs had rented a brooder house, leased a 900 acre ranch, (T. 139) had purchased a tractor, combine and necessary equipment for

planting and raising grain for feeding turkeys and were prepared to raise 14,000 turkeys in 1952. (T.146) The Defendant advised the Plaintiffs that it would not finance the Plaintiffs for 1952, (T.179) so an application was not filed with the Defendant for that year. However applications were made to General Mills (Ex. I - 1) Ralston Purina (T. 48) Farmers Grain Coop (Ex. G-1) and Pilsbury (T. 48) by the Plaintiffs in an attempt to secure financing for raising 14,000 turkeys in 1952. (T. 145) All of the applications, although recommended by the salesmen, (Ex G-1, I-1, T. 132, 72-74, 174) were denied when sent to the credit departments. (T. 162) When the first shipment consisting of 9,000 poults arrived, financing had not yet been secured, and therefore, only 6000 turkeys were accepted. During the 8 weeks the 6000 turkeys were being brooded continuous efforts were made to secure financing without success. The turkeys were then retaken by the hatchery. (T. 50) Thereafter an Ogden feed dealer co-signed with the Plaintiffs at a bank in Ogden which permitted them to raise a small number of turkeys in 1952 and again in 1953 and 1954. (T. 52, 164) Applications for financing were made in 1953 to the feed companies but were again rejected. Repeatedly Plaintiffs attempted to learn why their applications were turned down. Finally, early in 1954 when Mr. Boothe, the salesman for Ralston Purina asked them to make an application for financing, they agreed to, provided that if it were turned down the salesman would tell them the reason. In March of 1954 Plaintiffs were told that their application had been turned down because of unreleased mortgages (T. 180-181, 163-164) amounting to \$107,000.00. At the time of trial the real estate mortgages had not

been released, and the chattel mortgages were only released as a result of this lawsuit.

The court found that the Defendant's wrongful failure to release the satisfied mortgages consisting of the three chattel mortgages and the first two real estate mortgages proximately contributed to the damage of the Plaintiff. Damages were computed upon the cost, expenses, sales price, mortality rate and average profit per turkey determined from the number of turkeys actually raised and applied to the 14,000 turkeys which would have been raised. Damages were then doubled as provided by statute and the amount of the counterclaim was deducted therefrom.

Since the argument of the case will require a detailed review of the evidence, additional factual matters will be referred to hereinafter. To better enable the court to understand the evidence, most of which is documentary, some of the exhibits are attached hereto as an appendix.

The brief of the Appellant lists eleven points, some of which overlap and some of which are raised for the first time on appeal. Upon analysis it appears the eleven points will fall into the usual categories of liability, proximate cause, damages and alleged errors at the time of the trial. Consequently, the Plaintiffs shall answer the arguments in that order, with a cross reference to the points urged by the Appellant.

STATEMENT OF POINTS

POINT I LIABILITY

THE TRIAL COURT PROPERLY HELD THE DEFENDANT LIABLE FOR FAILING TO RELEASE MORTGAGES.

- A. All chattel mortgages should have been released. (Appellant's Point 5)
- B. The first two real estate mortgages should have been released (Appellant's Point 4)
- C. Demand was duly made for release of the mortgages (Appellant's Points 4 and 5)
- D. Defendant did not act in good faith in failing to release the mortgages (Appellant's Point 9)
- E. Agents of the Defendant had either actual or apparent authority to represent the Defendant (Appellant's Point 10)

POINT II PROXIMATE CAUSE

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S FAILURE TO RELEASE THE MORTGAGES WAS THE PROXIMATE CAUSE OF PLAINTIFFS' DAMAGE (Appellant's Point 8)

- A. Proximate cause in general
- B. Damages need not be apportioned between those caused by defendants failure to release real estate mortgages and those caused by defendant's failure to release chattel mortgages. (Appellant's Points 3 and 8)

POINT III DAMAGES

THE LAW AND EVIDENCE SUSTAIN THE COURTS DETERMINATION OF DAMAGES

- A. Actual damage (Appellant's Point 6)
- B. Punitive damages (Appellant's Point 3)

POINT IV

THE COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING JUDGMENT TO ALL THE PLAINTIFFS (Appellant's Points 1, 2, 3, and 5.)

POINT V

THE RULINGS OF THE COURT ON ADMISSIBILITY OF EVIDENCE WERE PROPER.

- A. Exhibits M, N, and O (Appellant's Point 7)
- B. Exhibit B (Appellant's Point II)

ARGUMENT

POINT 1 LIABILITY

THE TRIAL COURT PROPERLY HELD THE DEFENDANT LIABLE FOR FAILING TO RELEASE MORTGAGES.

- (A) ALL OF THE CHATTEL MORTGAGES SHOULD HAVE BEEN RELEASED (APPELLANT'S POINT 5)

1. 1949 CHATTEL MORTGAGES.

It is the contention of the Plaintiffs that the 1949 chattel mortgage was to be released in consideration of the Plaintiffs' executing the final real estate mortgage in August of 1950. The Defendant contended there was no such understanding. The trial court found this disputed factual issue in favor of the Plaintiffs. The facts leading up to the execution of the mortgage in August of 1950 will show the Defendant antici-

pated the deficit; requested a title search on the Plaintiffs' real property; prepared notes and mortgages in the exact amount of the deficit immediately after the deficit was determined; and instructed their local sales representative to secure the execution of the same. The sales representative secured the necessary signatures upon the representation that the new note and mortgage would take care of or pay the 1949 loss. More particularly, the facts are as follows:

On March 22, 1950, after it was known that the 1949 crop of turkeys was being held in storage, a letter was written from the Credit Department of Kellogg Company to a Mr. George Vogal of the Omaha plant in which it was stated as follows:

"We probably should have a real estate mortgage search made on this man to know who is holding the mortgage against his land, because there is going to be a deficit on the 1949 contract and we may want to get more security later on." (Ex. E-3, App 3)

After the entire proceeds of the 1949 crop consisting of \$17,891.24 was paid to the Kellogg Company, the following letter was written by a representative of Defendant, M. Schinker to Mr. R. M. Scoville, the sales representative of the Defendant at Salt Lake City, Utah, dated July 28, 1950:

"We have received a check on H. W. Nalder & Sons account in the amount of \$17,891.24, to apply against their 1949 turkey account. This leaves a balance of \$5,627.39 principal and interest of \$927.73 to date. We are attaching notes on these two amounts and will appreciate it if you will obtain the signatures as we have a 1950 contract with these people and will hope to obtain this money at the time they sell their 1950 birds." (Ex. C-6, App 5)

On August 2, a letter was written to Mr. S. J. Quinney of Salt Lake City by Mr. W. H. William, Jr. General Sales Manager, Omaha Plant of the Kellogg Company. After referring to a request for additional financing, mention was made of the 1949 deficit in the amount as quoted above, and Mr. Quinney was advised that notes securing those amounts were being sent to Mr. Scoville. It was suggested that a new mortgage also be secured. Mr. Quinney was advised of Mr. Scoville's address and was asked to contact him for the purpose of having the documents picked up and the signatures obtained thereon. In the letter, it was stated as follows:

“We are securing notes to cover these two items, but of course are depending on the second mortgage which we hold on Mr. Nalder's home place as security to cover the indebtedness.” (Ex. Y-1)

During the first part of August Mr. Nalder testified he had a conversation with Mr. Scoville regarding the execution of the real estate mortgage on his home. Mr. Nalder testified as follows:

Q. All right then, tell us what took place at that meeting?

A. He wanted me to sign a mortgage on my home to take care of the 1949 loss.

Q. What did you say to him and what did he say to you?

A. I told him I didn't want to do that. I didn't want to sign my home away on a thing like that. He said, “I'm sure that it will be all right. This com-

pany will never bother to foreclose your home on you. They'll give you years to work it out. ***"

Comment between Counsel and Court.

Q. Did he discuss with you the fact that you had a deficit for 1949?

A. Yes, I had a conversation with him. I understood, that would pay my obligation off to Kellogg, by that mortgage.

Q. Let's see if I understand you correctly. What do you mean by that, pay off your chattel mortgage?

A. Well, I owed them the money. They had received this money that would pay the obligation that I owed on this deficit on 1949. That was the impression that I had, the recollection that I had.

Q. You say pay off. It would satisfy as far as setting up arrangements for handling that deficit. Is that what you meant?

A. Yes. They didn't want to take the mortgage as pay. That's what they take the mortgage for. That's the way I understood it.

Q. Did you finally agree to sign such a mortgage?

A. We did." (T. 24-25)

Mr. Nalder further testified that he knew or expected that the real estate mortgage was still on record, but that all of the other mortgages were released. (T. 108)

In *Swaner v. Union Mortgage Company*, 99 Ut. 298, 105 P2d. 342, the court defined satisfaction of a mortgage as follows:

"A mortgage 'has been satisfied' when it has been terminated and the contract on which it was based

has been recinded **** full satisfaction may be received in other modes than by payment of money' (Citation of authorities)

“‘Satisfaction’ in legal phraseology ‘imports a release and discharge of the obligation in reference to which it is given.’ (Citation of authority) ‘To satisfy’ means ‘to answer or discharge, as a claim, debt, legal demand or the like.’ (citation of authority) **** The consideration for the mortgage having failed, the same was terminated and this termination satisfied ‘the mortgage’. ‘The holder of a mortgage renders himself liable for the statutory penalty for refusing to release a mortgage upon sufficient tender, although he claims that the tender is insufficient ****’

The Defendant either assumed that the 1949 chattel mortgage was released or should have been released and apparently was not relying upon it for an additional amount as a claim on after acquired property. In making a demand for \$352.00, which will be discussed in detail hereinafter, the demand was specifically made with reference to the 1951 chattel mortgage. (T. 205) Likewise, in January, 1954 in a letter to Ray, Quinney & Nebeker from Mr. W. H. Williams, Jr. General Manager of the Omaha plant, it was stated as follows:

“We are relying entirely on our real estate mortgage and for that reason, at this moment can release all the chattel mortgages which are unreleased at this time.” (Ex. R, App 29)

The turkeys and feed, purchased with money advanced by Kellogg were the chattels secured by the chattel mortgage

of 1949. When the feed had been consumed and the turkeys sold, it was obvious there was no longer any security upon which the chattel mortgage could be operative. Having this fact in mind, even before the deficit was determined, Kellogg became interested in determining the status of the title on the real property. Just one day after the amount was received from the sale of the 1949 crops, notes were prepared to evidence the amount of the deficit, and four days later a letter was written to counsel in Salt Lake City, requesting that a mortgage be prepared to secure this deficit. Thereafter the salesman was sent to the home of Mr. and Mrs. Nalder to secure its execution. In order to secure its execution, he represented that it would take care of the deficit. Subsequent events on the part of the Defendant's company indicate that they did not rely upon the chattel mortgage for any additional payments but relied completely upon the real estate mortgage. Under such facts, it is clear that the court's determination that the 1949 chattel mortgage should have been released, after execution of the real estate mortgage in August of 1950, is clearly supported by competent evidence.

2. 1950 CHATTEL MORTGAGES

The terms of the chattel mortgage specify as follows:

"Provided, that if the mortgagor shall pay, or cause to be paid, unto Kellogg Sales Company, or its assigns, the indebtedness above set forth, *** then this instrument shall be void, and otherwise in full force and effect." (Ex. A 1-3)

The ledger sheet, Exhibit D-4, shows that the amounts advanced for 1950 were paid in December of 1950, and that \$1,010.88 was transferred to the 1949 deficiency. A letter dated December 8, 1950 to H. Wm. Nalder, Jr. from M. Schinker of Kellogg Sales Company Credit Department, confirms payment in full for the 1950 advances. Under such circumstances it cannot be seriously maintained that there was not a duty to release that chattel mortgage.

3. 1951 CHATTEL MORTGAGE

The same type of chattel mortgage was involved here as mentioned in the preceding paragraph, which provides if the indebtedness is paid in full, the mortgage shall void. Here again, the amount was paid in full as disclosed by the Defendant's own ledger sheets (Ex. D-5). The last sheet is marked paid on January 29, 1952, and shows \$493.31 was transferred to the 1949 deficit. A letter, (Ex. F-15, App 16) dated January 30, 1952, to Mr. Nalder, Sr. and Jr. from Kellogg Sales Company, acknowledged receipt of the final payment for 1951 and stated that they had applied \$326.44 to principal, \$447.69 to interest, and the balance of \$493.31 to the 1949 account. Again it cannot be maintained that the 1951 mortgage should not have been released since it was paid in full.

The defendant under Point 5-B alleges that the trial court committed error in awarding damages against the defendant for failure to release chattel mortgages.

**SECURED THE PRIOR UNPAID DEBT OF PLAINTIFFS,
H. WILLIAM NALDER, SR., AND JR., WHICH WAS NOT**

PAID, HENCE NO RELEASE COULD BE DEMANDED.
(App. brief, p20)

To support this contention the defendant quotes from the chattel mortgages. The quotation does not support the assertion made, and is quoted out of context. In addition, the defendant deleted part of the section quoted and failed to quote the balance of the sentence which clearly showed that the mortgage was restricted to future advances pertaining to the particular crop of turkeys then being financed.

In context, the chattel mortgage after naming the mortgagor sets out the consideration clause as follows:

“for and in consideration of a sum estimated at \$23,300.00 advanced or to be advanced for the purchase of turkeys, turkey poults, turkey feed, grain, insurance premiums, miscellaneous supplies * * * *.”

The personal property then being mortgaged is described as all of the turkeys and turkey poults numbering approximately 6,000 located in Davis County, Utah.

The complete section from which the defendant quoted and on which he was relying is as follows: (the part emphasized by the defendant is italicized and the part deleted and omitted by defendant is underlined)

“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 for the purchase of turkey poults, prepared turkey feed and small grain, or any other advancements or credits extended in connection with the feeding, shelter, insurance and proper handling of said turkeys to maturity or for market, * * * together with interest, if any, and shall fully and punctually perform all the covenants and agreements hereon contained to be kept and performed by the mortgagor, then this instrument shall be void, otherwise in full force and effect.

The quotation refers to "indebtedness above set forth" and "such other further and future indebtedness." There is no reference to any existing or prior indebtedness.

The material quoted by defendant does not sustain its contention that:

"by the very terms of these chattel mortgages, they were given to secure the existing indebtedness no matter how originating."

The mortgages do purport to secure future advancements but those advancements are limited to funds extended in connection with the raising of said turkeys to maturity.

The provision clearly stated that upon payment of the indebtedness the chattel mortgage shall be void. The mortgages do not purport to secure past indebtedness or future indebtedness involving a different crop of turkeys in a subsequent year.

In *Bank of Searcy v. Kroh* 114 S.W.2nd 26, 194 Ark. 785, the mortgage involved specified:

It is also understood and agreed that the foregoing conveyance shall stand as security for the payment of

any extension or renewals * * * ; also as security for the payment of *any liability or liabilities of grantor already or hereafter contracted* * * *. (Emphasis added)

In spite of the language of the mortgage, the Court stated as follows:

“When a mortgage is given to secure a specific debt named, *the security will not be extended as to antecedent debts unless the instrument so provides and identifies those intended to be secured in clear terms and, to be extended to cover debts subsequently incurred, these must be of the same class and so related to the primary debt secured that the assent of the mortgagor will be inferred.* The reason is that mortgages, by the use of general terms, ought never to be so extended as to secure debts which the debtor did not contemplate. It would be an easy matter to describe the nature and character of the debt so that the debtor and third parties may be fully advised as to the extent of the mortgage.” (Emphasis added).

4. DEMAND FOR AN ADDITIONAL \$352 FOR 1951

The Defendant maintains it was willing to subordinate its mortgages provided an additional \$352 was paid for 1951. Further the Defendant asserts that the Plaintiffs illegally sold and failed to account for turkeys in 1951. To determine if the Defendant rightly insisted upon the \$352 payment and the validity of the other assertions requires a detailed review of the evidence. At the time the 1951 crop of turkeys were being processed, the Plaintiffs were offered approximately 24c to 26c per pound for the ‘C’ grade turkeys. They, therefore, took the turkeys from the processing plant and disposed of them per-

sonally and through the Economy Market at Ogden, for 38c a pound. After taking them from the processing plant, they were advised they should not have done so without permission from Kellogg. Consequently, the day after the turkeys were taken Mrs. Nalder wrote a letter to Kellogg advising them fully of what had taken place and the reason for taking the turkeys from the processing plant. (Ex. F-4, App 12)

After recounting the necessity of taking the turkeys because of a threatened action to collect funds against the Plaintiffs, Mrs. Nalder in the letter, stated as follows:

“Mr. Williams, by using the money when we did it has saved us from that judgment. Now if you are very disappointed or angry with us for doing this, we will see if they will increase our first mortgage about the \$1200 we got from those birds. We did not want to do this but it seemed there was no other way in such short notice. We do hope you have not lost faith in us. We realized too late that we should have called you on the 'phone, but you know a person who is desperate, the way we were, does little reasoning. Please do not judge us as dishonest, for we have placed the cards upon the table and there is nothing underhanded.

According to the defendant, the plaintiffs were not under any restrictions to how they disposed of their turkeys. This was 'readily admitted by the defendant when it was faced with the second count of this action which alleged the Defendant had compelled the Plaintiffs to sell the 1949 turkeys to one of its dealers. In a letter from Mr. Williams to Mr. Bowen it was stated: “The grower had full authority to sell through whatever channels

he deemed best. We of course relied on our chattel mortgage to be sure that the purchaser of the birds was aware that an obligation was due Kellogg's in connection with the turkey flock." (Ex. R App. 30) However, Mr. Williams stated the situation quite differently to Mr. Nalder. Mr. Nalder testified:

"A. He said the turkeys are mortgaged to us, 'and it is a penitentiary offense to sell turkeys that are mortgaged,' and I said, 'Well, I'll pay it then.'

Q. Did you have any discussion about the amount; and if so, what was said?

A. Well, the amount was \$1,250.00 and \$350.00 that Bill, my son, had traded to Olson for a gas bill that we owed in '49." (T. 44)

After this conversation, Mr. Nalder somehow made arrangements to borrow \$1,250.00 and on January 21, 1950 sent the same to Kellogg Company. (Ex F 14) On January 30, 1952, a check for losses covered by insurance on the turkeys in the sum of \$1,267.44 was received by Kellogg, thus paying the 1951 account in full plus a balance which was applied on the 1949 account. After receiving this latter check, Kellogg wrote to the Nalders as follows:

"We wish to acknowledge receipt of the insurance adjustment in the amount of \$1,267.44 which we have credited to your 1951 turkey account, the 1951 interest, *and we have credited the balance of \$493.31 to your old account.* The outstanding principal on the 1951 account was 326.44 and the interest amounted to \$447.69.

"We are awaiting the remaining balance for the 1951 turkeys which were sold locally. We understand

that Bill traded \$352.00 worth of turkeys to take care of a gasoline bill, and of course, inasmuch as we had a mortgage on these turkeys, that amount must be remitted to us together with the remaining balance as discussed with Mr. Williams recently. I would appreciate *having these funds forwarded to us so that we will be able to release the mortgage and return the note to you.* Your cooperation will be greatly appreciated (Ex. F-15 App. 16) (Emphasis added)

Mr. Nalder testified concerning the \$352.00 payment as follows:

"A. I told them when I paid them the \$1250.00 that I borrowed, that's all I could get. That Bill had traded this other, he wasn't able to pay. That was the straw that broke the camel's back. They knew I couldn't pay it. I was paying as high as 36% a month for some of this money I borrowed." (P-115)

On February 2, 1952, William Nalder, Jr. wrote to Mr. W. H. Williams, Sales Manager of Kellogg Company, Omaha, Nebraska, and mentioned that he had been informed by his father that Kellogg would not be financing them in 1952, and stated that arrangements had been made with another company for financing, provided they would be assured of a first lien to the extent of their advances. The Kellogg Company was advised that turkeys had been ordered and were expected to arrive during the first week of March. (Ex. f-16 App. 17)

Upon receipt of that letter, an interoffice communication was sent from W. L. Aust, the Credit Manager of Kellogg Sales, to Mr. Williams Plant Manager of the Omaha plant. The memorandum stated as follows

“Attached is a copy of a letter received from Bill Nalder, Jr. I would like to tell him that we will have to have the \$352.00 for 1951 turkeys which he traded for the gas bill before we could agree to write such a letter. What do you think? *I doubt that he can pay this but it might work.*” (Ex. F-17, App. 18) (Emphasis added)

On February 18, 1952 Mr. Aust replied to Mr. Nalder’s letter of February 2 and in part stated as follows:

“Before we can give a confirmation to you, it will be necessary that we receive the funds for the turkeys which you did not sell, but received credit on the outstanding gas bill, and this will have to be paid in full to us. After receipt of remittance of \$352.00 we would be pleased to furnish a subordination agreement to any feed company that you would suggest, but we would appreciate having you give us the name of the feed company so that we can write a letter direct to them and a copy of such subordination agreement sent to you, but as mentioned before, we would not be able to grant this until your share of the 1951 turkey contract is paid in full. (Ex. F-18, App 19)

Even though Mr. Aust, the Credit Manager, realized that the Nalders had received practically nothing from the raising of turkeys for three years, and that they were unable to raise \$352.00; yet the defendant insisted upon that payment, claiming that it was due for 1951. However, their letter and their ledger sheet discloses that the ’51 balance was paid in full. Mr. Aust stated in his testimony that he was demanding the \$352.00 as being owed on the 1951 obligation and not claiming it by virtue of the deficit for the 1949 chattel mortgage. (T-205)

Since Mr. Nalder did not advise Kellogg of the company with whom they were dealing, as requested in the letter dated February 18, 1952 Kellogg Sales Company wrote the following letter dated February 26, 1952 to Farmer's Grain Company and apparently sent a copy of the letter to General Mills. (T-241) The letter was as follows:

"Gentlemen: We have recently had a request from Mr. H. William Nalder, Jr. to subordinate our lien which we have on his 1951 flock of turkeys. We have written to Mr. Nalder and notified him that upon receipt of his remittance for \$352.00 we would agree to furnish a subordination agreement to cover the remaining balance for prior years, *but we must have the 1951 account cleaned up. We have also asked Mr. Nalder the name of the feed company willing to finance him this season but we have not received a reply to our letter.*

"We understand that you folks are contemplating financing his 1952 turkey program and we wish to notify you at this time that *we still have a lien on his turkeys.* If you have any further questions on this we would appreciate having you contact us." (Emphasis added) (Ex G 2, I-10, App 20)

After the first shipment of 9,000 poults arrived and financing had not been approved Mr. H. William Nalder, Jr. on March 2, 1952 sent the following telegram to Kellogg Sales Company.

"Talked Lee Brown, taking processing agreement, sending you \$352.00. Said would but now says can't do for 60 days. My Turkeys arrived 26th March. (sic. February). Got one ton feed, can't get more till General

Mills, Ogden, Utah, Mr. Henry Stevens, receives subordination. Can you send subordination to General Mills. Wire if possible and receive submittance Brown 60 days? My only possible way of raising it." (Ex. F-19, App. 21)

In reply to that telegram, Kellogg Company wired to William Nalder as follows:

"Necessary you secure a letter from Lee Brown agreeing to pay balance of \$352.00 to us by April 15, this year." (Ex. F-20, App. 22)

Attempts were made to secure the letter requested but Mr. Brown apparently changed his mind about making payment and therefore, the application with General Mills was not granted since the subordination agreement was not issued. (T-143)

After the hatchery had retaken all of the turkeys and all of the application had been turned down, Mr. Nalder, Sr. on April 5, wrote to the Kellogg Company and after mentioning that he had been unable to send the \$352.00 stated as follows:

"I have been fair and honest with your company and in all fairness I feel you should go along with me and help me to recover myself. I would like to put this proposition for your consideration. I would like to have 2,000 turkeys to care for right around here. This is the best condition I have been in. I have a lot of equipment. I want to stay in the business and not fail. I want to succeed and pay up without having to sell my home. I have never dealt with anyone that I could not do business with them again. Please reconsider my case and let me work out and regain my losses. Give me a chance and I will not let you down.

Please answer me back as soon as possible. Let it be favorable." (Ex. F-21, App. 23)

In response to that letter Kellogg Sales Company through their credit Manager, Mr. Aust, advised Mr. Nalder as follows:

"In regard to a finance agreement for 1952 we are indeed sorry but there is no way we can approve a contract for you for 1952 at least until your entire outstanding account is paid in full. ** We did agree to prepare subordination agreement for Bill provided we received payment of \$352.00 but inasmuch as this was never received we could not cooperate with him and furnish the subordination agreement and we might say at this time that we would be agreeable to furnish the subordination agreement for you, but it would be necessary that we receive the \$352.00 before this could be taken care of, the same agreement that we did give your son Bill." (Ex. F-22, App. 24)

Although Mr. Nalder had paid the \$1,250.00 as agreed, and in spite of the fact that the 1951 account had been paid in full, the Defendant was insisting that Mr. Nalder must pay the \$352.00 before they would issue a subordination agreement. Further demand was made for \$352.00 in a letter on August 27, 1952. (Ex. F-28, App. 25) Demand was made in a letter on April 15, 1953 referring to the amount as "the balance on the 1951 turkey contract * * * Also advise us when you will be able to pay the \$352.00 to clean up the 1951 account." (Ex. F-24, App. 27)

Similar language was used in a letter demanding the \$352.00 dated June 4, 1953, wherein the balance was referred to as the "\$352.00 which is the balance due on the 1951 turkey

contract * * *. You agreed to pay this \$352 balance on the 1951 account * * * ." (Ex. F-25, App. 28)

In a letter dated December 22, 1952 again demanding payment it was stated:

"As mentioned in our conference, on receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere, inasmuch as our mortgage is still of record.*" (Ex. 3, App. 26) (Emphasis added)

From the foregoing the following is clearly established:

First, the 1951 loan was paid in full as shown by the Ledger Sheet of the Defendant and a letter sent to the Nalders. (Ex. D-5, F-15, App. 16)

Second, By withholding releases of the mortgage the Kellogg Company was attempting to coerce an additional payment of \$352.00.

Third, the defendant knew that the unrealed mortgages would prevent the plaintiff from securing financing from other sources. (Ex. 3, App. 26)

Fourth, the defendant knew of the plaintiff's financial difficulties, but nevertheless flippantly insisted on the payment because "It might work." (Exhibit F-17, App. 18)

Fifth, the defendant officiously wrote letters to other feed companies claiming a lien, and stating that the 1951 account had not been paid in full, directly disputing information in applications filed by the plaintiff. (Ex. I-10, App. 20)

Sixth, the plaintiff did not illegally sell or fail to account for the 1951 turkeys but, rather advised the defendants fully of the sale and borrowed money to pay the 1951 account in full.

A conditional refusal based upon an invalid condition is still just a refusal.

In *Swaner v. Union Mortgage Company, Supra*, the mortgagee refused to release a mortgage even though it was unwilling to advance the money secured by the mortgage. An FHA application fee had been paid and fire insurance had been purchased to cover the proposed home. The mortgagee was insisting upon being paid for those expenses before it would release the mortgage. The court in determining that the mortgagee did not have any authority to insist upon those conditions before the mortgage was released stated as follows:

“Appellant insists that the finding of the lower court that appellant refused to cancel the note and mortgage is erroneous because it specifically offered to cancel said note and mortgage provided respondent reimbursed it for certain expenses. We see no error in the finding. By its very argument appellant admits that its offer to cancel was conditional. An offer to cancel based on a condition is in reality a refusal to cancel together with a counter offer. If appellant had breached its contract, as respondent alleged, it was bound to cancel the note and mortgage and could not require respondent to fulfill further conditions****.

Appellants breach released respondent from the duty and appellant was wrong in refusing to release the mortgage in an attempt to compel payment.”

It is clear from the foregoing that all of the chattel mortgages should have been released. The 1949 balance was in-

cluded in the August, 1950 note and real estate mortgage. The 1950 and 1951 accounts were paid in due course and therefore the mortgages should have been released at that time.

(B) THE FIRST TWO REAL ESTATE MORTGAGES SHOULD HAVE BEEN RELEASED. (Appellants point 4)

From September 14, 1949 to August 15, 1950 three real estate mortgages, secured by the same property were issued by Mr. and Mrs. Nalder to the defendant as follows:

September 4, 1954	\$4,000.00
April 1, 1950	6,721.80
August 15, 1950	6,555.12

The first mortgage was issued to secure the advance of \$2000.00 by the defendant to the plaintiffs. The second mortgage was in connection with the increasing of the primary loan on the home. The last mortgage was an incident of the 1949 deficit. No advances were made by defendant on the second mortgage. On July 27, 1950, the defendant received the last payment for the 1949 crop and determined the deficit (Ex. C-5, App. 4) On July 28, 1950, a promissory note and a letter were sent to the defendant's agent, Mr. Scoville, at Salt Lake City, Utah (Ex. C-6, App. 5) On August 2, 1950, a letter was sent to Mr. Quinney with instructions to prepare a mortgage including the exact amount of the deficit plus a contemplated additional financing of \$3600.00. (Ex Y-1, App. 6) The conversation between Mr. Nalder and Mr. Scoville at the time the mortgage was executed has been pre-

viously set out in this brief. In essence, Mr. Nalder protested signing the mortgage, but upon the assurances of Mr. Scoville that this would take care of the 1949 account, consented to sign the same. (T 24-25) Certainly the normal inference from such a discussion would be that the prior chattel mortgage and the two earlier real estate mortgages would be merged in the final mortgage, being the exact amount of the deficit. Mr. Scoville was not called as a witness to refute this testimony concerning this conversation.

The following cases support the statement that a prior mortgage may be satisfied by the execution of a new mortgage if the parties so intend.

First Nat. Bank of Jaskson v. Reynolds, 143 S.W.2d 721, 283 Ky. 837.

Benton Harbor State Bank v. Bubanovich, 242 N.W. 870, 259 Mich. 150.

Duvall v. Duncan, 111 S.W.2d 89, 341 Mo. 1129.

Brady v. Selberg, 60 P.2d 1104, 154 Or. 477.

Subsequent transactions on the part of the defendant indicate that they were relying solely upon the last real estate mortgage as security for the 1949 deficit. In a letter to Ray, Quinney and Nebeker from W. H. Williams, General Manager of the Omaha Plant of the Kellogg Company, it was stated as follows:

“We are relying entirely on our real estate mortgage and for that reason can at this point release all the chattel mortgages which are unreleased at this

time. We are attaching releases for 1949, 50, and 51 chattel mortgages. * * *

*The only real estate mortgage which is of record now, we feel quite sure, is the last one, as you put it * * * .”* (Ex. R., App. 29)

It is obvious that the defendant was of the opinion that it had released the earlier mortgages and was relying on the last one, as stated in the foregoing letter. In view of Mr. Nalder's testimony, the chronological sequence of the securing of the last mortgage which evidenced and secured the deficit of 1949, and the quotation from the foregoing letter, the trial court was certainly justified in finding that the first two real estate mortgages should have been released.

At no time did the plaintiffs maintain that the August, 1950 mortgage was not properly of record. If the three chattel mortgages and the first two real estate mortgages had been released as maintained by the plaintiffs, there would have been mortgages of record totaling \$15,555.12 consisting of the primary mortgage, which was originally in the sum of \$9,000.00 and the second mortgage to the defendant in the sum of \$6,555.12. A total mortgage indebtedness of \$15,555.12 secured by property valued at \$35,000.00 to \$45,000.00 (Ex. H-1, Q-2) would not have impaired the credit rating of the plaintiffs. In contrast, the record actually showed unreleased chattel and real estate mortgages amounting to \$116,501.92 consisting of three chattel mortgages and three real estate mortgages in favor of the defendant and the primary mortgage on the home in the amount of \$9000.00.

The defendant in Point 4 urged that the court committed error in awarding defendant damages for failure to release the real estate mortgages because the plaintiffs never paid or otherwise discharged the obligations secured by said mortgages. To sustain that proposition the defendant quotes from the mortgages to the effect that the mortgage was given to secure "all other sums due and to become due." The plaintiffs admit that the last real estate mortgage was not satisfied and therefore they had no right to insist upon its discharge. However, they submit that the quotation from the mortgage sustains the proposition that the prior mortgages should have been released since the final mortgage covered all indebtedness, both those due and those to become due. If the mortgage was given as a supplement to the earlier mortgages, there would have been no need for such a provision. In the last mortgage, the recitals clearly specify that:

"the mortgagors are indebted to the Mortgagee in the amount of \$6,555.12 together with interest thereon."

One of the final paragraphs of the mortgage states that the mortgage shall secure said amount and "all other sums due and to become due." This provision of the mortgage supports proposition of the plaintiffs that the mortgage given on August 15, 1950, was intended to consolidate all prior indebtedness into the one obligation secured by the one mortgage and that the others should have been released. Otherwise there would have been no reason for the provision in the mortgage that it secured all indebtedness then due.

The Legislature has specified that when mortgages have been paid or satisfied they should be released. The court found that the 1949 chattel mortgage and the first two real estate mortgages should have been released having been merged into the final real estate mortgage as represented by the agent of defendant. Even the defendants cannot deny that the 1950 and 1951 chattel mortgages were paid in full, and therefore should have been released.

It is submitted that there is not only sufficient competent evidence to support the findings of the court, but rather the evidence compels, in the light of legislature enactments, a determination that the defendant had a duty to release the above mentioned mortgages.

(C) DEMAND WAS DULY MADE FOR RELEASE OF MORTGAGES. (Appellant point 4 & 5)

The two statutes pertaining to the releasing of chattel and real estate mortgages are as follows:

Section 9-1-4 UCA, 1953 (chattel)

“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 actual damages sustained by such neglect or refusal.’

Section 57-3-8 UCA, 1953 (Real Estate)

"If the mortgagee fails to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage after the same has been satisfied; and the judgment of the court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit, and all damages resulting from such failure."

From the foregoing statutory provisions it is clear that a demand must be made for release of a chattel mortgage but that no demand is necessary for release of the real estate mortgage.

In spite of the fact that statute pertaining to real estate mortgages does not require a demand, the defendant in its Point 4 claims the court committed error in awarding damages for failure to release real estate mortgages because no demand was made. To support such a contention the defendant cites 56 ALR, 337. The authorities relied upon for the statement in the annotation are cases from only three jurisdictions, Missouri, North Dakota, and Nebraska. The laws of all three of those states, specifically require a demand or request and further provide for a time in which the demand or request must be satisfied. Clearly such statutes are distinguishable from the statute here in Utah. Two other states, New Mexico and New Hampshire have statutes similar to the one in Utah. Neither of those two jurisdictions have held that a demand or request for release

is a condition precedent to the bringing of an action under the statutes.

Appellant cites the case of *Shibata v. Bear River State Bank*, 205 Pac. 2nd, 251, a Utah case, inferring that a request or demand is necessary by the mortgagor before a penalty can be assessed under section 57-3-8 Utah Code Annotated (1953). In no place in the *Shibata* case does the court state or even imply anything about a demand or request for release. The facts of the case did not in any way give rise to the issue of a demand.

The statute does not provide for a demand. That the legislature could have so provided is clear since such a provision is contained in the section dealing with chattel mortgages. There are no Utah cases nor cases from other jurisdictions having a similar statute which in any way infer or state that a request or demand must first be made before the penalty of the statute may be imposed.

The appellant in its brief states as follows

“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.”

Not only is there a dispute but the record shows sufficient demands commencing in August of 1950.

Previous reference has been made to the discussion in August, 1950, at the time of the execution of the last real estate mortgage. The defendant secured the execution of

that real estate mortgage upon the representation that it would take care of the balance owing for 1949 which was secured by an earlier chattel mortgage and two earlier real estate mortgages.

In 1950, Mr. Nalder, Jr. went to Omaha and paid the 1950 account in full. At the time of that payment he testified the following conversation was had with an agent of the defendant.

A. "Yes, Mrs. Schinker was present, to my knowledge. We discussed our turkey operation and more pointedly, the payment we were making at that time."

Q. "Did she get out the ledger sheets and go through them with you?"

A. "Yes."

Q. "Tell us what was said."

A. "She broke it down, showed me what the balance was, and where they would apply the thousand dollars for the 1949 interest, and which left \$300 and something; she made out a check and returned it to me."

Q. "All right. Was anything else discussed concerning that payment?"

A. "We discussed the releasing of the mortgages."

Q. "What was said? Don't say, 'We discussed it,' say what was said about it. * * * Discussion by Counsel.

A. "She said she would release the mortgage. Mr. Williams was out of town, and she would wait until he got back, but she was sure they would be released. * * *

- A. "She said that Mr. Williams was in Los Angeles and that as soon as he got back why they would release the mortgages and of course I took it for granted that they would be.' (TR. 149 1950)

Corroberation of Mr. Nalder's testimony that the mortgages were discussed is contained in a letter sent from Mrs. Schinker to Mr. Nalder, Jr. dated December 8, 1950, which refers to their meeting and further states:

"We gave you the paid interest note on the 1949 account while you were in the office and the payment included charges to December 14 at 4 per cent. We are now returning the paid notes on your 1950 contract. Undoubtedly some satisfactory arrangements can be made for settling the balance due on your 1949 account, *but we will withhold releasing mortgages until we hear further from Mr. Willams.*" (Ex. E-6, App. 16)

From the foregoing it is clear that releasing of the mortgages was discussed and considered by the defendant on December 8, 1950 when the 1950 contract was paid in full, and that the plaintiff was led to believe the release of the mortgage was imminent.

On the same date that the letter was dictated to Mr. Nalder, Jr. from Mrs. Schinker, wrote a letter to Mr. Williams at Salt Lake City as follows:

"The attached copy of a letter to Mr. William Nalder will be self-explanatory. His 1950 account is all clear and he has paid the interest charges up to December 15 on his 1949 account.

The principal on the 1949 account amounts to \$5,627.39. He was wondering what the interest rate would be since I was not sure whether it would be four, five or eight, I did not commit myself.

We will not have any of the mortgages released, either the chattels or real estate, until we have advice from you.” (Ex. E-5, App. 9)

In December, 1951, Mr. & Mrs. Nalder and Mr. Williams and Mr. Aust met at the Hotel Utah. Plaintiffs were advised that Kellogg would not finance them in 1952. The question of releasing mortgages was apparently discussed since the defendant asserts they advised the plaintiffs that a subordination agreement would be given to permit another company to finance the plaintiffs if the \$352 payment were made. (TR 156, 266)

The plaintiffs made application to Pillsbury, Ralston Purina, General Mills, and Farmer's Grain Coop. for financing. (TR 48, 155) The details of this matter will be discussed under Proximate Cause. As a result of a request from General Mills, Mr. Nalder, Jr. called and wrote to Mr. Aust requesting cooperation from Kellogg (TR 141, Ex. F-16, App. 17)

In the letter it was stated as follows:

“I understand from Dad that you will not be feeding us this year but that you would be willing to let another feed company do so, letting them have first lien to the extent of their services. I have arranged for some poults and a company to feed them providing they get confirmation from you that they will be assured of their money first. I would like to remain in

turkeys if possible and try to clear off our outstanding obligations.

If such a satisfactory arrangement can be worked out with you people, I wish you would send me confirmation so I can turn it over to the feed company as that is the only thing holding it up and my turkeys are scheduled to arrive the first week in March."

Although the letter does not, in the strict technical terms, make a formal demand for a release of prior mortgages, it is clear that the defendant's attention was called to the problem of prior unreleased mortgages.

Under statutes requiring demand the courts have consistently held that the request need not be in any particular form and that no formalities are required. It need only call the mortgagee's attention to the fact that the indebtedness has been paid and the request for satisfaction has been made. In 56 A.L.R. 337 it is stated:

"A demand to satisfy is sufficient which calls to the attention of the mortgagee the fact that the indebtedness secured by the mortgage has been paid and requests, in consideration of that payment, that satisfaction of the mortgage be made, under a statute which requires the discharge 'at the request of the person making satisfaction,' without otherwise prescribing the form or substance of the request. *Barnett v. Bank of Malvern* (1928) - Ark.-4 S.W.2d 17.

"The request under such statute may be either oral or written. *Ibid*.

"And, although the request need not be presented in any particular form, yet the language in its fair and

reasonable meaning must inform the mortgagee as to what is desired. *Jordan v. Mann* (1877) 57 Ala. 595.

"The fact that the mortgagee did not understand the notice as a request to enter satisfaction will not excuse his delinquency, if the reasonable intendment of the request conveyed a desire for satisfaction. *Ibid.*"

In 59 C.J.S. 746 it is stated:

No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested.***

The unreleased chattel mortgages purported to mortgage after acquired property, and therefore there was a question, recognized by Kellogg, of whether the company currently financing would have a first lien on the turkeys. Under such circumstances it was necessary that either the mortgages be released or a subordination agreement would have to be given by the defendant. It is clear that the defendant was aware of the prior unreleased mortgages and their effect upon the plaintiff's ability to secure additional financing. On January 30, 1952, Mr. Aust, the Credit Manager, wrote to H. W. Nalder, Sr. & Jr. acknowledging payment in full on the 1951 account but nevertheless stated as follows:

"We are awaiting the remaining balance for the 1951 turkeys which were sold locally. We understand that Bill traded \$352 worth of turkeys to take care of a gasoline bill, and of course, inasmuch as we had a mortgage on these turkeys, that amount must be remitted to us together with the remaining balance

as discussed with Mr. Williams recently. We would *appreciate having these funds forwarded to us so that we would be able to release the mortgage and return the notes to you. Your cooperation will be greatly appreciated.*" (Ex. F-15, App. 16) (Emphasis added)

On February 18, 1952 the defendant wrote to Mr. Nalder, Jr. in replying to his letter of February 2, advising him that until the \$352 was paid a subordination agreement could not be given. (Ex. F-18, App. 19)

Again on December 22, 1952, the defendant wrote to Mr. Nalder stating as follows:

"As mentioned in our conference, upon receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere inasmuch as our mortgage is of record.*" (Ex. 3, App. 26)

There is no question but what the credit manager of Kellogg knew that the mortgages were still of record and that those mortgages were preventing and prohibiting the plaintiffs from securing financing. Requests by the plaintiffs to the defendant that others be permitted to finance the plaintiffs certainly amounted to a demand for release of the mortgages since they had been paid or had been merged into the last real estate mortgage.

In August, 1950, a conversation was had with reference to merging the 1949 obligations into the last real estate mortgage. In December of 1950, Bill Nalder paid off the 1950 account and had a discussion with an agent of the defendant

pertaining to the release of mortgages. At the end of the 1951 a conversation was had at the Hotel Utah wherein subordination of the Kellogg's claims to that of other companies was discussed. Letters, telegrams and telephone calls were made during the first two months of 1952 requesting permission for other companies to finance the plaintiffs, yet in spite of all this evidence, the defendant contends the record is without dispute, "that no demand was ever made for the release of the chattel mortgages until the end of 1953 or early 1954." It is submitted that repeated demands were made calling to the attention of the Kellogg Company the fact that the mortgages were not released and should have been released

Concerning demands made during January, February and March, 1954, for release of the 1951 chattel mortgage is contained in correspondence between Ralston-Purina Company, and the defendant. On January 28, 1954, Ralston Purina Company wrote to the Kellogg Sales Company inquiring if Kellogg was willing to release the 1951 chattel mortgage. (Ex. J-1, App. 32) Mr. Aust of Kellogg Co. advised them that the mortgages had been released. Ralston on February 5, 1954 wrote the County Recorder for confirmation. The County Recorder replied that the mortgage had not been released as of Feb. 7, 1954. (Ex. J-2, App. 33) Again on March 4th Ralston wrote to Mr. Aust stating that although they had been informed that the mortgages had been released, the public record did not so indicate; (Ex. J-4, App. 34) Mr. Aust replied on March 8 that releases had been prepared on January 21, but since the account was involved in litigation, the releases

had been forwarded to counsel rather than to the recorder. (Ex. J-3, App. 35)

The three chattel mortgages were finally released on March 11, 1954 after this law suit became imminent. (Ex. B 1-3)

It is a well recognized rule of law that the law does not require useless and needless acts. It is obvious from the position of the defendant that demands would be just such an occurrence. It was clear that after February 18, 1952 a request for release of the mortgages or subordination would be futile unless the \$352.00 payment was made. (Ex. F 18, App. 19) In view of the company's policy it is likewise clear that the demand for release of the mortgages would be a futile gesture. Mr. Williams, the plant manager at Omaha, testified that it was a policy of the company to never release a mortgage as long as there was any outstanding indebtedness. He testified as follows:

“Q. The last sentence states, ‘We will not have any of the mortgages released, either the chattels or real estate until we have advice from you.’

A. Yes.

Q. Could you tell us what advice you gave her concerning releasing either the chattel or real estate mortgages?

A. I told her not to release them.

Q. Why?

A. On advice of counsel. We have been following the customary practice where any indebtedness remained, no mortgages were to be released until the account was paid in full.

Q. Even though the amounts on the particular mortgage on any given year were paid in full?

A. Yes. All mortgages were retained until all indebtedness was paid in full." (Tr. 211, 212)

Under such circumstances the plaintiffs were clearly not required to make any further demands for release of mortgages after February, 1952. By statute, no demand is required for a release of real estate mortgages. Numerous demands were made to facilitate the financing of turkeys with other companies. Refusal to release the mortgages was consistently made by conditionally offering to subordinate provided an additional payment of \$352.00 for 1951 was made. Since the 1951 contract had been paid in full the mortgages should have been released.

(D) THE DEFENDANT DID NOT ACT IN GOOD FAITH IN FAILING TO RELEASE THE MORTGAGES.
(Appellant's Point 9)

It is stated by appellant that since Mr. Williams was acting upon advice of counsel the company was therefore acting in good faith. It is also stated that there is no other evidence on this matter except the testimony of Mr. Williams. The record will disclose nine instances where the defendant company was not acting in good faith but rather went out of its way to the detriment of the plaintiffs.

1. At the conversation at Hotel Utah previously referred to, Mrs. Nalder testified the following was stated.

"Well, they had called us and we went down after I had wrote the letter that we had taken those C turkeys

and Mr. Williams was awful put out about those C turkeys. In fact, he was very angry. He said we could have went to the penitentiary, that those turkeys belonged to Kellogg, *and he said that he wasn't going to feed us and he wasn't going to let anyone else feed us.* I said, 'How will we pay Kellogg then?' He said, 'That's just your hard luck. That's up to you.' " (Tr. 178, 43) (Emphasis added)

That threat was carried out as will be shown by the other matters discussed under this sub-paragraph.

2. After Bill Nalder had written his letter of February 2, 1952, requesting authorization for another feed company to finance them, the following inter-office communication was sent by the Credit Manager to the Plant Manager:

"I would like to tell him that we have to have the 352.00 for 1951 turkeys which he traded for the gas bill before we could agree to write such a letter. What do you think? *I doubt if he can pay this but it might work.*" (Ex. F-17, App. 18) (Emphasis added)

3. Thereafter, the defendant continually insisted upon the \$352.00 payment even though their own letters and ledger sheet acknowledged that they had been paid in full for 1951. (Ex. D-4, Ex. F-15, a-16, Ex. F 22, 23, 24, 25, Ex. E 3, App. 24-28)

4. When the defendant was not advised by the plaintiffs as to what companies were considering financing them, they wrote the following officious letters to Farmers Grain Company and apparently sent a copy to General Mills. (T 241) The letter is dated February 26, 1952.

"Gentlemen:

We recently had a request from Mr. H. William Nalder, Jr. to subordinate a lien which we have on his 1951 flock of turkeys. We have written to Mr. Nalder and notified him that upon receipt of his remittance of \$352.00 we would agree to furnish the subordination agreement to cover the remaining balance for prior years, but we must have the 1951 account cleaned up first. *We also asked Mr. Nalder the name of the feed company that intended to finance him for this season but as yet we have not received a reply to our letter.* (Emphasis added)

"We understand that you folks are contemplating financing his 1952 turkey program and we wish to notify you at this time that we still have a lien on his turkeys. If there should be any further questions on this we would appreciate having you contact us." (Ex. G-2, App. 20)

From the foregoing letter it is obvious that they did not know the name of the feed company intending to finance the plaintiffs. Also, it is obvious that the statement to the effect that defendant still had a lien on the 1951 flock of turkeys for failure to make a payment of \$352.00 on the 1951 account, would be in direct conflict with the application of the plaintiffs, since they represented that the 1951 season had been successful and the amount paid in full. The effect of such a letter sent to a business contemplating granting credit would only result in the disapproval of the application. Certainly the defendant went out of its way in writing the letter knowing that the result would be to prevent financing by other companies.

5. The defendants openly admitted that they insisted upon double liability when additional financing was granted. The first real estate mortgage was for \$4,000.00 even though only \$2,000 was advanced. In addition to testifying as to such a policy, Mr. Williams wrote to Mr. Quinney, August 2, 1950, and stated as follows:

"It has been our custom where additional finance was required to require security at the rate of two for one. In other words \$2.00 worth of security for each \$1.00 furnished on additional finance. * *

"We may be entirely off the beam in drawing a mortgage for an amount larger than we expect the account to become, but we feel that it is some protection to have a recorded amount in that figure, and if by some extreme it was necessary to advance more than was originally requested, there would not have been an opportunity for the grower to have placed another mortgage which would come in between the mortgage we might file now and another one some 60 or 90 days later. You might advise us as to this procedure. We understand that in most states the mortgage has to be backed up by notes but of course we would never attempt to collect any more than the account actually amounted to regardless of the size of the mortgage." (Ex. Y-1, 2, App. 6) (Emphasis added)

6. Bill Nalder testified that at the time the 1950 payment was made he was advised the mortgages would be released after the return of Mr. Williams. (Tr. 149, 150) Mrs. Schinker of Kellogg Company wrote to Mr. Nalder confirming that the mortgages would probably be released after consultation with Mr. Williams. (Ex. E-6, App. 10) However, in an interoffice letter it was clearly stated that the mortgages

would not be released until ordered by Mr. Williams. (Ex. 5, App. 9) Mr. Williams ordered that the mortgages not be released since it was the policy of the company never to release a mortgage as long as there was an unpaid balance. This policy was never communicated to the plaintiffs, rather, they were lead to believe that release of the mortgages would be taken care of in due course.

7. There is no question but that the defendant knew that as long as the mortgages were unreleased the plaintiff would not be able to secure financing. Mention of this fact was made in their letter of December 22, 1952 (Ex. 3, App. 26). Mr. Aust, the Credit Manager, testified that he knew it was a policy of the large feed companies not to finance a grower as long as there was a prior unreleased mortgage of another feed company. (Tr. 276, 277) Mr. Williams testified that there was some question in Utah as to the effect of the provision of the mortgage purporting to mortgage after acquired property but nevertheless refused to release the mortgage although they did not rely on them as against future turkeys, since they did not want to be a guinea pig in a test case. (Tr. 216) Because of this knowledge the defendants were completely surprised when they found out that the plaintiffs were still raising turkeys after 1952. Mrs. Nalder testified as follows:

“Q Was anything said about your raising turkeys during 1952?”

A. Well, yes, he thought we hadn't been raising, and when I told him we had he said 'My God, I don't know who is crazy enough to feed you.' ” (Tr. 180, 117)

8. The correspondence between Ralston Purina Company and the defendant during the first months of 1954 pertaining to a request that the 1951 mortgage be released has been referred herein. The dilatory and irresponsible lack of concern on the part of the defendant certainly did not show good faith. (See Ex. J-I-4, App. 32 to 35)

9. Upon receiving a letter from Ralston Purina Company, Exhibit J-1, the Credit Manager for the defendant called a representative of Ralston Purina at St. Louis. The letter merely asked if the defendant was willing to release the mortgage. Nevertheless, the agent of the defendant proceeded to tell the Credit Manager for Ralston Purina that he had received numerous promises from the plaintiffs which had not been kept, that they had not accounted for turkeys in 1950, and that the defendant was not willing to finance the plaintiffs. (T 195, 203-4) The Credit Manager first denied that he had stated that Mrs. Nalder was a trouble maker but after examining a telephone memorandum of the conversation, stated as follows:

“A. I do not recall saying that they were trouble makers.” (Tr. 194, 203, 204)

Not only did the defendant refuse to release the mortgages, they threatened to prevent the plaintiffs from obtaining financing elsewhere, flippantly insisted that \$352.00 be paid before a subordination agreement would be granted since “it might work,” wrote officious letters misrepresenting the facts to other feed companies, lightly demanded double security for additional financing, lead the plaintiff to believe the mort-

gages would be released while the company policy was completely opposite; exercised dilatory practices in releasing the mortgages even after suit was threatened and, finally, went out of their way to advise the credit men of another company that the plaintiffs could not keep their promises; had failed to account for turkeys; that they were trouble makers; and that defendant would not finance them. Rather than showing good faith, the conduct of the defendant was willful, wrongful and and even malicious to an extent sufficient to sustain punitive damages regardless of the statute specifying double damages for failure to release the mortgages.

In *Malarkey v. O'Leary* 256 Pac. 521 (Oregon) the court said that where the mortgagee refused to release the mortgage after it had been paid because the mortgagor owed another debt to him, that this was no defense to the action even though the mortgagee acted in good faith. The court stated:

"He (the defendant) also claims that the answer is sufficient, because it shows that the defendant was acting in good faith, and under an honest belief that he was not required to satisfy the mortgage until payment of the sum mentioned in the answer. *But his good faith is no defense.* Although the statute is penal in its character, the good faith of the mortgagee in refusing to cancel a mortgage of record will constitute no defense to an action brought to recover the penalty provided for in the statute, after the terms and conditions of the mortgage have been admittedly complied with." (Emphasis added)

The defendant in this case refused to release the mortgages in an attempt to coerce the plaintiff into paying an addi-

tional payment. According to the Oregon case such conduct cannot constitute a good faith defense.

In *Swaner v. Union Mortgage Company*, *supra* the court discussed the question of good faith when the refusal to release the mortgage is made to coerce an additional payment. The court states as follows:

"The evidence in the record indicates that appellant refused to advance money under the contract in an attempt to force payment on another contract. And appellant offered to release the mortgage only if reimbursed for its expenditures, although by its own act it had breached the contract and made it impossible for respondent to proceed. Appellant failed to establish that it acted in 'good faith' in refusing to release the mortgage.

"A party who contracts to lend money to another to build a house, taking a mortgage thereon as security, observes the other party spend money and time and perform as agreed, it refuses for reasons of coercion connected with another matter to advance money as agreed, can hardly insist that he acted in entire good faith and should therefore be protected from payment of certain damages."

The defendant asserts that the penal provisions of the statute should not be applied because the defendant was acting in good faith. To support this contention the defendant cites the case of *Shibata v. Bear River Bank*, *supra*. It is true the Utah court adopted the good faith rule in that case, but it was based upon the fact the mortgagee was acting in good faith "because he believes there has been no full satisfaction," or because he, "honestly thinks that it had a valid and

subsisting mortgage against appellant which had not been satisfied." In this case the defendant cannot claim that it thought it had valid and subsisting mortgages, since its own documents showed payment in full and since the defendant refused to release the mortgages because it was the policy of the company to never release any mortgages so long as there was an unpaid balance. There could be no good faith assertion that the defendant thought the 1950 and 1951 chattel mortgages were valid and subsisting. Kellogg's own ledger sheets and correspondence show that those obligations had been paid in full. The distinction that the good faith must be a belief that there had been no full satisfaction is supported by the numerous cases cited in the annotation in 56 ALR 345. The good faith necessary is a good faith belief in the proposition that the debt secured by the mortgage has not been paid. It would be easy to circumvent legislative intent by merely claiming good faith because counsel advised defendants to follow a given course of conduct. The statute clearly specified what should be done when a mortgage is satisfied. Defendant cannot escape liability by claiming that they were advised to ignore the provisions of the statute. Such is not the good faith intent necessary to escape the provisions of the statute.

(E) AGENTS OF THE DEFENDANT HAD EITHER ACTUAL OR APPARENT AUTHORITY TO REPRESENT THE DEFENDANTS. (Appellant's Point 10)

Previous reference has been made to the conversations had with Mr. Scoville, Mrs. Schinker and the Credit Manager, Mr. Aust. Mr. Scoville was directed to take the notes and

mortgages and have them executed by the Nalders after the deficit in 1949 was established. Letters Exhibits C-5, 6 and 7 Appendix 4, 5 and 8 are directives from the defendant to Mr. Scoville concerning this matter. In a letter of August 2, 1950 Mr. Williams, the Plant Manager, advised Mr. Quinney to contact Mr. Scoville for the purpose of having the mortgage signed. (Ex Y 1-2, App. 6)

Mrs. Schinker had authority to receive the money so it would appear that she had some authority to discuss the releasing of the mortgages upon payment in full. Mr. Aust, in his letters stated that upon payment of \$352.00 the mortgages would be released. (Ex. F-15, App. 16, and Ex. 3, App. 26) Although the employees freely discussed the matter of releasing the mortgages, it now appears from the testimony of Mr. Williams that he was the only one with authority to release mortgages. If the agents did not have actual authority, certainly they had apparent authority so far as the plaintiffs were concerned. Representatives of the defendant who requested execution of the mortgagees received the money paying the contract in full; discussed and insisted upon payment of additional amounts before mortgages would be released, must have had some authority.

According to 59 C.J.S. 756, a demand may be served on an agent or clerk of the mortgagee, in which case it will be sufficient if such person had authority to receive it, *or if knowledge of it is brought home to the mortgagee.* (Emphasis added).

In *Scoville v. Kellogg*, 1 Utah 2d 19, 261 P. 2d 933, the defendant attempted to disclaim liability on a bonus arrange-

ment with its salesmen on the ground that its representative did not have authority to bind the defendant. The court held it was error to strike the representative's testimony since he had executed a written bonus plan and had sent correspondence concerning bonus payments.

In the present case the plaintiffs were dealing with representatives who were signing applications, receipts for payment, and making written demand for payments in which they stated that upon receiving said payments mortgages would be released.

These representatives had sufficient authority to receive and did receive and transmit a demand for the release of the mortgages to an agent of the defendant who did have authority. Mr. Williams was advised of Mr. Nalder, Jr.'s letter requesting authority for financing by another company. Mr. Williams was advised by Mrs. Schinker that the 1950 account had been paid in full and that mortgages would not be released until so advised by him. When asked what advice was given to Mrs. Schinker, Mr. Williams said, "Yes, I told her not to release them." (T 212). It was admitted that Mr. Williams had authority to release the mortgages. Even after an agent of the defendant with authority received the information, it appears that there was no intention of releasing the mortgages since it was stated emphatically that it was the policy of the company not to release any mortgages so long as there was an unpaid balance. (T 212) Even if the agents did not have authority to actually release the mortgages, they had authority to discuss

the matter with the plaintiffs and to communicate those matters to persons with authority. As far as the plaintiffs were concerned, they were dealing with people acting within the scope of their employment concerning matters which the agents were directed to discuss with the plaintiffs and therefore, they were justified in assuming that the agents had actual authority even though it amounted to only apparent authority which is equally binding upon the principal.

POINT 2 — PROXIMATE CAUSE

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S FAILURE TO RELEASE THE MORTGAGES WAS THE PROXIMATE CAUSE OF PLAINTIFFS' DAMAGE. (Appellant's Point 8)

(A) PROXIMATE CAUSE IN GENERAL.

1. At the end of 1951 the defendant had on record the following mortgages:

Chattel Mortgages

<i>Date</i>	<i>Amount</i>
May 16, 1949	\$ 24,000.00
March 13, 1950	23,300.00
April 4, 1951	42,825.00

Real Estate Mortgages

February 14, 1949	4,000.00
April 1, 1950	6,721.80
August 15, 1950	6,555.12
Total	\$107,401.92

The effect upon a person's credit rating in having a mortgage of \$6,555.12 of record as contrasted with mortgages of \$107,401.92 is obvious. Recognizing the cautiousness of lending institutions, it would appear that the Court could take judicial notice that unreleased mortgages of \$107,401.92 would be sufficient to so impair one's credit rating, so as to prevent the securing of credit for future financing.

2. The plaintiffs made application to Ralston Purina, General Mills, Sperry-Globe Mills, and to Farmer's Grain Coop, being most, if not all, of the feed companies operating in the Ogden area. Even though the salesman and field representatives in each case recommended the approval of the application, in all cases the applications were refused when sent in to the Credit Department.

3. On December 7, 1951, an application was made to General Mills for turkey financing. The salesman, in writing up his report, to the company, recommended that the application be granted. On December 17, 1951, the Credit Manager dictated a memorandum to the salesman stating the Nalders would have to have Kellogg release the mortgages or secure a subordination agreement. (Ex. I-4)

Exhibit I-5 shows that General Mills wrote to the County Recorder of Davis County and in reply was advised of the three unreleased chattel mortgages as specified above. In exhibit I-6 an interoffice correspondence between the Supervising Credit Manager at San Francisco to the Credit Manager at Ogden, it is stated as follows

"We certainly have mingled feelings about this one *and while we have finally concluded to approve it*, we ask that you be satisfied on one or two points before actually proceeding to notify the grower. * * *

It would be necessary that Kellogg Sales Company release the mortgage on the turkeys which are of record — or they must be clearly subordinated in form of subordination acceptable to us, properly executed by Kellogg, and that subordination must be filed or recorded before we could proceed." (Emphasis added)

Other matters were mentioned in the letter which would have to be discussed and cleared up with the applicant.

Exhibit I-8 is a memorandum concerning a telephone conversation between the Credit Manager at Ogden and the Applicant. In part it stated as follows:

"By telephone today, Mr. Nalder gave us the answer to the points brought out in Mr. J. S. Hall's letter of 2-6-2 on the subject * * * *Nalder still trying to get subordination from Kellogg and understands we would not finance without it.* (Emphasis added)

Mr. Nalder, Jr. testified that he was advised that the application would be approved if arrangements were made with Kellogg. (T. 159) It is clear from the foregoing that General Mills was willing to finance plaintiffs provided the chattel mortgages were released or if it would subordinate its position to that of General Mills.

4. After applications had been filed for the years 1952 and 1953 and when the plaintiffs were approached to file an application in 1954 they stated that it wouldn't do any good

as they had been turned down before. Upon further urging by the salesman, Mrs. Nalder stated to the salesman for Ralston Purina Company as follows:

A. "Well, when the man came the last time for an application—"

Q. "What man?"

A. Vern Booth of this Purina Company. I said, "There is no use." I said, 'We have been turned down and why do you want us to put in an application?' And he said, 'Well, this will go over.' I said, 'Well, on one condition will we put in that application. If its turned down, you tell us why,' and he promised to do it."

Q. "All right, was the application turned down?"

A. "It was turned down."

Q. "Were you advised why?"

A. "Well, I went over to Mr. Rasmussen's. I was over there one day and I said, "Don't you remember Vernon Boothe saying if it were turned down again he would tell me why, and Mr. Rasmussen said, "Well, he can't. You don't want him to lose his job, and then he himself—"

Q. (Interposing) "Who is he?"

A. "Mr. Rasmussen, sitting right here. He let me know those mortgages were on there. I came down and looked at that record, and I couldn't believe it. Mrs. Eldredge spent two days going over it. I said, 'Isn't there any place where there is a release for these?' and she went over her books, she went over everything and she said, 'There is no releases,' and then, so Mr. Quinney had it, then instead of Mr. Bowen, and when I went to his

office one time, he wanted to see me. You see, they were going to start suit to foreclose the home. I wanted to know what they were closing on. That they had \$106,173.00 of mortgages against our place, and I asked him what he was suing on and he said 'All we are asking is \$51 or \$58.' He said, 'Pay that and it will be clear.' I said, 'Where is the things that you have,' and he wouldn't talk to me. He just said, 'Pay that,' and then I went three trips down there and the last time I asked him again why they hadn't released those mortgages and he still hadn't released them. He still just ignored it and wanted the money for this, so I said, 'Well, what are you suing on, Mr. Quinney,' and he said when we serve the summons you will know, so I came right over to your office and told you about the whole thing, and that is—and then they were released." (TR 180-181)

5. Mr. Clair Rasmussen, a feed dealer at Ogden representing Ralston-Purina Company further testified that after consultation with the Credit Department of his company he advised the Nalders that they had unreleased mortgages which would have to be cleared from the records at the County Recorder's office. (T. 163, 164)

6. It is clear that the representative of the defendants knew that the unreleased mortgages would prevent the securing of additional financing. Mr. Williams, the plant manager, testified after having had his attention called to the fact that he had stated they were only relying on the real estate mortgage and after being asked if any attempt had been made to claim a lien on the turkeys raised during 1952, 1953 and 1954 stated as follows:

Q. "You were not relying on your chattel mortgages on any of these turkeys in these other years, were you?"

A. "That point has never been cleared in the Utah Court where after acquired property can be attached under a mortgage similar to what we use, and we don't feel that it would be — that we should be the guinea pig, and therefore we made no serious attempt to attach the turkeys." (T. 216)

Mr. Williams revealed his surprise in learning that the Nalders had raised turkeys in 1952 in spite of the unreleased mortgages when he stated:

"I would like to know who is crazy enough to feed you this year." (T. 117)

6. Mr. Aust, the Credit Manager, for Kellogg knew that financing could not be secured as long as the mortgages were of record. In a letter dated December 22, 1952, to Mr. Nalder, he stated in part as follows:

"As mentioned in our conference, upon receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere inasmuch as our mortgage is still of record.*" (Ex. 3, App. 26) (Emphasis added)

Mr. Aust testified that he knew no other large feed company would finance the plaintiffs as long as the mortgages were of record. His testimony is as follows:

Q. "All right. One further question. It has been testified by Mr. Williams, it's not too clearly es-

tablished, what effect the clause in the mortgage has with reference to after-acquired property being subject to that lien in the State of Utah. Did you hear him say something to that effect or do you understand what I mean?

A. "I believe I do. That after-acquired property the attempt to mortgage property which would be acquired later."

Q. "Now when you see that in credit terms are you willing to take the chance on litigating that issue or do you insist that all mortgages from other companies are released before you go ahead? Do you understand my question?"

A. "Well, partially."

Q. "I'll put it this way: If John Doe came and applied to your company for credit and showed three unreleased chattel mortgages of about \$18,000 (sic), (\$88,000) and they said to you, 'We have paid them off, we have paid them, or we owe them \$5,000 on 1949', would you finance them or would you insist on a subrogation?" Mr. Bowman "you mean subordination."

A. "I would insist on a subordination. I would not finance them."

Q. "You wouldn't take the chance then that these earlier mortgages might have a lien on your property?"

A. "Well, there is always the case of reviewing it further, not just from the mortgages on record, as I say the mortgages of record may total \$30,000, they probably owe \$4,000; that is the governing factor, I would say."

Q. "All right, if they owed \$4,000 would you go ahead without a subordination agreement?"

A. "No. I wouldn't."

Q. "Is that the general policy as you understand it of most of the other feed companies?"

A. "Yes."

Q. "What feed company?"

A. "Orchard Daniel Midland Company."

Q. "All of them require subordination"

A. "I wouldn't say all of them I know a good many that do."

Q. "Most all of them?"

A. "Well, —"

Q. (interposing) "Would you say the larger ones, General Mills, Purina?"

A. "I would say the large ones."

Q. "Then you knew if these chattel mortgages were not released that these people couldn't get financing unless they came to you and asked for subordination. Isn't that right?"

A. "I don't know of any company that wouldn't feel that way, that they would insist on it." (T. 276 and 277)

7. Counsel for the defendant recognized that as long as the mortgages were of record additional financing could not be secured. After a discussion concerning subordination, Mr. Bowen stated as follows:

Q. "Yes, but as long as our mortgages were of record they couldn't get finances any place else."

A. That's it.

Mr. Bushnell, and that's our point.

Q. "That's all right. That's one reason, I should say, that wasn't the only reason." (T.189)

The defendant cites the dates that the turkeys were hatched and delivered as indicating there was sufficient time in 1954 after the chattel mortgages were released for the securing of financing for that year. The drawing of an inference from the date of delivery as to whether there is sufficient time to secure financing is not realistic. The financing must be arranged for a considerable period of time before the turkeys are delivered. After that is determined, then the turkeys may be ordered from the hatchery, the farm readied for the number to be received and subsequently they are delivered.

The application to General Mills in 1951 was dated December 7, 1951. (Ex. I-1) Credit reports, communications between the local credit office and the credit office at San Francisco and further transactions with the plaintiffs continued from that date until February 12, 1952. (Ex. I 1 - I 9) Even at that date additional information was being requested. The application to Farmer's Grain Cooperative was filed on February 3, 1952. One of the chattel mortgages to Kellogg was signed on the 27th day of January, 1950. Financing from large feed companies must be commenced at the first of the year if the same is to be secured in time to make an order for turkeys and have them received from the hatchery.

Attempts were made to secure financing in 1952, 1953 and 1954 with the large feed companies. It was only after such financing could not be secured, that the Ogden feed dealer co-signed at a local bank and made arrangements with the

plaintiffs for the securing of turkeys for those years. Consequently the delivery date for those years cannot be relied upon as establishing the time when financing could be secured from the large feed mills. Immediate bank financing was possible because an established feed dealer with a credit rating at the bank, co-signed, and the number of turkeys being financed was relatively small. Processing of an application for a large number of turkeys with a feed company having main offices other than in this area requires a considerable period of time before that financing can be arranged.

The defendant attempts to show that in addition to the mortgages held by the defendant, the plaintiffs were so heavily mortgaged that they probably couldn't secure financing anyway. Such is not the case. The total mortgage indebtedness other than the mortgage to the defendant amounted to \$14,000.00 secured by ample security. The mortgage on the home and brooded house was raised from \$3,500.00 to \$9,000.00 to facilitate the raising of turkeys. The home and brooder house were valued between \$35,000 and \$45,000, being more than ample security. (Ex. H-1 & Q-2)

The defendant states that Bill Nalder, Jr. had issued a real estate in the sum of \$2,500 and a chattel mortgage of \$2,500. The chattel mortgage was secured by equipment, machinery, trucks, etc. (Ex. I) Mr. Nalder, Jr. testified he had purchased a tractor and combine for the purpose of facilitating the raising of feed for turkeys. (Tr. 146) Such equipment would be more than ample security for this mortgage.

The defendant cites Exhibit I in support of the proposition that the plaintiff, Nalder, Jr., was indebted in the sum of \$7,500.00, and then states that the plaintiffs owed obliga-

tions of \$16,500.00 after eliminating defendant's mortgage. An examination of the Exhibits referred to will show that \$2,500.00 of that indebtedness was shown to be part of the indebtedness to Kellogg, and therefore, cannot be added separately from the amounts owed to Kellogg as the defendant had done. It is next stated that it may be fairly assumed that the mortgages were likewise recorded. There is no evidence in the record upon which such an assumption can be made. Title search was made by the County Recorder and supplied to the credit institutions. (Ex. I-5) At no place does it refer to a real estate mortgage of \$2,500.00 or a chattel mortgage on equipment for \$2,500.00.

Notwithstanding argument of the parties, the fact is simply that the application, Exhibit I, which was relied upon by the defendant as showing the poor financial condition of the plaintiffs was the application to General Mills; and General Mills approved the application if a subordination agreement could be secured from Kellogg. (Ex. I-6, T. 159) Furthermore, the financial condition of the plaintiffs was substantially the same as it had been during the three years that the Kellogg Company had been willing to finance them.

A misconception is possible as a result of the following statement in defendant's statement of facts

"Between April 1950 and July 1950 this crop was sold with the resulting loss of \$6,000.00. Out of the original 6,000 poults, with which the Nalders began operation, 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)"

All of the references except one pertain to the \$6,000.00 loss about which there is no dispute. The reasons for the loss

has been mentioned in the argument. The only reference to turkey losses is Tr. 81. In reading the testimony there, it will disclose that turkeys were damaged during shipment and were left conditionally with the plaintiffs recognizing that they would probably not live. The turkeys supposedly matured was the number processed and does not take into consideration the number of turkeys retained by the grower and sold locally.

Proximate cause is established from the foregoing facts that all of the salesmen recommended approval; that all of the applications were turned down then sent to the credit department; that tentative approval was given by General Mills subject to release or subordination agreement; that the feed dealer for Ralston-Purina told the plaintiffs the reason for the disapproval of their application was the unreleased mortgages; and the recognition on the part of both Williams and Aust and counsel for the defendants, that as long as the mortgages were unreleased additional financing could not be secured.

As was stated in *Malarkey v. O'Leary*, Pac. 521, 34 Or. 493:

"An unsatisfied mortgage of record is constructive notice of the existence of a debt, and necessarily tends to injuriously affect the pecuniary standing and credit of the mortgagor. When it is paid, the statute has provided for its satisfaction on the record, so that the fact of payment may be known to the world. The reasonableness of the requirement is apparent. To insure its observance, the mortgagee is required to acknowledge the satisfaction of a mortgage, when paid, in as public a manner as the mortgagor had acknowledged its existence, or suffer the statutory penalty. And it is no defense that the mortgagor may be otherwise indebted to the mortgagee."

Without relying on all of the other evidence it would appear to be sufficient to sustain the courts finding of proximate cause that the two officers of the defendant company acknowledged that the unreleased mortgages would prevent subsequent financing by other feed companies. These admissions in addition to all the other evidence compels an affirmance of the trial court.

B. DAMAGES NEED NOT BE APPORTIONED BETWEEN THOSE CAUSED BY DEFENDANT'S FAILURE TO RELEASE REAL ESTATE MORTGAGES AND THOSE CAUSED BY DEFENDANT'S FAILURE TO RELEASE CHATTEL MORTGAGES.
(Appellant's point 3 and 8)

The court found that the damage suffered by the plaintiffs was sustained as a result of the defendant failing to release "satisfied mortgages." That would include all the chattel mortgages and the first two real estate mortgages. To escape the double damage provisions of the statute relating to real estate mortgages, the defendant asserts on page 16 of the brief as follows:

"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."

A similar assertion is made on page 18.

The law does not require the plaintiffs to apportion the damage between concurrent causes. The court having found

that the failure to release both real and chattel mortgages proximately caused the plaintiffs' damage, it then becomes incumbent upon the defendant to show that one cause or the other did not contribute to the damage. No such attempt was made by the defendant to show that only the chattel mortgages proximately contributed to the damages suffered by plaintiffs.

The most familiar example of this doctrine arises in cases of automobile collisions. If a plaintiff can show that his damage was caused by the negligence of A and B, he is entitled to recover and is not required to show to what extent the damage was caused by A or B.

General citations of authority would appear to be sufficient on this point. In *American Jurisprudence, Negligence*, Section 63, 64, it is stated as follows:

"Clearly, two acts committed by the defendants, are by a person for whose conduct he is responsible, which combine to cause an injury to the plaintiff may each constitute a proximate cause of the injury. * * * (38 Am. Jur. 716)

"The rule is that when an injury occurs through the concurrent negligence of two persons, and it would not have happened in the absence of the negligence of either persons, the negligence of each of the wrongdoers will be deemed a proximate cause of the injury, although they may have acted independently of one another; and both are answerable jointly or severally to the same extent as though the injury were caused by his negligence alone, without reference to which one was guilty of the last act of negligence." (38 Am. Jur. 717, 718)

"However, there is authority for the rule that where separate and independent acts of negligence

of two persons are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each person contributed to the injury; either wrongdoer is responsible for the injury; and this, even though the act alone might not have caused the entire injury." (38 Am. Jur. 719)

If the law holds two persons acting independently, liable for damage concurrently caused, there can be no question but what the defendant should be held liable in this case since both torts were committed by the defendant company. The defendant cannot now confuse the issue by claiming that the burden is upon the plaintiff to show what amount of damages was caused by failure to release the real estate mortgages. The court found upon competent evidence that the failure to release all of the satisfied mortgages proximately contributed to the plaintiffs' damage. The defendant at the trial made no attempt to show that the damages were caused solely by its failure to release the chattle mortgages. The law does not now require the plaintiffs to apportion the damages as between two concurrent causes.

POINT 3 — DAMAGES

THE LAW AND EVIDENCE SUSTAIN THE COURTS

DETERMINATION OF DAMAGES.

(A) Actual damage (Appellant's point 6)

(B) Punitive damages (Appellant's point 3)

(A) Actual Damages

There is no serious dispute as to the rules of law cited by the appellant in its brief, wherein it is stated that dam-

ages for loss of profits must be proven with reasonable certainty, or that the damages must be based upon some reasonable formula. The plaintiff does not agree that damages for loss of profits must always be established by proof of past experience. Usually this is the type of proof resorted to because there is nothing better. However, in this case, the plaintiff actually raised turkeys during the three years for which damages are claimed. These damages were based upon actual experience rather than resorting to something less definite such as experiences prior to the years for which loss of profits are claimed.

If the damage is the certain result of the wrong of the defendants, and the damages can be shown with any reasonable certainty, the wrongdoer will not be heard to complain. In the leading case of *Story Parchment Company vs. Patterson Parchment Paper Company* 282 US 555, 51 Sup. Ct. 248, 75 L. ed. 544, it is stated:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and a measure of proof necessary to enable the jury to fix the amount. The Rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount * * * *

Where the tort itself is of such a nature, as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from mak-

ing any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess it will be enough if the evidence shows the extent of the damages, as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they can not be measured with the exactness and precision that would be possible if the case, which he alone, is responsigle for making, were otherwise. (Citation of authorities) As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoers instead upon the injured party."

The plaintiffs assert there is no need to rely upon the foregoing rule since the evidence of damage is shown with reasonable certainty and is not based upon speculation or conjecture.

1. The evidence reasonably shows that the plaintiffs had the facilities to raise in excess of 14,000 turkeys per year. Mr. Nalder, Sr. had adequate facilities for raising 6,000 turkeys near his home. It was clearly established his brooder house had a capacity to brood 6,000 poults. For the three years that the defendant financed the plaintiffs, the plaintiffs raised 5,000 the first year and 6,000 each of the last two years. (Ex. A-1, 2, Ex. D1-5 App. 1 and 2) In fact the sales representative of the defendant recommended that two flocks of 6,000 each be brooded by Mr. Nalder, Sr. and be raised on his farm. (Ex. E-1, App. 1)

In addition to the facilities of Mr. Nalder, Sr., Mr. Nalder, Jr., had leased a 900-acre ranch east of Bountiful Utah from Deon Toone and had made arrangements for the use of the brooder house of Seth Oberg which had a capacity to brood

11,000 poult. (T-139) There was no evidence submitted by the defendant in any way refuting the foregoing evidence.

2. The evidence reasonably sustained the court's findings that the plaintiffs intended to and would have raised 14,000 turkeys.

Mr. Nalder, Jr. testified that he intended to raise 9,000 turkeys. (T-143) An application for financing 9,000 turkeys was made by him to Farmer's Grain Coop. (Ex. G-1). In fact, 9,000 turkeys were ordered and delivery tendered. Since financing had not been approved, at the time of delivery, the turkeys were not placed in the rented brooder house, but rather 6,000 were placed in the brooder house of Mr. Nalder, Sr. and the additional 3,000 were turned over to another grower. (T-146, 51, 52) Mr. Nalder, Sr. was to receive his turkeys at a later date. (T-51) When financing could not be secured, the 6,000 turkeys actually brooded were taken from him (T-52).

In addition to the 9,000 ordered by Mr. Nalder, Jr. Mr. Nalder, Sr. made application to raise 5,000 turkeys on his ranch where 6,000 turkeys had been raised for each of the past two years. (Ex. 2)

Since an application, order, and delivery of 9,000 turkeys had been made for the ranch east of Bountiful, and since an application had been made for 5,000 turkeys to be raised on the home ranch, the court was justified in finding the plaintiffs intended to and had the facilities to raise 14,000 turkeys. The defendant offered no testimony in any way refuting the foregoing evidence.

3. In a normal loss of profits case, involving the raising of turkeys, there would be considerable uncertainty as to

the price which would have been paid for the turkeys, the price paid for feed, the number of turkeys which might have died, and the price at which the turkeys would have been sold. However, in this case, such uncertainty was not present since the plaintiff actually raised some turkeys in each of the years for which a loss is claimed. Thus, the purchase price, the cost of the feed, the mortality loss, and sales price was established without any speculation as to whether the plaintiffs would have bought or sold when the market prices were up or down.

When the plaintiffs could not secure financing from the feed companies, Mr. Rasmussen, a feed dealer in Ogden, co-signed with the plaintiff at the First Security Bank enabling him to raise a small herd of turkeys each year. The plaintiffs raised 1018 turkeys in 1952, 1430 turkeys in 1953, and 2200 turkeys in 1954. These amounts were taken into consideration in computing damages.

Mr. Nalder testified as to the amount paid for the turkeys, feed, electricity, and a watchman. The amount for processing the turkeys at the end of the year is shown by the manifest of the processing plant. (Ex. L) These amounts were summarized on Exhibit M., (App. 36) In addition to the amounts actually received for the turkeys, as shown by Exhibit L, Mr. Nalder testified that he sold 51 turkeys from his home and the amount therefore is also shown on Exhibit M. From these facts the profit per bird was computed and the mortality rate established.

In 1952, the plaintiffs sold 986 turkeys and would have lost 414 turkeys out of 14,000 based upon the established mortality rate of 3.1 per cent. These amounts were deducted

from 14,000 leaving 12,300 turkeys to which the average profit of \$1.86 per turkey was applied. (Ex. M, App. 36)

For the years 1953 and 1954 the number of turkeys and the amount paid therefor was established by Exhibit W, a ledger sheet of the Lee Brown Processing Plant. Exhibit U, Exhibit T and U-1 and 2 are copies of the ledger sheets of Rassmussen Feed Company which shows the amount paid for feed during 1953 and 1954. The 1953 turkeys were sold live weight from the field and therefore there was no processing charge. The number sold and the amount received is shown on Exhibit X taken from the records of the purchaser. During the time of trial in October, 1954, the turkeys then being raised were appraised by the Lee Brown Company and the Company offered to purchase the same at the price of 23½c per pound for Toms and 32c per pound for Hens, live weight out of the field as the turkeys then existed. (Ex. V) This was the price actually used even though the turkeys would have weighed more at the time of the Thanksgiving market. These amounts were again summarized in Exhibit N for 1953 and Exhibit O for 1954. In each case the amounts shown on the summarization were supported by other evidence in the record — either the testimony of Mr. Nalder or the ledger sheets from the seller or the purchaser of the turkeys, and from the records of the feed company.

The foregoing evidence clearly established initial cost, maintenance and feeding expenses, sales price and expenses, and mortality rate. These amounts were then extended to show the actual loss of the plaintiffs by being denied the right to raise the number of turkeys for which they had ample facilities. Such evidence certainly presented to the court a reasonable

basis for determining the loss of the plaintiffs. It presented a much stronger case than one attempting to project loss of profits based upon past experience. Rather it gave an index under actual conditions for each of the years and eliminated any speculation as to whether the plaintiffs would have sold their turkeys when the market price was higher and eliminated any speculation as to how many turkeys the plaintiffs would have lost during the course of each year. The defendant introduced no evidence whatsoever refuting the foregoing matters pertaining to damages.

4. The plaintiffs introduced and the court deducted amounts in mitigation of the damages. From the total amount of loss sustained for the three years was deducted the rent on the ranch amounting to \$3600 which was not paid because the lease was cancelled. In addition, the salary received by Wililam Nalder, Jr. for the period of time which he would have been spending his full time raising the turkeys was deducted amounting to \$6,600. (Ex. 3, App. 39) Mr. Nalder, Sr. testified that he raised his turkeys at his home in addition to carrying on his regular employment and therefore no deduction was made because of amounts received from his employment. (T 218)

In Caspery v. Moore, 70 P2d 224, 21 Cal. App. 694, it is stated that evidence of profits both past and present is admissible in determining the amount of prospective profits. In DeWiner v. Nelson, 33 P2d 356, 54 Idaho 560, it was held that the evidence that the plaintiff made daily computation of costs and determined the average daily profit for feeding each man was competent to prove loss of anticipated profits.

Relying upon the authorities cited by the defendant, it is submitted that the evidence in this case does establish a reasonable formula or basis for computing the damages or that the damages have been shown with reasonable certainty. If exact certainty has not been established, the defendant cannot be heard to complain. Again quoting from the leading case of *Story Parchment Company vs. Patterson Parchment Paper Company*, *supra*, decided by United States Supreme Court:

“To deny the injured party the right to recover any actual damages in such cases, because they are of such a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite trepidation. Such is not, and cannot be, the law * * * and the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.

Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced.”

The court also quoted from another case discussing this question wherein it was stated:

“Certainty, it is true, would thus be attained; but it would be the certainty of injustice.”

B. PUNITIVE DAMAGES (APPELLANT'S POINT NO. 3)

The defendant argues in point 3 that the damages may not be doubled unless the plaintiffs can show the amount

of damages attributed to the defendant's failure to release the real estate mortgages. This is a related argument to that considered in this brief under point 2, B, involving proximate cause. As there discussed, the law does not require apportionment of the damages between these caused by failure to release the real estate mortgages and those caused by failure to release the chattel mortgages, where both proximately caused the damage.

A statute such as 57-3-8, Utah Code Annotated providing for a penalty if mortgages are not released is a very common one. Thirty-one states have a similar statute. The Utah statute was originally enacted on March 13, 1884 as contained in Section 2641, Compiled Laws of Utah, 1888. The language in the law has remained substantially the same ever since that date. It was Section 206, Revised Statutes of Utah, 1898, and was Section 78-3-8, Revised Statutes of Utah, 1933, and Utah Code Annotated, 1943.

The legislative intent is clear. The statement of damages is made without equivocation in the first sentence of the statute as follows

"If the mortgagee fails to discharge or release any mortgage after the same has been satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure *****" Sec. 57-3-8, UCA, 1953.

Even construing the statute strictly, there can be no question about the requirements of the statute. There was ample competent evidence to justify the trial court in finding that the failure to release all of the mortgages, caused the damage to the plaintiffs.

The evidence is such as to support or warrant punitive damages even if the legislature had not so provided. The defendant refused to finance the plaintiffs after 1951 and threatened that they would not let any other company finance them. This threat was carried out. Officious letters were written to Farmer's Grain Coop and General Mills misrepresenting the facts as to the payment in 1951 and claiming a lien on the turkeys. Such a letter was only calculated to prevent the plaintiffs from securing financing from other sources. The defendant when asked if it would release a mortgage by another feed company didn't just answer that question, but proceeded to advise the other company that the plaintiffs had not kept their promises, had failed to account for turkeys and apparently advised the other company that the plaintiffs were trouble makers and further that the defendant would not finance them. Such conduct not only failed to show good faith, but rather showed a willful intent to damage the plaintiffs. These facts have been review in detail under Point I D. The conduct of the defendant company was overt, intentional, wrongful and malicious. As such it is sufficient to sustain the award of punitive damages even without support of the statute.

In *Taylor v. Dudley* (1923) 237 P. 645, 28 Ariz. 536, the Court in affirming a judgment based upon a statute providing a penalty for failure to release mortgages, stated:

"The refusal to satisfy the mortgage need not be willful or oppressive, it is sufficient if it results from inadvertence, inattention or indifference."

The conduct of the defendant in this case cannot even be classified as inadvertence, inattention or indifference. Rather it was a calculated course of conduct designed to coerce ad-

ditional payments on a mortgage which had been satisfied. The defendant is therefore liable for double the damages arising therefrom. As required, the trial court made a factual determination based upon adequate competent evidence. The Legislature has specified the results to follow from such a determination. The Supreme Court, following the traditional rules of review, should sustain that judgment.

POINT IV.

THE COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING JUDGMENT TO ALL THE PLAINTIFFS (Appellant's Points 1, 2, 3, and 5)

The defendant on appeal places considerable emphasis on the issue that the judgment was awarded to all the plaintiffs. Consistently in the statement of facts and in four out of the eleven points reference is made to this matter. No mention of this supposed issue was made at the time of trial nor was the same argued on the motion for a new trial. This issue is raised for the first time on appeal.

In 39 Am. Jur. 995, PARTIES Sec. 119, it is stated:

It appears to be quite generally held that objection to a misjoinder of parties plaintiff should be interposed before judgment, otherwise, it is deemed to be waived, especially where no prejudice could arise to the defendant from the alleged misjoinder. After a judgment has been entered in favor of several plaintiffs, an objection that one of the plaintiffs had no interest in the action and was therefore improperly joined cannot be successfully urged. Such an objection cannot be taken advantage of in a reviewing court.

Likewise, in 3 Am. Jur. 70, Appeal & Error Sec. 311, it is stated:

It is well settled that the objection that there was a defect or a misjoinder of parties cannot be raised for the first time on appeal or writ of error ***.

The foregoing proposition is supported by extensive citation of authority; none of which appear to dissent therefrom. But considering the issue on its merits there is no prejudicial error. Until this time the defendant has been content to treat the plaintiffs just as they were, a family partnership. In fact, Mrs. Nalder was joined as a party plaintiff pursuant to an understanding between counsel for the parties. A prior suit between the parties had been dismissed at the time the present suit was being filed. At the request of counsel for the defendant, Mrs. Nalder was made a party plaintiff so that all parties would be before the court and the defendant could in the same action counterclaim to foreclose its mortgage. Service of process was accepted by counsel at the commencement of this action and a stipulation was immediately filed giving the defendant additional time in which to file an answer.

The defendant in its pleadings allege that the obligation and security was jointly incurred and given by all the plaintiffs. In paragraph 7 of the Answer and Counterclaim, it is stated:

"Defendant alleges that all of the real estate and chattel mortgages referred to in said First Cause of Action were made, executed and delivered by the said plaintiffs to the defendant as part of the financing program of the defendants who were engaged in the turkey raising business.

At the beginning of the transactions between the parties hereto, the application was filed by just one of the Nalders and at the request and instigation of the defendant both of the parties signed the same as a partnership. (T. 17) During the first year of the operations when additional financing was required, Mr. Nalder, Jr. corresponded with the defendant requesting additional funds and offered the real property of Mrs. Nalder as security. Although Mr. Nalder, Jr. did the negotiating the security on the real property was actually given by Mrs. Nalder. (Ex. 2-1-3)

The defendant company relied on the real estate mortgage as security on all obligations of all the plaintiffs. An excerpt from a mortgage is quoted in defendant's brief on page 19 which in part states:

"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."

The defendant had no intention of treating the parties separately when it came to securing the obligations by virtue of the real property. As a matter of fact, throughout the entire period of dealings between the parties, the plaintiffs have been considered by the defendant as constituting a family partnership.

There is no dispute but what the Plaintiffs raised turkeys during these years as a family partnership. The two men jointly and actively participated in the raising of the turkeys. Mrs. Nalder likewise worked right along with the men in tending, feeding, processing and negotiating for the sale of the

trakeys. (T. 184, 119-124) She contributed further by pledging the home in her name as security for the obligations.

The defendant in the present law suit recognized the plaintiffs as being partners equally liable. The defendant is counterclaiming to foreclose its mortgage against the property in the sole name of Mrs. Nalder. The judgment granted the amount of the counterclaim as an offset and deducted the same from the judgment awarded to all the plaintiffs. If Mrs. Nalder is not a proper party plaintiff, then possibly the counterclaim for foreclosure on the property should not have been deducted from the judgment awarded to the other plaintiffs.

The defendant was unwilling to treat the parties separately with reference to the \$352.00 payment. As agreed, Mr. Nalder, Sr. paid the \$1,250.00 received by him from the sale of the C turkeys. However, when Mr. Nalder, Jr. could not pay the \$352.00, the defendants were unwilling to give a subordination agreement to either of the parties. Rather they insisted that if Mr. Nalder, Sr. wished to raise turkeys and receive a subordination agreement, he would have to pay the \$352.00. (Ex. F 21, App. 24)

The defendant argues that the judgment was not proper either as to Mrs. Nalder or Mr. Nalder, Jr. If after considering the other issues this court concludes that the trial court properly found the issues against the defendant company, then the judgment in favor of Mr. Nalder should be sustained. If the judgment is proper as to one of the plaintiffs, it is not prejudicial to the defendant to award the judgment to the other plaintiffs.

It would then be for the plaintiffs to urge that one of them was not entitled to receive judgment. Certainly it is not for

the defendant to claim prejudicial error because the judgment was awarded to one or more parties not entitled thereto. If there be any error, the most that can be said is that it is not a prejudicial error.

Plaintiffs were in fact a family partnership in the purchasing, raising, processing, selling and financing of their turkeys. The defendant so considered them in arranging for the financing, in the taking of security, in demanding the \$352.00, in the pleadings, and at the trial. The court so considered them in deducting the amount of the counterclaim from the total judgment. The defendant does not argue that Mr. Nalder, Sr. was not a proper party. The judgment being proper for one of the plaintiffs cannot be prejudicial to the defendant because it includes the other plaintiffs.

POINT V

THE RULINGS OF THE COURT ON ADMISSABILITY OF EVIDENCE WERE PROPER

A. Exhibits M, N, and O (Appellants Point 7)

Exhibits M, N, and O (App. 36 to 38) contain a summarization and a computation of the plaintiffs' claim for damages. Each of the items in the exhibits were supported by other competent evidence. As discussed under Point III on damages, Mr. Nalder testified concerning the expenses of raising the turkeys. The amount of feed, the costs of processing, the amount paid for the turkeys, the amount received for turkeys, were all supported by other exhibits contained in the file. The only objection to the admissibility of these documents was that they were immaterial. They were material in that they aided the

court to better understand the plaintiffs' theory of the case. They were not submitted nor received by the court as evidence of the facts therein stated. (T 58, 79)

The defendant's argument as to these exhibits is difficult to understand. The argument challenges the credibility of the documents or the weight to be given rather than their competency. It is argued that by the exhibits Mr. Nalder is shown to be "transformed from a failure to an outstanding success." This would not render admissibility of the documents erroneous. It is further argued that the documents are incomplete since they did not take into consideration other items in computing the damages, such as taxes, depreciation and interest. These arguments would again go to the weight of the evidence rather than its admissibility. The taxes on plaintiffs' real property would be the same whether he raised turkeys or not. Since the turkeys were raised after the first of the year and sold before the end of the year, there would be no personal property taxes thereon. Since the brooder house was used each year, depreciation thereon would be the same. The cost of the feed for 1952 was based upon the amount paid to the bank, which included interest. The cost of the feed for the other two years was shown on Exhibits T and U and any additional charges should appear thereon. The defendant states that "the materiality and competency of these exhibits was destroyed by these omissions." The documents were competent as offered. No additional items needed to be shown. The defendant is free to argue the weight to be given to such documents. If the Exhibits did not contain all the evidence which the defendant thought necessary, such fact would not destroy their materiality or competency. The court did not commit

error in receiving these documents as showing the theory of the plaintiffs' case when the evidence contained thereon was supported by other competent evidence.

B. EXHIBIT P (Appellants Point 11)

Exhibit P is a sheet entitled Turkey Feeding Results which is an analysis of the amount and type of feed fed to the turkeys and the results based thereon. Mr. Booth, who prepared the document, testified that he secured the information from the records of the feed company and from the processing plant. The records of the feed company were introduced in as evidence. Exhibits U-1 and U-2 are the ledger sheets of Rasmussen Grain Company which show the amount and type of feed sold Mr. Nalder for raising his turkeys. Exhibit L is a copy of the manifest sheet from the processing plant which shows the number of turkeys processed and the net weight from which the average weight per turkey can be computed. It likewise shows the number of turkeys processed. Exhibit W shows the number of turkeys purchased. The information contained in Exhibit P is supported by other competent evidence in the record and therefore cannot be considered to be hearsay. Representatives from the processing plant and from the feed company were both present and testified and were available for cross-examination concerning the evidence.

The defendant has put in issue the competency and integrity of the plaintiffs. The main argument as to why the admissibility of exhibit P was prejudicial is stated by the defendant as follows:

“The exhibit was damaging to the defendant because it purported to show plaintiffs as competent turkey raisers.”

On page 31 of this brief it is stated the plaintiffs business was a failure, and on page 38, it is stated:

"It seems strange indeed that over-night, beginning in 1952, Nalder, Sr. was by some mysterious necromancy transformed from a failure to an outstanding success, without any logical explanation for this sudden and swift change."

Previous reference has been made to defendant's claims that the plaintiffs illegally sold turkeys, slanted testimony, were poor financial risks and were failures. These claims were not substantiated by the defendant. Such accusations were only made in an attempt to focus attention onto the plaintiffs and away from the willful intentional and malicious conduct of the defendant.

The evidence is complete to the effect that the Nalders were good turkey raisers and were highly regarded.

1. In Exhibit E-1, Appendix 1, completed for the defendant by one of its dealers it is stated:

"Nalder came out with the best flock in the area in every respect * * *

"How was he regarded in his community?"

"Very good. He had the newest and most modern equipment in the area."

2. Mr. Rasmussen, a feed dealer, was so convinced that the plaintiffs were competent turkey raisers and people of integrity that he was willing to and did co-sign with the plaintiffs at the bank to enable them to continue in the turkey

business. An overt act by a business man, subjecting himself to personal liability, is strong proof of the character of the plaintiffs and of their ability to raise turkeys.

3. Lee Brown the owner of a processing plant of Ogden personally guaranteed \$2400.00 on each of two accounts to the Kellogg Company in connection with the 1951 crop of turkeys whereby he agreed to underwrite any loss on the Nalder accounts to that amount in favor of Kellogg. (Ex. F 2, App. 11) Such action is independent concrete evidence that the Nalders were highly regarded as turkey raisers and their integrity was not questioned.

4. Mr. Rasmussen testified as follows:

“Well, the Purina man and myself have made numerous trips to their place to look over their turkeys and see how they were doing, like we do on most any of the growers we work with. They have always had the finest turkeys we have had each year, anywhere. They have had the necest turkeys of any of the growers.”

5. It appears that for the year 1952 a feed dealer for General Mills named Fred Wheeler was willing to underwrite any loss of the Plaintiffs up to \$1,000.00. (T. 239)

6. The salesman for General Mills completed his report to his company as follows:

“Do you recommend that General Mills, Inc. finance the applicant?” “Yes.” (Ex. I-3)

The application for credit to Farmers Grain Cooperative was completed by its salesman as follows:

"Do you recommend that we finance the applicant?"
"Yes." (Ex. T-1)

7. Apart from Exhibit P, Mr. Boothe testified that he had examined the facilities of the plaintiffs, had analyzed their turkey raising activities, and stated they were good turkey raisers.. (T 69)

It was legally wrong to damage the plaintiffs in their business; it is no less wrong to now accuse the plaintiffs of incompetency and dishonesty. The record completely refutes such claims. The plaintiffs were open and above board in their dealings with the defendant. Testimony and actions of independent parties acclaim the integrity and competency of plaintiffs.

The court did not error in receiving exhibits M, N, O and P.

CONCLUSION

This appeal is predicated upon a factual dispute. The plaintiffs, having been awarded judgement by the trial court, is entitled to have this court review the record to determine if there is any competent evidence to support the findings of the trial court. Not only is there sufficient, competent evidence to sustain that determination; but rather, evidence would have to be ignored to rule as a matter of law that all reasonable persons would conclude that the plaintiffs have not sustained their case. The duty to release mortgages upon satisfaction is specified by the Legislature. The Court found that all of the mortgages, except the last real estate mortgage, had been satisfied either by payment or by express merger into said mortgage. The existence of unreleased mortgages, totaling \$107,401.92 as contrasted to a mortgage of \$6,550.12, clearly supports a finding that plaintiffs' credit rating was so impaired that they could not secure financing to enable them to continue

in their chosen business. The Court's determination of damages is based upon actual experience not usually found in a loss of profits case. Since 1884 the law in Utah has provided that a defendant who fails to release a mortgage after it has been satisfied must pay double the actual damages caused by such failure. A legal wrong has been done to plaintiffs. The possible magnitude of such wrong was recognized by the legislature when it set out the penalty of double damages. Irrespective of the statute, punitive damages may be awarded where a wrongful act is done with a bad motive or with negligence amounting to positive misconduct, or in a manner evidencing a wilful disregard of the rights of others. The anguish suffered by plaintiffs in their vain attempt to continue in their chosen business cannot be put aside lightly. They were but puppets in the hands of defendant who held the purse strings; and who, in that position of power, manifested a conscious disregard of the rights of the plaintiffs, and a reckless indifference to the consequences of their acts. Defendant's action was so wilful and done with such wanton disregard that an award of punitive damages is more than justified.

The fundamental issue is whether the defendant company may curtail a farmer's ability to remain in business. Does the defendant company have the right to coerce payments by lightly disregarding its statutory duties, with full knowledge that such business practices make it impossible for the farmer to earn a livelihood in a business of his own choice? The Legislature did not so intend; the Lower Court did not so find. This Court should not nulify that legislative intent nor overthrow that factual determination.

Respectfully submitted,

RICHARDS, BIRD & BUSHNELL

BY: DAN S. BUSHNELL

Attorneys for Plaintiffs and
Respondents

A P P E N D I X

1950 TURKEY CONTRACTS

Name — H. W. Nalder

Address — Layton

Location from nearest large city *Layton*

What is your opinion of this individual as a turkey grower?

Excellent....., Good *Good*, Fair....., Poor..... Explain:

He has fine equipment. In spite of some brooder loss, caused by factors not his responsibility — for which a complete poult adjustment is being made — *Nalder came out with the best flock in the area in every respect.*

Mr. Scoville is familiar with this operation and results. *Mr. Scoville has suggested two flocks this year of 6000 each. Mr. Nalder wants to follow this program.*

Was he well satisfied with his results last year? Yes, Mr. Nalder is very happy over the prospects for 1950. He feels that with a reasonable market and results similar to what he finished with last year, he will have a very profitable season. He is very enthusiastic over the Kellogg program and the advice and help given to him by Mr. Scoville.

How is he regarded in his community? Very good. *He has the newest and most modern equipment in the area.* He has sufficient land and water to carry on his project. He has plenty of grain and enough help.

Will grower give these turkeys his personal attention or will someone be hired to raise them? Yes. Mr. Nalder will be with both herds all the way through. He will have helping him some members of his immediate family who are interested in his project. Their final pay will be determined by the final outcome of the project. Therefore interest from all parties will be extended to this project all the way through.

Remarks:

We believe that this man will successfully carry out his project.

H. J. Bonie Poultry Co.
Ogden, Utah

150-4
Ex. C 1

A-1

Dictated by T. J. Lyon-ed
Mr. George Vogel
OMAHA PLANT

DATE: March 22, 1950

Dear George:

I am returning to you herewith the 1949 and 1950 Turkey files with H. William Nalder of Layton, Utah which you sent me at Salt Lake City.

Nalder has his 6,000 turkeys in the brooder house, and we have asked Mrs. Schinker to find out from Nalder if he is satisfied to have us pay Bonie's for those turkeys. He indicated at the time of our call there on March 14 that he was not satisfied at that ime.

We probably should have a real estate mortgage search made on this man to know who is holding the mortgage against his land, because there is going to be a deficit on the 1949 contract and we may want to get some security later on.

Credit Department

/s/ TJL

encl.

Def. Ex. E-3

A-3

M. Schinker:mc
Mr. E. C. Ogden
Battle Creek Plant

July 27, 1950, Omaha

Dear Mr. Ogden:

We have received H. J. Bonie's check on 1949 turkeys of Mr. H. W. Nalder, Layton, Utah for \$17,891.24. This is final payment on his 1949 birds which leaves a balance of \$5627.39 plus interest charges. *We will prepare notes and have Mr. Scoville obtain signatures on the principal and interest as he has a 1950 turkey account.*

Yours very truly,

C-5

A-4

M. Schinker:mc
Mr. R. M. Scoville,
Belvedere Apt. Hotel
Salt Lake City, Utah

July 28, 1950, Omaha

Dear Ray:

We have received a check on H. W. Nalder & Sons account in the amount of \$17,891.24 to apply against their 1949 turkey account. This leaves a balance of \$5627.39 principal and interest of \$927.73 to-date. We are attaching notes on these two amounts and will appreciate it if you will obtain the signatures as we have a 1950 contract with these people and will hope to obtain this money at the time they sell their 1950 birds.

Yours very truly,

Plaintiff's Ex. C 6

A-5

August 2, 1950

Mr. S. J. Quinney
c/o Ray, Quinney & Nebeker
921 Kearns Building
Salt Lake City, Utah

Dear Mr. Quinney:

It now appears to be necessary for us to furnish additional finance to Mr. H. W. Nalder under our turkey production program.

It has been our custom where additional finance was required to require *security at the rate of two for one*. In other words, \$2.00 worth of security for each \$1.00 furnished on additional finance.

We have now received returns on Mr. H. W. Nalder's 1949 turkey production and it leaves a balance of \$5627.39 *in principal and interest to July 28, 1950 in the amount of \$927.73*.

We are securing notes to cover these two items, but of course are depending on the second mortgage which we hold

on Mr. Nalder's home place as security to cover this indebtedness.

The additional grain finance required will amount to approximately \$3600.00 and we feel that we should have double security on the combined amount of his 1949 balance and the grain finance for this year, which amounts in round dollars to \$10,154.00.

If you will prepare a mortgage in the amount of \$10,000.00 on the property which we are now holding a mortgage in the amount of \$6721.80 showing various notes to be executed from time to time and deliver this to our representative, Mr. R. M. Scoville at the Belevvedere Apt. Hotel, Your city, He will secure the signatures of Mr. and Mrs. Nalder and deliver same back to you for recording.

So you will have the complete description of the property we are sending you the Subordination Agreement dated May 26, 1950 and the note amounting to \$6721.80. When you have prepared the new mortgage and it is properly recorded, you may return these papers along with a copy of the new mortgage. This should give us a total of \$16,721.80 against this property and will give us a recorded mortgage value of 1.6 to 1 of indebtedness.

We may be entirely off the beam in working on the basis of drawing a mortgage for an amount larger than we expect the account to be, but we feel that it is some protection to have a recorded amount in that figure and if by some extreme it was necessary to advance more than was originally requested there would not have been an opportunity for the grower to

have placed another mortgage which would come in between the mortgage we might file now and another one some 60 or 90 days later. You might advise us as to this procedure. We understand that in most states the law is that the mortgage has to be backed up by notes and of course we would never attempt to collect any more than our account actually amounted to regardless of the size of the mortgage.

Mr. Scoville can be reached by phoning him c/o the address listed above and will be glad to come over to your office and pick up the documents for signature.

Yours truly,

Kellogg Sales Company
W. H. Williams, Jr.
General Sales Manager
Omaha Plant

WHW:mc

CC

Mr. R. M. Scoville

Mr. T. J. Lyon

Mr. L. C. Borsum

Plaintiff's Ex. Y No. 2

A-7

August 30, 1950

M. Schinker:mc

Mr. R. M. Scoville

Belvedere Apt. Hotel

Salt Lake City, Utah

Dear Ray:

We are returning voided notes on Mr. H. William Nalder, Sr. and Jr. on the principal for their 1949 turkey account and the interest, as the notes are signed in error.

We are sending along new notes and will appreciate it if you at your first opportunity will obtain the signature of Mr. H. William Nalder, Sr. and Jr. and they may be signed H. William Nalder Sr. and Jr. by H. William Nalder, Sr. or Jr. Thank you.

Yours very truly,

Plaintiffs Ex. C 7

A-8

Dec. 8, 1950, Omaha Plant
Dictated Dec. 7

M. Schinker:mc
Mr. H. W. Williams, Jr.
Utah Hotel
Salt Lake City, Utah

Dear Bill:

The attached copy of letter to Mr. William Nalder will be self-explanatory. *His 1950 account is all clear and he has paid the interest charges up to December 15 on his 1949 account.*

The principal on the 1949 account amounts to \$5627.39. He was wondering what the interest rate would be and since I *was not sure whether it would be 4, 5 or 8, I did not commit myself.*

We will not have any of the mortgages released, either the Chattels or Real Estate until we have advice from you.

Your very truly,

Defs. Ex. E-5

A-9

December 8, 1950
Dictated December 7

Mr. H. W. Nalder, Jr.
1221 Fourth Avenue
Salt Lake City 3, Utah

Dear Mr. Nalder:

It was certainly a pleasure to make your acquaintance when you stopped in the office this morning to settle your turkey account. As you will note from the copy of statement we gave you while you were in the office we were pleased to give you our check for \$362.35 and only sorry that it wasn't more.

We have contacted Mr. Williams and he undoubtedly will see you or your father while he is out West.

We gave you the paid interest note on the 1949 account while you were in the office and the payment included charges to December 15 at 4%. *We are now returning the paid notes on your 1950 contract. Undoubtedly some satisfactory arrangements can be made for settling the balance due on your 1949 account, but we will withhold releasing mortgages until we hear further from Mr. Williams.*

It was a pleasure to serve you and we would like to take this opportunity to thank you for your fine cooperation.

We are returning the manifest sheets and thank you for their use.

Yours very truly,

KELLOGG SALES COMPANY

/s/ M. Schinker

M. Schinker

Credit Dept.

Omaha Plant

MS:mc

cc

Mr. W. H. Williams, Jr.
Utah Hotel
Salt Lake City, Utah
Mr. Scoville

Def. Ex. E-6

A-10

LEE BROWN

TURKEYS

247 24th Stret, Ogden, Utah

March 19, 1951

Kelloggs Sales Company
26th and Center Street
Omaha 5, Nebraska

Attention Mr. W. H. Williams Jr.
General Sales Manager,
Omaha Plant.

Dear Mr. Williams:

This letert is confirmation that we will under-write the loss on H. W. Nalder and H. Wm. Nalder Jr. Turkey Finance Accounts, up to the amount of the purchase price of the Poult, which will be a maximum of \$2,400.00 on each of the two accounts, namely; H. W. Nalder and H. Wm. Nalder Jr. This refers to the 1951 projects only, and it is understood that any past indebtedness owing, by Nalders, to the Kellogg Sales Company from other years operations, will not enter into this agreement.

Very truly yours,

LEE BROWN COMPANY

signed E. L. Brown

E. L. Brown

ELB:fwc

Plc. Ex. F 2

A-11

November 21, 1951
Layton, Utah

Mr. Williams of the Kellogg Company

Dear Mr. Williams:

Find enclosed check and manifest for the turkeys this year. It surely looks bad again for us. Mr. Williams you will see by the manifest those in red we brought home and sold. We know that we should not have done this without your consent, but last Monday they were starting suit against us to get Judgement for \$200.00 which was due two years ago. You know, Mr. Williams it just does not matter who you are or what you are if you cannot pay you are out. You also know without me telling you that we have made nothing since we went into the turkeys. The first year we were so green. We knew nothing about the business end of it I guess we had to learn the hard way. But it is a lesson we will never forget.

We let Mr. Bonie ship our turkeys East in his name when the understanding was that they were to stay in our name till sold. If we had sold them here when processed we would have been able to pay Kellogg all we owed and had \$800.00 over, but as it was we went \$6000.00 in the hole. We were unable to do much about it as they were shipped in his name.

The next year (last year) we were able to pay Kellogg Company all of last year's bill and \$1000.00 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 I believe will be more than \$6000.00 above what it was last year. We would sure like to talk this feed situation over with you if possible.

You can see by the other letter I have also sent that we lost turkeys apparently was no fault of ours but it looks now that the Insurance Company will pay for this loss which would pay up the Kellogg Company for this year.

Mr. Williams, two weeks after this loss Mr. Barnard insisted that we give the herd blue vitriol which he said would do no harm if it did no good. This was against our desire because those turkeys did not need any medicine as the birds that did not die two weeks before were good birds as they had never gone off feed. As for myself and Mrs. Nalder we do not believe in doping up turkeys with medicine when there is no need of it. At the time Mr. Barnard gave us the understanding that Mr. Erikson also advised it. We found out after he was also against giving it.

When we took some of these birds up to the A. C. College at Logan they had a fever which they said was caused by the blue vitriol, this (the blue vitriol) had poisoned them. Dr. Benno told us never to put that in Mash as a few might get most of it which apparently had happened in this case. He said if it was necessary always put it in the drinking water. We lost 105 at this time.

A-12

Mr. Williams, by using the money when we did it has saved us from that Judgement. *Now if you are very disappointed and angry with us for doing this we will see if they will increase our first mortgage about the \$1200.00 we got from these birds. We did not want to do this but it seemed there was no other way in such short notice. We do hope that you have not lost faith in us. Now we realize when it is too late that we should have called you on the phone, but you know a person who is desperate the way we were, does little reasoning. Please do not judge us as dishonest for we have placed the cards upon the table and there is nothing underhanded.*

Mr. Williams, please do not blame Mr. Lee Brown in any way as we were unable to get hold of him that day and he did not know at the time that we had taken them, we just told the foreman there that we would like to take that many turkeys. He said O.K. Now we don't know whether Mr. Brown had orders from you not to remove any birds. We really did not think of that part until now. It is the last desire of our heart to cause him any trouble as he is a very fine man and we are going over to see him and find out if we have caused him any trouble as you know he has the processing plant. I assure you this will not happen again.

Respectfully,

Mr. and Mrs. H. W. Nalder
Layton, Utah

P.S. Please let us hear from you by return mail.

Mrs. H. W. Nalder

You will see by the count that we came out of the brooder with better the 3000. In fact it was 3129. Mr. Brown had put in some extra birds.

Ex. F-5

A-13

Layton, Utah
January, 16

Dear Mr. Aust

Just a line to inform you that I am sending you some money. I thought I would be able to send it off today but connections have been so bad to make contact. But I will send it to you by the 20th and will send it air mail so you will get it without unnecessary delay. The amount will be \$1250.00 and by that time I hope the check from the insurance will be in your hands. \$1267.40 is that amount, so I hope all will work out for me. I am trying and doing my best so please be as patient and forbearing with me as you can. I have a lot at stake and want to work out as soon as possible. I hope to be able to see you or Mr. Williams when you come to Utah. Be sure and contact me.

Thanking you,

I am respectfully,

H. W. Nalder

Ex. F 11 & 12

A-14

Air Mail

January 17, 1952
Dictated January 16

Messrs. H. W. Nalder Sr. & H. William Nalder, Jr.
Layton, Utah

Gentlemen:

On January 8 the writer wrote you confirming the telephone conversation of January 5 in regard to your outstanding 1951 turkey balance.

It is our understanding when I talked to you on January 5 that you would arrange to have the funds forwarded to this office by January 11 to take care of the number of turkeys which you sold locally.

We note that we have not yet received these funds from you and this is now January 16. It is imperative that you immediately arrange to forward these funds to this office by return mail. We have not yet received the insurance adjustment check, as soon as it arrives we will forward it to you for endorsement. Please give this matter your immediate attention and we will look forward to receiving your check in accordance with our letter of January 8.

Yours very truly,

KELLOGG SALES COMPANY

V. L. Aust

Credit Manager
Omaha Plant

VLA: mc

cc

Mr. Barnard

Plaintiff's Ex. F 13

A-15

January 30, 1952

Messrs. H. W. Nalder, Sr. & H. William Nalder, Jr.
Layton, Utah

Gentlemen:

We wish to acknowledge receipt of the insurance adjustment check in the amount of \$1267.44 which we have credited *to your 1951 turkey account, the 1951 interest, and have credited the balance of \$493.31 to your old account.* The outstanding principal on the 1951 account was \$326.44 and the interest amounted to \$447.69.

We are awaiting the remaining balance for the 1951 turkeys which were sold locally. We understand that Bill traded \$352.00 worth of turkeys to take care of a gasoline bill and of course *inasmuch as we had a mortgage on these turkeys that amount must be remitted to us together with the remaining balance as discussed with Mr. Williams recently. We would appreciate having these funds forwarded to us so that we would be able to release the mortgage and return the notes to you.* Your cooperation will be greatly appreciated.

Yours very truly,

KELLOGG SALES COMPANY

V. L. Aust
Credit Manager
Omaha Plant

VLA:mc
cc

Mr. Barnard
(Notation attached as follows:)
H. W. Nalder S. Jr.

Ins. Ck for	1267.44
Appiled	
1951 TC	326.44
Int.	447.69
N. Rec.	493.31
	1267.44

Plaintiff's Ex. F 15

A-16

Bountiful, Utah
February 2, 1952

Mr. W. H. Williams, Jr.
Kellogg Sales Company
Omaha, Nebraska

Dear Mr. Williams:

I understand from Dad that you will not be feeding us this year but that you would be willing to let another feed company do so, letting them have first lien to the extent of their services.

I have arranged for some poults and a company to feed them providing they get confirmation from that they will be assured of their money first. I would like to remain in turkeys if possible and try to clear off our outstanding obligations.

If such a satisfactory arrangement can be worked with you people I wish you would send me confirmation so I can turn it over to the feed company as that is the only thing holding it up and my turkeys are scheduled to arrive the first week in March.

Sincerely Yours,

H. William Nalder, Jr.

P. O. Box 552
Bountiful, Utah

Plaintiff's Ex. F16

A-17

2-5-52

ATTENTION Mr. Williams

Attached is copy of letter received from Bill Nalder Jr.

I'd like to tell him that we will have to have the \$352.00 for 1951 turkeys which he traded for the gas bill before we could agree to write such a letter. What do you think? *I doubt if he can pay this but it might work.*

V. L. Aust

Ex. F-17

A-18.

February 18, 1952

Mr. H. William Nalder, Jr.
P. O. Box 552
Bountiful, Utah

Dear Mr. Nalder:

We wish to acknowledge receipt of your letter of February 2 in which you desired *a confirmation from us that we would permit another feed company to finance your 1952 turkeys.* The delay in reply to this letter was caused due to the fact that Mr. Williams was in Salt Lake City at the time and we forwarded the letter out to him and he attempted to get in touch with you but inasmuch as you do not have a telephone he was unable to see you.

Before we can give a confirmation to you, it will be necessary that we receive the funds for the turkeys which you did not sell, but received credit on the outstanding gas bill and this will have to be paid in full to us. *After receipt of a remittance of \$352.00 we would be pleased to furnish a Subordination Agreement to any feed company that you would suggest, but we would appreciate having you give us the name of the feed company so that we can write the letter direct to them and a copy of such Subordination Agreement sent to you, but as mentioned before, we would not be able to grant this until your share of the 1951 turkey contract is paid in full.*

I believe that Mr. Williams explained this to your Father when he was out there recently, so we trust you have been able to make arrangements for this money by this time. We do want to apologize for the delay in getting a letter to you, but sincerely trust this has not inconvenienced you too greatly.

Yours very truly,

KELLOGG SALES COMPANY
V. L. Aust
Credit Manager, Omaha Plant

VLA:mc
cc
Mr. Lyman

Pls. Ex. F-18

A-19

KELLOGG SALES COMPANY

FEED DEPARTMENT

26th and Center Streets

OMAHA, NEBRASKA

Air Mail

February 26, 1952

Farmers Grain Company
Ogden
Utah

Gentlemen: Mr. H. William Nalder, Jr. — Bountiful, Utah

We recently had a request from Mr. H. William Nalder, Jr. to subordinate a lien which we have on his 1951 flock of turkeys. We have written to Mr. Nalder and notified him that upon receipt of his remittance for \$352.00 we would agree to furnish a subordination agreement to cover the remaining balance for prior years, *but we must have the 1951 account cleaned up first. We also asked Mr. Nalder the name of the feed company that intended to finance him for this season but as yet we have not received a reply to our letter.*

We understand that you folks are contemplating financing his 1952 turkey program and we wish to notify you at this time that we still have a lien on his turkeys. If there should be any further questions on this we would appreciate having you contact us.

Yours very truly,

KELLOGG SALES COMPANY

/s/ V. L. Aust

V. L. Aust
Credit Manager
Omaha Plant

CLA:mc

Stamped Received Feb. 28, 1952 8.15

Defs. Ex. G-2

A-20

TELEGRAM

10:45

March 2, 1952

Kellogg Sales Co.
Church and Center Sts.
c/o Mr. Aust or Mr. Williams
Omaha Nebr.

Talked Lee Brown taking processing agreement sending you \$352. Said would but now says can't do for 60 days. *My turkeys arrived 26th March. Get one ton feed can't get more until General Mills Ogden Utah Mr. Henry Stephens receives subordination can you send subordination to General Mills?* Wire if possible and receive submittance Brown 60 days? *My only possible way of raising it.*

H. William Nalder, Jr.

Box 552 Bountiful, Utah

Pl's. Ex. F-19

A-21

TELEGRAM

Paid X
Collect

9:15 A.

March 3, 1952

H. Wm. Nalder Jr.
Bountiful, Utah

Necessary you secure a letter from Lee Brown agreeing to pay balance of 352 dollars to us by April 15 this year.

V. L. Aust

Kellogg Co.

322 So. 19th St.

(Contains pencil notation of)
Fell thru, I guess.

Plaintiff's Ex. F 20

A-22

April 5, 1952
Layton, Utah

Mr. Williams of Kelloggs Sales Co.

Dear Mr. Williams:

I have been unable to send the \$350 we owe you. Bill has a job now and he is getting in a better condition. He will be able to send it before long. I hope you will bear with me and consider my case again in order that I may work out of my predicament, you know the three years I have feed Kelloggs feed. You may say rightly that they have not been good years, I have been able to pay up my current feed bills, however myself, Mr. Scovill and Mr. Bonie in storing those first turkies sure made a bonner. and I am the looser of close to 7,000 \$ seven thousand dollars, this placed me in my present condition.

I have been fair and honest with your Co. and in all fairness I feel you should go along with me and help me to recover my self. I would like to put this proposition for your consideration. I would like to have 2000 turkeys to care for right around here I can get the turkies, I have about 50 acres of grain. This is the best condition I have been in. I have a lot of equipment I want to stay in the business and not fail I want to succeed and pay up with out having to sell my home. I have never dealt with anyone that I could not go back and do business with them, again. Please reconsider my case let me work out and regain my losses give me a chance and I will not let you down.

Please ans. me back as soon as possible

let it be favorable

respectfully

H. W. Nalder R.F.D. No. 2

Layton, Ut.

Stamped: Received April 8, 1952 Kellogg Co. Omaha at 9.

Plaintiff's Ex. F 21

A-23

Mr. H. W. Nalder
R No. 2
Layton, Utah

April 9, 1952

Dear Mr. Nalder:

We have received your April 5 letter addressed to Mr. Williams regarding the outstanding balance of \$352.00 in connection with your 1951 turkey project. We note that apparently Bill has gotten a job and is now working out and as you mentioned is getting in a better condition so that he will be able to send us in the \$352.00 before too long.

We are indeed sorry and realize that you have had two or three bad years in the turkey business which has caused you to go in the hole considerably.

In regard to a finance arrangement for 1952 we are indeed sorry but there is no way that we can approve a contract for you for 1952, at least until your entire outstanding account is paid in full. There is nothing in our 1952 finance program that would permit us to approve a contract until your obligations are taken care of. We did agree to prepare a subordination agreement for Bill providing we received payment of \$352.00 but inasmuch as this was never received we could not cooperate with him and furnish the subordination agreement and we might say at this time that we would be agreeable to furnish a subordination agreement for you, but it would be necessary that we receive the \$352.00 before this could be taken care of, the same agreement that we did give your son, Bill.

We sincerely trust that you will be able to secure financing so that you can continue in the turkey business. We also want you to arrange to take care of your outstanding account with us just as soon as possible and we would appreciate hearing from you as to just what your plans are in taking care of this.

Yours very truly
KELLOGG SALES COMPANY
V. L. Aust
Credit Manager
Omaha Plant

VLA:mc
cc - Mr. Lyman
Mr. H. Wm. Nalder, Jr.
Box 552 — Bountiful, Utah

Plaintiff's Ex. F 22

A-24

KELLOGG SALES COMPANY
FEED DEPARTMENT
26th and Center Streets
OMAHA, NEBRASKA

August 27, 1952

Mr. H. William Nalder, Jr.
Box 552
Bountiful, Utah

Dear Mr. Nalder:

We have been reviewing your account and find that we have not yet received a remittance of \$352.00 for turkeys which you disposed of and did not remit to us in accordance with the terms of your contract.

We are sending a copy of this letter to your Dad and note that in a recent letter of April 5 your Father wrote us advising that you now had a job and would be in a position to take care of this obligation in the very near future.

It is imperative that you make arrangements to take care of this part of your obligation without delay.

The outstanding balance on the 1949 account, the principal balance is \$5134.08. *This is secured by a second mortgage on your parents home at Layton, Utah.*

In connection with this old account we had hoped that we would receive substantial payments during 1952 but as yet we have not received anything except some proceeds from the 1951 obligation and at this time our Home Office is requesting that we proceed to effect this collecting. We feel we have been very lenient with you folks and that we should not be asked for an additional extension. We wish to advise you at this time that we are going to expect full payment of this obligation this fall and we trust you and your father will work towards this settlement.

Yours very truly,

KELLOGG SALES COMPANY
signed
V. L. Aust
Credit Manager
Omaha Plant

VLA:mc

Plaintiff's Ex. F 23

A-25

December 22, 1952

Mr. H. W. Nalder
R No. 2
Layton, Utah

Dear Mr. Nalder:

It was indeed a pleasure to meet with you and Mrs. Nalder when we were in Salt Lake City last week.

We want to confirm the arrangements made in our conference that you will turn over to the Kellogg Sales Company your proceeds from the trial about March 15, 1953 which you are suing the H. J. Bonie Poultry Company. It is also understood that you will arrange to *pay the \$352.00 balance on the 1951 Turkey account* which amount was for the turkeys which Mr. H. William Nalder, Jr. did not account to us for.

As mentioned is our conference, upon receipt of these remittances we will be in a position to furnish you with a subordination agreement allowing you to secure turkey financing elsewhere inasmuch as our mortgage is still of record.

We want to urge you to do everything possible to liquidate this account and will appreciate having you keep in touch with us in regard to these payments which you have promised to send us. Your cooperation will be greatly appreciated and best wishes for a Happy Holiday Season.

Yours very truly

KELLOGG SALES COMPANY

V. L. Aust
Credit Manager
Omaha Plant

VLA:mc
cc
Mr. Lyman

Defs. Ex. 3

A-26

April 15, 1953

Mr. H. W. Nalder
R No. 2
Layton, Utah

Dear Mr. Nalder:

I happened to be out in Salt Lake City last week on Friday and Saturday and I did attempt to contact you by telephone two different times but was unable to get an answer at your phone.

I recently wrote you on December 22, 1952 in regard to your old account confirming the arrangements made in the conference with you and Mrs. Nalder and Mr. Williams and myself last December.

We had expected to receive the remittance agreed upon and the proceeds from the trial long before this time and are indeed disappointed that we have not heard further from you. *We did agree to furnish a subordination agreement contract upon receipt of \$352.00, the balance on the 1951 turkey contract but we will be unable to do this until the payment is received. We are wondering whether you are intending to raise turkeys this year or not.*

We would like to ask at this time that you arrange to forward us a substantial remittance to apply on your account and also *advise us when you will be able to pay the \$352.00 to clean up the 1951 account.* We must insist on your cooperation in an effort to liquidate this account and unless a substantial remittance is received at this time we will have to proceed with other action.

Yours very truly,

KELLOGG SALES COMPANY

V. L. Aust
Credit Manager
Omaha Plant

VLA:mc
cc — Mr. Lyman
Mr. H. W. Nalder

Plaintiff's Ex. F 24

A-27

KELLOGG SALES COMPANY

FEED DEPARTMENT

26th and Center Streets

OMAHA, NEBRASKA

June 4, 1953

Mr. H. W. Nalder

R No. 2

Layton, Utah

Dear Mr. Nalder:

On April 15 I wrote you in regard to your outstanding balance *especially the \$352.00 which is the balance due on the 1951 turkey contract* from the Sale of the balance of the turkeys which of course would be applied on your old account. We asked you at that time to arrange to forward us a substantial remittance by return mail and also advised that if we did not receive this we would proceed with legal action.

When Mr. Williams and myself saw you last December you *agreed to pay this \$352.00 balance on the 1951 account* and also remit to us the proceeds from your trial on approximately March 15.

We feel we have been very lenient with you and inasmuch as you have not cooperated with us we have no other alternative than to place your account with our attorney for collection. We will withhold action until June 15 and unless we receive a substantial reduction at that time we will proceed to enforce this collection.

Yours very truly,

KELLOGG SALES COMPANY

V. L. Aust

Credit Manager

Omaha Plant

VLA:mc

Plaintiff's Ex. F 25

A-28

KELLOGG COMPANY

26th & Center Streets

Omaha 5, Nebraska

January 21, 1954

Ray, Quinney & Nebeker
Suite 921 Kearns Building
Salt Lake City, Utah

Attention Mr. Albert R. Bowen

Gentlemen: Nalder vs Kellogg Sales Company

Your letter of December 21 addressed to Mr. Harding and copies to Messrs. Aust and the writer have been received. Mr. Harding has suggested that we answer your letter and keep him informed by sending a copy so his file will be complete.

We are relying entirely on our Real Estate Mortgage and for that reason can at this point release all the Chattel Mortgages which are unleased at this time. We are attaching releases for 1949, 1951 and 1951 Chattel Mortgages together with fee for releasing.

The only Real Estate which is of record now we feel quite sure is the last one as you put it, which came about as a result of our having had a second mortgage on the Real Estate and they wanted to secure \$1,500.00 more than the current balance from Deseret Building and Loan, which we agreed to. We advised Mr. Quinney of what we were doing and asked him to handle the details, and Mr. and Mrs. Nalder both came into Mr. Quinney's office and signed the note and mortgage which is now of record. No doubt his file in this matter will disclose what was stated at the time as to whether or not it was a bona fide mortgage and will also disclose as to whether or not anyone had ever told the Nalder's that we would never foreclose on it.

Plf Ex. R

A-29

I do not recall ever having made a statement to Mrs. Nalder regarding the Real Estate Mortgage, but if I did make a statement to her it would have been along the line that Kelloggs were not interested in acquiring real estate and that we certainly would not foreclose on the mortgage unless it was necessary to clean up an account and this would only be done after all other courses of action had been pursued to the fullest extent. Naturally I would not say to her that we would not foreclose on the mortgage, otherwise why would we ever take it in the first place.

With regard to the statement that Bonie's acted as our agent in selling the turkeys, we would be forced to deny this inasmuch as we have never given any one this specific responsibility, having always taken the position that we acted both as feed supplier and financial supplier in line with our contract, *but that the grower had full authority to sell through whatever channels he deemed best. We of course relied on our Chattel Mortgage to be sure that the purchaser of the birds was aware that an obligation was due Kellogg's in connection with the turkey flock.* It could be possible that Mr. Bonie or some one in the Bonie Poultry Company organization implied to the Nalder's that they had been appointed as agents to handle the Kellogg financed birds, but this was not the case and our written contract should show this quite clearly.

I would suggest that you contact Mr. Bushnell again and review the case in light of the above statements and offer to release all unreleased Chattel Mortgages and see what the reaction is at this time.

Plf. Ex R Contd.

Yours very truly,

KELLOGG COMPANY

/s/ W. H. Williams, Jr.

W. H. Williams, Jr.

General Manager
Omaha Plant

WHW: MC

We are enclosing additional correspondence listed below which may be helpful to you:

Copy of Letter to Mr. S. J. Quinney written August 2, 1950 by Mr. W. H. Williams, Jr.

Copy of Letter to Mr. H. William Nalder, Jr. written September 21, 1949 by M. Schinker.

Letter dated September 16, 1949, written to M. Schinker by Mr. H. Wm. Nalder, Jr.

Copy of Letter of August 18, 1949, written by M. Schinker to Mr. H. W. Nalder and Mr. H. Wm. Nalder, Jr.

Undated Letter written by Mr. H. Wm. Nalder, Jr. to M. Schinker.

Plf. Ex R cont.

A-31

RALSTON PURINA COMPANY

Checkerboard Square,
St. Louis 2, Missouri
January 28, 1954

Credit Department
Kellogg Sales Company
Battle Creek, Michigan

Gentlemen:

In re: Hacer W. & Catherine Nalder, 962 Church St., Layton,
Ut.

Our branch plant at Pocatello, Idaho has informed us that the above has applied for credit from our company for the feeding of turkeys this year.

In the course of our credit investigation, it was noticed that you folks are still holding a mortgage which the Nalders gave you on March 26, 1951. This mortgage was recorded on April 4, 1951 in file No. 11183 in the amount of \$42,825.

I believe your company is no longer engaged in the feed business in Utah, and therefore, we are wondering whether you are willing to release the mortgage at this time.

If so, it would certainly be appreciated by us if you would take whatever steps are necessary to have the mortgage released on the records.

In any event, would you please notify us by return mail what your position is so that we will be able to determine whether or not the Nalders are eligible for any credit with us. This will be appreciated by us.

Sincerely

signed

R. J. Musec

R. J. Musec

General Consumer Credit Division

r jm/gr

(Pencil notations as follows:)

V. L. Aust Omaha Plant

Phoned 2-1-54
gave information to VLA
Plaintiff's Ex. J 1

A-32

RALSTON PURINA COMPANY Box 230 Pocatello, Idaho

February 5, 1954

Emily T. Eldridge, Recorder
Davis County Courthouse
Farmington, Utah

Dear Miss Eldridge:

A short while ago you sent us a list of chattels outstanding against Hacer W. and Catherine Nalder.

In your listing you should that these folks still had on file a chattel mortgage given to Kellogg Sales Company dated March 26, 1951, recorder April 4, 1951, for \$42,825, file No. 11183. We contacted the Kellogg people on this mortgage and they said it has been released. Since sending us your list that maybe the case, but we would appreciate it if you would check into this for us and let us know whether or not it is still a matter of record.

Thank you very much for your help and for your convenience in replying you will find attached a return envelope which requires no postage.

Sincerely,

signed

R. A. Bliss
Credit Manager

dlw
Enclosure

Gentlemen:

The mortgage you speak of dated March 26, 1951, recorded April 4, 1951 for \$42,825, file No. 11183 has not been released on our records as of this day, Feb. 7, 1954.

Very truly yours,

signed

Emily T. Eldridge
Davis Co. Recorder

Plaintiff's Ex. J 2

A-33

RALSTON PURINA COMPANY Box 230 Pocatello, Idaho

March 4, 1954

Mr. V. L. Aust, Credit Manager
Kellogg Sales Company
26th & Center Streets
Omaha, Nebraska

Dear Mr. Aust:

On March 26, 1951, Hacer W. and Catherine Nalder, of Layton, Utah, gave your company a chattel mortgage on their turkeys.

This mortgage on their turkeys for \$42,825.00 was recorded by your company on April 4, 1951 at the Davis County Courthouse, Farmington, Utah. The File Number on this instrument is 11183.

You have told our people in St. Louis that this item has been released. A recent check, however, shows that it is still a matter of public record.

If there is any reason to keep this mortgage in full force and effect please advise. Otherwise, kindly release this mortgage, sending a copy of your releases to:

Mr. R. A. Bliss, Credit Manager
Ralston Purina Company
Box 230
Pocatello, Idaho

Thank you for your usual good help.

Sincerely,

signed

R. A. Bliss
Credit Manager

Plaintiff's Ex. J 4

A-34

Kellogg Sales Company

Feed Department
26th and Center Streets
Omaha, Nebraska
March 8, 1954

Ralston Purina Company
Box 230
Pocatello, Idaho
Mr. R. A. Bliss
Credit Manager

Gentlemen:

Your letter of March 4 is acknowledged and we notice you are inquiring about the Chattel Mortgage which we had on H. W. Nalder and Catherine Nalder of Layton, Utah.

When I talked to Mr. Musec of your St. Louis office on Feb. 1 I advised him that these Chattel Mortgages were being released record. Our records show that on January 21 we issued a release of the Chattel Mortgage in the amount of \$42,825.00 file No. 11183.

Inasmuch as this account is involved in litigation we forwarded these releases to our attorney and asked that he release them if he felt it would not jeopardize our claim.

For your information we have an outstanding balance of the 1949 contract of \$5867.67 as of September 15, 1953. We have a note signed by the Nalder's dated July 28, 1950 which original amount was \$5627.39 with 5% interest. We trust this information will be of assistance to you.

Yours very truly,

KELLOGG SALES COMPANY

signed

V. L. Aust

Credit Manager
Omaha Plant

VLA:mc

Plaintiff's Ex. J 3

A-35

1952 TURKEY CROP

Turkeys Purchased	1018	\$900.00
Feed		4476.00
Brooder Expenses ie. Electricity		101.80
Herder		180.00
Processing		935.90
Total Costs		<u>\$ 6593.70</u>

Sales

935 dressed	\$ 8044.01
51 turkeys 64 lbs. dressed weight @ 55c	386.40
Total sales	<u>\$ 8430.41</u>

Net Profit	\$ 1836.71
Average profit per turkey	\$ 1.86

Computation of-Loss

Turkeys which would have been raised	14,000	
Mortality loss	03.1%	414
Sold	986	<u>1,700</u>
		12,300

Net Loss

12300 @ \$1.86	\$22,878.00
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Defcs. Ex. M

1953 TURKEY CROP

Turkeys Purchased	1430	\$ 1244.10
Feed		6125.59
Brooder Expenses ie. Electricity		143.00
Herder		180.00
		<hr/>
Total Costs		\$ 7692.69

Sales

1127 Live		\$ 8754.35
100 at \$9.00 retail		900.00
		<hr/>
Total Sales		\$ 9654.35
		<hr/>
Net Profit		\$ 1961.56
Average Profit per turkey		1.60

Computation of Loss

Turkeys which would have been raised		14,000
Mortality Loss 05.0%	714	
Sold	1227	1,941
		<hr/>
		12,059

Net Loss

12,059 at 1.60	19094.40
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Plaintiff's Ex. N

1954 TURKEY CROP

Turkeys Purchased	2200	1691.60
Feed purchased to Oct. 27 1954		6432.60
Brooder Expenses ie. Electricity		140.00
Herder		90.00
Total Costs		\$ 8,354.20

Sales

1900 - average weight 24½ lbs. at 23½c	\$10,939.00
100 - Average Weight 24½ lbs. at 32c retailed	784.00
Total Sales	11,723.00
Net Profit	3,368.80

Average profit per turkey	1.68
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Computation of Loss

Turkeys which would have been raised		14,000
Mortality loss	13.6%	1884
Sold	2000	3,884
		10,116

Net Loss	\$16,995.00
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10,116 at \$1.68

Defendants' Ex. O

DAMAGES

1952	Ex. M	\$22,878.00
1953	Ex. N	19,094.40
1954	Ex. O	16,995.00
		<hr/>
		\$58,967.40

MITIGATION OF DAMAGES

Rent on Ranch not required

3 Yrs at \$1,200.00 \$ 3,600.00

Salary Earned by H. Wm. Nalder

1952 1,700.00

1953 2,450.00

1954 \$ 2,450.00

\$10,200.00

Net Loss \$48,767.40

Double as required by statute 48,767.40

Total Damages \$97,534.80

Def's. Ex. Z