

1958

## Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc. et al : Brief of Respondent

Utah Supreme Court

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Howell, Stine and Olmstead; Attorneys for Plaintiff and Respondent;

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Case No. 8723

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IN THE SUPREME COURT

of the

FILE

STATE OF UTAH

JUL 13 0 1958

Clerk, Supreme Court,

PILLSBURY MILLS, INC., a corporation,

*Plaintiff and Respondent*

vs.

NEPHI PROCESSING PLANT, INC.,

a corporation,

*Defendant and Appellant,*

and

LAFE MORLEY and CALLIE MORLEY,

his wife,

*Cross-Complainants and Respondents.*

HOWELL, STINE AND OLMSTEAD

*Attorneys for Plaintiff and Respondent*

## Respondent's Brief

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his wife,  
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HOWELL, STINE AND OLMSTEAD  
*Attorneys for Plaintiff and Respondent*

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BRIEF OF PLAINTIFF AND RESPONDENT

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NATURE OF THE APPEAL

The parties to this appeal will hereafter be designated as in the lower court, namely, Pillsbury Mills, Inc., Respondent here, as the "Plaintiff" or as Pillsbury, Nephi Processing Plant, Inc., Appellant here, as the "Defendant" or as Nephi. We do not conceive that Lafe Morley and Callie Morley, so-called "Cross-complain-

ants" in the court below, are parties to the proceedings here, but to the extent reference is made to them they will be referred to as "Cross-complainants", or as the Morleys.

In defendant's statement in its brief as to the nature of the case, the following appears:

"This is an appeal *from the judgment entered against Nephi*, the refusal of the trial court to vacate the judgment, and grant a trial."

The emphasized portion of the foregoing is clearly erroneous, as there was and is no appeal from the judgment entered in favor of plaintiff against defendant on February 21, 1957. The notice of appeal filed on July 15, 1957, limits the appeal to the

"order made on the 15th day of June, 1957 \* \* \* denying defendant's motion to vacate the judgment \* \* \* filed herein on February 21, 1957."  
(R. 102)

Thus, the judgment itself is not appealed from, and is not before the court, but only the question of whether the lower court erred on the record before it in entering an order denying defendant's motion to vacate the judgment. In fact the time for appeal from the judgment as such had expired long prior to the time that defendant filed its motion to vacate the judgment.

Observation should also be made of the fact that subsequent to the denial of the motion to vacate the judgment, the defendant filed with the lower court a motion for "rehearing or retrial" of its previous motion to vacate, which the lower court refused to grant on

August 21, 1957, and from which defendant also purports to appeal. (R 82 and 111.)

Upon this phase of the matter, we submit the lower court was without jurisdiction to entertain the motion for rehearing or retrial of the previous motion, and accordingly, no proper appeal could lie from its order thereon. This by reason of the fact (1) the court has no power to reopen the question of granting a motion for a new trial after disposing of it, *Luke v. Coleman*, 38 *Utah* 383, 113 *P.* 1023, and (2) the defendant having theretofore appealed from the original order, it had by such appeal vested exclusive jurisdiction of the cause in this court, and the lower court was without power or authority to further act therein. *State v. Carter*, 52 *Utah* 305, 173 *P.* 459.

Thus the only question properly before this court is whether the lower court erred in denying defendant's motion to vacate the judgment previously entered.

### STATEMENT OF THE CASE

With the nature of the appeal thus identified, a statement of the case in simple and understandable form is desirable.

In January, 1953, the Morleys, being raisers of turkeys, entered into an agreement with plaintiff Pillsbury Mills, for the financing of Morleys 1953 turkey feed requirements. To secure such financing the Morleys executed a chattel mortgage upon their turkeys in favor of Pillsbury, which mortgage was properly filed of record. In November 1953, the defendant, Nephi Processing Plant, purchased the mortgaged turkeys

from the Morleys. Nephi at that time had actual notice of Pillsbury's mortgage, and in fact remitted to Pillsbury Forty Three Thousand Seven Hundred Twenty-two and 08/100 (\$43,722.08) Dollars of the purchase price to apply thereon. (Page 4 of Appellant's Brief). A balance of Two Thousand Six Hundred Seventy-nine and 16/100 (\$2,679.16) Dollars remained owing to Pillsbury. The mortgage, of which Nephi had actual notice, provided for payment to Pillsbury of the sales proceeds up to the full amount of the debt. (R 2-3, Ex. A of Complaint). Nephi, without ascertaining from Pillsbury the full amount of the debt, and without Pillsbury's consent, and prior to the receipt of all of the turkeys, advanced to Morley some Seven Thousand (\$7,000.00) Dollars under the assumption that when the final purchase price was determined there would remain enough to pay any remaining balance to Pillsbury.

On January 14, 1954, Pillsbury, through its counsel, advised Nephi that the Morley debt to Pillsbury was Forty Six Thousand Four Hundred One and 24/100 (\$46,401.24) Dollars, less Forty Three Thousand Seven Hundred Twenty Two and 08/100 (\$43,722.08) Dollars paid, leaving a balance of Two Thousand Six Hundred Seventy Nine and 16/100 (\$2,679.16) Dollars, and requested an accounting of the proceeds from the turkeys. (Tr. 37 Ex. A.). Nephi replied on January 20, 1954, advising it was willing to pay Pillsbury the balance of Two Thousand Six Hundred Seventy Nine and 16/100 (\$2,679.16) Dollars, if the Morleys authorized it so to do, but as Nephi understood there were some disputes between Morley and Pillsbury it, Nephi, didn't want to make the payment without Morley's approval. (Tr.



22-35 Ex. 7). No mention was made by Nephi that it had previously advanced against the proceeds some Seven Thousand (\$7,000) Dollars to Morley.

Under date of February 11, 1954, Pillsbury through its counsel, replied by letter to Nephi to the effect that under the mortgage it was entitled to receive the proceeds up to the amount of Morley's debt to it, and it expected Nephi, as the purchaser of the turkeys with notice of the mortgage, to comply with the request for remittance of the amount still owing. The letter further advised Nephi that any disputes between Morley and Pillsbury would be settled by the parties to the dispute, that Nephi should not involve itself therein, and that unless Nephi remitted the proceeds as provided in the mortgage, Pillsbury would sue Nephi. (Ex. B).

Nephi did not make the remittance, and on or about May 10, 1954, Pillsbury served its complaint on Nephi, pleading the mortgage, the fact that Nephi had bought the mortgaged turkeys, had not remitted the proceeds of the sale as provided in the mortgage, was withholding a portion of the proceeds, and refused to account to Pillsbury for the same. (R. 1, Complaint). The complaint did not seek a foreclosure of the mortgage, but only an accounting of the proceeds as provided in the mortgage. The only parties thereto were Pillsbury Mills, as plaintiff, and Nephi Processing Plant, Inc. as defendant. The complaint and summons were served upon M. L. Harmon, President and General Manager of the defendant, Nephi Processing Plant.

Following service of the complaint and summons, Mr. Harmon took the same to Dwight L. King, an

attorney, and arranged for him to represent Nephi Processing Plant, Inc., the defendant. In this connection Mr. Harmon testified as follows:

“Q. That is what I’m getting at. You went to King for the purpose of getting him to represent Nephi Processing Plant in this litigation?

A. Yes sir.

Q. So he was authorized to represent you?

A. He was authorized to take care of it, yes.

Q. I take it that you discussed with him at that time the merits of Pillsbury’s claim, did you not?

A. Yes sir.

Q. And discussed with him the matter of the \$2,700.00 for which Pillsbury was seeking judgment?

A. Yes sir.

Q. And it was shortly following that conversation you had with Mr. King that the answer was actually filed in this case, was it not?

A. That I couldn’t say.

Q. But you expected it to be filed within the time permitted by law, did you not?

A. Yes, I did.” (Tr. 32-33).

In due course Mr. King, as attorney for defendant, filed a motion for a change of venue from Weber County to Juab County. The motion was denied. (R. 3, 5). Thereupon and in due course defendant, Nephi Processing Plant, Inc., through its attorney, Mr. King, filed an answer. By such answer the defendant alleged that the Morley turkeys were sold, that it held some Two

Thousand Seven Hundred (\$2,700.00)Dollars of the proceeds, and that:

*“This defendant claims no interest in said sum but is unable to determine to whom it belongs and to whom it should be paid and alleges that both plaintiff and Lafe Morley and Callie Morley, his wife, have made demands upon it for the payment of the funds in its possession.*

*“That defendant cannot safely pay to either plaintiff or Lafe Morley or Callie Morley until it shall have been determined to whom the funds in defendant’s hands belong.” (R. 14).*

By the prayer of the answer defendant asked the court to determine to whom the funds belonged, and to make appropriate orders protecting it as against the conflicting claims of plaintiff and the Morleys. Defendant, while pleading the conflicting claims of the Morleys, did not seek to interplead them. Neither did defendant claim that it had any interest in the money, but expressly disclaimed any interest therein. Thus, by defendant’s answer, the sole issue tendered the court was the determination of rights to the money as between plaintiff Pillsbury and the Morleys. While admitting it had the money and had no interest therein, Nephi did not tender the money into court, has never tendered it, and has at all times had the use thereof.

Concurrently with the filing of this answer of the defendant, Nephi Processing Plant, the Morleys, through Dwight L. King, as their attorney, filed a motion to intervene and tendered what was denominated as Cross-complaint against the plaintiff Pillsbury. Plaintiff resisted the motion to intervene, but it was allowed and

the Cross-complaint filed. By the Cross-complaint the Morleys alleged in substance that Pillsbury had furnished defective feed that reflected itself in the maturing of the turkeys, and asked damages against Pillsbury therefore. (R. 7). Plaintiff Pillsbury in due course answered, putting in issue the essential allegations. (R. 18).

Thus, as a consequence of this intervention there became in these proceedings before the lower court what were in truth and in fact and in law two separate and distinct actions. The first was strictly between Pillsbury and Nephi with regard to the proceeds from the sale of the turkeys. The Morleys were not parties to that action. The second was between the Morleys and Pillsbury, and involved strictly a claim for damages against Pillsbury for supplying defective feed. Nephi Processing Plant was not a party to or involved in any way in that action. Both Nephi Processing Plant in its action, and the Morleys in their action, were represented by the same attorney, Dwight L. King, but there is nothing on the face of any of the pleadings to indicate any conflict of interests as between Nephi and the Morleys, nor is there anything in the record to so indicate.

With the pleadings thus closed, the court in due course set the actions for trial on February 13, 1957. Pending arrival of the trial date negotiations for settlement of the quality claim of the Morleys against Pillsbury were had, and a settlement was reached. Nephi Processing Plant as such was not consulted in those negotiations, as it was not a party to that action and

had no interest therein. The settlement was effected, and by stipulation between the Morleys and Pillsbury the action arising out of the cross-complaint of the Morleys was dismissed (R. 26). This left only the original action between Pillsbury and Nephi Processing Plant for the proceeds from the sale of the turkeys, and with respect to which Nephi had disclaimed any interest. The only issue therein for the lower court to determine, based upon Nephi's answer, was whether Nephi should pay these funds to Pillsbury or to the Morleys.

To solve this issue the Morleys, through their attorney, executed a stipulation, the effect of which was that the Morleys disclaimed any interest in the moneys Nephi was holding, that the same should be paid by Nephi to Pillsbury, and that Pillsbury have judgment therefor. (R. 25).

Thus, upon the answer as filed by Nephi that the right to the funds was solely between Pillsbury and the Morleys, and the Morleys' stipulation that the funds should go to Pillsbury, the court on February 21, 1957, entered judgment against Nephi and in favor of Pillsbury for the sum claimed, namely Two Thousand Six Hundred Seventy Nine and 16/100 (\$2,679.16) Dollars, with interest. (R. 27).

Notice of the entry of judgment was given by Pillsbury to Nephi on February 21, 1957. (Tr. 26, Ex. 5). No appeal from the judgment was taken within the time allowed by law, or at all, but Nephi, after the time for appeal had elapsed, filed a motion to vacate the judgment and set it aside. (R. 29). A rather extended

hearing was had thereon on April 22, 1957, and on June 15, 1957, the court denied the motion. (R. 54). On June 28, 1957, defendant filed a "Motion for Rehearing or Retrial", (R. 82) and while that motion was pending, the defendant on July 15, 1957, filed its notice of appeal to this court. The filing of the appeal to this court, of course, deprived the lower court of further jurisdiction, and the lower court accordingly denied the then pending motion for rehearing. (R. 87).

Based upon the foregoing pleadings, and the record made at the hearing on the motion to vacate the judgment, the defendant now contends that the lower court erred as a matter of law in denying the motion to vacate the judgment.

While this statement of facts is becoming somewhat extended, it is necessary in order to fully understand the matter that some further reference be made to the hearing, and the evidence adduced thereon.

The motion to vacate the judgment, while setting forth many matters strictly between Nephi and the Morleys, and with respect to which Pillsbury was not and could not be concerned, did indirectly at least touch upon two matters with which the lower court might properly concern itself in determining whether Pillsbury's judgment should be set aside. The first is that Mr. King was never authorized to appear for or represent the defendant Nephi, and the second is that the judgment was taken without previous notice to Nephi.

With respect to the contention that Mr. King was never authorized to represent Nephi Processing Plant, we have heretofore quoted the testimony of Mr. Harmon,

President and General Manager of the Company, on cross-examination, with respect to his arranging with Mr. King to do that very thing. (Tr. 32-33). However, the further contention is made that the recitals in the answer to the effect that Nephi had no interest itself in the fund, was in effect but a stakeholder as between the conflicting claims of the Morleys and Nephi, is challenged as being erroneous, not in accordance with the true facts, and in effect a mistake. On this point reference is made to the Exhibits 7, 9 and 11 offered and received at the hearing, and particularly to the letter Exhibit 7, written by Nephi to counsel for Pillsbury before the answer was filed, and even before the action was started. In it it is stated,

“Nephi Processing Plant notified Mr. Lee Turner of Pillsbury Co., Ogden, Utah also Pillsbury Co’s office at Los Angeles that they stand ready and willing to pay Pillsbury Co. for the account of Lafe Morley \$2,679.16 as soon as we receive the authority from Lafe Morley to do so.

“We do not feel that we should make a payment on the account of Lafe Morley until we have the authority from Mr. Morley in writing.

“It is my understanding that Mr. Morley is making some kind of a claim against the Pillsbury Co. We do not want to be involved in any controversy between these two parties but do have to clear ourselves in this matter.”

The sum and substance of that letter is that Nephi has the funds, that they are subject to conflicting claims as between the Morleys and Pillsbury, and that Nephi is in effect a stakeholder which does not want to become involved in that conflict of claims. The answer as filed

does no more than reiterate the sum and substance of that letter.

Additional evidence introduced in connection with the hearing further corroborates the factual accuracy of the answer as filed by Mr. King, that Nephi was but a stakeholder, and except for the conflicting claim of the Morleys to the funds, had no defense to Pillsbury's suit.

Exhibit 11 is a letter from Mr. King, former counsel for Nephi, to present counsel for Nephi, introduced in evidence by Nephi on the motion to vacate. In it is the following statement:

"In regard to your letter of March 19, 1957, concerning my representation of Nephi Processing Plant, the only time that I had any duty as far as Nephi Processing Plant was concerned, was to file for them a disclaimer and I furnished to you heretofore a copy of that document which was filed in the Pillsbury Mills vs. Nephi Processing Plant case.

"\* \* \*

"The material contained in my answer is what was furnished to me by Mr. Harmon. He advised me that he had the money from the sale of the Morley turkeys and that Nephi Processing Plant had no interest in the money itself, but since Morley was one of his customers, he would not pay to Pillsbury since Morley had a claim for deficiencies in the feed.

"When I discussed this with him, he told me directly that he still had the money and that he would not pay it either to Morley or Pillsbury until they had settled their differences, so that



the processing plant would not be held twice for the same money.”

“\* \* \*

“\* \* \* I know that the money Pillsbury Mills claimed was due from Nephi Processing Plant on information which Harmon furnished me was due it. I could find no reason in any of the information which I had why that money should not be paid over by Nephi Processing Plant to Pillsbury Mills.”

The affidavit of Mr. King, which affidavit was considered by the lower court in connection with the motion to vacate contains the following recitals:

“That the Answer on file in the above entitled action for Nephi Processing Plant, Inc. was filed pursuant to a request by M. L. Harmon; that said Answer sets forth accurately the information furnished to affiant by M. L. Harmon and is in effect a disclaimer of any interest in the money which was the proceeds from certain turkeys sold by Lafe Morley and Callie Morley, his wife, in the fall of 1953.

“At no time prior to the filing of the motion to vacate judgment entered February 18, 1957, was affiant ever informed of any defense that Nephi Processing Plant, Inc. had to the claim of Pillsbury Mills, Inc., a corporation. That affiant has discussed with M. L. Harmon and with counsel for Nephi Processing Plant, Inc., Udell R. Jensen, the matter of the claim of Pillsbury Mills, Inc., a corporation, against Nephi Processing Plant, Inc. and has never been informed by either of said persons of any substantial defense that Nephi Processing Plant, Inc. could have or had to the claim of Pillsbury Mills, Inc., a corporation.

“That affiant filed the Answer requested by M. L. Harmon and forwarded a copy of said Answer to M. L. Harmon under date of May 13, 1955; that nothing was thereafter stated by M. L. Harmon concerning the Answer filed and no acception (sic) or objection was taken of it. That said Answer is in effect a disclaimer on the part of Nephi Processing Plant, Inc. of any interest in the proceeds from the sale of the Lafe Morley birds in the fall of 1953.”

Still further, in an affidavit made by Mr. Jensen, present counsel for Nephi, he quotes Mr. King as having stated that on or about March 13, 1955, he wrote the defendant Nephi a letter, stating in part as follows:

“Judge Norseth finally got off his seat and ruled that the Pillsbury Mills case was properly brought in Weber County. I have, therefore, answered on your behalf and filed a cross complaint against Pillsbury Mills on behalf of Lafe Morley and his wife. Enclosed herewith you will find a copy of the answer which has been filed.”

Disregarding the reference to the trial judge, the important thing is that this affidavit of Mr. Jensen's disclosed to Judge Norseth, who had the duty of ruling on the motion to vacate, that Mr. King claimed to have forwarded to Nephi Processing Plant, over a year and a half before the trial setting, a copy of the answer he had filed on behalf of Nephi.

The second point is that Nephi had no notice of the taking of the judgment, and the proceedings leading up to it. There is no doubt but that from the time Mr. King appeared in the action as attorney for Nephi (for which we have seen Nephi arranged), that all matters

pertaining to the action as they concerned Nephi were handled with Mr. King, as Nephi's attorney, and no attempt was made to go around him and deal with Nephi directly. He was the attorney of record for Nephi, no information was ever brought to the attention of Pillsbury or its attorneys that he was not doing the job assigned to him by Nephi, and under the circumstances he was the only one with whom Pillsbury and its attorneys could properly deal.

### ARGUMENT

In defendant's introductory statement to its argument (Page 16 of defendant's brief), a statement is made with which we must take issue, as it goes to the heart of this appeal. The statement is

"The real dispute arose between Pillsbury and the Morleys as to whether Morleys owed Pillsbury or Pillsbury owed Morleys *on their transaction*. Without any notice to or information received by Nephi, Pillsbury and Morleys settled their differences between themselves; and they then stipulated without notice to Nephi judgment be entered in favor of Pillsbury and against Nephi for the debt of Morleys."

The error in the statement arises from the emphasized words "on their transaction", inferring that these proceedings involved but one transaction as between Pillsbury and Morley, rather than two. The first transaction was under the mortgage, and involved solely the question of the balance owing on the feed account. No one has disputed, including Nephi as well as the Morleys, that this balance was \$2,679.16. The only question in-

volved was whether Nephi was in funds, the proceeds of Morley's turkeys, which should be paid over to Pillsbury in discharge of the debt.

The second transaction involved the quality of the feed sold by Pillsbury to Morleys, and whether Morleys had been damaged thereby. Nephi was in no wise concerned therein.

The true question here is whether Pillsbury and the Morleys could settle this quality claim between themselves, and, having settled that, could agree between themselves that the funds in Nephi's possession be paid over to Pillsbury.

The mere statement of the proposition provides the necessary affirmative answer. As Nephi was not involved in the quality dispute, it had no concern therein nor with the settlement thereof. As it had pleaded in its answer that it had no interest in the funds representing the proceeds from the sale of the turkeys, and which but confirmed its previous letter to Pillsbury concerning the funds (Ex. 7), it could not be to its detriment that the Morleys and Pillsbury agreed as to their disposition.

Further than that, however, if it be suggested that Nephi was entitled to prior notice, a suggestion we categorically reject, it cannot be denied that Nephi did in fact have that notice, as everything that was done was consummated through the participation of Mr. King, who was Nephi's attorney in the proceedings.

With this preliminary statement we will now answer defendant's seven points of argument seriatim.

## POINT I.

### THIS IS NOT AN ACTION TO RECOVER A DEBT OR FOR THE ENFORCEMENT OF A RIGHT SECURED BY MORTGAGE

The complaint filed herein by the plaintiff Pillsbury against the defendant Nephi, was not to foreclose a mortgage, or to enforce any right secured by mortgage. The complaint was for an accounting upon the sales proceeds of mortgaged property, and for the payment thereof to plaintiff. The mortgage was attached to the complaint as an exhibit, as it embodied the agreements under which the right of Pillsbury to the possession of the proceeds arose.

The mortgage agreement by its terms provided for the sale of the mortgaged turkeys by the mortgagors. This was done. It further provided that the proceeds of the sale should come to Pillsbury for application upon its debt. Nephi had the whole of the proceeds, and paid over a part of them to Pillsbury as provided in the mortgage agreement. It declined to pay the balance, albeit admitting it had possession thereof. The action was for the recovery of the possession of those funds.

Actually, at the time the action was brought, there was no property upon which foreclosure could be had. The mortgaged property had long since been sold and disposed of by mutual consent of the mortgagors and mortgagee. All that remained was the proceeds from the sale, and the parties, by agreement set out in the mortgage instrument, had provided for the manner of handling the same. This action was to enforce those

agreed rights as against a third person admittedly in possession of the subject funds, and with full knowledge of plaintiff's right thereto under the mortgage agreement.

The statue quoted by defendant to the effect that there can be but one action for the recovery of any debt secured by mortgage has no application to a situation such as this where the chattels that constitute the security have been sold by mutual agreement of the mortgagor and mortgagee, or have been otherwise extinguished or exhausted. As stated in *Security First National Bank v. Chapman*, (Calif.) 87 P. (2) 724:

“Where mortgaged property has been destroyed or sold and is no longer in existence, so far as the mortgagee is concerned, there is little doubt that a personal action may be maintained without going through the empty form of foreclosing the mortgage.”

We further submit that the point here raised by defendant is not one available to it even though the turkeys had not all been sold, as it is a defense that would at most be available to the mortgagors.

To suggest, as defendant does in the last sentence of his argument under this point that the judgment against Nephi should be vacated and the trial court directed to proceed to adjudicate the amounts owing between the mortgagor and mortgagee is to suggest not only an impossible, but a useless proceeding. It is impossible, because there is no action pending between the mortgagor and the mortgagee in which the same may be adjudicated, and never was with relationship

to the balance owing the mortgagee under the mortgage agreement. It is useless, as the mortgagor and mortgagee have themselves determined this question by the stipulation filed in this action to the effect that the \$2,769.16 plus interest, in defendant's possession be paid over to plaintiff Pillsbury.

## POINT II.

DEFENDANT WAS AT ALL TIMES REPRESENTED BY COUNSEL IN THE ACTION IN THE COURT BELOW, AND SUCH COUNSEL HAD FULL AUTHORITY TO PLEAD AS HE DID.

Defendant here asserts three propositions as follows: That there was no notice from Mr. King, defendant's attorney, to defendant,

- (a) That he had filed a Motion for Change of Venue,
- (b) That he had filed an answer in the name of defendant,
- (c) That he had in Nephi's name pleaded that Nephi held \$2,700.00 of proceeds from the sale of Morleys turkeys.

As to (a) above, the filing of such a motion was but a procedural matter, which was certainly within general scope of an attorney's authority. Regardless of that, however, the motion was denied by the court so no prejudice did nor could result to defendant.

As to (b) above, defendant's President and General Manager testified that he arranged with Mr. King for the latter to represent defendant in this action, and expected him in due course to file an answer on its behalf

(Tr. 32-33). It now seems a little ridiculous for defendant to claim to this court that having secured Mr. King's services to represent it and file an answer on its behalf, that there was some duty on Mr. King's part to notify Nephi that he had done the very thing he was employed to do. He was employed to file an answer, and he did file an answer, so no prejudice resulted whether Nephi was notified that he had done so, or otherwise. Further than that, Mr. King's affidavit that appears in the record (R. 41) discloses that he did in fact notify the defendant, and in fact forwarded defendant a copy of the answer as filed.

As to (c) above, that defendant was not specifically advised as to the contents of the answer, there is a conflict. Mr. King states by his affidavit (R. 42) that promptly upon its filing he forwarded a copy by mail to the defendant. Mr. Harmon, President of defendant, and Mr. Steele, its Secretary-Treasurer, disavowed that either of them ever saw it prior to the entry of judgment. To the extent that the lower court considered that question material, it resolved the conflict against the defendant by denying the motion to vacate.

However, we submit the question is wholly immaterial because the answer as filed, namely, that Nephi held the funds pending determination of the conflicting claims thereto of Pillsbury and the Morleys, is in accordance with the facts.

Nephi Processing Plant, in its letter of January 20, 1954, acknowledged that it would pay Pillsbury for the account of the Morleys, the sum of \$2,679.16 as and when the Morleys further authorized it so to do (Ex. 7). That



letter was written prior to the bringing of the action, and was in response to the letter of Mr. Olmstead, on behalf of Pillsbury, to Nephi, dated January 14, 1954 (Ex. A). That letter of defendant, in the light of the one it responded to, is subject to no construction but that Nephi held a balance of proceeds from the sale of Morleys turkeys, that it claimed no interest therein, and would pay them over to Pillsbury or to the Morleys as their respective rights were determined.

Further, Mr. Harmon, President of the defendant company, testified that at the time of the sale of the turkeys he knew they were subject to Pillsbury's mortgage, that defendant had possession of all of the proceeds therefrom, that Pillsbury was claiming the right to all of the proceeds under the provisions of the mortgage, and that defendant made partial remittances to Pillsbury (Tr. 34). Knowing of the existence of the mortgage, he also knew that under the terms thereof either Pillsbury or Morley was entitled to the balance of the proceeds. Under the circumstances, if there was a dispute between Pillsbury and the Morleys, defendant could be no more than a stakeholder, which is precisely what Mr. King pleaded.

In this connection we are not unmindful that Nephi is now claiming that Morley was indebted to it (a point the Morley's apparently deny (R. 43) and that if it were established that the sales proceeds belonged to the Morleys it might have offset the same against the Morley debt. That, however, has nothing to do with Nephi's position as a stakeholder of the funds. Those funds belonged either to Pillsbury or Morley, and with

respect to those funds as such Nephi had no interest in them. If in fact Morley had a right thereto superior to that of Pillsbury, and if at that time Morley was indebted to Nephi, it might be that Nephi could use the funds in its possession as an offset against the Morley debt, but that right, if it existed, would not be based upon any interest of Nephi in the fund, but purely upon a future right of offset..

Finally, under this point, defendant makes grave assertions against Mr. King, a member of this Bar, charging him not only with carelessness and negligence, but with breach of his duty to his client, and breaches of the canons of ethics.

It is not our purpose here to defend Mr. King's actions in this case, as such is not our responsibility. He was engaged by defendant to represent defendant, and whether he did a good or a bad job of it is not for us to say, as we were on the other side. We do feel, however, that we would be remiss if we did not make some general observations with regard to the undisputed facts.

At the time defendant employed Mr. King to represent it, it knew that Mr. King was attorney for the Morleys. It knew that the Morleys were adversary to Pillsbury insofar as the funds in Nephi's possession are concerned. It further believed that the Morleys were then indebted to Nephi. Nothing in that connection was in anywise concealed, and with full knowledge of all of those facts it chose Mr. King to represent it. In fact Mr. Harmon testified that he didn't think Nephi needed much representation (R. 32), that it was

primarily the Morleys' concern, and that he went to King because Morley suggested it. All of this but further confirms that Nephi didn't have any interest in the controversy other than to protect itself against paying the money to the wrong party, and that is what it wanted of Mr. King.

Now defendant charges that Mr. King mispleaded the facts, which from the record it is clear he did not do, and that he abandoned Nephi in its defense, which he didn't, as the only defense Nephi had was that it didn't want to pay the money to the wrong party, and it was fully protected in that regard at all times.

Finally, it is suggested that the pleading was a nullity as it constituted a confession of judgment, which requires express, rather than implied authority on the part of defendant's attorney.

On this subject generally the law is far from being as clear as counsel would have the court believe. Counsel quotes at Page 25 of its brief from 5 Am. Jur. Attorneys at Law, Sec. 101. He didn't, however, quote the first sentence of the section as follows:

"It is quite generally conceded that the control of the attorney, as such, over the conduct of the cause impliedly authorizes him to bind his client by a confession of, or consent to, judgment, and by his consent to orders and judgments made in the progress of a cause and intended to promote the interests of his client."

Be that as it may, however, it is not pertinent to the present situation, as what we are here concerned with is not a confession of judgment, but a disclaimer.

What Mr. King pleaded was that Nephi had no interest in the funds as such, which was true beyond peradventure of doubt, and that it wanted protection only in the matter of to whom it paid the funds—Pillsbury or the Morleys. Certainly that pleading was “intended to promote the interests of his client” Nephi, and was a factually accurate pleading of Nephi’s relationship to the fund. What he did later in stipulating for payment of the fund to Pillsbury he did as attorney for the Morleys—a position Nephi at all times knew he held—and tended merely to solve the problem Nephi wanted solved, namely, who, as between Pillsbury and the Morleys, should be paid by Nephi.

### POINT III.

#### THE ANSWER FILED BY DEFENDANT WAS A VALID AND EFFECTIVE PLEADING.

Under Point III defendant makes the astonishing assertion that because of conflicting interests between the defendant and cross-complainants the defendant’s answer is of no effect. While it may be true that an attorney may be subject to criticism for representing conflicting interests, it is a novel suggestion that a pleading filed by him under those circumstances is without effect in an action brought by a third party.

Here the action was brought by Pillsbury against Nephi. Nephi, being fully advised of Morleys’ interest in the outcome of the action, nevertheless voluntarily, intentionally and deliberately elected to be represented by one it knew to be attorney for the Morleys in other matters. Morleys were not parties to this action, but

the Morleys were nevertheless the ones Nephi wanted to protect. This is the explanation that is given as to why it went to the Morleys' attorney.

Morleys then brought an action against Pillsbury, which action is wholly separate and distinct from the one Pillsbury brought against Nephi. It might have been brought in a separate proceeding, but with the consent of the court it was brought in the pending action by way of intervention. Nephi was not a party to the second action, nor did it have any interest in its outcome.

How it can sincerely be urged that because of King's bringing that action and prosecuting it to settlement there developed such a conflict of interests as to negate his representation of Nephi in the action brought by Pillsbury, is something we just can't understand. Nephi wanted Morley to intervene, and wanted King to represent the Morleys in that intervention. Mr. Harmon testified (Tr. 32) in response to a question with regard to the filing of the answer,

"A. Mr. King would file that on behalf of the Nephi Processing Plant and the Morleys."

If there was in fact a conflict of interests between Nephi and the Morleys, and the record thoroughly demonstrates the contrary, it arose subsequent to the filing of Nephi's answer and the intervention of the Morleys, and was something of which Mr. King was not informed—as Mr. Harmon testified (Tr. 26) there was no further contact with Mr. King after his original employment. Certainly it could not give rise under any circumstances to a premise for invalidating Pillsbury's judgment.

We submit that defendant's third point of argument is without any merit whatever.

#### POINT IV.

DEFENDANT HAD NOTICE OF ALL PROCEEDINGS, WAS REPRESENTED BY COUNSEL, AND HAD ITS DAY IN COURT.

Defendant here asserts that Morleys' Motion to Intervene was not served upon it, that Morleys' Cross-complaint was not served upon defendant, Pillsbury's answer to the cross-complaint was not served upon the defendant, notice of the trial setting was not served upon it, the stipulation for judgment was not served upon it, and the stipulation for dismissal of Morleys' cross-complaint was not served upon it. All this is claimed to be in violation of Rule 5 (a), U.C.P., which provides in substance that the service of all pleadings, motions, etc., shall be upon each party *affected thereby*.

While quoting in its brief the substance of Rule 5 (a), defendant omits to refer to Rule 5 (b) which provides in part:

“Whenever under these rules service is required to be made upon a party represented by an attorney, the service shall be made upon the attorney \* \* \*.”

In considering this phase of the matter it is to be remembered that Nephi, the defendant, and Morley, the cross-complainant against plaintiff, had the same attorney, and it was deliberately arranged by Mr. Harmon, President of the defendant company, that the defendant be represented by one whom he knew to be Morleys'

attorney. With this in mind we will review the record on the matters referred to by defendant.

(1) *The motion of the Morleys to intervene.* This motion was served upon Mr. Olmstead, Attorney for Pillsbury, but not otherwise. Defendant as such was not served. The motion to intervene by its terms reflects its sole purpose as being the filing of a cross-complaint against the plaintiff alone. The rights of the defendant would not be affected by the granting or denial of the motion, and we submit that service upon defendant was not required under Rule 5 (b). Further than that, defendant had the same attorney as the Morleys, and under Rule 5 (b) where a party is represented by an attorney, service shall be made upon the attorney, not the party.

Certainly an attorney who represents two parties in a pending action, and who files a motion on behalf of one, need not serve himself as attorney for the other. The purpose of the service requirements is to keep the attorneys for the parties fully informed, and where an attorney himself files a pleading he need not serve himself in order to have notice thereof.

(2) *The Cross-complaint.* What we have said under (1) above, applies with equal force here. The cross-complaint was against plaintiff alone. Defendant was not a party thereto, and not affected thereby. The attorney for the defendant was the same as the attorney for the cross-complainants, and Rule 5 does not require that under those circumstances an attorney serve himself.

(3) *Pillsbury's answer to the cross-complaint.* Pills-

bury's answer to the cross-complaint was served upon the cross-complainants through their attorney. Defendant was not a party thereto, and not affected thereby. To the extent, if any, to which defendant was entitled to notice, which we deny, notice to Mr. King, upon whom a copy of the answer was served, was notice to defendant, his client.

(4) *Notice of the trial setting.* Notice of the trial setting was given to all parties, through their respective attorneys, which is in compliance with the rules. However, in view of the manner in which the matter was ultimately disposed of, the matter of such notice is purely academic.

(5) *The stipulation for judgment.* This stipulation was prepared by Mr. King, and signed by him as attorney for cross-complainants. He was also attorney for defendant, and so had notice in such capacity of what he was doing in his capacity as attorney for the Morleys. Whether he should have discussed the matter further with the defendant we express no opinion, as that is not involved in the point under discussion, namely, the matter of notice under Rule 5. We do say that any such discussion would be of no consequence, as defendant had pleaded and so represented to the court and to plaintiff that it had no interest in the funds which were the subject of the stipulation, and wanted only to pay them over to the party, Pillsbury or Morleys, entitled thereto. The stipulation agreeing for payment to Pillsbury served only to solve the quandry defendant felt itself in.

(6) *The stipulation for dismissal of the cross-com-*



*plaint.* As we have previously noted, the cross-complaint was solely between the Morleys and plaintiff. The Morleys brought it, and with the consent of the plaintiff could dismiss it. Defendant was not a party thereto, and its consent to dismissal was not required. If it was entitled to notice, which we deny as it was not affected thereby, it had such notice by reason of the fact that the attorney that represented it was a signatory thereto.

We submit that there is no merit to any contention based upon lack of notice under Rule 5.

#### POINT V.

#### THIS IS NOT A PROPER CASE FOR RELIEF BY WAY OF VACATING THE JUDGMENT UNDER RULE 60 (b)

It is uncontroverted in this record that in the fall of 1953 when the Morleys brought their turkeys to Nephi Processing Plant for processing and sale that Nephi knew they were subject to mortgage to Pillsbury, and that in fact Nephi did remit to Pillsbury by two checks (Tr. 17) in excess of \$43,000.00, (Tr. 30), which but for \$2,679.16 covered the Morleys obligation to Pillsbury. However, Nephi claims that when the toms were to come in, which were the last of Morleys' birds, Morleys represented to it that there would be enough toms to finish paying Pillsbury, with some \$7,000.00 over. Based upon this representation, and without checking with Pillsbury as to the amount of its debt, and without checking to determine how many toms were actually left, Nephi advanced to Morley \$7,000.00 against what it anticipated to be surplus. This was done while

fully cognizant of the fact that if there were not in fact sufficient proceeds to liquidate the Pillsbury debt, in the light of the \$7,000.00 advance to Morleys, Nephi would have to nevertheless account to Pillsbury for the balance of the debt (Tr. 19, 41). Later it developed that there were insufficient birds to pay the \$2,679.16 balance owing Pillsbury, and to offset the \$7,000.00 advance to Morleys, by some \$3,887.25, so on February 1, 1954, Nephi took the Morleys' note for \$6,012.58, representing the \$3,887.25 excess advance above referred to, and \$2,135.33, that they had owed Nephi from the year previous (Tr. 9, 10, 12).

Morley's note for \$6,012.58, dated February 1, 1954, was not by its terms due until December 31, 1954, so even if the funds in Nephi's possession belonged to Morley, which they couldn't in the light of the mortgage agreement, they were not then subject to set off against the Morley note, because the note wasn't due. Hence, there is small wonder that Nephi wrote to Mr. Olmstead (Ex. 7) advising that it was "ready and willing to pay to Pillsbury for the account of Lafe Morley \$2,679.16 as soon as we receive the authority from Lafe Morley so to do", or that Mr. King, when the transaction was explained to him, pleaded in behalf of Nephi that Nephi had no interest in the funds, but wanted only directions as to whether to pay them to Pillsbury or to the Morleys.

Now defendant claims surprise and excusable neglect in that Mr. King pleaded these facts on its behalf, and claims the lower court committed reversible error in not vacating the judgment and permitting it to file an amended answer which, on the face of the record, is patently sham and frivolous.

The sum and substance of the tendered amended answer, and which defendant now contends contains its "meritorious defense", is that the Morleys, by their quality claim against Pillsbury, had the right to offset the same against the balance owing Pillsbury on the feed account under the mortgage; that having settled the quality claim without taking into account the mortgage balance, this mortgage balance is nevertheless wiped out and defendant, *who is not a party to any of those matters*, is thereby discharged insofar as plaintiff is concerned with respect to the proceeds from the sale of the Morley turkeys.

In other words, and to get the meat of the matter, the proposition is that Pillsbury and the Morleys, who were the only persons involved, had no right to settle Morleys' claim against Pillsbury for asserted damages arising out of the quality of feed sold by Pillsbury to the Morleys, without taking into account in the settlement the balance owing by the Morleys for the feed. There can be no merit in such contention. Pillsbury and the Morleys were dealing at arms length, and they had the right and were free to compromise their differences as they mutually agreed. If they wanted to settle them piecemeal, they were free so to do. If they wanted to settle the quality claim and get that behind them, before concluding the matter of the feed account, there was nothing to prevent them doing so. The quality claim was initiated by the Morleys by way of intervention and it could be disposed of by voluntary dismissal. Defendant was not a party to it, and certainly can't complain that the Morleys who originally filed it, subsequently elected to dismiss it.

By the same token, defendant having not only pleaded, but acknowledged in its testimony, that it possessed funds from the mortgaged turkeys over and beyond those remitted to Pillsbury, and having acknowledged that but for its own carelessness and neglect it would not have over advanced to the Morleys against anticipated surplus funds, and having acknowledged that it knew when it made the advance to the Morleys that the advance was against mortgaged birds and that if it over advanced it must nevertheless account to Pillsbury, and having acknowledged that it now holds Morleys note for the full amount of what Morley owes it, and still withholds from Pillsbury proceeds from the sale of the mortgaged turkeys, it is difficult to conceive of *any* meritorious defense to Pillsbury's claim against it, much less the one set forth in the proposed amended answer.

Finally, we come to a consideration of the true significance of Rule 60 (b), under which the defendant seeks to invoke the aid of the court. At page 36 of defendant's brief is a partial quotation from this Court's decision in the case of *Chrysler v. Chrysler*, 5 Utah (2) 415, 303 P. (2) 995. We quote further therefrom:

"It will be found, however, that these cases are predicated upon the hypothesis that there has been some mistake or excusable neglect on the part of the movant from which, in justice and equity, he should be relieved. The pertinent inquiry here is whether plaintiff met that requirement."

As heretofore pointed out, the sole question on this appeal is whether the lower court erred in denying

defendant's motion to vacate the judgment previously entered, a motion invoking the sound discretion of the trial court in the light of the facts as they were then made to appear. Rule 60 (b) in its provisions for relief from a judgment, is not dissimilar to former Section 104-14-4, so far as the latter dealt with this subject. The position of this court in the matter of review of the trial court's ruling on such a motion has been stated on several occasions. In *Thomas v. Morris*, 8 Utah 284, 31 P. 446, the rule was thus stated:

"The statute is very broad, and under it the granting or refusing of an application to set aside a judgment taken by default or rendered upon a hearing in the absence of one of the parties, through 'his mistake' inadvertence, surprise, or excusable neglect,' is, by the express terms of the statute, vested in the court, and its action will not be disturbed on appeal, unless an abuse of discretion is shown."

And in *McWhirter vs. Donaldson, et al.*, 36 Utah 293, 104 P. 731:

"The general rule is that a motion to vacate a judgment entered by default on the ground of excusable neglect and permit the party against whom it is entered to plead to the merits is addressed to the sound discretion of the court, and, unless it is made to appear that such discretion has been abused, the ruling of the court in vacating or refusing to vacate the judgment will not be disturbed on appeal."

Further in the *McWhirter* case, *supra*, the court said:

"In order for a party to bring a case within the provisions of Section 3005, Comp. Laws 1907, he

must show that he has used due diligence to prepare and present his defense, and that he was either prevented from doing so because of some accident, misfortune, or circumstance over which he has no control; or that he has been misled or lulled into inaction by some agreement or act of the opposite party or his counsel upon which he had a right to rely. This appellant has wholly failed to do."

From the foregoing it is apparent that the determination of the lower court in a matter such as this is controlled by certain considerations, namely, (1) there must be some mistake or excusable neglect on the part of the movant from which he ought to be relieved, (2) he has used due diligence to present his defense, (3) he has been prevented from so doing because of some accident, misfortune or circumstance over which he has no control, or has been misled or lulled into inaction by some act of the opposite party or counsel upon which he had a right to rely, and, (4) granting the motion would be in furtherance of justice. The action of the lower court in granting or denying such a motion will not be disturbed by this court unless there has been a "manifest abuse of discretion."

With these rules in mind, consideration may be given to the ruling of the lower court on the record before it.

(1) No mistake or excusable neglect on the part of the defendant was shown. The "mistake and neglect" attempted to be relied upon is that defendant pleaded in its answer that it had the funds, had no interest therein, and wanted protection only in the matter of

to whom to make payment. That pleading was not a mistake, but on the record reflects the true facts. While defendant may urge that it was a mistake for its attorney to plead the truth, such of course, is not the type of mistake to which the rule has reference.

(2) Upon the matter of diligence, the record shows, and it is a record that was largely made by the defendant, that upon being served with summons, it took the same to Attorney King and arranged that he represent it (Tr. 32-33); it advised Mr. King that it had the \$2,679.16 proceeds from the turkeys, had no interest therein, and wanted only to pay it to the party, Pillsbury or Morley, properly entitled thereto, (Exhibits 9 and 11 and Affidavit of Mr. King. R. 41). These are the facts, and the only facts, that were disclosed by defendant to its attorney, notwithstanding defendant received a copy of the answer as filed.

(3) No contention has ever been made that defendant has been misled or lulled into inaction by plaintiff, who was and is the only other party to the proceeding. Plaintiff not only warned defendant of its intention to bring suit, but also warned defendant against injecting itself into any disputes between plaintiff and the Morleys, and particularly advised defendant that any such disputes would be "settled by the parties themselves directly." (Exhibit B).

(4) Nor could the vacation of the judgment be in "furtherance of justice", but on the contrary justice is served only by preserving the judgment as entered. The funds in Nephi's possession came from the sale of Morleys' turkeys, and belonged either to the Morleys,

the owners, or to Pillsbury, the mortgagee thereof. Nephi, nor any one else had any right thereto. Morleys and Pillsbury, the only ones concerned, agreed that they should go to Pillsbury. Justice certainly would not be served by re-litigating a question upon which the only interested parties have agreed.

## POINT VI.

### THE JUDGMENT SHOULD NOT BE VACATED FOR ANY ALLEGED ABSENCE OF FINDINGS OR FAILURE TO DISPOSE OF MATERIAL ISSUES.

The point here is made, among others, that Rules 12 (d) and 56 (c) were not complied with. Rule 12 (d) concerns itself with the procedure for disposing of a motion for judgment on the pleadings, and Rule 56 (c) with motions for summary judgment. Neither are here pertinent, as neither type of question was here involved.

Here the pleadings reflected a claim by plaintiff against the defendant for certain funds, the disclaimer by the defendant of any interest therein, and the assertion by the defendant that there was involved conflicting rights to the funds as between plaintiff and the Morleys. Hence, on the pleadings, the only material issue was whether defendant should pay the funds over to Pillsbury or to the Morleys. The trial court was saved the burden of determining that by the stipulation of the Morleys that they be paid to plaintiff. Had defendant theretofore tendered the money into court, an appropriate order could have been made for payment over to plaintiff. As defendant had not made such tender, however, and still had possession of the



funds, the only appropriate order that could have been made was that which the Court did make, namely, judgment in favor of plaintiff against defendant.

The other point here made is that the lower court failed to make findings of fact. There appear to be a number of complete answers to this contention.

Rule 52 (b) provides that except in actions for divorce, findings are waived by a failure to appear at the time of trial, and the defendant here did not so appear, albeit it had notice through its attorney of all proceedings.

Another answer lies in the fact that there were no unresolved issues of fact upon which the court might make findings, and findings are required only with respect to material issues. The material issues raised by plaintiff's complaint were all admitted by defendant in its answer, and the only issue raised by defendant was to whom, as between plaintiff and the Morleys, it should pay the money. This was settled by the stipulation of the Morleys that it should go to plaintiff.

This court in the case of *I. X. L. Stores v. Moon*, 49 *Utah* 262, 162 *P.* 622, stated the rule as follows:

"The contention that the court erred in failing to make a finding upon defendant's plea of payment is not tenable. While it is true that findings should be made upon all material issues, yet in a case where the facts are stipulated, and it is clear that upon those facts the plaintiff cannot recover upon other grounds than that of payment, such a finding is immaterial."

The contention that the lower court failed to dispose

of material issues as between plaintiff and defendant is likewise without merit. The only issues between these parties were (1), did defendant have possession of proceeds from the mortgaged turkeys, and (2), if so, should it pay them over to plaintiff or to Morley. The first was resolved by the admission of defendant in its answer that it did hold such proceeds, and the second was resolved by agreement between plaintiff and the Morleys. There were no material issues undisposed of.

## POINT VII.

NEITHER PLAINTIFF'S JUDGMENT OF FEBRUARY 18, 1957, NOR THE ORDER DISMISSING THE CROSS-COMPLAINT SHOULD BE VACATED.

Defendant's argument here is extremely difficult to follow or to understand. The statement is made at the outset that "unless relief was granted to defendant against the Morleys herein its claim against the Morleys would probably be res adjudicata and defendant have no relief".

The judgment under attack is a judgment in favor of Pillsbury and against Nephi Processing Plant. The Morleys are not parties to the judgment, and were not parties to the action. Vacating this judgment is not going to give defendant any relief against the Morleys, as they have no interest in the action, and by their stipulation, no interest in the subject thereof.

The defendant by its own testimony holds the promissory note of the Morleys, which evidences the debt owed by the Morleys to the defendant, and whether this judgment is vacated or sustained cannot in any way,

either favorably or adversely, affect Morleys' obligation to defendant under that note. What the situation may be as to pending litigation referred to in defendant's brief, between Lafe Morley, Ray Nielsen and M. L. Harmon, none of whom are parties hereto, and with respect to which litigation we are wholly uninformed, is not apparent, but whatever the status of that litigation may be it has nothing to do with the present case.

Defendant asserts that "in fairness defendant is entitled to file a proper claim herein against the Morleys and to be heard thereon". This Pillsbury has never denied, nor in anywise sought to influence. We suppose that after the Morleys intervened that the defendant might, had it elected so to do, have cross-complained against the Morleys on the note, or on any other claim it might have had, but it didn't do so, and vacating the Pillsbury judgment will not reinstate any such right as the Morleys are not now involved in this action.

Certainly if Nephi holds a bonafide note of the Morleys it may bring suit thereon against the Morleys without regard to anything involved in the present case. What defenses the Morleys may have we do not know, but certainly the fact that Pillsbury has a judgment against Nephi will not or cannot be one of them.

## CONCLUSION

The single question for determination by this court is whether there was a manifest abuse of discretion by the lower court in denying defendant's motion to vacate the judgment. We have seen that under plaintiff's

mortgage it was entitled to receive the proceeds from the sale of the turkeys to an amount of \$2,679.16 over that paid to it, and that defendant at all times knew of plaintiff's rights in this regard. Notwithstanding plaintiff's rights, defendant nevertheless and in complete disregard thereof refused to pay over to plaintiff proceeds from the sale of the mortgaged property. Nothing can change the fact that as between plaintiff and defendant the defendant was at all times legally liable to account to the plaintiff for that \$2,679.16, and justice would not be furthered by further litigation of these issues between these parties.

The judgment of the lower court should be affirmed.

Respectfully submitted,

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