

1950

LaVar Park v. Moorman Manufacturing Company and Gail Barron : Brief of Appellant

Utah Supreme Court

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David L. McKay; George M. McMillan; McKay, Burton, Nielsen and Richards; Attorney for Appellants;

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In the Supreme Court of the State of Utah

LaVAR PARK

Plaintiff and Respondent

— vs. —

MOORMAN MANUFACTURING
COMPANY,
a corporation

Defendant and appellant

and GAIL BARRON,

Defendant

Civil No.
7456

FILED

SEP 5 1950

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

LaVAR PARK

Plaintiff and Respondent

— vs. —

MOORMAN MANUFACTURING
COMPANY,

a corporation

Defendant and appellant

and GAIL BARRON,

Defendant

Civil No.
7456

Brief of Appellant

STATEMENT OF FACTS

The plaintiff in this action is engaged in the chicken business in Riverton, Utah (R. 120), and the defendant Moorman Manufacturing Company is a corporation organized in Illinois, and engaged in the business of the manufacture and sale of various feeds for poultry and livestock. (See R. 627 et seq.) The plaintiff alleges in his complaint that on or about June 9, 1948, defendant Gail Barron

contacted plaintiff at his residence in Riverton and represented himself to be a salesman for the Moorman Manufacturing Company, and represented further that the company was selling a protein concentrate for chickens which would save considerable time, effort and expense in the feeding of chickens. (R. 1-5) The new feed was sold under the trade name "Poultry Mintrate 40". It is a concentrate intended to be fed with other feeds. (R. 621)

The plaintiff's suit is really based upon three theories. The first is that plaintiff made a written agreement with the defendant through its agent guaranteeing certain results through the use of "Mintrate 40" and the "self-feed" method of feeding. The second theory is that of a breach of express warranties under the Uniform Sales Act. The third theory is that the defendant breached the implied warranty of fitness for a particular purpose, as defined under the Sales Act. The trial court refused recovery under the first of these three theories because plaintiff failed in his proof. (Instruction No. 2; R. 79) Recovery was permitted under either or both of the other two. (Instructions 14, 15 and 16; R. 87-89)

Because one of the theories upon which recovery was permitted was that of express warranty, the conversations between Barron and Park are set forth in some detail under Point I of this brief. In substance they were to the effect that the Moorman Manufacturing Company was offering a new feed to save chicken men time and money; that chickens using this feed would not moult and would produce not less than 65% and that there had been better results than that. (R. 126-127) Barron said that the new feed had been tried numerous times and that it had been

proved to be the equal or superior of any feed now on the market. (Ibid)

Two methods of feeding chickens were described in the testimony. The "mash" method consists in keeping mash before the birds at all times, and feeding scratch once a day on the floor of the coops. Alfalfa and grit are often fed also. The "self-feed" or cafeteria method consists in keeping concentrate and oats or barley before the birds at all times, with grit or some other form of calcium, and feeding scratch, grain, wheat or corn on a limited basis. (R. 624) The scratch is scattered on the floor of the coops. The testimony is that Barron recommended the "self-feed" method to Park.

Apparently the plaintiff believed that the "self-feed" method was revolutionary in the poultry business. He stated without hesitation in cross-examination that this lawsuit is based upon the idea that there is something wrong with the method. (R. 238, 239)

After the plaintiff had agreed to use the new feed by this method for part of his chickens, but before any feed had arrived (R. 135-136), Barron wrote out a statement on a scratch pad in which he purported to speak for the Moorman Manufacturing Company. This written statement is as follows (Exhibit C):

"It is agreed that the LaVar Park feeds approximately 2850 laying hens in accordance with the 'self-feed' sponsored by the Moorman Manufacturing Company. It is further agreed that in the event of these birds failing to produce an equal amount of eggs for the same food costs as his other hens, now on a different method of feeding, the Moorman Manufacturing Company will reimburse

Mr. Park the entire amount of the money difference.

In the event of sickness an uninterested veterinary will be secured by Mr. Park and the representative of the Moorman Manufacturing Company, and the cause of the sickness will be determined. In the event that the illness is caused by the feeding program, the Moorman Manufacturing Company will reimburse Mr. Park for his loss. In the event of illness by some other cause the Moorman Manufacturing Company will not be responsible.

This agreement is entered into on the 19th of June, 1948.

Signed—Gail Barron
Moorman Manufacturing Co.
Representative.”

The detailed circumstances surrounding the execution of this writing are not here discussed, because in the first place there was no proof of the kind required under the first paragraph of the writing, and in the second place, no veterinary was obtained, as agreed upon. The document was admitted by the Court on the theory that it tended to corroborate the plaintiff's testimony as to the oral representations. (R. 140)

Plaintiff purported to state three causes of action in his complaint. The First Cause of Action set forth the statements and representations made by Barron to plaintiff, and then stated that they were untrue; “that said feed together with the method of feeding was not as good or better than feeds now on the market and that by reason of the false representations and warranties of the defendant and reliance thereon by the plaintiff, plaintiff was

damaged. (R. 1-3) The Second Cause of Action stated that by reason of the false representations and warranties, plaintiff had lost "more than half of 2850 hens which he originally placed on the "Mintrate 40" through culling and deaths and as a result thereof will be greatly damaged through the loss of egg production in the future", and that he was damaged in an additional amount as loss of profits. (R. 3, 4) The Third Cause of Action, which was filed after the first pre-trial conference pleaded a breach of the implied warranty of fitness for a particular purpose under the Sales Act. (R. 39, 30)

Defendant Gail Barron was never served and did not appear as party to the action, although he testified as one of the plaintiff's witnesses.

When Park met Barron, the plaintiff was alarmed over picking in his young chickens; in fact, Barron first sold him some minerals to stop the picking. This was before Mintrate was discussed. (R. 179-180)

The conversation concerning the qualities of "Mintrate" occurred around the middle of June, 1948. Soon after, the plaintiff put 2850 chickens on defendant's feed and the method of feeding advocated by Barron, and kept approximately 3500 on the mash method and the kind of feed he had been using. (R. 142-143) At first he was satisfied with the results of the Mintrate. (R. 144) In about three weeks his production on these birds had risen to approximately 63½ %. (R. 144) At about that time he began to notice an unusual amount of picking, and his testimony is that the picking occurred much more severely in the Mintrate pens than in the conventional feed pens. (R. 146-148) He states that some of the Mintrate

chickens lost weight and that many of them died, but he was unable to produce any figures from which could be ascertained the relative deaths during the months of July, August and September. He used the feed and feeding method until approximately August 18th, when it was discontinued. (R. 148)

From the time of the first picking in his chickens—before he fed Mintrate—to the time of the trial, a period in excess of sixteen months, plaintiff never consulted a veterinary concerning the illness or loss of production in his flocks. His only evidence as to the cause of the picking, deaths and loss of production in his birds was that three chicken producers in Salt Lake besides himself testified that they conducted similar operations during the time involved and comparable numbers of chickens were placed on their usual diet and feeding program and on the “self-feed” and “Mintrate 40” by each of these witnesses. Although none of these witnesses had figures any more reliable than Park, they were permitted to testify in substance and effect that the chickens on the mash program prospered while the birds on the “Mintrate” using the “self-feed” plan became ill.

There was absolutely no testimony by the plaintiff that tended to show that any deleterious substances were used in Poultry Mintrate 40, although plaintiff did admit that the sample of the feed was being tested. All of the testimony by persons who had had any experience with the “self-feed” method was that the method was sound, and that when it was properly used it gave excellent results. (See testimony of Dr. Wallace Emslie, R. 495-530; Dr. C. I. Draper, R. 626-636) The “self-feed” method was

extensively tested by a number of state universities, with the result that it was highly recommended. (See testimony of plaintiff's witness, Wood, on cross examination, R. 380-381, 391-393.)

There is likewise nothing in the record from which the jury could have inferred that the contents of Mintrate 40 are not entirely satisfactory and proper for chickens. The defendant feed company takes great care in maintaining the proper proportion of ingredients in the feed. This formula is based upon scientific principles and sound poultry practice. No witness testified that the ingredients in the feed are not wholesome and nutritious. All of the testimony that was produced, in fact, is to the effect that the feed is entirely proper for chickens, and that it will sustain and improve laying hens. The plaintiff's testimony that his chickens "starved to death" by eating too much Mintrate and too much oats is absolutely ridiculous.

It is interesting that one of plaintiff's witnesses stated that he was acquainted with the use of "Mintrate 40" in the mash method of feeding, but that he had not previously tried it under the "Self-Feed" plan. His testimony was that under the mash method the feed was successful and satisfactory. Plaintiff himself said he believed that it was the feed and combination of the oats that produced the unfortunate results. (R. 238-239) At another place in his testimony plaintiff states that his chickens starved to death from eating too much oats. (R. 187) Plaintiff's objections were to the quantity of oats. (R. 239)

It is not contended that the defendant Moorman Manufacturing Company sold plaintiff any oats. Nor is

there any evidence to the effect that chickens fed oats alone would die from starvation. On the contrary, oats is the best single grain for chickens (See testimony of Emslie, Draper and Wood, R. 495-530, 626-636, and 380-381, 391-393, respectively).

Some time around the middle of August, 1948, the defendant company learned that plaintiff was dissatisfied with the results he was obtaining, and it sent its manager of the service department, Roger Mittelberg (sometimes spelled "Mittleberg" in the record), to investigate. Mr. Mittelberg did not learn that plaintiff had been guaranteed any results or that plaintiff claimed that defendant was liable for breach of warranty until August 28th. On this date he saw for the first time the writing heretofore referred to. He and Park ended their discussion in a very unfriendly attitude. Mittelberg's testimony was that he told Park the company was not bound by the writing or anything that Barron said. (R. 799-801) Park hedges somewhat on the words used but he testifies that he definitely got the impression that the company did not consider itself liable. (R. 205, 239) At that time plaintiff had ceased using the feed and was back on the mash method. (R. 204)

Plaintiff's attempted proof of damages is somewhat involved, and it will be discussed in more detail under Point V of this brief. At this place we will say simply that he hoped to recover not only for loss of chickens during the time they were fed "Mintrate 40" under the feeding method indicated right up until the time of the trial, but in addition thereto he asked for damages on the theory that the birds which died would have laid a

certain number of eggs if they had lived, and that he should be permitted to recover the value of those eggs.

During the spring, summer and fall of 1948, plaintiff's birds were infected with chicken-pox (R. 193, 199), tracheitis, pullorum, big liver (R. 186) and Newcastle. (R. 206) All of the diseases except Newcastle and big liver were in the chickens before July. Big liver was present to some extent throughout the entire summer and fall, but because plaintiff had no expert help with his chickens nobody was able to say exactly the extent to which the deaths were contributable to this disease. Newcastle hit his flocks during the latter part of September and the early part of October. At this time the birds went into a moult. Plaintiff was unable to say how many of his chickens died from picking, how many died from Newcastle, how many were lost from big liver or other causes. His only counts in fact were at the time he moved the 2850 across the road, about June 1, 1948, and on December 4, 1948. (R. 274)

STATEMENT OF POINTS RELIED UPON

POINT NO. I. THE COURT ERRED IN SUBMITTING THE CASE TO THE JURY UPON THE THEORY OF EXPRESS WARRANTY.

A. *No statement of fact was made to Park such as constituted an express warranty.*

B. *Park did not rely on any oral representation.*

C. *The alleged statement of fact submitted to the jury as a warranty was not proved to be untrue when made.*

POINT NO. II. THE COURT ERRED IN PERMITTING THE JURY TO FIND EITHER (A) THAT BARRON HAD EXPRESS OR IMPLIED AUTHORITY TO MAKE ANY WARRANTY WHATSOEVER CONCERNING DEFENDANT'S FEED, OR (B) THAT MOORMAN MANUFACTURING COMPANY RATIFIED ANY STATEMENT OR WARRANTY MADE BY BARRON, OR (C) THAT MOORMAN MANUFACTURING COMPANY WAS ESTOPPED TO DENY THE AUTHORITY OF BARRON TO MAKE ANY STATEMENT OR WARRANTY.

A. There was no express authority to make any statements as warranties; there was no implied authority to make any such statements inasmuch as the proof by both plaintiff and defendant is unequivocal and clear that such statements as are relied on by the plaintiff are unusual and not customary.

B. Defendant Moorman Manufacturing Company is not bound by the statements or representations of fact, if any, of Barron on the theory of ratification.

C. There was no justification for submitting this case to the jury upon the theory that the Moorman Manufacturing Company is estopped to deny liability for the statements of Barron, or for his authority to make any statements or warranties allegedly on behalf of this defendant.

POINT NO. III. THE COURT ERRED IN HOLDING THAT DEFENDANT IS LIABLE IN THE THEORY OF BREACH OF EXPRESS AND IMPLIED WARRANTIES AS TO THE METHOD OF FEEDING AS DISTINGUISHED FROM THE FEED ITSELF.

POINT NO. IV. THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT PLAINTIFF'S

LOSS, IF HE HAD ANY, WAS THE PROXIMATE RESULT OF THE USE OF EITHER POULTRY MINTRATE 40 OR THE SELF-FEED METHOD OF FEEDING, OR BOTH.

POINT NO. V. THE COURT ERRED IN ADMITTING EXHIBIT C.

POINT NO. VI. THE COURT ERRED IN ITS THEORY OF DAMAGES.

A. The Court erred in permitting recovery based upon the loss of chickens and, in addition, the loss of profits from the dead chickens.

B. The evidence with reference to loss of profits was remote and conjectural. It lacked the definiteness and completeness required by law for proof of this nature of damages. The Court, therefore erred in permitting the case to go to the jury upon the theory of loss of profits.

C. The procedure in the trial with respect to proof was prejudicial to defendant's cause.

D. In instructing upon damages, the Court failed to take into consideration the intervening causes which the evidence of the plaintiff shows to have proximately caused or proximately contributed to the deaths and/or loss of production, if any, in plaintiff's chickens, and the Court failed to instruct the jury properly upon the duty of the plaintiff to minimize his loss.

ARGUMENT

POINT NO. I

THE COURT ERRED IN SUBMITTING THE CASE TO THE JURY UPON THE THEORY OF EXPRESS WARRANTY.

The Court instructed the jury that the plaintiff could recover upon either of two basic theories. (Instruction No. 14; R. 87) The first theory was that of breach of express warranty. The second theory was that of breach of an implied warranty of fitness for a particular purpose. (Instruction No. 18; R. 88, 89) The fallacies of the second theory are pointed out in the brief under the heading dealing with proximate causation. We desire to point out under the present heading that there is no basis in law for submitting the case to the jury on the theory of express warranties under the Sales Act.

The first essential for recovery based upon the theory of express warranty is that the seller must have made a statement of fact as distinguished from a statement of opinion or "puffing" or "dealers' talk" or predictions or broken promises. The theory of express warranty in the law of sales grew out of the theory of fraud in the law of torts. In both situations, recovery is based upon the making of a statement of fact, an act in reliance on the statement, and the falsity of the statement. In this case neither of these elements was present. There was no statement of fact, no reliance, and no proof that any statement made was untrue at the time of its utterance.

A. No statement of fact was made to Park such as constitutes an express warranty.

The Court's attention is here invited to statements, according to plaintiff and his witnesses, made by Gail Barron to Mr. Park as alleged inducements for the sale. Mr. Park testified: "He said there would be no moulting from fifteen or eighteen months over the laying period of

a chicken, and they would never lay below sixty-five per cent, and that there had been better results than that; that one woman was supposed to have got ninety per cent." In response to the question, "What did he say about this particular method of feeding?" Park said, "Well, he said there were three ways to feed and the number one method was the easiest, and that is what they recommended mostly was the number one feeding program." (R. 126, 127) To the question, "Did he make any other statement concerning this feed during that time?", Park said: "Well, just that it was a good feed and thought well of, that is about all." (R. 128)

Mrs. Park stated the conversation as follows:

"A. So I walked over to them and he asked me what I thought of it. I told him I did not know anything about the mintrate or his feed plan, and he said:

'Well, Mrs. Park, it is cheaper feed, and it will stop the pick-outs and blow-outs. It will make your chickens pay 65 per cent or more, from 10 to 15 months.'

I said: 'That is pretty good feed, then.'

He said: 'Don't you believe in feeding it?'

I said: 'Well, I never decided things like that for my husband.'

He said: 'I will give him a written guaranty'—or something of that order. With that conversation I said: 'That is entirely up to him.'

Q. Was anything said about other persons having used this feed and obtained results?

A. Well, he just said they had others use it. He did not tell me, and I did not bother to ask him." (R. 512)

Later Mrs. Park said, "Well, he was just telling me how good the feed was, what it was supposed to do. I believe he did mention moulting." (R. 513)

Gail Barron testified that he told Park:

"A. I told him what I had been told, and in addition I had pamphlets—the pamphlets I hold here, which he read. I explained the method as it was used. I explained that it did not require having a grinding machine or mixing machine, because this method eliminated that, and it did not require that he buy his mash from commercial sources; and that in this way, on this plan, he would be able to feed his birds cheaper. It would cost him less money.

Q. Did you say anything about the extent of lay that could be expected from the mintrate birds of this type?

A. I told him the birds had not laid under 65 per cent. I told him that and made the statement based on what I had heard—not that I had seen it personally or knew it personally myself.

Q. Based on whose statement?

A. On Mr. McCullough's statement and Mr. McArthur's statement.

Q. Did you tell him anything about what he could expect?

A. That he could expect to get 65 per cent or better in view of the fact that anyone else using it did that, and he could expect to get it.

Q. Did you compare this with other feeds?

A. Yes. We discussed—Mr. Park and myself, we discussed it completely in every detail. We

spent the biggest part of one day talking about this feed, in relation to other feeds and other methods.

Q. What did you tell him about this feed in relation to other methods?

A. That it was simpler, that it was less expensive, that his chickens, if he fed them on this feed, on the method they described, the chickens would not moult and that he could expect a 15 months lay without a moult.

Q. Did you say anything about the manner of feeding, other than what is stated in the pamphlets?

A. Yes, this manner of feeding makes it easier. All you do is to fill the hoppers, and you can fill them clear full, then you don't need to feed the chickens again till the hoppers are about empty. You don't have to go into the coops with buckets of feed."

It is submitted that the statements testified to by these witnesses, considered as a whole and in their context, merely constitute "puffing" or "dealer's talk" or predictions. Such statements do not furnish a basis for recovery upon the theory of express warranty.

In *De Zeeuw v. Fox Chemical Company* (1920), 189 Iowa 1195, 179 N. W. 605, the seller of a hog remedy stated to a prospective purchaser that the remedy would improve the growth and condition of hogs. Plaintiff alleged in his complaint that he relied on this statement as a warranty and that defendant's feed did not improve the growth and condition of the animals, but, rather, resulted in their deaths. The trial court declined to direct a verdict for the defendant, and after the jury had re-

turned a verdict in favor of the plaintiff and a judgment was entered, defendant appealed. The Supreme Court of Iowa reversed the trial court's decision, stating in answer to the argument that the question of warranty was properly submitted to the jury:

"We find nothing that pleads a warranty or that would make a jury question of whether such a plea if made was sustained. The most that appears is the claim of one who desires to sell a worm powder that its use would be beneficial to certain animals that were then ill or not thriving.

"If on this it may go to the jury whether there has been a warranty, then the same is true if a physician expressed an opinion that a certain prescription which he was willing to give to benefit one who was then ill and it proved that the medicine did not improve his condition. Or if a lawyer expressed the opinion that he could win a suit, and that he thought certain defenses or tactics would bring about that result, and if despite the use of these tactics the suit failed, it would be for a jury to say whether, the suit not having been won, there was or was not a breach of warranty.

"We decline to hold this to be the state of the law either on what is a warranty or on what makes a jury question of alleged warranty."

In *Farrows v. Andrews*, 69 Ala. 96, a representation was made by the seller of Guano that it was a good fertilizer. *Held*, as a matter of law such statement is not warranty.

In *Ross v. Porteous, Mitchell and Braun Company* (1939) 139 Maine 512, 3 Atl. (2d) 650, plaintiff asked the defendant's sales clerk for a particular brand of dress

shield. The clerk stated that the brand requested was no longer stocked but that the defendant had one very similar which was considered better.

“The new kind recently marketed was taking the place of ‘that one’ (the shield asked for) * * * they have been chemically treated so that they can be washed and ironed out.”

The purchaser brought an action for damages as a result of inflammation of her skin. The court held that the statements were merely expressions of opinion, not of fact, and were not warranties. The Court said that expressions of opinion, no matter how strong, do not constitute warranties.

In *Micklen Tire Company v. Schultz*, 295 Pa. St. 140, 145 Atl. 67, the seller stated, among other things, that tires had given and should give an average of 36% more service than other good tires. The Court held as a matter of law that such a statement was not a warranty.

The principle of these cases is applied in the Utah case of *Detroit Vapor Stove Company v. J. C. Weeter Lumber Company* (1923), 61 Utah 503, 215 Pac. 995. In this case the seller stated that certain stoves and ovens were first class and would give first class satisfaction; that the buyers could not represent them too highly to their customers; that the sellers would stand by any recommendations concerning the stoves, heaters and ovens as to their being first class; that they were the best and finest on the market; that anybody with ordinary intelligence could operate them successfully, and that the items would “sell like hot cakes”, and were far superior to anything

on the market. The Court held that all of these representations were "puffing" and "dealer's talk"—expressions of opinions and not warranties—as a matter of law. The principle is universally accepted.

See the following illustrative cases holding that the described statements are not warranties:

Chalmers v. Harding, 17 LT NS 571, that a reaping machine would "cut wheat, barley, etc., efficiently; *Schroeber v. Trubee*, 35 Fed. 652 (C. C. Comm.), that dividends which had been declared on stock had been earned, and that the stock account was "all right"; *Sleeper v. Wood*, 60 Fed. 888, 21 U. S. App. 127, 9 CCA 289 (CCA 1), that canned corn was of the "best packing of 1888", accompanied with "usual guarantee against swells"; *Crosby v. Emerson*, 142 Fed. 713, 74 CCA 45 (CCA 3), a statement by the seller of mining stock in regard to the value of the property, with prophecies as to the projects of the company; *Bain v. Withey*, 107 Ala. 223, 18 So. 217, that a patented article was "a valuable and useful improvement"; *Pate v. J. S. McWilliams Auto Co.*, 193 Ark. 620, 101 S.W. (2d) 794, that trucks would not consume more gasoline and oil than trucks traded in; *Baldwin v. Daniel*, 69 Ga. 782, that a plow would "sell well in Mississippi"; *Towell v. Gatewood*, 3 Ill. 22, 33 Am. Dec. 437, that a bill of sale described tobacco as "good, first, and second rate tobacco"; *Barrie v. Jerome*, 112 Ill. App. 329, that Balzac's works were "nice books" that "children would love to read"; *Shambraugh v. Current*, 111 Iowa 121, 82 N. W. 497, and *Burnett v. Hensley*, 118 Iowa 575, 92 N. W. 678, a description of animals as "thoroughbred"; *Gaar v. Halverson*, 128 Iowa 603, 105 N. W. 108, that an engine was

"practically as good as new" and was of sufficient power to drive defendant's machinery; *Rowe Mfg. Co. v. Curtis-Straub Co.*, 223 Iowa 858, 273 N. W. 895, that an article was far superior to others of the kind and would sell itself; *McCullough v. Bales*, 125 Kan. 670, 265 P. 1110, that a cow would calve the following March; *Bryant v. Crosby*, 40 Me. 9, that "sheep would shear from 3 to 5 pounds of wool per head, and that the buyer could pay for sheep by the wool from the sheep in two years and have wool left"; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L.R.A. 473, that a bond was "an A-1 Bond"; *Morley v. Consolidated Mfg. Co.*, 196 Mass. 257, 81 N. E. 993, that a second-hand automobile had been used as a demonstrator and had been run about 500 miles; that it was in first-class condition and was all right; *Ireland v. Louis K. Liggett Co.* 243 Mass. 243, 137 N. E. 371, that cold cream was very good and very popular; that they sold a great deal of it and people did not find fault with it; *Rosenbush v. Learned*, 242 Mass. 297, 136 N. E. 341, that shoes are "prime elegant merchandise"; *Camden Fire Ins. Co. v. Peterman*, 278 Mich. 615, 270 N. W. 807, that a gasoline stove was "fool proof"; *Stumpp v. Lynbur*, 84 N. Y. S. 912, that roses "were very fine stock"; *St. Hubert's Guild v. Quinn*, 64 N. Y. Misc. 336, 118 N.Y.S. 582, that Voltaire's works were "fit for everybody to read"; *Washburn-Crosby Co. v. Kindervatter*, 147 App. Div. 114, 131 N.Y.S. 871, that flour "should be as good as any made" and that the brand defendant had been using "would not be in it" with this; *Maggiros v. Edson*, 164 N.Y.S. 377, that cheese is of "excellent quality"; *Kirsch v. Benyunes*, 174 N.Y.S. 794, 105 N. Y. Misc. 648, that chestnuts were of

"good quality"; *Harburger v. Stern*, 189 N. Y. S. 74 that a suit of clothes would "wear like iron"; *Cash Register Co. v. Townsend Grocery Store*, 137 N. C. 652, 50 S. E. 306, that a cash register "would do away with a bookkeeper"; "that the books could be kept on the machine"; "that the machine could be operated by a person of ordinary intelligence"; *Dieterich v. Bartunek*, 38 Ohio App. 46, 175 N. E. 614, that programs from foreign countries could be received with a radio offered for sale; *Gray v. Gurney, etc. Co.*, 57 S. D. 280, 231 N. W. 940, that a certain seed corn would outyield any other variety that matures at the same time; that an agricultural machine would work "in all kinds of hay, grain, straw and other grass."

In the case at bar the trial court recognized, in part, the principle applied by the foregoing cases. At several places in the instructions it is mentioned that there must be a statement of fact to constitute a warranty. It is clear that the court felt that the statement as to 65% production was a statement of fact and that all of the other statements were simply matters of opinion and "puffing".

In Instruction No. 13 the court says:

"The only oral representation that you may consider a warranty is the statement that Mintrate chickens on the self-feed plan had laid no less than 65% production of eggs, if you find from the evidence that such a statement was made."

In Instruction No. 11 the court said that if the statement was, "that the feed had been tried numerous times and it had never had less than 65% egg yield when the hens were fed Mintrate and in the self-feed manner", such

a statement would constitute a warranty. To the same effect are Instructions 9, 10 and 12.

Consideration must be given to the context of the alleged statement. The sum and substance of Barron's sales talk was that Mintrate 40 was a good feed; that it would save money by saving time and producing increased profits. (R. 128, 512) There is no doubt that such statements as that a purchaser will save money and time, that it is a good feed, that it is the cheapest and best feed on the market, are all "puffing", and that they do not constitute warranties. *Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co.*, *supra*, a Utah case, is squarely in point as to this proposition. The 65% statement, whatever it was, considered in this context certainly must be considered as sales talk and not as an express warranty.

It is to be noted that the testimony of plaintiff and of his wife was not to the effect that Barron said there had never been less than 65% production, but rather that the feed had been used many times and proved to be successful, *and that chickens using it would produce not less than 65%*. Park said the statement was, "* * * they would never lay below 65 per cent, and that there had been better results than that; that one woman was supposed to have got 90 per cent." (R. 127) Mrs. Park's version was, "it will make your chickens lay 65 per cent, or more" * * *. (R. 512) Barron's testimony as to the conversation comes somewhat closer to constituting a warranty than any other evidence, but Barron says in substance that he told Park that he had heard that birds using the feed and method had not laid under sixty-five per cent. Certainly this is not a representation of fact, even considered

alone. (Record 410.) Perhaps Barron *had* heard such statements. He specifically stated to Park that these representations were "based on what I had heard—not that I had seen it personally or knew it personally myself." (Ibid) Then Barron told Park "that he *could expect* to get sixty-five per cent or better * * *."

Clearly, considering that these statements were intermingled with matters that without question constitute mere "puffing", they do not transcend the realm of opinion, speculation and sales talk. Park's understanding at the time was that they were no more.

A statement as to what a feed will do is certainly different from a statement that certain results had always been achieved. It is submitted that, as a matter of law and under the testimony of these witnesses, especially that of the plaintiff, and his wife—the two persons most concerned in the decision—there was no evidence from which the jury could find that there had been a statement to the effect that there had never been less than 65% production, and that the court erroneously permitted this question to go to the jury in any manner.

B. Park did not rely on any oral representation.

We emphasize at this point that by making the argument that Park did not rely on any oral representation, but instead relied upon the written guarantee made by Barron. Moorman Manufacturing Company does not in any sense or in any way ratify the writing or the authority of Barron to bind this company. Barron had no authority when he made the writing, and nothing that has been done by this defendant is a ratification of his unwarranted

act. We merely point out that Park did not in fact rely upon the oral statements made to him in purchasing the feed.

Park states unequivocally that the so-called "written guarantee" was intended to take the place of the oral statements. (R. 130) In Paragraph 6 of the complaint he says "that on or about the 19th day of June, 1948, the defendant Gail Barron did contact the plaintiff and at the request and insistence of the plaintiff did reduce the guarantee to writing, and that said guarantee is as follows, to-wit: * * *". At the trial the plaintiff insisted that that was what occurred. (Ibid.; R. 131) Park further testified :

"At the time I made the purchase, that was on this written guarantee, that was my whole claim. If he had not given me the written guarantee, I would not have bought the feed. It was supposed to refer to that. If I could have got a written guarantee, I would feed the feed, but if I did not get it I would not feed it." (R. 133)

He further testified:

"Then I said: 'I can give you a chance to prove that feed, but I will want it in a written guarantee form. There will be no talk.' " (R. 135)

In connection with the statement concerning the 65%, Park was asked on cross-examination:

"Q. Why didn't you buy the mintrate when he said that? * * *

A. Well, I am hard to sell.

Q. You mean by that that you did not believe his statement?

A. It seemed a little out of line, yes.

Q. As a matter of fact, you refused to buy the mintrate until he gave you a written warranty?

A. Until he promised to give me one, yes.

Q. Did you ask for the written warranty?

A. Yes, sir.

Q. Why?

A. Because verbal warranties are not too good.”
(R.190)

It is perfectly clear that Park did not rely upon the statement made by Barron but rather upon the written guarantee. He insisted on its execution from the beginning, and he testified that “There will be no talk”, and he would not have bought the feed except for the writing.

Where a representation of fact is alleged as an express warranty it is clear that the plaintiff must prove that he relied upon the statement before he can recover. (Williston on Sales, Rev. Ed. Sec. 206)

Of course, in the ordinary case the buyer need not be especially concerned with this element of proof, since it may very often be presumed that he relied upon statements if they were of a kind which naturally would induce the purchase of goods. (Ibid.) Here, however, the buyer expressly states that he did not rely upon them but relied upon something else, viz: the writing, and that he would not have made the purchase except for the writing. Since there was no reliance on the alleged statement, it is clear that there can be no liability upon the theory of express warranty.

C. The Alleged Statement of Fact Submitted to the Jury as a Warranty was not proved to be untrue when made.

There is a third compelling reason why the case should not have gone to the jury on the theory that there is liability on the theory of an express warranty regarding 65% production. The reason is that there was absolutely no evidence whatever which would permit an inference that such a statement, if made, was untrue. The Court recognized in its instructions that a representation of fact must be proved to be untrue for recovery upon the theory of express warranty. In Instruction No. 12 it stated:

“If you find that the defendant made a statement of fact concerning the 65% egg yield based upon the use of Mintrate and the self-feed plan *and that said statement of fact was untrue * * **”

And in Instruction No. 9 the jury was told that plaintiff must be required to prove “that such statement was false”. In Instruction No. 15 the Court specifically stated that the plaintiff must prove, “that the said representation of the numerous trials produce not less than 65% egg yield was false.”

The requirement made by the Court is, of course, a proper one.

It is elementary that in the law of warranties, as in the law of fraud, plaintiff must prove the represented statement of fact to be untrue before recovery can be had.

Blackstone states (3 *Blackstone Commentaries*, 165):

“The warranties can only reach the things in being at the time of the warranty made, and not

the things *in futuro*; as, that a horse is sound at the buying of him, not that he will be sound two years hence."

Professor Williston agrees that when recovery is on a warranty as a statement of fact, the statement must be proved to be untrue. (See *Williston on Sales*, Sec. 211, Rev. Ed. Vol. 1, P. 548)

The error here complained of is that there is absolutely no evidence from which the jury could infer that such a statement, if made, was untrue. There is not a word of evidence in the entire record from which the jury could infer, even if Gail Barron told Park that no less than 65% production had ever been attained, that this statement was not true. No attempt was made to offer any such evidence; in fact, there is no evidence whatever in the record as to any results before the time that the alleged statement was made. That evidence was introduced tending to show several unsuccessful uses *after* the statement was made does not tend to show that less than 65% was attained *before* the statement.

Again, the Court's attention is invited to the fact that chicken raising is a highly precarious and speculative occupation. Chickens die or fail to produce without any observable cause. Chickens purchased at the same time and raised under identical conditions, being cared for side by side in similar groups, often prosper or fail without discernible reason. It is a matter of common knowledge that such factors as heredity, feed, light, wind and disease greatly affect chickens.

Mr. Barker's testimony that his use of Mintrate was successful is clear, convincing and unimpeached. Certainly,

it cannot be contended that an inference can be made from the testimony of plaintiff's unsuccessful users, all *after* Gail Barron's statement, to the fact which plaintiff was bound to prove that there were unsuccessful users *prior* to the time the statement was made. It is to be noted that plaintiff had more than a year to get his evidence; that defendant's feed has been used throughout the United States, and that he did not produce one witness to testify that less than 65% production was achieved before June 1, 1948. This element was part of plaintiff's case. It is his burden to prove it. The complete failure of his evidence is fatal to the theory of express warranty.

For the reasons, then, that there was no statement of fact made to the plaintiff, no oral representation was relied upon by him, and if a statement of fact was made it was not proved to be true, the Court erred in permitting the jury to consider the theory of express warranties.

POINT NO. II

THE COURT ERRED IN PERMITTING THE JURY TO FIND EITHER (a) THAT BARRON HAD EXPRESS OR IMPLIED AUTHORITY TO MAKE ANY WARRANTY WHATSOEVER CONCERNING DEFENDANT'S FEED, OR (b) THAT MOORMAN MANUFACTURING COMPANY RATIFIED ANY STATEMENT OR WARRANTY MADE BY BARRON, OR (c) THAT MOORMAN MANUFACTURING COMPANY WAS ESTOPPED TO DENY THE AUTHORITY OF BARRON TO MAKE ANY STATEMENT OR WARRANTY.

Under the Court's instructions, the jury was authorized in finding either that there was express or implied authority for Barron to warrant defendant's feed, and

particularly to represent that it had been tried "numerous times and had always produced 65 eggs per one hundred hens per day", or that the company ratified the statements, if any, made by Barron to Park, or that the company was estopped to deny the authority of Barron to make any such statement (see Instructions Nos. 1, 2, 10, 11 and 15). We shall point out that under the facts of this case and the law applicable to these facts, it was error to submit the case to the jury on any one of these three possibilities concerning agency.

(a) *There was no express authority to make any statements as warranties; there was no implied authority to make any such statements inasmuch as the proof by both plaintiff and defendant is unequivocal and clear that such statements as are relied on by the plaintiff are unusual and not customary.*

The principle is perfectly clear that express authority must come in a direct line from the board of directors. The power to warrant would be delegated through the officers and appropriate employees to Barron. Plaintiff, of course, proved no resolution of the board. Instead of starting with the top and working down, plaintiff proved that Barron had no authority, but that he contacted the state manager, McArthur. McArthur testified that he contacted the district manager, McCullough. McCullough denied that McArthur contacted him, and although McArthur testified that he made a telephone call to McCullough's residence in Idaho, the telephone company records did not show any such call. (R. 745) There is no question, however, that the attempt to prove as to authority went no

further than McCullough. A director and western sales manager for the area, including Utah, Mr. Claude Holmes, testified that the board of directors of Moorman Manufacturing Company had never authorized any written or oral warranties or guarantees, and that there was a company policy to the effect that no such statements or warranties were permitted, and that if any authority were given by the company to any salesman in Utah, it would come through him. (R. 611-614)

There is no evidence in the record, except the testimony of Mr. Holmes, with respect to whether or not any authority was given by the corporation. Certainly his testimony is unimpeached, and there is nothing from which the jury could presume that there is any express authority for a salesman to make the kind of statements made to Park.

Nor was there any implied authority.

The rule is stated as follows in the *Restatement of the Law of Agency*, Sec. 63, Comment "C" on Subsection (1):

"In the absence of a usage or other indication of the principal's consent to do so, an agent authorized to sell either land or goods is not authorized to make promises as to the present or future existence of a fact in connection with the sale. If there is a usage, however, to give a warranty upon the sale of a particular subject matter, authority to give such a warranty is ordinarily inferred from authority to sell, if the agent has no notice that the warranty cannot be performed."

The same section, illustration 2, is as follows:

"P authorizes A to sell a shipment of P's flour

in State X and vicinity. It is the usage in making the sales in X to warrant that the flour is sweet and fresh. A makes the sale to T in X, warranting (1) that the flour is sweet and fresh, and (2) that it will remain fresh and sweet after a voyage in the tropics. A is authorized to make the first warranty but not the second."

The law is settled that a principal is not bound by the acts or statements of his agent when the agreement to sell is upon unusual terms or conditions, or when the statements made are unusual and not customary in the trade. Particularly where the evidence shows that there is a custom not to warrant a particular kind of goods, the statements of the salesman as to the quality or attributes of the goods do not bind the principal. Illustrative cases follow:

In *John Stimber & Co. v. Keene*, 152 S. W. 661 (Texas), the Court said:

"It is there held (referring to *Friedman & Son v. Kelly*, hereafter referred to) that the principal is not bound by the acts of the agent in agreeing to sell upon unusual terms on condition, unless it is shown that such authority is given the agent. When the salesman proposes terms or conditions of payment so unusual as those urged in this case by the defendants, it may be assumed as a matter of law that they are not within the apparent scope of the authority commonly conferred upon and exercised by travelling salesmen. To agree as a consideration for the purchase of new goods that the seller will take in payment the unsold portion of an old stock that had been on hand for nearly a year would seem at least to be so uncommon an offer

that the purchaser might well question the authority of the agent to make it. The power to sell personal property does not presumptively carry with it the power to barter or to take over stock in part payment. That proposition is so well settled by authority no citations are necessary."

In *Morse v. Illinois Power & Light Corporation*, 14 N. E. (2d) 259, 294 Ill. App. 498, an agent of the defendant sold certain stock to plaintiff, and agreed to repurchase the stock. The Court said:

"However, a mere holding out of an agent as having authority to sell stock and collect for the same does not carry with it an implication that he also possesses authority to make a repurchase agreement or to agree on behalf of his principal that the money will be returned if the purchaser is not satisfied with the stock at any time in the future. An agent who is authorized merely to sell personally and collect and turn over the money for the same is not empowered to bind the principal by an agreement to repurchase the property, which promise is made by the agent as an inducement to the consummation of the sale."

The case of *Chas. E. Morris & Co. v. Bynum Bros.*, 93 So. 467, 207 Ala. 541, is concerned specifically with the power of an agent to bind his principal as to warranties. The Court quoted 2 Corpus Juris, 605, and stated:

"The implied power of an agent to warrant title and guaranty rests upon the necessity and propriety of such warranties in the sale of goods. It is not, therefore, to be extended to other warranties of an unusual sort, however impossible the agent

may find it to make a sale without giving such warranty."

The alleged warranty was that the plaintiff would take the clothes off the hands of the defendants at the sale price in certain situations.

In *Beck v. Freund*, 117 N. Y. Supp. 193, the Court, speaking through Judge Lehman, said:

"It is well settled that an agent has not general authority merely through his employment as a salesman to sell goods upon extraordinary terms, and certainly not to consign goods of his employer upon such terms as Myers attempted to give here."

The Court then discussed whether a certain telephone conversation was sufficient as ratification under the facts of the case, and held that it was not.

Similarly, in *Tollerton & Warfield Co. v. Gilruth*, 112 N. W. 842, 21 S. D. 320, a salesman sold sugar and purportedly executed a secret rebate slip which reduced the price below the market value when the sugar was purchased. The Court said:

"Such traveling representatives of wholesale dealers are usually clothed with power to solicit sales and take orders at the market value, so when, as in this case, a reasonable price consistent with current quotations is prescribed by the wholesaler, the representative has no authority, implied or otherwise, to enter into a secret agreement to sell for less, and the attempt to do so, when considered with the fact that the private memorandum at variance with the order was signed in his individual capacity, and did not purport to bind anyone but

himself, was sufficient to put a purchaser on inquiry.”

In *Rubin v. Askins*, 204 N. Y. Supp. 827, 123 Misc. Rep. 155, the plaintiff sued to recover the agreed purchase price of certain merchandise consisting of coats. The defendant resisted payments on the theory that the plaintiff's salesman had told defendant that defendant need not return these coats but if by the end of the season defendant had not been able to dispose of them plaintiff would accept their return. The Court said:

“This alleged agreement on the part of the salesman was denied. The authority of the salesman to make such an agreement, assuming that it was made, was not shown. There was no proof that plaintiff knew of this alleged agreement, or that he had in any way ratified it. The right to make such an agreement is not incidental to a salesman's selling authority. A salesman has no implied powers beyond that which is usual and necessary to bring about the sale. The court erred in charging the jury that the salesman ‘being the only person with whom the transaction was made, any terms agreed upon between the two were binding; * * * that there is no question of the authority of the salesman. Any agreement made between him and the defendant was binding.’ ”

In *Churchill Grain & Seed Co., Inc. v. Buchman*, 197 N. Y. S. 552, 204 App. Div. 30, a carload of oats was sold by defendant and was to be shipped in June, but it was in fact not shipped until July 8th. On July 19th the plaintiff's salesman, one Gusman, called upon the defendant and told him that if he took the car, any loss would

be taken care of by the plaintiff. Gusman and plaintiff's treasurer both testified that he had no authority to make such a statement. The jury, however, found that he had implied authority. The Court cites 2 Corpus Juris 607, 708, as follows:

“Ordinarily a sales agent is supposed to be employed to contract a sale and has no implied power once this is done, either to undo or to modify the contract.”

The Court says:

“I think that is a correct statement of the law in the absence of any evidence of custom. Here nothing further appears than that the agent was empowered to sell at prices named by the plaintiff. His statement, made to the defendant long after the order was taken, that the seller would stand the loss if the defendant would take in the car and pay for it, was made entirely without authority, insofar as the record discloses, and was not binding on the plaintiff. One dealing with an agent is bound to inquire as to the extent of his authority and the burden of proof was upon the defendant to establish the authority of the agent to make the agreement that the plaintiff would stand the loss. There is no evidence in the case which justified the submission of that question to the jury.”

The case of *Friedman & Sons v. Kelly*, 102 S. W. 1066, 126 Mo. App. 279, contains instructive language:

“This responsibility of the principal for the acts of his agent, not expressly authorized, is limited, however, to such acts as are within the apparent scope of the authority conferred; that is

to say, it is implied, of course, that an agent on the road, such as a traveling salesman, for the sale of goods to various dealers, has the authority to employ all necessary and proper means for the accomplishment of the sale which are justified by and consistent with the usages of trade. Or, to state the proposition in other language, the law presumes, and those dealing with the agent have the right to act upon the presumption of law, that the agent is authorized to sell the goods in the usual manner and only in the usual manner, and make such contracts thereabout as are reasonable or comport with the usage and custom of the trade in like undertakings, and it is to this extent, and this extent only, that an agent may be said as a matter of law to be acting within the scope of his apparent authority. Story on Agency (2d Ed.) Sec. 60; Tiffany on Agency, Secs. 45-47; Benjamin on Sales (6th Ed.) Sec. 624; 6 Amer. & Eng. Ency. Law (2d Ed.) 224; Wharton on Agency, Sec. 189; Mechem on Agency, Secs. 350-362; 1 Clark & Skyles on Agency, Sec. 244; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

"Now, in keeping with the principles thus stated, it was determined by our Supreme Court in *Palmer v. Hatch*, 46 Mo. 585, that while a traveling salesman on the road, with general authority to sell whiskies for his principal, had authority to employ the usual modes and means of accomplishing the sale, and sufficient to warrant the quality and condition of the whiskey sold, an unusual warranty, such as to warrant against any seizure of the article for violation of the revenue laws, may not be included within the limits of the apparent scope of the authority of such agency. And, so, too, in *Butter v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795, it was held that the authority of an agent selling

by sample and on credit, but not intrusted with the possession of the goods to be sold, could not be extended so as to authorize him to bind his principal by receiving payment for the goods under the doctrine of apparent authority. And so too in *Chambers v. Short*, 79 Mo. 204, it was adjudged that the apparent authority of a canvassing agent for the sale of books by subscription, to be afterwards delivered, did not include authority to receive payment for such books to be subsequently delivered and not then in his possession. And likewise the Supreme Court of Massachusetts, in *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163, adjudged that it was not within the apparent authority of an agent selling flour to bind his principal by a warranty that the flour sold by him on the account of his principal would keep sweet during a sea voyage, in the absence of a usage or custom of the business to that effect. As a correlative of the principle which affixes the limitation of the rule with respect to the apparent authority of an agent, as above indicated, there is another and companion principle which enforces a reasonable degree of diligence upon those who deal with the agent in relying upon his apparent rather than his express authority to bind the principal; and that is the person dealing with the agent, although ever so innocent, will not be permitted to ignore all the precepts of common sense pointing contrariwise and rely exclusively upon the representations or promises of the agent, however unreasonable, for the law with respect to every relation of life not involving intentional fraud or malice, as we understand it, sets up an ordinarily prudent man as the standard by which the conduct and affairs of other men should be governed, and in consonance with this standard a person dealing with an agent is re-

quired to act with ordinary prudence and reasonable diligence. Therefore, if the authority which the traveling salesman assumes to exercise in and about the consummation of the sale of such goods is of such an unusual, improbable, and extraordinary character as would be sufficient to place a reasonably prudent business man in dealing with him, upon his guard, the party so dealing will not be justified in disregarding his senses and overlooking the real situation, and thereafter seek to hold the principal, upon the theory of the agent's apparent authority. Under such circumstances, it is the duty of the party dealing with the agent to either refuse to close negotiations with him at all or first proceed to ascertain from the principal whether the true scope of his authority is such as will authorize the extraordinary and unusual contract proposed. The principal last mentioned, not only comports with the ends of justice sought to be attained by the established law of principal and agent, but it is in fact one of the fundamentals of our entire system of jurisprudence, and is as sound as the Rock of Ages. 1 Clark & Skyles on Agency, Sec. 210; Mechem on Agency, Secs. 291-362; Wharton on Agency, Sec. 137; 6 Amer. & Eng. Ency. Law (2d Ed.) 244, et seq. Mechem on Agency, 350-362."

The Court then pointed out that the buyer himself regarded the salesman's proposition as unusual; yet he did nothing to ascertain his authority. His defense to an action for the price was held invalid.

In *Central Commercial Co. v. Lehon*, 173 Ill. App. 27, the Court said:

"The only authority that is implied from the

mere fact of agency is 'to sell in the usual manner and only in the usual manner in which the goods or things of that sort are sold.' "

See also *Ide v. Brody*, 156 Ill. App. 479, and *George DeWitt Shoe Co. v. Adkins*, 98 S. E. 209, 83 W. Va. 267.

The principle of these cases is recognized in *George B. Leavitt Co. v. Couturier*, 23 Pac. (2d) 1101, 82 Ut. 256, where Mr. Justice Elias Hansen, speaking for the court, said:

"The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within the apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority."

The general rule is clear, and the Utah Supreme Court has specifically held, that a person dealing with an agent is bound at his peril to determine the agent's authority. *Dobrmann Hotel Supply Co. v. Beau Brummel, Inc.*, 99 Utah 188, 103 Pac. (2d) 650.

The case of *Royal Seed and Milling Co. v. Thorne* (1928) 142 Miss. 92, 102 So. 282, stands for the proposition that an agent has no implied authority to warrant the soundness of animal foods for a given period of time, especially where the orders are transmitted to the principal for approval.

The rule that an unusual or extraordinary statement by a salesman is not within the scope of his employment is stated by Mechem on Agency, 2nd. Ed., Vol. 1, Pages 635, 636, Sec. 889. That the rule is sound in principle appears

to be uncontradicted in the cases. No reason exists to distinguish between cases where a written warranty is made and cases where there is an attempt to recover upon an alleged express warranty as a statement of fact.

A salesman, for example, as a matter of principle, should be no more able in law to bind his employer by stating to a prospective customer that an automobile will last for fifty years, or that all automobiles of this kind have lasted in the past for fifty years, than to give a written guarantee stating that the company would stand back of its product and guarantee it lasting fifty years. Under the provisions of the Sales Act relating to express warranties the seller is no less liable in one situation than the other if agency is established, assuming, of course, that all the conditions relating to express warranty are satisfied.

The policy of the law certainly is not, under these circumstances, to penalize an employer by holding him liable for oral statements of his salesmen when admittedly written warranties of the same tenor and to the same effect would not be binding upon him. The law which affords certain protection to purchasers must and does give sanctuary to a seller whose salesmen make extraordinary or unusual statements concerning seller's product.

The importance of these principles as applied to the case at bar is that here the evidence is uncontradicted on both sides that the giving of a warranty of any kind by a feed company is unusual. The plaintiff himself stated that he has been in the chicken business for eighteen years. (R. 120) During that time he was engaged in business in Riverton. On cross-examination he stated that it was unusual for a feed company to give a written guarantee,

(R. 190) and that no other feed company has ever given him an oral guarantee, or written guarantee. (R. 191)

He further testified that during this period of time he had never heard of any other person receiving an oral or written guarantee from any other feed company. (R. 191) One of plaintiff's witnesses was Mr. Earl Wood, a resident of Salt Lake City, and an employee of General Mills Farm Service Division. (R. 352 et seq.) He has been in field work for General Mills for ten years. (R. 353) His testimony is that General Mills is one of the largest feed companies in the country. (R. 353) He stated upon cross-examination that he has never before seen a guarantee of the kind Barron allegedly gave Park. (R. 385.)

For the defendant, Mr. Claude Holmes of Quincy, Illinois, testified that he is an officer and director of the Moorman Manufacturing Company and that the company does an annual business in excess of twenty-five million dollars. He was western sales manager and his territory included everything west of the west half of Nebraska, South Dakota and North Dakota to the Pacific Coast. There was no authority given to any agents or employees of this defendant to make any written or oral guarantees or warranties of any kind whatsoever. (R. 611-613) Mr. Holmes is acquainted with the custom of other feed companies in the United States, and stated that as far as he knows no other company makes such a guarantee or authorizes such warranties as was allegedly made to Park by Barron in this case.

The fact of the matter is that there is a custom to the effect that no warranty is given by feed companies. There

is not a word of evidence in the entire record of this case, except that giving of warranties of the kind allegedly given by Barron to Park here is unusual and was unusual during the period of time in question.

It is therefore clear that Gail Barron had no authority, express or implied, to make such a representation of fact as is relied upon by the plaintiff in this action. The law puts one dealing with an agent on inquiry as to the extent of the agent's authority. The plaintiff knew at the time he bought the feed, and at all times prior thereto and subsequent thereto, that Barron was making an unusual kind of proposition to him. He was bound to ascertain Barron's authority at his peril, and he was not permitted to rely upon Barron's statements as to what that authority was. The statements were made beyond the scope of Barron's employment and are therefore not binding upon the defendant Moorman Manufacturing Company.

(b) Defendant Moorman Manufacturing Company is not bound by the statements or representations of fact, if any, of Barron on the theory of ratification.

In Instructions Nos. 10 and 15 the Court in effect authorized the jury to find for the plaintiff upon the theory that defendant feed company ratified the statements of Gail Barron. The Court said that if the defendant company knew of an oral warranty, and thereafter accepted orders for feed or payment for feed without notifying plaintiff that it did not intend to be bound by the warranty as it was made, then the defendant was bound nevertheless. The Court also stated that if the company accepted any benefit from the sale of mintrate after receiv-

ing knowledge of the oral warranty, without repudiating it, then the company was estopped to deny Barron's authority.

It may be that these are correct principles of law in the abstract, but there was certainly no evidence to justify the submitting of the case to the jury on this theory in the case at bar. There is not an iota of evidence in the record, and in fact there was none produced or offered at the trial, which as much as suggested that the Moorman Manufacturing Company at any time accepted any benefit from the Park contract, or any other contract made by Barron. There is not a word to show that the Park feed was ever paid for. There is nothing to show the acceptance of any benefits after the matter came to the attention of the company.

The first time the company had any direct knowledge of the guarantee allegedly made in this case was when Roger Mittelberg talked with Barron on August 28th at the Newhouse Hotel in Salt Lake City. Mittelberg had been here on July 19th, but at that time neither he nor Park nor anyone else told him that there was an agreement of the kind made and claimed for in this action. (R.797-798) When Barron told Mittelberg of this agreement Mittelberg immediately went out to Park's farm and conferred with him about the situation. (R. 799) At that time Park told Mittelberg that Barron had sent a copy to the company. Mittelberg said that was the first he knew of it, and he was permitted to make a copy. (R.799, 800) At that time Mittelberg told Park in no uncertain terms directly and unequivocally that Barron had no authority to make any such agreement or representation. (R. 800) Subse-

quently Mittelberg wrote McArthur and told him that he had no authority to make a guarantee. (R. 801)

The plaintiff himself hedges somewhat as to what Mittelberg told him in this conversation, but he testifies that he got the impression, because of what Mittelberg said, that the company was not going to be bound by Barron's actions. (R. 205, 209, 240) The Mittelberg-Park conversation was on August 28th. Park had discontinued the feed at that time. (R. 148) In September plaintiff's counsel wrote to the company and notified it that he was representing Park in the action that resulted. (R. 240)

Barron himself stated that he never sold any feed after this Park-Mittelberg conversation. (R. 448)

The subject of ratification by a principal of acts of an agent is treated in the *Restatement of the Law of Agency*, Vol. 1, Chap. 4, Secs. 82 to 104. There is no question that the whole theory of ratification is built on knowledge by the principal of the agent's act and his accepting of the benefits of the act or making some manifestation of consent to it, although the agent originally lacked authorization for it. We believe the principle is sufficiently clear that no authority need be cited. The plaintiff in this case proved nothing to justify the submitting of the action to the jury on ratification theories. The instructions of the Court, therefore, that the jury could make a finding that there was ratification were manifestly prejudicial error.

(c) *There was no justification for submitting this case to the jury upon the theory that the Moorman Manufacturing Company is estopped to deny liability for the*

statements of Barron, or for his authority to make any statements or warranties allegedly on behalf of this defendant.

Insofar as the basic theory of estoppel is distinguished from the theory of ratification in agency law the estoppel idea is that a principal has held an agent out through a course of dealings so that one dealing with him relied on his authority to represent the agent in given kinds of transactions. The principal then discharges the agent but fails to notify persons dealing with him. Under such a situation it is held that the principal is estopped to deny the agent's authority.

Under the facts of this case there is absolutely no basis for submitting to the jury the proposition that defendant is bound by a theory of estoppel. The Court apparently intended to submit the estoppel idea in Instruction No. 11, where it stated that if Barron was given instructions in sales meetings as to the selling points of the defendant's feed, and Barron made representations to the plaintiff along the lines of his instructions, "and if * * * plaintiff purchased the feed because of said statements and reliance thereon, then you are informed that the defendant company is estopped to deny the agent's authority and is bound by the representation." It is submitted that the doctrine of estoppel has absolutely no basis whatsoever on this set of facts.

The Court also refers to estoppel in Instruction No. 10. There is no situation here that justifies the jury to consider the estoppel question. Plaintiff was not induced to purchase this feed by the defendant's holding the agent out as his authorized representative and then cutting him

off without notifying the plaintiff. The matter of estoppel should not have been submitted.

The fact is that the Court went out of its way to submit any conceivable hypothesis to the jury whether it was justified or not. The net effect was to overstress defendant's liability. Insofar as the question of implied authority is involved, it is discussed under subheading (a) of this heading. Insofar as the question of ratification is involved, it is discussed under subheading (b).

The Court committed error in telling the jury that the defendant was guilty of acts which estopped it from denying Barron's authority in this case. The error, moreover, was not simply a harmless one. It had the tendency to re-emphasize and reiterate to the jury that the defendant was liable on one theory or another. The purpose of instructions is to aid the jury in reaching a proper decision, not to confuse it. Certainly the question of estoppel here was not involved, and the submitting of the question only confused and misled the jury. Certainly it was prejudicial to defendant's rights to have the matter explained in estoppel terms.

POINT NO. III

THE COURT ERRED IN HOLDING THAT DEFENDANT IS LIABLE IN THE THEORY OF BREACH OF EXPRESS AND IMPLIED WARRANTIES AS TO THE METHOD OF FEEDING AS DISTINGUISHED FROM THE FEED ITSELF.

In Instructions Nos. 4, 9, 14 and 15 the Court states in effect that liability on the warranty idea exists whether the feed or the method of feeding was the cause of plaintiff's

unfortunate result. The Court refused to distinguish between the theories of recovery with reference solely to the feed, and statements made concerning the feed made by plaintiff and the statement as to the method or procedure of feeding.

When a method or procedure of conduct is suggested or recommended, the speaker is liable, if at all, on different theories than those that arise in the case of the sale of a chattel.

The Court's attention is invited to the decision in *De Zeeuw v. Fox Chemical Co.* (1920), 189 Iowa 1195, 179 N. W. 605, where the Court said:

"If on this it may go to the jury whether there has been a warranty, then the same is true if a physician expressed an opinion that a certain prescription which he was willing to give to benefit one who was then ill and it proved that the medicine did not improve his condition. Or if a lawyer expressed the opinion that he could win a suit, and that he thought certain defenses or tactics would bring about that result, and if despite the use of these tactics the suit failed, it would be for a jury to say whether, the suit not having been won, there was or was not a breach of warranty."

Certainly the advice of a man engaged in a profession could not possibly precipitate an action unless there were pleaded and proved the elements of fraud or negligence. Why, then, would there be any liability if one who does not pretend to be giving expert advice makes suggestions as to procedure?

The matter of warranty as it is concerned in this case

involves personal property; in fact, the Uniform Sales Act is applicable only to goods and chattels, and Section 76 of the Act defines the classes of goods subject to its provisions. An idea or procedure or method is not subject to the Act. These are simply intangibles, the only reality of which lies in their application to physical things. If, therefore, Mr. Optimistic tells me a way in which I can make a million dollars and I follow his directions with the result that I am bankrupt, I am not entitled to recover. Similarly, if Mr. Efficiency Expert outlines a method of production which he says will cut operating costs in half, and the method fails, there can be no breach of warranty.

The law encourages the expression of opinion and the dissemination of ideas to such a degree that a person bringing an action upon statements such as these, cannot hope to recover—certainly not on a warranty theory—even if it is proved that the idea or method or procedure recommended is basically unsound.

If, therefore, plaintiff's trouble was caused by the method suggested by Barron, as distinguished from feed, there can be no recovery for breach of warranty. The difference in the theories of liability as to chattels and ideas is of particular importance in this case, because plaintiff's own witnesses testified that the method was the cause of plaintiff's difficulties. Park himself testified that his theory was that the method of feeding caused the loss, and that is the theory of this lawsuit. (R. 238-239) Plaintiff had the feed itself analyzed (R. 238), but no facts whatsoever tended to show either that the feed contains deleterious substances or that the proportion of the contents are not as represented by the company. There is no proof

that the contents in the proportions found in the feed are not proper and beneficial for chickens. The only possibility remaining, if defendant is to be kept in the case at all, is the method of feeding. Since under plaintiff's theory the method was the proximate cause, and since there is no such thing as an express warranty as to methods or other intangibles, the plaintiff cannot recover on this theory.

The Court not only submitted the cause to the jury on the theory that there could be a breach of an express warranty as to the method, but stated as well that there was an implied warranty. (See Instructions Nos. 9, 14 and 15; R. 88) What kind of a creature would that be? The Sales Act admittedly implies certain warranties as to the sale of goods under certain circumstances, but that warranties could not possibly be implied in the sale or communication of a naked idea—an intangible that has no substance. Defendant requested an instruction to express this idea, but his request was refused. (R. 71)

It is submitted that the Court committed gross error in permitting the case to go to the jury on these theories.

POINT NO. IV

THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT PLAINTIFF'S LOSS, IF HE HAD ANY, WAS THE PROXIMATE RESULT OF THE USE OF EITHER POULTRY MINTRATE 40 OR THE SELF-FEED METHOD OF FEEDING, OR BOTH.

It is, of course, elementary that plaintiff must establish by competent and substantial evidence that his loss was proximately caused by a violation of duty to him by

defendant. In the case at bar defendant has insisted throughout the proceedings that any loss of production or deaths in plaintiff's chickens was caused by factors other than defendant's feed and self-feed method. The question of proximate cause assumes importance in this case because all the witnesses who pretended to know anything about chickens testified without hesitation that there are numerous causes of sickness and death in the poultry business.

Plaintiff's own experience in the six-month period following March 1, 1948, demonstrates the numerous hazards he encountered. His chickens had chicken-pox, tracheitis, pullorum, big liver and Newcastle during this period of time. In addition, he was concerned about the picking in his flocks before egg production started. (R. 179, 180) In fact, his testimony discloses that the first thing he bought through Barron was a supply of minerals to try to stop this picking. (Ibid.)

Plaintiff's other witnesses had similar difficulties. Dan Damjanovich had Newcastle in his flocks (R. 469, 483, 485); Gail Smith had Newcastle and picking (R. 460). His testimony is that the birds just died. Apparently he did not know what was the matter with them. (Ibid.) Earl Sorensen testified that his chickens were fed scratch and oats every day and fed the quantity of mintrate prescribed and cleaned up all the feed, and yet they starved to death. (R. 496-8)

Chicken men are constantly threatened by perils and disease and hereditary factors which are not easily discernible. One cannot read the testimony of plaintiff's witness Conta, who had been in the chicken business for

some thirty years, without realizing that the poultry business is precarious and uncertain and that poultrymen themselves often do not know what causes the difficulties. His testimony is that chickens in two pens, with similar heredity, fed on the same kind of feed by the same person, and for all intents and purposes treated the same way, have very different results. One pen may prosper, while another pen may be afflicted with pickouts or disease or may go into a moult without apparent reason. (R. 341) The testimony of the plaintiff himself is to the same effect. (R. 192-193)

Under these circumstances, in considering the uncertainties involved, and especially considering the lack of proof in the case, the question of proximate cause deserves serious consideration.

Consideration should be given to the fact that plaintiff was well pleased with the early results. Egg production went up to 63½ % in the mintrate pens. (R. 147) The important fact is there was picking in his flocks before he used the mintrate and self-feed method. (R. 179-180) Plaintiff did not have a veterinary examine the birds at any time, even though he consulted counsel as early as September, 1948, and kept the chickens for more than a year after that time. Plaintiff produced no expert testimony of any kind. There is nothing from which the jury could infer that the self-feed method is not basically sound. There is nothing from which it could infer that there is any deleterious substance in defendant's feed, or that the substances in the proportions named and guaranteed by defendant are not nutritional. Plaintiff, in fact, reduces his own position to an absurdity when he testifies in effect

that despite the fact these chickens ate the mintrate, ate the oats and scratch placed before them in the proportions named, and had oats before them at all times, they starved to death. Certainly evidence of this kind does not reach the dignity of competent, substantial evidence such as justifies recovery. The mere fact that an event occurs after another event does not mean that the one was the proximate cause of the other.

Plaintiff's position is almost as ridiculous as that of the man who decided he was going to try an experiment to see what it was that was making him get drunk. The man mixed rye and soda, then Scotch and soda, then Bourbon and soda, then a blend and soda, and each time the man became precariously inebriated. He decided that since soda was present in each of the combinations, it was the soda that made him drunk.

If this appears to be facetious, it is nevertheless submitted that there is no more scientific proof by the plaintiff in this action. Neither on principles of inductive nor deductive logic can plaintiff be heard to say that his evidence is sufficient.

Only three other chicken raisers besides plaintiff testified in this case as to results obtained. These are Dan Damjanovich, H. Gail Smith and Earl Sorensen. It is important to notice the kind of statements made by these men on the witness stand. They all testified only that they followed defendant's directions in using the feed. Some of them could not remember what the directions were without being prompted. There is annexed hereto a chart comparing the pertinent parts of the testimony of these witnesses with respect to the time after the use when

<i>Witness</i>	<i>Length of time used</i>	<i>Size of coops or pens</i>	<i>Number of Birds</i>	<i>Other diseases in flocks during period</i>	<i>Symptoms complained of</i>	<i>Length of time used before symptoms appeared</i>	<i>REMARKS</i>
LaVar Park	2 months & 10 days (R 148)	various	2850	pox tracheitis Pullorum big liver Newcastle	picking loss of weight loss of production (R 148)	about 30 days (R 148)	These hens got up to 63½% production (R 147). There was picking in his flocks before he used mintrate (R 179, 180). Park says the chickens of his that starved to death from eating too much oats had more flesh on them than the ones that died from big liver (R 187).
Dan Damjanovich	2½ months (R 468)	20 x 32 (R 462)	250 (R 464)	Newcastle (R 476) hit birds 24 days after started feeding (R 485)	picking (R 469, 483)	5 days to 1 week (R 469)	No evidence as to number of birds died from Newcastle and number from picking. No evidence as to whether stopped dying after stopped feeding mintrate.
H. Gail Smith	6 weeks (R 559)	32 x 20 (R 553)	250 (R 555)	Newcastle (R 560)	pickouts (R 560) birds just died	no evidence	No evidence as to number of birds that died from Newcastle or number from picking.
Earl Sorensen	2 months (R 590)	No evidence	650 (R 588)	None "at that time" (R 598), but had no veterinarian examine (R 599)	"a lot of them were pick-outs, and a lot of them simply starved to death" (R 592)	2 months (R 590)	Testified on cross examination that chickens starved to death although they were fed scratch and oats every day and they cleaned it up. (R 596-8). No evidence on number that allegedly died.

a particular result occurred, what the complaint was in each case, the size of the coops, the length of time that they used the feed and what damages, if any, were complained of. It is observed that the symptoms of the chickens involved were not sufficiently parallel to render the evidence produced on this subject competent in the Park case. The complaints are not uniform. The symptoms of Park's chickens were different from those of some of the other users.

Is it fair to permit recovery based on no more trustworthy evidence than this? It may be that if Park came into court with a hundred witnesses in this area who had used the feed and method, some importance might be attached to a uniform result in all of the cases. Certainly four users of the feed having different but unsatisfactory results does not justify the inference that the feed or the method is the proximate cause of the unfortunate situation complained of. Defendant produced two witnesses who testified that their results were entirely satisfactory. One of these, Mr. Alvin Barker, is an eminently successful poultryman in Salt Lake County. The testimony of these witnesses was absolutely unimpeached. It is to be noted that no one besides Park claimed that his chickens lost weight. Two of the witnesses said there was no more picking than usual in the mintrate and self-feed pens.

There is no uniformity as to the time between the beginning of the feeding and the alleged result. In fact, Park used the feed successfully for three or four weeks and had his chickens up to nearly 65% production before picking started. Denton Black used the feed only twenty or twenty-one days altogether. The dearth of evidence

as to salient matters is particularly apparent. The record is convincing that the conclusions of each of the witnesses as to his own results is unsatisfactory. Not one witness could say how many birds died over what period of time, or exactly what his loss of production was per bird. Plaintiff consulted counsel within a month after he was told by the company that defendant would not be responsible for his loss; yet, despite the fact that the lawsuit was tried some fourteen or fifteen months later, plaintiff never consulted a veterinarian during the entire period of time. Plaintiff produced no evidence that there was any deleterious substance in Mintrate 40, or that there was anything in defendant's feed other than the contents and the proportions appearing on every carton. Plaintiff had the feed tested by the Utah State Chemist, but the result of the test must not have helped plaintiff, because they were never given to the jury.

Is proof of this nature sufficient to justify the inference that the proximate cause of plaintiff's damage, if he had any, was defendant's feed? The burden is upon plaintiff to establish proximate causation by competent evidence. It is submitted that the jury should not be permitted to speculate. The test is if plaintiff's evidence is believed, is it sufficient to establish the fact in dispute?

It is pointed out that this is not the ordinary case of claimed negligence in the manufacture or sale of a particular sack or can or other container of feed, or drink, or some other commodity. Plaintiff's claim here is not that he got a bad sack of mintrate, or a bad truckload of mintrate. Plaintiff claims that there is something wrong with the mintrate feed, or, in the alternative, that there is

something wrong with the self-feed method of feeding, or there is something wrong with the combination of these two. The method and kind of feeding were on trial.

Of importance is the fact that the defendant feed company has been in the business for fifty years. It has manufactured a concentrate feed since 1934. (R. 620) The present product, Mintrate 40, has been manufactured and sold as an approved product since January, 1945. (R. 620)

The company sells chicken feed throughout the United States and engages in a considerable amount of research in Illinois and conducts field tests all over the country. (R. 619-622) The feed fulfills the requirements of the National Research Council (R. 621), and the feed was not adopted by the company until it had been extensively tested. (R. 619-620) In fact, extensive tests on the self-feed method have been made by defendant company and by a number of universities, and the method is recommended by a number of state universities, including the University of Ohio. Dr. C. I. Draper of the Department of Poultry, Utah State Agricultural College, testified in detail of his experiments concerning the self-feed or cafeteria style of feeding, and his opinion is that it can be successfully carried out and that eggs can be successfully produced. (R. 741-756)

After the complaints made by plaintiff and his witnesses to defendant company, the company contacted Mr. Alvin Barker of Taylorsville, Utah, and at its request he placed some of his chickens on the defendant's feed and method to see whether there was anything about the at-

mospheric or weather conditions in this area which prevented the successful use of the combination. Mr. Barker's testimony at the trial appears at Pages 830-848 of the record. His experiment was carefully conducted, and the testimony and records amply demonstrate that the use of the feed and method was successful. He got good production; the weight of his birds was good, and the mortality was higher in the mash pens than in the Moorman pens. (See R. 836-838) In view of these successful uses and the unimpeached substantial testimony that the feed was successful, and in view of the fact that plaintiff did not produce any expert testimony as to any deficiency in the food or method, it certainly seems clear that there is no substantial proof that the feed or method or both was the cause of plaintiff's difficulties.

While no case can be found on all fours with the case at bar as to the question of proximate cause, it is worthwhile to examine samples of some analogous decisions. The general principle of the nature and quality of the proof required in instances of this kind is discussed in 2 *Wigmore on Evidence*, Sec. 448 et seq., P. 439 seq. Wigmore makes clear the proposition that where the proponent of proof is attempting to show something stronger than a mere capacity, that is, "*a general or usual tendency*, and has evidenced this by a few instances; here, obviously, an equal or greater or less number of negative instances, or perhaps even a single instance, would help to show that no usual or general tendency could be predicted, and thus would be practically available to answer the showing made by the proponent."

Wigmore continues:

"But suppose, finally, that the proponent is interested in showing a fair *certainty or inevitableness* of effect; here even a single negative instance would suffice to dispose of his contention. The proponent cannot claim that an effect is invariably found, if an instance is shown in which the effect is not found; for example, where it is claimed that a near gunshot wound always leaves powder-stains, a single instance will overturn this claim."

The problem obviously is one of logic. If the major premise is all apples are red, the proving of one non-red apple is sufficient to avoid the proposed conclusion.

In *Lamb v. Boyles*, (1926) 192 N. C. 542, 135 N. E. 464, the plaintiff drank a bottle of beverage described in the decision as strawberry ale, which was manufactured by the defendant. Plaintiff was taken ill while drinking the ale and was confined to bed and suffered some impairment of vision. Defendant's motion for a non-suit at the end of plaintiff's case was denied, and this ruling was his chief specification of error on appeal. The Court reversed the trial judge, pointing out that there was no chemical analysis of the ale and no specific indication of poisoning. The Court rejected the *res ipsa loquitur* doctrine.

"In the case at bar there is no evidence that any foreign substance was discovered in the ale or in the bottle. It is too plain for argument that more than one inference may be drawn from the evidences as to the cause of plaintiff's sickness and under the circumstances disclosed * * * it would be unsafe to permit the plaintiff to avail himself of the doctrine that the 'thing itself speaks'. The defendant's motion should have been allowed."

In *Sheffer v. Willoughby* (1896), 163 Ill. 518, 45 N. E. 253, the plaintiff ate some oyster stew at defendant's restaurant and he became sick while he was eating. The court held this was insufficient proof to make a prima facie case.

In *Crocker v. Baltimore Dairy Lunch Co.*, 215 Mass. 177, 100 N. E. 1078, plaintiff complained of ptomaine poisoning allegedly caused by eating food at defendant's restaurant. The plaintiff introduced no proof other than that he became ill after eating, and the Court held that this was insufficient to go to the jury.

In *Reese v. Smith*, (1937) 9 Cal. (2d) 324, 70 P. (2d) 933, the plaintiff became ill while eating sausage. A physician diagnosed the illness as botulism. The evidence tended to show that there were maggots in the uncooked portion of the sausage and that poisoning does not occur such a short time after eating. *Held* that the proof failed to show that the illness was due to unwholesomeness of the sausage.

In *Palmer v. Rosedale Catering Co.*, (1940) La. App. 195 So. 859, the plaintiff did not feel just right a few hours after eating crab meat. The sea food "didn't taste just right" to her. She suffered some intestinal disturbances and the attending physician found it necessary to remove her appendix. The physician testified that while the crab meat was more likely to cause the disturbance than anything else she had eaten, he would not definitely say it was the cause of the trouble. The Court held that she failed to establish (1) the unwholesomeness of the food, and (2) the proximate cause. (See 130 A.L.R., Pages 625-626)

It is, of course, clear that mere possibilities leave the solution of an issue of fact in the field of conjecture. The following Utah cases stand for the proposition that a jury's verdict may not be based on testimony showing only possibility, nor on speculation, conjecture or suspicion:

Edwards v. Clark, 83 P. (2d) 1021

Spackman v. Benefit Assoc. of Ry Employees (1939)
97 Utah 91, 89 P. (2d) 490

In the case of *Crouch v. National Livestock Remedy Co. et al.* (1928) 205 Iowa 51, 217 N. W. 557, the defendant was a seller of hog remedy. The plaintiff buyer sued the defendant upon the theories of implied and express warranty and negligence. He introduced evidence over objection that other farmers and hog raisers used defendant's hog powder. One witness said he used it on 160 hogs and 107 of them died within a period of six months, and some died as long as six or seven months later. Another witness said that he fed it to 150 hogs and that some 60 to 80 died from six to eight weeks after the feeding. The Iowa Supreme Court held this testimony to be inadmissible. The Court said that there was not sufficient showing of identical conditions, even though all of the witnesses testified that the directions were followed in feeding the powder.

"It is also apparent that the evidence as to the death of the hogs is remote from the claimed cause. To say that hogs fed at a certain time died 'six or seven months' after the feeding, or 'from six weeks to three months' thereafter is to open a door for speculation and conjecture as to whether there is

any causal connection between the feeding and the subsequent death at such a remote period."

Evidence must do more than merely raise a conjecture or show a possibility. *Sumsion v. Streater Smith, Inc.* (1943), 103 Utah 44, 132 P. (2d) 680; *Anderson v. Nixon*, 139 P. (2d) 216, 104 Utah, 262; *Smith v. Industrial Com.* (1943) 104 Utah 318, 140 P. (2d) 314.

Where plaintiff's undisputed evidence from which essential fact is sought to be inferred points with equal force to two things, only one of which points to defendant's liability, plaintiff must fail. *Reid v. San Pedro, L. A. & S. L. R. R.*, 39 Utah 617, 118 Pac. 1009; *Tremelling v. Southern Pacific Co.*, 51 Utah 189, 170 Pac. 80; *Peterson v. Richards*, 73 Utah 69, 272 P. 229.

The attention of the Court is again invited to the facts testified to by the various users of Mintrate 40 on the self-feed method of production. With reference to the different symptoms shown by the chickens in each case, and the length of time following the use of the feed and the method, the Court's attention is invited again to the unimpeached testimony of Mr. Barker as to his eminently successful use of the feed. Certainly it must be concluded in the action as a matter of law that in view of the dissimilarity of the results of the witnesses of the plaintiff, and all of the other factors involved, there was insufficient proof as a matter of law from which the jury could infer that any difficulty experienced by the plaintiff was the proximate result of defendant's feed and/or the self-feed method.

POINT NO. V.

THE COURT ERRED IN ADMITTING EXHIBIT C.

Exhibit C is the writing which was made by Barron, in which Barron purports to make certain guarantees concerning the results to be obtained from the use of Mintrate 40 and the self-feed method of feeding it. At the time it was offered it was admitted "not to bind the company on the question of the guaranty," but on the theory that "it has some value in showing whether or not the oral conversations took place." The court stated that it was of the opinion that it could not bind the company, and the evidence admitted at that time. Defendant made his objection clear that it was not admissible for that purpose, and that there was no agency or authority for Barron to make the representations that appear in the writing under any theory of the case. (R. 139-140) The court admitted the exhibit and instructed the jury that it was to be considered only in connection with the oral representations and not for any other purpose. (Ibid) This exhibit was thereupon read to the jury. (R. 141) It was before the jury at all times after this incident, and was taken to the jury room for consideration. In the court's instructions it is specifically pointed out that there could be no recovery under the provisions of the writing itself. Nevertheless, the exhibit was before the jury at all times, and was frequently mentioned during the course of the trial.

It is submitted that prejudicial error was committed in permitting the jury to consider this exhibit.

The law concerning the lack of authority of Barron in making and executing the exhibit has been fully discussed

under Point II of this brief. The court itself specifically points out in the instruction that the plaintiff could not recover under the written instrument. The writing therefore was before the jury at all times, even though under the trial court's own theory there was absolutely no reason for the jury to consider it.

Error was committed in its being received in evidence. The written instrument does not tend in any way or degree to corroborate the evidence concerning the alleged oral representations of Barron. The only material statement of fact concerned the 65% figure, and nothing in the writing itself is even remotely connected with this alleged representation. The contents of the writing do not tend to corroborate the evidence concerning the oral representations. Even if they did, at no time during the trial was any authority proved for the execution of the exhibit. As to Moorman Manufacturing Company, it was and is immaterial.

The written "guaranty," although not spelling out any liability against the defendant, was certainly influential in plaintiff's recovery. It tended to emphasize the idea that the defendant was liable one way or another. It emphasized the feeling which permeated the trial that the judge thought plaintiff should recover on *some* theory. It was highly prejudicial and certainly tended to influence the reaction and decision of the jury.

POINT NO. VI

THE COURT ERRED IN ITS THEORY OF DAMAGES.

A. The Court erred in permitting recovery based upon

the loss of chickens and, in addition, the loss of profits from the dead chickens.

In his complaint plaintiff attempted to recover for loss of profits based on calculated egg loss from the time when he started feeding mintrate until the time of the trial some sixteen months later. The trial court held in substance that he could recover to and including December 9, 1948, as far as his egg loss was concerned, and to December 4, 1948, as to his bird loss. Not only were plaintiff's damages after that time speculative under the theories of the trial court, but a reasonable and prudent poultryman would have replaced the chickens by that time and thereby minimized his loss.

A basic error in the Court's theory on damages was that recovery was permitted for the value of dead birds and culls, and the jury was permitted to find, in addition, that the plaintiff would have received a certain number of eggs from the dead chickens and that he would have made a profit on these eggs. Attention is particularly directed to the third paragraph of Instruction No. 18, where the Court says:

"In determining the amount of damage, you are instructed that plaintiff is entitled to the value of the eggs, less the cost of producing the same, that the dead hens and culls would have laid from the time of the damage to each hen until plaintiff could replace it, acting with the speed and diligence of an ordinary prudent poultryman."

Attention is invited to the whole of Instructions Nos. 17 and 18.

The law is well settled that damages cannot be re-

covered for the value of animals and also for loss of profits which the dead animals would have made. The market value of an animal takes into consideration the potential profit to be made by the animal for its owner. If beef is selling for 25c a pound, the value of a one-year-old steer, weighing a certain number of pounds, can be definitely computed. It certainly would be unrealistic to permit the owner of the animal to recover its value and as well to receive an amount as profits that might have been made had the animal lived to be two years old.

In the case of *S. A. Gerrard Co. v. Fricker* (1934) 27 P. (2d) 678, 42 Ariz. 503, a colony of bees was destroyed by poison. The owner was permitted to recover the market value of the bees at the time and place of the loss, plus reasonable expense incurred in his effort to mitigate the loss, but no recovery was permitted based on the theory of loss of increase. The decision was reversed by the Arizona Supreme Court on the grounds that double recovery was contrary to law, and in addition, highly speculative on the facts. The Court said:

"In addition to the above items of damage, plaintiff claimed damages by reason of the loss of increase, fixed at 250 hives. This claim, it seems to us, is entirely too speculative and uncertain. While the bee is industrious, dependable and intelligent, it is short-lived; sixty to ninety days is his allotted time. The span from October 11th to spring, when the bee swarms, is greater than the life of the bee. What colony or how many would have doubled and swarmed in the following spring is too much of a guess to be the basis of a claim for damages."

In *Miller v. Economy Hog and Cattle Powder Co.*,

293 N. W. 4, 228 Iowa 693, an action was brought by an owner of sheep on an alleged express warranty against the seller of certain stock powder. The Court said at P. 11, Northwest Reporter:

"Part 2 of the Instruction allowed damages based on ascertainable future profits on the dead animals in addition to their value at the time of the deaths allowed by part 1. This was erroneous. The measure of damages for the wrongful destruction of an animal is its value, less salvage, if any. 3 C.J.S., Animals, Section 234; 17 C. J., Damages. Section 185."

The Court says that the measure of damages is the same as in tort:

"Presumably payment to the injured party of the value of the animal before death would make him whole. *He would not be entitled to future profits in addition to present value.*" (Emphasis supplied)

The lower court was reversed for failure to instruct properly as to measure of damages. The editors of Corpus Juris and Corpus Juris Secundum concur in expressing the idea that the recovery value of a dead animal is the market value plus any salvage. It is stated that where the recovery is for loss of profits from an injured animal, the damage shall in no case exceed the animal's value. 3 C. J. S., Animals, Sec. 234, P. 1345 et seq.; 17 C. J., Damages, Sec. 185, P. 879.

In the case of *Chicago B. & Q. R. R. Co. v. Gelvin*, 238 Fed. 14, 151 C. C. A. 90, L. R. A. 1917C, 983, the

plaintiff's cattle were injured through alleged negligence of the defendant railroad. The Court held that the measure of damages was the difference between the value of the cattle before and after the alleged injury. The second headnote from the decision in this case is as follows:

"Sparks escaping from defendant's locomotive ignited brush and weeds on its right of way, which fire was communicated to plaintiff's pasture and meadow land, where it destroyed about 150 acres of grass and frightened defendant's 391 head of high-grade fat cattle, which he was feeding for the market. The cattle stampeded by reason of the smoke and roar of the fire, and one of them was killed, and all received bruises, becoming overheated. Thereafter the teeth of the cattle became sore from eating short grass and weeds raised on the burnt land, and they would not eat. There was evidence that, by reason of the soreness of their teeth and their fright, the cattle did not put on weight at the customary rate, and that when they were marketed in Chicago, a city in another state, they were not heavy enough to bring the top price; heavy cattle being in demand. *Held*, that as the measure of damages for injuries from the fire was the difference in the value of the cattle immediately before and after the fire at the place of injury, evidence that the cattle did not put on weight as fast as was customary for cattle being so fed, and that they did not bring the top price because they were not heavy, was inadmissible, as relating to speculative matters."

The Court said:

"We think the inquiry as to the probable gain of these cattle in the event there had been no fire,

and therefore the probable weight at the time of their sale in Chicago, in the fall succeeding the fire, the classification of the cattle as to weight, placing them in the lighter class, the fact that heavy cattle, in the fall, at the time of marketing the cattle, were in better demand, and therefore brought a higher price at that time and place, without even a suggestion that the heavier cattle were in better demand than lighter cattle, at the time of the fire, or that heavier cattle had a greater value, at Maitland, either before or after the fire, are not proper elements to be considered by the jury in determining the value of the cattle just prior to the alleged injury and the value just subsequent thereto; the damage being the difference, if any."

These cases are precisely in point with the case at bar. There is no reason why plaintiff could not have replaced the dead birds and culls. His only loss then would have been the value of the birds replaced. The court erred in permitting the double recovery here allowed, and returned by the jury, under Instruction Number 18.

B. The evidence with reference to loss of profit was remote and conjectural. It lacks the definiteness and completeness required by law for proof of this nature of damages. The Court, therefore erred in permitting the case to go to the jury upon the theory of loss of profits.

Throughout the trial there was difficulty experienced by the plaintiff in proving damage of any kind, and particularly loss of profits. Evidence of the theory first submitted by the plaintiff was placed before the jury during the early part of the trial and requires ap-

proximately eleven pages of the transcript. (R. pp. 158-168 inclusive) The Court took the motions to strike this evidence and the objections to it under advisement and later refused to permit the jury to consider the damages submitted at this time because the nature of the proof was not such that it could be understood, and, too, because the kind of figures and evidence presented was wholly speculative and conjectural. Various kinds of evidence concerning damage through loss of profits were presented upon several other occasions before plaintiff rested.

The final results of plaintiff's effort to prove damage for loss of profits were embodied in Exhibit R, which purports to be a summarization of the testimony of John R. Miller, beginning at Page 528 of the record. The testimony of Mr. Miller, and also of other witnesses called by the plaintiff, was that on July 3, 1948, there were three thousand four hundred ninety-one chickens on the west side of the road in the coops referred to herein for convenience as non-mintrate coops. There were twenty-eight hundred fifty birds using mintrate under the self-feed program on the east side of the road. (R. 529) According to the egg charts of the plaintiff, between the 3rd day of July and the 9th day of December, 1948, 250,156 eggs were laid by the non-mintrate chickens. The witness computed that 2,850 is 81.6 per cent of 3,491, so that under plaintiff's theory of the case the mintrate chickens should have laid 81.6 per cent as many eggs as the 250,156 eggs laid by the chickens west of Redwood Road.

The Court should keep in mind that the defendant does not admit by adopting these figures of the plaintiff's that they are by any means correct or accurate, or that

they were produced as admissible evidence, or that the evidence qualifies under any exception to the hearsay rule. The fact is that they are entirely self-serving and hearsay as to this defendant. However, the trial court admitted them into the evidence and the jury had no other figures to consider; so for the purpose of this argument the defendant has no other figures to use.

The product of $81.6\% \times 250,156$ is 204,135 eggs. This represents, according to plaintiff's theory, the number of eggs that should have been produced by the mintrate birds had they laid the same number as were produced by the non-mintrate chickens. (R. 530, 531) Mr. Miller testified that according to his egg charts the plaintiff actually received 156,157 eggs from the mintrate birds during the period of time in question. The difference between the number of eggs plaintiff says he should have received, 204,135, and the number he did receive, 156, 157, is 47,370, or, figuring thirty dozen to a case, a total of 131.58 cases. (R. 528-533) These figures were duly objected to by the defendant; the defendant duly made a motion for a nonsuit and asked the court for a directed verdict, and also asked the court not to submit the matter of loss of profits to the jury based upon the idea that the proof of damages on the theory were insufficient, speculative and erroneous.

Counsel for plaintiff asked Mr. Miller on direct examination (R. 532):

"Question by Mr. Rich: Do you know how much eggs were selling for during the fall of 1948?

A. I know approximately what they averaged during that time.

Q. What was the average?

MR. McKAY: I object to that as improper, not showing the market value at any time, no foundation laid for the answer.

THE COURT: Overruled.

Q. What is the average?

A. Fifteen dollars per case."

Based upon this estimate as to the average cost, the witness was permitted to testify that the amount of plaintiff's damage for loss of profits during the period was \$2,004.00. He then corrected the figure to be \$1,974.00. Later the same witness testified to the same theory and, correcting his arithmetic in small details, arrived at the figure of \$1,973.40 as the egg loss. (R. 537)

It is pointed out specifically that this figure is based upon a sale price of eggs at \$15.00 per case. It is a well known and uncontroverted fact that the price of eggs is extremely speculative. Pullet eggs are not nearly as valuable as hen eggs, and eggs during the month of October and the latter part of September are much more valuable than eggs produced in December and the latter part of November. No direct evidence whatsoever was offered by the plaintiff as to any specific prices of eggs during the entire period from July 3rd to December 9th. No evidence was presented as to the fluctuation in the market. The fact that there was such a change in market conditions appears affirmatively from plaintiff's own evidence and, in fact, from plaintiff himself. It is submitted, therefore, that the court erroneously permitted the

figure of \$15.00 per case to be used as an average in computing the value of eggs during this period of time.

It appears from the document designated "Judgment on Verdict" submitted to the jury, upon which it was to return its verdict in the case (R. 100), that it was permitted to find under the heading "For Loss of Egg Yield" a total of \$1973.70 as damage for the plaintiff. *One striking and important thing about this figure is that it fails to take into consideration in any manner or degree the cost of feeding the chickens involved during this seven months period.* Recovery is obtained simply for the difference between the number of eggs produced on the west side of the road and the number of eggs produced on the east side on a pro rata basis. The essential element in computing loss of profits is to produce evidence, so that the jury may arrive at a figure that presents the difference between the cost of production and the gross sales.

It is not sufficient in this case for the plaintiff to prove that he should have received 47,370 more eggs than he did receive. For all that appears it may have cost him two thousand dollars or five thousand dollars, or more perhaps, to feed the chickens and properly care for them, and in otherwise managing his flock, to produce the eggs which give him the sales price, according to his figures, of \$1973.70. It appears from his testimony and from the fact that he claims damage for loss of chickens that he was not feeding as many chickens proportionately on the east side as he was on the west. How many less were being fed during that period of time does not appear from the evidence, but plaintiff's testimony is that at the time of his count on December 9th or 13th, 1948, he had

1,318 birds on the Mintrate side out of the original 2850. This means that during the period of time in which he claims loss of profit, plaintiff lost in the mintrate pens 1532 birds. We do not know and the plaintiff does not know, nor did any of the witnesses know, whether these birds died or were culled during the first week after July 3rd, or during the first week before December 9th. The point is that if there had been birds living that would have produced the 47,378 eggs, which he complains were lost, he would have had to feed more chickens, and he would have been required to furnish them straw and to have the eggs cleaned and crated and the birds cared for by a hired man. None of these costs were taken into consideration in any manner whatsoever in arriving at a figure for loss of profits.

It is interesting to see how essential this information is before it is possible to arrive at a reasonably sound figure. Plaintiff testified that it cost eight and one-third cents per week per chicken for feed. (R. 579, 580, 581) It is to be noted in this connection that Mr. Park does not furnish any details as to what this eight and one-third cents per week included. It is not clear whether it includes alfalfa, concentrates or mash and oats, and wheat and scratch, or whether it includes all feeds of all kinds. Defendant objected at the time that the figure was used, and still contends that such an estimate without proof of the details of feed cost is unwarranted as a basis for proof of damage in a case of this kind. However, using plaintiff's own estimates, the feed cost for the dead chickens, the profit from whose production plaintiff is attempting to recover, would reach an astonishing figure.

Plaintiff claims that he lost 1532 chickens. If the figure is divided in half, so that a rough average is obtained as to the number of chickens he had during the entire period, the figure of 756 is the result. Defendant would like to have a more exact figure, but despite thorough cross-examination, it is not to be had. Park simply did not know. There are twenty-three weeks from July 3rd to December 9th, and, based on a figure of eight and one-third cents per week per chicken, plaintiff's feed bill would have been \$1462.29 during this period. (Of course, it may be argued that there were losses of chickens in the non-mintrate pens and that this basis for computing is not fair, since it does fail to take into consideration the cost of production of the non-mintrate birds.) The point, however, is that there is simply no evidence one way or another which furnishes any reliable guide to the jury or to the court in fixing the cost of production for these birds and the 47,378 eggs which they purportedly would produce. Moreover, the eight and one-third cents figure includes only the feed. How much did the plaintiff pay for his hired help to take care of the chickens and gather the eggs? How much did he pay for straw? What were his overhead costs, including gasoline, car upkeep, lights, water, building repair, rent, depreciation and maintenance? There is not one iota of evidence in the record as to any of these items. Certainly, it cost plaintiff something to be in the chicken business as a matter of overhead and operating expense. If the plaintiff could have been fortunate enough to raise a flock of chickens without any deaths or culls, he would have had some expenses in producing the number of eggs claimed. What were those expenses?

Defendant submits that gross error was committed by the court in permitting the jury to return a verdict awarding damages to plaintiff in the amount of \$1973.70, or any other amount, in the absence of proof of these items.

The law is clear that in situations where damages for loss of profits is recoverable, proof of such damage must be made clear and convincing and must transcend the realm of conjecture and speculation. The very term "profits" suggests something more than gross sales. It is for this reason that the law does not permit damage of this kind for a new business or enterprise.

This defendant does not contend that loss of profits is not in a proper case and with proper proof a correct theory of damages. The more recent cases support the proposition that loss of profits may in certain situations be recoverable. What is contended is that the proof in the case at bar lacks such definiteness and certainty as is required in proof of such damages. While no citation of authority is required, perhaps, for the notion that profits is a different thing as a matter of law from gross sales, the court's attention is invited to the line of cases holding "that prospective profits of a new non-industrial business, or one merely in contemplation, are too uncertain and speculative to form a basis for recovery, for the reason that there are no facts extant (provable data of past business), as in the case of an existing or established business, from which the amount of such profits may be established with reasonable certainty." 99 A.L.R. 938.

The editor of this A.L.R. Annotation points out that the line is drawn between cases where past experience provided proof with reference to costs and gross sales,

whereas, new businesses are unable to produce such proof, and, therefore, prospective profits from new enterprises were not considered sufficiently certain and definite to justify recovery. The cases along this line follow the reasoning of such decisions as *Ellerson v. Grove* (1930) C.C.A. 4th, 44 Fed. (2d) 493, where the court said:

“He who is prevented from embarking in a new business can recover no profits because there are no provable data of past business on which the fact of anticipated profits would have been realized can be legally deduced.”

This principle and the cases which follow it are distinguished from such cases as *National Soda Products Co. v. City of Los Angeles, et al.*, Supreme Court of California (1943), 143 P. (2d) 12, 23 Cal. (2d) 193.

These cases are only intended as illustrations of the somewhat obvious principle that cost must certainly be proved with reasonable certainty based on past experience if loss of profits is to be computed as a measure of damages. The cases appearing in the annotation at 99 A.L.R. 938 are all to this effect.

In the case at bar the plaintiff was admittedly an experienced chicken raiser in the sense that he had or should have had in his possession records of costs of operation, including feeding costs, labor expenses, depreciation, rent, cost of light and car expense, and matters of that kind. He put into evidence none of these records, and he testified as to none of them himself. The only evidence which he presented, and which was received by the court, was as heretofore pointed out—his estimate based upon these

records that the cost of feed was eight and one-third cents per chicken per week. Plaintiff was not qualified as a book-keeper or accountant, and the introduction of this estimate by him, based upon records which were not in evidence, was manifestly and clearly error. It is impossible to determine what kind of feeds were included and, of course, it is therefore impossible to determine what weight, if any, should be given to the testimony.

Moreover, the period of time used in making the estimate is not shown. It is impossible to tell from the estimate itself whether an entire year is figured, including the time during which a chicken admittedly does not produce any eggs, or whether the period of time is based upon the lifetime of a chicken, or whether it is based upon the laying period, or whether the figure represents the amount that is to be fed to white leghorn chickens, or some other kind. Moreover, as heretofore pointed out, there is no proof of any other overhead.

It is a matter of common knowledge that eggs must be gathered and cleaned before they are ready for sale; that chickens must be fed and watered; that coops must be cleaned and kept in repair. Ordinary business experience is sufficient for the assertion that there are overhead and management costs that must be taken into consideration. None of these figures were put into evidence in any manner whatsoever, and even the evidence as to the feed costs, which was improperly in evidence, was used to compute the loss of profits. The conclusion from the jury's verdict is inescapable that the jury did not consider any of these matters in arriving at its verdict.

It is submitted that under the facts of this case and

the applicable legal principles, the court should have held as a matter of law that evidence of loss of profits was insufficient to go to the jury, and that the instructions permitting recovery based upon this theory were clearly erroneous.

C. The procedure in the trial with respect to proof was prejudicial to defendant's cause.

Plaintiff had great difficulty in proving damages in this case. The first effort consumes approximately eleven pages in the record. (R. 159-168), and the facts and figures are so unintelligible, vague and uncertain that all of defendant's objections to the evidence were taken under advisement. (R. 167) The court decided that such evidence was insufficient and required further proof. However, all of plaintiff's figures were left on the blackboard and remained there for a period of approximately one week during the course of the trial. (See R. 857). The photograph of the figures appears in the files; Exhibit 42 and 43).

The second effort to prove damages was made by having defendant's hired man, John A. Miller, testify. Mr. Miller made further speculations and estimates without being requested to produce the source of his costs and estimates, all of which testimony was over the objection of the defendant. (See R. 527, 535, 536, 552)

When plaintiff presented his case the first time the Court recognized that there was no adequate evidence concerning damages, and he thereupon permitted the plaintiff to reopen and introduce further evidence. At one time during the testimony of Miller the Court mentioned

to counsel for plaintiff that he had given counsel a certain figure, and counsel for plaintiff in the presence of the jury commented upon having received figures on the amount of damages from the Court. (R. 529, 530) This conduct was highly prejudicial and gave the jury the impression that the Court was working with plaintiff in computing and assessing damages against the defendant. The day after this occurrence in court, the trial judge commented to the jury upon the statements made the day before, and explained that plaintiff had a right to have his theory of damages presented to the jury. (See R. 538-541) This comment had the further effect of emphasizing to the jury that plaintiff was entitled to damages, rather than helping the situation. Under the circumstances here the Court's comments only emphasized and reiterated its conduct of the day before.

After all of the trial, and even after counsel for both sides had argued their cases to the jury, the Court, before dismissing it for deliberation, invited the jury's attention to the exhibit of plaintiff, which computed damages and gave further instructions on the question of damages. (R. 859, 860) Coming at this time, and in view of the previous occurrences and actions of counsel and the Court with reference to damages, this was an extremely unfair and prejudicial kind of procedure.

It is recognized that the conduct of the trial in general is in the sound discretion of the trial court. It may be that the Court did not intend to over-emphasize damages by its repeated and consistent help to plaintiff's counsel in and out of the presence of the jury. The fact is that the matter was handled in such a manner and at such times that it

could not help but be prejudicial. In so conducting itself, the Court abused its discretion.

D. In instructing upon damages, the Court failed to take into consideration the intervening causes which the evidence of the plaintiff shows to have proximately caused or approximately contributed to the deaths and/or loss of production, if any, in plaintiff's chickens, and the Court failed to instruct the jury properly upon the duty of the plaintiff to minimize his loss.

The subject of proximate cause as it relates to the facts in the present case is argued in some detail elsewhere in this brief. We point out at this time only that the subject is important and has far-reaching consequences insofar as the measure of damages is concerned. The plaintiff used Mintrate 40 and the self-feed method of feeding chickens for a period of approximately six weeks. As stated elsewhere in this brief, there is probably no proof of any kind that either the food or the method impairs the health or laying ability of white leghorn hens, or of any other chicken. Even if we should assume, however, that the health or laying ability was impaired in some degree by the use of the feed or the method, the evidence discloses that many other factors contributed to any loss which plaintiff had during the time from the middle of June until the middle of December, during which period the plaintiff was permitted to recover damages, both for death losses and production loss.

It is admitted both by the plaintiff himself and by all of the witnesses who purported to know anything whatsoever about the chicken business, that the business is highly

precarious and that chickens die at a rapid rate or go off production for causes which are unknown to the poultry man. Mr. Conta, for example, testified that in his twenty or thirty years in the chicken business, chickens in one coop on the same poultry farm as another coop would die or go off in production when no other coop was affected, the feed being the same and the chickens having precisely the same care and raised under the same conditions. That being so, it is particularly important to consider the questions of intervening causes,—particularly diseases that got into the plaintiff's chickens during the period of time in question.

Plaintiff and Mr. John Miller, the hired man of the plaintiff, testified that during the last part of September and the fore part of October, 1948, Newcastle disease became prevalent in plaintiff's chickens on both sides of the road. Both of these witnesses testified that their observation was that the disease hit somewhat more heavily on the mintrate side than on the non-mintrate birds, but neither had kept any record as to deaths or culls, and neither could testify as to what extent the disease was more prevalent in the mintrate coops. The fact that this disease hit the flocks is the important consideration. Heavy loss resulted and the chickens went into a moult. It is elementary that a person liable either in contract or tort is not liable for damage which results from an intervening cause. Certainly a disease of this kind is not foreseeable in a legal sense, and this disease in September must be considered as an intervening cause as a matter of law. Instead of so instructing the jury, the court permitted recovery based upon both death and loss of production and culls until the

middle of December. It is submitted that on the basis of the evidence and the record, no jury could be expected to determine fairly and with a reasonable degree of accuracy what portion of the loss in the mintrate coops was due to Newcastle disease, and what portion, if any, was due to dietary deficiency, if any, in these birds, as a result of a breach of duty by defendant.

Another factor that is of importance in considering the question of intervening cause is the picking that was present as early as the middle of May or the first part of June, when Gail Barron first talked with the plaintiff, and which continued, according to plaintiff's testimony, throughout the summer months, and was particularly active in the flocks and apparent around the 24th of July. Picking occurs in chicken flocks for various and sometimes undetermined reasons. It can hardly be claimed, and was not seriously claimed by the plaintiff in this case, that picking in his flocks was a proximate result or even contributed to by Mintrate 40 or the self-feed method. Plaintiff did not testify and did not produce any evidence of any kind with respect to the question of what portion of his loss in birds and what portion of the resulting egg loss was due to picking. The Court's instructions did not aid the jury in any way in making a determination of the allocation of this kind of disease or condition. In fact, the sum total effect of the court's instructions was to permit the jury to lay all of the loss from whatever source to the feed of the defendant.

It submitted that especially in view of the factors which play a part in determining the health and productive capacity of chickens, the failure of the court to in-

struct properly and completely on the principles of intervening cause was prejudicial and gross error.

One further matter is directed to the attention of the court in connection with the instructions on damages. Plaintiff fed the Mintrate 40 and used the self-feed method of production for approximately six weeks. For the first three or four weeks, at least, he was able to find nothing wrong with it. In fact, his testimony is that his chickens increased in production and the mintrate birds produced at a higher rate than did the birds on the west side of Redwood Road. (R. 147)

Sometime between the 24th of July and the 1st of August, plaintiff decided that his chickens had been made ill by the use either of the method or the particular kind of concentrated feed, and he took his chickens off the feed. The evidence is that in the latter part of August or the first of September, approximately, the plaintiff consulted an attorney. The plaintiff did not at any time from the first sickness allegedly noted in his chickens, or the first undue amount of picking in July until the time of this lawsuit in the latter part of October, 1948, call in a veterinarian to determine what was wrong with his chickens, or what could be done to put them back into full production or on a healthy basis. From the beginning, it appears that plaintiff did everything possible to increase his damage and basis for his recovery in planning for this lawsuit, rather than to mitigate his loss. Even the written guarantee which was introduced into evidence as Exhibit C stated that in the event of sickness the plaintiff and a representative of Moorman Manufacturing Company would call in

a disinterested veterinarian to examine the chickens for illness and determine its cause.

In the face of this agreement, and even though plaintiff had consulted counsel nearly fifteen months before the action was tried, no veterinarian had ever examined the chickens. The only thing he did to stop the picking was to paint the birds with a salve, while debeaking appears to be the only deterrent. (See testimony of Conta, R. 346) Can plaintiff come into court now and claim that he took reasonable steps to lessen his loss when he did not as much as call in an expert to determine the cause of sickness? Plaintiff did not testify as to one thing that he did to prevent his own loss, except that he changed back to the feed he had previously used. He did not at any time attempt to determine from expert sources what kinds of feed, if any, might restore the productive capacity or stop picking.

Moreover, if in July or the first of August, plaintiff noted that his birds were ill, as a prudent and reasonable poultry raiser, knowing the propensity of chickens for easy disturbance in laying and production, and knowing the ease with which disease is communicated, would not plaintiff, as a reasonable man, replace his flocks with some birds that had not been damaged? Of course, it is quite possible that all of plaintiff's testimony is impeached by this fact, and that he did not notice anything wrong with the birds because there was nothing wrong with them, and that he simply changed feed and is trying to recover from the defendant the natural losses from disease during these months in his poultry-raising business. But if the plaintiff's testimony is believed and he noticed something

wrong with them, and he noticed the loss of production, could he as a reasonable and prudent man continue to lose money on these birds and lay the damage to the feed of Moorman Manufacturing Company? Certainly, the court should not permit the plaintiff to speculate at the defendant's expense. It is submitted that there was a ready and available market for chickens for meat during the months of September and October and August, 1947, and that the evidence shows that pullets up to five months of age were available for purchase.

The reasonable position is that if plaintiff is entitled to recover anything in this action, his damages should be the difference between the value of his flock after plaintiff stopped using the defendant's feed and the self-feed method and the value of other birds that could be purchased to replace plaintiff's birds on the open market. If plaintiff lost ten or twenty days' production as a result of changing from one flock to another, perhaps this loss could be recovered. Of course, it must be proved by competent and reasonably certain evidence.

It is submitted that the theory upon which the question of damages was placed before the jury simply permitted the plaintiff to speculate and did not require him as a matter of law to mitigate the loss. In this particular, as well as in those heretofore pointed out, defendant submits that the court committed gross and prejudicial and reversible error.

SUMMARY

It is submitted that the court erred in each of the particulars set forth in this brief. Based on the proof submitted

at the trial, there is no theory in law supported by substantial evidence upon which plaintiff could recover against this defendant. The court should make an order setting aside the judgment of the trial court and dismissing the complaint with prejudice.

Respectfully submitted,

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