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H. William Nalder et al v. Kellogg Sales Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

vs.

KELLOGG SALES COMPANY,
a corporation,
Defendant and Appellant.

UNIVERSITY UTAH

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Case No.
8529

FILED

SEP 4 - 1956

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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IN THE SUPREME COURT of the STATE OF UTAH

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a corporation,
Defendant and Appellant.

Case No.
8529

APPELLANT'S BRIEF

STATEMENT OF FACTS

This case was before this court on appeal from the District Court of Davis County, Utah, as Case No. 8313. The opinion in the former appeal reversed the trial court

and ordered a new trial and was handed down on October 11, 1955, and is reported in 4 *Utah 2d* 117, 288 *Pac. 2d* 456. The facts in this appeal are substantially the same as in the former appeal. This proceeding is an appeal from the same court in which a judgment was rendered, this time upon the verdict of a jury, in favor of the respondents and against this appellant.

The respondents will be referred to hereafter as plaintiffs and appellant as defendant.

By its former opinion, this court ruled, that since the defendant, Nalder, Jr., signed none of the real estate mortgages which are, in part, the subject of this litigation, no judgment for damages for failure on the part of the defendant to release such mortgages could be awarded in his favor. Notwithstanding that mandate the trial court made no attempt to differentiate between damages flowing from the failure to release real estate mortgages and defendant's failure to release chattel mortgages and the jury was permitted to find the issue of damages in Nalder, Jr.'s favor without regard to the law of the case established by this court on that phase of the controversy.

This court further ruled on the former appeal that Nalder, Jr. could have no award of damages based upon the failure of defendant to release any mortgages for any period after he ceased doing business as a turkey grower. On the mistaken theory that the evidence upon retrial showed that Nalder, Jr. was attempting to engage in the turkey business during all of the time complained of by the plaintiffs, the trial court permitted the jury to award damages to him covering a period after which he had ceased to engage in that business or attempted to do so.

We shall have more to say regarding this aspect of the case hereafter.

Plaintiffs by this action seek recovery of alleged damages to their business as turkey raisers occurring in 1952, 1953 and 1954. They assert damage was caused by the failure of the defendant to release three chattel mortgages signed by Nalder, Sr. and Nalder, Jr. and two real estate mortgages executed by Nalder, Sr. and his wife and delivered to the defendant in connection with turkey financing agreements in 1949, 1950 and 1951. (Ex. A 1-3 and A 7-8) A third real estate mortgage was also given to defendant. (Ex. A 10) It was admitted by plaintiffs without dispute that that mortgage was a valid subsisting obligation which defendant was entitled to maintain of record. It amounted to \$6,555.12 plus \$3,600.00 for ~~furniture~~^{future} advances.

The case was tried upon plaintiffs' contention that because defendant did not release these mortgages, Nalder, Sr. and Nalder, Jr. were prevented from securing turkey financing from other companies, thus preventing them from raising the number of turkeys in 1952, 1953 and 1954, which they intended to and were capable of raising. They declare that it was their intention to raise 14,000 turkeys in each of those years and that they would have realized a profit of \$64,850.40 which they lost as the result of defendant's alleged wrongdoing. (R. 1-2) (Tr. 81-84, 296, 303, 305)

The record shows that plaintiffs never raised more than 6,000 turkeys in any year, even with the identical facilities which they now contend would have been used by them to raise 14,000 turkeys. The record further shows that during the three years preceding 1952, plaintiffs en-

gaged in the turkey business at an overall loss. In none of those years did the turkey business yield plaintiffs any substantial profit.

Defendant denied the alleged wrong and that plaintiffs had suffered any damage by reason of anything done or omitted by defendant, and counterclaimed to foreclose its third real estate mortgage. (Ex. A 10) (R. 3-10) Since no attempt was made by plaintiffs to contest the amount owing defendant on its counterclaim, defendant was awarded judgment for the full amount demanded, including attorneys' fees. The amount thus granted to defendant was deducted from the jury's verdict of \$22,-030.61 and judgment was finally entered in favor of Nalder, Sr. and Nalder, Jr. for the net amount of \$14,-739.09 plus \$150.00 penalty. (R. 16) It is from that judgment and other rulings of the trial court that this appeal is prosecuted.

At the conclusion of the evidence defendant made a motion for a directed verdict. The court took the motion under advisement (Tr. 514-517) and after verdict and judgment on the verdict, denied the motion. (R. 18)

Within the proper time after judgment defendant filed its motion for judgment notwithstanding verdict, or for a new trial. (R. 17) Those motions were likewise denied. (R. 18)

In addition, on March 27, 1956, the court granted plaintiffs' motion to retax costs which defendant claimed by a cost bill filed December 10, 1955, following reversal in the former appeal. (R. 23) The court struck from defendant's cost bill on appeal the items of \$682.84 which was the cost of the supersedeas bond required on the

former appeal and \$19.80 charged for the filing of the record on appeal.

It is undisputed that prior to 1949 Nalder, Sr. made preparations to go into the turkey business. Neither he nor his son, H. William Nalder, Jr., had engaged in that business before that time. (Tr. 21) In that year Nalder, Sr. and Nalder, Jr. entered into a partnership and commenced business. (Tr. 22, 23) They were financially unable to carry on business without credit. For each of the years 1949, 1950 and 1951 they entered into contracts with defendant, whereby, in exchange for their agreement to use defendant's turkey feed preparations, defendant agreed to advance the price of turkey poults and the necessary feed to grow and mature them for market. Exhibits B 2 and B 3 constituted the contract for 1949 and the contracts for 1950 and 1951 contained the same provisions except for the necessary variations of amount and year.

To secure the defendant for its advances Nalder, Sr. and Nalder, Jr., each year for the three years in which defendant provided the financing, signed and delivered to defendant promissory notes evidencing advances made by defendant and secured those notes by chattel mortgages upon the turkeys and the machinery, feed and equipment used in the business. Those chattel mortgages are part of the record as Exhibits A 1, A 2 and A 3.

It is not disputed that defendant provided all of the plaintiffs' required financing for 1949, 1950 and 1951.

In addition to chattel mortgage financing the defendant provided supplemental financing for which real estate mortgages were taken as security upon the real estate of Catherine Nalder. (Ex. A 7-13) This was neces-

sary because the chattel mortgage financing was insufficient to mature the turkeys and was furnished by defendant upon plaintiffs' request.

For the sole purpose of creating the impression with the jury that defendant was oppressive in its dealings with plaintiffs and did not act in good faith, plaintiffs contended that the defendant exacted notes and mortgages exceeding the actual amounts advanced to them. The contention is that defendant demanded notes and mortgages in double the amount actually requested or needed. (Tr. 56,150) As a matter of fact, prior to September 14, 1949, plaintiffs requested an additional \$2,000.00 and offered real estate in the name of Mrs. Nalder as security. Because it was anticipated that additional funds might be needed, a mortgage was taken for \$4,000.00. (Ex. A 7) (Tr. 363,365,367) Under that mortgage not \$2,000.00 but \$5,500.00 was actually advanced. (Tr. 369) (Ex. E)

In April, 1950, another real estate mortgage was taken on the same property. (Ex. A 8) Prior to that date defendant had made advances to plaintiffs in the amount of \$6,721.80 which was in addition to chattel mortgage financing and that real estate mortgage was to secure those additional advances. (Tr. 141,370) (Ex. E) Nevertheless, H. William Nalder denied having received any advances under that mortgage. (Tr. 57)

Again on August 15, 1950, a real estate mortgage was taken to secure anticipated further advances of \$3,600.00 (Ex. A 10) Under that mortgage over \$3,600.00 was advanced by defendants. (Tr. 371) (Ex. E) It was the sworn testimony of the plaintiffs that the third real estate mortgage was given for the sole purpose of merging the balance due from the 1949 indebtedness which

amounted to \$6,555.12 and upon a promise that all prior mortgages would be released. (Tr. 60-62, 214-215, 216) Timely objections were made to that evidence and were overruled by the court notwithstanding there was no foundation showing that the defendant's agent who was purported to have made the promise had any authority to make it and in the face of testimony and evidence that he had no such authority. (Tr. 60, 214, 44-54, 339) (Ex. C 4, 5, 6, 7.5, 8)

In none of the years that the plaintiffs raised turkeys with the aid of defendant's financing were they able to make a substantial profit. The operation in 1949 resulted in a loss of over \$6,000.00 (Ex. C 4, 5. Ex. D 4, 8. Ex. E) (Tr. 65, 69) In 1950 they succeeded in repaying all advances made for that year and about \$1,000.00 over, which was applied on the 1949 deficit. (Ex. D 4, 8. Ex. E) (Tr. 69) In 1951 they were even less successful. They made only about \$400.00 more than the total cost of that year's operation. (Ex. E) In 1951 in a letter written to defendant the plaintiffs confessed themselves as failures in the turkey business. (Ex. D 4)

In no year did the plaintiffs ever raise more than 6,000 turkeys. Yet in this case they would have the court believe it was their intention and that they actually would have raised 14,000 turkeys had defendant not prevented them from getting the necessary financing. The only year in which they made any attempt to get financing for 14,000 turkeys was 1952. (Ex. G 2 and H 1)

At the end of 1951 defendant declined to finance plaintiffs any longer. Plaintiffs had failed to substantially reduce the amount of their indebtedness from the 1949 operation. In addition, irregularities were discovered in

their dealings with defendant. They had sold turkeys covered by defendant's 1951 chattel mortgage and had not accounted for the proceeds. (Ex. D 4-8, D 11-13) (Tr. 66) As a matter of fact they have never fully accounted to defendant to this day for all of the turkeys which they illegally sold. (Tr. 379, 149) They knew perfectly well that they had no right to sell those mortgaged turkeys or to divert the proceeds to other uses than the payment of their obligations to defendant. (Ex. D 4, 5) (Tr. 68, 148, 218, 219) They made a full written confession of their wrongdoing in November, 1951. (Ex. D 4-8) The money they received from those sales was used to pay claims of other creditors who were pressing them for payment or threatening to take judgments. (Ex. D 4, 5) (Tr. 68, 70, 148) At the trial the plaintiffs tried to make it appear that those turkeys had been sold because by so doing they were able to get more money for them. (Tr. 66, 146) On cross examination they were forced to admit the real motives behind their actions.

It was for those reasons plus the fact that defendant could no longer provide the type of financing which plaintiffs required that defendant declined to finance plaintiffs any longer. (Tr. 423, 458)

Late in the fall of 1951 a conference was held between Mr. and Mrs. Nalder, Sr. and Messrs. Williams and Aust representing the defendant. The purpose of the meeting was to discuss the liquidation of the amount owing defendant. The meeting took place in the Hotel Utah. The Nalders claim that when the subject of 1952 financing came up for discussion Mr. Williams not only refused to extend further credit, but went further and threatened that he would prevent the Nalders from getting credit

from anyone else. (Tr. 73, 74, 80, 151, 222, 230) Mr. Williams and Mr. Aust both emphatically deny such a threat. (Tr. 423, 424, 458) If made and carried out it would have almost certainly forever foreclosed the only hope which defendant had of ever getting its money and defendant well knew this to be so. (Tr. 461) The obvious purpose of the accusations made by the plaintiffs was again to make it appear to the jury that defendant was guilty of bad faith. The evidence clearly demonstrates that no such threat to plaintiffs' credit was ever made.

The record shows that the plaintiffs themselves are not in unity about the matter of a threat having been made. H. William Nalder, Jr. wrote a letter to defendant couched in extreme opposite terms than his parents testified. (Ex. D 14) In that letter he states that his father told him that defendant would permit other financing arrangements to be made by plaintiffs and asks the defendant to confirm the understanding. Furthermore, he testified to the same effect. (Tr. 324, 325) Yet H. William Nalder, Sr. denied under oath that he ever told his son the very thing which H. William Nalder, Jr. wrote to defendant about. (Tr. 151) Responsive to that letter defendant confirmed its willingness to permit other financing and expressed its willingness to subordinate its claim to anyone willing to provide financing. That offer was repeatedly renewed and was never withdrawn. (Tr. 152) (Ex. D 16-23) (Tr. 299, 324) Defendant attached as a condition to its agreement to subordinate that plaintiffs pay \$352.00 which represented the value of mortgaged turkeys which had been wrongfully delivered to a service station operator to satisfy an unpaid account for gas and oil which Nalder, Jr. owed and had failed to pay. (Ex. D 17, 19) (Tr. 154,

155, 301, 302, 323, 325) The plaintiffs not only recognized the condition to be reasonable but attempted to comply with it. Furthermore, there was an exchange of perfectly friendly correspondence after this alleged threat was made. (Ex. D 10.5, 21.5)

During the trial the matter of the efforts of plaintiffs to secure other financing was testified to at great length. It appears that Nalder, Sr. and Nalder, Jr. made separate and individual applications to different feed manufacturers. It was asserted that this was done in the full knowledge that if made jointly the applications would have been refused. (Tr. 296)

In 1952 Nalder, Jr. made an application to Farmer's Grain (Ex. H) and one to the Pillsbury Company. There is in the record absolutely no evidence as to why those applications were rejected. (Tr. 305, 322, 323) Consequently, there is no proof that they were rejected because defendant did not release its mortgages.

Also in 1952 another application was made by Nalder, Jr. to General Mills (Ex. F) and there is considerable evidence as to why it was not approved. It requested financing for 5,000 turkeys, not 14,000. (Ex. F 1) Many unfavorable factors are revealed by the record and are graphically portrayed in Exhibit F 6. It is conceded that one of the conditions for approval was a release or subordination of defendant's mortgages. But in addition the matter of H. William Nalder, Jr.'s credit reputation was seriously questioned. (Tr. 111, 122) Also his involvement in litigation and a poor paying record and other mortgages and debts. (Tr. 117, 122-124) Furthermore, he was to be strictly limited in his operations to 5,000 birds, not 9,000 which he contends he was going to raise. (Tr. 115, 121) In ad-

dition, a guarantee which was an absolute requirement for approval was never obtained by him. (Tr. 115, 116, 126, 127, 133) Mr. Stevens, credit manager of General Mills, was called by plaintiffs and despite counsel's repeated efforts to get him to do so he refused to state that Nalder's application would have been approved if defendant had released or subordinated its debt. (Tr. 128) The record does not support the contention that the application would have been approved if defendant had released its mortgages. It is significant to note that the turkey processor with whom the plaintiffs had done business for two or three years would not advance even \$352.00 to Nalder, Jr. in order for him to get a subordination from defendant. (Tr. 302, 324) Here was a man who knew the plaintiff as well as anyone who had no confidence that he would get his money back even if he loaned them only this small amount.

The record is likewise clear that Nalder, Jr. abandoned any further efforts to finance turkeys after 1952. (Tr. 309) In spite of such abandonment the jury was permitted to find that Nalder, Jr. was damaged in turkey operations in the years 1953 and 1954 because defendant did not release its mortgages.

We turn now to the credit applications made by Nalder, Sr. to Ralston Purina Company in 1952, 1953 and 1954. The application of 1953 was not produced but he testified it was for 1,300 to 2,000 turkeys. (Tr. 156, 204) The exact number is indefinite.

He had attempted to get financing for 5,000 turkeys in 1952 (Ex. G 2) but when this was not approved he reduced his request hoping it would be approved and in 1954 his application was for only 2,000 turkeys (Ex.

G 3), not 5,000 or 14,000. The evidence is that in 1953 and 1954 he tried to get financing for no more than 2,000 turkeys. Here again we point out that despite this evidence the plaintiffs were permitted to go to the jury upon the theory that they intended to raise 14,000 turkeys in 1952, 1953 and 1954 and that they would have been successful except for defendant's alleged wrongdoing.

The record indicates clearly that the applications of Nalder, Sr. to Ralston Purina were rejected for much the same reasons that Nalder, Jr's. application was denied by General Mills. They were: (1) Bad credit rating and pending litigation. (Ex. L 11, 13, 14) (Tr. 96, 478-82, 499, 508, 509) (2) Lack of character and reputation. (Ex. L 15) (3) The existence of other mortgage indebtedness. (Tr. 492, 493) (4) All other factors affecting credit. (Tr. 499, 510, 511)

It was not the existence of unreleased Kellog mortgages which was responsible for the denial of credit applications. (Tr. 497, 500) That a release or subordination of defendant's mortgages would have been necessary in the event the application was accepted is not disputed. (Tr. 483, 492) The evidence is that these applications were denied solely because Nalder, Sr. was considered to be an undesirable individual to do business with. He did get financing for 1,000 to 2,000 turkeys in 1952, 1953 and 1954, but only upon a guarantee of his obligation by Rasmussen, his feed dealer. First Security Bank would not accept him upon the strength of his own credit reputation or assets. (Tr. 271, 272)

It is undisputed that credit men do not deny credit applications because an applicant may have unreleased mortgages outstanding in any amount. Of much greater

importance is the amount of the debt which underlies such recorded instruments. Unreleased mortgages are only an indication of the existence of a possible debt which an applicant may owe. (Tr. 119, 122, 125, 322, 388, 459, 460)

We cannot pass this phase of the case without alluding to the record of false and incomplete credit information supplied by Nalder, Sr. to Ralston Purina. He signed the financial statements, which are Exhibits G 1 and G 5, certifying that they were complete, accurate and truthful. The only indebtedness which he disclosed was to Deseret Federal Savings & Loan Association. He made no mention whatever of the debt owing defendant nor did he mention the existence of numerous chattel and real estate mortgages and judgments outstanding to other creditors. He knew the information contained in his application was untrue. (Tr. 157-163, 165-168, 169, 170) He excused his conduct in this regard by stating that he notified Wheelwright, a Ralston Purina Agent, of the existence of those debts and omitted them upon Wheelwright's suggestion and advice. Significantly he failed to call Wheelwright to testify in corroboration of this statement.

The existence of those mortgages and judgments, many of which had not been released or satisfied when the applications for credit were made, is amply supported by the record. (Tr. 572-575, 491, 275-283) They total some eighteen separate items. Many of them were unreleased at the time of trial.

One of the important issues in this case is whether a demand was ever made by plaintiffs that defendant release its mortgages, assuming that they had been paid and satisfied and plaintiffs were entitled to releases, which de-

fendant specifically denied. The record is bare of any evidence that any demand was ever made for a release of the real estate mortgages. Furthermore, with respect to the real estate mortgages the record shows conclusively that plaintiffs were not entitled to releases. The mortgages dated April 1, 1950, and August 15, 1950, (Ex. A 8, A 10) both expressly provided that they were to secure all indebtedness then existing or accruing thereafter by all the plaintiffs to the defendant until the same was paid in full. The debt owing to defendant never having been paid in full those mortgages were never in fact satisfied and hence defendant was under no obligation to release them. Those mortgages totaled \$13,276.92. The validity of the mortgage of August 15, 1950, (Ex. A 10) is conceded. The jury was permitted to take into account the fact that the mortgage of April 1, 1950, (Ex. A 8) was not released as a basis for damages.

No demand for release of chattel mortgages was made prior to 1954. (Tr. 208-213, 241, 257) The only evidence even remotely resembling a demand prior to 1954 is contained in the testimony of Nalder, Jr. (Tr. 318) The most that can be said for his testimony is that on that occasion, November, 1950, the subject of a release was discussed. That discussion pertained to a settlement of the 1950 account and the record clearly shows that the defendant's agent, Mrs. Schinker, advised that no mortgages would be released until authorized by defendant's general manager. (Ex. C 9, C 10) (Tr. 314, 315, 318, 338, 339, 342) Mrs. Schinker had no authority to release mortgages or to commit defendant to make a release. It is not even pretended that any other demand for a release of chattel mortgages was made after November, 1950, and until

1954. (Tr. 320-322) Hence there is no evidence of any demand ever having been made to release the 1951 chattel mortgage (Ex A 3) which was for \$42,825.00 In the absence of this vital evidence the jury was permitted to find issues in favor of plaintiffs that defendant's failure to release chattel mortgages was unlawful and could form the basis for an award of damages. Releases of the chattel mortgages were executed January 21, 1954, and they were filed March 11, 1954. (Ex. A 4-6) (Tr. 456-7)

In connection with the subject of a demand for release the plaintiffs asserted that they had been led to believe that all but the third real estate mortgage (Ex. A 10) had been released. They assert they first made the discovery that this had not been done in 1954. (Tr. 208-213, 241, 257) The documentary evidence will not support the plaintiffs in this assertion. They were advised in writing as early as February, 1952, and as late as June, 1953, that the mortgages had not been released and could not be released until they accounted for the balance of the proceeds from the sale of the mortgaged turkeys. (Ex. D 14, D 21.5, D 22, D 23) Exhibit C 10 advised the plaintiffs that the mortgages dated before December, 1950, would not be released until approved by defendant's general manager.

Defendant in retaining all of its mortgages of record was acting in accordance with its usual business practice and policy of not releasing any mortgages until indebtedness owing it was paid in full. This policy was adopted and in use at the time in question upon the advice and instruction of counsel. Counsel had advised the defendant that the release of any mortgages prior to the full payment of indebtedness would jeopardize defendant's rights.

(Tr. 336, 337, 357, 377, 432-434, 448, 449, 451, 462) Certainly animosity or desire to injure plaintiffs played no part in defendant's decision not to release these mortgages. (Tr. 461) Defendant acted in good faith in what it did.

During the trial numerous objections to the introduction of evidence and the propriety of counsel's questions were raised to no avail. Also exceptions were taken to several of the court's instructions and his refusal to give requested instructions. These matters will be referred to and discussed hereafter.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT COMMITTED ERROR IN PERMITTING THE JURY TO AWARD DAMAGES TO PLAINTIFF, H. WILLIAM NALDER, JR., FOR DEFENDANT'S ALLEGED WRONGFUL FAILURE TO RELEASE REAL ESTATE MORTGAGES AND IN PERMITTING THE INTRODUCTION OF EVIDENCE THAT SAID PLAINTIFF ENGAGED IN OR ATTEMPTED TO ENGAGE IN THE TURKEY BUSINESS AFTER MAY OF 1952 CONTRARY TO THE ESTABLISHED LAW OF THE CASE.

POINT II

THE TRIAL COURT COMMITTED ERROR IN PERMITTING THE JURY TO AWARD DAMAGES TO PLAINTIFFS, H. WILLIAM NALDER, SR. AND H. WILLIAM NALDER, JR., BECAUSE OF DEFENDANT'S ALLEGED FAILURE OR REFUSAL TO RELEASE REAL ESTATE MORTGAGES BECAUSE NO DEMAND OR REQUEST FOR SUCH RELEASES WAS EVER MADE AND FOR THE ADDITIONAL REASON THAT SAID PLAINTIFFS NEVER PAID OR OTHERWISE DIS-

CHARGED THE OBLIGATIONS SECURED BY SAID MORTGAGES.

POINT III

THE TRIAL COURT COMMITTED ERROR BY PERMITTING THE JURY TO AWARD DAMAGES FOR DEFENDANT'S FAILURE TO RELEASE CHATTEL MORTGAGES: (a) BECAUSE NO DEMAND FOR RELEASE WAS MADE PRIOR TO 1954. (b) BECAUSE EACH CHATTEL MORTGAGE SECURED THE PRIOR UNPAID DEBT OF PLAINTIFFS, H. WILLIAM NALDER, SR. AND H. WILLIAM NALDER, JR. HENCE, NO RELEASE COULD BE DEMANDED. (c) BECAUSE THERE IS NO EVIDENCE THAT SAID PLAINTIFFS COULD NOT HAVE SECURED FINANCING IN 1954 AFTER THE RELEASE OF SAID CHATTEL MORTGAGES ON MARCH 11, 1954. (d) BECAUSE THE EVIDENCE CONCLUSIVELY SHOWS THAT PLAINTIFF, H. WILLIAM NALDER, JR., ABANDONED THE RAISING OF TURKEYS IN 1952 AND NEVER ENGAGED IN THE TURKEY BUSINESS THEREAFTER. (e) BECAUSE THE EVIDENCE SHOWS THAT PLAINTIFF, H. WILLIAM NALDER, SR., OBTAINED FINANCING IN 1953 AND 1954 ON ALL TURKEYS FOR WHICH HE MADE ANY APPLICATION FOR FINANCING.

POINT IV

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

POINT V

THE TRIAL COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE PLAINTIFFS' EXHIBITS I-1, I-2, Q, R and N 1-4 FOR THE REASON THAT SAID EXHIBITS WERE INCOMPETENT, IRRELEVANT AND IMMATERIAL AND NO PROPER FOUNDATION WAS LAID FOR THEIR ADMISSION IN EVIDENCE.

POINT VI

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

POINT VII

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

POINT VIII

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

POINT IX

THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING VERDICT OR FOR A NEW TRIAL.

POINT X

THE COURT ERRED IN CERTAIN OF ITS INSTRUCTIONS TO THE JURY AND IN ITS REFUSAL TO GIVE CERTAIN OF DEFENDANT'S REQUESTED INSTRUCTIONS.

POINT XI

THE COURT ERRED IN STRIKING CERTAIN ITEMS OF DEFENDANT'S COST BILL ON APPEAL.

A R G U M E N T

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO AWARD DAMAGES TO PLAINTIFF, H. WILLIAM NALDER, JR., FOR DEFENDANT'S ALLEGED WRONGFUL FAILURE TO RELEASE REAL ESTATE MORTGAGES AND IN PERMITTING THE INTRODUCTION OF EVIDENCE THAT SAID PLAINTIFF ENGAGED IN OR ATTEMPTED TO ENGAGE IN THE TURKEY BUSINESS AFTER MAY OF 1952, CONTRARY TO THE ESTABLISHED LAW OF THE CASE.

In its opinion in the former appeal in this case, 4 *Utah 2d*, 117, 288 *Pac.* 456, this court stated:

"Nalder, Jr. did not sign any of the real estate mortgages and consequently, any award to him for the Kellog Company's failure to release these mortgages is without basis. Nor can he recover damages beyond the period when he actually engaged in, or tried to engage in, the turkey business."

This court further found upon the record in the former appeal that:

"In 1952 Nalder, Jr. was unable to obtain financing for further turkey raising and turned to other pursuits. Nalder, Sr. was unable to obtain

financing upon his sole credit but obtained co-signers and participated in turkey raising upon a limited scale in 1952, 1953 and 1954. His success during these years was used by the trial court as the basis for determining the amount of damages awarded, not only to Nalder, Sr. but to Mrs. Nalder and Nalder, Jr., as well. This was error, as was the court's failure at any time to distinguish between Nalder, Sr., Nalder, Jr. and Mrs. Nalder upon any of the basic requirements for a cause of action based upon wrongful failure to release mortgages * * *

None of the real estate mortgages involved in this case were executed by Nalder, Jr. (Ex. A 7, A 8, A 10) Although this court explicitly and unmistakably ruled that Nalder, Jr. could not recover for defendant's failure to release real estate mortgages, the jury was nevertheless permitted to consider this fact as a basis for awarding damages to Nalder, Jr. Because no attempt was made by the trial court in instructing the jury to differentiate between a failure to release real estate and chattel mortgages in determining the question of damages as applied to Nalder, Jr., it is submitted reversible error was committed.

The language of this court above quoted, recognizes the highly penal nature of *Sec. 57-3-8, U.C.A. 1953* upon which plaintiffs must base their right to a judgment in favor of Nalder, Jr. The statute is explicit in its terms in allowing damages only to mortgagor. Since Nalder, Jr. executed none of the real estate mortgages it must inevitably follow that he may claim no damages for defendant's failure to release them. Nor does it aid plaintiffs to contend that because the real estate mort-

gages were given by Mrs. Nalder to secure the partnership obligations of Nalder, Sr. and Nalder, Jr. the penalty for wrongfully failing to release them must inure to the benefit of Nalder, Jr. as one of the partners. Neither Nalder, Jr. nor the partnership were the mortgagors, hence, Nalder, Jr. does not come within the provisions of this statute.

This court also determined in the former appeal that Nalder, Jr. abandoned the turkey raising business in 1952. In an effort to escape from the effect of that decision and to justify a judgment on his behalf, the plaintiffs were permitted to testify that Nalder, Jr kept an interest in the turkey business by actively participating in the limited turkey operations of Nalder, Sr. in 1952, 1953 and 1954, even to the extent of sharing in the profits and losses of Nalder, Sr. for those years. Defendant objected to this testimony on the ground that it was a repudiation of the testimony which plaintiffs had given at the former trial. (Tr. 293) This situation was fully pointed out to the trial court, whose rulings appear at pages 201-202 of the transcript. The testimony at the former trial is found at pages 192-197 of the transcript.

Furthermore, the uncontroverted testimony still is that in May of 1952 Nalder, Jr. commenced working for the Grolier Society. (Tr. 306) In the spring of 1953 he was selling books in California and in June of 1953 he began working full time for the Utah Sand and Gravel Company during all of the time which he would have devoted to raising turkeys. (Tr. 193) He continued on this job without interruption until the time of the former trial. (Tr. 194) Also, Nalder, Jr. made no attempt whosoever to get any turkey financing after 1952.

(Tr. 309) He made no joint application for financing with Nalder, Sr. disclosing any partnership with his father anytime after 1951. (Tr. 296) In the face of this testimony and against the decision of this court, it is submitted the trial court erred in permitting Nalder, Jr. to claim a continuation of the partnership after 1951.

The trial court, aided by the insistence of plaintiffs' counsel, also permitted the jury to consider the pretended success of Nalder, Sr. in 1952, 1953 and 1954 as the basis for assessing damages awarded to Nalder, Jr. This court, in the language above quoted, declared such action on the part of the trial court on the former trial, to be error. Since this same error was again committed a reversal of the judgment is required on the same ground.

POINT II

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

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

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

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

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

A fact of even greater significance, which the trial court totally ignored, is that the record shows that the real estate mortgage of April 1, 1950, (Ex. A-8) was never satisfied, hence plaintiffs at no time had a right to demand a release. In that mortgage, this provision was inserted:

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

At the time that mortgage was executed, plaintiffs,

Nalder, Sr. and Jr., were indebted to defendant for the amounts recited in said mortgage. It should, therefore, be evident that by the express terms of the mortgage the plaintiffs could not require a release until all indebtedness owing to the defendant had been paid in full. Never, at any time, have the plaintiffs attempted to deny that they owed defendant amounts secured by this mortgage and the trial court so found. (R. 16) In addition, the 1949 real estate mortgage (Ex. A 7) was never satisfied because the debt owing, which was secured in part by that mortgage, was never paid. Hence, the plaintiffs were not entitled to demand its release. It must, therefore, be apparent that the judgment awarded by the court for the failure to release real estate mortgages cannot stand, because the conditions which would have entitled the plaintiffs to the relief under the statute relied upon did not exist.

POINT III

THE TRIAL COURT COMMITTED ERROR BY PERMITTING THE JURY TO AWARD DAMAGES FOR DEFENDANT'S FAILURE TO RELEASE CHATTEL MORTGAGES: (a) BECAUSE NO DEMAND FOR RELEASE WAS MADE PRIOR TO 1954. (b) BECAUSE EACH CHATTEL MORTGAGE SECURED THE PRIOR UNPAID DEBT OF PLAINTIFFS, H. WILLIAM NALDER, SR. AND H. WILLIAM NALDER, JR., HENCE, NO RELEASE COULD BE DEMANDED. (c) BECAUSE THERE IS NO EVIDENCE THAT SAID PLAINTIFFS COULD NOT HAVE SECURED FINANCING IN 1954 AFTER THE RELEASE OF SAID CHATTEL MORTGAGES ON

MARCH 11, 1954. (d) BECAUSE THE EVIDENCE CONCLUSIVELY SHOWS THAT PLAINTIFF, H. WILLIAM NALDER, JR., ABANDONED THE RAISING OF TURKEYS IN 1952 AND NEVER ENGAGED IN THE TURKEY BUSINESS THEREAFTER. (e) BECAUSE THE EVIDENCE SHOWS THAT PLAINTIFF, H. WILLIAM NALDER, SR., OBTAINED FINANCING IN 1953 AND 1954 ON ALL TURKEYS WHICH HE MADE ANY APPLICATION FOR FINANCING.

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

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

The record in this connection shows that no demand was ever made for the release of chattel mortgages until 1954. (Tr. 208) By the unequivocal terms of the statute which this court has said, in ruling upon the companion statute requires strict construction there can be no penalty assessed for failure to release until after demand. *Shibata v. Bear River State Bank, supra*. Notwithstanding this fact, the jury was permitted to award Nalder, Sr. and Jr. a judgment for purported loss of profits sustained in 1952, and 1953, which losses, if sustained at all, were suffered prior to any demand for a release having been made. It must be apparent, there-

fore, that the judgment in this respect is fatally defective.

Releases of chattel mortgages were executed on the 21st of January, 1954, and were recorded in the office of the clerk of Davis County, Utah, March 11, 1954. (Ex. A 4-6) It is submitted that there is no evidence that these plaintiffs sustained any damage for failure to release chattel mortgages between the time when the demand was made and the time when the releases were placed of record. The releases were filed before the beginning of the 1954 turkey season and there is no scintilla of evidence by which it was shown that the chattel mortgages were not released in time for plaintiffs, in the exercise of reasonable diligence, to have secured financing for their 1954 operations. The record shows (Ex. I 1) that the plaintiffs' 1951 turkey poults were delivered April 3, May 4 and May 11, 1951, respectively, and Exhibit E 1 shows that the turkeys raised in 1949 were not hatched until April 29, 1949, and Exhibit E 3 shows that the turkeys raised in 1950 were hatched May 1 and May 7 respectively and Exhibit E 5 shows that those turkeys raised in 1951 were hatched March 9 and May 10, respectively.

The trial court permitted a judgment for Nalder, Sr. and Jr. for alleged damages sustained in 1952, 1953 and 1954. Each of the chattel mortgages under consideration contained this provision:

"Provided that if the mortgagor shall pay or cause to be paid unto Kellogg Sales Company or its assigns the indebtedness above set forth on demand as evidenced by his note or notes, together with interest as therein provided and shall further pay or cause to be paid subject to the further and

future indebtedness whether evidenced by promissory note or not as the mortgagor may hereafter incur to the mortgagee, *it being the intent hereof to secure the said mortgagee any advance or credit now made or hereafter made * * * or any other advancement or credit extended * * **"

Thus, by the very terms of these chattel mortgages they were given to secure existing indebtedness no matter how originating. It is undisputed in the record that there was unpaid indebtedness going back to the inception of the business relationship between the parties.

The law is well settled that taking a new chattel mortgage in the absence of intent does not satisfy a pre-existing indebtedness. *Pacific National Agricultural Credit Corp. v. Wilbur, Cal.*, 42 Pac. 2d 314:

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

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

It is the position of defendant that each new chat-

tel mortgage taken by it included the past due and unpaid debt of Nalder, Sr. and Jr., and that consequently no right to demand a release of any chattel mortgage existed, even assuming that a proper demand for release was made, until the debt secured by those mortgages was paid in full, including the amount still unpaid from the 1949 operations of the mortgagors. Certainly, in view of the record, there never existed any right to a release of the 1949 chattel mortgage and we contend the same construction must be applied to the chattel mortgages given in 1950 and 1951 as well. Plaintiffs attempted to escape the consequence of their failure to pay the amount due under the 1949 chattel mortgage by contending that defendant promised in exchange for their agreement to execute the real estate mortgage of August 15, 1950, (Ex. A-10) that the 1949 chattel mortgage would be released. Defendant denied any such agreement and we shall discuss under another heading of this brief why plaintiffs' contention is untenable.

The record conclusively demonstrates that Nalder, Jr. abandoned the business of raising turkeys in 1952. The record shows that he went to other pursuits in that year and never returned to turkey raising. He made no efforts after 1952 to get financing, either individually or jointly, with H. William Nalder, Sr. He also abandoned the ranch which he had leased for the purpose of raising turkeys and either sold or returned to his seller the equipment which he claims he was going to use in such operations in 1953 and 1954. (Tr. 306-309, 192-197) This being so it must necessarily be concluded that Nalder, Jr. voluntarily made it impossible for himself to raise the 14,000 turkeys which he states he intended to or

could have raised in those years. Since the verdict and judgment in this case permitted a recovery for him for 1952, 1953 and 1954 lost profits, it necessarily follows that there is no evidence which can or does support this judgment and for this reason the case requires a reversal.

Similarly, Nalder, Sr. was awarded a judgment upon the theory that he too suffered damage in 1953 and 1954 because he and his son were prevented from raising 14,000 turkeys. Inasmuch as the facilities necessary to raise that number of turkeys ~~was~~^{were} voluntarily surrendered by Nalder, Jr. in 1952, it likewise follows it could not have been and was not the intention of either Nalder, Sr. or Nalder, Jr. to raise the claimed number of turkeys as represented. The record further shows that no application made in those years by Nalder, Sr. requested financing for more than 2,000 turkeys. (Ex. G 3) (Tr. 156, 204) He and Rasmussen testified that his unsuccessful efforts to obtain financing for 5,000 turkeys on his 1952 application had discouraged him and led to reduced applications in 1953 and 1954. (Tr. 207, 265) Nevertheless, with the aid of Rasmussen, his feed dealer, he actually obtained all the financing in those years which he made any attempt to get. (Tr. 264, 265, 271, 272) Nalder, Sr. claims he did not know why his applications were being rejected and certainly he did not at the time they were made and rejected, attribute the rejection to defendant's unreleased mortgages. In this state of the record it is apparent that no attempt was made by either Nalder, Sr. or Nalder, Jr. to raise 14,000 turkeys in 1953 or 1954, hence, no claim to damages can possibly be predicated upon the assertion that in those years plaintiffs would have raised that number of turkeys. The record shows

a complete abandonment of the business by Nalder, Jr. and a voluntary reduction in the applications made by Nalder, Sr. for financing. In either case the judgment is entirely unsupported by any competent evidence sustaining the extent of the damage claimed.

POINT IV

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

In order to sustain a judgment in their favor the plaintiffs were required to show that as a result of defendant's wrongful conduct they sustained damage. Loss of profits like any other damage must be proven before any recovery may be had for such a loss. The same rules of certainty and definiteness apply to a claim of lost profits as apply to any other type of damage. Also, conjecture, speculation and guessing are as objectionable in proving such losses as they would be in any claim for damages.

It is conceded that loss of future or anticipated profits is recoverable in a proper action. The following authorities support this proposition:

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

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

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

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

Claims for loss of anticipated or future profits by their very nature are speculative and uncertain. The general rule applicable to damages is that in order to be recoverable they must be certain. See *Restatement of the Law of Torts*, Section 912; *Steiner v. Long Beach Local No. 128*, (Cal.) 123 Pac. 2d. 20; *Grupe v. Glick*, (Cal.) 160 Pac. 2d 832. In the latter case the following statement was made:

“An award of damages for the detriment occasioned by the loss of future profits is subject to the general rule that the amount which, except for the defendant’s wrongful act, would have come to the plaintiff, must be certain and must have been within the contemplation of the parties when they contracted.”

See also *Blakely Printing Co. v. Fort Dearborn Mercantile Co.*, (Ill.) 53 N.E. 2d 55 and *Krikorian v. Dailey*, (Va.) 197 S.E. 442 at page 448:

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

The rule applying to such cases, as the above authorities clearly demonstrate, is that any loss of future profits must be related to the experience of the claimant *prior* to the time of the commission of the wrongful act.

The *Restatement of Torts*, Section 912, page 578 states the rule as follows:

“As a condition to recovery for loss of earnings, the person harmed must offer evidence, convincing to the trier of the fact, that a substantial amount of earnings has been lost. To do this he must introduce evidence of the amount of earnings received *prior* to the time of the injury, or the amount which he was capable of obtaining, and at least some evidence having a tendency to show that he could have earned something during the period in which loss of earnings is claimed.”

A leading case on this subject is *Williams v. Island City Mercantile & Milling Company*, (Ore.) 37 Pac. 49. That case involved a claim for loss of future profits growing out of breach of contract. Among other things, the court says the following:

“We are of the opinion, therefore, that the true measure of damages for the failure to complete the contract within the time stipulated, and for the loss of time occasioned by the attempts of plaintiffs, after September 20th, to comply with the terms of their contract, is the reasonable value of the use of the mill during such time, *as ascertained from the past experience of the defendant*
* * *

“The ruling announced by the court as the measure of damages is the difference between the actual and guaranteed capacity of the mill was, we think, correct *because it was based upon past transactions*; * * *

See also:

Chain Belt Co. v. U. S., 115 Fed. Supp. 701

William H. Rankin Co. v. Associated Bill Posters
of the United States, 42 Fed. 2d 152
Shell Oil Co. v. State Tire & Oil Co., 126 Fed.
2d 971

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

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

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

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

The evidence is undisputed that in the years prior
to 1952, when there was no interference from the defend-
ant and when in fact the defendant was financing the
plaintiffs to the full extent of their operations, their busi-
ness was a failure. We quote from the plaintiffs' own
statements regarding their business operations. On No-
vember 21, 1951, they wrote defendant as follows:

" * * * It surely looks bad for us again * * *
 You also know without me telling you, that we
 have made nothing since we went into the turkeys
 * * * .

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

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

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

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

" * * * You may say rightly that they have
 not been good years * * * " (Ex. D 9)

In those three years plaintiffs were unable to pay off
 the 1949 debt owing to defendant. Did they show as
 this court in *Jenkins v. Morgan, supra*, states they must
 show "that the business had been in successful operation
 for such a period of time as to give it permanency and
 recognition, and that such business was earning a profit
 which could be reasonably ascertained and approxi-
 mated?" The record shows exactly the opposite. The
 turkey raising business, to paraphrase the case of *Wil-
 liams v. Island City Mercantile & Milling Co., supra*, is
 even more speculative than the milling business and to
 permit these plaintiffs to come into court and testify
 that in 1952, 1953 and 1954 they would have raised

14,000 turkeys and marketed the same at so much profit per bird was the purest kind of speculation and was in no way related to their past experience of earnings or the extent of their past operations. It is consequently submitted that the judgment rendered cannot stand or be sustained and that the same should be reversed.

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

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

See also:

Chain Belt Co. v. United States, *supra*
 Grupe v. Glick, *supra*
 Krigorian v. Dailey, *supra*
 Steiner v. Long Beach Local No. 128, *supra*
 15 Am. Juris. page 573, Sec. 157
 25 Corpus Juris Secundum, P. 518, Sec. 42 (b)
 Eastman Kodak Co. v. So. Photo Material Co.,
 295 Fed. 98
 Ellerson v. Grove, Circuit Court of Appeals, 4th
 Circuit, 44 Fed. 2d 493
 Andreopoulos v. Peresteredes, (Wash.) 163 Pac. 770
 Goebel v. Hough, 2 N.W. 847, (Minn.)
 Blankenship v. Lanier, (Ala.) 101 So. 763
 Central Coal Co. v. Hartman, 111 Fed. 96
 Whitehead v. Cape Henry Syn. (Vir.) 68 S.E. 263

Shreveport Laundries, Inc. v. Red Iron Drilling
Co., Inc. (La.) 192 So. 895
Mensing v. Wright, (Kan.) 119 Pac. 374
Landon v. Hill, 29 Pac. 2d 281, (Cal.)

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

The plaintiffs testified that in 1952 they had capacity to hold and care for 14,000 turkeys and that they would have raised that many birds if financing had been available. They asserted they would have duplicated the same number in 1953 and 1954 and the proof was that in 1952, 1953 and 1954 they never raised in any year more than 2,000 turkeys. We have already pointed out that Young Nalder in 1952 completely abandoned turkey raising as a business and that Nalder, Sr. in 1953 and 1954 curtailed his applications for credit and we have already made the observation also that in no year had they ever raised more than 6,000 turkeys. We submit that the jury was permitted to speculate upon the theory contended for by the plaintiffs and that even the speculation upon which the jury was permitted to act had no basis or foundation in fact.

POINT V

THE TRIAL COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE PLAINTIFFS' EXHIBITS I-1, I-2, Q, R AND N 1-4 FOR THE REASON THAT SAID EXHIBITS WERE INCOMPETENT,

IRRELEVANT AND IMMATERIAL AND NO
PROPER FOUNDATION WAS LAID FOR THEIR
ADMISSION IN EVIDENCE.

Under the next preceeding argument of this brief we have stated our reasons for asserting that the court erred in awarding damages to plaintiffs for loss of anticipated or future profits because there was no relationship between the damages awarded and the plaintiffs' experience in the turkey business prior to the alleged interference by defendant. We now wish to make comment upon the exhibits which the court received over the objection of defendant upon which a determination of damages was made.

Exhibits I-1 and I-2 were taken from the books and records of Lee Brown Processing Company. They were admitted upon the testimony of Keith McMurdie who identified himself as plant manager and field man for the Brown Company. At page 35 of the transcript appears the following testimony:

- Q. I show you what has been marked as Exhibit I-1 and ask you if you can tell me just what it is? Don't give me any information from it. Just what is that?
- A. This is our — this must be a photostatic copy of our ledger sheet. Out of our records.
- Q. Is there any question about it being a ledger sheet? Some question about a photostat, but,—
- A. This is a duplicate, I suppose, of our ledger sheet.

The same kind of testimony marked the foundation laid for the admission of Exhibit I-2. (Tr. 37) There was no testimony that these exhibits were the records of the Brown company kept under the supervision and control of the witness or that they were true or correct or that the witness knew them to be true and correct. Furthermore, they were not the original books of account but were copies. This hearsay evidence was admitted by the court over the well-founded objections of the defendant. (Tr. 36, 328)

Exhibits Q and R also purported to be documents taken from the files of the Lee Brown Processing Company and they were not identified by any witness from the Brown company as being correct or as kept under his supervision and control or that the witness knew them to be correct. Exhibits Q and R, on the other hand, were admitted on the testimony of Nalder, Sr. who merely stated that they had been received by him in connection with a settlement which he had with the Lee Brown Company. Both Q and R were the rankest of hearsay not even possessing the inadequate qualifications of Exhibits I-1 and I-2. (Tr. 326, 327)

Based upon Exhibits I-1, I-2, Q and R, the court admitted in evidence plaintiffs' Exhibit N 1-4 which constituted the computations of the alleged profits which the plaintiffs contend they would have made based upon 14,000 turkeys in 1952, 1953 and 1954. There having been no foundation laid to receive any of the exhibits, which were all hearsay, the evidence of lost profits, even if otherwise acceptable, was inadmissible and the judgment based upon these computations and exhibits must necessarily be erroneous. (Tr. 330, 331, 334)

- Nichols Applied Evidence, Vol. 1, Secs. 48, 59,
pages 789, 794
Nichols Applied Evidence (1934 Supp.) Secs. 48,
53, pages 103, 104
Meredith, et al v. Bitter Root Valley Irrig. Co.
(Mont.) 141 Pac. 643, page 648
Ogden Packing and Provision Co. v. Tooele Meat
and Storage Company, 41 Ut. 92, 124 Pac.
333
Clayton v. Metropolitan Life Insurance Co., 96
Ut. 331, 85 Pac. 2d 819

POINT VI

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

The judgment in this case rests upon the unsupported conclusion of plaintiffs that the reason for their inability to obtain turkey financing for 1952, 1953 and 1954 was that the record in the county recorder's office in Davis County, Utah, showed the real estate and chattel mortgages, pleaded in plaintiff's complaint, unsatisfied and unreleased. Plaintiffs asserted their complete ignorance of the condition of this record until notified by Rasmussen in 1954. (Tr. 208-213) The record does not support plaintiffs in this claim of ignorance. They were notified in writing by defendant that the mortgages were not released in 1950. (Ex. C-10) Furthermore, the plain-

tiffs carried on correspondence with defendant in 1952 and 1953 requesting subordination of defendant's debt. (Exs. D13, 14, 16-23) (Tr. 244-257) They could hardly be ignorant of the fact that the requirement of a subordination agreement by General Mills Company was for the purpose of clearing the record of these mortgages and to constitute the General Mills obligation a first lien. In a memorandum dated December, 1951, reference is made to unreleased chattel mortgages which would have to be released or subordinated. (Ex. F 4) Presumably this subject was discussed with Nalder, Jr. for he made several attempts to get defendant to give him such a subordination. (Ex. D 17, 19) (Tr. 154, 155, 301, 302, 323) See also Exhibit F 8. Furthermore, plaintiffs well understood the purpose of a subordination agreement. They requested defendant in 1950 to subordinate defendant's debt to the first mortgage on their home, which request defendant granted. (Tr. 56-57) This pretended lack of knowledge by plaintiffs is unconvincing and not very significant except that it gives a good insight into plaintiffs' willingness to slant testimony to their own advantage.

The important question pertains to the actual reasons why plaintiffs' applications for financing were denied and the equally important question as to whether the evidence shows that defendant's conduct was the proximate cause of plaintiffs' inability to get financing.

The burden of proving damage from defendant's failure to release mortgages was always upon the plaintiffs. Defendant contends that the proof submitted does not sustain this burden and that the verdict and judgment entered must be reversed.

Plaintiffs' counsel, contrary to the theory upon which

he ~~tried~~^{tried} his case that defendant's failure to release mortgages was the sole cause of plaintiffs' alleged damages, requested that the jury be instructed that more than one proximate cause may exist in an action for damages and that the defendant's acts did not need to constitute the sole proximate cause in order for plaintiffs to recover, and that concurrent acts of two wrongdoers combining to cause injury do not excuse a defendant from liability. The court, included these requests in the charge to the jury as instructions No. 16 and 18. These instructions were grossly erroneous because insrtuction No. 18 assumed, without any proof, that a wrong had been committed by some third party in refusing to accept plaintiffs' credit applications. Instructions No. 16 misconceived the burden of proof resting upon the plaintiffs.

Nalder, Jr. testified that he made an application to the Pillsbury Company and Farmers Grain of Ogden. These applications were denied and there is no pretense of any proof as to the reasons why they were denied, or that the defendant's unreleased mortgages caused their rejection. (Tr. 305, 322, 323) Nalder, Sr. also stated that he had tried to get the Pillsbury Company to approve an application but he had not the remotest idea of why his request to that company for credit was not accepted.

In 1952 Nalder, Jr. made an application to General Mills for financing for 5,000 turkeys. (Ex. F-1) The application was never approved and no reason was ever given by General Mills for its rejection. There is nothing in the record which sustains the claim that this refusal was because of defendant's unreleased mortgages. It is not disputed that one of the requirements made by General Mills was for a release or subordination of the

debt owing to defendant. (Ex. F 8) It is also a fact that defendant never executed such a release or subordination. That it offered repeatedly to do so is established beyond question. (Tr. 152, 299, 324, 325) (Ex. D 14, 16-23) Defendant did make its offer conditional upon payment of \$352.00 which represented a sum which Nalder had received as a credit for delivery of mortgaged turkeys to a service station operator. Nalder, Jr. recognized that this condition was reasonable and attempted to comply with it. (Tr. 154, 155, 301, 302, 323, 325) (Ex. D 17, 19)

Plaintiffs would have the court accept these facts as proof that the unreleased mortgages were the cause of General Mills' refusing to finance Nalder, Jr. in 1952. These facts, however, fall far short of proving proximate cause. In the first place, the General Mills credit representative who appeared at the trial and testified for plaintiffs refused to testify that this application would have received favorable consideration even if defendant had either subordinated or released its mortgages. (Tr. 128) On the contrary, he testified that many factors concerning Nalder and his credit and business reputation were under investigation and that other indispensable conditions imposed by his company were never complied with. For instance, Nalder, Jr. was to be strictly limited to 5,000 turkeys, not 9,000 or 14,000. (Tr. 115, 121) He was to secure his application by a guarantee which was never obtained and without which the application would not have been approved. (Tr. 115, 116, 126, 127, 133) The credit reputation of Nalder, Jr. was under serious question. (Ex. F 6) (Tr. 111, 122) He presented a poor paying record and was involved in litigation and had

numerous mortgages and debts of record in considerable amounts in addition to the mortgages in the name of defendant as mortgagee. (Tr. 117, 122-124) It could be argued that this application "died on the vine" because Nalder, Jr. never got the subordination or the guarantee, but there is no justification in the record for assuming or inferring that even if he had obtained these documents, the application would have been approved. It is certain that nothing in the record justified the trial court in permitting the jury to speculate that Nalder, Jr.'s. application failed because of defendant's unreleased mortgages. A fair inference from the evidence in this record leads irresistibly to the conclusion that the application would never have been approved. The testimony of Nalder, Jr., himself, shows that his credit was so bad that he could not even borrow \$352.00 with which he could have had a subordination from defendant. (Tr. 302, 324)

Nalder, Sr. made applications to Ralston Purina Company in 1952, 1953 and 1954. All that the record shows concerning the 1953 application was that it was for 1,300 to 1,500 turkeys (Tr. 156, 204) and that it was not approved.

In 1952 the application of Nalder, Sr. was for credit for 5,000 turkeys. (Ex. G 2) It, too, was rejected. In 1954, the application was for 2,000 turkeys. (Ex. G 3) Both the latter applications were not accepted.

The record is clear that all applications made by Nalder, Sr. were turned down for much the same reasons that Nalder, Jr.'s. application to General Mills was denied. His credit rating was poor, (Ex. L 11, 13, 14) (Tr. 96, 478-82, 499, 508, 509), he lacked the character and reputation which Ralston Purina thought one of their credit

risks should possess, (Ex. L 15), there were numerous mortgages and judgments in favor of other creditors, in addition to defendant's mortgages, which were of record (Tr. 492, 493). Other factors played their part in these rejections. (Tr. 499, 510, 511)

The Ralston Purina credit manager testified positively that it was not defendant's unreleased mortgages which were responsible for a denial of Nalder, Sr.'s credit applications. (Tr. 497, 500) Of course, it was conceded that a release or subordination of defendant's mortgages would have been necessary to the approval of an application. But here again the record in no sense justifies the conclusion that defendant's unreleased mortgages were the cause or the reason why Nalder, Sr.'s applications were turned down, or that if they had been released the applications would have been approved.

The burden of proof, resting as it did upon the plaintiffs, required them to prove by competent evidence that any application which was made by either Nalder, Sr. or Nalder, Jr. would have been granted if defendant had released or subordinated its mortgages, and that solely because those mortgages were not released, the plaintiffs were unable to get credit. We submit it was not enough for plaintiffs to prove that the failure of the defendant to release combined with other reasons, as in a case involving the concurrent acts of joint tort feorsors.

The contentions of the defendant in this regard are well grounded in the authorities. In the case of *Ebbert v. First National Bank of Condon*, (Ore.) 279 Pac. 534, a case closely analogous to this case, the plaintiff was likewise claiming damages because of the alleged wrongful

refusal of the defendant bank to release some chattel mortgages. The court makes these observations:

“The recovery of the item of \$37,808.08 was ventured upon the contention that the defendant wrongfully and purposely failed to satisfy the mortgage records and thereby caused the Oregon-Washington Joint Stock Land Bank of Portland to reject his application for a mortgage loan in the sum of \$25,000.00. Before that incident could become an element of damages, it was necessary that the evidence should show (a) that in the absence of the wrongful act there was a reasonable likelihood that the loan would have been made, and (b) that the defendant’s neglect caused the rejection of the application.”

In that case many of the factors were present that are present in this case. For instance, in that case there was a whole series of chattel mortgages which the plaintiff had not mentioned, including unpaid taxes. After considering all of the elements the court stated:

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

See also *Shealy's Inc. v. So. Bell Tel. & Tel. Co.*, 126 *Fed. Supp.* 382.

In *United States v. Huff*, 175 *Fed. 2d.* 678, the plaintiff claimed damages for lost sheep and goats because of destroyed fences. The court in that case said:

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

"While it may be inviting to approve the trial court's findings and allow at least a partial recovery for such losses, it remains our solemn duty under this evidence to disallow these unproved claims, as it is well settled that speculative damages are not recoverable. It was incumbent upon these plaintiffs to adduce some clear and convincing proof of specific losses resulting *solely* from the Government's failure to repair and maintain the fences and this they have signally failed to do."

See also:

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

This court has spoken unmistakably in cases similar to this one in which several causes or explanations of an injury are involved, only one of which may be attributed

to the wrong or negligence of the defendant, and has held that in such cases it must be shown that the loss or damage claimed would not have occurred if the particular wrong attributed to the defendant had not been committed.

Jenson v. S. H. Kress & Co., 87 *Utah* 434, 49 *Pac.* 2d 958

Tremelling v. So. Pac. Co., 257 *Pac.* 1066, 70 *Utah* 72

Virend v. Utah Ore-Sampling Co., 48 *Utah* 398, 160 *Pac.* 115

Quinn v. Utah Gas and Coke Co., 42 *Utah* 113, 129 *Pac.* 362

Inasmuch as there were numerous factors involved in this case which just as effectively could have prevented, and, we think did prevent, these plaintiffs from securing their financing in 1952, 1953 and 1954 as the existence of defendant's recorded mortgages, there was no proof of proximate cause. The evidence in the record fails to eliminate all factors which existed as possible reasons for the rejection of the applications, except the alleged wrong of the defendant. It is submitted that in this case there is no showing of proximate cause and that the judgment rendered by the court rests upon speculation and guess and cannot be permitted to stand.

POINT VII

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

Evidence supporting the above proposition is found

in the testimony of witnesses Quinney, Williams and Aust. (Tr. 336, 337, 357, 377, 432, 433, 434, 444, 448, 449, 462) There is nothing in the record contradicting this testimony. This being the only evidence on the question of good faith, the jury should have been directed that the good faith of the defendant was established. The verdict and judgment, contrary to this testimony, is against the evidence and hence is reversible error.

This court in *Shibata v. Bear River State Bank*, *supra*, denied recovery in a case where damages were claimed because a mortgagee did not release a mortgage. In that case the record showed that in refusing to release the mortgage the mortgagee was acting on the advice of its attorney. This court, referring to *Section 57-3-8, UCA 1953*, says the following:

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

There is proof in the record from which it conclusively appears that defendant was relying on the advice of its counsel. It must be presumed in the absence of contrary evidence that defendant acted in good faith when it was

following a policy with regard to releasing mortgages laid down by its counsel as a business procedure to protect the best interests of the defendant. The policy was, to retain all mortgages as long as there was unpaid indebtedness owing to the defendant.

To overcome the overwhelming effect of the testimony of defendant's witnesses concerning its policy and the advice given it by counsel relating to releasing mortgages, plaintiffs attempted to show oppressive conduct on the part of the defendant in requiring excessive security and the alleged threats attributed to the witness Williams that the defendant would prevent the plaintiffs from obtaining any further credit. They further assert that defendant's demand for the payment of \$352.00 to be applied upon a debt of over \$5,000.00 as a condition to giving a subordination agreement is evidence that defendant was acting in bad faith. We have already sufficiently answered the first two contentions by showing indisputable evidence that there was no duplicate financing and that the threats claimed were nothing but the figment of the plaintiffs' imagination. We shall give what we believe to be a complete answer to the final contention hereafter.

POINT VIII

THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF EVIDENCE OVER DEFENDANT'S OBJECTION THAT SCOVILLE AND SCHINKER PROMISED OR AGREED ON BEHALF OF DEFENDANT TO RELEASE MORTGAGES WITH NO PRELIMINARY SHOWING OF AGENCY OR AUTHORITY TO MAKE SUCH PROMISE AND

FOR THE FURTHER REASON THAT UNCON-
TROVERTED TESTIMONY ESTABLISHES THAT
SCOVILLE AND SCHINKER HAD NO SUCH
AUTHORITY.

The court permitted the plaintiffs to testify to promises or agreements supposedly made by one Scoville and Schinker relating to the release of the 1949 chattel mortgage and to defendant's agreement to accept the real estate mortgage of August 15, 1950, as payment of all prior mortgages and other alleged representations relating to the release of the 1950 chattel mortgage. The plaintiffs' contentions in this regard are found in the transcript at pages 42, 60-62, 214-216 and 318. There is nothing in the record showing that either Scoville or Schinker had authority to make the promises or representations attributed to them with respect to these matters. Williams, defendant's general manager, specifically testified that these individuals had no such authority. (Tr. 44-54, 314, 315, 338, 339, 342) The correctness of Williams' testimony is corroborated by Exhibits C 9 and C 10. By Exhibit C 10 the plaintiffs were informed directly by defendant that no release of mortgage would be obtained without authority from Mr. Williams and Exhibits C 4, 5, 6, 7.5 and 8 all show that Scoville in securing the signature on the real estate mortgage of August 15, 1950, (Ex. A 10) was acting solely as a messenger.

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

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

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

It is submitted that all of the evidence in this case relating to the alleged promises or agreements asserted to have been made by Scoville and Schinker relating to releasing chattel mortgages or to accepting the real estate mortgage (Ex. A 10) in satisfaction of the 1949 real estate and chattel mortgages was inadmissible without the preliminary showing that such promises or representa-

tions were made with defendant's authority, and defendant's exception should have been allowed.

POINT IX

THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING VERDICT AND FOR A NEW TRIAL.

At the proper time in the trial proceedings defendant made its motion for a directed verdict. (Tr. 514) At that time the trial court expressed doubt that plaintiffs had proved causal connection between the acts of defendant and the alleged loss or damage claimed or that there was adequate proof of damage. (Tr. 516) However, this motion was denied after judgment was entered on the verdict, as were defendant's motions for judgment notwithstanding verdict or for a new trial. By its requested instructions B and C defendant also asked the court to direct a verdict against the plaintiffs, Nalder, Sr. and Nalder, Jr. All of these motions were denied.

The basis for the motion for directed verdict is that there is no competent or sufficient evidence in this record to sustain a finding that defendant, in failing to release its mortgages, destroyed the credit of plaintiffs; that defendant had a right to maintain all of its mortgages of record; that there is no proof that failure to release mortgages was the proximate cause of damage to plaintiffs; that at all times complained of defendant was willing and offered to subordinate its mortgages to any concern willing to advance credit to plaintiffs; that the defendant was within its rights in demanding an ac-

counting of \$352.00 for turkeys illegally sold by plaintiff, Nalder, Jr., in violation of the terms of the defendant's 1951 chattel mortgage, as a condition to delivering such a subordination agreement; that no proper demand was made upon defendant for a release; that the evidence is conclusive that defendant acted in good faith in not releasing its mortgages which is a complete defense to plaintiffs' action, and there is no competent evidence of bad faith; that there is no competent evidence of any damage having been sustained by plaintiffs and the evidence on damages is speculative, uncertain, incompetent, irrelevant and immaterial and was admitted without proper foundation.

All of the matters have been fully argued under the preceding points of this brief and no useful purpose can be served in their repetition.

It is submitted that the motions made and each of them should have been granted and the denial thereof was error.

POINT X

THE COURT ERRED IN CERTAIN OF ITS INSTRUCTIONS TO THE JURY AND IN ITS REFUSAL TO GIVE CERTAIN OF DEFENDANT'S REQUESTED INSTRUCTIONS.

It is the contention of defendant that fundamental and prejudicial error was committed by the trial court in his instructions to the jury. Exceptions were taken to specific instructions complained of. (Tr. 536-539)

By instruction No. 4 the jury was permitted to de-

termine whether Nalder, Sr. and Nalder, Jr. were partners in 1952, 1953 and 1954 and if they so found to assess a single verdict in favor of both plaintiffs. This instruction ignored completely the determination by this court on the former appeal that Nalder, Jr. quit the turkey business in 1952 and turned to other pursuits. This court also decided that Nalder, Jr. could recover no damages after he left the business of raising turkeys. We have fully set out defendant's views with respect to this subject under Point I hereof and rely upon the arguments therein set out.

Instruction No. 7 concerned itself with the elements of damage which the jury was instructed might be considered in the event the issues were found in plaintiffs' favor. All the elements of damage referred to in said instruction were in the realm of speculation because the evidence which the jury had to consider in determining these matters was inadmissible and insufficient to support a claim of damages. Under point V of this brief the reasons why this evidence was inadmissible are argued at length. Based upon the reasons therein stated it is submitted the instruction was erroneous. This instruction was likewise improper because, as pointed out under Point VI of this brief the jury was improperly permitted to find the issues in plaintiffs' favor when there is no proof that defendant's actions proximately caused the damage claimed by plaintiffs.

Defendant excepted to the giving of instruction No. 12 because it ignored the defense of good faith upon which defendant was entitled to rely. Under Point VII of this brief appears the argument of defendant with respect to this defense. This instruction should have at

least been modified to the extent of informing the jury that even though it might appear by a preponderance of the evidence that plaintiffs could not get financing because of defendant's unreleased mortgages, the verdict should nevertheless be for the defendant, if the jury found that the defendant acted in good faith.

Furthermore, this instruction was contrary to the overwhelming weight of the evidence in that the real estate mortgages were never in fact satisfied and because the chattel mortgages secured the unpaid debt of plaintiffs and consequently plaintiffs were not entitled to demand releases. Under Points II and III of this brief appear all of the arguments which sustain defendant's objections to this instruction.

The defendant objected to the giving of instruction No. 13 relating to the sufficiency of a demand for a release of mortgage. The basis of this objection is the lack of any evidence of a demand for such releases ever having been made by plaintiffs. It is clear that no demand for release of real estate mortgages was ever made. See arguments under Point II of this brief. Under Point III of this brief appears the argument that there is no evidence of any demand made by plaintiffs for release of chattel mortgages prior to 1954. For the reasons stated under Points II and III the giving of instruction No. 13 was error.

Instruction No. 14 given by the court embodied plaintiffs' request No. 4. It instructed the jury on the various modes in which a mortgage may be satisfied, including merger in a later or subsequent mortgage.

There is absolutely no evidence in the record that a merger of any of the mortgages involved in this case ever

occurred or was intended to occur. Therefore, it is submitted that the instruction was a mere abstract statement of a legal principle unsupported by any evidence in the record. The giving of such an instruction was error.

Most grievous error was committed by the trial court in giving instruction No. 16. Plaintiffs' counsel invited the court into this error by his request No. 6 (a), which was given as requested.

In substance the instruction advised the jury that more than one proximate cause might exist and that if the acts or omissions of two or more persons work concurrently to cause an injury each act or omission may be regarded as a proximate cause.

In the first place the plaintiffs predicated the whole theory of their case upon the proposition that it was the act of defendant in failing or refusing to release mortgages which was the sole cause of plaintiffs' injury or damage. Therefore, the instruction given by the trial court was contrary to and in contradiction of plaintiffs' theory. Furthermore, the instruction assumed the existence of other causes brought about by the wrongful acts of third parties. There was no evidence of any wrong or act committed by a third party which, acting concurrently with the acts of defendant, jointly caused damages to plaintiffs. This instruction had no proper place in this case. It is an instruction which is applicable to a negligence case in which the evidence may justify a finding that more than one person caused an injury. Instead of giving this instruction the court should have instructed the jury that before a verdict could be rendered for plaintiffs they were required to find by a preponderance of the evidence that the acts of defendant were the sole

proximate cause of injury to plaintiffs. Under Point VI appear the arguments and authorities holding that in a case where more than one cause of damage may exist only one of which is chargeable to the defendant, before a verdict may be reached the jury must find that the injury was caused solely by the wrong of the defendant. Until the jury was able to say from the preponderance of the evidence that the plaintiffs' credit applications would have been granted if defendant had released its various mortgages no recovery in favor of the plaintiffs could be permitted. That the record in this case fails to show that any applications of plaintiffs would have been granted if defendant had released is abundantly demonstrated in this record.

After instructing the jury in instruction No. 17 that good faith constitutes a defense in an action for refusing to release a mortgage, the court proceeded by paragraph three of that instruction to advise the jury that if defendant was not rightfully insisting upon an additional payment as a condition to releasing its mortgages, then defendant was not acting in good faith. It is submitted that a creditor may mistakenly demand a payment he is not entitled to which would not be right and yet still act in perfect good faith in making the demand.

This part of the instruction was highly prejudicial and erroneous. In the first place, there is no evidence to support the instruction that defendant was motivated by a desire to coerce or by other improper motives. It is not disputed by plaintiffs that they were in debt to the defendant for over \$5,000.00. Much less than 10% of this sum was requested in consideration of giving a subordination agreement. Defendant had a right to demand

payment of its entire debt which was then owing and had been owing for three years. Believing as it did, that its mortgages were not satisfied and acting upon the advice of its counsel not to release its mortgages, which is undisputed and uncontradicted, it could, without acting in bad faith, impose conditions upon its giving of a release or subordination agreement. Demanding a token payment on a debt is not wrongful.

In addition, the amount demanded represented the value of turkeys mortgaged to the defendant in 1951 which Nalder, Jr. wrongfully and illegally disposed of to pay his gas bill. The mortgage (Ex. A 3) required plaintiffs to account to defendant for the proceeds of all turkeys raised with the feed and money supplied by defendant. The evidence instead of showing any wrong or oppressive action in demanding an accounting for those turkeys shows the leniency of defendant in not demanding payment of the entire balance owing from plaintiffs. The plaintiffs recognized that the demand made by defendant was reasonable. (Ex. D 17, 19) (Tr. 301, 302, 323, 154, 155) It should be remembered that at the time defendant was willing to subordinate its mortgages it could have commenced proceedings to foreclose. Instead of doing so it waited for three years in the vain hope that plaintiffs would make an honest effort to pay their debt. It was only after the defendant insisted upon payment that this unwarranted and unjustified action was commenced. Here again plaintiffs' counsel led the court into reversible error by his requested Instruction No. 10.

Instruction No. 18 contains the same basic defects as Instruction No. 16. It is the embodiment of plaintiffs' request No. 6 (b). This instruction permitted the jury

to speculate that wrongful acts committed by third persons, not parties to the action, may have combined with the acts of the defendant to cause injury to the plaintiffs. There is absolutely no evidence of any wrong committed by any third party. Therefore, the instruction had no basis in the evidence before the court. Furthermore, it was an improper instruction because not applicable to this case. It is an instruction frequently encountered in personal injury cases where joint or concurrent acts of negligence have produced an injury.

It is submitted that the instruction as applied to this case was misleading and was calculated to produce in the mind of the jury the impression that the court believed the defendant and others in some way, not disclosed by any evidence, caused injury to the plaintiffs. Here again the jury should have been instructed that where there are several possible explanations for a cause of injury only one of which may be attributed to the defendant, then it must affirmatively appear that the damage complained of would not have occurred except for the conduct of the defendant.

Objection was made to instruction No. 19 which stated that any notice to Schinker and Aust that plaintiffs had made a demand for release of mortgages was notice to defendant. It is submitted that there is insufficient evidence of any notice having been brought to the attention of Aust or Schinker. Therefore, there was no basis for the giving of this instruction.

The court refused defendant's requests No. 1, 6 and 14 which defendant submits was error.

Defendant was entitled to have the jury instructed that the filing of a suit by plaintiffs created no inference

that plaintiffs were entitled to recover. This is a correct statement of the law and was applicable to this case. The denial of defendant's request No. 1 was error.

Defendant's request No. 6 was based upon the theory that the jury could properly find from the evidence that the plaintiffs' turkey raising business was unestablished and hence they could claim no damages for its alleged destruction or injury. The law is well settled as shown by the authorities set out under Point IV that no damages for lost profits to an unestablished business or one merely in contemplation may be recovered. The evidence in the case shows that the turkey raising venture of plaintiffs was precarious, unsuccessful and not possessing the degree of permanence and stability to justify any claim for damages by reason of loss of alleged profits.

By its request No. 14 defendant requested that the jury be instructed that before any action for damages for failure to release mortgages could be maintained a demand was essential. This instruction the court did not give. This was error as appears from the authorities and argument under Point II of this brief. The issue of demand was one of the vital and important issues involved in this case to which much of this record is devoted. It being the contention of the defendant that the record discloses that no demand for releases was ever made by plaintiffs, the instruction requested on this important issue should have been given. It is submitted that the record amply justifies the requested instruction.

POINT XI

THE COURT ERRED IN STRIKING CERTAIN
ITEMS OF DEFENDANT'S COST BILL ON APPEAL.

Following the order reversing the judgment on the

former appeal in which defendant was awarded costs, defendant filed its cost bill for items incurred in that appeal. (R. 23) Among the items claimed was the sum of \$682.84 which represented the premium defendant was required to pay for an appeal and supersedeas bond. That judgment was for over \$90,000.00. The supersedeas was necessary because following the entry of that judgment the plaintiffs commenced garnishment proceedings to attach the accounts of the defendant. Also included in that cost bill was the item of \$19.80 for filing the record on appeal. Both items of costs referred to were necessarily incurred by defendant in prosecuting said appeal. Under rule 54d (3) these costs should have been allowed. See *Everts v. Barker*, 58 *Utah* 519, 200 *Pac.* 473.

CONCLUSION

The evidence in this case establishes that plaintiffs are indebted to defendant for the amount demanded in defendant's answer and counterclaim. On the other hand, the record clearly demonstrates that defendant was fully entitled to retain all mortgages of record, and that it did so acting in good faith and upon advice of counsel. There is a complete failure of proof that the existence of defendant's mortgages upon the records was the cause of plaintiffs' alleged losses and the judgment in plaintiffs' favor is founded upon incompetent evidence of damage. Judgment was granted in favor of H. William Nalder, Jr. for failure to release real estate mortgages not signed or executed by him and after he had abandoned the turkey business.

For all of the reasons referred to in this brief the

judgment should be reversed with directions to enter judgment for defendant for the amount due upon its mortgage and to enter a decree of foreclosure and order of sale and dismissing the complaint of plaintiffs.

Respectfully submitted,

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