

1958

Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc. et al : Brief of Defendant and Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Udell R. Jensen; Jensen & Jensen; Attorney for Defendant;

Recommended Citation

Brief of Appellant, *Pillsbury Mills v. Nephi Processing Plant*, No. 8723 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/2907

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

MAY 3 1958

IN THE SUPREME COURT LIBRARY
of the
STATE OF UTAH

FILED

JAN 11 1958

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.

Clerk, Supreme Court, Utah

Case No.
8723

BRIEF OF DEFENDANT AND APPELLANT

UDELL R. JENSEN

Of JENSEN & JENSEN, *Lawyers*

Attorney for Defendant

INDEX

Other Authorities

U. C. A. '53, 78-22-3	25
U. C. A. '53, 78-37-1	20
U. R. C. Pr. 5	31, 37
U. R. C., Pr. 6 (d) & 7 (b)	37
U. R. C. Pr. 12 (d)	38
U. R. C. Pr. 56 (c)	38
U. R. C. Pr. 58 A (e)	25
U. R. C. Pr. 60 (b)	34, 36
5 Am. Jur. Sec. 101 p. 322	25
5 Am. Jur. Sec. 29, p. 278-9	22, 27
5 Am. Jur. Sec. 46, p. 286	23
5 Am. Jur. Sec. 101 p. 322	25
31 Am. Jur. Judg. Sec. 402, p. 67	32
31 Am. Jur. Sec. 411, p. 74	32
36 Am. Jur. Sec. 428, p. 902	33
B. C. Pr. and R., Vol. 1, Sec. 57, p. 66	24
33 C. J., Sec. 84, p. 1135-6	39
Fed. Pra. and Pro. Rules, Ed. Vol. 1, Sec. 202, p. 357	
Barron & Holtzoff	31
Rule 6, Professional Conduct of Utah State Bar	23
174 ALR 163	33

I N D E X

ARGUMENT	16
CONCLUSION	42
NATURE OF CASE	1

POINT I

THIS IS AN ACTION TO RECOVER A DEBT OR FOR THE ENFORCEMENT OF A RIGHT SECURED BY A MORTGAGE. THE LAW REQUIRES THE DEBTS BE DETERMINED THEREON AND OFFSETS ALLOWED ; AND THE JUDGMENT OR ORDER SHOULD BE VACATED AS THIS WAS NOT DONE	17
---	----

POINT II

DEFENDANT WAS NOT REPRESENTED BY COUNSEL; OR IF REPESENTED ITS COUSEL, HAD NO AUTHORITY TO PLEAD AS HE DID; AND DEFENDANT WAS ABANDONED BY COUNSEL WITHOUT NOTICE OR KNOWLEDGE. JUDGMENT RENDERED AGAINST DEFENDANT WITHOUT NOTICE OR KNOWLEDGE IS WITHOUT DUE PROCESS OF LAW AND IS TO BE VACATED	21
--	----

POINT III

CONFLICTING INTERESTS OF DEFENDANT AND CROSS COMPLAINANTS MAKE THE PLEADING FILED HEREIN IN THE NAME OF DEFENDANT IN 1954 AND THE ONE FILED IN 1955 OF NO EFFECT	27
--	----

POINT IV

THE COURT ERRED IN REFUSING TO VACATE THE JUDGMENT IN THAT IT IS EQUITABLE AND FAIR THAT DEFENDANT BE GIVEN NOTICE; THAT IT BE REPRESENTED BY COUNSEL; AND THAT IT HAVE ITS DAY IN COURT, WHERE IT HAS A MERITORIOUS DEFENSE	30
--	----

POINT V

RELIEF SHOULD BE GRANTED FROM JUDGMENT ENTERED UPON, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT, OR OTHER JUST REASON; AND IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO VACATE ITS JUDGMENT AND ORDER UNDER FACTS HEREIN	33
--	----

POINT VI	
JUDGMENT SHOULD BE VACATED BECAUSE OF PROCEEDINGS CONTRARY TO U. R. C. P., FOR LACK OF TRIAL; FAILURE TO ENTER FINDINGS; AND AND FAILURE TO DISPOSE OF MATERIAL ISSUES ..	37

POINT VII	
VACATION OF THE JUDGMENT AGAINST DEFENDANT DATED FEB. 18, 1957; AND VACATION OF THE ORDER DATED FEB. 21, 1957 OF DISMISSAL OF MORLEY'S CROSS COMPLAINT SHOULD BE MADE AS DEFENDANT'S CLAIM AGAINST MORLEY'S MAY BE RES ADJUDICATA AND DEFENDANT WILL HAVE BORN A SUBSTANTIAL LOSS WITHOUT A REMEDY, UNLESS VACATED	40

STATEMENT OF FACTS	3
--------------------------	---

I N D E X

Blyth & Fargo Co. v. Swenson, 15 U. 345; 49 P. 1027	23
Cannon v. Tuft, 3 U. 2d. 410; 285 P. 2d. 843	36
Chrysler v. Chrysler, 5 U. 2d 415; 303 P 2d. 995	36
Cutler v. Haycock, 32 U. 354, 90 P. 897	36
Farmers & Merch. Bank v. Universal C. I. T. Cr. Corp. 4 U. 2d 155; 289 P 2d. 1045	40
Fretz v. Anderson, 5 U. 2d 290; 300 P. 2d. 642	40
Gillette v. Newhouse Realty Company, 75 U. 13, 282 P. 776	29
Hammett v. McIntyre, 249 P. 2d. 885, Cal.	26
Hansen's Estate, 55 U. 23, 184 P. 197	24
Lowe v. Bank of Vernal, 110 U. 496; 175 P. 2d. 484	23
Malia State Bank Com'r et al v. Giles et al, 100 U. 562 114 P. 2d. 208	29
McClure v. Donovan, 186 P. 2d. 718	28
Morley v. Morley, (Wash) 230 P. 645	32
Sandall v. Sandall, 57 U. 150; 193 P. 1093	27
Stewart Livestock Co. v. Ostler et al, 105 U. 529; 144 P. 2d. 276	21
Stevens v. Doxey, 58 U. 196; 198 P. 216	20
Tudaro v. Gardner, 3 U. 2d. 404; 385 P. 2d 839	42
Ut. Comm. Bank v. Trumbo, 17 U. 198, 53 P. 1033	36

IN THE SUPREME COURT
of the
STATE OF UTAH

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.

Case No.
8723

BRIEF OF DEFENDANT AND APPELLANT

NATURE OF THE CASE

Plaintiff and respondent, Pillsbury Mills, Inc., A Corporation, is a manufacturer and seller of turkey feeds at Ogden, Utah. It will be called "Pillsbury." Defendant and appellant, Nephi Processing Plant, Inc., A Corporation, was and is a processor and buyer of turkeys at Nephi, Juab County, Utah. It will be called "Nephi." Cross-complainants, intervenors and respondents, Lafe Morley and Callie Morley, his wife, hereinafter called "Morleys," are turkey growers of Millard County, Utah.

This is a suit brought by Pillsbury against Nephi. The theory of the suit was that Nephi had purchased from Morleys some turkeys and was obligated to pay those proceeds to Pillsbury under the terms of the chattel mortgage. It sought an accounting from Nephi as to the proceeds and a judgment for any proceeds not turned over to Pillsbury. Morleys intervened and claimed offsets, and alleged Pillsbury was not entitled to any more money. Nephi contends it purchased said turkeys on Morleys representation for Pillsbury and themselves of the balance owing Pillsbury which it remitted. After it developed said representations were false, Morleys undertook and agreed to protect Nephi against the suit by Pillsbury and took or sent Nephi to Morleys' attorney, who assured Nephi that it would be protected, and in effect need not follow the matter. Morleys' attorney filed an answer, confessing that Nephi held \$2700.00 which belonged either to Pillsbury or to Morley. In effect the answer stated that Nephi was a stake holder. Thereafter, Morleys' attorney signed a stipulation to the effect that the court could enter judgment against Nephi. Nephi did not enter into the stipulation and was not given any notice thereof, or that the other parties were in effect asking for entry of judgment against it. Upon learning of the judgment against Nephi, it asked the trial court to vacate said judgment. The trial court refused to vacate said judgment. This is an appeal from the judgment entered against Nephi, the refusal of the trial court to vacate the judgment, and grant a trial. It is predicated upon the

theory that Nephi never authorized anyone to confess judgment against it, and it was never given notice or knew that Pillsbury and Morley were in effect stipulating for judgment against it.

STATEMENT OF FACTS

On or about January 20, 1953 Pillsbury and Morleys entered into a turkey raiser financing agreement; and to secure performance thereof and payment to Pillsbury by Morleys of a sum not to exceed \$60,500.00 on or before December 31, 1953, Morleys did on or about the 1st day of April, 1953 execute and deliver a chattel mortgage to the Pillsbury, a copy of which is attached to the Pillsbury's complaint (R. 2 to 3).

Said mortgage was upon turkeys located on the farm of Morleys near Delta, Millard County, Utah. It was filed of record in Millard County, Utah; and there is no evidence herein of filing it in any other county. Among other things it provided that in the event Morleys desired to sell they would notify Pillsbury, and if written consent were obtained:

“*** such sale will be made (by Morleys) for the use and benefit of the mortgagee to the extent of whatever obligations the mortgagors may owe to the mortgagee, and further agree that the moneys received from such sale to the extent of such obligations shall be and belong to the mortgagee and be applied upon and by way of mortgagors' said obligations up to the full extent thereof, and shall be remitted by the buyer of such tur-

keys directly to the mortgagee or its agent thereunto duly authorized without any right in mortgagors to receive any of the proceeds of such sale except such surplus as there may be over and above the amount of such obligations. Said mortgagors will direct the buyer to pay the proceeds of such sale to the mortgagee to the extent of the obligations owed by said mortgagors to the mortgagee.***." (R. 2-3, Ex. A. compt.).

During 1953 Pillsbury sold Morleys certain turkey feeds; and in connection therewith made certain representations and warranties of the character of said feed (R. 7-11).

On or about November 4, 1953, Morleys with consent of Pillsbury sold their 1953 turkeys New York Dressed to Nephi (defendant) at Nephi, Utah (Tr. 12-13; Ex. 2, 3, 4, 7, A). On or about the same day, Lafe Morley told M. L. Harmon, President-Manager of defendant, Morleys were indebted to Pillsbury in the sum of approximately \$41,000.00-\$43,722.08; that he had 5000 toms to process and market; that they would weigh approximately so much; that he needed \$4,000.00 for Ray Nielsen (for labor) and he needed \$3,000.00 for himself. A computation was made of the estimated purchase price to be paid by Nephi for said turkeys upon the representation by Morleys and the mutual assumption of the average weight of said turkeys to be determined in fact as the basis of the agreed purchase price. Upon such estimate it appeared there would be sufficient money to pay Pillsbury Forty-three Thousand odd dollars (\$43,722.08) and make

the \$7,000.00 advance payment to and for Morleys as requested (Tr. 10-12, 30-31).

Pursuant to the above computed price Nephi did on November 4, 1953 deliver to Ray Nielsen a check for \$4,000.00, and to Lafe Morley a check for \$3,000.00 as a part payment of the purchase price of said turkeys, subject to the later final determination of the correct total sale price of said turkeys, according to the actual weight after they were processed. After said purchase price was determined upon the actual processed weight of the birds delivered and the account between Nephi and Lafe Morley was cast up as of November 4, 1953 the account showed an advance overpayment on the agreed purchase price of \$3,887.25 (Tr. 10, 30-31).

Lafe Morley had also been a customer of Nephi during 1952. At the end of 1952 he was indebted to Nephi in the sum of \$2,135.33 (Tr. 10-11; Ex. 1). In 1953 he was again a customer of Nephi, and on November 25, 1953, he was indebted to Nephi in the sum of \$6,506.30 plus \$20.88, which by credit of \$514.60 was reduced to \$6,012.58 owing by Lafe Morley to Nephi on February 1, 1954 (Ex. 1); and that on February 24, 1954 Lafe Morley signed a promissory note as of February 1, 1954 to Nephi in said sum of \$6,012.58 (Tr. 9-12, 31, Ex. 1, Ex. 2).

During all of 1954 said Lafe Morley, Ray Nielsen and M. L. Harmon were partners, dba M. & J. Co. (R. 31).

On January 14, 1954 Pillsbury's counsel by letter notified Nephi that Morley's indebtedness to Pillsbury was \$46,401.24 less \$43,722.08 remitted by Nephi to Pillsbury, leaving a balance owing of \$2,679.16 and requested Nephi render Pillsbury a complete accounting (Ex. A, Tr. 37-8).

On January 20, 1954 Nephi answered, which was in part as follows:

"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 to 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 offer to clear this account will be terminated thirty days from date and the matter will have to be worked out directly with Mr. Morley."

A copy of said letter was sent to Lafe Morley (Ex. 7).

By letter dated February 11, 1954 Pillsbury's counsel wrote Nephi again requesting the accounting and proceeds under the terms of the mortgage; and among other things stated:

“Any dispute that may exist between Pillsbury and Mr. Morley need not be of any concern to you (Nephi Processing Company) as the same will be settled by the parties themselves directly, except as aid of the courts may be involved.” and advised that legal proceeding would be brought against Nephi (Ex. B; Tr. 37).

Shortly after receipt of Exhibit B from the Pillsbury's attorney, M. L. Harmon saw Lafe Morley and had a conversation with him concerning the contents thereof, in the defendant's office at Nephi. Mr. Harmon told Mr. Morley that said letter had been received, and that it claimed Nephi was indebted to Pillsbury about \$2,700.00. He also told Morley that he (Morley) was indebted to Nephi; but in view of the fact Harmon, Morley (and Nielsen) were going ahead with their turkey operation in 1954, Harmon would endeavor to have Nephi advance enough money to pay Pillsbury the \$2,700.00 if Morley so directed. Morley said he had a claim against Pillsbury much greater than \$2,700.00 and it would be offset; and that Morrley would protect the defendant from liability herein (R. 31-2 Tr. 22-23).

Pillsbury brought this action against Nephi without joining Morleys. On or about May 10, 1954 Nephi was served with process herein (Tr. 23). It was left with M. L. Harmon. He forthwith contacted Lafe Morley and advised Morley of said service. Lafe Morley advised Nephi that Morley's attorney was Dwight L. King of Salt Lake City, Utah; that all Harmon needed to do

to protect Nephi herein was to go and see said attorney of said Morleys (Tr. 24-5; R. 32-3).

About May 15, 1954 Harmon took summons to attorney Dwight L. King. Harmon told Mr. King what Mr. Morley had told Mr. Harmon. Mr. King told Mr. Harmon there was a greater sum owing Mr. Morley (by Pillsbury) so that he (Harmon) would not have to be concerned about it; that he (King) would protect Nephi in this suit and in the suit against Pillsbury. At that time Harmon told King that Morley was indebted to Nephi in the sum of \$6,012.58 for 1953 and prior years operations. Harmon did not tell Mr. King that Nephi had \$2,700.00 on hand which could be remitted to Pillsbury (or any other sum). That was the only conversation Harmon had with Mr. King. After what Mr. King told him, Mr. Harmon didn't think Nephi would need to be represented, and relied upon Mr. King to file an answer on behalf of Nephi and the Morleys (Tr. 24-6, 32-33).

Unknown in fact to Nephi, King filed a Motion for Change of Venue in the name of Nephi (R. 3), but for Morleys (Ex. 9, Tr. 45).

Eleven months passed by without any activity of record in the case. No communication or word passed between Nephi and Mr. King.

May 16, 1955 Mr. King filed herein Morley's cross-complaint against Pillsbury, alleging a breach of said turkey raising contract and warranties, and prayed that

the court order \$2,700.00 in the hands of Nephi be paid to Morleys, and Morleys have judgment against the plaintiff for \$23,634.00 less any sum due and owing under the mortgage involved herein; and for such other and further relief as to the court may seem meet and equitable (R. 7-11). It was not served on Nephi. Pillsbury's answer thereto was not served on defendant (R. 18-20). At the same time Mr. King filed Morleys Motion to Intervene (R. 12). It was not served on Nephi; and no information of or notice of any or all of these matters came to Nephi until after entry of judgment, February 22, 1957 (Tr. 6-8; 25-6).

On May 16, 1955 Mr. King filed an answer in the name of Nephi, and purportedly for Nephi, and therein it was falsely stated that Nephi held in its hands approximately \$2,700.00 from the sale price of Morleys 1953 turkeys. Said answer prayed that the court determine to whom the funds in Nephi's hands belonged, and make such orders as are necessary to protect Nephi against Pillsbury or Morleys for such payments should the court require the Nephi to pay either, and for such further relief as to the court may seem meet and equitable in the premises (R. 13-14). It was not a pleading to protect Nephi; but was in the nature of an interpleader to help Morleys. No authority was given by Nephi to file such a pleading. It was repudiated when it became known (R. 29-31).

The Secretary-Treasurer of Nephi, Mr. Steele, never

knew prior to February 22, 1957 that Dwight L. King purported to represent Nephi in the above cause. He never saw a copy of the answer filed herein by Mr. King in the name of Nephi until after February 21, 1957, when a copy of said answer was brought to Nephi's office by attorney Jensen. Mr. Steele was the one who always picked up Nephi's mail during 1954 and 1955, and no communication was received from Dwight L. King during those years in relation to this case; and no such record was in the files of Nephi (Tr. 5-7). Mr. King claims he forwarded a copy of the answer filed in the name of Nephi under date of May 13, 1955 (R. 42), which was never received by Nephi.

On November 15, 1956 the above cause was set to be tried February 13, 1955 (R. 21). On January 23, 1957, written interrogatories were submitted to the Morleys by Pillsbury and served upon Mr. King, as counsel for the Morleys. On January 29, 1957, Pillsbury noticed Mr. King as Morley's counsel, and purportedly as Nephi's counsel, he would take the deposition of Lafe Morley (R. 24). No word was sent to or received by Nephi of any of these. (No examination of Lafe Morley was made on behalf of Nephi).

On February 13, 1957, Mr. King, as attorney for the Morleys signed a stipulation that judgment might be entered against Nephi. It was filed February 21, 1957. Mr. King did not even purport to sign as attorney for Nephi (R. 25). On February 18, 1957 judgment was

rendered and entered on February 21, 1957 in favor of Pillsbury and against Nephi for \$2,679.16 plus interest, or for \$3,181.38 (R. 27). On the same date judgment was entered dismissing said cross-complaint on a written stipulation dated February 19, 1957 between counsel for Pillsbury and counsel for Morleys (R. 26).

On February 21, 1957 counsel for Pillsbury wrote Nephi that judgment had been entered against it in the above amounts and asked Nephi to pay same (Ex. 5, Tr. 27).

On February 22, 1957 Udell R. Jensen, counsel for Nephi, called attorney King by phone. At that time Mr. King stated he didn't represent Nephi herein and that the pleading he filed in Nephi's name was only as a matter of courtesy or accommodation (Tr. 45-6; R. 52-3).

On February 25, 1957 at 7:30 p.m. (after judgment had been entered) an envelope was mailed to Mr. Milton Harmon, Nephi Processing Plant, Inc., Nephi, Utah, by Dwight L. King. It contained a letter which was dated February 13, 1957 to "Dear Milton"; and stated that the Pillsbury and Morleys had finally agreed, and the balance held from the sale of the Morley birds in 1953 could be paid to the plaintiff (Ex. 6; Tr. 26-7).

The first information which came to Nephi after Pillsbury's letters requesting an accounting and payment dated January 14, 1954 and February 11, 1954 (Ex. A and B) was Exhibit 5 dated February 21, 1957, after entry of judgment (Tr. 25-7).

On March 12, 1957 counsel for defendant wrote Mr. King, in part as follows:

“In view of your statement to me over the phone on February 22, 1957, that you did not represent the Nephi Processing Plant in the above case, will you please advise me on behalf of the Nephi Processing Plant the following:

1. On whose statement, and on what facts did you file the Motion for Change of Venue in the above case, and also the Answer, both of which purport to be filed on behalf of the Nephi Processing Plant.
2. If you at the time believed you represented the Nephi Processing Plant, Inc., a corporation, when did you first come to the view that you no longer represented them in the above case?
3. What notice or information did you give to the Nephi Processing Plant, or any of its officers, that you did not represent said Processing Plant in said case?
4. What, if any, notice did you give to them, or anyone on their behalf, that you intended to have the Judgment entered against them dated February 18, 1957.” (Ex. 8, Tr. 45).

On March 15, 1957, he answered in part as follows:

“* * * I never did discuss the Motion for Change of Venue with anyone representing Nephi Processing Plant to my recollection, that was purely the discussion between myself and Mr. Morley.

“2. In answer to question number two, the

question of representing Nephi Processing Plant, Inc. other than for the purpose of protecting Morley's interest was never discussed with anyone. When Mr. Harmon came into my office to discuss this matter he had already talked to Morley and Morley had instructed him to come in and had told him that I was representing the Morleys in their claim against Pillsbury Mills. The Answer which was filed represented my understanding of the only interest which Nephi Processing Plant Inc. had in the law suit, namely, that of a stake holder and were only concerned about not having to pay twice on the same claim.

"3. I am sure Mr. Harmon will recall that no fee was ever discussed with me nor has there ever been any tendered or received by me for the Answer which was filed disclaiming any interest in the money on the part of Nephi Processing Plant, Inc.

"No notice was ever given to Nephi Processing Plant of my not representing said plant. I never did represent them so it was not my thought in the matter that I was not representing them." (Ex. 9; Tr. 45).

A further letter was sent by attorney Jensen for the defendant to attorney King on March 19, 1957 (Ex. 10; Tr. 45). March 27, 1957, attorney King answered at length stating his position and explaining his conduct. Therein, among other things, he says:

"My only interest was in presenting for Morleys a claim against Pillsbury Mills, Inc., which I have done and which I have settled satisfactory

to my client, Lafe Morley, and to my own satisfaction." (Ex. 11; Tr. 45).

On April 15, 1957 Nephi filed its Motion to Vacate Judgment rendered February 18, 1957 challenging attorney King's authority to appear or plead for defendant herein; to strike the answer filed by him in defendant's name; and to permit defendant to file its tendered answer (actually filed 4-15-57, R. 46-48) to which was attached the affidavits of M. L. Harmon and Edward W. Clyde (R. 31-7). Said affidavit of Mr. Clyde states he advised Mr. King that Mr. Clyde was not the attorney for the defendant in the above cause or generally; that notice should be given to either Mr. John S. Boyden or Udell R. Jensen (R. 35-6). No such notice was given, or claimed to be given, by Mr. King.

The accounting case between Lafe Morley, Ray Nielsen and M. L. Harmon filed in Juab County, Utah (Civil No. 3767) is referred to by Mr. King (Ex. 9, R. 41-45), in which Mr. Arthur Nielsen is counsel for Morley and Nielson. In that case, Mr. Nielson has resisted the inclusion therein of the further and supplemental answer and defense of the facts of the judgments entered in this case. On pre-trial of that case in Juab County, which Mr. King refers to in his affidavit, the Hon. Maurice Harding announced he was inclined to rule that the matters which could have been litigated in this case (Civil No. 29182) could not be included in Civil No. 3767 (R. 51-53).

On April 19, 1957 demand was made on Dwight L. King for the production of certain documents, at the time the motion to vacate the judgment was to be heard (R. 37-8). Said documents were never produced; and Dwight L. King never appeared in court on this matter. His only statement in the case is his affidavit filed herein after the hearing.

On June 15, 1957 the district court entered its order denying defendant's motion to vacate the judgment and to strike pleading filed by Mr. King in defendant's name and to permit filing of defendant's answer (R. 54).

On June 28, 1957 defendant filed its motion for rehearing or new trial, and attached an affidavit referring to the documents or papers which the Morleys and their counsel had been asked to produce, asserting that Dwight L. King advised defendant on April 20, 1957 that he claimed to have written a letter to defendant, which among other things read: "I do not think that it will be necessary for you to appeal (appear) or take any action at the time of trial." Therein is asserted lack of notice, surprise and excuse for failure to produce documents which would have established that the Morley defendants knew that the substance of the answer of the defendant was false; that the defendant and the court had been imposed on; and that by ordinary diligence defendant could not produce said documents at the hearing on the motion herein (R. 84-5).

Defendant's motion for rehearing or new trial was

denied by the trial court the 21st day of August, 1957 (R. 88).

Notice of appeal from denial of the Motion to Vacate the Judgment, strike the pleading filed by attorney King in defendant's name, and to permit defendant to file its answer herein was filed July 15, 1957 (R. 102).

Second Notice of Appeal from the ruling of the court denying defendant's motion for rehearing or new trial was filed September 10, 1957 (R. 111).

ARGUMENT

INTRODUCTION

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 terms of the mortgage between Pillsbury and Morleys among other things provided that the mortgagors (Morleys) would direct the buyer (Nephi) to pay the proceeds of the sale to mortgagee (Pillsbury) to the extent of the obligation owed by said Morleys to Pillsbury. For the purpose of giving that information, it appears Pillsbury had designated Morleys as its agent

to advise Nephi as to what the mortgage debt was. Likewise it appears that Morleys were selling as an agent of Pillsbury. In both connections the representations of the Morleys to the buyer bound Pillsbury.

The records of Nephi, the testimony of its president-manager and its secretary-treasurer all establish beyond any question that the representations of the mortgagors (Morleys) to Nephi as buyer were false. It was by inadvertance, or by intentional misrepresentation of Morleys and mistake or inadvertance, of Nephi that the figures were relied on and the money paid to and for Morleys. Pillsbury did not notify Nephi of the amount it claimed until the second month after the sale of the turkeys. Under such circumstances, Pillsbury is not entitled to recover from the purchaser, 10 Am. Jur., Sec. 192 p. 843. Pillsbury may not pass its loss, if any, to Nephi, which arose under and through Morleys while acting as an agent of Pillsbury, 10 Am. Jur., Sec. 203 p. 850.

POINT I.

THIS IS AN ACTION TO RECOVER A DEBT OR FOR THE ENFORCEMENT OF A RIGHT SECURED BY A MORTGAGE. THE LAW REQUIRES THE DEBTS BE DETERMINED THEREON AND OFFSETS ALLOWED; AND THE JUDGMENT OR ORDER SHOULD BE VACATED AS THIS WAS NOT DONE.

It is asserted by Pillsbury; and also asserted in the affidavit of Dwight L. King that the settlement between Pillsbury and Morleys had nothing to do with Nephi

herein. Said position is not sustained by either the facts, the pleadings, or the law.

Pillsbury attached to its complaint a copy of the chattel mortgage. It alleged it was filed in Millard County, Utah; that it is in full force and effect; that the debt secured thereby is in an amount in excess of \$2700.00; and is now owing from Morleys (mortgagors) to Pillsbury, and it is past due. Under "Second" said mortgage reads:

"This mortgage is given to secure the indebtedness of the mortgagors to the mortgagee created and to be created under and by virtue of the terms of one certain Turkey Raiser's Financing Agreement between the parties hereto dated January 20, 1953, and to secure the faithful performance by the mortgagors of the terms of said agreement * * *."

The prayer of the complaint then asked that Nephi be required to account; and upon said accounting, Nephi be ordered to pay over and deliver Pillsbury all proceeds from the sale of said turkeys not theretofore delivered to Pillsbury, and upon its failure so to do Pillsbury have and recover judgment against Nephi for the amount thereof, and for such other and further relief as may be proper.

Morleys in paragraph IV of their cross-complaint, in part plead as follows:

"That as part of the agreement between the plaintiff and these cross complainants, cross com-

plainants agree to purchase from the plaintiff whole grain pellets and other necessary feeds for the turkey poults. That all of the moneys advanced by the plaintiff under the mortgage were used by cross complainants for the purchase of feed for turkeys, for the care and raising of said turkey poults."

Part of paragraph X of said cross-complaint reads:

"That there remains due and owing on said mortgage a sum much less than the amount due to these cross-complainants from the plaintiff as a result of the breach, of implied and expressed warranties of the plaintiff's whole grain pellets."

In part the prayer thereof reads:

"these cross complainants have judgment against the plaintiff for the sum of \$23,634.00, less any sum due and owing under that certain mortgage of animate chattels dated the 1st day of April, 1953."

Other allegations of cross-complaint were that Pillsbury breached the warranties that ordinarily go with the sale of feeds; and as heretofore pointed out, then asked that the cross-complainants have judgment against Pillsbury less any sum due and owing under said mortgage. What could be plainer in a pleading as a request for an offset, without calling it such, than the words of the cross-complaint. There is no doubt that by Morleys request for relief, they tied the feeding contract and the mortgage together, and that all they did thereafter did not change the legal effect of these proceedings as they relate to Nephi.

This case is an action brought by a mortgagee under the terms of its mortgage. It appears our statute on actions brought on mortgages governs this action.

‘There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon * * * personal property, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due with costs and disbursements * * *.’

78-37-1 U. C. A. '53.

A situation not too unlike this one arose in a Utah case hereinafter referred to, except said action was brought to foreclose a mortgage, instead of recover the proceeds from the sale of the mortgaged assets. Said mortgage was given to secure payment for the construction of a building upon the property of the defendant. The plaintiff's assignor (an uncle of plaintiff) agreed to build a house in a certain manner; but did not perform it in accordance with its terms. The court in that case held the damages arising under the building contract were offset against the indebtedness under the mortgage, even with the mortgage in the hands of an assignee. *Stevens v. Doxey*, 58 U. 196; 198 P. 216.

Another Utah case of similar effect is one in which the plaintiff sought to foreclose a mortgage, but did not ask for any deficiency judgment. In that case, it was urged that there could not be any offset because there had been no request for a deficiency judgment.

In that case, the court said:

“The request or absence of request for a deficiency judgment does not determine whether or not a defendant may urge any defense which he otherwise might have. Foreclosure is statutory. Foreclosure proceedings on a mortgage securing a note in default must be conducted in accordance with the statutes, Sec. 104-55-1 to 9, U. C. A. 1943. It is necessary to have the court ascertain what sum of money, if any, is due and owing on the note and mortgage * * *. If it is determined that the mortgage has received funds sufficient to extinguish the mortgage indebtedness, and which funds should have been so applied, the mortgagor has a right to have such funds applied to the payment of the mortgage note as of the date when they should have been so applied.”

Stewart Livestock Co. v. Ostler et al, 105 U. 529 at p. 540-1; (144 P. 2d 276).

On Point I, we submit that this is an action to enforce a right secured by a mortgage, and the law requires that the debt owing from Morleys (mortgagors) to Pillsbury be determined and offset allowed thereon. As this was not done the judgment should be vacated and the trial court directed to proceed to adjudicate the amounts owing between the mortgagor and mortgagee.

POINT II.

DEFENDANT WAS NOT REPRESENTED BY COUNSEL;
OR IF REPRESENTED, ITS COUNSEL HAD NO AUTHORITY TO PLEAD AS HE DID; AND DEFENDANT WAS
ABANDONED BY COUNSEL WITHOUT NOTICE OR

KNOWLEDGE. JUDGMENT RENDERED AGAINST DEFENDANT WITHOUT NOTICE OR KNOWLEDGE IS WITHOUT DUE PROCESS OF LAW AND IS TO BE VACATED.

The evidence is clear and uncontradicted that no notice, letter or word was received from Mr. King, or other persons, by Nephi, its officers or agents of either or any of the following: (a) that Mr. King had filed a Motion to Change the Venue, (b) that he had filed an Answer in the name of the defendant, or (c) that he had in Nephi's name pleaded Nephi held \$2700.00 of proceeds from the sale of Morleys' 1953 turkeys. So there was and cannot be any employment by ratification, or estoppel by knowledge and failure to act.

It is said there must be a contract of employment, express or implied, between the attorney and the party for whom he purports to act or some one authorized to represent such party, 5 Am. Jur. 278.

Our Supreme Court in a case involving similar questions quoted with approval an earlier case in part as follows:

"Their appearance is prima facie evidence of authority to act, but when such authority is denied, or properly put in issue, it is competent to rebut by proofs any presumptions which may arise from such acts. If the attorney was without authority, then his acts could bind no one * * *.

It follows, as a logical result of the propositions before discussed, that a judgment rendered with-

out service, or upon the unauthorized appearance of an attorney is (* * *) void.”

Blyth & Fargo Co. v. Swenson, 15 U. 345 at 354-5, 49 P. 1027.

Further it is held in said case that the judgment will not stand, and the parties will not be left to their remedy against the attorney. Same effect: *Lowe v. Bank of Vernal*, 110 U. 496; 175 P. 2d 484. Judgment in said case was vacated by district court.

If in May, 1954 Dwight L. King was the attorney for Nephi herein, he had the following duties: to faithfully, honestly and consistently represent the interests, and protect the rights of his clients; and to discharge those duties with the strictest fidelity and the utmost good faith. 5 Am. Jur., Sec. 46, p. 286.

Our standards of representation of a client state:

“It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests, when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.”

Rule 6 of Professional Conduct of Utah State Bar.

The answer filed in May, 1955 by Mr. King in Nephi's name was without authority, or in excess of authority and purported to contain an admission which tended to create liability against Nephi. No written or

oral authority appears on the record on which that type of pleading was filed.

Even where there is no conflict of interest, counsel has no implied authority to make admission of liability against his client. Such authority must be expressly granted.

In an action involving an admission by counsel for appellant that the appellant was "liable" for the reasonable rental value of the lands, our Utah court held that such an admission was but a legal conclusion and was not binding either upon the person upon whose behalf it was purportedly made (appellant) nor upon the court. *Re: Hansen's Estate*, 55 U. 23, 184 P. 197, Syl. 3.

In relation to authority to confess a judgment against his client, the following appears:

"At common law a judgment was confessed pursuant either to a warrant of attorney or a cognovit actionem. And more recently the practice is regulated by statutes, in some states based upon this common-law practice. The manner in which the authority to confess judgment is created, whether at common law or under statute would seem to negative any implied authority on the part of the attorney merely from the relation of attorney and client."

B. C. Pr. and R., Vol. 1, Sec. 57, p. 66

While there is authority that a counsel for a party has authority to confess judgment, it is limited. The following illustrates the limitation:

“Moreover, a considerable number of decisions maintain the view that an attorney has no implied authority to enter a consent decree or confess judgment without the client’s direction, knowledge, or consent, and that where a judgment or decree is entered against the protest of the client or his instructions not to compromise, it will be held not binding on the client, especially when the judgment or decree is designated to carry into effect an unauthorized compromise.”

5Am. Jur. Sec. 101, p. 322—Attorneys at Law

The judgment appears to be one entered upon an unauthorized stipulation for confession of judgment, or one on motion for summary judgment. Judgment by confession is authorized by 78-22-3 U.C.A. '53. Rule 58A(e) provides “the party seeking the same must file with the clerk * * * a statement *verified* by the defendant * * * concisely stating the claim and that the sum confessed therefor is justly due or to become due;” and authorize the entry of judgment for a specified sum. No verified statement was filed; and no specified sum was pleaded.

Rule 56 (c) provides that a motion for summary judgment shall be served at least 10 days before the time fixed for the hearing. No such motion was served.

Surely the filing of an unverified answer in the name of Nephi “that it now holds the sum of approximately \$2700.00 which is a portion of the proceeds from the sale of turkeys delivered to it by Lafe Morley and

Callie Morley'' is, to say the least, a careless and flagrant disregards of the facts and duties of counsel for Nephi, if he were such. It is not only an abandonment of Nephi and its interests; but was an aider of his Morley clients interests. To contend Nephi held money for either the Morleys or Pillsbury was to the interest of the Morleys for interpleader or intervention, or both. It was against the interests of Nephi.

It was then the duty of Mr. King to take steps to terminate the apparent relationship which existed on the record, to make a full disclosure of the record to Nephi; and to inform Nephi that it should obtain independent legal advice. But on the contrary King says he wrote a letter in May, 1955 to Nephi, which was never received, and the copy of which was never produced by Mr. King; but he advised of its contents, part of which were:

"I do not think that it will be necessary for you to appeal (appear) or take any action at the time of the trial." (R. 84-5).

The same or similar language was used by another counsel who wrote his client and prepared an answer for a defendant where there was conflicting interests, believing he was doing right. But the court held defendant was deprived of a fair trial essential to due process and defendant was entitled to a new trial. *Hammett v. McIntyre*, 249 P. 2d 885, Cal.

In part Mr. King attempts to claim notice was given

Nephi in February, 1957 just before judgment, by calling attorney Ed Clyde and advising him of the proposed settlement. The affidavit of Mr. Clyde shows that the information given to him was not given by him to Nephi and also that he was not the attorney for Nephi in this case or generally, and that he so advised Mr. King.

“The relationship in a particular case cannot be established by the fact that it exists in some other case or has existed at some remote time, even though the subject matter of the two cases bears some relation to the other.

5Am. Jur. Sec. 29, p. 279.

“In our opinion, it would be a dangerous precedent to hold that the relationship of attorney and client in a particular case can be established by the fact that such relationship exists in some other case, even though the subject matter of the two cases may bear some apparent relation to each other * * *.”

Sandall v. Sandall, 57 U. 150 at p. 161 193 P. 1093.

On Point II defendant submits the judgment and order were entered without representation by counsel; or after abandonment by counsel, and without authority notice or information to Nephi, and should be vacated.

POINT III.

CONFLICTING INTERESTS OF DEFENDANT AND CROSS-COMPLAINANTS MAKE THE PLEADING FILED HEREIN IN THE NAME OF DEFENDANT IN 1954 AND THE ONE FILED IN 1955 OF NO EFFECT.

The conflicting interests of Morleys and Nephi make the answer filed by Dwight L. King in 1955 in Nephi's name a filing without any authority of Nephi, of no force and effect, and void as pleading of Nephi.

The law upon this question of the effect of such conflict of interests is quite clear. In a matter in California involving an incompetent and a guardianship, the court said:

"An attorney has a constant and perpetual rendezvous with ethics. He stands as a trustee for his clients interests—a most sacred and confidential relationship. It is elementary that a conflict of interests between a trustee and his beneficiary is never permissible. As a trustee cannot maintain an attitude adverse to his beneficiary, so an attorney may not represent claims inconsistent with those of his clients, or conflicting claims of two clients. He cannot serve two masters."

McClure v. Donovan, 186 P. 2d 718.

Our Utah Law is not without good examples of what this type of conflicting interests does in relation to the rights of clients. One of the early cases that appeared before our court was one in which an attorney held a promissory note for one client; and thereafter for another client he had obtained judgment against the same persons for whom he held the note; and thereafter through legal proceedings caused the note to be levied upon and sold. Thus conflict arose as to the ownership of the note and the certificates of stock that may have

passed under the mortgage or a deed. In that case our court struck down the proceedings under which the note was levied on, and among other things said, therein referring to an earlier case in Utah and quoting it:

“It is a well settled general rule that an attorney cannot represent conflicting interests. For more cogent reasons an attorney may not, by a contract of employment with his client, place himself in a position where his own interests are in conflict with those of his client. The relation of attorney and client is one of trust and confidence requiring the attorney to use all the care, skill, and diligence at his command to serve his client alone without any obligation to serve a master whose interests may be adverse to those of his client, and without any temptation to serve his own interests at the expense of the interests of his client. The rule that an attorney may not by his contract of employment place himself in a position where his own interests or the interests of another, whom he represents, conflicts with the interests of his client, is founded upon principles of public policy * * *

“In cases where applicable the rule has been rigidly adhered to by the courts * * *”

Malia State Bank Com'r, et al v. Giles et al,
100 U. 562, at p. 571; 114 P. 2d 208.

The above quotation is from *Gillette v. Newhouse Realty Company*, 75 U. 13, 282 P. 776, 779.

In *Gillette vs. Newhouse Realty Company supra*, our court struck down the claim of a lawyer to recover for

his services in which the only conflicting interest was that he was to recover as his fee 10% from one client which said client as a joint defendant might have the other joint defendant pay in satisfaction of claims against them both. In other words, counsel represented the hotel company sued jointly with an elevator company for damages resulting from the fall of an elevator. He was to get as his fee 10% of the amount which the elevator company would have to pay on this judgment.

In our case, it would be a travesty on justice to permit counsel who purportedly appears for Nephi to say that Nephi had money in its hands, which all the evidence shows to be untrue; and then for another party, Morleys, who actually owed Nephi, to obtain money from Pillsbury which should have paid Morleys' debt; and assist Pillsbury to get judgment against Nephi who never did have an opportunity to appear and defend.

POINT IV.

THE COURT ERRED IN REFUSING TO VACATE THE JUDGMENT IN THAT IT IS EQUITABLE AND FAIR THAT DEFENDANT BE GIVEN NOTICE; THAT IT BE REPRESENTED BY COUNSEL; AND THAT IT HAVE ITS DAY IN COURT, WHERE IT HAS A MERITORIOUS DEFENSE.

The record in this case shows that the motion of Morleys to intervene was not served upon Nephi (R. 12). It shows the cross-complaint of Morleys was not served upon Nephi (R. 11). Pillsbury's answer to the cross-complaint was not served on Nephi (R. 20). No notice

was given to Nephi of the trial setting of the above cause (R. 21). No notice was given defendant of the continuance of the trial of February 13, 1957, if any occurred. The stipulation of attorney King purports to stipulate judgment against Nephi without its knowledge or approval. It was not served upon Nephi (R. 25). The stipulation for dismissal entered into by Pillsbury's and Morleys' counsel was not served upon Nephi (R. 26). All pleadings and actions by the court mentioned in this paragraph affected Nephi, and substantially contributed to the court entering judgment against Nephi.

"Rule No. 5(a) of Civil Procedure in part provides " * * * every pleading subsequent to the original complaint * * * every written motion other than one which may be heard ex parte and every written notice, appearance, demand, offer of judgment * * * and other paper requiring service shall be served upon each of the parties affected thereby * * *."

Of the above rule, it is said:

"Rule 5 is simple, clear and effective. It requires notice to every party affected, of every step in the action. The notice must be given by the service of the pleadings, notices and papers in the manner provided by subdivision (b) and (c)." Fed. Pra. and Pro. Rules Ed. Vol. 1, Sec. 202, p. 357, Barron & Holtzoff.

"A judgment is irregular where its rendition is contrary to the course and practice of the courts—that is, where proper rules of practice have not been followed or where some necessary

act has been omitted or has been done in an improper manner. There are even cases in which a departure from the established modes of procedure have been held to render the judgment void."

31*Am. Jur. Judg. Sec.* 402, p. 67.

The failure of Pillsbury and Morleys to follow the established Civil Rules of Procedure were a substantial part of the causes of Nephi not having its day in court.

"Notice and opportunity to be heard are essentials to validity of judgment, without which judgment is denial of due process, and not entitled to respect of other courts."

Morley et al. v. Morley et al. (Wash.) 1924, 230 P. 645.

By lack of notice, lack of representation by counsel and receipt of no information, Nephi did not have its day in court.

"It is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court, or an opportunity to be heard."

31*Am. Jur. Sec.* 411, p. 74.

The tendered answer of Nephi sets out meritorious defenses. Nephi's meritorious defenses are:

1. The mortgage debt must be determined against the mortgagors, before Nephi can be liable thereon.
2. Nephi is not indebted to Pillsbury. It did not have on hand any moneys from sale of mortgaged turkeys. It paid the full sale price and more.

3. Nephi was entitled to purchase the turkeys from Morleys as agents of Pillsbury; and to rely upon their representations as to amount owing.
4. Settlement between Pillsbury and the Morleys discharged the mortgage as to Nephi.

In support of the discharge of the debt ("4" above) we find the following:

"The general rule is that where mutual debts between two persons are reciprocally extinguished by agreement, a mortgage securing one of them falls with the extinguished of the debt secured."

36 Am. Jur. Mortgages, Sec. 428, p. 902.

In the few instances of suits to enforce chattel mortgages the view has been taken the facts and circumstances asserted were meritorious defenses, and justified the vacating of th judgment. 174 ALR 163.

On Point V, we submit that the personal judgment against Nephi dated February 18, 1957 and entered February 21, 1957; and the Order of Dismissal of the cross-complaint as it affects Nephi adversely, by letting said Morleys out of this action, in equity should both be vacated and set aside; and the tendered answer of the defendant be permitted to be filed and the cause set down for trial.

POINT V.

RELIEF SHOULD BE GRANTED FROM JUDGMENT ENTERED UPON, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT; OR OTHER JUST REASON; AND IT WAS

AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO VACATE ITS JUDGMENT AND ORDER UNDER FACTS HEREIN.

Our Utah Rule of Civil Procedure 60 (b) in part provides :

“On motion and upon such terms as are just, the court may in the furtherance of justice, relieve a party or his legal representative from a final judgment, order, or proceedings, for the following reasons :

- (1) * * *, inadvertance, suprise or excuseable neglect;
- (2) * * *
- (3) fraud whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) * * *
- (5) the judgment is void; or
- (6) * * *
- (7) any other reason justfiying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1) or (3), not more than three months after the judgment, order, or proceeding was entered or taken.”

In November, 1953 Nephi relied upon the misrepresentation of Morleys that they only owed Pillsbury approximately \$43,000.00 and were entitled as surplus over the mortgage debt to \$7,000.00 on the estimated pounds of turkeys sold to defendant, which defendant paid to and for them. Late in November 1953 Lafe Morley was informed of overpayment by Nephi to Morleys. In Febru-

ary, 1954 Lafe Morley recognized the overpayment had been made when he signed a note to Nephi promising to pay it \$6,012.58.

For over twenty months following May, 1955 Morleys by pleadings in the above action filed by their attorney Dwight L. King, misrepresented that Nephi had on hand approximately \$2700.00 of receipts from sale of Morleys 1953 turkeys.

It was a surprise to Nephi's officers to learn near the end of February, 1957 that in May, 1954 a motion to change the venue of the cause had been filed in Nephi's name; and that a year later an answer had been filed in its name stating it held approximately \$2700.00, which was false. It was a surprise to Nephi to find on or after February 22, 1957 that judgment had been entered in favor of Pillsbury and against Nephi. For three years last past it had relied upon the assurance of Morleys and for over thirty-one months upon attorney King, that it would be protected from the claim of Pillsbury against Nephi, and Pillsbury's claim would be offset on Morley's bill against Pillsbury herein.

Surely it is excuseable for the manager-president of Nephi to be lulled into a false sense of security, when for over 31 months after May, 1954, he had no word and no information that the above action was proceeding against Nephi; and during said time never learned Pillsbury and Morleys were contemplating having judgment entered herein against Nephi, and to make their own

settlement between them and not recognize an offset. (By the stipulated settlement Morleys obtained more money from Pillsbury than the judgment of Pillsbury against Nephi).

This court has granted relief from failure of our trial courts to vacate default judgments and other judgments within the provisions of U.R.C.P. 60 (b). In *Commercial Bank Trumbo*, 17 U. 198, 53 P. 1033; *Cutler v. Haycock*, 32 U. 354, 90 P. 897; and *Cannon v. Tuft*, 3. U. 2d 410; 285 P.2d 843 it did so. None were more meritorious than this case on appeal.

In a Utah case in which the lower court was sustained, this court recently approved the following rule as the basis of relief from such judgment:

“We are entirely in accord with the authorities cited by plaintiff to the effect that it is generally regarded an abuse of discretion for a trial court to refuse to vacate a default judgment where timely application is made and there is any reasonable grounds for doing so to the end that cases may be decided on their merits.”

Chrysler v. Chrysler, 5 U. 2d 415; 303 P.2d 995.

In *Utah Commercial Bank v. Trumbo*, supra, our Supreme Court held that where the defendant was served and he had his wife submit the cause to a certain firm of attorneys; and then he left the state on business relying they would care for his case; and their letters to him and their notice of withdrawal from his cause did not

reach him; it was an abuse of discretion for the trial court not to vacate the judgment, when he made timely application.

In *Cutler v. Haycock*, supra, the Supreme Court holds that the mere fact the appellate court thinks the lower court should have granted the motion is not the test in all cases for reversing the judgment, but it raises a serious doubt, and in such case a reasonable doubt is always resolved in favor of granting a trial upon the merits.

We submit laymen are entitled to rely upon their partners representations and upon a partners counsel where no notice, fact or information comes to their attention that such reliance is not well placed; and accordingly it was an abuse of discretion for the trial judge not to vacate the judgment and give Nephi an opportunity to be heard on the merits.

POINT VI.

JUDGMENT SHOULD BE VACATED BECAUSE OF PROCEEDING CONTRARY TO U.R.C.P., FOR LACK OF TRIAL; FAILURE TO ENTER FINDINGS; AND FAILURE TO DISPOSE OF MATERIAL ISSUES.

U.R.C.P. 5 (a), in part quoted above was not followed.

Rule 6 (d) and 7 (b) required motions shall be made in writing, and notice of hearing thereon shall be served not later than 5 days before the hearing. No notice of motion was given Nephi.

Rule 12 (d) provides a motion for judgment on the pleadings shall be determined before the trial on the application of any party unless the court order that the hearing and determination thereof be deferred until the trial. If additional matters are considered, the motion shall be considered as one for summary judgment; and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. No motion was served on, or notice given Nephi of request for the judgment.

Said Rule 56 (c) provides that a motion for summary judgment shall be served at least ten days before the time fixed for the hearing. No such motion or notice was given.

The judgment entered February 21, 1957 recites the matter came on regularly for trial on a different date than that set by the court, upon the pleadings reciting an admission of liability, and the stipulations of other parties than Nephi against whom the judgment was entered. But there is no minute of any trial. No record appears in the judgment of who appeared, who moved the court for the judgment, or who was and who was not represented. No findings of fact or conclusions were made or entered herein.

If pleadings filed in Nephi's name are of any effect, then the material issues tendered by the pleadings not disposed are: (a) Pillsbury's complaint alleged its de-

mand for an accounting by Nephi for turkey proceeds. Only an approximate amount was given in Nephi's answer. It was not determined what if any amount was received to which Pillsbury was entitled; nor to whom the same was due. The accounting would show no sum on hand. (b) There was no adjudication of the amount due and owing under the mortgage. (c) No amount was determined as owing from the mortgagee to the mortgagor as a necessary condition before liability could fall upon Nephi. (d) Answer tendered issue there was no sum owing from the Morleys to Pillsbury, and Nephi was entitled to have same tried. (e) Prayer was made for an order to protect Nephi; and whether or not Nephi was entitled to that order was not adjudicated. (f) Nephi and Morleys prayed for equity, and no determination of the equities between the parties was made. (g) Morley tendered issue that there remained due and owing on the mortgage a sum less than the amount which Pillsbury owed Morleys; and prayed for judgment against Pillsbury in a sum certain less any sum due and owing under the said mortgage. Nephi was very much interested in those issues, and was entitled to have them adjudicated.

“A judgment without trial and determination of all the issues properly raised is erroneous. It is a general rule that the ***, findings, and judgment must be as broad as the issues and must respond to all issues of both law and fact, ***.”

33 C.J., Sec. 84, p. 1135-6.

“In view of the fact that the issue was neither raised nor tried, in fairness it should be sent back

for a new trial so that the parties will have a full opportunity to marshal and present whatever evidence they may be able to find relating to this issue."

Fretz v. Anderson, 5 U.2d 290 at p. 302; 300 P.2d 642.

"No specified finding was made by the trial court on this matter; ***. Since the judgment was rendered on the basis of outstanding drafts, rather than the checks whose payment was wrongfully indced by appellants, this case must be reversed and remanded for further proceedings."

Farmers & Merch. Bank v. Universal C.I.T. Cr. Corp., 4U.2d 155 at p. 160-1; 289 P. 2d 1045.

On Point VI, defendant submits that judgment should be vacated because of proceeding contrary to Utah Rules of Civil Procedure, for lack of trial, for failure to enter findings, and for failure to dispose of material issues.

POINT VII.

VACATION OF THE JUDGMENT AGAINST DEFENDANT DATED FEBRUARY 18, 1957; AND VACATION OF THE ORDER DATED FEBRUARY 21, 1957 OF DISMISSAL OF MORLEYS' CROSS-COMPLAINT SHOULD BE MADE AS DEFENDANT'S CLAIM AGAINST MORLEYS MAY BE RES ADJUDICATA AND DEFENDANT WILL HAVE BORN A SUBSTANTIAL LOSS WITHOUT A REMEDY UNLESS VACATED.

In defendant's motion for vacation of the judgment herein, one reason assigned was, that unless relief was

granted to defendant against the Morleys herein its claim against Morleys would probably be res adjudicata and defendant have no relief (R. 30). In defendant's tendered answer filed with its said motion defendant pleaded that if for any reason the offset of Morleys' claim against plaintiff herein was not made herein, that in fairness defendant is entitled to file a proper claim herein against the Morleys and to be heard thereon (R. 48). To grant that relief, and to do equity Morleys should not be dismissed as parties hereto and the order dismissing them should be vacated.

The affidavit of Dwight L. King urges the court to disregard this part of the record as another action of accounting is pending between Lafe Morley, Ray Nielsen and M. L. Harmon and says he is informed this matter is a part thereof. Defendant never knew or had reason to believe this issue would ever arise; and the issues therein were joined before judgment herein was entered. But when it appeared the trial court in the above cause likely would not grant relief to defendant herein, a supplemental pleading was filed in the accounting case on this judgment. Prompt objection was made therein that the supplemental issue tendered was no part of the accounting case, but should be settled herein; and the trial judge on pre-trial indicated he regarded the matter as res adjudicata so far as that case was concerned (R. 51, 53). Unless relief is granted herein Nephi has wrongfully been imposed upon, has sustained substantial loss; and

likely will never have an opportunity to have its day in court thereon.

“Generally a judgment in favor of plaintiff is adjudication, not merely as to existence of plaintiff’s cause of action, but as to non-existence of any defense thereto.”

Todaro v. Gardner, 3 U.2d 404; 385 P.2d 839.

On Point VII, it is submitted that both the judgment in favor of Pillsbury and against Nephi and order of dismissal of the cross-complaint of the Morleys should be vacated and set aside; and Nephi permitted to plead against said Morleys herein.

CONCLUSIONS

1. This was an action for the recovery of a debt or the enforcement of a right secured by a mortgage upon personal property. In absence of a stipulation by all parties, the court should have determined the issues raised by the pleadings and adjudged the amount due if any. This was not done.

2. Mere conversation of Mr. Harmon with Mr. King, and the latter’s filing two papers in the name of Nephi did not constitute his employment. The presumption that Dwight L. King was attorney for Nephi by filing of said pleadings herein, was overcome by a denial of such employment by Nephi; repudiation by Nephi of the pleadings filed by attorney King in Nephi’s name; and the express assertion by said attorney that he did not represent Nephi herein and his only interest herein was in the

cross-complainants, Lafe Morley and Callie Morley. Where judgment and order were entered without notice to defendant or knowledge by defendant of the likelihood thereof, and contrary assurances were given, the judgment is of no force and effect and should be vacated.

3. The interests of Nephi and Morleys conflicted. When Dwight L. King determined he was going to plead in Nephi's name it held money for Pillsbury on a mortgage debt of the Morleys, or for the Morleys if the mortgage were satisfied, and he did not obtain such information from the defendant's records or its officers, and he plead for Morleys such money was held by Nephi, that was a conflict of interest. He then had a duty to fully advise the parties thereof. He did not do so. King's duty was to advise Nephi he intended to sign a stipulation that Pillsbury could have a judgment against Nephi, and dismiss the case as to the Morleys. His interest for Morleys was otherwise. Accordingly the pleadings filed herein in Nephi's name by Dwight L. King are not binding on Nephi.

4. Lack of notice to Nephi, failure of Pillsbury and Morleys to serve their pleadings on Nephi, and failure of Nephi to receive any information as to the progress of the case, having been assured it would be protected, substantially contributed to the error of the trial court entering judgment against Nephi and dismissing cause as to Morleys. Thereby Nephi did not have its day in court

and Nephi is in justice entitled to the opportunity to plead and be heard.

5. The misrepresentation of facts to the defendant in November, 1953 by Morleys; and the reliance of defendant upon the same and statements of Morley and King that Nephi need not be concerned—it would be protected—are just and legal reasons why the judgment and order should be vacated. Failure of the trial judge to vacate the same was an abuse of discretion. Said judgment and orders should be vacated, Nephi permitted to file its answer, and be given its day in court.

6. The U. R. C. Pr. 5, 6, 12, and 56 (c) were not followed, and are applicable. If the pleadings in Nephi's name are of any force or effect against Nephi, then the following issues in the pleadings were not adjudicated: (a) issues on accounting for funds claimed to be in Nephi's hands and in which Pillsbury and Morleys claimed an interest; (b) the amount due on the mortgage debt; (c) issue on complaint and cross-complaint of what amount was owing Pillsbury by Morleys, and the amount less than said amount to which Morleys were entitled to judgment against Pillsbury; (e) what orders Nephi was entitled to have entered against Pillsbury and Morleys for its protection; and (f) the equities between the parties.

7. The judgment and order herein should be vacated so the claim of Nephi against the Morleys will not be res adjudicata for failure of the same to be determined here-

in; and to save an innocent party from paying the debt of another without recourse; and to prevent an unjust enrichment of the Morleys herein.

Respectfully submitted this 8th day of January, 1958.

UDELL R. JENSEN
Of JENSEN & JENSEN, *Lawyers*
Attorney for Defendant