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

Utah Supreme Court

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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

RESPONDENT'S BRIEF

FILED

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
Statement of Facts	3
Argument	24
Point No. 1. The case was properly submitted to the jury upon the theory of express warranty.....	24
Point No. II. The issue of the authority of Barron to make an oral warranty was properly submitted to the jury..	37
Point No. III. Breach of express or implied warranty may be predicated upon misdirections given by defendant concerning the use of its feed.....	55
Point No. IV. There was ample evidence that plaintiff's loss was proximately caused by defendant's feed and feeding method	58
Point No. V. Exhibit C was properly admitted.....	68
Point No. VI. The theory of damages adopted by the court is correct	70

TABLE OF CASES CITED

Beaver Drug v. Hatch, 61 Utah 597, 217 Pac. 695 (1923)....	26
Bell v. Reynolds, 78 Ala. 511.....	84
Bergstrom v. Mellen, 57 Utah 42, 192 Pac. 679 (1920).....	73
Cleary v. Shand, 48 Utah 640, 161 Pac. 453 (1916).....	79
Crouch v. National Livestock Remedy Co., 205 Iowa 51, 217 N.W. 557 (1928)	48, 59, 60, 63, 66
Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, 130 S.W. 430 (1910)	45
De Zeeuw v. Fox Chemical Co., 189 Iowa 1195, 179 N.W. 605 (1920)	28
Detroit Vapor Stove Co. v. Weeter Lumber Co., 61 Utah 503, 215 Pac. 995 (1923)	27
Economy Hog and Cattle Powder Co. v. Compton, 132 N.E. 642 (1921)	29, 37, 48, 66
Economy Hog and Cattle Powder Co. v. Compton, 135 N.E. 1 (1922)	66
Egelhoff v. Ogden City, 71 Utah 511 (1928).....	72
Friedman & Sons v. Kelly, 126 Mo. App. 279, 102 S.W. 1066..	46
Gardner v. Airway Motor Coach Lines, 166 P. (2d) 196 (1946)	74

I

Gerrard S. A. Co. v. Fricker, 42 Ar. 503, 27 P. (2d) 678 (1934)	71, 72, 88
Horace F. Wood Transfer Co. v. Shelton, 180 Ind. 273, 101 N.E. 718 (1913)	74
Ingraham v. Associated Oil Co., 166 Wash. 205, 6 P. (2d) 645 (1932)	31
International Harvester Co. v. Lawyer, 155 Pac. 617 (1916) ..	44
Jorgensen v. Gessell Brick Co., 45 Utah 31, 141 Pac. 460 (1914)	26
Kennedy v. Treleaven, 103 Kan. 651, 275 Pac. 977, 7 A.L.R. 274	73
Metcalf v. Mellen, 57 Utah 44, 192 Pac. 676 (1920)	73
Miller v. Economy Hog & Cattle Powder Co., 228 Iowa 626, 293 N.W. 4 (1940)	27, 28, 48, 57, 63, 75, 80
Moorman Manufacturing Co. v. Barker, 40 N.E. (2d) 348 (1942)	57
Moorman Manufacturing Co. v. Harris, 280 Ky. 845, 134 S.W. (2d) 936 (1939)	48, 59
Moorman Manufacturing Co. v. Wilson, 209 Ill. App. 104 (1918)	30
Nielsen v. Hermansen, 109 Utah 180, 166 Pac. (2d) 536 (1946)	26
Philbrick v. Kendall, 111 Me. 198, 88 Atl. 540 (1913)	84
Rabinowitz v. Hawthorne, 98 Atl. 315 (1916)	84
Reese v. Bates, 94 Va. 321, 26 S.E. 865 (1897)	31
Reiger v. Worth, 130 N.C. 268, 41 S.E. 277 (1902)	31
Royal Seed and Milling Co., 142 Miss. 92 (1926)	47
Sharp v. Gianulakis, 63 Utah 249, 225 Pac. 337 (1924)	80
Smith v. Doubay, 20 Utah 443 (1899)	45, 52
Smith Table Co. v. Madsen, 30 Utah 297, 84 Pac. 885 (1906) ..	45
Stringfellow v. Botterill Auto Co., 63 Utah 56, 221 Pac. 861, 34 A.L.R. 533	26
Studebaker Bros. v. Anderson, 50 Utah 319, 167 Pac. 663 (1917)	25
Stuart v. Burlington County Farmers' Exchange, 101 Atl. 265 (1917)	84
Summers v. Provo Foundry & Machine Co., 53 Utah 320, 178 Pac. 916 (1919)	25
Swift Co. v. Meekins, 179 N.C. 173, 102 S.E. 138 (1920)	31

II

Swift & Co. v. Redhead, 147 Iowa 94, 122 N.W. 140 (1909)	29, 48, 63, 80, 84
Thatcher Milling & Elevator Co. v. Campbell, 64 Utah 422, 231 Pac. 621 (1924)	27, 54
Tomlinson Co. v. Morgan, 82 S.E. 953 (1914)	31
United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W. (2d) 432 (1937)	30
Vincent v. Federal Land Bank of Berkeley, 109 Utah 191, 167 P. (2d) 279 (1946)	80
Wolcott v. Mount, 13 Am. Rep. 438	84

TEXTS CITED

27 A.L.R. 1250	29
39 A.L.R. 399	29
69 A.L.R. 748	84
99 A.L.R. 938	83
15 Am. Jur. Damages, sec. 15	73
22 Am. Jur. Food, sec. 121	29
46 Am. Jur. Sec. 13	34
46 Am. Jur. Sec. 736	36
McCormick on Damages (1935), p. 477	76
Mechem on Agency, 2d Ed., Vol. 1,	
Sec. 396	51
Sec. 456	52
Sec. 723	43
Sec. 881	44
Sec. 887	48
Sec. 890	44
Restatement of the Law of Agency,	
Sec. 63	43
Sec. 82 et seq.	49
Wigmore on Evidence	68
Williston on Sales, Rev. Ed., Vol. 1,	
Sec. 194	33
Sec. 203, footnote 16	32
Sec. 206	34
Sec. 211	36
Sec. 212	33, 36

III

In the Supreme Court of the State of Utah

LaVAR PARK,
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vs.

MOORMAN MANUFACTURING
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and GAIL BARRON,
Defendant.

Civil No. 7456

RESPONDENT'S BRIEF

STATEMENT OF FACTS

As the appellant in its brief has omitted some of the most essential facts, and has misconstrued and misstated others, the respondent feels compelled to submit a complete statement of facts.

The plaintiff is a poultry farmer living in Riverton, Utah, and the defendant is a corporation with home offices in Quincy, Illinois, which manufactures feed for livestock and

poultry. Plaintiff bought poultry feed from the defendant to be fed in a particular manner. A large number of the chickens so fed died and the plaintiff sued to recover damages for breach of express or implied warranty.

About Jan. 20, 1948, plaintiff bought and received 10,000 white leghorn baby chicks one week old from Sales and Bourke's Hatcheries in California, and put them into his brooding pens on the west side of Redwood Road (R. 121-122). In March, 1948, he sold about 2,250 of the young birds since the maximum capacity of all his coops—East and West of Redwood Road—was not above 7,000 mature pullets (R. 180, 198). Before that time he had had some normal brooding losses among his chicks, and he had sold the roosters (R. 199-200, 266-267). When the pullets were 2½ months old, a number of them died of chickenpox and tracheitis (R. 193, 199), so that about the middle of April plaintiff's flock consisted of about 6,400 three-month-old chickens (R. 180).

To make room for the growing pullets, plaintiff sold all the older hens in the coops on the east side of the road in May, 1948, and washed and disinfected their coops (R. 122-124). About June 1, he moved 2,850 of the young pullets over to the east side with the help of a Mr. Conta, poultry buyer for the Utah Poultry Company, a very experienced chicken man who had handled "millions of chickens," his job being to "cull" chickens, that is select those hens which do not lay eggs and buy them as meat. By law, and the strict rules of his company, he was not permitted to buy any diseased chickens (R. 304). As a result, and through his long years of experience, he had exceptional ability to recognize disease

in chickens. Mr. Conta testified that only the best layers were selected to be moved to the east side (R. 306) and that they were in good shape and had no diseases (R. 307-310).

Up to that time plaintiff fed all his chickens a product of General Mills, known as "Larro," and was satisfied with the results. This feed was a pre-ground "mash" containing the nutritional requirements for chickens, including protein and minerals, in ready-mixed form, with scratch grains in regulated quantities to be fed separately once a day. Mr. Wood, a representative of General Mills, explained at the trial that under their feeding program the scratch grains—wheat, or wheat combined with oats or corn—are progressively withheld from the chickens the higher their level of egg production. At 75% production, for example, the chickens receive less grain than when the egg yield is lower, or when they just start to lay. He said that chickens have a natural preference for the grains which must be withheld from them because with increasing production the protein requirement increases and the carbohydrate requirement decreases (R. 362-365).

Early in June, 1948, plaintiff met Gail Barron, salesman for defendant Moorman Manufacturing Company. The first business he had with him was a day or so later when Barron came to plaintiff's place and sold him some minerals to stop picking in his young birds. This picking was the ordinary feather picking which occurs in all sizeable flocks from time to time and is distinguished from "pick-outs" or "cannibalism" which afflicted the hens on the east side after using defendant's feed. Conta testified that these conditions are not the same,

that they "are two" (R. 340). The picking did not concern plaintiff very much and later cleared up by itself so that at the time when he started to feed mintrate the picking was "very nominal." (R. 181).

When Barron came to see plaintiff, his main purpose was to sell him a new self-feed concentrate called "Poultry Mintrate 40," which his company had just put out. Barron explained that plaintiff could feed Mintrate right along with oats, that its use would eliminate the need for the more expensive commercial pre-ground mash or obtaining grinding and mixing machines to mix and grind up the feed himself. Plaintiff had never heard of this product before and was naturally skeptical at first, knowing how easily chickens can be upset and thrown off egg production.

Mr. Barron visited plaintiff almost every day in the fore part of June, 1948, and once spent practically the whole day with him in an attempt to persuade him to change to the new feeding plan. He told Park that numerous successful experiments with Mintrate on the self-feed method had been made, that it had been proved equal or superior to any feeding method now on the market, and that no less than 65% production—65 eggs per 100 hens a day—had in all cases been achieved. He added that there had been better results than that, that 90% production had been reached in at least one instance, and that plaintiff would in any event obtain a minimum lay of 65% on the self feed plan (R. 126-127). Barron also said that chickens on their plan would not moult for the full 15-months laying period (R. 408-409).

Barron showed plaintiff some literature which impressed

him (R. 190), particularly a pamphlet (Exhibit A) entitled the "NEW, EASY, NO MIX, SELF-FEED CONCENTRATE" which states in red and black advertising, among other things: "Compared with the average laying mash—three times as much minerals—twice as much protein—half as much needed — *Mintrate 40 and your grain=good results* — contains only what you need, but can't raise—lower cost per bird—all the advantages of a concentrate without the work, fuss or muss" (emphasis supplied). On the large inside page the pamphlet gives detailed instructions on "How to use the EASY, NO MIX, SELF-FEED WAY new feeding method for laying hens—no grinding or mixing" (R. 137). Further down the pamphlet states:

"When not set up for grinding or mixing, the self-feed way described above may be preferred. *It has been successfully used by thousands of Moorman customers.*" (Emphasis supplied).

The self-feed plan which Barron specifically recommended to plaintiff (R. 127, 143) is based on the idea that the chickens will be able to balance their own diet. They have before them at all times the mintrate concentrate in one feeder and whole oats in another feeder and have free choice in the amounts of each they wish to consume. In addition they receive scratch grains (not oats, usually wheat) once a day, and alfalfa hay (R. 137).

On his visits to plaintiff, Barron was once or twice accompanied by a Mr. McArthur, the District Sales Manager for defendant company. McArthur was present when the statement concerning 65% production and other statements as to

the superiority of the Mintrate plan were made (R. 134). Plaintiff finally agreed to order some mintrate, but only enough for 1,250 chickens (R. 189, 263-264). That was before a written guaranty was discussed (R. 263-264, 410).

A day or so later plaintiff and Barron began talking about the possibility of entering into a written agreement under which plaintiff would receive definite assurance that he would not lose any money through the use of the Mintrate plan (R. 411). In case such a contract could be obtained, plaintiff agreed to feed Mintrate to 2,850 instead of the original 1,250 chickens. Mr. Barron needed some time to contact his superior to make sure that he had authority to enter into such an agreement (R. 411). But in the meantime, on the strength of Barron's promise to get the guaranty, if he could, plaintiff started, about June 11, to feed Mintrate to all the 2,850 chickens on the east side of Redwood Road (R. 189).

This arrangement made it possible for plaintiff to carry out a clear-cut test to compare the two feeds and feeding method with respect to chickens of the same breed, the same age and hatch which were receiving the same care, housing, and sanitation, and were comparable in numbers. (Plaintiff then had 3,491 "Larro" birds, all on the west side of the road). On the basis of this test Park intended to decide which of the two feeding methods to use in the future (R. 411).

Following the instructions of defendant, plaintiff gradually changed over to the mintrate plan, at first mixing it with his regular feed and increasing the portion each day until at the end of 10 days, about June 21, the east side chickens were completely mintrate-fed (R. 142).

In the meantime, Mr. Barron had contacted the District Sales Manager McArthur. Barron testified as follows:

"A. Yes, I called him, as I remember it. I called him on the phone and explained to him that Mr. Park would place 2,850 birds on our feeding plan if the company would insure that he would not lose any money through it.

Q. What did he say?

A. At that time he said he could not tell me; that he was quite sure the company would, because they were interested in getting poultry business in this area; and that he could not okeh it without checking further on it.

Q. Did you later have a conversation about this same matter?

A. About a day following, Mr. McArthur contacted me and told me . . .

A. (continued). That Mr. McCullough had approved the guaranty and that we could guarantee that he would get the same results or have the same production rate, the same money return from his chickens as from the chickens on the other side" (R. 412).

Later, Mr. Barron testified, McArthur personally went with him to plaintiff's place and told plaintiff who asked him about the guaranty that "Mr. McCullough had approved it, that the company was behind it" (R. 413). McArthur's testimony is to the same effect. He said that he called McCullough, the Sales Manager for the states of Utah, Idaho, and parts of Nevada, and was told by him that he could guarantee the product, that the company "would equal the production of any competitive feed" on the self-feed method (R. 286).

Mr. Barron also testified that Mr. McCullough personally recruited him as a salesman in the middle of May, 1948, when the company was getting ready to open up the Utah area for the new-type feed; that McCullough pointed out to him the selling points of Mintrate 40 and particularly the attractiveness of the self-feed method to farmers; "that the program would eliminate and was eliminating many of the standard types of feeding; that it would eliminate the need for getting it through a mash house and eliminate the need or necessity for mixing the grain. The farmer himself could feed the grain and the protein direct to the chicken . . ."; that McCullough told him further that "if fed on this method the chickens would not ever lay under 65%"; that the method was new but would be appealing to any farmer, and that "it would eliminate the sales resistance to the program" (R. 398-400). Later, in sales meetings in June, Gail Barron was further instructed along the same lines, and McCullough explained to the salesmen that chickens on the self-feed method would not moult for the entire 15-months laying period (R. 400). See also McArthur's testimony (R. 282-285).

The written agreement was executed on June 19, 1948 (Exhibit C, set out in full at R. 141).

At the time the agreement was executed, the east side chickens were already on the Mintrate feeding plan and were just starting to lay. Plaintiff did not start to count egg collections East and West and to record them on his eggcharts until about June 20. It was not before July 3 that egg production was high enough to gather eggs twice daily (R. 207, 211). For

about two weeks thereafter the results were good. Plaintiff testified as follows:

"I would say maybe the mintrate might have had a little the better of it, for one per cent, when Mr. Mittelberg came out there, and they got up to 63½ per cent, is the highest I ever did get out of them, out of the pullets. That should have been around the middle of July. Then they started to dropping off" (R. 144-145).

About the same time plaintiff noticed that the Mintrate birds were losing weight. He told Barron about it and Barron told Mr. Mittelberg, the Manager of the Service Department of defendant who had come out from the head office in Illinois. Mr. Mittelberg went to see plaintiff on July 19. He testified that the birds looked good and the egg production was just about the same as that of his other birds (R. 797). He gave plaintiff some advice on how to improve their weight (R. 418-419).

About the same time Barron asked plaintiff to recommend the feed to other farmers, but plaintiff declined because the chickens were losing weight (R. 150-151). Plaintiff weighed some of the chickens, put them on scales and found the Mintrate birds ½ to ¾ pound lighter than the other birds on the average (R. 151). Mr. Wood, and a Mr. Bryson, who bought eggs from plaintiff during this period, confirmed the fact that the Mintrate birds were getting thin (R. 357, 245).

A little later plaintiff became disturbed about the amount of picking in the mintrate pens. He testified that there was "a terrible lot of cannibalism," that many chickens were

picked to death (R. 144). The worst outbreak started about July 24. Plaintiff saved many by painting them with a salve, but many died (R. 149). Mrs. Park and Mr. Miller, plaintiff's hired man, testified to the same effect. Mr. Barron testified:

"Q. Coming back to Mr. Park, when was the next time you saw Mr. Park?

A. I think after that, the day of the 25th or 26th of July. It was just after the 24th.

Q. What was the occasion?

A. He called me out there.

Q. What did you see when you got there?

A. Mr. and Mrs. Park and the hired man, they were attempting to stop chickens from killing each other on the east side of the road. They had an outbreak for about three days there; he was completely discouraged with the feed.

Q. What did you tell him?

A. I told him I would notify the company of his intention and see if there was not a solution to the problem.

Q. Did you ask him to keep feeding or stop feeding?

A. I asked him to keep feeding.

Q. Did he keep feeding?

A. He did.

Q. Did you notice what they were doing.

A. They were picking each other.

Q. What was the result of this picking, that you could see?

A. There were deaths, a number of deaths; and of

his entire 2,850 birds I would say a good $\frac{1}{3}$ of them were painted. They had been picked or picked at, and he was continually painting them to stop it.

Q. Did you yourself see any of the dead birds?

A. Yes.

Q. How many?

A. I would not know. I did not count them. There was in one pen I counted at one runway about fifteen birds newly dead, and in Pen No. 1—

Q. Can you point that out?

A. The 6-foot runway there, they were in that runway between Pen No. 1 and 2.

Q. About how many?

A. I would say about fifteen.

Q. Were there any dead chickens anywhere else?

A. Every runway had dead chickens, but some had more than others. I did not count them." (R. 420-421).

At the same time many of the mintrate birds went off egg production and became culls while the Larro birds layed up to 85% (R. 148). The culls were bought as meat by Tom Conta (R. 156), while the chickens that had died had to be thrown out as garbage. Plaintiff testified as follows:

"They were giving me a bad time, and I told Gail something had to be done. I said I had better take them off this feed. He said 'No, you better give them a fair chance.'

Q. What did he say to you?

.

A. Well, he said to leave them on this plan and we would see. We had to give them a fair trial. So I figured, well, I would have to give them a fair trial. If I had to have any bad business with the company, I would have to give them a fair trial, so I left them on it. I finally took them off. That is, I started to take them off before Dr. Sturdy came out. I think I started on Saturday, and they came out on Monday." (R. 150).

Plaintiff said he thought he started to go back to the Larro feed about August 18, that he changed back gradually taking about ten days (R. 148). He did not ask a disinterested veterinarian to look at the chickens because a Dr. Sturdy, the defendant's own veterinarian flew out to Utah for the special purpose of examining plaintiff's flock (R. 153). McArthur testified as to these occasions as follows:

"Mr. Barron called me during the night and told me that there was a lot of trouble with Park's chickens and I was down there very early the next morning and went through the coops and looked the chickens over. That is when I first saw the written guaranty.

Q. About when was that —do you know?

A. I would say it was some time during August.

Q. Was that the fore part or the latter part of August?

A. I could not definitely say as to date.

Q. By the way, you said you came down and examined the chickens?

A. Yes.

Q. What did you see?

A. I saw a lot of dead chickens and a lot of chickens picking badly.

Q. What did you do after you had examined the chickens and knew about this guaranty?

A. I went through all of the pens and looked the situation over, all of the pens where the chickens were being fed mintrate, then, on the opposite side of the street, after making a comparison I went back to Ogden and called Mr. McCullough and reported to him just exactly what I had seen, and told him that I thought it was quite serious and that he definitely should get some action. He instructed me to immediately call Mr. Hulsen, the sales manager, in Quincy, Illinois, and I did that.

Q. What did you say to Mr. Hulsen?

A. I told him approximately what I had told Mr. McCullough. I told him that the chickens were dying, that they were losing weight, and that they were picking bad; that as far as I knew, the feed had been fed in accordance with our instructions; that I had been checking the particular operation as closely as I could and still attend to my other work. At that time I had been in Mr. Park's place—that was the fourth trip, I think.

Q. You had discovered the manner in which he fed his chickens?

A. I had very definitely observed it, and I was very much concerned about the deal.

Q. What was the name—Hulsen? What did he say?

.

A. He told me that the company would get someone out here immediately.

Q. Did they get someone out here?

A. Yes.

Q. Who came out?

A. Dr. Sturdy.

Q. When did you first see Dr. Sturdy?

A. I met him at the airport.

Q. Where did you go from there?

A. I took him to the hotel, and the next morning I brought him up to Mr. Park's place (R. 287-288).

Mr. McArthur then relates how Dr. Sturdy examined the chickens, and that one remark of Dr. Sturdy's struck him as being unusual, and therefore he remembered it. He said: "*We are just starving these chickens to death on all the feed they want.*" (R. 290).

Plaintiff and Mr. Barron and Mr. Miller all testified that they heard Dr. Sturdy make the same remark after he dissected two chickens, cut open their gizzards and found them to be full of oat fibre (R. 154-155, 422-424, 523-524). Mr. Barron testified:

"A. He said that the gizzard was full of hulls, which he showed us. There was nothing else in the gizzard except oat hulls, and he said that the chicken was starving to death, that he thought it was full. The full gizzard made the chicken feel as if it were full, and as a result it was not eating enough. It was gradually starving." (R. 424).

Mr. Miller, who was particularly interested in poultry diseases because he was studying about them at school, asked

Dr. Sturdy about leukosis and Dr. Sturdy said it did not show in these chickens, and he also told him that there was no pullorum or coccidia, nor any other disease (R. 523-524). Miller stated:

"All he said was: 'We have been starving these chickens to death. They feel like they are full, getting plenty to eat, but they are not.' " (R. 524).

Dr. Sturdy himself testified as a witness for the defendant company. He is a Doctor of Veterinary Medicine and employed by defendant as Research Veterinarian, also has some duties in connection with the company's Experimental Farm. While the witness obviously avoided committing himself as to the cause of plaintiff's difficulties, he did admit that the chickens on the east side "just did not look too good" as compared with the Larro birds (R. 717, 728-729), that there were "quite a few culls" among them, and that they were light in weight (R. 727), and that the consumption of too many oats in the self-feed program may have been the cause of the difficulties (R. 733-734). He testified:

"When I opened up the crop and gizzard I said to Mr. Park: 'There is your trouble. That bird is overeating oats. No wonder your birds are not doing any better!

Q. That was your opinion at that time?

A. Yes." (R. 732, see also 719).

Dr. Sturdy looked for illnesses among the flock and testified as to all the disease possibilities at great length. He said that there was no pullorum (R. 718, 727), nor coccidia (R.

719, 727) nor any other disease that he could positively diagnose. He suspected that there may have been a few cases of big liver or other form of leucosis, but he was not certain (R. 743), but added that there might be some cases of big liver in a flock without affecting the other birds and that this disease is entirely different from Newcastle which spreads rapidly and usually hits all the coops on one farm (R. 729-730). Dr. Sturdy testified that he was going on to California to investigate some similar complaints (R. 735), and that on other poultry farms in Utah that he had visited egg production was lower on mintrate than on other feeding programs (R. 739).

After his trip to California, on August 28, Dr. Sturdy returned and visited plaintiff's farm again (R. 725), and by that time several other officers of defendant, including Mr. Mittelberg and Mr. Garrison, the Regional Sales Manager for the Pacific area, had also arrived in Salt Lake City because of their great concern over the progress of plaintiff's feeding experiment (R. 294, 459). There were some efforts made by defendant to come to a settlement with plaintiff (R. 458-461), but no adjustment finally materialized.

There was a large amount of additional testimony to the effect that the Larro birds were doing well while the mintrate birds went down in egg production, had many more culls, more deaths and the quality of the eggs produced was inferior (Mittelberg R. 807-808, Wood 356-357, 359, Keith Bryson R. 244, 245, 247, John Miller R. 526-527). This was apart from the testimony of other poultry men in Utah

who had similar unsuccessful experiences with the Mintrate self-feed program.

There was no question but that plaintiff fed Mintrate strictly in accordance with defendant's instructions. The evidence was also undisputed that apart from the difference in nutrition, the Mintrate and Larro chickens received absolutely equal care, housing and sanitation, and that they were of the same age and heredity. In that connection defendant's expert witness, Dr. C. I. Draper, head of the Department of Poultry of the Utah State Agricultural College, testified that where a farmer has chickens all of the same age, raised under the same conditions up to the age of 5 months, and then they are separated, but they continue to be under the same management, with the same type of coop and the same amount of space and the same care in all respects, except that one group receives a different type of feed, and that group develops severe picking and cannibalism while the other group does not, then it follows as a logical conclusion that the cannibalism was caused by a nutritional deficiency (R. 773-774).

See also R. 726 showing that in Government Bulletin No. 1652 "Cannibalism," is listed under nutritional diseases. Dr. Draper and Dr. Sturdy, however, call cannibalism not a disease, but a "vice," not caused by any organism (R. 726, 758).

Plaintiff does not claim that there are any deleterious substances in the composition of the Mintrate feed itself. Dr. Draper testified, however that because a feed has a certain constituency that does not necessarily mean it is good for the bird (R. 766, see also Dr. Elmslie's testimony R. 644-645). Dr. Draper

stated that the feeding program for chickens must be varied according to the kind of the bird, its size, and the percentage of its egg production (R. 768-770). The Mintrate self-feed program does not allow for any such variation, particularly not in relation to the level of egg production. That was admitted by Mr. Mittelberg (R. 816-817).

As to the beneficial qualities of oats in feeding chickens, there appears to be a difference of opinion among the experts (R. 734). Oats have more fiber than other grains and are therefore less digestible for chickens (R. 820, 760-761). All experts agree, however, that chickens fed on too many oats or oats alone will deteriorate and produce very few eggs (R. 734-735, 757, 648). Also, confined poultry such as chickens on the larger farms of the west have different nutritional requirements than the smaller family-sized or farm flocks of the middle west which can run freely about the green of the country (R. 815, 821).

The self-feed method itself is not generally recommended for chickens. Dr. Draper testified that he had not seen it used in Utah and that the Utah State Agricultural College does not recommend it (R. 767). Dr. Miner, also of the Utah State Agricultural College, states in a letter that the "cafeteria method" of feeding can be carried to extremes, that it has to be used with judgment and skill, and that for most individuals the mixed rations are preferable (R. 762). And Mr. Wood, representative of General Mills Farm Service Division, testified that his company does not recommend a free choice self-feed program for chickens above the age of 20 weeks (R. 362, 382).

The defendant itself evidently began to have doubts as to the appropriateness of the self-feed method. In September, 1948, after the occurrences at plaintiff's farm, it cautioned against recommending a change to the self-feed method (R. 434-435, 809).

According to the testimony of Dr. Elmslie, Director of Research of defendant, Poultry Mintrate 40 was not adopted by the company before the fall of 1947 (R. 623, 634). It is the first chicken concentrate of the company intended to be used on the self-feed plan, the older Poultry Mintrate 38 having been developed for mash feeding only (R. 653). Dr. Elmslie, who also supervises the 180-acre experimental farm of defendant, could not point to any experiment of the company that had been made with White Leghorn chickens on the self-feed method although they are the most widely-used laying chickens in the United States. There also had not been any self-feed experiments before the fall of 1947 with any other breed of chickens except one with an "Austrowhite" breed and one with a "High Line" breed. Only one of these experiments was on a comparative basis, but involved only two pens of 70 birds, and the other one covered only one pen of 75 chickens (R. 634, 635). The witness did not have any information or figures on the results of these experiments, neither did Mr. Mittelberg (R. 825). That was the extent of the research and testing of the new product before it was released to the public. The company's main business seems to be feeds for livestock. It sells a hog mintrate, a cow mintrate, a beef cattle mintrate, and mineral feeds for horses and sheep (R. 626-628). Poultry Mintrate 40 is intended

for turkeys as well as chickens (R. 628), but for turkeys, Dr. Elmslie said, they do not recommend the self-feed method (R. 632).

As a matter of fact, there is not the slightest evidence in the whole record that there had ever been an adequate or proper testing of the Mintrate feed or the self-feed method by the company or any one else indicating that satisfactory results could be obtained when fed to a larger flock. Apparently, the plaintiff was the first person to carry out a full scale experiment on a comparative basis, which test proved conclusively that the Mintrate, when fed on the self-feed method, was a dismal failure.

Plaintiff did not attempt to recover damages for all the losses of his Mintrate birds, but asked solely for compensation of his *relative or comparative loss*, that is, any losses in excess of those experienced by his Larro birds. He concedes that there are certain risks involved in the chicken business which are, however, due to modern advances in the science of poultry farming, not nearly as unavoidable and unpredictable as appellant attempts to show. Since he experienced some normal losses among his Larro birds and would in all probability have had about the same amount of losses in the Mintrate birds had it not been for the fact that he changed feeds, plaintiff, in fairness to the defendant, did not include them in his claim for damages. Normal loss factors, such as the outbreak of Newcastle disease which struck both flocks in November (R. 208), not in September or October as appellant states, have thus been automatically excluded from consideration in the computation of plaintiff's damages. The New-

castle disease caused the Larro, as well as the Mintrate birds to go off production for several weeks so that consequently hardly any egg losses were included for the Mintrate birds during that period. The egg charts which were introduced in evidence substantiate these facts. (See R. 208).

Plaintiff made several different counts of his birds, on both sides of the road, one in June, when the Mintrate program was started, one in the beginning of October, and one in the beginning of December, 1948. He had complete figures of the number of deaths, the number of culls, and the amount of eggs produced by the Mintrate birds as well as the Larro birds. In his complaint, he prayed for \$6,775.50 as damages on his first cause of action, \$3,522.25 as damages on his second cause of action, and \$4,978.75 on his third cause of action. He asked for damages up to October 31, 1949 which was the end of the laying season of the damaged flock. He had found it impractical to replace part of the Mintrate flock before, for the reason that, as will be discussed under Point VI of this brief, piecemeal or partial replacements with younger pullets not ready for egg production—the only chickens then available on the market—would have upset the annual cycle of his poultry business. The Court, however, did not permit him to prove any losses beyond December 9, 1948 (R. 538). As a result, and as a result of the many deductions from his proved losses which plaintiff was required to make (see Exhibit V, and R. 859), the maximum recovery allowed was reduced to \$2,231.34 which the jury returned as the total amount of its verdict.

ARGUMENT

POINT NO. I

THE CASE WAS PROPERLY SUBMITTED TO THE JURY UPON THE THEORY OF EXPRESS WARRANTY.

A. There was an affirmation of fact constituting an express warranty.

The Court instructed the jury that if the defendant had stated that Mintrate on the self-feed plan had been tried numerous times, and that chickens fed Mintrate on that plan had had no less than 65% production of eggs, they might find that to constitute a warranty. (Instructions No. 9 and 13).

The record shows that the percentage of production is a very important, if not the most important, figure in the business of a poultry man depending for his livelihood upon the production of his hens. Plaintiff appeared to be ever-conscious of that percentage and seemed to have it figured out every day upon every gathering of the eggs. When Mr. Mittelberg went to see him on July 19, plaintiff told him that the Mintrate birds on that day were up to 63½%, and that the other chickens were 1% below that. A few days later he found that the percentage of lay had gone down on the Mintrate side. Later, plaintiff states that the Larro chickens achieved 85% and held that high figure for some time. Mr. Wood of General Mills also testified in terms of percentages of egg production. The 65% statement therefore had a very definite, all-important, mathematically ascertainable meaning which left no doubt as to its significance in the mind of any egg producer. It can therefore not be regarded in one class

with such statements as that a car will last 50 years or that cars of that type had lasted 50 years, or that a certain product will give 50% more satisfaction.

While the Court limited the jury to this one statement, it must of course be considered in the setting of all the related claims for the new free choice feed that were made, and the situation plaintiff found himself in when pressed to purchase an unknown product. Particular attention is called to the pamphlet Barron showed the plaintiff prior to the sale (Exhibit A) wherein it is stated that the Mintrate self-feed way of feeding chickens "has been successfully used by thousands of Moorman customers."

It is submitted that the representation with respect to the 65% egg yield, taken alone as well as in its context amounts to an express warranty, and the jury was justified to so find.

In *Studebaker Bros. Co. of Utah v. Anderson*, 50 Utah 319, 167 Pac. 663 (1917), the Court held a statement by the seller that a car is "as good as new and . . . fit for the use of the carrying of passengers to and from the New Grand Hotel . . ." to be not merely an opinion of the salesman but an express warranty. The Court stated:

"We think from the foregoing statements made concerning the particular car in question something more was to be implied, as a matter of law, than that the plaintiff could sell the defendants a junk pile for an automobile and then escape liability therefor by saying such statements were only 'seller's talk.' "

Again, in *Summers v. Provo Foundry & Machine Co.*, 53 Utah 320, 178 Pac. 916 (1919), the Supreme Court of Utah

held in an action for the breach of warranty in the sale of a Hudson car that

"there was a warranty as to the car being free from defects as to material and workmanship, but we regard the statement that the car would do whatever any other Super-Six would do as also amounting to an express warranty, and not mere 'seller's talk,' or an expression of opinion."

In *Jorgensen v. Gessell Brick Co.*, 45 Utah 31, 141 Pac. 460 (1914) the Court held a representation that brick is "first class-wire-cut, white brick" to be an express warranty of the quality and color of the brick.

And in *Nielson v. Hermansen*, 109 Utah 180, 166 Pac. (2d) 536 (1946), it was held that the question as to whether statements were made regarding the kind of wheat sold which might have induced the plaintiff to buy it, should have been put to the jury to find whether they constituted an express warranty. The court said that

"where it appears doubtful whether or not the statement is one of fact or opinion and therefore whether there is a warranty, the question should be left to the trier of the facts."

See also *Stringfellow v. Botterill Auto Co.*, 63 Utah 56, 221 Pac. 861, 34 A.L.R. 533, holding a statement that a car is a 1922 model to be a warranty, and *Beaver Drug Co. v. Hatch*, 61 Utah 597, 217 Pac. 695 (1923) which held that a representation that certain stock would inventory \$4,000 was not an expression of opinion.

In contrast to the facts of these cases, *Detroit Vapor Stove Co. v. Weeter Lumber Co.*, (1923) 61 Utah 503, 215 Pac. 995 relied on by appellant presents a typical case of "puffing" or "dealer's talk." All that was said to the buyer of certain stoves was that the buyer would have no difficulty in reselling them to his customers, that they would "sell like hot cakes."

The Court stated:

"For a dealer to say that the article he offers for sale 'will sell like hot cakes' may have a tendency to induce an ardent lover of hot cakes to make an improvident purchase, but it affords him no grounds of action or defense if the statement proves to be false."

No case has been found in Utah or any other jurisdiction relating to express warranties made in the sale of feed for chickens. However, there is one Utah case where an implied warranty of fitness for the particular purpose was held to be present where wheat sold for the purpose of being fed to chickens was found unfit and caused damage to the buyer's flock. *Thatcher Milling and Elevator Co. v. Campbell*, 64 Utah 422, 231 Pac. 621 (1924).

The case most closely related on its facts to the case at bar that has been found is *Miller v. Economy Hog & Cattle Powder Co.*, 228 Iowa 626, 293 N.W. 4 (1940). There the owner of sheep sued the manufacturer of a livestock powder in an action for breach of express warranty and negligence for losses of sheep caused through the feeding of defendant's powder. The Supreme Court of Iowa held that a statement by defendant's agent that it would be all right to feed the

powder to plaintiff's sheep in the condition they were in was properly submitted to the jury upon the theory of express warranty. The Court distinguishes *De Zeeuw v. Fox Chemical Company*, 189 Iowa 1195, 179 N.W. 605 (1920) (the main authority relied upon by appellant for Point I and Point III of its brief) decided 20 years earlier by the Supreme Court of Iowa, as follows:

"Appellant contends this statement was merely an expression of opinion and not a warranty, and relies upon *De Zeeuw v. Fox Chemical Company*, 189 Iowa 1195, 179 N.W. 605. In that case the statement pleaded as a warranty was that a worm powder would improve the growth and physical condition of certain hogs, the claimed breach being that the powder contained poison. The court held the statement was not a warranty but merely an expression of opinion similar to that of a physician that a certain prescription would benefit an ill person. It was also held that the alleged poison in the powder was not a breach of the particular warranty pleaded in that case.

"The evidence of warranty in the case at bar was not a promise to improve the growth or effect a cure but that it would be all right to feed the stock powder to the sheep, in other words that the powder could not harm the sheep."

Later in its opinion, the Court in the *Miller case* again refers to "the erroneous premise that this was a warranty of cure." The Court also held that the question of implied warranty of fitness was properly left to the jury although the powder had a trade name.

The distinction made by the court between a "warranty of cure" and a normal warranty of good quality and fitness is

the basis for a line of decisions which hold that physicians and surgeons do not, in the absence of special contract, guarantee the success of their treatment (see 27 A.L.R. 1250), and that the manufacturer of vaccines or serums for the inoculation of animals against some specific disease is not generally a warrantor of the efficacy of the remedy. (See 39 A.L.R. 399).

The case of *De Zeeuw v. Fox Chemical Company* falls into this group of authorities relating to medicines and cures which have no application to the case at bar. In the case of food, as distinguished from medicines, the trend of the authorities is in the opposite direction, and according to some authorities the principle that there is an implied warranty of soundness in the sale of provisions has been extended to the sale of feed for animals. See 22 Am. Jur. Food, sec. 121, p. 904.

In *Economy Hog and Cattle Powder Co. v. Compton*, 132 N.E. 642 (1921) an Indiana Court held statements in pamphlets and made by defendant's agent that the stock powder manufactured by it was "a beneficial and valuable food for brood sows" to be "more than mere expressions of opinion or dealer's talk. They were representations of fact.

In *Swift and Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140, (1909) the agent of a feed company recommended blood meal as a cattle feed, stating that it was very fine feed for cattle, that many were using it, that it is valuable in preventing scours in calves, that it was better than cotton seed meal, and it would cause cattle to take on fat much quicker. The Court

held that this was sufficient to sustain a verdict finding that this was a warranty.

See also *Moorman Manufacturing Co. v. Wilson*, 209 Ill. App. 104 (1918) which states in the abstract reported:

"Evidence was held sufficient to warrant a finding that a certain hog remedy sold by plaintiff to defendant was sold upon certain representations as to its effects upon hogs and that it did not have such effect upon defendant's hogs."

Judgment was given to defendant in the action which was for the price of the product sold.

See also *United States Pipe & Foundry Co. v. City of Waco*, 130 Tex. 126, 108 S.W. (2d) 432 (1937) holding general statements of a pipe manufacturer that the pipe was amply strong for use under deep fills, that it would stand the load and had stood heavy fills at other places to amount to express warranties. The Court stated:

"It is vigorously denied that any warranty was given for the reason that the statements relied on to show warranty were at most but expressions of an opinion or judgment only.

"To properly appraise this contention, it is necessary to here briefly sketch the background of such statements. Hi-tensile pipe was a recent invention and had been little used. The parties were not dealing with each other at arm's length, and with reference to an article as well known to one as the other. The manufacturer had decidedly superior advantage in its knowledge of the fitness of this pipe for the use intended, and of its quality. Presumably, as its largest manufacturer and its enthusiastic sponsor, it knew or should

have known, better than the city of Waco could know, of its fitness and quality."

The Court then held that the above statements, "considered in their proper settings, and not as isolated statements" amounted to an express warranty, quoting from another case that

"Superior knowledge of the seller, in conjunction with the buyer's relative ignorance, operates to make the slightest divergence from mere praise into representations of fact effective as a warranty."

And see *Tomlinson Co. v. Morgan*,N.C....., 82 S.E. 953, (1914) where it was held that a representation that fertilizer is "a high-grade fertilizer, specially suited for tobacco" justified the jury to find an express warranty, not a mere opinion; *Reiger v. Worth*, (1902), 130 N.C. 268, 41 S.E. 277, holding "excellent seed rice" to amount to a warranty; *Ingraham v. Associated Oil Co.*, 166 Wash. 205, 6 Pac. (2d) 645 (1932) where the jury was held justified in finding an express warranty where fruit grower was told that a spray would not harm trees but kill a pest; *Reese v. Bates*, 94 Va. 321, 26 S.E. 865, (1897) to the effect that a sale of guano as "good fertilizer, and as well adapted to the raising of potatoes as any other in the market" was made with an express warranty; and *Swift Co. v. Meekins*, 179 N.C. 173, 102 S.E. 138 (1920), where the court held that a statement by the seller's agent that fertilizer "was as good fertilizer as there was on the market, as good as any sold to be used for cotton and corn" constituted an express warranty as a matter of law, and that the question of warranty should not have been left to the jury, remanding the case for a new trial.

For a long list of cases in which statements were held to be warranties, rather than "puffing" or mere opinions, see Williston on Sales, Rev. Ed. Vol. 1, Sec. 203, footnote 16, first part, preceding the list incorporated by appellant into pp. 18-20 of its brief.

There is no question that Barron told Park that chickens on the Mintrate plan *had not laid under 65%*. See the testimony of Barron quoted by appellant on p. 14 of its brief (R. 408-409). Barron says he told that to Park, and then he goes on to say by way of excuse to the examining counsel—not to Park—that he made that statement on the basis of what he had heard. Of course, as an agent employed to make sales, Barron could not be expected to have any personal knowledge of experiments with the feed. The only question relevant under this Point is *whether the statement was actually made by him, not from where he obtained his information.*

At the time of the sale to plaintiff, Barron was convinced that he was giving true facts to his customers; as soon as some doubts as to the correctness of the representations entered his mind, he stopped making representations and soon thereafter left the employ of the company (R. 448-449).

It is true that in addition to the statements as to the past experience with Mintrate, some representations were made that chickens on the Mintrate plan *would* produce no less than 65%. While the court limited the jury to a finding as to past results obtained, it would have been perfectly proper to submit also those statements relating to future results to be expected. See Williston on Sales, Rev. Ed., Vol. 1:

"Sec. 212. *Warranty of future events.*

It is said by Blackstone: "The warranty can only reach the things in being at the time of the warranty made, and not the things *in future*; as that a horse is sound at the buying of him, not that he will be sound two years hence.' An understanding of Blackstone's meaning needs a recollection that the law of warranty originated in an action on the case for deceit. *It is of course law today that one may bind himself by contract for the happening of any future event*, and a warranty of a piano for a year, for instance is a contract to be answerable for any defect that may occur during that time; *and the definition of express warranty in the Sales Act includes promises.*" (Emphasis supplied.)

See also Sec. 194, p. 499 *ibid.* to the effect that in its later development the action of assumpsit was substituted as a remedy for breach of warranty for the earlier action based on fraud, and that as a result many cases held that only a promise, as distinguished from an affirmation of fact, can constitute a warranty.

B. *Park did rely on the oral representations.*

While it is true that plaintiff felt that a written guaranty would give him more protection than oral representations alone, he placed reliance on both the oral statements and the guaranty. He testified on cross examination:

"Q. Did you ask for the written guaranty?

A. Yes, sir.

Q. Why?

A. Because verbal warranties are not too good.

Q. You had no confidence in any verbal warranty?

A. Well, I had confidence to the effect that anybody, if they did you damage, should reimburse you for your loss, I should imagine; but without a statement of this sort of thing, a man has to have a little to show—I figured.

Q. Didn't you believe Gail Barron?

A. Yes, I believed Gail Barron, as far as I am a businessman of any sort, as a friend, yes; but as a business agreement, no.

Q. In other words, you did not rely on his reputation?

A. Yes, I relied on his reputation on account of his pamphlets and books that showed to that effect." R. 190).

Williston on Sales states in sec. 206:

"There is danger of giving greater effect to the requirement of reliance than it is entitled to. Doubtless the burden of proof is on the buyer to establish this as one of the elements of his case. But the warranty need not be the sole inducement to the buyer to purchase the goods;"

See also 46 Am. Jur. sec. 13, p. 495:

"One who examines an article himself and relies on his own judgment may at the same time protect himself by taking a warranty upon which he also relies."

It is clear, therefore, that one particular warranty need not be the sole inducement for a sale. The buyer may rely on several different warranties or on his own judgment and a warranty.

The whole question of reliance comes up only in cases

where there is a question as to whether the buyer makes the purchase on the strength of his own judgment or inspection, or whether he is induced to buy by the seller's representations. In the case at bar, there is no question that plaintiff was in no position to form a judgment of his own on the appropriateness of defendant's feeding plan for chickens. Nothing short of an actual test, that is, a purchase, could satisfy him as to that. Knowing then that he *had to rely*, that there was no other alternative, he did what any cautious and prudent man would have done under the circumstances: he asked for as many assurances as he could possibly get. First, he listened to the oral representations, then he read the pamphlets and other literature, and finally he obtained the written agreement. As he states in the above testimony, he did have confidence in the verbal warranty, he did have confidence in the salesman and especially the printed material he showed him, and he did believe that that would give him some protection in the event of any loss, but in addition he felt he should also have "a little to show." It is submitted that Barron relied on the oral representations as much as on the guaranty.

In this connection, attention is called to Instruction No. 12 which instructed the jury fully upon the subject of reliance, and to the fact that plaintiff gave his first order for feed before the written guaranty was discussed; that at that time he agreed to put only 1,250 chickens on the Mintrate feed; that later he raised that figure to 2,850 chickens and actually fed them Mintrate beginning about June 11 while the guaranty was not signed before June 19. (See the Statement of Facts above).

C. All the necessary elements of an express warranty are present.

No statement has been found in Williston on Sales, either in section 211 or on page 548 as claimed by appellant (on p. 26 of its brief) to the effect that when recovery is on a warranty as a statement of fact, the statement must be proved to be untrue. Nor does the quotation from Blackstone have such a meaning. (See Williston sec. 212 quoted above under A).

Under the Uniform Sales Act the only elements of an express warranty are (1) an affirmation of fact (or promise); (2) reliance by the purchaser, and (3) a sale.

Appellant evidently means to say that there should be proof of the breach of the warranty. Respondent submits that the point of breach of the warranty is covered by Point No. IV of appellant's brief relating to proximate cause. If plaintiff establishes that his loss was proximately caused by defendant's feed, it is submitted that no further proof is required to show that the representation is false. See 46 Am. Jur. sec. 736:

"It is usual to allege that the defendant falsely and fraudulently warranted, etc., but the words 'falsely and fraudulently' are considered as only matters of form."

It must be stated, however, that there is clear evidence in the record to show that the statement as to 65% production was absolutely false. Dr. Elmslie, Director of Research, and Mr. Mittelberg, superintendent of the Experimental Farm of defendant, both testified that no experiments to speak of, and in any event no experiment resulting in 65% egg pro-

duction of chickens was conducted on the company farm before the release of Mintrate 40 to the public in the fall of 1947. Also, none of these company officials knew of any experiment in the field supervised by defendant where any production figures were available or showed 65% egg yield (R. 634-635, 825). The representations made were not only untrue, but there is evidence that defendant knew them to be untrue or, without actually knowing their falsity, made them recklessly, without regard to their truth or falsity which would have made out a case of fraud.

See *Economy Hog and Cattle Powder Co. v. Compton, Ind.,*, 132 N.E. 642 (1921) holding a stock powder company liable for fraudulent representations that a certain powder would keep livestock in a healthy condition.

That defendant produced two witnesses who testified—without any clear production figures—that they had had satisfactory results with Mintrate over one year *after this action was started*, of course, does not prove that there was any testing of the product before its release on the market. There was also no indication, in the period after the Mintrate was put out, in the fall of 1947 and before plaintiff was contacted in June, 1948, that defendant made any tests or experiments which would justify the claims made for the feed and the self-feed method.

POINT NO. II

THE ISSUE OF THE AUTHORITY OF BARRON TO MAKE AN ORAL WARRANTY WAS PROPERLY SUBMITTED TO THE JURY.

According to Instruction No. 2 plaintiff was not allowed to recover under the terms of the written agreement (Exhibit (C) because the Court found there was insufficient proof of the comparative feed costs as required under paragraph 1 of the agreement (R. 705). The denial of recovery was not predicated upon any ruling with respect to Barron's authority to execute the written guaranty.

While plaintiff is of the opinion that under the evidence Barron had authority to execute the written guaranty, that question is not here presented. The only question is whether Barron had authority to make the oral representations relied upon by the plaintiff.

In this connection, it is submitted that evidence establishing Barron's authority to give a written guaranty tends to prove that he also had power to make oral representations along the same general lines as the guaranty, upon the theory that the larger power includes the lesser. The reverse, however, would not appear to be true. That is to say, if it is found, particularly under the theory of implied warranty, that Barron lacked authority to enter into a written contract guaranteeing definite results, it does not follow therefrom, as appellant contends on p. 39 of its brief, that Barron did not have implied power to make oral representations within the scope of his authority as a sales agent.

A. There was sufficient evidence to find that Barron had express or implied authority to make oral representations.

1. *Express Authority.* As has been related in the Statement of Facts above, Barron did not execute the guaranty agreement

before asking his superior, the District Sales Manager of Utah, Mr. McArthur, for authority to execute it. Mr. McArthur replied that he would first have to obtain the approval of his superior, Mr. McCullough, the State Sales Manager of the defendant for Utah, Idaho, and parts of Nevada. McArthur called him on the telephone at his home in Idaho and was told by McCullough that "by all means you could guarantee it under those circumstances to anyone," and that the company "would equal the production of any competitive feed." (R. 286, 300). Thereupon McArthur told Barron—and Mr. Park—that McCullough had authorized the giving of a guaranty to Park.

McCullough, who was sick in bed when his deposition was taken, denied that he had given such authority (R. 849). However, since he denied having knowledge of just about every occurrence at sales meetings and elsewhere which were testified to by other witnesses, his testimony was evidently not given much weight by the jury. Also, there was evidence of rifts within the company, of disagreements between Mittelberg and McCullough with respect to the claims that had been made for the self-feed method, a definite reversal of McCullough by Mittelberg on the point that chickens on their feed would not moult, which occurred at the sales meeting of July 19 (R. 419-420, 447-448), and finally McCullough was, after the events at Park's place, at least temporarily released from his position in the defendant company (R. 851-852). This may have been an additional reason for his disclaiming any knowledge of the guaranty. The telephone company testified for defendant that there had

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been no call between McArthur and McCullough at the time in question, but stated that its records covered collect calls only, and that there had been some telephone conversations between McArthur and McCullough later in June, 1948 (R. 746-747).

This was sufficient evidence for the jury to find that McCullough had expressly authorized Barron through McArthur to give the guaranty.

Appellant insists, however, that any authority to guarantee had to come all the way from the head office of the company in Quincey, Illinois. This, it is submitted, is not a correct view of the law. The evidence is clear that McCullough was not a special agent, but a general agent of the company with power to recruit salesmen, to hold training programs and instruct salesmen as to the quality of the feed and the self-feed method, and in general to do anything necessary and proper to advance the business of the company in the territory assigned to him. He had no special instructions from the company, as Mr. Holmes testified, "other than would be considered in the normal trend of business" (R. 615-616). Particularly did he have no special instructions with respect to the giving or authorizing of guarantees or warranties. If there was actually a policy of the company which did not permit guarantees or warranties, it was never brought to the attention of its sales managers or agents. As Mittelberg testified, the sales instructions were silent in this respect and contained neither a permission nor a prohibition (R. 803). At the time in question the company was particularly interested in extending its sales to the State of Utah. McArthur testified in this respect:

"This chicken business—at the itme I was made manager, we had very little business in the chicken feeding, and Mr. Tolley, who preceeded me, had tried several times to get into the Salt Lake area and the Utah County area where there were a lot of chickens, and had not been very successful; and Mr. McCullough, after I was made district manager, continually impressed me with the fact that we had to get in and get some of this business down here. It was a million-dollar busines, and it was going by" (R. 291-292).

It is submitted that McCullough within the scope of his powers as general sales manager had authority to authorize guaranties which he found helpful in the drive to introduce defendant's feed into this area; and that he had good reason to assume that obtaining a customer with as large a flock as Park's, by means of a written guaranty if need be, would be most beneficial for these purposes.

If the written guaranty was thus found to be expressly authorized under the evidence, it is submitted that power to make an oral warranty along the same lines can be inferred therefrom, as has been pointed out before. While the writing guarantees the production of "an equal amount of eggs" by the Mintrate birds as is produced by Park's other birds, from the practical standpoint of a poultry man the 65% production figure means just about the same. To him a 65% yield signifies nothing more than good or adequate production, approximately the same level of production that he knew from experience that he had achieved before. (The evidence discloses that the Larro birds had an 85% egg yield for a good part of the period in question). It was not so much the 65% figure, which only assured him of adequate

results, but its combination with the more simple and more economical feeding method which finally persuaded Park to make the purchase.

2. *Implied authority.* (a) The most obvious source of Barron's authority to make the oral warranty is found in the instructions he received by McCullough and McArthur during the salesmen's training meetings and from McCullough personally. McCullough's authority to give instructions is admitted by Mr. Mittelberg in his testimony (R. 803, 811-812). The testimonies of Barron and McArthur are positive to the effect that the salesmen were told that the feed had been tried numerous times and that there had always been a minimum of 65% egg yield when the hens were fed Mintrate in the self-feed manner (R. 398-402, 282-285). There was evidence that this statement, together with the other representations described in the Statement of Facts above, were intended to be repeated to prospective customers. As a matter of fact, McArthur accompanied Barron on his first sales trips and Barron heard him make the statement as to 65% minimum egg lay to a prospective customer (R. 406-407). This was sufficient evidence for the jury to find, in accordance with Instruction No. 11, together with Instruction No. 15 (I-C), that Barron had authority to make the representations he made to Park.

It is submitted that Instruction No. 11, which is criticized by appellant on p. 44 of its brief because it uses the term "estoppel," correctly states the law which the jury was charged to apply, and that it is immaterial whether the particular type

of authority referred to was labelled implied authority, apparent authority, or authority by estoppel.

In his connection, the attention of the Court is invited to the following statement by Mechem on Agency, 2nd Ed., Vol. 1, sec. 723, p. 512:

"There is, in many places, a tendency to include under the one head of 'apparent powers' those deduced from usage or from the character in which the agent is authorized to act, and also those resulting from estoppel. In very many cases it is entirely immaterial practically, because there is enough in the proof to satisfy the requirements of either rule; and in many cases also usage and estoppel may unite to account for the powers exercised."

See also the diagram on p. 515 of the same work where apparent authority is listed as being based on the theory of estoppel.

(b) Furthermore, it is submitted that Barron had implied power within the scope of his authority as a sales agent, to make the oral representations relied upon by Park, particularly in view of the fact that he was introducing a new feed and a new feeding method into a new territory and that his prospective customers had no means of ascertaining the quality and appropriateness of the feed and of the method for themselves.

The *Restatement of the Law of Agency*, sec. 63, states the rule as follows:

"Unless otherwise agreed, authority to sell includes authority to make such, and only such, representations

as the agent reasonably believes to be true and as are usual with reference to such a subject matter *or, in the absence of usage*, representations concerning qualities of the subject matter which, at the time, are not open to inspection and as to which the principal has reason to know the buyer will desire to be informed." (Emphasis supplied.)

And Mechem on Agency, cited above, states in sec. 881, p. 631 that there may be cases

"in which the making of a warranty of quality is so practically essential to the making of the sale as, *without proof of usage*, to justify the inference of the power *as a necessary incident of the authority to sell*. A number of cases have been put upon this ground. Thus, an agent for a distant principal, endeavoring to introduce a new article in a certain community, and who could not sell it unless it was warranted, has been held to have authority to warrant as a necessary incident to the authority to sell." (Emphasis supplied).

See also sec. 890, p. 636 of the same work:

"Thus, if the principal should send an agent out to introduce and sell a new article, as, for example, a new machine, a new article of food, a new medicine, and the like, authority to answer questions or to make statements, concerning such matters as would naturally and ordinarily arise under such circumstances, would properly be implied. Questions respecting the purpose of the article, the manner in which it might be safely handled, the conditions and circumstances under which it could be properly used, and the like, would fall within this principle."

In *International Harvester Co. v. Lawyer*, Okla., 155 Pac. 617 (1916) it was held that an agent with power to

sell an automobile in a new territory had implied authority to warrant that it would go over the particular roads and could go anywhere a team of mules could be driven (which was held an express warranty rather than a statement of opinion). The Court stated:

"In the case at bar, the defendant was seeking to introduce an automobile, untried and unproven in that particular section, and it seems most reasonable to presume that an agent, endeavoring to obtain some one who would stand sponsor for it there, owing to a general custom, had the implied power to warrant the same. If the reputation of the automobile in that vicinity had been so well established that it had become a staple, then this rule might not apply, but we believe it does apply most certainly when an untried article is sought to be introduced in a new field."

See also *Darks v. Scudders-Gale Grocer Co.*, 146 Mo. App, 246, 130 S.W. 430 (1910) where the court held the defendant company bound by the representations made by its agent in connection with the sale of a ginger extract, stating:

"The defendant permitted the agent to go into the field and solicit orders. In soliciting business for the defendant, questions would naturally come up concerning the quality and usefulness of the articles the agent was attempting to sell, and therefore statements made by the agent concerning the quality of the articles and the purposes for which they were intended must be within his apparent authority."

Cf. *Smith Table Co. v. Madsen*, 84 Pac. 885, 30 Utah 297 (1906) to the effect that a certain traveling salesman had power, within the apparent scope of his authority, to give a trade discount, and *Smith v. Droubay*, 20 Utah 443 (1899)

holding that a sales agent with power to make a contract also had power, as an incident to his employment, to fix the time for the delivery of the goods.

The case at bar falls directly under the principles of the above authorities. Neither Barron nor any other salesman could have sold a single bag of Mintrate in this state, had it not been for the representations made as to 65% egg yield together with the promise of a more simple and more economical feeding method. Thus, whether McCullough or anyone else in the company expressly or by implication authorized Barron to make an oral warranty, his power to warrant must be implied as a necessary incident to his authority to sell under the peculiar circumstances of the case. Under the above authorities no particular proof of custom to warrant is required under such circumstances.

The authorities relied upon by appellant on pages 28-38 of its brief are not inconsistent with this position. They are based on the principle that a salesman has no implied power to do anything that is unusual or extraordinary. As compared with the facts of these cases, there is nothing unusual in giving an oral warranty in the case at bar. There is no question, as these authorities hold, that a salesman has no implied power to take back merchandise, to modify the terms of a contract after it is complete, to sell for a lower price than instructed, or to warrant liquor against seizure under the revenue laws. All these powers are truly "unusual" or extraordinary. However, as is stated in *Friedman & Sons v. Kelly*, 126 Mo. App. 279, 102 S. W. 1066, quoted at length by appellant on p. 34 of its brief, while a traveling

salesman does not have authority to warrant whiskey against seizure under the revenue laws, he does have implied power to make warranties which are not unusual such as a warranty of the quality and condition of the whiskey sold.

The case of *Royal Seed and Milling Co. v. Thorne*, 142 Miss. 92 (1926), cited by appellant on p. 38 of its brief, does not relate to the implied authority of an agent, however. It holds that there was no implied warranty of fitness, and that the plaintiff who was the customer of the dealer could not recover against the manufacturer on the ground of breach of warranty.

It is conceivable, as appellant contends, that the making of a *written guarantee* binding a feed company to reimburse a customer in a certain amount would be held unusual, and not within the implied powers of a sales agent. But that is not true for oral representations without the help of which a sale in a new territory could not be expected by the company to be consummated. Also, defendant does not point to any significant evidence to the effect that *oral warranties* by feed companies are unusual. The plaintiff said he thought it was unusual for a feed company to give a *written guarantee* (R. 191), that he personally had not received an oral guarantee (R. 191); Mr. Wood of General Mills stated that he had not seen a written guarantee of the type Barron received before (R. 385); and Mr. Holmes, a director of the defendant company said that his company had not given express authority to make written or oral guarantees and had a policy against permitting them. Mr. Mittelberg testified, however, that nothing was said to the agents and employees of the company

about guarantees, that there was just no general permission given to execute guarantees (R. 803). See Mechem, sec. 887, p. 635 where the author states that

“evidence is not admissible to prove that it was not the custom of this particular principal to warrant, unless it be shown that the purchaser had notice of that fact, or that the agent was expressly forbidden to warrant, unless notice of such prohibition be brought home to the purchaser.”

For cases in which feed companies, including the defendant company itself, have been found to have made a warranty, through the medium of an agent, see for example *Miller v. Economy Hog and Cattle Powder Co.*, 228 Iowa 626, 293 N. W. 4 (1940) holding that a warranty by an agent that the stock powder in question was harmless for sheep was not an unusual warranty; *Economy Hog and Cattle Powder Co. v. Compton*, Ind., 132 N.E. 642 (1921); *Crouch v. National Livestock Remedy Co.*, 205 Iowa 51, 217 N. W. 557 (1928) where the authority of the agent to make a warranty was not questioned; and *Swift & Co. v. Redhead*, 147 Iowa 94, 122 N. W. 140 (1909) where the authority of an agent to warrant the quality of feed for cattle was also assumed to be present.

And in *Moorman Manufacturing Co. v. Harris*, 280 Ky. 845, 134 S. W. (2nd) 936 (1939), the court held in an action for damages resulting from the feeding of defendant's mineral to dairy cows that defendant's agents acted within the scope of their authority in selling the feed when making representations with respect to the product. (The language

of the court is not quite clear on this point, but this is evidently what it meant to say).

B. There was evidence that Barron had authority under the theory of ratification.

Under the rules as stated in the Restatement of the Law of Agency, sec. 82, *et seq.*, ratification is basically an "affirmance" of a previous unauthorized act by the principal or his authorized agent. Affirmance may be inferred from any conduct manifesting consent, from failure to repudiate transactions, or from the receipt or retention of benefits. It is not necessary that there be a receipt of benefits or their retention, if affirmance can be inferred from words or conduct of the principal or his authorized agent.

In the case at bar there is one incident that may be found to establish Barron's authority by operation of the doctrine of ratification.

On July 19, 1948, after plaintiff had been using defendant's feed for about a month, and had started to notice a loss of weight among the Mintrate birds, Mr. Mittelberg came out to see him. Mr. Barron testified as follows:

"He was worried about the loss of weight, and he wanted someone to look at them. He wanted some man, in our company if possible, to see them.

"Q. Did you get some man in your company to look at them?

A. On the 19th of July Mr. Mittelberg of our company went to Park's place and looked at them.

Q. Were you with him?

A. Yes.

THE WITNESS: May I qualify one answer?

Q. Yes.

A. That there was a meeting held at the Hotel Utah, as I remember it, it was on July 19. It was that day that Mr. Mittelberg went to Park's place.

Q. Did you tell Mr. Mittelberg about the loss of weight of Park's birds?

A. Yes.

.....

Q. What did Mr. Mittelberg say about the birds?

.....

A. He asked Park if he had tried different methods, if he had mixed his wheat with his oats. As I remember it, he said specifically, in some instances, that where it is, they eat more, and he asked about such general questions of Mr. Park" (R. 418-419).

On the same day the meeting of salesmen and Mr. Mittelberg and Mr. McCullough took place which has already been referred to, Mr. Mittleberg discussed the self-feed method in great detail and reversed McCullough on the point that chickens on their method would not moult, also cautioned the salesmen about the self-feed method in general and discouraged them from "selling a method" (R. 419-420).

It must be assumed that Mr. Mittleberg knew when he went to see Mr. Park on the same day what representations the salesmen had been instructed to make, and that Barron presumably had made those representations to Park when he first sold him the feed. If he did not know about the guaranty, he knew or must have known about the oral representations.

Knowing these he went out and advised Park on how to improve the weight of his chickens. That showed, if not more, at least silent acquiescence, and consequently ratification of the oral warranties made. Later, when Mr. Mittelberg went to see Mr. Park about the guaranty, in the end of August, he did not disclaim all liability, only stated, according to Mittelberg's own testimony, that no settlement would be made "on the basis of that contract" (R. 800). He did not say, as appellant intimates on p. 42 of its brief that Barron had no authority to make oral representations.

In connection with the theory of ratification, attention is called to Mechem on Agency, above cited, sec. 396, p. 289:

"It is not to be denied that there may occasionally be found cases in which it seems to be asserted that there may be ratification without knowledge. Most of these cases when examined seem to be sound enough upon their facts, . . . and what is said as to ratification in many of them is probably merely an inadvertent expression. Part of them belong to a class of cases . . . which do not depend upon ratification at all. These are cases in which an agent while doing an authorized act has done some incidental act, given some promise, or made some representation which was not *expressly* authorized, but which is binding upon the principal under the ordinary rules of agency . . . Although ratification need not be resorted to at all in these cases, . . . it is said that the principal is liable, if he takes the benefits of the performance, even although he did not know of these incidental acts. The conclusion would ordinarily have been the same, if the doctrine of ratification had not been referred to."

Instruction No. 10 does not use the term "ratification" at

all. While there is the above evidence of ratification in the record, the instruction may very well be read, in the light of the above quotation from Mechem, as a charge with respect to implied or apparent authority rather than ratification. In this connection compare the language used in *Smith v. Droubay*, 20 Utah 443 (1899) where the opinion at pages 450 and 451, speaks in terms of "acceptance of benefits by the principal" when holding that the agent had implied or apparent authority as an incident of his employment.

C. There was sufficient evidence to submit the case to the jury on the theory of estoppel.

As has been pointed out above under the discussion of implied authority, Instruction No. 11 was properly submitted to the jury permitting it to find that Barron's authority to make oral representations may be derived from the instructions he received at sales staff meetings. While the use of the term "estoppel" may have been a misnomer, it is submitted that the use of technical expressions like "estoppel" is not conclusive as long as the main principles of the law of agency are correctly stated to the jury. That there is a certain amount of confusion surrounding the concept of estoppel, and that the borderlines between ratification, estoppel, and apparent authority are somewhat cloudy, is evidenced by the above quotations from Mechem on Agency, to which the following excerpt may be added:

Sec. 456, p. 336:

"In a large number of cases, if not in a majority of them, there are present some elements of estoppel,

as well as circumstances from which pure inferences of approval in fact may be drawn; and any conclusion will be likely to be one in which both elements are more or less inseparably mixed. Courts and writers—sometimes carelessly, sometimes unavoidably—pass in apparent unconsciousness from one field to the other. It is perhaps true, also, that our whole process of drawing inferences of fact springs from the same roots as that from which estoppel springs. At any rate, it is entirely clear that, in the various rules and statements of principle made respecting this matter of ratification by acquiescence, the element of estoppel is constantly found and that it plays a large part in the actual determination of the case.”

This discussion shows that the concept of estoppel is a very wide one, and as has been stated before, Professor Mechem bases the whole theory of “apparent authority” on the idea of “holding out” or “estoppel.” But regardless of whether estoppel is used in a wide or a narrow sense, appellant’s theory that estoppel applies only to the one situation where someone has been held out as an agent and is then discharged without notice to persons dealing with him, is based on an entirely too restrictive use of the term.

It is submitted that there is one situation that arose under the facts in the case at bar which gave rise to the operation of the true theory of estoppel:

Assuming that McCullough did not approve the written guarantee, the facts are undisputed that McArthur came to plaintiff’s place and assured him that the Sales Manager had authorized it. Mr. Park did not rely on Barron’s authority in the first place. He made inquiries of Barron, and of Mc-

Arthur, who was the only superior officer of the company with whom he had any contact. McArthur told Park personally and definitely that the company had approved the guaranty. What more should Park have done? Telephone McCullough himself, or someone in the office in Illinois? It is true that a party dealing with an agent is bound to ascertain, where any reasonable man would have any doubt, what is the true scope of the authority of the agent. It is submitted that that is exactly what plaintiff did. He did not have to go to the principal himself to ascertain the scope of Barron's authority. He only had to do as much as is reasonably necessary under the circumstances. It is submitted that under the circumstances Park was justified in taking McArthur's word for it, that the defendant through its District Sales Manager McArthur held Barron out as its agent authorized to write the guaranty; that Park in reliance thereon changed his position to his detriment by feeding the Mintrate to his chickens; and that the company is therefore estopped to deny Barron's authority.

In connection with this discussion of Barron's authority to warrant, it might be pointed out generally (1) that McArthur himself repeated the oral representations to Park, and that as the District Sales Manager the scope of his authority is even wider than that of Barron; (2) that as far as the implied warranty of fitness for a particular purpose is concerned, Barron's authority to warrant need not be proved. See Mechem, cited above, sec. 883. See also *Thatcher Milling and Elevator Co. v. Campbell*, 64 Utah 422, 231 Pac. 621 (1924) holding the seller of chicken feed liable on the theory of an implied

warranty of fitness for the particular purpose; and (3) that as far as the representations of defendant are contained in advertising matter such as Exhibit A herein, they may be actionable regardless of the authority of an agent.

POINT NO. III

BREACH OF EXPRESS OR IMPLIED WARRANTY MAY BE PREDICATED UPON MISDIRECTIONS GIVEN BY DEFENDANT CONCERNING THE USE OF ITS FEED.

The case at bar does not relate to the dissemination of ideas or professional advice to cure a sickness nor the recommendation of a method standing alone, as appellant contends, but simply the sale of a feed with definite instructions by the seller concerning its use. In a case of this kind, it is submitted that there is not a separate sale of the feed, and another separate transaction with respect to the method, but both the feed and the method are united into an integrated whole so that the instructions for its use become part of the sale of the product itself. Defendant has expressed this idea itself in its advertising leaflet (Exhibit A) entitled the "NEW, EASY, NO MIX, SELF-FEED CONCENTRATE."

It is submitted that the instructions for use of a product given by a manufacturer are nothing but representations of fact (or promises) relating to the use that can be made of the product and the results that can be obtained, which amount to express warranties if they induce the sale and the buyer relies on them.

If, for example, a housewife buys "No-Rub Floor Wax," she relies on the representation that the wax can be used without the additional work of polishing, just as much as that the wax itself is of good quality. And if it turns out to be not "self-polishing" as expected, the manufacturer would have no defense to an action for breach of warranty to the effect that the wax itself was perfect, and that good results could have been obtained by the use of an electric polisher.

It is submitted that simplicity of operation, where held out as an inducement to a sale, is an affirmation of fact or promise relating to the goods themselves which may give rise to an action for breach of warranty, irrespective of the quality of the goods themselves.

Another example may come even closer to the facts of the present case: Another housewife buys an "Instant Dessert—No Cooking." On the back of the box there are two sets of directions. Method 1 describes the "no-cooking" way of preparing the dessert. Method 2 instructs the housewife that she may cook it if she prefers, but the process takes longer and is more cumbersome. She tries Method 1 and her family gets sick. Should the manufacturer be allowed to say that the ingredients of the dessert itself are good, that Method 1 might be harmful, but that he cannot be held responsible for a mere method, particularly where an alternative method was also provided for?

The same reasoning applies to an implied warranty of fitness for the particular purpose. It is submitted that fitness includes all appropriateness of using a product,

and if the seller suggests a method that is harmful, that would amount to a breach of the implied warranty.

No authorities have been found expressly discussing this point. However, the courts seem to assume that the suggestion of a method of use may give rise to an action for breach of warranty.

In *Miller v. Economy Hog and Cattle Powder Co.*, 228 Iowa 626, 293 N. W. 4 (1940), for example, the court stated:

“Veterinarians also testified the forced feeding method of giving the powder to sheep with a mild form of gastritis would have a bad effect and be dangerous because some of the animals would get too much of the mixture. This method was adopted by appellee under instructions from Kenworthy.”

The Court concluded that there was substantial evidence to show that the death of the sheep was chargeable to the feeding of the stock powder.

And in *Moorman Manufacturing Company v. Barker*,Ind., 40 N.E. (2d) 348 (1942), an action was brought for damages resulting from the loss of a litter of pigs caused by feeding defendant's feed. The suit was on the theory of breach of warranty and negligence. Plaintiff's evidence disclosed that he was instructed by defendant's agent to let the sows have all the feed they wanted, and that they would not eat too much of it. The Court said that there was no evidence that the feed contained any deleterious or poisonous ingredients; and that in the Court's judgment, the complaint is

“based upon the theory that the appellants recommended that the sows be allowed to eat all they wanted of the

mineral; and although the appellee used due care and precaution, the loss occurred as the proximate result of the negligent verbal directions in telling appellee how to feed the product."

Judgment for plaintiff was reversed for failure of the instructions to include the element of plaintiff's freedom from contributory negligence.

In this connection attention is called to Instruction No. 3 to the effect that plaintiff has to establish that he followed the instructions given to him by defendant. Assuming that appellant's theory is correct, plaintiff would be required to show (as he has done) that he complied with defendant's directions as a prerequisite to recovery, but defendant would then be allowed to defend on the theory that the loss would not have occurred if the instructions had been disregarded. This, it is submitted, cannot be the law of this state.

POINT NO. IV

THERE WAS AMPLE EVIDENCE THAT PLAINTIFF'S LOSS WAS PROXIMATELY CAUSED BY DEFENDANT'S FEED AND FEEDING METHOD.

There was a great mass of highly persuasive evidence linking the Mintrate feed and self-feed plan with the deaths among plaintiff's chickens and the decline in their egg production. It is hard to see how under these circumstances appellant can earnestly contend that proximate causation was not sufficiently established.

Not only was there a great volume of testimony pointing to the feed used as the cause of plaintiff's losses, but this evidence is practically uncontroverted by any proof defendant had to offer.

Appellant insists at least six different times in the course of its brief that "no veterinarian had ever examined the chickens" (p. 83, also pages 4, 6, 50, 54, 82). It fails to mention one of its own major witnesses, Robert Allan Sturdy, Doctor of Veterinary Medicine and Research Veterinarian of the Moorman Manufacturing Company (R. 707). As has been related in the Statement of Facts above, Dr. Sturdy was called to Utah by defendant's agents in order to make a thorough examination of plaintiff's chickens. He did so, and was quite disturbed about what he found, remarking to the bystanders that "we are just starving these chickens to death on all the feed they want" (R. 290, 424, 524, 155). On the witness stand as defendant's witness, Dr. Sturdy recalled having made a statement somewhat to that effect (R. 732, 719), and admitted that the Mintrate birds did not look good, but looked "rough," (R. 727), as compared with the Larro birds, that there were many culls and the birds were thin and that the consumption of too many oats to which the chickens had free access at all times in the self-feed program may well have been the cause of plaintiff's troubles (R. 732-735).

There was none of the conflicting expert testimony that is ordinarily offered in cases of this type. See for example *Moorman Mfg. Co. v. Harris*, 280 Ky. 845, 134 S.W. (2d) 936 (1939) concerning a feed for dairy cows; and *Crouch v. National Livestock Remedy Co. et al.*, 205 Iowa 51, 217 N.W.

557 (1928) where the testimony of the veterinarians was conflicting, but the court held that evidence that the hog remedy in question had resulted in the death of hogs was sufficient to carry the case to the jury on the question of proximate cause.

Plaintiff's additional items of proof tending to show proximate causation may be briefly summarized as follows:

1. The fact that plaintiff used Mintrate only for one separately kept portion of his chickens, and that none of the symptoms complained of developed in the non-Mintrate chickens; see *Crouch v. National Livestock Remedy Co.*, *supra*, where the plaintiff kept one bunch of hogs in a separate pen and did not feed the remedy to them by the same method of forced feeding, and these hogs did not get sick.

2. The testimony of two experts in the feed and poultry business, Mr. Wood and Mr. Bryson, that the Mintrate birds were getting thin and that their eggs were not up to standard (R. 244-245, 247, 356-357, 359).

3. The testimony of all the officers and agents of defendant company who observed plaintiff's two sets of chickens, including the testimony of the superintendent of defendant's experimental farm, Mr. Mittelberg, to the effect that the birds on the Mintrate feed were thin and in poor condition, that their egg production fell off and many died as a result of cannibalism which broke out about one month after plaintiff put them on defendant's feed and about one week after he first noticed their loss of weight; permitting the inference that they were all convinced that the Mintrate on the self-feed plan was the cause of the cannibalism, the deaths and the loss of

egg production (R. 807-809, 287-288, 417-424). See for example Mittelberg's letter to Gail Barron of September 1, 1948 in which he stated with reference to plaintiff's Mintrate birds:

"Without eating the proper amount of scratch their physical condition fell off and cannibalism developed. You have heard the saying: 'You can lead a horse to water but you can't make him drink.' Here it seems we might change that saying: 'You can feed scratch but you can't make them eat it!'" (R. 809),

blaming the feeding method for the cannibalism and the general deterioration of the chickens, on a slightly different theory from that of Dr. Sturdy, who expressed the opinion that the overdose of oats was the cause of plaintiff's losses.

4. The fact that a few days after August 28, when Mr. Mittelberg visited plaintiff's farm, he changed the general instructions with respect to the self-feed method, limiting and discouraging its use (R. 804, 434-436). See also his letter of September 1 in which he further stated:

"Whenever poultrymen are using the laying mash and scratch system of feeding it seems advisable to recommend the use of our Mintrate mix in a laying mash instead of self-feeding it,"

and

"Some who are now using the self-feed plan may get better production if they would revert to the scratch and mash system" (R. 809).

5. Defendant's own evidence showing that any testing of the new Mintrate product that the company may have undertaken was wholly inadequate and insufficient and in no way

justified the claims that were made for the product on the self-feed method (R. 626-635, 825).

6. Expert testimony that the self-feed method should not be recommended, and that in any event it should be approached with caution (R. 767, 762, 362, 382), all of which tends to prove that the method has not as yet passed its experimental stage and should not have been unconditionally released to the public.

7. Dr. Draper's testimony that cannibalism in a situation like the present must be caused by faulty nutrition (R. 774).

8. The opinion of defendant's expert witnesses Dr. Draper and Dr. Elmslie that the composition and ingredients of a feed might be harmless without assuring that the feed is good from the standpoint of improving the growth and production of chickens (R. 766, 644-645).

9. Expert testimony that the feeding of unlimited amounts of oats is harmful to chickens, and that laying hens require varying rations of feed depending upon the percentage of their egg production, both of which are recognized principles of nutrition which were not followed in defendant's self-feed program (R. 734-735, 757, 648, 768-770, 816-817).

10. The testimony of three other poultry farmers who fed Mintrate on the self-feed plan to some of their chickens of similar ages for similar lengths of time with similar unsuccessful experiences, including low egg production, severe picking and cannibalism (R. 462, 559, 587).

This evidence which is discussed in greater detail in the Statement of Facts above, it is submitted, is amply sufficient to sustain the verdict of the jury with respect to proximate causation in the case at bar.

Authorities very much in point are *Miller v. Economy Hog & Cattle Powder Co.*, 228 Iowa 626, 293 N.W. 4 (1940) holding that the testimony of veterinarians was sufficient to sustain a verdict that the death of sheep was proximately caused by defendant's stock powder; and *Crouch v. National Livestock Remedy Co., et al. supra*, holding that in an action against H. C. Moorman doing business under the name of "National Live Stock Remedy Company (not Inc.)" to recover damages for the death of hogs the question of proximate cause was properly left to the jury. See also *Swift & Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140 which held that the evidence sustained a finding that a certain cattle feed was not suitable for fattening cattle, as represented, but was injurious to the cattle so fed.

Appellant's main argument appears to be that there are numerous causes of sickness and deaths in the poultry business, that death or loss of production in chickens may occur "without apparent reason," and that consequently plaintiff's losses must have resulted from something not connected with the feed. For support of its contention appellant relies heavily on testimony purportedly given by Mr. Conta at R. 341; Mr. Conta, however, did not make any such statement at that page of the Record nor at any other page that respondent has been able to find. Appellant also refers to some testimony by plaintiff, which is, however, merely to the effect that there

are diseases among chickens and that plaintiff has had experience with some of them (R. 192-193).

Respondent does not deny that chickens, like all living creatures, are susceptible to disease and other hazards not necessarily, though often, related to their feeding. Instruction No. 5 covers this point fully, giving ample consideration to defendant's position. But it does not go as far as to state what appellant apparently had in mind, that chickens "just die" or go off production without any determinable cause. To attempt to escape liability in this fashion by a plain denial of the principle of causation is a new type of defense not known to the law as yet. If this is not the meaning of appellant's contention, then its argument appears to be reduced to the claim that disease or some similar factor *must* have caused plaintiff's losses, without attempting to put its finger on any particular disease or cause which would exclude the nutritional factor as the only proximate cause of plaintiff's damage.

Not only is there no evidence that there was any other cause that might have resulted in plaintiff's loss, but there is positive proof to the effect that plaintiff's chickens were not diseased, neither on June 1, 1948, when the 2,850 pullets were moved over to the east side of the road (Conta R. 307-310), nor in the end of August, 1948 when Dr. Sturdy saw them and made some *post mortem* examinations. There is not the slightest evidence that plaintiff's chickens had any sicknesses after they entered the laying stage, except for a possible few cases of "big liver," and the Newcastle disease, which did, however, not hit the birds before

November, close to the December cut-off date after which plaintiff was not permitted to prove any loss. As has been pointed out in the Statement of Facts, Dr. Sturdy did not positively diagnose any case of big liver in plaintiff's flock, and further stated that this disease does not spread readily and is usually limited to a few birds in a flock (R. 743, 729-730. As far as Newcastle is concerned, it has been explained in the Statement of Facts that any losses caused by this disease are automatically excluded from plaintiff's claim for damages because plaintiff asked to recover only those losses in excess of losses in the Larro birds, and the Larro birds were afflicted with Newcastle almost to the same extent as the other chickens.

Appellant also mentions chicken-pox, tracheitis, and pullorum. As has been shown in the Statement of Facts, plaintiff's chickens had chicken-pox and tracheitis in April, 1948 when they were 21½ months old, and at that time a number of them died therefrom (R. 193, 199). There was evidence to the effect that they had no more trace of these diseases when they entered upon egg production and that generally these diseases do not recur in the same flock, particularly where chickens have been vaccinated as was here the case. Dr. Sturdy did not find any case of these diseases. There was also evidence that none of the chickens had pullorum, a disease which today is largely controlled at the hatcheries and the baby chicks are tested before they enter the State of Utah (R. 193).

As far as the "picking" is concerned, in the severe form of cannibalism, the evidence discloses that it is not a disease, but

a vice or habit (R. 726, 758), and that in the case at bar it was not an independent cause, but rather a link in the chain of causation. In other words, severe picking and cannibalism was caused by the Mintrate feed and feeding method which made the birds thin and restless, and the cannibalism in turn led to the death and loss of production of many of the Mintrate chickens. This is clearly established by the evidence of Dr. Draper (R. 774) and of Mr. Mittelberg (R. 809).

It is submitted that under the evidence none of the diseases or other hazards have in any way been proved to have been a possible cause of plaintiff's losses. The correctness of the principle is not disputed that where the evidence points with equal force to two causes, only one of which makes the defendant liable, the plaintiff must fail. But respondent is at a loss to find any evidence pointing to any second cause of loss in the case at bar in addition to defendant's feed and feeding method.

Appellant further insists that the testimony of the three poultry men with similar unsuccessful experiences was not sufficient to prove proximate causation. Appellant relies on *Crouch v. National Livestock Co.*, *supra*, where the court held, however, that there was substantial evidence to find proximate causation. The testimony of others whose hogs had also died after eating the same hog remedy was held inadmissible but not primarily on the ground of remoteness stated by appellant, but for the main reason that the hog powder used by them was different in color, coarseness, and chemical analysis.

In *Economy Hog & Cattle Co. v. Compton*, Ind., 132 N.E. 642 (1921), and 135 N.E. 1 (1922), evidence of

sickness of other hogs caused by the same powder was held to be admissible and the Supreme Court of Indiana stated:

"We do not understand that appellants are contending that it is not competent to show like effects of the powder on other hogs under like conditions. We find no objection when the other owners testified. We also find that the testimony in defense is largely made up by farmers who had used this powder and thought it all that appellants claimed for it. It would hardly be safe to confine the case to the scientific proposition of the chemical analysis and mechanical mixture of the powder, and the effect which the combination would have upon hogs. This must be especially true where the symptoms are all objective. Hogs do not speak our language."

The testimony of other similar users of the Mintrate feed was introduced as supplementary evidence only, to be considered in addition to the great amount of other more direct proof. The jury must have clearly understood the nature of this evidence under the cautioning Instruction No. 4.

Appellant's rebuttal testimony, however, cannot have carried much weight. In the first place, both witnesses, one of whom was an employee of the defendant company (R. 776) started to use Mintrate only in June and July, 1949, about one year after Park bought it, and after the proceedings in this case had long been commenced. Secondly, appellant admits that the company *requested* Barker to make a test which may have led the jury to believe that the experiment was staged for purposes of use as evidence in the expected trial. And finally, Mr. Barker, who had a flock of 6,500 chickens, did not risk more than 500 on the Mintrate

plan, and although he claimed that the Mintrate program was very successful and saved him a great deal of grinding and mixing which he used to do by himself, he intimated that he was not ready to put his other 6,000 chickens also on the new feeding plan.

In connection with appellant's reference to Wigmore on Evidence on p. 56 and 57 of its brief, respondent merely wishes to state that in the case at bar plaintiff did not have the burden of proving "general or usual tendency" or "certainty or inevitableness" of results, but merely the fact that his own chickens died or became incapacitated as a proximate result of defendant's feed.

Plaintiff does not claim that there are any harmful ingredients in the feed, nor that it has any composition other than that stated on its bag. But plaintiff does contend that the mere fact of its chemical purity and correct composition does not prove that the feed as such is good or beneficial for laying hens, nor that the particular feeding method adopted by defendant is good or beneficial for chickens.

POINT NO. V

EXHIBIT C WAS PROPERLY ADMITTED.

The Court instructed the jury that Exhibit C may be considered only for the purpose of determining whether oral representations had been made; and that no recovery could be had under the writing itself because proof of comparative

feed costs had not been made as required under its terms. (Instruction No. 2).

This Exhibit guarantees to plaintiff the production of "an equal amount of eggs" by the Mintrate birds as is produced by the Larro birds. As has been pointed out before under Point No. II, a representation that 65% egg production had always been achieved means nothing more than that good or satisfactory results have been obtained. It relates to the same general subject matter as the "equal production clause" of Exhibit C. It is submitted that the fact that this document was written and signed by defendant's agent Gail Barron, whether he had authority to make a guaranty or not, is evidence of the fact that he made oral representations relating to egg production on the Mintrate plan, and that Exhibit C was properly admitted in evidence for the limited purpose stated in the instruction.

The admission of the Exhibit did not in any way harm defendant's cause. On the contrary, it helped defendant in two particulars: (1) it caused the idea to prevail that something more had to be proved than implied authority of Barron to make oral representations, that proof of express authority might be required; and (2) it influenced the computation of damages to such an extent that instead of applying the ordinary rules of damages for breach of warranty, plaintiff's recovery was limited to the "money difference" between the Mintrate birds and the Larro birds, as provided in Exhibit C. Thus, instead of receiving compensation on the basis of the 1532 Mintrate birds actually lost through deaths and culling, damages were computed on the basis of a loss of only 1144

birds after deducting a number equalling the percentage of losses in the Larro birds. Plaintiff does not criticize this computation for the reason that all normal losses not attributable to the feed are thereby absorbed and any possible intervening cause is automatically excluded from consideration. He merely wishes to point out that this theory was adopted and maximum recovery was reduced as a direct result of the admission of Exhibit C.

POINT NO. VI

THE THEORY OF DAMAGES ADOPTED BY THE COURT IS CORRECT.

A. The Court correctly permitted recovery, in the absence of ascertainable market value, of the cost of replacements in plaintiff's flock (with deductions for added egg yield), plus loss of egg production during the interim before replacements could be made (with deduction of cost of producing eggs), less amounts received from the sale of culls.

Appellant in its brief (at pages 62-67) has taken the last sentence of paragraph 3 of Instruction No. 18 from its context in an attempt to prove that the Court allowed a double recovery of damages. Quoting this sentence relating to the loss of egg yield, appellant contends that *in addition* to the full market value of the lost chickens, plaintiff was permitted to recover the loss of profits from eggs which these chickens would have produced. This, if it is submitted, is based on a thorough misconstruction and misinterpretation of the

instructions given by the Court and of the facts in the Record showing plaintiff's computation of his damages. The Court's theory of damages cannot be gathered from the one sentence quoted by appellant, but can only be understood from some of the facts in the Record and from a reading of Instructions No. 17 and 18 in their entirety.

The difficulty the Court was confronted with was similar to that experienced by the Court in the case of *S. A. Gerrard Co. v. Fricker*, 42 Ar. 503, 27 P. (2d) 678 (1934) relied upon by appellant, where no precedent was available announcing the rule of damages properly applicable to the destruction and injury to a colony of bees. The Court stated:

"We think the rule must be the one ordinarily applied for the destruction of or injury to personal property in general. This rule we find is: 'Definite rules which will measure the extent of recovery in all cases even of a particular class are difficult to formulate owing to the consideration which must be given in each case to its specific and perhaps peculiar surrounding circumstances . . . ' 17 C. J. 844, sec. 166."

After reviewing the evidence in the light of this general principle the Court in that case found that the damage could be readily computed and concluded that a measure of damages based upon the market value of the colonies at the time of the damage could be adopted, with additional allowances for extra work and feeding of the bees.

In the case at bar, Instruction No. 18, par 2 announces the same rule of damages to the effect that *plaintiff cannot recover any more than*

"an amount that will correspond to the market value of the chickens which died and which were culled at the time and place of the death and culling thereof, or a reasonable time thereafter, less the amount received by the plaintiff for the sale of the culls." (Emphasis supplied).

This is the basic instruction with respect to the amount of damages in the case at bar. *It allows no recovery beyond the market value of the lost chickens. It does not permit any additional recovery for the loss of profits from the dead chickens.* However, in the case at bar, there was the added difficulty which distinguishes it from the *Gerrard Co. case* above that the market value of chickens of the ages of the Mintrate birds could not be directly ascertained. The evidence is undisputed to the effect that laying hens above the age of five months are not generally available on the market because at five months they begin to produce eggs so that people who have raised them to that age will not sell them then because they are so valuable for egg production. (See the expert testimony of Earl Wood R. 370-371 and of Keith Bryson R. 247, 258). Also, since chickens are brooded only during certain months of the year, even five-months old pullets are not available on the market at all times (R. 259). Consequently the market value of the lost chickens had to be arrived at by a process of indirection. The formula employed by the Court to this end is the same as that used by the Utah courts and many other courts in case of destruction of a building where there is also no ascertainable market value.

In *Egelhoff v. Ogden City*, 71 Utah 511 (1928), for example, the Supreme Court of Utah stated:

"It has been held by this court that the measure of damages for the destruction of a house is the '*cost to reproduce it, and the value of its use while that was being done.*' *Marks v. Culmer*, 6 Utah 419 . . ." (Emphasis supplied).

See also *Kennedy v. Treleaven*, 103 Kan. 651, 275 Pac. 977, 7 A.L.R. 274, also holding that the cost of replacing the building is the best measure of damages in cases of that kind, stating:

"There is no universal test for determining the value of property injured or destroyed and the mode and amount of proof must be adapted to the facts of each case . . .

It is frequently said that the market value of the property described at the time and place of the fire is a proper measure, and this is true if the property in fact has a market value. If there be no market value, then another criterion of value must be found, and the best evidence which can be obtained, must be produced to show the elements which enter into real value."

This rule of damages based on replacement cost plus use value is not limited to the destruction of buildings, but is also applied in case of destruction of personal property having no market value. 15 Am. Jur., Damages, sec. 15. The formula is the same as the measure of damages applied in many cases of injury to personal property. Compare, for example, *Bergstrom v. Mellen*, 57 Utah 42, 192 Pac. 679 (1920), and *Metcalf v. Mellen*, 57 Utah 44, 192 Pac. 676 (1920) holding that in an action for damages to an automobile recovery may be had for the reasonable costs of repair, plus any deprecia-

tion in market value after repairs are completed, plus the reasonable use of the car during the period the plaintiff was deprived of its use. Cf *Gardner v. Airway Motor Coach Lines*, Utah, 166 P. (2d) 196 (1946).

In accordance with these authorities, the third paragraph of Instruction No. 18 states that *as a substitute for the market value* of the lost hens the jury may use the "cost of replacement plus temporary loss of use" formula, with the necessary adjustments due to the fact that five-months old pullets have to be fed and cared for for at least two months before they are mature, but on the other hand produce eggs for two additional months. The item of "loss of use" during the period before replacements can be made in the case at bar consists of temporary loss of egg production.

That this element of "loss of use" for a temporary period, even where it takes the form of a temporary loss of profits, has nothing in common with a claim for loss of future profits, is held in *Horace F. Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718 (1913) which was an action for damages to a carriage and a team of horses. The Court stated:

"In its seventeenth instruction the court told the jury in assessing damages, if it should find for the plaintiffs, it might consider 'whether the plaintiffs were for any period of time deprived of the use of said horse and cab by reason of any injury sustained to said horse and cab in said collision, and the reasonable value for the use of said cab and horse during said period of time, all as shown by the evidence in the case.' *This instruction is manifestly not open to appellant's objection that it permitted the jury to*

assess damages for such speculative loss as might accrue in the future by reason of the lessened value of the injured horse and cab. Fairly interpreted, and especially in the light of all the evidence given on the trial, this instruction simply told the jury that in determining the question of damages, if any, it might consider the reasonable value of the use of the cab and horse during the period necessary in which to repair the injuries caused by the collision. There was no evidence before the jury of any loss which was not past, certain, and known at the time of the trial;" (Emphasis supplied.)

The Court also held that evidence showing that the plaintiff lost \$5 to \$7 a day for a two-months period because he was deprived of the use of the horse and carriage was not open to the objection that it sought to set up speculative profits, stating that it only

"tended to show probable profits which might have been received not as the measure of damages, but to aid the jury in estimating damages."

The three cases relied upon by appellant on pages 64-67 of its brief are all distinguishable on the ground that the animals lost there had an ascertainable market value so that the ordinary rule of loss or depreciation of market value could be applied. Also, there was evidence that the future profits claimed in those cases were truly speculative as for example a claim for the increase of a bee colony which, the court said, was "too much of a guess to be the basis of a claim for damages." In one of the three cases, *Miller v. Economy Hog and Cattle Powder Co.*, 228 Iowa 693, 293 N.W. 4 (1940), the Court recognized that damages might be recovered for the temporary loss of use by an animal, stating:

"The damage resulting from injury to an animal is the difference in value before and after the injury. There may be other elements of damage such as expense of treatment or *temporary loss of use or of produce*. But whether the animal is injured or destroyed the total damages ordinarily recoverable may not exceed its value prior thereto." (Emphasis supplied).

McCormick on Damages (1935), p. 477, takes issue with the last sentence quoted, stating that

"If in fact the cost of repair, including loss of use exceeds the value of the chattel, there should be no hard and fast rules fixing that value as the maximum recovery."

Respondent does not have to be concerned with this rule, however, because in the first place there is no ascertainable value which may not be exceeded, and secondly, the total price of five-months old pullets if bought to replace the older and more valuable hens of plaintiff already amounted to \$2,033.44 after deduction of \$540.56 received for the culls so that under the total verdict of \$2,231.34, less than \$200.00 was allowed to cover the temporary loss of egg production and the other items intended to be allowed under Instruction No. 18. (See Exhibit V).

Plaintiff's summary of his computation of damages appears on the typewritten Exhibit V (introduced in evidence at R. 674). After this document was admitted, two more figures were subtracted from the total—\$53.94 for overhead saved with respect to the chickens which had died or had been culled (R. 691), and \$1,235.52 for feeding costs saved with respect to the same chickens (R. 859).

Detailed evidence substantiating plaintiff's claim of losses appears on pages 527-543, 574-585, 654-675, and 682-691 of the Record. A great part of this evidence consists of testimony of Mr. Miller, who worked for plaintiff and personally made most of the entries on the daily eggcharts which contain complete figures on egg production and counts of chickens. The market price of five-months old pullets and of eggs was testified to by two poultry experts, Mr. Wood and Mr. Bryson (R. 246, 370). Amounts received for culls bought by Mr. Conta for the Utah Poultry Company were proved by the receipts given by that Company (R. 575-579).

Plaintiff's computation of damages may be summarized as follows:

Original number of Mintrate birds.....	2,850
Number left on Dec. 4, 1948.....	1,318
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Absolute loss (including deaths and culls).....	1,532
Number that should have been left if lost at same rate as Larro	2,462
Number actually left	1,318
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Relative loss (in excess of Larro).....	1,144
Price of 1,144 pullets 5 months old at \$2.25 per pullet	\$2,574.00
Minus price received for 744 culls at \$0.74 per cull	540.56
<hr/>	
	\$2,033.44
Plus cost of feeding 5-months old pullets until mature	822.54
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	\$2,855.98

Minus added egg yield of 5-months old pullets	1,308.90	
		<hr/>
		\$1,547.08
Plus egg loss up to assumed replacement date (Dec. 9, 1948).....	1,973.70	
		<hr/>
		\$3,520.78
Minus overhead saved on lost hens.....	53.94	
		<hr/>
		\$3,466.84
Minus feeding costs saved on lost hens.....	1,235.52	
		<hr/>
		\$2,231.32

It will be noted that this computation is in accord with Instructions No. 17 and 18, and the additional Instruction given on page 859 of the Record. The arrangement of the figures on Exhibit V is slightly different, but the result is the same.

It is submitted that the theory of damages adopted by the Court and the computation of damages thereunder is correct.

Respondent does wish to add, however, that a recovery of \$2,231.32 under the total verdict of the jury by no means compensates him for the total amount of his loss. The reason is that he was unable to replace the lost hens and thereby minimize his damages as the Court ruled as a matter of law he should have done not later than December 4, 1948 (R. 538). That laying hens of the same age and breed as those he lost were not available on the market, has been pointed out before. It is possible that he might have been able to buy some five-months old pullets, assuming that he could have found them in the numbers and at the times needed and had the capital to purchase them. Assuming then that he could have acquired

younger replacement birds, he would, however, have been confronted with innumerable problems of management, feeding and accommodation. The following January when his new crop of baby chicks would have come in, he would have had three flocks of three different ages, with the replacement birds still in the best part of the laying stage at a time when the new chicks would have been ready for egg production and required more space. As Mr. Park testified, he chose the month of January as the starting point of his business cycle after some years of experimentation because January chicks will reach the peak of egg production in October and November when egg prices are highest (R. 703). Then, about January of the next year, he starts to cull out the older flock to make room for the new ones. When the new ones go into the laying pens, more of the old hens are culled out until, about October, all of the flock of the preceding year has been disposed of, and the cycle starts again. In view of these facts, it is clear that the presence of a third flock would have been difficult and impractical for Mr. Park to handle, under the particular set-up of his poultry business.

A more realistic rule of damages might have been to regard plaintiff's losses not like the loss of a few individual chickens kept by a family for its household use, but rather as damages suffered in his poultry business, or, in an analogy to the loss of an annual crop, as losses sustained by his annual flock of chickens. Viewed in this fashion, damages would not be assessed upon the basis of the individual chickens lost, but rather upon the loss of egg production over the entire laying period. Compare *Cleary v.*

Shand, 48 Utah 640, 161 P. 453 (1916); *Sharp v. Gianoulakis*, 63 Utah 249, 225 P. 337 (1924); *Vincent v. Federal Land Bank of Berkeley*, 109 Utah 191, 167 P. (2d) 279 (1946). That profits lost as the result of the breach of warranty of feed for animals may be recovered similar to profits lost from a growing crop, is suggested in *Swift & Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140 (1909). Cf *Miller v. Economy Hog and Cattle Powder Co.*, 228 Iowa 693, 293 N.W. 4 (1940) where the Court intimated that where future profits are contemplated as the immediate fruits of a warranty of animal feed, they can be recovered.

Respondent is of the opinion that under any such theory under which the plaintiff's loss would be figured on the basis of the eggs which are the product of his business rather than the chickens which constitute merely his capital investment, he would have received a more just and fair amount of compensation. The present verdict does not allow him even as much as the full market value of \$2,574.00 for 1144 young pullets which are admittedly much less valuable than his mature laying hens. In this connection attention is called to defendant's requested Instruction No. 11 (R. 70) which was not given, in which defendant suggests that damages be awarded on the basis of an imaginary market price of \$2.80 per chicken, which would amount to a total of \$3,203.20 for the 1144 chickens lost. After deducting the \$540.56 received for the culls the total amount of damages to be awarded would still be \$2,662.64, well above the present verdict of \$2,231.32.

B. The evidence with respect to the temporary loss of egg production was sufficiently definite and certain.

It is true that plaintiff experienced some difficulties in proving his damages. That was due to the fact that as a farmer, he does not keep elaborate books and he did not have the assistance of an accountant in preparing his figures for the trial. Furthermore, his proof was complicated by the fact that he did not pray damages for his absolute loss in Mintrate birds, but solely for his relative loss in excess of Larro losses necessitating many computations on a percentage basis; and finally the theory of damages adopted by the Court due to the fact that the market value of the lost chickens could not be directly established, resulted in an involved method of figuring out feeding costs, overhead, egg production gains and losses, and similar items described above under A.

It is submitted that the average price of \$15.00 a case was a proper figure to use in the computation of the value of the eggs lost. Plaintiff did not rely on the estimate of Mr. Miller to that effect, as appellant claims, but the price of eggs was testified to by the poultry expert Mr. Keith Bryson, who had bought all of plaintiff's eggs (R. 245-246). Mr. Bryson stated that eggs of young pullets sell for a little less, but that the average throughout the fall season of 1948 was \$15.00 a case (a case consisting of 30 dozen). Plaintiff himself testified from the actual sales figures that he received 41.2 cents a dozen on the average for the eggs of his young pullets who had just started to lay up to August 20 (R. 686, 695), and thereafter prices went up and the eggs got larger so that 50 cents a dozen or \$15.00 a case is a fair average. Appellant had the opportunity to controvert this figure by bringing in evidence of its own, but failed to do so.

It is difficult to understand how appellant can claim, in the face of plaintiff's computation of damages showing a deduction of as much as \$1,235.52 for savings in feeding costs and \$53.94 for savings in overhead, that no allowance has been made for either one of these items (see pages 71-74 of appellant's brief). The jury was charged specifically in Instruction No. 17 that in determining the temporary losses in egg production, plaintiff may recover "the value of the eggs *less the cost of producing the same*," and in Instruction No. 17 the Court stated, after overhead had already been deducted before arriving at the total of \$3,466.84 (R. 691), that

"the cost of feeding hens is in evidence and it is necessary for you to deduct from the figure that the plaintiff gave you, of \$3,466.84, if you find by a preponderance of the evidence that you should use such figures, the cost of feeding the chickens that plaintiff did not feed during the period that he claims he had a reduced egg production."

And at page 859 of the Record the Court instructed the jury that plaintiff

"would not be entitled to an egg lay without deducting the money he would have had to pay to feed the chickens,"

and submitted to the jury the stipulated figure of \$1,235.52 "as the plaintiff's feeding cost, leaving a balance of \$2,231.34."

The maximum permitted recovery after deducting the \$1,235.52 was, however, not inserted into the Instruction, leaving the higher maximum of \$3,466.84, with the above-

quoted additional charge of Instruction No. 17 to the effect that the feeding costs must still be deducted. The Document "Judgment on the Verdict" also carried the \$3,466.84 maximum figure, listing a maximum of \$1,973.70 allowable for egg loss. The jury, sent out with this document and with a figure of \$1,255.52 to be deducted for feeding costs, naturally deducted most of the feeding cost from the amount allowed for the chickens, instead of from the egg loss, ending up correctly with a maximum verdict of \$2,231.34, but allowing \$1,672.00 for eggs and only \$558.93 for chickens. Of course, under the theory of damages adopted by the Court a subdivision of the damages into chicken loss and loss of egg yield was not necessary and might have been avoided, but it is submitted that the arrangement of the figures was not material and had not the slightest effect on the ultimate result of the case.

With respect to the amount of \$540.56 deducted for overhead, attention is called to pages 687-691 showing how plaintiff arrived at that figure. His feeding costs were also testified to at length in the trial (R. 579-581, 687).

It is also submitted that in the case at bar there was nothing speculative or conjectural about the evidence introduced to prove plaintiff's temporary loss of egg production. In connection with appellant's reference to the Annotation in 99 A.L.R. 938 relating to prospective profits of new businesses, it may be stated that not only did plaintiff have provable data of his past poultry business, but better than that, his egg losses could be rationally arrived at, without guessing or speculation, through a comparison with the egg pro-

duction of the Larro birds, which was a simultaneous absolutely equal venture. The Court found the ideal situation that the basis of comparison was provided by the plaintiff himself through the division of his flock. See the Annotation in 69 A.L.R. 748 (1930) entitled "Loss of or damages to crop as element of damages for breach of contract of sale or warranty of agricultural machinery or fertilizer." Some of the cases listed in this annotation refer to facts similar to the case at bar where, for example, defective fertilizer had been used only on part of a plaintiff's land and not on the other. The court in a case like that held that the "actual experiment that was made relieved the damages of any objection based on the idea of their being speculative or contingent." *Wolcott v. Mount*, 13 Am. Rep. 438; *Bell v. Reynolds*, 78 Ala. 511; *Philbrick v. Kendall*, 111 Me. 198, 88 Atl. 540 (1913); and *Swift & Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140, stating that a claim for profits lost through breach of warranty in the sale of a cattle feed is not subject to the objection that it is speculative or uncertain.

Finally, in answer to appellant's objection to the use of plaintiff's own figures, which are, however, all based on the egg charts introduced in evidence, the case of *Stuart v. Burlington County Farmers' Exchange*, 101 Atl. 265 (1917) is referred to where the plaintiff's oral testimony with respect to the amounts of his sales of a crop and losses sustained was held competent evidence, and also *Rabinowitz v. Hawthorne*, N.J., 98 Atl. 315 (1916).

C. The procedure in the trial with respect to proof was not prejudicial to defendant's cause.

There was nothing in the procedure in the trial court that was prejudicial to defendant's cause. On the contrary, the Court was most exacting, strictly requiring plaintiff to make his proof of damages air tight, so that as a result plaintiff had to labor over his figures and problems of arithmetics while defendant could sit by relying on the Court to check the minutest details of the proof. Furthermore, the Court on its own, without any motion or request by defendant, compelled plaintiff to make one deduction after the other from his claim for damages, and on one day even told him that a non-suit would be granted if additional figures for further deductions were not brought in within five minutes (R. 680-681). The Court also on its own initiative cut off all of plaintiff's damages after Dec. 9, 1948 (R. 538) without plaintiff having an opportunity to show that it would be impractical and inexpedient for him to replace the lost chickens before the end of their laying period in the fall of 1949. Reading the whole record and all the instructions one cannot but receive the impression that if any side was helped by the Court, it was the defendant's rather than the plaintiff's.

D. The Court gave complete instructions on the subject of intervening causes and the plaintiff's duty to minimize his losses.

As has been fully discussed above under Point IV relating to proximate cause, any normal losses in the Mintrate pens not attributable to the feed have been automatically excluded from consideration due to the fact that only extraordinary losses, that is those exceeding Larro losses have been

included in plaintiff's computation of his damages. Instead of claiming compensation for his absolute loss of 1532 birds, only his relative loss of 1144 birds was considered, leaving the balance of 388 chickens (for which even younger replacements would have cost \$873.00) to be written off as normal risks of the poultry business.

As has also been stated before, the Newcastle disease did not become prevalent before November, 1948, not long before the cut-off date of December 9, 1948. While appellant claims that the disease broke out in the end of September or October, the Record clearly shows, and the egg charts prove, that the disease started in November, 1948 (R. 208). Furthermore, Newcastle losses were experienced also by the Larro birds, almost to the same extent as by the Mintrate birds which suffered slightly more because of their previously weakened condition caused by the defective nutrition. Consequently, under the relative loss theory, very slight, if any, losses were counted during the period of the Newcastle disease.

The condition of "picking" has also been discussed before, particularly under Point No. IV. It suffices to repeat that plaintiff does take the position, and the evidence in the record clearly proves, that the severe picking known as "cannibalism" or "pickouts," as distinguished from the ordinary feather picking which occurs in most flocks from time to time without any serious consequences—was caused as a proximate result of the Mintrate feed and feeding method. Any losses occasioned by the cannibalism are the proximate result of the Mintrate feed.

Any intervening causes not automatically excluded through the relative-loss method of computing damages are covered by Instruction No. 19 which charges the jury to consider any contingencies or diseases peculiar to the Mintrate coops.

The duty to minimize damages is fully covered by Instruction No. 17. Also, as has been discussed before, the Court ruled that under his duty to minimize his losses it would be unreasonable as a matter of law for plaintiff to recover for any losses beyond December, 1948 (R. 538). Plaintiff spent whole days in the Mintrate pens painting the birds with a salve to prevent further cannibalism, with considerable success. And although defendant again claims that he did not see a veterinarian and again fails to mention its own veterinarian, Dr. Sturdy, it must be repeated that Dr. Sturdy made a special trip from Illinois to Utah to examine plaintiff's birds. Dr. Sturdy, who saw that plaintiff used a salve to stop the picking, had no other suggestion to make to help this condition. According to Mr. Conta, debeaking is a new method used by some poultry men to alleviate this condition, but it does not help very much (R. 346), and it is certainly not the only deterrent plaintiff should have used to minimize his loss.

Plaintiff did not stop using Mintrate immediately when he noticed its harmful effects because defendant's agent Gail Barron requested him to give the feed a "fair trial" (R. 150, 420). However, when plaintiff was certain that the effects of the feed were becoming disastrous, he discontinued it immediately (R. 150). He changed back gradually to the

other feeding program so that by September 1, 1948, his chickens received no more Mintrate feed.

Appellant contends that plaintiff could have replaced his damaged birds right then, in September or October, 1948. In this connection attention is called to the following language from *S. A. Gerrard Co. v. Fricker*, 42 Ar. 503, 27 P. (2d) 678 (1934) relied on by appellant on page 64 of its brief:

"We know of no rule of law that requires a person whose property has been wrongfully injured to go into the open market as the court states, and buy substitutes, or, as here 'other bees' in order to claim damages from the wrongdoer or to mitigate them."

Appellant suggests on page 83 of its brief that since the whole flock was affected, plaintiff should have replaced his whole flock. Appellant further states (p. 84 of its brief) that since there was a ready market for chickens *for meat* in the fall of 1948, and pullets up to the age of five months of age were available for purchase, plaintiff should have disposed of his whole flock and bought a new one of younger pullets, and received damages for the difference. Even leaving aside the fact that plaintiff would then have had less valuable non-laying chickens, plaintiff would under defendant's own theory of damages recover more than twice the amount of the present verdict: He would have spent \$6,412.50 to buy 2850 five-months old pullets at \$2.25 per pullet; and assuming that he would have had only half of his actual losses at that time, or a loss of only 766 birds, he would have received only \$1,542.16 in a sale of the remaining 2,084 chickens for meat at \$0.74 a piece, leaving a balance to be awarded as

damages in the total amount of \$4,870.34. This figure does not yet include an amount to compensate plaintiff for the loss of "ten or twenty days' production as a result of changing from one flock to another" which appellant suggests might also be added.

CONCLUSION

Respondent submits that no error was committed in the trial court, and that its judgment should be affirmed.

Respectfully submitted,

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