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

Utah Supreme Court

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In the Supreme Court of the State of Utah

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

*Plaintiffs and
Respondents,*

vs.

KELLOGG SALES COMPANY,
a corporation,

*Defendant and
Appellant*

Case No. 8529

BRIEF OF RESPONDENTS

FILED
NOV 30 1956

Clerk, Supreme Court, Utah

DAN S. BUSHNELL

Attorney for Plaintiffs and Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	7
ARGUMENT	8
 POINT I LIABILITY	
THE JURY PROPERLY FOUND THE DEFEND- ANT LIABLE FOR FAILING TO RELEASE MORT- GAGES	8
(a) All of the Chattel Mortgages Should Have Been Released (Defendant's Point III)	8
(b) The First Two Real Estate Mortgages Should Have Been Released (Defendant's Point II)	23
(c) Demand Was Duly Made for Release of Mort- gages (Defendant's Points IV & V)	27
(d) The Defendant Did Not Act in Good Faith in Failing to Release the Mortgages (Defendant's Point VII)	36
(e) Agents of the Defendant Had Either Actual or Apparent Authority to Represent the Defendant (Defendant's Point VIII)	44
Conclusion, Point I	46
 POINT II PROXIMATE CAUSE	
THE JURY PROPERLY FOUND THAT THE DE- FENDANT'S FAILURE TO RELEASE THE MORT- GAGES WAS THE PROXIMATE CAUSE OF PLAIN- TIFF'S DAMAGE (Defendant's Point VI)	48

POINT III DAMAGES

THE LAW AND EVIDENCE SUSTAIN THE
JURY'S DETERMINATION OF DAMAGES (De-
fendant's Point IV) 56

POINT IV

THE COURT PROPERLY HELD THAT H. WIL-
LIAM NALDER, SR. AND JR. WERE PARTNERS
AND, THEEFORE, THE JUDGMENT IN BOTH
OF THEIR NAMES IS PROPER (Defendant's Points
I and III) 63

POINT V

THE COURT PROPERLY:

- (a) Received in Evidence Exhibits I-1, I-2, Q, R, &
N 1-4 (Defendant's Point V)..... 69
- (b) Denied Defendant's Motion for Directed Ver-
dict, Judgment Notwithstanding Verdict, or for
New Trial (Defendant's Point IX) 71
- (c) Instructed the Jury and Refused Certain of De-
fendant's Requested Instructions (Defendant's
Point X) 72
- (d) Disallowed Items on Defendant's Cost Bill on
Appeal (Defendant's Point XI)..... 75

CROSS APPEAL

POINT VI

THE DAMAGES AWARDED BY THE JURY
SHOULD BE DOUBLED PURSUANT TO SEC.
53-3-8, U.C.A. 1953 76

POINT VII

THE COURT IMPROPERLY ALLOWED ATTOR-
NEYS' FEES ON DEFENDANT'S COUNTER-
CLAIM 80

CONCLUSION 81

INDEX OF AUTHORITIES

41 A.L.R. 2d 677	81
56 A.L.R. 337	28, 32
81 A.L.R. 1532	75
14 Am. Jur. 36	75
23 Am. Jur. 627	79
59 C.J.S. 746	33
59 C.J.S. 756	45
Augustine v. Bowles, 149 F. 2d 93	71
Babcock v. Gray, 107 P. 2d 846; 165 Ore. 398.....	71
Bank of Searcy v. Kroh, 114 S.W. 2d 26; 194 Ark. 785.....	15
Benton Harbor State Bank v. Bubanovich, 242 N.W. 870; 259 Mich. 150	24
Brady v. Selberg, 60 P. 2d 1104; 254 Ore. 477.....	25
Caspery v. Moore, 70 P. 2d 224; 21 Cal. App. 694.....	62
Chatwin v. Terry, 107 U. 340; 153 P. 2d 941.....	80
City of Corning vs. Iowa-Nebraska Light & Power Com- pany, 225 Iowa 1380; 282 NW 791.....	61
DeWiner v. Nelson, 33 P. 2d 356; 54 Idaho 560.....	62
Duvall v. Duncan, 111 S.W. 2d 89; 341 Mo. 1129.....	25
First National Bank of Jackson v. Reynolds, 143 S.W. 2d 721; 283 Ky. 837	24
Malarkey v. O'Leary, 256 Pac. 521; 34 Ore. 493.....	42, 55
Michigan Bankers Association vs. Ocean Accident & Guar- anty Corp., 264 N.W. 868; 274 Mich. 470	71
Scoville v. Kellogg, 1 Utah 2d 19; 261 P. 2d 933	45

	Page
Shibata v. Bear River State Bank, 205 P. 2d 251.....	28, 43
Smith v. American Packing & Provision Co., 102 U. 351, 130 P. 2d 951	80
Story Parchment Co. v. Patterson Parchment Paper Com- pany, 282 U.S. 555; 51 S. Ct. 248; 75 L. Ed 544.....	56, 63
Swaner v. Union Mortgage Co., 99 Utah 298; 105 P. 2d 342	11, 22, 42
Sec. 9-1-4 U.C.A. 1953	27
Sec. 48-8-6 U.C.A. 1953	68
Sec. 53-3-8 U.C.A. 1953	76
Sec. 57-3-8 U.C.A. 1953	27, 28
Utah Rules of Civil Procedure:	
Rule 54(d) (3)	76
Rule 73(d)	75, 76
Rule 75(p) (2)	1

In the Supreme Court of the State of Utah

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

*Plaintiffs and
Respondents,*

vs.

KELLOGG SALES COMPANY,
a corporation,

*Defendant and
Appellant*

Case No. 8529

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Rule 75(p) (2) specifies that the appellants' brief shall contain a concise statement of the facts of the case. It is submitted that the defendants' statement of facts is not concise, nor is it objective. Rather, it is, in many instances, misleading and argumentative. Attempts will not be made at this point to refute defendant's statement of facts. However, a brief reference to a deliberate attempt on the part of the defendant to belittle the plaintiffs must be mentioned.

Repeatedly in the sixteen pages of the statement of facts

the defendant makes derogatory remarks concerning the plaintiffs, such as: "Irregularities were discovered in their dealings," page 7; "Mortgaged turkeys which had been wrongfully delivered to a service station operator," page 9; "Involvement in litigation and poor paying record," page 10; "could not secure financing from other sources," pages 11 and 12; "bad credit rating and pending litigation," page 12; "lack of character and poor reputation," page 12; "false and incomplete credit information," page 13; "confessed themselves as failures," page 7; and "written confession of their wrongdoings," page 8. Such statements are not accurate, are taken out of context, and are used only to emphasize the defendant's version of the testimony. No mention was made of the numerous reports wherein the plaintiffs were characterized as good turkey raisers having a good reputation, and instances where persons, relying upon the integrity of the plaintiffs, were willing to co-sign on their obligations to enable them to secure turkey financing. Certainly such repeated repetition of this aspect of the case was only intended to emphasize part of the evidence and prejudice the court. It cannot be said to be part of a brief, concise and objective statement of facts, advising the court of the litigation.

In other instances the defendant makes statements consistent only with his theory of the facts, such as the importance of unreleased mortgages to the effect that the amount owing was the important factor, not the fact that they were unreleased. However, the record is clear that as to unreleased turkey chattel mortgages, no large feed company would advance financing until those mortgages were released, since they purported to give a lien on after acquired turkeys (Tr. 120, 358, 382-3).

A similar statement is, "The record is bare of any evidence that any demand was ever made for a release of the real estate mortgages." This again is seriously disputed, as will be shown in the balance of the brief.

The lengthy statement of facts is resplendent with argumentative statements. In fact, the normal statement of facts ends at the top of page 6, and continually thereafter, through page sixteen, the defendant proceeds to make statements concerning the facts and argue the same. Such argumentative statements involve the following:

Discussion concerning the defendants demanding double security, page 6; authority of the defendant's agents, page 7; the number of turkeys the plaintiffs had and would raise, page 7; threats made by the agents of the defendants concerning turkey financing after 1951, pages 8 and 9; information contained in applications made by the plaintiffs to Ralston-Purina, page 13; language of the mortgages, page 14; no demands having been made for release of the mortgages, page 14; the policy of the company and whether it acted in good faith, page 15. None of these involve a concise statement indicating a disputed issue, but rather they contain the theory and arguments of the defendants. The case was tried before a jury. The plaintiff throughout the case and in his argument stressed his theory and the facts. The jury has determined those factual issues on competent evidence against the defendant.

The plaintiffs submit the following statement of facts:

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

Chattel Mortgages

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

Real Estate Mortgages

Exhibit A-7, September 14, 1949	4,000.00
Exhibit A-8, April 1, 1950	6,721.80
Exhibit A-10, August 15, 1950	6,555.12

\$107,401.92

During 1948 and the first part of 1949, the plaintiffs invested approximately \$20,000.00 in building a brooder house, purchasing necessary equipment, etc., in contemplation of going into the turkey business (Tr. 308).

Prior to 1949, the plaintiffs had brooded turkeys for others. The first year that plaintiffs raised turkeys financed by defendant was 1949. Plaintiffs maintained that they were required by defendants to let the dealer of the defendant dispose of the turkeys financed by Kellogg, which resulted in considerable freight and storage charges. If the plaintiffs had been permitted to sell the turkeys, as they desired, they would have paid the 1949 account in full and would have received approximately \$800.00 (Tr. 65, 69, Ex. D-4). Due to a combination of the freight and storage charges, a depressed market, and 29,000 pounds of turkeys allegedly becoming green struck (Tr. 217) because of improper transporting or storing of turkeys, the plaintiffs were only able to repay \$17,891.24 of the \$23,518.63 advanced by the defendant.

In 1950 and 1951 the plaintiffs were able to repay the amounts advanced on the chattel mortgages and applied a small

balance from each of three years to the obligation secured by the last real estate mortgage (Ex. E 4, 7). To increase their volume and thus their profits, the plaintiffs had rented a brooder house, leased a 900-acre ranch, (Ex. J-8, Tr. 294) had purchased a tractor, combine and necessary equipment for planting and raising grain for feeding turkeys and were prepared to raise 14,000 turkeys in 1952 (Tr. 304, 306). The defendant advised the plaintiffs that it would not finance the plaintiffs for 1952, (Tr. 74) so an application was not filed with the defendant for that year. However, applications were made to General Mills (Ex. F-1), Ralston Purina (Tr. 81), Farmers Grain Coop (Ex. H-1), and Pillsbury (Tr. 296) by the plaintiffs in an attempt to secure financing for raising 14,000 turkeys in 1952 (Tr. 306). All of the applications, although recommended by the salesmen (Ex. H-1, F-1, Tr. 96, 108) were denied when sent to the credit departments. When the first shipment consisting of 9,000 poults arrived, financing had not yet been secured, and, therefore, only 6,000 turkeys were accepted (Tr. 82, 83). During the eight weeks the 6,000 turkeys were being brooded, continuous efforts were made to secure financing, without success (Tr. 207). The turkeys were then retaken by the hatchery (Tr. 306). Thereafter an Ogden feed dealer co-signed with the plaintiffs at a bank in Ogden, which permitted them to raise a small number of turkeys in 1952 and again in 1953 and 1954 (Tr. 264). Applications for financing were made in 1953 to the feed companies, but were again rejected. Repeatedly plaintiffs attempted to learn why their applications were turned down. Finally, early in 1954 when Mr. Boothe, the salesman for Ralston Purina, asked them to make an application for financing, they agreed

to, provided that if it were turned down the salesman would tell them the reason. In March of 1954 the plaintiffs were told that their application had been turned down because of unreleased mortgages (Tr. 268, 241), amounting to \$107,000.00. At the time of the first trial the real estate mortgages had not been released, and the chattel mortgages were only released as a result of this lawsuit.

The jury found that the defendant's wrongful failure to release the satisfied mortgages consisting of the three chattel mortgages and the first two real estate mortgages proximately contributed to the damage of the plaintiff. Damages were computed upon the cost, expense, sales price, mortality rate and average profit per turkey determined from the number of turkeys actually raised and applied to the number of turkeys the jury determined would have been raised.

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

The brief of the defendant lists eleven points, some of which only incorporate arguments contained under other points. Upon analysis, it appears the eleven points will fall into the usual categories of liability, proximate cause, damages and alleged errors at the time of the trial. Consequently, the plaintiffs shall answer the arguments in that order, with a cross-reference to the points urged by the defendant.

STATEMENT OF POINTS

POINT ONE: LIABILITY

The Jury Found the Defendant Liable for Failing to Release Mortgages

- (a) All of the Chattel Mortgages Should Have Been Released (Defendant's Point III)
 - 1. 1949 Chattel Mortgages
 - 2. 1950 Chattel Mortgages
 - 3. 1951 Chattel Mortgages
 - 4. Demand for an additional \$352 for 1951
- (b) The First Two Real Estate Mortgages Should Have Been Released (Defendant's Point II)
- (c) Demand was Duly Made for Release of Mortgages (Defendant's Points IV and V)
- (d) The Defendant Did Not Act in Good Faith in Failing to Release the Mortgages (Defendant's Point VII)
- (e) Agents of the Defendant Had Either Actual or Apparent Authority to Represent the Defendant (Defendant's Point VIII)

POINT TWO: PROXIMATE CAUSE

The Jury Properly Found that the Defendant's Failure to Release the Mortgages was the Proximate Cause of Plaintiff's Damage (Defendant's Point VI)

POINT THREE: DAMAGES

The Law and Evidence Sustain the Jury's Determination of Damages (Defendant's Point IV)

POINT FOUR: THE COURT PROPERLY HELD THAT H. WILLIAM NALDER, SR. AND JR. WERE PARTNERS AND, THEREFORE, THE JUDGMENT IN BOTH OF THEIR NAMES IS PROPER (Defendant's Points I and III (d))

POINT FIVE: THE COURT PROPERLY:

- (a) Received in Evidence Exhibits I-1, I-2, Q, R, & N 1-4 (Defendant's Point V)
- (b) Denied Defendant's Motions for Directed Verdict, Judgment Notwithstanding Verdict, or for New Trial (Defendant's Point IX)
- (c) Instructed the Jury and Refused Certain of Defendant's Requested Instructions (Defendant's Point X)
- (d) Disallowed Items of Defendant's Cost Bill on Appeal (Defendant's Point XI)

CROSS-APPEAL

POINT SIX: THE DAMAGES AWARDED BY THE JURY SHOULD BE DOUBLED PURSUANT TO SECTION 57-3-8 UCA 1953

POINT SEVEN: THE COURT IMPROPERLY ALLOWED ATTORNEYS' FEES ON DEFENDANT'S COUNTERCLAIM.

ARGUMENT

POINT ONE. LIABILITY

THE JURY PROPERLY FOUND THE DEFENDANT LIABLE FOR FAILING TO RELEASE MORTGAGES.

- (a) ALL OF THE CHATTEL MORTGAGES SHOULD HAVE BEEN RELEASED. (DEFENDANT'S POINT III).

1. 1949 CHATTEL MORTGAGES.

It is the contention of the Plaintiffs that the 1949 chattel mortgage was to be released in consideration of the Plaintiffs' executing the final real estate mortgage in August of 1950.

The Defendant contended there was no such understanding. The jury found this disputed factual issue in favor of the Plaintiffs. The facts leading up to the execution of the mortgage in August of 1950 will show the Defendant anticipated the deficit; requested a title search on the Plaintiffs' real property; prepared notes and mortgages in the exact amount of the deficit immediately after the deficit was determined; and instructed their local sales representative to secure the execution of the same. The sales representative secured the necessary signatures upon the representation that the new note and mortgage would take care of or pay the 1949 loss. More particularly, the facts are as follows:

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

"We probably should have a real estate mortgage search made on this man to know who is holding the mortgage against his land, because there is going to be a deficit on the 1949 contract and we may want to get more security later on." (Ex. C-3, App. 2).

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

"We have received a check on H. W. Nalder & Sons account in the amount of \$17,891.24, to apply against their 1949 turkey account. This leaves a balance of \$5,627.39 principal and interest of \$927.73 to date. We are attaching notes on these two amounts and will appreciate it if you will obtain the signatures as we

have a 1950 contract with these people and will hope to obtain this money at the time they sell their 1950 birds." (Ex. C 5, App. 4).

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

"We are securing notes to cover these two items, but of course are depending on the second mortgage which we hold on Mr. Nalder's home place as security to cover the indebtedness." (Ex. 7-5, App. 5).

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

A. He asked us if we would sign another mortgage and I told him: "No". I said: "You have more now on there than we owe Kellogg Company" and he said: "Well, Mrs. Nalder," he said, "If you will sign this, this is what you now owe Kellogg, and if you will sign this one, we will release all the others including the chattel mortgage for '49." * * * *
(Tr. 215. Also see testimony of Mr. Nalder to the same effect; Tr. 61-62). No witness was called by the Defendant to refute the foregoing testimony.

The Defendant either assumed that the 1949 chattel mort-

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

“We are relying entirely on our real estate mortgage and for that reason, at this moment can release all the chattel mortgages which are unreleased at this time.”
(Ex. D-24, App. 26) .

In *Swaner v. Union Mortgage Company*, 99 Ut. 298, 105 P 2d 342, the court defined satisfaction of a mortgage as follows:

“A mortgage ‘has been satisfied’ when it has been terminated and the contract on which it was based has been rescinded * * * full satisfaction may be received in other modes than by payment of money’ (Citation of authorities.)

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

The Court instructed the jury in Instruction No. 2 fully concerning the theories of the parties regarding the release of the 1949 chattel mortgage. In Instruction No. 14 the Court

instructed the jury concerning satisfaction of mortgages as set out in the preceding quotation from the Swaner case. The factual issue was therefore squarely and properly placed before the jury. The jury found in favor of the Plaintiffs and such finding must be sustained since it is clearly supported by competent evidence.

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

2. 1950 CHATTEL MORTGAGE

The terms of the chattel mortgages specify as follows:

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

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

3. 1951 CHATTEL MORTGAGE

The same type of chattel mortgage was involved here as mentioned in the preceding paragraph, which provides if the indebtedness is paid in full, the mortgage shall be void. Here again, the amount was paid in full as disclosed by the Defendant's own ledger sheets (Ex. E-5). The last sheet is marked paid on January 29, 1952, and shows \$493.31 was transferred to the 1949 deficit. A letter, (Ex. D-13, App. 13) dated January 30, 1952 to Mr. Nalder, Sr. and Jr. from Kellogg Sales Company, acknowledged receipt of the final payment for 1951 and stated that they had applied \$326.44 to principal, \$447.69 to interest, and the balance of \$493.31 to the 1949 account. Again, it cannot be maintained that the 1951 mortgage should not have been released since it was paid in full.

The defendant under Point III (b) alleges that the trial court committed error in permitting the jury to award damages against the defendant for failure to release chattel mortgages because each chattel mortgage secured the prior unpaid debt

of Plaintiffs, H. William Nalder, Sr., and Jr., which was not paid, hence no release could be demanded.

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

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

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

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

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

“Provided that if the mortgagor shall pay or cause to be paid unto Kellogg Sales Company or its assigns the indebtedness above set forth on demand as evidenced by his note or notes, together with interest as therein provided and shall further pay or cause to be paid such other further and future indebtedness whether evidenced by promissory note or not as the mortgagor may hereafter incur to the mortgagee, *it being the intent hereof to secure the said mortgagee any advance or credit now made or hereafter made* for the purchase of turkey poults, prepared turkey

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

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

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

"Thus by the very terms of these chattel mortgages, they were given to secure the existing indebtedness no matter how originating." (Defendant's brief, Page 27).

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

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

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

"It is also understood and agreed that the foregoing conveyance shall stand as security for the payment of any extension or renewals * * * ; also as security for the payment of *any liability or liabilities of grantor already or hereafter contracted* * * * (Emphasis added.)

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

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

4. DEMAND FOR AN ADDITIONAL \$352.00 FOR 1951

The Defendant maintains it was willing to subordinate its mortgages provided an additional \$352 was paid for 1951. Further, the Defendant asserts that the Plaintiffs illegally sold and failed to account for turkeys in 1951. To determine if the Defendant rightly insisted upon the \$352 payment and the validity of the other assertions requires a detailed review of the evidence. At the time the 1951 crop of turkeys was being processed, the Plaintiffs were offered approximately 25 cents per pound for the "C" grade turkeys (Tr. 66). They, therefore, took the turkeys from the processing plant and disposed of them personally and through the Economy Market at Ogden, for 38 cents a pound (T. 67). After taking them from the processing plant, they were advised they should not have done so without permission from Kellogg. Consequently, the day after the turkeys were taken, Mrs. Nalder wrote a letter to

Kellogg advising them fully of what had taken place and the reason for taking the turkeys from the processing plant (Tr. 67, 146).

Although the Defendant asserts that the Plaintiffs illegally and wrongfully sold said "C grade turkeys," Mr. Williams, the Defendant's head representative, testified as follows:

Q. I believe you stated that the grower may make his own arrangements for the sale of the turkeys?

A. That is right.

Q. Well, then, the Nalders did have the authority to remove the turkeys from Lee Brown's plant, "C" grade turkeys, and make other arrangements for sale of them, did they not?

A. That's true. (Tr. 465 and 466).

Nevertheless, Mr. Williams told the Plaintiffs that the sale of the "C" turkeys was a penitentiary offense (Tr. 73, 222) and a demand was made for the 315 "C" grade turkeys at the rate of 42 cents per pound for the hens and 38 cents a pound for the toms, amounting to \$2,130.06 (Ex. D-10, Tr. 453). This price was recognized to be higher than the amount which could have been secured for sale of the turkeys as "C" grade turkeys (Tr. 453).

Mr. Nalder made arrangements to borrow \$1,250.00 and on January 21, 1950, sent the same to Kellogg Company (Ex. D-12). On January 30, 1952, a check for losses covered by insurance on the turkeys in the sum of \$1,267.55 was received by Kellogg, thus paying the 1951 account in full, plus a balance which was applied on the 1949 account. After receiving this latter check, Kellogg wrote to the Nalders as follows:

"We wish to acknowledge receipt of the insurance adjustment in the amount of \$1,267.44 which we have

credited to your 1951 turkey account, the 1951 interest, *and we have credited the balance of \$493.31 to your old account.* The outstanding principal on the 1951 account was \$326.44 and the interest amounted to \$447.69. (Ex. D-13) (App. 13).

In spite of the fact that in the preceding letter, the 1951 account had been paid in full and a balance of \$493.31 was credited to the old account, they still insisted in the same letter than an additional \$352 be paid on said "C" grade turkeys.

On February 2, 1952, William Nalder, Jr. wrote to Mr. W. H. Williams, Sales Manager of Kellogg Company, Omaha, Nebraska, and mentioned that he had been informed by his father that Kellogg would not be financing them in 1952, and stated that arrangements had been made with another company for financing, provided they would be assured of a first lien to the extent of their advances. The Kellogg Company was advised that turkeys had been ordered and were expected to arrive during the first week of March (Ex. D-14, App. 14).

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

Attached is a copy of a letter received from Bill Nalder, Jr. I would like to tell him that we will have to have the \$352.00 for 1951 turkeys which he traded for the gas bill before we could agree to write such a letter. What do you think? *I doubt that he can pay this but it might work.*" (Ex. D-15, App. 15). (Emphasis added.)

On February 18, 1952, Mr. Aust replied to Mr. Nalder's letter of February 2 and stated that a subordination agreement could not be granted until the \$352 was paid.

Even though Mr. Aust, the Credit Manager, realized that the Nalders had received practically nothing from the raising of turkeys for three years, and that they were unable to raise \$352, yet the Defendant insisted upon that payment, claiming that it was due for 1951. However, their letter and their ledger sheet discloses that the '51 balance was paid in full. Mr. Aust stated in his testimony that he was demanding the \$352 as being owed on the 1951 obligation and not claiming it by virtue of the deficit for the 1949 chattel mortgage (Tr. 377-8).

Since Mr. Nalder did not advise Kellogg of the company with whom they were dealing, as requested in the letter dated February 18, 1952, Kellogg Sales Company wrote the following letter dated February 26, 1952, to Farmers' Grain Company and apparently sent a copy of the letter to General Mills (T. 129). The letter was as follows:

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

"We understand that you folks are contemplating financing his 1952 turkey program and we wish to notify you at this time that *we still have a lien on his turkeys.* If you have any further questions on this we would appreciate having you contact us." (Emphasis added.) (Ex. F-10, App. 17).

After the first shipment of 9,000 poults arrived and financing had not been approved, Mr. H. William Nalder, Jr. on

March 2, 1952, sent the following telegram to Kellogg Sales Company:

"Talked Lee Brown, taking processing agreement, sending you \$352.00. Said would but now says can't do for 60 days. My turkeys arrived 26th March (sic. February). Got one ton feed, can't get more till General Mills, Ogden, Utah, Mr. Henry Stevens, receives subordination. Can you send subordination to General Mills. Wire if possible and receive submittance Brown 60 days? My only possible way of raising it." (Ex. D-17, App. 18).

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

"Necessary you secure a letter from Lee Brown agreeing to pay balance of \$352.00 to us by April 15, this year." (Ex. D-18, App. 19).

Attempts were made to secure the letter requested but Mr. Brown apparently changed his mind about making payment and therefore the application with General Mills was not granted since the subordination agreement was not issued (Tr. 302).

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

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

ness with them again. Please reconsider my case and let me work out and regain my losses. Give me a chance and I will not let you down. Please answer me back as soon as possible. Let it be favorable." (Ex. D-19, App. 20).

In response to that letter, Kellogg Sales Company, through their credit manager, Mr. Aust, advised Mr. Nalder he would still have to pay the \$352 (Ex. D-20, App. 21).

Although Mr. Nalder had paid the \$1,250.00 as agreed, and in spite of the fact that the 1951 account had been paid in full, the Defendant was insisting that Mr. Nalder must pay the \$352.00 before they would issue a subordination agreement. Further demand was made for \$352.00 in a letter on August 27, 1952 (Ex. D-21, App. 22). Demand was made in a letter on April 15, 1953, referring to the amount as "the balance on the 1951 turkey contract * * * Also advise us when you will be able to pay the \$352.00 to clean up the 1951 account." (Ex. D-22, App. 24).

Similar language was used in a letter demanding the \$352.00 dated June 4, 1953, wherein the balance was referred to as the "\$352.00 which is the balance due on the 1951 turkey contract * * * . You agreed to pay this \$352 balance on the 1951 account * * * ." (Ex. D-23, App. 25).

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

"As mentioned in our conference, on receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere, inasmuch as our mortgage is still of record.*" (Ex. D 21-5, App. 23). (Emphasis added.)

From the foregoing, the following is clearly established:

First, the 1951 loan was paid in full as shown by the ledger sheet of the Defendant and a letter sent to the Nalders (Ex. E-5, D-13, App. 13).

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

Third, the Defendant knew that the unreleased mortgages would prevent the Plaintiff from securing financing from other sources (Ex. D-21-5, App. 23).

Fourth, the Defendant knew of the Plaintiff's financial difficulties, but nevertheless flippantly insisted on the payment because, "It might work" (Ex. D-15, App. 15).

Fifth, the Defendant officiously wrote letters to other feed companies claiming a lien, and stating that the 1951 account had not been paid in full, directly disputing information in applications filed by the Plaintiffs (Ex. F-10, App. 17).

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

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

In *Swaner v. Union Mortgage Company*, *supra*, the mortgagee refused to release a mortgage even though it was unwilling to advance the money secured by the mortgage. An FHA application fee had been paid and fire insurance had been purchased to cover the proposed home. The mortgagee was insisting upon being paid for those expenses before it would release the mortgage. The court, in determining that the mort-

gagee did not have any authority to insist upon those conditions before the mortgage was released, stated as follows:

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

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

It is clear from the foregoing that all of the chattel mortgages should have been released. The 1949 balance was included in the August 1950 note and real estate mortgage. The 1950 and 1951 accounts were paid in due course and therefore the mortgages should have been released at that time.

(B) THE FIRST TWO REAL ESTATE MORTGAGES SHOULD HAVE BEEN RELEASED (DEFENDANT'S POINT II).

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

September 14, 1954	\$4,000.00
April 1, 1950	6,721.80
August 15, 1950	6,555.12

The first mortgage was issued to secure the advance of \$2,000.00 by the Defendant to the Plaintiffs. The second mort-

gage was in connection with the increasing of the primary loan on the home. The last mortgage was an incident of the 1949 deficit. No advances were made by Defendant on the second mortgage. On July 27, 1950, the Defendant received the last payment for the 1949 crop and determined the deficit (Ex. C-4, App. 3). On July 28, 1950, a promissory note and a letter were sent to the Defendant's agent, Mr. Scoville, at Salt Lake City, Utah (Ex. C-5, App. 4). On August 2, 1950, a letter was sent to Mr. Quinney with instructions to prepare a mortgage including the exact amount of the deficit plus a contemplated additional financing of \$3,600.00 (Ex. C 7.5, App. 5). The conversation between Mrs. Nalder and Mr. Scoville at the time the mortgage was executed has been previously set out in this brief. In essence, Mrs. Nalder protested signing the mortgage, but upon the assurances of Mr. Scoville that the other mortgages would be released, consented to sign the same (Tr. 60, 61, 215, 216). Certainly the normal inference from such a discussion would be that the prior chattel mortgage and the two earlier real estate mortgages would be merged in the final mortgage, being the exact amount of the deficit. Mr. Scoville was not called as a witness to refute this testimony concerning this conversation.

In addition to the prior decision in this case by the Supreme Court, the following cases support the statement that a prior mortgage may be satisfied by the execution of a new mortgage if the parties so intend:

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

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

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

Brady v. Selberg, 60 P. 2d 1104, 254 Or. 477.

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

“We are relying entirely on our real estate mortgage and for that reason can at this point release all the chattel mortgages which are unreleased at this time. We are attaching releases for 1949, 50 and 51 chattel mortgages. * * * *

The only real estate mortgage which is of record now, we feel quite sure, is the last one, as you put it
* * * (Ex. D 24, App. 26).

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

At no time did the Plaintiffs maintain that the August, 1950 mortgage was not properly of record. If the three chattel mortgages and the first two real estate mortgages had been released as maintained by the Plaintiffs, there would have been mortgages of record totaling \$15,555.12 consisting of the primary mortgage, which was originally in the sum of \$9,000.00 and the second mortgage to the Defendant in the

sum of \$6,555.12. A total mortgage indebtedness of \$15,555.12 secured by property valued at \$35,000.00 to \$45,000.00 (Ex. G-1 and G-5) would not have impaired the credit rating of the plaintiffs. In contrast, the record actually showed unreleased chattel and real estate mortgages amounting to \$116,501.92 consisting of three chattel mortgages and three real estate mortgages in favor of the defendant and the primary mortgage on the home in the amount of \$9,000.00.

The Defendant in Point II urged that the court committed error in permitting the jury to award Plaintiffs damages for failure to release the real estate mortgages because the Plaintiffs never paid or otherwise discharged the obligations secured by said mortgages. That there was no duty to release any mortgages until the 1949 deficit was paid was vigorously argued upon the prior appeal. The Supreme Court answered such arguments as follows:

“Appellant’s final contention is that respondents were never entitled to have any of the mortgages released because the original 1949 debt, it contends, continued during the entire financial dealings of the parties. Such would be the case only if a merger was not intended by the parties upon the execution of subsequent mortgages. The trial court found such a merger to have been intended, and his finding is well supported by the frank testimony of appellant’s own witness that *it was the final real estate mortgage upon which the company relied for security.*”

In view of this decision, there can be no doubt but what on the same evidence the issue was properly submitted to the jury.

The Legislature has specified that when mortgages have been paid or satisfied they should be released. The jury found

that the 1949 chattel mortgage and the first two real estate mortgages should have been released having been merged into the final real estate mortgage as represented by the agent of Defendant. Even the Defendants cannot deny that the 1950 and 1951 chattel mortgages were paid in full, and therefore should have been released.

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

(C) DEMAND WAS DULY MADE FOR RELEASE OF MORTGAGES (DEFENDANT'S POINTS IV AND V).

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

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

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

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

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

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

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

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

The statute does not provide for a demand. That the legislature could have so provided is clear since such a provision is contained in the section dealing with chattel mortgages.

There are no Utah cases nor cases from other jurisdictions having a similar statute which in any way infer or state that a request or demand must first be made before the penalty of the statute may be imposed.

The Defendant in its brief states as follows:

"The record in this connection shows that no demand was ever made for the release of chattel mortgage until 1954."

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

Previous reference has been made to the discussion in August, 1950, at the time of the execution of the last real estate mortgage. The Defendant secured the execution of that real estate mortgage upon the representation that the mortgages would be released.

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

- A. The check that I had taken back was for about \$14,000.00, and she got out our account and went over it with me and said: "This here pays your 1950 account in full, and we'll apply \$900.00 on your '49 account, which will take care of the interest and leave a balance of some \$300.00." Then she made a check out to me, and she says: "I'm sorry that this isn't more" and I don't know just how I stated it, but the question of the mortgages being released was brought up, and she said: "Mr. Williams is in Los Angeles, and we'll wait until he gets back before we release the mortgages."
- Q. Did you discuss with them the release of the mortgages?
- A. Yes." (Tr. 318).

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

"Undoubtedly some satisfactory arrangements can be made for settling the balance due on your 1949 account, *but we will withhold releasing mortgages until we hear further from Mr. Williams.*" (Ex. C 10, App. 8).

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

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

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

"The principal on the 1949 account amounts to \$6,627.39. He was wondering what the interest rate would be. Since I was not sure whether it would be four, five or eight, I did not commit myself.

"We will not have any of the mortgages released, either the chattels or real estate, until we have advice from you." (Ex. C 9, App. 7).

The Plaintiffs made application to Pillsbury, Ralston Purina, General Mills, and Farmer's Grain Coop. for financing (Tr. 48, 155). The details of this matter will be discussed under Proximate Cause. As a result of a request from General Mills,

Mr. Nalder, Jr. called and wrote to Mr. Aust requesting co-operation from Kellogg (Tr. 141, Ex. D-14, App. 14).

In the letter it was stated as follows:

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

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

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

Concerning these letters, Mr. Williams testified as follows:

Q. All right. He was calling attention then to his prior accounts, was he not?

A. Oh, surely.

Q. And to go ahead and finance with other companies, he could be permitted to do so by one or two ways, either a release of the mortgage or a subordination agreement, is that true?

A. That is true.

Q. And your attention then was directed to the proposition of the unreleased mortgages, was it not, by that type of letter?

Mr. Bowen to witness: You may answer, if you know.

A. Yes." (Tr. 346, 347).

Mr. Aust, the credit manager, testified as follows:

Q. (Reading) "As mentioned in our conference, upon

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

Now the question again was do you recall discussing the subordination agreement or mortgages in that conference?

A. Subordination agreement, yes.

Q. This would recall to your mind the fact the mortgages were still of record, would it not?

A. Yes.

* * * *

Q. Would that have called your attention to unreleased mortgages?

A. I believe it would, yes." (Tr. 401, 402).

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

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

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

"And, although the request need not be presented in any particular form, yet the language in its fair and reasonable meaning must inform the mortgagee as to what is desired. *Jordan v. Mann* (1877) 57 Ala. 595.

"The fact that the mortgagee did not understand

the notice as a request to enter satisfaction will not excuse his delinquency, if the reasonable intendment of the request conveyed a desire for satisfaction. Ibid."

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

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

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

"We are awaiting the remaining balance for the 1951 turkeys which were sold locally. We understand that Bill traded \$352 worth of turkeys to take care of a gasoline bill, and of course, inasmuch as we had a mortgage on these turkeys, that amount must be remitted to us together with the remaining balance as discussed with Mr. Williams recently. We would *appreciate having these funds forwarded to us so that we would be able to release the mortgage and return the notes to you. Your cooperation will be greatly appreciated.*" (Emphasis added.) (Ex. D 13, App. 13).

On February 18, 1952, the Defendant wrote to Mr. Nalder, Jr. in replying to his letter of February 2, advising him that

until the \$352 was paid a subordination agreement could not be given. (Ex. D-16, App. 16).

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

“As mentioned in our conference, upon receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere inasmuch as our mortgage is of record.*” (Ex. D 21-5, App. 23).

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

In August, 1950, a conversation was had with reference to merging the 1949 obligations into the last real estate mortgage. In December of 1950, Bill Nalder paid off the 1950 account and had a discussion with an agent of the Defendant pertaining to the release of mortgages. At the end of the year 1951 a conversation was had at the Hotel Utah wherein subordination of the Kellogg's claims to that of other companies was discussed. Letters, telegrams and telephone calls were made during the first two months of 1952 requesting permission for other companies to finance the Plaintiffs; yet in spite of all this evidence, the Defendant contends the record is without dispute “that no demand was ever made for the release of the chattel mortgages until the end of 1953 or early 1954.” It is submitted that repeated demands were made calling to

the attention of the Kellogg Company the fact that the mortgages were not released and should have been released.

Demands made during January, February and March, 1954, for release of the 1951 chattel mortgage are contained in correspondence between Ralston-Purina Company and the Defendant. On January 28, 1954, Ralston-Purina Company wrote to the Kellogg Sales Company inquiring if Kellogg was willing to release the 1951 chattel mortgage (Ex. G-6, App. 27). Mr. Aust of Kellogg Company advised them that the mortgages had been released. Ralston on February 5, 1954, wrote the County Recorder for confirmation. The County Recorder replied that the mortgage had not been released as of February 7, 1954 (Ex. G-7, App. 28). Again on March 4th Ralston wrote to Mr. Aust stating that, although they had been informed that the mortgages had been released, the public record did not so indicate (Ex. G-8, App. 29). Mr. Aust replied on March 8th that releases had been prepared on January 21, but since the account was involved in litigation, the releases had been forward to counsel rather than to the recorder (Ex. G-9, App. 30).

The three chattel mortgages were finally released on March 11, 1954, after this law suit became imminent (Ex. A 4, 5 and 6).

It is a well recognized rule of law that the law does not require useless and needless acts. It is obvious from the position of the Defendant that demands would be just such an occurrence. It was clear after February 18, 1952, a request for release of the mortgages or subordination would be futile unless the \$352.00 payment was made (Ex. D-16, App. 16). In view of the company's policy, it is likewise clear that the demand for

release of the mortgages would be a futile gesture. Mr. Williams, the plant manager at Omaha, testified that it was a policy of the company to never release a mortgage as long as there was any outstanding indebtedness. He testified as follows:

Q. Mrs. Schinker would discuss with you the problem of releasing this mortgage, would she not?

A. Yes.

Q. What did she ask you?

A. I received a copy of the letter which she sent out and subsequently I told her we would not release the mortgage.

Q. You told her you would not release the mortgage?

A. Yes.

Q. What mortgage were you talking about?

A. All existing mortgages at that time." (Tr. 342, 343).

Under such circumstances the Plaintiffs were clearly not required to make any further demands for release of mortgages after February, 1952. By statute, no demand is required for a release of real estate mortgages. Numerous demands were made to facilitate the financing of turkeys with other companies. Refusal to release the mortgages was consistently made by conditionally offering to subordinate provided an additional payment of \$352 for 1951 was made. Since the 1951 contract had been paid in full, the mortgages should have been released.

(D) THE DEFENDANT DID NOT ACT IN GOOD FAITH IN FAILING TO RELEASE THE MORTGAGES. (DEFENDANT'S POINT VII).

It is stated by Defendant that since Mr. Williams was acting upon advice of counsel the company was therefore acting in good faith. It is also stated that there is no other evidence on this matter except the testimony of Defendant's witnesses. The record will disclose nine instances where the Defendant

company was not acting in good faith but rather went out of its way to the detriment of the Plaintiffs.

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

A. He said: "Do you folks know you could have went to the penitentiary for taking those \$352.00 worth of turkeys?", and he said: "I will not feed you or let anybody else feed you," and I said, "Then how can we pay Kellogg?", and he said: "That's up to you. That's your hard luck." (Tr. 222).

She further testified that the discussion became very heated and they became a little angry. Testimony to the same effect was given at Pages 151 and 73 of the transcript.

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

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

"I would like to tell him that we will have to have the \$352.00 for 1951 turkeys which he traded for the gas bill before we could agree to write such a letter. What do you think? *I doubt if he can pay this but it might work.*" (Ex. D 15, App. 15). (Emphasis added.)

3. Thereafter, the Defendant continually insisted upon the \$352.00 payment even though their own letters and ledger sheet acknowledged that they had been paid in full for 1951. (Ex. D-16, D-20, D-21, D-21.5, D-22, D-23, App. 16, 18, 21, 22, 23, 24 and 25).

4. When the Defendant was not advised by the Plaintiffs as to what companies were considering financing them, they wrote the following officious letters to Farmers Grain Com-

pany and apparently sent a copy to General Mills (Tr. 129). The letter is dated February 26, 1952:

"Gentlemen: We recently had a request from Mr. H. William Nalder, Jr., to subordinate a lien which we have on his 1951 flock of turkeys.

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

"We understand that you folks are contemplating financing his 1952 turkey program and we wish to notify you at this time that we still have a lien on his turkeys. If there should be any further questions on this we would appreciate having you contact us." (Ex. F 10, App. 17).

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

5. The Defendant openly admitted that they insisted upon double liability when additional financing was granted. The

first real estate mortgage was for \$4,000.00 even though only \$2,000.00 was advanced. In addition to testifying as to such a policy, Mr. Williams wrote to Mr. Quinney, August 2, 1950, and stated as follows:

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

"We may be entirely off the beam in drawing a mortgage for an amount larger than we expect the account to become, but we feel that it is some protection to have a recorded amount in that figure, and if by some extreme it was necessary to advance more than was originally requested, there would not have been an opportunity for the grower to have placed another mortgage, which would come in between the mortgage we might file now and another one some 60 to 90 days later. You might advise us as to this procedure. We understand that in most states the mortgage has to be backed up by notes but of course we would never attempt to collect any more than the account actually amounted to regardless of the size of the mortgage." (Ex. C-7.5, App. 5). (Emphasis added.)

6. Bill Nalder testified that at the time the 1950 payment was made he was advised the mortgages would be released after the return of Mr. Williams (Tr. 318). Mrs. Schinker of Kellogg Company wrote to Mr. Nalder confirming that the mortgages would probably be released after consultation with Mr. Williams (Ex. C-10, App. 8). However, in an interoffice letter it was clearly stated that the mortgages would not be released until ordered by Mr. Williams (Ex. C-9, App. 7). Mr. Williams ordered that the mortgages not be released since it was the policy of the Company never to release a mortgage as long as there was an unpaid balance. This policy was never

communicated to the Plaintiffs; rather, they were lead to believe that release of the mortgages would be taken care of in due course.

7. There is no question but that the Defendant knew that as long as the mortgages were unreleased the Plaintiff would not be able to secure financing. Mention of this fact was made in their letter of December 22, 1952 (Ex. D-21.5, App. 23). Mr. Aust, the credit manager, testified that he knew it was a policy of the large feed companies not to finance a grower as long as there was a prior unreleased mortgage of another feed company (Tr. 382-4). Mr. Williams testified that his company, as well as other companies, would not grant financing without securing releases of prior turkey mortgages because they purported to give a lien on future acquired turkeys (Tr. 358, 465).

8. The correspondence between Ralston-Purina Company and the Defendant during the first months of 1954 pertaining to a request that the 1951 mortgage be released has been referred herein. The dilatory and irresponsible lack of concern on the part of the Defendant certainly did not show good faith. (See Ex. G-6, 7, 8 & 9, App. 27 to 30).

9. Upon receiving a letter from Ralston Purina Company, Exhibit G-6, App. 27, the credit manager for the Defendant called a representative of Ralston Purina at St. Louis. The letter merely asked if the Defendant was willing to release the mortgage. Nevertheless the agent of the Defendant proceeded to tell the credit manager for Ralston Purina his personal opinion of the Plaintiffs. A report of the call was as follows:

“The credit man who called us (whose name I didn’t catch) was personally acquainted with the Nalders. He

certainly did not have a very high opinion of the Nalders and referred to Mrs. Nalder as the 'troublemaker.' '' (Ex. G-10, App. 31).

Not only did the Defendant refuse to release the mortgages, they threatened to prevent the plaintiffs from obtaining financing elsewhere, flippantly insisted that \$352.00 be paid before a subordination agreement would be granted since "it might work," wrote officious letters misrepresenting the facts to other feed companies, lightly demanded double security for additional financing, lead the Plaintiffs to believe the mortgages would be released while the company policy was completely opposite; exercised dilatory practices in releasing the mortgages even after suit was threatened and, finally, went out of their way to advise the credit man of another company that the Plaintiffs could not keep their promises; had failed to account for turkeys; that they were troublemakers; and that Defendant would not finance them. Rather than showing good faith, the conduct of the Defendant was willful, wrongful, and even malicious to an extent sufficient to sustain punitive damages regardless of the statute specifying double damages for failure to release the mortgages.

The issue of whether the defendant acted in good faith is a question of fact for jury determination. The Court, by Instruction No. 17, instructed the jury "that there can be no recovery of damages * * * * if the mortgagee mistakenly, but honestly, and in good faith" failed to release said mortgages." The jury found this factual issue against the defendant. The foregoing evidence is more than adequate to justify the submission of that issue to the jury and to sustain the verdict on that issue.

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

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

The Defendant in this case refused to release the mortgages in an attempt to coerce the Plaintiff into paying an additional payment. According to the Oregon case such conduct cannot constitute a good faith defense.

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

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

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

The Defendant asserts that the penal provisions of the statute should not be applied because the Defendant was acting in good faith. To support this contention, the Defendant cites the case of *Shibata v. Bear River Bank*, *supra*. It is true the Utah court adopted the good faith rule in that case, but it was based upon the fact that the mortgagee was acting in good faith “because he believes there has been no full satisfaction,” or because he “honestly thinks that it had a valid and subsisting mortgage against appellant which had not been satisfied.” In this case the Defendant cannot claim that it thought it had valid and subsisting mortgages, since its own documents showed payment in full and since the Defendant refused to release the mortgages because it was the policy of the company to never release any mortgages so long as there was an unpaid balance. There could be no good faith assertion that the Defendant thought the 1950 and 1951 chattel mortgages were valid and subsisting. Kellogg’s own ledger sheets and correspondence show that those obligations had been paid in full. The distinction that the good faith must be a belief that there had been no full satisfaction is supported by the numerous cases cited in the annotation in 56 ALR 345. The good faith necessary is a good faith belief in the proposition that the debt secured by the mortgage has not been paid. It would be easy to circumvent legislative intent by merely claiming good faith

because counsel advised Defendants to follow a given course of conduct. The statute clearly specified what should be done when a mortgage is satisfied. Defendant cannot escape liability by claiming that they were advised to ignore the provisions of the statute. Such is not the good faith intent necessary to escape the provisions of the statute.

(E) AGENTS OF THE DEFENDANT HAD EITHER ACTUAL OR APPARENT AUTHORITY TO REPRESENT THE DEFENDANTS. (DEFENDANT'S POINT VIII).

Previous reference has been made to the conversations had with Mr. Scoville, Mrs. Schinker and the credit manager, Mr. Aust. Mr. Scoville was directed to take the notes and mortgages and have them executed by the Nalders after the deficit in 1949 was established. Letters Exhibits C-4, C-5, C-8, Appendix 3, 4 & 6 are directives from the Defendant to Mr. Scoville concerning this matter. In a letter of August 2, 1950, Mr. Williams, the plant manager, advised Mr. Quinney to contact Mr. Scoville for the purpose of having the mortgage signed (Ex. C-7.5, App. 5).

Mrs. Schinker had authority to receive the money, so it would appear that she had some authority to discuss the releasing of the mortgages upon payment in full. Mr. Williams admitted that she was familiar with the policy of the company regarding releasing mortgages and had authority to discuss such policy (Tr. 340-3). Mr. Aust in his letters stated that upon payment of \$352.00 the mortgages would be released (Ex. D-13, App. 13 and Ex. D-21.5, App. 23). Again Mr. Williams admitted Mr. Aust as credit manager had a responsible position with the company, and was familiar with the policy of the company (Tr. 336-7). Although the employees

freely discussed the matter of releasing the mortgages, it now appears from the testimony of Mr. Williams that he was the only one with authority to release mortgages. If the agents did not have actual authority, certainly they had apparent authority so far as the plaintiffs were concerned. Representatives of the Defendant who requested execution of the mortgagees received the money paying the contract in full; discussed and insisted upon payment of additional amounts before mortgages would be released, must have had some authority.

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

In *Scoville v. Kellogg*, 1 Utah 2d 19, 261 P. 2d 933, the Defendant attempted to disclaim liability on a bonus arrangement with its salesmen on the ground that its representative did not have authority to bind the Defendant. The court held it was error to strike the representative's testimony since he had executed a written bonus plan and had sent correspondence concerning bonus payments.

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

In each case, before any conversation involving Scoville or Mrs. Schinker was permitted, Mr. Williams was called out of order and testified concerning their positions with the Defendant company. (*Scoville*, Tr. 44-54; *Schinker*, Tr. 313-

317). The court gave careful consideration to Defendant's claim of lack of authority before such evidence was admitted.

These representatives had sufficient authority to receive and transmit a demand for the release of the mortgages to an agent of the Defendant who did have authority. Mr. Williams was advised of Mr. Nalder, Jr.'s letter requesting authority for financing by another company. Mr. Williams was advised by Mrs. Schinker that the 1950 account had been paid in full and that mortgages would not be released until so advised by him. When asked what advice was given to Mrs. Schinker, Mr. Williams said, "Yes, I told her we will not release the mortgage" (Tr. 342). It was admitted that Mr. Williams had authority to release the mortgages. Even after an agent of the Defendant with authority received the information, it appears that there was no intention of releasing the mortgages since it was stated emphatically that it was the policy of the company not to release any mortgages so long as there was an unpaid balance. Even if the agents did not have authority to actually release the mortgages, they had authority to discuss the matter with the plaintiffs and to communicate those matters to persons with authority. As far as the plaintiffs were concerned, they were dealing with people acting within the scope of their employment concerning matters which the agents were directed to discuss with the plaintiffs and, therefore, they were justified in assuming that the agents had actual authority even though it amounted to only apparent authority which is equally binding upon the principal.

CONCLUSION, POINT ONE

All of the matters argued under this point were presented to the Supreme Court by the Defendant upon the prior appeal.

The Defendant strenuously argued that there was no duty to release any of the mortgages until the 1949 account was paid in full. The Court's holding has previously been quoted ruling against the Defendant. The Defendant also argued that no demand had been made, that the Defendants had acted in good faith, and that the agents of the Defendant did not have authority. The Plaintiffs felt that the Court was searching for grounds for reversal because of the amount of the judgment, but found no substance in such arguments. Rather, a reversal was granted because the trial court had not distinguished between the parties, an issue raised for the first time on appeal. The Supreme Court, by its decision, knew that the case would be retired but did not feel constrained to pass upon those issues as raised by the Defendants. In fact, the Court felt compelled to emphasize the fact that none of the mortgages had been released, even though there was only approximately \$6,000.00 owing. The court stated as follows:

"The Kellogg Company refused to finance the Nalders in 1952. At this time there were on record in favor of the Kellogg Company chattel mortgages executed by Nalder, Sr. and Jr. in 1949, 1950 and 1951, and real estate mortgages executed by Mr. and Mrs. Nalder in 1949 and 1950 totalling \$107,401.92. *Not one of the mortgages was ever released by the company until shortly before the instant case was filed in 1954, notwithstanding the fact that the 1949 deficit of some \$6,000.00 was the only debt owing the company from the Nalders.*"

Whether the mortgages had been paid, or satisfied by merger, whether there had been a demand, and whether the defendant had acted in good faith, are all factual issues. They were all properly submitted to the jury with adequate instruc-

tions. The jury's verdict on these issues is more than adequately sustained by substantial competent evidence.

POINT TWO. PROXIMATE CAUSE

THE JURY PROPERLY FOUND THAT THE DEFENDANT'S FAILURE TO RELEASE THE MORTGAGES WAS THE PROXIMATE CAUSE OF PLAINTIFF'S DAMAGE. (DEFENDANT'S POINT VI).

The question of proximate cause is an issue for jury determination. The Court properly submitted this issue to the jury with adequate instructions. The evidence justifying such submission and the determination thereon is as follows:

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

Chattel Mortgages

May 16, 1959	\$24,000.00
March 13, 1950	23,300.00
April 4, 1951	42,825.00

Real Estate Mortgages

February 14, 1949	4,000.00
April 1, 1950	6,721.80
August 15, 1950	6,555.12

Total.....\$107,401.92

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

2. The Plaintiffs made application to Ralston Purina, General Mills, Sperry-Globe Mills, and to Farmers Grain Co-op., being most, if not all, of the feed companies operating in the Ogden area. Even though the salesman and field representatives in each case recommended the approval of the application, in all cases the applications were refused when sent in to the credit department (Tr. 96, 108, 505).

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

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

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

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

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

Exhibit F-8 is a memorandum concerning a telephone conversation between the credit manager at Ogden and the applicant. In part, it stated as follows:

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

It is clear from the foregoing that General Mills was willing to finance Plaintiffs provided the chattel mortgages were released or if it would subordinate its position to that of General Mills.

4. Mr. Clair Rasmussen, a feed dealer at Ogden representing Ralston-Purina Company, further testified that, after consultation with the credit department of his company, he advised the Nalders that they had unreleased mortgages which would have to be cleared from the records of the County Recorder’s office (Tr. 268-9).

5. Robert Brown, credit manager for Ralston-Purina, testified that the Kellogg unreleased mortgages were a contributing cause for the refusal of the Plaintiffs’ application (Tr. 483, 492, 500). He further testified:

“A. We would definitely want a chattel mortgage that anyone had covering turkeys. explicitly turkeys, we would want that mortgage released before we would enter into a contract with a grower as a turkey operation.” (Tr. 499).

6. It is clear that the representative of the defendants knew that the unreleased mortgages would prevent the securing of additional financing. Mr. Williams, the plant manager, after having his attention called to the fact that he had stated they were only relying on the real estate mortgage, and after being

asked if any attempt had been made to claim a lien on the turkeys raised during 1952, 1953 and 1954, stated as follows:

Q. Would your company loan money to a grower, where there is an outstanding chattel mortgage in favor of another company, which has a provision purporting to give a lien on turkeys which might be acquired in the future?

(Discussion by counsel and court.)

A. We would under certain circumstances.

Q. Under what circumstances?

A. If we had a subordination agreement with the other company, and the credit reputation and all other matters being satisfactory.

Q. But you would insist upon either that they be released or a subordination agreement, would you not?

A. Yes, we would." (Tr. 358 (a))

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

"As mentioned in our conference, upon receipt of these remittances we will be in a position to furnish you with a subordination agreement *allowing you to secure turkey financing elsewhere inasmuch as our mortgage is still of record.*" (Emphasis added.) (Ex. D 21-5, App. 23).

Mr. Aust testified that he knew that neither Kellogg nor any other large feed company would finance the Plaintiffs as long as the mortgages were of record. After reluctantly admitting that Kellogg would not have financed the Nalders if some other company had unreleased mortgages of record, he testified as follows:

Q. All right. You would insist then, as these other companies—like General Mills and Ralston-Purina—that they either be released as subordinated?

- A. If we were going to finance them, yes.
- Q. Have you had experience with any other large feed company?
- A. Yes, I have.
- Q. Name the company, please.
- A. Orchard, Daniel, Midland Company.
- Q. Any others?
- A. No. That's the only one I have worked directly with.
- Q. Are you familiar with the policy of that company in making feed financing?
- A. They're pretty much the same as Kellogg.
- Q. Could we say then that they too would have insisted upon a release or discharge of these turkey chattel mortgages, before they would have financed?
- A. I would say yes." (Tr. 383).

* * * *

- Q. Well, do these provisions in these turkey chattel mortgages, purport to give a lien on turkeys acquired in the future, play any part in this requirement?
- A. I would say yes.
- Q. Isn't that an important factor?
- A. I believe it is, yes." (Tr. 384).

It was conceded in the brief of the defendants that both General Mills and Ralston-Purina were insisting that Kellogg's chattel mortgages be released or a subordination agreement be secured before any financing could be granted to the Plaintiffs. On Page 10 it is stated: "It is conceded that one of the conditions for approval was a release or subordination of Defendant's mortgages." On Page 12 it is stated: "that a release or subordination of Defendant's mortgages would have been necessary in the event the application was accepted is not disputed." On Page 41 it is stated: "It is not disputed that one of the requirements made by General Mills was for a release or subordination of the debt owed to defendant." On Page 44 it is stated: "Of

course, it was conceded that a release or subordination of defendant's mortgages would have been necessary to the approval of an application."

8. Defendant repeatedly states that Plaintiffs had a poor reputation and credit rating. Support for this contention is claimed in connection with documents discussing the application filed with General Mills. The fact is simply that the application to General Mills would have been approved if a subordination agreement had been secured from Kellogg (Ex. F-6). Furthermore, the financial condition of the Plaintiffs was substantially the same as it had been during the three years that the Kellogg Company had been willing to finance them. Also direct letters from Plaintiffs' creditors gave them a high rating (Tr. 505-7).

9. In addition to the Defendant failing to release the mortgages as required by law as constituting a proximate cause for the Plaintiffs' failure to secure financing, the Defendant took affirmative steps to further prevent the Plaintiffs from securing their necessary financing. They went out of their way to write officious letters (Exhibit F-10, App. 17) to Farmers Grain Cooperative, and apparently sent a copy of General Mills (Tr. 129). Further, the defendant volunteered information of a derogatory nature, more particularly, gave his personal opinion of the Plaintiffs, and stated that one of them was a troublemaker (Ex. G-10) (Tr. 417).

10. The Defendant at the time of trial placed great emphasis before the jury upon the fact that there were numerous unreleased household and equipment chattel mortgages other than the mortgages of the defendant. It is submitted that none of these chattel mortgages purported to give a lien on after

acquired turkeys such as the defendant's mortgages. It was consistently stated by other credit men, in addition to the representatives of the defendant, that a failure to release such other type chattel mortgages would not necessarily prohibit the approval of an application. In fact, Kellogg during the three years that it financed the Plaintiffs, did not insist upon any releases of these chattel mortgages, most of which were of record at that time. Mr. Williams testified that the Kellogg Company would go ahead without demanding a release of chattel mortgages on furniture (Tr. 465). Both Mr. Aust, credit manager for Kellogg, and Mr. Brown, credit manager for Ralston-Purina, testified to the same effect (Tr. 385, 498).

11. Defendant in its brief states that the Plaintiff tried the case on the theory that the Defendant's failure to release the mortgages was the sole proximate cause. Such is not the case. It has consistently been the position of the Plaintiffs that if the Defendant's failure to release the mortgages was a proximate cause under the usual definition or was a substantial factor in prohibiting the Plaintiffs from securing their financing, the burden of proof would have been sustained. The failure to release household-type chattel mortgages might have been a contributing cause also. However, the court properly instructed the jury that the law does not seek and recognize only one proximate cause of damage, and that the acts or omissions of two or more persons may work concurrently as an efficient cause of any injury, and each of the participating acts or omissions may be regarded in law as a proximate cause.

12. On Page 42 of the defendant's brief it is stated that the application to General Mills would not have been approved since a guarantee had not been obtained by a local feed

dealer. Mr. Robert Konrath, salesman for General Mills, testified that the necessary arrangements had been made to secure such guarantee.

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

As was stated in *Malarkey v. O'Leary*, 256 Pac. 521, 34 Or. 493:

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

Without relying on all of the other evidence, it would appear to be sufficient to sustain the jury's finding of proximate cause that the two officers of the Defendant company acknowledged that the unreleased mortgages would prevent subsequent financing by other feed companies. These admissions

in addition to all the other evidence compels an affirmance of the jury's findings on this factual issue.

POINT III—DAMAGES

THE LAW AND EVIDENCE SUSTAIN THE JURY'S DETERMINATION OF DAMAGES (Defendant's Point IV).

There is no serious dispute as to the rules of law cited by the defendant in its brief, wherein it is stated that damages for loss of profits must be proven with reasonable certainty, or that the damages must be based upon some reasonable formula. The plaintiff does not agree that damages for loss of profits must always be established by proof of past experience. Usually this is the type of proof resorted to because there is nothing better. However, in this case, the plaintiff actually raised turkeys during the three years for which damages are claimed. These damages were based upon actual experience rather than resorting to something less definite, such as experiences prior to the years for which loss of profits are claimed.

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

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

the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. * * *

"Where the tort itself is of such a nature, as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages, as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, in which he alone is responsible for making, were otherwise. (Citation of authorities). As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoers instead of upon the injured party."

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

The defendant, both in the Statement of Facts at Pages 7, 10, and 12, and under Point IV on Page 36, argues strenuously that there is no evidence to support the contention that the plaintiffs would have raised 14,000 turkeys in each of the three years in question. Although there is substantial competent evidence to support even a verdict computed upon 14,000 turkeys, it would seem to be a sufficient answer to point out that this is a factual question, and the jury apparently only awarded damages computed on 6,000 turkeys each year, which was the number raised during the last two years that the plaintiffs were financed by the defendant. Computations on 14,000 turkeys

resulted in a prayer for damages in the sum of \$56,268.82. The jury only awarded a verdict of \$22,030.61.

1. The evidence reasonably shows that the plaintiffs had the facilities to raise in excess of 14,000 turkeys per year. Mr. Nalder, Sr. had facilities for raising 6,000 turkeys near his home. It was clearly established that his brooder house had a capacity to brood 6,000 poults. For the three years that the defendant financed the plaintiffs, the plaintiffs raised 5,000 the first year and 6,000 each of the last two years (Ex. A 1 & 2 and E 1.5).

In addition to the facilities of Mr. Nalder, Sr., Mr. Nalder, Jr. had leased a 900-acre ranch east of Bountiful, Utah, from Deon Toone and had made arrangements for the use of the brooder house of Seth Oberg, which had a capacity to brood 11,000 poults (Tr. 295). There was no evidence submitted by the defendant in any way refuting the foregoing evidence.

2. The evidence showed that the plaintiffs intended to and would have raised 14,000 turkeys.

Mr. Nalder, Jr. testified that he intended to raise 9,000 turkeys (Tr. 305, 306). An application for financing 9,000 turkeys was made by him to Farmers' Grain Co-op (Ex. H-1). In fact, 9,000 turkeys were ordered and delivery tendered (Tr. 303). Since financing had not been approved at the time of delivery, the turkeys were not placed in the rented brooder house, but rather 6,000 were placed in the brooder house of Mr. Nalder, Sr. and the additional 3,000 were turned over to another grower (Tr. 82 and 83). Mr. Nalder, Sr. was to receive his turkeys at a later date. When financing could not be secured, the 6,000 turkeys actually brooded were taken from him.

In addition to the 9,000 ordered by Mr. Nalder, Jr., Mr.

Nalder, Sr. made application to raise 5,000 turkeys on his ranch where 6,000 turkeys had been raised for each of the past two years.

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

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

When the plaintiffs could not secure financing from the feed companies, Mr. Rasmussen, a feed dealer in Ogden, co-signed with the plaintiff at the First Security Bank, enabling him to raise a small herd of turkeys each year. The plaintiffs raised 1,018 turkeys in 1952, 1,430 turkeys in 1953, and 2,200 turkeys in 1954. These amounts were taken into consideration in computing damages.

Mr. Nalder testified as to the amount paid for the turkeys,

feed, electricity, and a watchman. The amount for processing the turkeys at the end of the year is shown by the manifest sheet of the processing plant (Ex. L). These amounts were summarized on Exhibit H-1, App. 33). The amounts actually received for the turkeys is shown by Exhibit L. From these facts the profit per bird was computed and the mortality rate established.

In 1952 the plaintiffs sold 986 turkeys and would have lost 414 turkeys out of 14,000 based upon the established mortality rate of 3.1 per cent. These amounts were deducted from 14,000 leaving 12,300 turkeys to which the average profit of \$1.86 per turkey was applied (Ex. N-1, App. 33).

Similar computations were made for 1953 and 1954, based upon ledger sheets from the feed company and processing plant (Ex. R, Q and I) and upon personal testimony (Tr. 331) which even took into account taxes, insurance, and depreciation (Ex. N 1-4, App. 36).

The foregoing evidence clearly established initial cost, maintenance and feeding expenses, sales price and expenses, and mortality rate. These amounts were then extended to show the actual loss of the plaintiffs by being denied the right to raise the number of turkeys for which they had ample facilities. Such evidence certainly presented to the jury a reasonable basis for determining the loss of the plaintiffs. It presented a much stronger case than one attempting to project loss of profits based upon past experience. Rather, it gave an index under actual conditions for each of the years and eliminated any speculation as to whether the plaintiffs would have sold their turkeys when the market price was higher and eliminated any speculation as to how many turkeys the plaintiffs would

have lost during the course of each year. The defendant introduced no evidence whatsoever refuting the foregoing matters pertaining to damages.

4. The plaintiffs introduced and the jury deducted amounts in mitigation of the damages. From the total amount of loss sustained for the three years was deducted the rent on the ranch, amounting to \$3,600, which was not paid because the lease was cancelled. In addition, the salary received by William Nalder, Jr., for the period of time which he would have been spending his full time raising the turkeys was deducted, amounting to \$6,600 (Ex. N, App. 36).

The defendant maintains that the sole and exclusive method of proving loss of profits is by projecting past performance. This is not the rule of law which is applicable. The rule is that damages must be proved with reasonable certainty. Past performance is the method normally used, but it is not exclusive. Other methods may be used, provided they comply with the requirement that damages are shown with some reasonable certainty.

In *City of Corning vs. Iowa-Nebraska Light and Power Company*, 225 Iowa 1380, 282 N.W. 791, the court held that the evidence of the first year's operations of a power plant could be used to establish the profits which would have been earned during the prior 11 months when the plant was not in operation due to conduct of the defendant. In so doing the court stated:

"Defendants urge that because the Corning municipal electric light, power and distributing system was a new business and had not been in operation or existence, that the loss of profits or loss of use of a plant

not in being yet is too speculative and uncertain to form a basis for recovery.

We do not concur in this contention. * * * *

Defendants insist that, conceding the plant was, in effect, an established business, the profits sought to be recovered as damages are too speculative, remote and uncertain to permit recovery and are not susceptible to legal proof. The rule against certain damages applies where there is uncertainty as to the cause of the damages and as to the fact of legal damages. The damages claimed must be the certain result of the alleged breach on which the injured party relied. If the damages are the result of the breach, the fact that the amount of the damages is uncertain or difficult to determine does not prevent recovery of the amount of the damages if the amount of the damages can be established with reasonable certainty * * * * .

The trial court was able to determine from the evidence the net earnings of the plant the first year of operation and there was sufficient evidence to support the findings of the trial court that the earnings during the preceding 11 month period would have been substantially the same. The cause was tried to the court without a jury and, there being evidence to sustain the findings of fact of a trial court, they are binding and conclusive on this court.”

In *Casper v. Moore*, 70 P. 2d 224, 21 Cal. App. 694, it is stated that evidence of profits both past and present is admissible in determining the amount of prospective profits. In *DeWiner v. Nelson*, 33 P. 2d 356, 54 Idaho 560, it was held that the evidence that the plaintiff made daily computations of costs and determined the average daily profit for feeding each man was competent to prove loss of anticipated profits.

Relying upon the authorities cited by the defendant, it is submitted that the evidence in this case does establish a rea-

sonable formula or basis for computing the damages or that the damages have been shown with reasonable certainty. If exact certainty has not been established, the defendant cannot be heard to complain. Again quoting from the leading case of *Story Parchment Company vs. Patterson Parchment Paper Company*, supra, decided by United States Supreme Court:

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

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

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

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

POINT IV

THE COURT PROPERLY HELD THAT H. WILLIAM NALDER, SR. AND JR. WERE PARTNERS AND, THEREFORE, THE JUDGMENT IN BOTH OF THEIR NAMES IS PROPER. (Defendant's Points I and III (d)).

From the time the pleadings were first filed, through the first trial, and again on the retrial, the defendant did not challenge that these plaintiffs were partners. Only on appeal

is such issue raised. This procedure is used to entrap the trial court and to reserve a ground for appeal. The Supreme Court in the prior decision assumed that the plaintiffs were not, in fact, partners and treated them separately in granting a reversal. Then again on the second trial the defendant conceded that Nalder, Sr. and Jr. were partners. Concerning this issue, the following took place at the time of retrial:

"MR. BUSHNELL: It's a question of a partnership between two of them. We would like to show they jointly procured the money for setting up the physical plant.

MR. BOWEN: There is no issue on the partnership, your Honor.

MR. BUSHNELL: Are you willing to admit, for the purpose of this record, that Bill Nalder, Jr. and Mr. Nalder, Sr., were partners in the instigation and raising of these turkeys?

MR. BOWEN: I have always so contended that they were. Surely I'll admit it.

THE COURT: All right. Go ahead.

MR. BUSHNELL: I won't spend any further time on it." (Tr. 25 and 26).

Now again on appeal the defendant would assert the parties should be treated separately.

There is no question but what Nalder, Sr. and Jr., were partners and the defendant so treated them. The evidence concerning this matter is as follows:

1. In Paragraph 7 of the answer and counterclaim, the defendant alleged as follows:

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

2. The defendant company relied on the real estate mortgage as security on all obligations of all the plaintiffs. An excerpt from the mortgage states:

"This mortgage shall secure all other sums due and to become due from H. William Nalder, Sr. and Catherine Nalder, his wife, and H. William Nalder, Jr. and Mrs. William Nalder, Jr., his wife, in favor of Kellogg Sales Company."

3. Exhibit J-5 is a proposed form of partnership agreement for the formation of a partnership between Nalder, Sr. and two of his sons. Since one of the sons withdrew before active operations, the agreement was not signed. However, Nalder Sr. and Jr. testified that the terms of the agreement were carried out between him and his father.

4. The title to the real property upon which a brooder house was constructed was in both names, and mortgages granted thereon were signed by all of the parties thereto (Ex. J-4, 5, 6, 7).

The defendant maintains that the prior decision in this case would prohibit the parties from showing the continuation of the partnership after they were unable to procure financing from the defendant and after Nalder Jr., in order to mitigate damages, sought employment elsewhere. By the very terms of the decision, it is clear that the court did not know what the factual situation was in this regard. The court stated as follows:

"The record is not clear as to whether the turkey raising activities in 1952, 1953 and 1954 were a joint operation of Nalder, Sr. and Mrs. Nalder, or whether limited to Nalder, Sr."

To clarify this point in the record, additional evidence was submitted concerning the status of the parties at this time.

The defendant has asserted that this amounts to a repudiation of prior testimony. It is submitted that there is not one phase of this testimony which is inconsistent with any prior testimony in either trial, but rather it is an amplification of an issue not previously contested but made pertinent by virtue of the Supreme Court's decision. It is claimed that Nalder, Jr., abandoned the raising of turkeys after 1952, and the defendant further asserts that the prior decision would prohibit any evidence in this matter. Again quoting from that decision, it is submitted that the holdings do not sustain the defendant's contention. The court stated with reference to Nalder, Jr.:

“Nor can he recover damages beyond the period when he actually engaged in, or tried to engage in, the turkey business.”

This statement is again based upon the assumption that Nalder, Sr. and Jr., were not, in fact, partners. That the defendant Nalder, Jr., would have continued raising turkeys is supported by the following evidence:

1. The parties had invested approximately \$20,000 in the brooder house and equipment for a full-scale and continued operation in the turkey business (Tr. 308).
2. The defendant Nalder Jr. had leased a 900-acre ranch east of Bountiful, Utah, for a period of three years, expiring in 1953 with the option to renew on the same terms for an additional period of three years (Tr. 294, Ex. J 8).
3. The plaintiffs had purchased a tractor and combine, and planted grain on this ranch (Tr. 304).
4. In addition to the lease, the plaintiff was acquiring one spike-tooth harrow, one three-bottom gang plow, one grain drill, one six-foot tractor, and incidental tools (Tr. 294-5).

5. The parties testified that the partnership had never been terminated and during the three years in question Nalder, Jr. assisted with the turkeys on each week-end and two or three times during the week (Tr. 292-3, 311).

By law the plaintiffs are required to mitigate the damages. Nalder, Jr., could not have refused to seek employment elsewhere and sought to charge that additional loss to the defendants. Since he was required and did seek employment elsewhere and has deducted the amount he received in their claim for damages against the defendant, the defendant should not be permitted to rely upon this fact to attempt to defeat recovery as to Nalder, Jr.

The defendant next asserts that a distinction should be made as to the parties on the real estate mortgage in the instructions to the jury because of the highly penal nature of the section pertaining to the release of real estate mortgages. It should be pointed out that the court did not instruct the jury concerning any penalty damages. This issue was decided summarily in favor of the defendant. At the defendant's insistence and objections, the trial court refused to grant any instructions concerning penalty damages or to even permit the submission of a special interrogatory on the question of whether failure to release the real estate mortgages would amount to an independent concurring proximate cause. Since no penalty was involved, this assertion by the defendant cannot be maintained.

It is fundamental that partners cannot sue for their proportionate share of any amounts owing to a partnership. It is equally fundamental that suit may be brought by all of the partners or in the partnership name. In this case all of the

partners are joined as parties plaintiff and no attempt has been made by them or by the trial court to apportion the amount of the judgment or among the parties plaintiff, except by stipulation and instruction to the jury Mrs. Nalder was eliminated as a partner. By law all of the parties were required to be parties plaintiff and therefore there was no reason for the trial court to distinguish between Nalder, Sr. and Nalder, Jr. in computing the amount of damages. The Uniform Partnership Act states that the act of a partner is the act of the partnership. Section 9 of the Uniform Partnership Act, being Section 48-1-6 U.C.A. 1953, states as follows:

“Partner Agent of Partnership as to Partnership Business.

(I) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.”

It is fundamental that inactive partners will be held liable for the act of other partners and it therefore follows that they are entitled to treat the act of a partner as the act of the partnership in any determinations to amounts owing to the partnership.

The record is clear that the parties had the facilities to raise the turkeys claimed and in fact attempted to secure the necessary financing to raise the number of turkeys for which damages were awarded. It was only after they had been pre-

vented from securing the necessary financing that Nalder, Jr., discontinued raising turkeys and sought other employment. Any remuneration received from this other employment was deducted in mitigation of damages. The defendant as the wrongdoer should not be permitted to benefit from the fact that it forced Nalder, Jr. from the turkey-raising business. But for the conduct of the defendant, Nalder, Jr., with his father would have raised turkeys during all of the years in question. The law required the parties to mitigate damages and should not now penalize them for so doing.

POINT V.

THE COURT PROPERLY:

- (a) RECEIVED IN EVIDENCE EXHIBITS I-1, I-2, Q, R, & N 1-4 (Defendant's Point V)
- (b) DENIED DEFENDANT'S MOTIONS FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING VERDICT, OR FOR NEW TRIAL (Defendant's Point IX)
- (c) INSTRUCTED THE JURY AND REFUSED CERTAIN OF DEFENDANT'S REQUESTED INSTRUCTIONS (Defendant's Point X)
- (d) DISALLOWED ITEMS ON DEFENDANT'S COST BILL ON APPEAL (Defendant's Point XI)

THE COURT PROPERLY:

- (a) RECEIVED IN EVIDENCE EXHIBITS I-1, I-2, Q, R, AND N 1-4 (Defendant's Point V)

The defendant in its brief quoted only part of the testimony concerning the foundation for the admissibility of Exhibits I-1 and 2. After the testimony contained in defendant's

brief, the counsel for the defendant asked the witness questions on voir dire and established that the record was prepared by the bookkeeper of the Lee Brown Company. It further appeared that said document was maintained as a part of the regular business entries of that company (Tr. 36). As to Exhibit I-2, it was likewise testified that it was a document which was kept in the usual course of the business transactions of the company (Tr. 37-9). It is respectfully submitted that with such a foundation the exhibits were properly admitted as an exception to the hearsay rule as a business entry. However, the documents were not received at that time, but were later admitted, the court stating as follows:

“The stipulation this morning was that those exhibits may be received in evidence. They will be received” (Tr. 328).

As to Exhibits Q and R, they were processing sheets listing the exact number of turkeys, grade, weight, boxes, etc., the original being given to the plaintiff and a copy maintained by the processor. These documents were used to establish the amount of processing charges paid by the defendant. He testified that these sheets were the documents used for settling with Lee Brown, which is equivalent to his stating that he paid the amount specified thereon for processing charges. Certainly the plaintiff is qualified to state the amount of expenses paid by him in connection with the raising of his turkeys.

As to Exhibits N 1-4, they merely amount to a tabulation and computation of the amounts claimed by the plaintiffs. All of the essential elements contained on each of those documents were otherwise independently received as evidence as being ledger sheets from the feed company's records, processing

sheets, purchasing records, etc., and the personal testimony of the plaintiffs (Tr. 331-3). Said documents were not relied upon to establish the actual facts therein contained, but rather as a summary of other facts properly admitted which would enable the court and jury to follow the contentions of the plaintiffs. That such a procedure is proper is supported by the following cases:

“Where voluminous documents are a necessary part of evidence in a cause, tabulation of the documents in the form of charts and schedules may be introduced for aid of the trier of the facts.” *Augustine v. Bowles*, 149 F. 2d 93.

“Where books and documents are multifarious and of a character rendering it difficult for the court or jury to comprehend the facts without schedules, the court may admit schedules verified by testimony of persons making them.” *Michigan Bankers Association vs. Ocean Accident and Guaranty Corp.*, 264 N.W. 868, 274 Mich. 470.

It is further held that admission of maps and charts in evidence “is largely a matter of the trial court’s discretion, not to be disturbed by appellate courts, unless abuse of discretion is shown.” *Babcock vs. Gray*, 107 P. 2d 846, 165 Ore. 398.

THE COURT PROPERLY:

(b) DENIED DEFENDANT’S MOTION FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING VERDICT, OR FOR NEW TRIAL (Defendant’s Point IX)

The defendant, in arguing its Point IX, merely summarizes its contentions and arguments as made in other points in the brief; more particularly, a generalized statement is made that

the defendant did not destroy the credit of the plaintiffs, that the defendant had the right to maintain all its mortgages of record, and there was no proof of proximate cause, demand, or lack of good faith, and that damages had not been shown, but rather were speculative, uncertain and incompetent. It is submitted that all of the foregoing were factual issues which were properly presented to the jury with adequate and sufficient instructions and, under proper rules of appellate practice, such verdict must be sustained.

THE COURT PROPERLY:

(c) INSTRUCTED THE JURY AND REFUSED CERTAIN OF DEFENDANT'S REQUESTED INSTRUCTIONS (Defendant's Point X)

As to most of the instructions claimed to have been given in error, the defendant makes a cross-reference to other places in the brief where the factual or legal issue is argued. However, in addition to these assignments of error, the defendant claims that the most grievous error in this regard was the trial court's granting of Instructions No. 16 and 18. Instruction No. 16 advises the jury that for them to find the defendant's conduct was the proximate cause they need not find that it was the sole proximate cause. Instruction No. 18 advises the jury that if the wrongful acts of two or more persons were committed independently and contributed concurrently as proximate causes, each person could be liable. These instructions were proper in form, having been copied from the California Approved Jury Instructions, being Instructions No. 104-A and 104-B. The main contention of the defendant seems to be that the instructions were not applicable to the facts of this case. The defendant states "that 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. (Page 56).

At the time of trial, the defendant placed considerable emphasis on the fact that there were numerous unreleased household-type chattel mortgages which likewise may have contributed to the denial of the application made by the plaintiffs. Not only by cross-examination were these factors greatly emphasized (Tr. 157-170) but counsel for the defendant read into the record some 18 such mortgages (Tr. 472-5). The various credit men from General Mills and Ralston-Purina, in addition to Mr. Aust, the credit manager for the defendant, stated that unreleased household chattel mortgages would not necessarily prohibit the approval of applications, since they did not purport to give a lien on after acquired turkeys. In fact, the defendant had financed the plaintiffs for three years during which time most of these chattel mortgages were still of record. Nevertheless, the defendant, having raised the issue of the conduct of other persons in failing to have mortgages released, presented a factual issue upon which the court was required to instruct the jury. That is to say, the issue had been raised as to what effect should be given to the failure of the H. A. Company to release its chattel mortgages even though they had been paid, as testified by a representative of that company (Tr. 274-281). The instructions as given properly instructed the jury that if the conduct of the defendant was a proximate cause, being a substantial factor contributing to the damage of the plaintiffs, the fact that other persons or causes may also have been a contributing factor would not relieve the defendant from liability. The defendant is not

stating the true facts when it states in its brief on Page 59, "There is absolutely no evidence of any wrong committed by any third party." Such evidence was clearly introduced and presented by the defendant.

Objection was also made to Instruction No. 19 which stated that notice to Schinker and Aust of a demand for release of the mortgages was notice to the defendant. No contention was made by the defendant that said agents did not have authority to at least receive demands for release of mortgages. Rather, the defendant maintained that they had no authority to release the mortgages. This was not the issue presented by Instruction No. 19. Rather, it was limited to the effect that such agents could receive demands for release of mortgages and convey them to a representative of the company having authority to either release or refuse to release said mortgages. The record shows that this procedure was, in fact, followed and Mrs. Schinker advised Mr. Williams that the release of the mortgages had been discussed and requested advice from him as to whether releases should be granted. She was advised by Mr. Williams that the mortgages were not to be released (Tr. 342).

The defendant complains because the jury was not instructed that the filing of the suit by the plaintiffs created no inference that the plaintiffs were entitled to recover. It is implicit in the instructions as a whole that such was the case and there can be no complaint of prejudicial error by the court's refusal to grant such instructions.

The other claimed errors in the giving or refusing to give certain instructions are argued in other points in both briefs.

THE COURT PROPERLY:

(d) DISALLOWED ITEMS ON DEFENDANT'S COST BILL ON APPEAL (Defendant's Point XI)

The defendant argues that it was error for the trial court, in retaxing costs, to disallow a premium of \$682.84 paid for a supersedeas bond. Rule 73(d), Utah Rules of Civil Procedure, states that the appellant, if he so *desires, may* present to the court for its approval a supersedeas bond. It will be noted that this is only permissive, and may be resorted to if the appellant so desires. It is not required, nor is it mandatory, for the purpose of perfecting the appeal.

In an annotation entitled "Taxable Costs and Disbursements as Including Premiums Paid on Bonds Incident to Steps Taken in Action," 81 A.L.R. 1532, it is stated as follows:

"At common law, costs were unknown, were not recoverable, and were not adjudged in the judgment of the court. It is said to be a general rule that common law courts have no inherent power to award costs, which can be granted to either party in any cause or proceeding only by virtue of express statutory authority; and that for courts of law to allow or apportion costs, it is necessary to point to some specific provision of the statute giving the right. And such statutory provisions are to be construed strictly. 7 R.C.L. 781, 782.

"The practice of employing surety companies to furnish bonds in judicial proceedings is of comparatively recent origin. In most instances the courts were disinclined to hold that the premiums paid for such bonds were included in the language of a general statute providing for the taxation as costs of the disbursements necessarily incurred in the action."

In 14 Am. Jur. 36, Costs, Section 60, Premiums on Bonds, it is stated:

“The general rule seems to be that in the absence of statutory authority, the premium paid for a bond given in a pending action may not be taxed as costs therein.”

Rule 54(d)(3) and the case cited by the defendant do not specifically discuss the awarding of premiums on bonds as costs. Neither Rule 54-3(d) discussing the awarding of costs on appeal nor Rule 73(d) specifically dealing with supersedeas bonds specify that premiums may be awarded as taxable costs. Consequently, in view of the foregoing law, it would appear that costs for said premium may not be taxed against the plaintiffs. The bond was procured for the convenience of the defendant and was not required to perfect the appeal.

CROSS-APPEAL

POINT VI. THE DAMAGES AWARDED BY THE JURY SHOULD BE DOUBLED PURSUANT TO SECTION 57-3-8, U.C.A. 1953.

POINT VII. THE COURT IMPROPERLY ALLOWED ATTORNEYS' FEES ON DEFENDANT'S COUNTER-CLAIM.

POINT VI—ARGUMENT

THE DAMAGES AWARDED BY THE JURY SHOULD BE DOUBLED PURSUANT TO SECTION 53-3-8, U.C.A. 1953.

In the decision on the prior appeal, the Supreme Court stated as follows:

“One whose credit is damaged by the wrongful failure to release both real estate and chattel mortgages may, in exceptional cases, be able to satisfactorily prove elements of damages proximately caused by a particular

unreleased mortgage. In such case, damages should be awarded under the particular statute applicable.”

Having this statement in mind, the plaintiff requested the court to give the following instruction:

Requested Instruction No. 11

“If, adhering to the Court’s instruction, you find that the defendant wrongfully failed to release real estate mortgages as contrasted to chattel mortgages and such failure in and of itself was a proximate cause of damage, then you are instructed to return a verdict in favor of the plaintiff in double the amount of actual damages determined by you to have been caused by such failure.

If you do not find that such a failure to release real estate mortgages alone amounted to a proximate cause of damages but that such failure along with a wrongful failure to release chattel mortgages jointly were a proximate cause of damage, then you are instructed to return a verdict for the plaintiff for actual damages sustained, plus \$50.00 punitive damages” (R. 42).

Without giving effect to the prior decision as quoted above, the defendant prevailed upon the trial court that said instruction should be refused, relying upon this additional statement made by the Supreme Court in the prior decision:

“The court should apply the rule that when either of two statutory penalties is equally applicable to a given set of facts, the lesser of such penalties must be applied.”

It is submitted that reliance upon this statement alone, without considering the context in which it was stated, gives an erroneous interpretation to the court’s prior decision. After the court had refused to give Instruction No. 11, the plaintiffs requested the submission of a special interrogatory as contained in requested Instruction 8 (R. 39). The interrogatory to be answered, as requested in said instruction, was as follows:

“Did the defendant wrongfully fail to release real estate mortgages, which failure proximately damaged the plaintiffs?”

By such answer, either the trial court or the Supreme Court would have been in a position to rule as a matter of law whether double damages should be applied. Again the defendant prevailed upon the trial court that such an answer was not required in view of the Supreme Court's prior decision. It is submitted that this was error and an abuse of discretion on the part of the trial court. If the jury had answered the interrogatory in the negative, there would have been no purpose for any further argument. If they had answered the interrogatory in the affirmative, the issue would be squarely presented as to the earlier decision; and, since the jury would have found the factual issue that failure to release the real estate mortgage was also a proximate cause in and of itself, the court would be in a position to assess the damages. Since the defendant prevented a determination on this factual issue and the jury found that failure to release both real estate and chattel mortgages were the proximate cause of the plaintiffs' damage, it now must be presumed that failure to release real estate mortgages was also a proximate cause and, therefore, damages must be doubled.

There is no support for the court's statement:

“The Court should apply the rule that when either of two statutory penalties is equally applicable to a given set of facts, the lesser of such penalties must be applied.”

Attempt to find authority supporting such a statement has been unsuccessful. The statement is that when either of two statutory penalties is *equally applicable*. It would appear

that if either statutory penalty is equally applicable, then the Court should not disregard legislative intent and the jury should be free to apply either or both penalties as they may find the issues. If there is uncertainty as to whether failure to release the real estate mortgages was an *independent* concurring cause, then there would be some justification for applying the lesser of the two penalties. Stating it differently, if failure to release the real estate mortgages was not in and of itself sufficient to cause the damages alleged but that failure to release such mortgages together with failure to release chattel mortgages operated as concurrent causes, the lesser penalty should be applied; but if the jury concludes that either one acting separately or independently was sufficient to cause the damages and therefore were "equally applicable" there does not appear to be any authority requiring application of the lesser of the two penalties.

Statutes imposing penalties serve a proper and legitimate purpose well within the province of the legislature to enact as is stated in 23 Am. Jur. 627, as follows:

"The statutes of nearly every state of the Union provide for the increase of damage where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double and in some cases treble and even quadruple the actual damages. Experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation."

By holding that where the statutory penalties are *equally applicable* the lesser must be applied, this court abrogates legislative enactments in contravention of prior cases recognizing a

contrary rule of construction. In *Chatwin vs. Terry*, 107 U. 340, 153 P. 2d 941, it is stated:

“In construing statutes such as here it is the duty of this Court to give meaning to each and to reconcile them in such a manner as to carry out the reasonable and practical intention of the legislature.”

In *Smith vs. American Packing and Provision Company*, 102 U. 351, 130 P. 2d 951, it is stated:

“In *Cuckle v. Ogden Furniture & Carpet Co.*, 61 Utah 559, 216 P. 684, 685, this court said: ‘But it is not to be presumed that the legislature would enact a vain and meaningless statute. We conceive it to be our duty, if possible, to adopt that interpretation which will give effect to each provision and harmonize them with each other, so that neither will be meaningless.’”

The verdict of the jury assessing damages should be doubled as required by the legislature.

POINT VII. THE COURT IMPROPERLY ALLOWED ATTORNEYS’ FEES ON DEFENDANT’S COUNTER-CLAIM.

The defendant counterclaimed for the amount owing representing the deficiency for 1949 in addition to attorneys’ fees as specified in the promissory note. At no time was there any issue or contest concerning the obligation for the deficiency to the defendants. The extended trial was concerned solely with the items alleged in the plaintiffs’ complaint. Nevertheless, the defendant called Mr. Quinney to testify concerning reasonable attorneys’ fees to be awarded in the matter, and Mr. Quinney’s testimony was based upon the extended trial when he stated that a fee of \$750 was not nearly adequate and would not be the only fee charged in the matter (Tr. 437).

Since there was no issue as to the amount owing for the 1949 deficiency and therefore no litigation was involved concerning said amount, and since as determined by the jury the defendants in fact owed the plaintiffs more than the amount of the counterclaim, it is submitted that the defendant is not entitled to an award of \$750 for attorneys' fees in this case.

In a recent annotation entitled "Recovery of Attorneys' Fees Provided for in Bill, Note, or Similar Evidence of Indebtedness as Affected by Opposing Recovery," 41 A.L.R. 2d 677, a summary of the law is stated as follows:

"While there is some divergence of opinion, the majority of the courts which have weighed the question agree that where the defendant in an action on a note or similar evidence of indebtedness containing a provision for the payment of attorney's fees, recovers on a counterclaim, or the like, in an amount in excess of the amount due on the note for principal and interest, the plaintiff is not entitled to recover such fees. * * * * This rule appears to be founded on the reasoning that, the holder of the note being indebted to the defendant maker in a greater amount than the sum due on the note, the note is substantially paid * * * * "

Based upon the foregoing authority, the awarding of attorneys' fees to the defendant on its counterclaim cannot be sustained.

CONCLUSION

This appeal is predicated primarily upon a factual dispute. The plaintiffs having been awarded a verdict by the jury, is entitled to have this court review the record to determine if there is competent evidence to support the findings of the jury. Not only is there sufficient, competent evidence to sustain

that determination; but rather, evidence would have to be ignored to rule as a matter of law that all reasonable persons would conclude that the plaintiffs have not sustained their case. The duty to release mortgages upon satisfaction is specified by the Legislature. The jury found that all of the mortgages, except the last real estate mortgage, had been satisfied either by payment or by express merger into said mortgage. The existence of unreleased mortgages, totalling \$107,401.92 as contrasted to a mortgage of \$6,550.12, clearly supports a finding that plaintiffs' credit rating was so impaired that they could not secure financing to enable them to continue in their chosen business. Their maximum investment and endeavor was rendered useless. The jury's determination of damages is based upon actual experience not usually found in a loss of profits case. Since 1884 the law in Utah has provided that a defendant who fails to release a mortgage after it has been satisfied must pay double the actual damages caused by such failure. A legal wrong has been done to plaintiffs. The possible magnitude of such wrong was recognized by the legislature when it set out the penalty of double damages. Irrespective of the statute, punitive damages may be awarded where a wrongful act is done with a bad motive or with negligence amounting to positive misconduct, or in a manner evidencing a willful disregard of the rights of others. The anguish suffered by plaintiffs in their vain attempt to continue in their chosen business cannot be put aside lightly. They were but puppets in the hands of defendant who held the purse strings; and who, in that position of power, manifested a conscious disregard of the rights of the plaintiffs, and a reckless indifference to the consequences of their acts. Defendant's action was so willful

and done with such wanton disregard that an award of punitive damages is more than justified.

The fundamental issue is whether the defendant company may curtail a farmer's ability to remain in business. Does the defendant company have the right to coerce payments by lightly disregarding its statutory duties, with full knowledge that such business practices make it impossible for the farmer to earn a livelihood in a business of his own choice? The Legislature did not so intend; the jury did not so find. This Court should not nullify that legislative intent nor overthrow that factual determination. Not only should the jury's verdict be affirmed, but in addition the amount of that verdict should be doubled and the award of attorneys' fees on defendant's counterclaim should be disallowed.

Respectfully submitted,

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