

1963

Ray Tanner v. Utah Poultry & Farmers Cooperative et al : Brief of Respondents

Utah Supreme Court

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Clarence J. Frost; Attorney for Appellant;

Irwin Clawson; Attorney for Respondent;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

FILED

UTAH

RAY TANNER,

JUN 25 1963

963

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

ARY.

—vs.—

**UTAH POULTRY & FARMERS
COOPERATIVE, a corporation,
GEORGE RUDD and CHARLES
P. RUDD,**

Case No.

9721

Defendants and Respondents.

BRIEF OF RESPONDENTS

**Appeal from the Judgment of the Third District Court
for Salt Lake County, Honorable Merrill C. Faux, Judge**

IRWIN CLAWSON

**141 East Second South
Salt Lake City, Utah**

Attorney for Respondents

CLARENCE J. FROST

**716 Newhouse Building
Salt Lake City, Utah**

Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAY TANNER,

Plaintiff and Appellant,

—vs.—

UTAH POULTRY & FARMERS
COOPERATIVE, a corporation,
GEORGE RUDD and CHARLES
P. RUDD,

Defendants and Respondents.

Case No.
9721

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Generally they are as stated, except as differences are pointed out in the argument. ~~However, defendant does not see the crux of the case as plaintiff does. Whether a cooperative can make a corporate profit is a question of law, lightly, if at all, touched on in plaintiff's brief.~~

~~Defendant contends that if there is a crux, it is recited in St. Matthew 25:24, wherein the servant said~~

~~"...I knew thee that thou art an hard man,
reaping where thou hast not sown. . . ."~~

~~The crux suggested by plaintiff and the one suggested by defendant will be discussed in the argument.~~

However, since most of the problems raised relate to an accounting or as plaintiff claims, the lack of it, let defendant point out the various accountings made as the turkeys progressed from the plaintiff's ranch, through the dressing plant and in some cases, the eviscerating plant.

There were the truckers' receipts (Tr. 870, L. 9 to 12, Tr. 872 L. 1 to 4) issued at plaintiff's ranch when defendant first took over plaintiff's turkeys. It specified the number and sex. Then there were the Loading & Packing Manifest (Tr. 337 L. 14 to 24; 870 L. 26 to 29) issued to plaintiff, made up at the dressing plant (such as Exh. 4P, 37P, and 38P). This accounting repeated the number and sex and gave additional information, namely, the grading and the weight and disposition.

He also received processing invoices, statements for the processing and hauling charges (Tr. 1274 L. 4 to 8) such as Exhibits 8P and 13P, vouched for by plaintiff, and 98D, which again showed the grade, sex, number of boxes, number of head, net weight and disposition, and allowed plaintiff to ascertain he was receiving full credit for all turkeys delivered.

Plaintiff, after reversing his earlier testimony (Tr. 868 L. 19 to 22), admitted he did have the truckers' receipts (Tr. 870 L. 9 to 12) and invoice at the processing plant (Tr. 870 L. 13 to 30). He had those two accountings and the manifest at the time he got his settlement sheet (Exh. 3; Tr. 871 L. 20 to 27).

If plaintiff left the turkeys with defendant for marketing, whether marketed as New York dressed or eviscerated, he got a Turkey Department Receipt (such as Exh. 61) giving the same information with the opportunity of checking against earlier tallies. When the birds were sold the Settlement Sheets (Exh. 3, 7, 12, 21, 22, 23, 24 and 32) were given him, identifying the flock by reference to the Turkey Department Receipt number and the same information as to the grade, sex, number, net weight was stated, along with data as to sales price, gross receipts and the detail on the deductions.

~~This information was available to plaintiff as each flock left his farm, was processed, and, if they were left with defendant for sale, as they moved toward and through a sale. Any shortage would be immediately visible at each step as the records were given plaintiff shortly after each step was taken (Tr. 870 L. 26), any mistake could be rectified without accountants, or lawyers, or delay of weeks, months or years. With these four (truckers' receipts, Loading and Packing Manifests, Processing Invoices and Turkey Department Receipts)~~

or more records to check each settlement sheet, (Exh. 3, 7, 12, 21, 22, 23, 24 and 32) plaintiff made no protest (Tr. 871 L. 3 to 9, Tr. 872, L. 1 to 12).

A second observation relates to plaintiff's auditors and their work.

Mr. Alan Mann of the firm of Wood, Child, Mann & Smith, is a certified public accountant according to the firm's letterhead (Exh. 17D). He appeared and testified (Tr. 1380 and 1384) and verified the matters covered in his reports in Exhibits 17D, 28P and 72D (a second copy got into the record as 97D). He noted (Exh. 72D, at the top of the first page) that plaintiff had turned over receipts to him which he stated he used as a basis for his investigations. (It does not appear whether he refers to the truckers' receipts given at the farm pick-up, or the Turkey Department Receipts, such as Exh. 19P, issued when the turkeys were turned over to the Utah Poultry for marketing.) At the top of page 2 of Exhibit 72D, he pointed out that Utah Poultry *accounted for all birds with ten birds over*. At the top of page 3 he discussed the results of his investigation as to the price on local sales as compared with the New York quoted price. He said if the birds were sold locally, the price obtained was the equivalent of other like sales. He stated that on sales in New York a flat 4¢ per pound was deducted to cover freight and icing.

~~Apparently plaintiff was questioning the grading of the D grade birds and the 4¢ for eviscerating, and whether there would be stock issued (he probably meant certificates of interest) for the 1/2 cent per pound deducted. The auditor indicated (Exh. 72D, page 4, middle) that plaintiff wanted to know where plaintiff's birds were sold and at what prices. He reported that the Utah Poultry was reluctant to release that information but did show the accountant the sales invoices upon receiving the accountant's promise not to divulge the names of the purchasers shown therein.~~

The plaintiff refused to consent to sales of his 1951 crop during the Thanksgiving and Christmas marketing in 1951, or the less brisk winter and spring market, and finally a letter (Exh. 93D) dated May 19, 1952, was sent asking him to refinance his loan elsewhere or permit Utah Poultry to sell, and added that if this request was not complied with, Utah Poultry would begin selling in spite of him, and a trip to Indianola was made by George Rudd (Tr 1261 L. 4) to get permission to sell. Plaintiff then sent his auditors into Utah Poultry records a second time, resulting in the auditor's report (Exh. 17D) dated August 21, 1952. Then, subsequent to Utah Poultry accounting on the last (1951) crop in the Settlement Sheet (Exh. 32P) on September 2, 1952, the plaintiff sent his auditor in for a third investigation.

~~Returning to the auditor's report, in the one dated August 21, 1952 (Exh. 17D) page one, third paragraph, Mr. Mann stated that the 1949 crop was sold on a New York dressed basis. In the fifth paragraph he stated that Mr. Rudd said the plaintiff wanted a settlement on a New York dressed basis though part were already eviscerated.~~

~~At the bottom of page 2, he stated that he examined the Utah Poultry sales books, inventory cards and~~

~~“ . . . asked every kind of question, not one of which was evaded.”~~

~~According to the report, while the auditor at first thought Utah Poultry had made a secret profit on the 1949 purchase (bottom of page 2, Exh. 17D) his investigation showed the Utah Poultry lost money on the 1949 crop.~~

~~In the last auditor's report (Exh. 28P, second paragraph, page 1) dated just one month after the letter of September 2, 1952 (Exh 65D) tendering the release and check covering the 1951 crop, Mr. Mann reported:~~

~~“Utah Poultry supplied me with all inventory cards and supporting data for the three years 1949, 1950 and 1951. When I saw the amount of work involved in checking the items out I decided to concentrate on 1950 at present, as I told you over the phone.”~~

He stated ~~he checked the Utah Poultry inventory~~ cards on the hens against those of the Utah Ice and they were identical other than minor overage or shortage. In the middle of page 4, he reported:

~~"It is my belief that the inventory records on your 1950 crop checks out with the American Fork recap sheets [manifests] as well as could be expected; it is difficult for me to see how they could vary through the processing plant into cold storage, the way they are checked and double checked." (Brackets and emphasis added.)~~

He testified in the trial concerning this matter:

"... I was not aware of anything being withheld from me or any other attitude than one of complete cooperation.

"Q. You didn't ask for any papers that were not made available to you?

"A. That's right." (Trans. 1381 L. 21 to 26)

Another fact which should be stated is that the publication of the plaintiff's first and second deposition is found at Transcript 544.

ARGUMENT

The judgment should be sustained as to George Rudd and as to Chas. P. Rudd. There is not a scintilla of evidence to sustain any judgment against either of them.

~~Before considering the details of the points raised by the plaintiff under his six numbered points, and his more numerous unnumbered ones, it might be well to call attention to the fact that the defendant-respondent's defenses of Statute of Limitations and Release, are each a complete defense to all of the points raised by plaintiff, excepting only IV (that mistake should be considered) and VI (that plaintiff was prejudiced by loss of the original bill-of-sale-letter, Exhibit 29P, verifax copy Exhibit 52P).~~

~~Without considering the details of the various points raised by plaintiff, attention can be passed to the defenses of Statute of Limitations (Brief p. 80) and Release (Brief 64). However this brief will attempt to follow the order established by the plaintiff in his brief and in order to shorten the same will not discuss the defenses of Statute of Limitations, etc., which can be raised to each of the points, but those principles and facts applying to them will be grouped at the end and treated there.~~

~~RELIABILITY OF PLAINTIFF'S TESTIMONY:~~

~~Plaintiff's testimony is always important. Whether it is reliable is another matter. The Court in Finding of Fact No. 17 (Tr. 298) found that his testimony "was not frank but evasive and contradictory," as detailed in six specific instances numbered in that many subparagraphs.~~

~~As to the denial that he received truckers' receipts for the number picked up from plaintiff (enumerating the hens and toms separately), a step so vital as to the number and sex for which defendant was accountable, see the following:~~

Denial of getting truckers' receipts (Tr. 430, L. 4 to 7; Tr. 867, L. 6 to 868, L. 26); acknowledgement that he got the truckers' receipt (Tr. 868, L. 27 to 870 L. 17.)

As to whether he ever sold turkeys to the defendant (as distinguished from marketing through defendant) he denied ever selling to defendant the turkeys covered by the March 20, 1951 settlement sheet (Exh. 24P) wherein defendant claimed it purchased 183, 725 pounds of eviscerated turkeys. He denied signing Exhibit 52P, the verifax photo of the bill-of-sale-letter of March 20, 1951 (Tr. 401, L. 10 to 17). He testified the letter had been changed over the copy presented (Tr. 842, L. 12 to 18); changed, so the turkeys were to be marketed by defendant and not purchased by the latter (Tr. 851, L. 22 to 30). He finally admitted signing it. (Tr. 1369, L. 2, 3.)

PLAINTIFF'S POINT I (a) — ~~That evidence does not support Finding No. 2, which was that defendant did not market plaintiff's turkeys in 1947 and 1948.~~

DEFENSES:

1. ~~Evidence does support Finding.~~
- ~~2. Final pleadings do not admit marketing.~~
- ~~3. Processing is no evidence of marketing.~~
- ~~4. Claim of 1947-1948 marketing of recent origin.~~
- ~~5. In 1959, claim was based on vouchers, since abandoned.~~

DEFENSE 1: EVIDENCE DOES SUPPORT FINDING THAT PLAINTIFF DID NOT MARKET 1947-1948 TURKEY CROPS THROUGH DEFENDANT.

The evidence in favor of a finding that defendant did market plaintiff's 1947 and 1948 crops was the plaintiff's testimony and the exhibits bearing date of 1948, namely: Exhibit 37P, being seven (7) Loading & Packing manifests from American Fork, and Exhibit 38P, being two similar manifests issued by the Salt Lake Eviscerating plant, and Exhibit 39 being two Utah Ice delivery blanks showing the withdrawal by defendant, and Exhibit 40P, being a Utah Poultry sales invoice for some eviscerating.

Concerning those items, George Rudd, the manager of the defendant's Poultry and Eviscerating plant, testified that none of these indicated that defendant marketed these 1948 turkeys (Tr. 1283, L. 10 to 17); Manifests (Tr. 1249, L. 29 to 1250 L. 2); Withdrawal from cold storage (Tr. 1250 L. 16 to 19); eviscerating invoice (Tr. 1251, L. 6 to 10); Utah Ice Manifests (Exh. 41—Tr. 1251, L. 12 to 19). He also testified that there was no record of marketing plaintiff's birds in either 1947 or 1948. Charles Rudd, the former manager of the Poultry Department, (including the turkey marketing division) did not recall defendant marketing turkeys for plaintiffs in 1948 (Tr. 719 L. 30 to 720, L. 2, also lines 8 and 9 and 723, L. 8 to 10) and testified the Utah Poultry eviscerating invoices (Exh. 40P) didn't indicate defendant was marketing plaintiff's turkeys in 1948 (Tr. 777 L. 20 to 24).

DEFENSE 2: FINAL PLEADINGS DON'T ADMIT MARKETING IN 1947-1948

~~While plaintiff cites an admission in the initial answer (Tr. 15 paragraph 11) that defendant marketed turkeys for plaintiff in 1947, he fails to mention that in the Answer to the Amended Complaint this mistaken admission was corrected and such marketing was denied. (Tr. 235, paragraph 12.)~~

DEFENSE 3: PROCESSING IS NO EVIDENCE OF MARKETING.

~~Plaintiff then says there is a verification in Exhibit 56, showing defendant processed plaintiff's turkeys in 1947. The reference is to a copy of a ledger sheet showing the margins credited to a grower. It shows, as plaintiff stated, that defendant *processed* some turkeys for plaintiff in 1947. Defendant furnished processing of two kinds, processing to New York dressed (killing and picking) and processing to include evisceration (killing, removing feathers, head, feet, viscera or entrails) and a third service, marketing. It would and did perform one, or two, or all three of these services as requested. (Tr. 723 L. 10 to 17.)~~

DEFENSE 4: CLAIM OF 1947-1948 MARKETING OF RECENT ORIGIN.

From the plaintiff comes evidence that we did not market his birds either years. In his threat-of-litigation letter of August 25, 1952, (Exhibit 90D), plaintiff did not mention any marketing in either year when he wrote:

“It is of vital importance . . . that I be allowed to inspect the records concerning all business . . . for the past three years. I herewith renew my demand for such records. . . .”

~~Similar reference to 1949, 1950 and 1951 is made by those employed by him. Mr. Lamoreaux in his letter to defendant of a month earlier (Exhibit 67D) stated:~~

~~"My good friend, Ray S. Tanner, has discussed with me and shown to me his complete file relative to shipments of turkeys through your association over the last three years."~~

~~In Mr. Lamoreaux's letter of August 11, 1952 to plaintiff (Exh. 91D), in reporting on his conversation with defendant's attorney, he reported in detail but only on the crops for the three years 1949, 1950 and 1951.~~

In Mr. Mann's report of October 2, 1952 (Exh. 28P) in the second paragraph, he stated that he was supplied by defendant with

"... all inventory cards and supporting data for the three years, 1949, 1950 and 1951. . . ."

These quotations show that when plaintiff's recollection was ten years fresher than it was at trial, he made no claim of marketing prior to 1949.

DEFENSE 5: IN 1959, PLAINTIFF'S CLAIM THAT HE MARKETING HIS 1947 and 1948 CROPS THROUGH DEFENDANT WAS BASED ON TEN VOUCHERS SINCE ABANDONED.

In his 1959 deposition, he based his claim on ten yellow copies of draft vouchers (Exh. 70D) portions of sight drafts for turkeys. (Tr. 855, L. 14 to 27; 856 L. 5 and 6 and L. 26 to 30; Tr. 859, L. 29, 30; 860 L. 1 to 12.) He was positive that Charles Rudd personally, or as agent for Utah Poultry, gave him the original sight drafts to which these vouchers were attached. Plaintiff's counsel finally stipulated this was in error (Tr. 860, L. 8 to 12).

PLAINTIFF'S POINT I (b) — 460 Head short.

DEFENSES:

1. ~~Plaintiff failed to prove delivery of 460 head.~~
2. ~~Explanation of 460 additional head.~~
3. ~~Misstatement—plaintiff charged for eviscerating.~~
4. ~~This flock sold New York dressed, not eviscerated.~~
5. ~~Plaintiff received credit for full sales price.~~

DEFENSE 1: PLAINTIFF FAILED TO PROVE DELIVERY OF AN ADDITIONAL 460 HEAD.

There is no guess work as to whether plaintiff delivered 460 head more than the 5,232 for which defendant

accounted on the Settlement Sheet of September 15, 1949 (Exh. 3). Plaintiff had in his possession truckers' receipts (Tr. 870, L. 9-12) issued to plaintiff before his turkeys left his ranch by defendant's truckers who picked up the turkeys. These truckers' receipts showed the head count and the sex of every turkey delivered by plaintiff to defendant, then when the birds were processed (Tr. 870, L. 16, 17) he had no complaint when he got the processing manifest and compared it with the truckers' receipt (Tr. 870, L. 30 to 871 L. 1 to 9).

He failed to produce the truckers' receipts although requested to do so (Tr. 870, L. 13 and 14). He compared the count on them with the processing manifest (Loading & Packing Report, Exh. 4P) introduced and vouched for by the plaintiff. It showed a total of 5,232 head (opposite the word "Total" on the next to the last line on the righthand side). *This is the identical number for which we accounted on Settlement Sheet Exhibit 3P.*

~~Plaintiff not only failed to prove that he was shorted 460 head, he definitely proved he was not short any. Defendant accounted for every turkey.~~

DEFENSE 2: EXPLANATION OF 460 ADDITIONAL HEAD.

The evidence of shortage relied on by plaintiff appeared by an eviscerating invoice (Exh. 5P) made up

some time later in the Salt Lake Eviscerating Plant, and not at the American Fork Processing Plant. The testimony of Charles Rudd, at that time manager of the turkey department, was to the effect that he told plaintiff the latter could sell his turkeys on a particular order Rudd had. Plaintiff told Charles Rudd to sell them on that order. (Tr. 731, L. 5 to 14). They were then transported to the Salt Lake Eviscerating Plant and some more turkeys added to the group to round out the order defendant was filling (Tr. 733, line 16 et. seq.). In the eviscerating plant, for identification as to the source of the turkeys, they were referred to under the name of the producer who had raised and sold them, that is "Tanner." (Tr. 733 L. 21). Thus the entire lot, both those sold by plaintiff and the much smaller group sold by another grower, were run through the eviscerating line under the name of "Tanner," although they had already been sold by plaintiff in their New York dressed state. (Tr. 733, L. 21).

DEFENSE 3: MISSTATEMENT.

~~Plaintiff states he was charged for eviscerating this flock. Plaintiff misstates the fact, in the middle of page 11 of the brief, wherein he says that he was "charged" \$3,077.67 for this eviscerating. That amount was charged, but not to him, but to the purchaser of those turkeys who, after the sale by plaintiff, had directed the eviscerating. This settlement sheet fails to show anything paid~~

~~for eviscerating. Nor was there any evidence introduced that plaintiff paid for eviscerating. So, to claim that plaintiff was charged for the evisceration was not supported by any evidence and was a misstatement.~~

~~DEFENSE 4: FLOCK SOLD NEW YORK DRESSED NOT EVISCERATED.~~

~~Plaintiff claims in his brief (middle of page 11) that he paid for the eviscerating. But his accountant, Mr. Mann, reported eleven years earlier, in the third paragraph on page 1 of his August 21, 1952 letter (Exh. 17D) that they were not eviscerated:~~

~~"These birds were not held. . . . They were New York Dressed."~~

~~DEFENSE 5: PLAINTIFF RECEIVED CREDIT FOR FULL SALES PRICE.~~

~~Plaintiff (brief, bottom of page 9) starts a new un-numbered objection, that he did not receive the full amount for which the turkeys were sold. He reached this conclusion by New York quotations showing a price differential between different sized birds in small quantities. But marketing small lots of a dozen or a hundred head is different from selling 10,279 head (1949 crop) or 9,653 head (1950 crop) or 8,369 head plus 183,000 pounds (1951 crop), and those for which there is slight demand (Tr. 758 L. 14 to 759 L. 19, 761 L. 11 to 19).~~

~~However, no testimony was introduced showing that plaintiff did not receive credit for the entire purchase price. The evidence was unanimous to the contrary, including that of his auditor as quoted above from the first full paragraph on page 2 of his August 21, 1952 report, Exhibit 17D.~~

This is an attempt to :

“REAP WHERE THOU HAST NOT SOWN.”

PLAINTIFF'S POINT I (c) :

Plaintiff has four objections under this point.

Defendant's argument follows plaintiff's point.

1.—Parties could contract for outright sale because of earlier written agreement.

~~On page 12 of his brief, plaintiff quarrels with Finding 3 (b), on the ground that in Exhibit 2P, the Turkey Marketing Contract between plaintiff and defendant and the Utah Cooperative Turkey Producers, provided how the turkeys were to be marketed. The Utah Cooperative Turkey Producers ceased to do business in 1950 and has not and is not now objecting to modification of that contract which the other two parties (plaintiff and defendant) for whose benefit the contract was made, have seen fit to change on two occasions, namely: the December 12, 1949 sale of plaintiff's turkeys to defendant and a similar~~

sale on March 20, 1951. In both cases, plaintiff sought to have defendant buy the turkeys. (Tr. 1251 L. 30 to 1252, L. 8 and Exh. 52P). In both cases the two principals agreed and the turkeys were sold to defendant and the sales price paid or applied.

~~Now after a lapse of fourteen years, for plaintiff to renege and seek to retreat behind a contract he later modified is ridiculous. This claim is barred by the Statute of Limitations, and by the Release as hereinafter detailed.~~

2.—Revolving fund deduction.

At the bottom of page 13, reference is made to the requirement in the Turkey Marketing Contract (Exh. 2P) for the defendant to deduct one-half cent ($\frac{1}{2}\text{¢}$) per pound for a revolving fund. It was deducted, as shown in the September 15, 1949 settlement, under the section "Deductions" and opposite the typed-in words: "Reserve-stock" (Exh. 3) and later in the two December 12, 1949 settlement sheets (Exh. 7P and 12P) opposite its proper, typed-in, name "Certificates of Interest."

The three deductions in 1949 totaled \$847.01, and that amount was set up as a credit on plaintiff's patronage (margin) refund ledger cards (Exh. 56P) and a certificate issued therefor in the amount of \$850, on April 1, 1950, as shown on the right portion of the same ledger card. Thereafter no such deduction was made from

money due plaintiff and no objection was made on that account. However, the purpose of the reference about the deduction seems to be pointless. It is merely stated and dropped.

3.—Claim of fifteen (15) bird shortage.

DEFENSES:

~~A. No shortage proven.~~

~~B. Auditor's report in 1952 agreed with defendant's count.~~

DEFENSE A. NO SHORTAGE PROVEN.

This objection (Brief, p. 14) to Finding No. 3 (b), is based upon three other eviscerating invoices (Exh. 9P). If there was a shortage, plaintiff had the truckers' receipts and the manifests for first processing and the processing invoice of which Exhibit 8P is a verifax copy. Neither the truckers' receipts, nor the manifests were produced to show he delivered fifteen (15) additional turkeys. But he also had a copy of the processing invoice and he introduced it and vouched for it. That showed but the 3,738 for which we accounted in the settlement sheet, Exhibit 7P. He introduced the Turkey Receipt No. 2354 (accounted for on the same settle-

ment sheet, Exhibit 7, see upper corner, second line for the identifying number). On the settlement sheet and the Turkey Receipt, the weights correspond.

~~He has not shown he delivered more than those for which he has received his accounting. He knew or had the means of knowing, whether the number of birds was 3,738 as set forth in the settlement sheet (Exh. 7P) or 3,753 as he now claims.~~

DEFENSE B. AUDITOR'S REPORT AGREED WITH DEFENDANT'S COUNT.

Plaintiff had his accountant, Alan Mann, investigate this crop in 1952 and plaintiff received a report thereon, dated August 21, 1952 (Exh. 17D). On the first page Mr. Mann reported that:

"Lot 2354 [the ones now in question—see Exhibit 7, upper right hand corner where the 'Turkey Rec. No. 2354' appears] came in on October 26th and covered 3,738 *birds* . . ." (Matter in brackets and emphasis added.)

So the number for which defendant was responsible was established in 1952 by plaintiff's auditor at the number for which defendant accounted and not the number now claimed as having been delivered.

4.—Plaintiff claim of underpayment.

—Again in plaintiff's brief, on page 15, there is the cry that plaintiff did not get as high a price as he should have received on December 12, 1949. While part of the birds were eviscerated, he demanded that they be purchased on a New York dressed basis (Tr. 1251 L. 30 to 1252 L. 29; also 1253 L. 28 to 30). According to George Rudd (Tr. 1251 L. 30 to 1252 L. 8) then the new manager of defendant's poultry and turkey operation, plaintiff demanded such purchase and since the latter was the president of the newly formed Utah Cooperative Turkey Producers and, presumably controlled, through its membership, large turkey processing patronage, Mr. Rudd had the defendant buy the turkeys.

Plaintiff's own auditor investigated this deal rather carefully, comparing the New York dressed price with the eviscerated price in New York and found plaintiff was overpaid and that defendant lost about a dollar a head. (Exh. 17D, page 2, end of first full paragraph.)

—Another bit of evidence, showing plaintiff's knowledge and consent to the sale of the eviscerated turkeys on a New York dressed basis, is found in Exhibit 99D. It is a verifax copy of the December 12, 1949 Settlement Sheet (Exh. 7P) which was in the possession of the plaintiff at the time his first, 1959, deposition was taken. On his copy, opposite the charge for eviscerating is handwritten, "Sold NY's".

George Rudd testified the price paid on these two purchases of December 12, 1949 (Exh. 7 and 12) was above market (Tr. 1268 L. 22 to 27, 1270 L. 27-29).

So the finding was supported by evidence.

~~This claim is stale, barred by the Statute of Limitations, and by the Release, all detailed hereafter.~~

~~RE: \$2500 ADVANCE WHICH PLAINTIFF CLAIMED HE NEVER RECEIVED.~~

~~While our attention is focused on Exhibit 7P, let us consider one more point. This is the sheet showing the \$20,217.44 advance which plaintiff claimed he did not get. This lapse of memory of the plaintiff was remedied by reminding him of the various items of the advances made until there was only \$2,500.00 in question. It was not until the duplicate copy of the check (Exh. 71D) was produced and identified by the defendant's clerk (Tr. 1306, L. 15 to 30) who signed and delivered the original to plaintiff (Tr. 1307 L. 27 to 29) and testified it was cashed and paid, that plaintiff remembered the \$2,500.00 was received. This was the instance recalled by the trial court (Tr. 1394, L. 7 to 12), in connection with his criticism of plaintiff as not being frank but evasive, etc. Plaintiff got every cent to which he was entitled.~~

PLAINTIFF'S POINT I (d):

"Findings No. 8, 9 and 10 are not supported by evidence."

~~The three findings are nearly identical in wording, each covering one of the crops from 1949 to 1951 and establishing that the number, weight, grade and sex of the turkeys delivered in that year were known by plaintiff in the year of delivery or the next year (the 1951 crop, by September 2, 1952) and no protest was made until September 17, 1958.~~

DEFENSES 1. There was evidence to support Findings 8, 9 and 10.

There was an absence of truckers' receipts—None were introduced to show the number was other than that appearing on the processing invoices, the Packing & Loading Manifests, and the Settlement Sheets.

Alan Mann, the plaintiff's own auditor, checked plaintiff's deliveries against the accountings made by defendant and found no discrepancies. (See Exh. 17D, August 21, 1952; Exh. 28P, October 2, 1952, and Exh. 72D, January 5, 1951) And he said that defendant accounted for ten (10) more birds than charged (Exh. 72D, top of page 2). In the center of that page he said "Total (all accounted for) 17,249". In Exh. 28P, page 4, the third paragraph he said:

“ . . . It is difficult for me to see how they (turkeys) could vary through the processing plant and into cold storage the way they are checked and double checked.”

The plaintiff, after denying he received truckers' receipts during 1949 (Tr. 430 L. 7) and especially none for the September 1949 flock (Tr. 868 L. 10 to 22), he finally admitted getting truckers' receipts for the September, 1949 flock (Tr. 870 L. 9 to 12). He had them with him when he received the processing invoice at the plant (Tr. 870 L. 26 to 29) and the manifest sheets (Tr. 871 L. 20 to 27). He couldn't remember whether they corresponded, but made no complaint that they did not (Tr. 870 L. 30 to 871 L. 1 to 9, 28 to 30). The same was true of the 1950 crop (Tr. 872 L. 1 to 12)—there was no protest as to number of head, only as to the price (Tr. 873 L. 8, 9). He didn't protest on the number processed (Tr. 874 L. 29, 30). He received the eviscerating invoice and manifest (Tr. 881 L. 16 to 21). Nor did he protest at the March 9, 1951 settlement (Exh. 23, Tr. 884 L. 22 to 27) and as to the March 20, 1951 settlement sheet (Exh. 24P) his only protest was that he thought from the Urner Barry reports, he should have received a better price (Tr. 885 L. 4 to 13).

DEFENSE 2: AN ACCOUNTING WAS NOT REFUSED.

Objection is briefly made under this heading, that Plaintiff was denied an accounting. An accounting was made before the turkeys were moved from plaintiff's ranch. Each trucker gave a receipt with the number and sex stated therein (Tr. 870 L. 9 to 12, 872 L. 1 to 4). An accounting was made at the American Fork processing plant where the turkeys count, sex, weight, grade and boxes were given, and a copy of the manifest furnished to plaintiff. If they were eviscerated an accounting was also given then, showing the number, individual weights, grades, sex, etc. If the turkeys were turned over to the defendant to sell, a turkey receipt was issued again identifying the birds in the same detail. When they were sold still another accounting, (See Exhibits 3, 7, 12, 21, 22, 23, 24 and 32) was given, setting forth the same information and in addition the sales price of each group bringing a different price per pound, and then the detail of each deduction item and the amount of it.

And when there was the slightest question, Plaintiff was permitted to send his auditors to investigate as he did on three occasions (Exh. 17, 28 and 72). He also had Mr. Lamoreaux and Mr. Brockbank each requiring answers, and since this litigation started, there have been better than a half dozen depositions taken.

3. ACCOUNT SALES

It seems utterly impossible to satisfy this man. He has had everything and still asks for more. There is no ground for complaint that defendant has not accounted.

Reference is made to Exhibit 50, a letter from plaintiff to Clyde Edmonds, then manager of the defendant, and on page two, is a demand for account sales. "Account Sales" seems to plaintiff to be something mythical and magic, and not as Webster's Dictionary defines it:

"Account Sales—Com. An account sent by one person to another, giving particulars as to sales made by the sender on the other's account or behalf." (Webster's New International Dictionary, Second Edition, Unabridged, 1947, page 16.)

The settlement sheets (Exh. 3, 7, 12, 21, 22, 23, 24 and 32) are very detailed and clearly come within the definition of an "Account Sales."

Plaintiff has, in each instance, had his account sales. The period of the Statute of Limitations has run against any claim Plaintiff has relative to those accounts.

~~POINT I (e) — Plaintiff's objection: Finding 11 (Defendant accounted for all turkeys) and Finding 12 (December 12, 1949 and March 20, 1951 settlements were of purchases by defendant at plaintiff's request) are not supported by evidence. With this is tucked in another claim of shortage.~~

DEFENSES:

1. ~~Both findings are adequately supported by evidence.~~

2. ~~As to the claimed shortage of 2,507 pounds of hens (Brief p. 17) and 1,257 pounds of Toms (Brief p. 18):~~

A. ~~Defendant accounted for all the 1950 crop delivered to it for marketing.~~

B. ~~Claim ignores turkeys returned to and kept by plaintiff.~~

C. ~~Claim of shortage in Grade A (prime) ignores changes in grade.~~

D. ~~Plaintiff has admitted Toms accounting correct.~~

E. ~~Plaintiff's auditor admits complete accounting for all turkeys.~~

DEFENSE 1: BOTH FINDINGS ARE ADEQUATELY SUPPORTED BY EVIDENCE.

Finding number 11 is to the effect that a full accounting has been made for all turkeys received in 1949, 1950 and 1951. Plaintiff leaves the matter of any insuf-

ficiency as to the 1949 crop to his objection raised under his Points I (b) and I (c). Point I (b) relates to plaintiff's claim of 460 head shortage of turkeys he never showed he delivered. Defendant leaves the matter as answered under his Points I (b) and I (c). We submit our answers under the same headings.

Finding number 12 is to the effect that the accountings shown on the settlement sheets dated December 12, 1949 (Exh. 7 and 12) and March 20, 1951 (Exh. 24) resulted from sales to the defendant by plaintiff. No reference is made to evidence to support plaintiff's claim. However, there was evidence that the December 12, 1949 transaction was a sale. George Rudd testified to that fact. (Tr. 1251 L. 30 to 1252 L. 29). As to the March 20, 1951 accounting, the letter-bill of sale (Exh. 52P, clearer copy Exh. 69D) speaks for itself. The last paragraph of that letter states:

"I hereby sell, assign, transfer and set over to you all of my right, title and interest in the turkeys above named at the prices of 52¢ for grade A and 50¢ for grade B and warrant the title to the same . . . In making this sale, I am not relying upon any representation of the Utah Poultry & Farmers Cooperative as to the market price of turkeys or as to market conditions." (Emphasis added.)

Clearly the objection to Finding number 12 is not well taken. The main argument relates to another alleged shortage on accounting.

DEFENSE 2: AS TO THE CLAIMED SHORTAGE OF 2507 POUNDS OF HENS (BRIEF 17) AND 1257 POUNDS OF TOMS (BRIEF 18):

A. DEFENDANT ACCOUNTED FOR ALL THE 1950 CROP DELIVERED TO DEFENDANT FOR MARKETING.

Vernon Ferre, whose knowledge of the business and credibility were the matter of favorable comment by the court (Tr. 1393 L. 3 to 8), testified (Tr. 1359 L. 1 to 4) we were required under the Turkey Department Receipts (Exh. 19) to account for 386,041 pounds of New York dressed turkeys (Tr. 1359 L. 1 to 4). Part of these were sold as New York dressed and were so accounted Exh. 21P and 22P. The balance were eviscerated and accounted for as such. The evisceration caused a loss of weight and the accounting in settlement sheets, Exhibits 22, 23 and 24, was on an eviscerated weight basis. The conversion from eviscerated weight back to New York dressed weight is set forth in Exhibit 102D, showing only 69 pounds difference on an estimated shrinkage of from 13% to 14%, within .06% of the estimated minimum

shrink. This showed we accounted in the Settlement Sheets, Exhibits 21, 22, 23 and 24, for all of the 1950 crop which was delivered for marketing, including the 2507 pounds of hens and 1257 pounds of toms delivered in the 1950 crop. Vernon Ferre (Tr. 1303 L. 12 to 1305 L. 1) testified as to the receipt of the 1950 crop as evidenced by the six processing invoices (Exh. 98D) and our accounting for them (Exh. 102D) in each of the settlement sheets. In Exhibit 102 he covers those which were sold as New York dressed and those which were eviscerated and sold that way. He showed defendant accounted for all.

DEFENSE 2 B: PLAINTIFF'S CLAIM IGNORES
OVER 4500 POUNDS OF TURKEYS RETURNED TO
AND RETAINED BY PLAINTIFF.

In a very carefully worked out accounting (Exh. 72D, Mann's report of January 5, 1951) wherein the number of head and total weights are examined in detail, there appears in the middle of page 2 of that report:

	Birds	Weight
"Delivered to you [plaintiff]	235	3,365/14
(unchecked by us)."		

Also on page 1, four lines from the bottom:

	Birds	Weight
"less kept out [by plaintiff]	(15)	(215)"
(words in bracket added.)		

and in the middle of the same page is a reference to "71 birds you kept out." And a further reference, five lines down:

"Receipt No. 121 was marked void, with a notation that you had sold these birds direct to Henny Penny."

~~The 15 turkeys, weighing 215 pounds, averaged about 14 pounds each. If we use that average for the 71 head retained by plaintiff there is 994 pounds. This latter weight, plus the 215 pounds and the 3,365 pounds all as above mentioned, total in excess of 4500 pounds, which were not left with defendant to market. And then there are all the turkeys sold by plaintiff to Henny Penny. Plaintiff should have proved that those 3764 pounds are in addition to the 4500 pounds, and the Henny Penny turkeys, those which plaintiff took.~~

Before we can be held to have failed to account for the 3764 pounds, plaintiff must show they were not part of the 4500 pounds, and the Henny Penny turkeys of which we were relieved of accountability by plaintiff's own action of taking possession of them.

DEFENSE 2C: CLAIM OF SHORTAGE IN GRADE
A (PRIME) IGNORES CHANGES IN GRADE.

Plaintiff's evidence, based upon the one grade (grade A or prime) leaves the question whether plaintiff has gotten an accounting on every head he turned over. Grading changes occur as shown in the Auditor's report of October 2, 1952 (Exh. 28P). On the bottom of page one, it appears that there is a shortage of 78 grade B hens, but in the center of that page, there appears an increase in grade A of the same number of head.

On page 2, there is a decrease of 196 head of grade A Toms, but grade B is increased by 200.

Obviously it is impossible to say that there is an over-all shortage on accounting, if we look only at Grade A, without also looking at all the other grades to see if the head count on plaintiff's turkeys still remains the same.

Certainly, with only the Grade A to examine, the Court was justified in finding that the accounting was full and complete.

DEFENSE 2 D: PLAINTIFF HAS ADMITTED THE ACCOUNTING ON TOMS WAS CORRECT.

~~In his letter-bill of sale of March 20, 1951 (Exh. 52P, clearer copy 69D), plaintiff acknowledged the number of turkeys for which defendant was still accountable. He states there~~

"I understand that you are willing to purchase *all* of my eviscerated turkey Toms which you have in your possession, totaling approximately 143,000 pounds of grade A and 40,000 pounds of grade B."

The total amount unsold was 183,725 pounds, as shown by the Settlement Sheet of the same date (Exh. 24P).

The plaintiff knew the amount for which we had not accounted and named the weight on hand within .5% of the exact poundage.

DEFENSE 2 E: PLAINTIFF'S AUDITOR ADMITTED COMPLETE ACCOUNTING.

But in any case, before plaintiff signed the Release on October 7, 1952, plaintiff sent his highly trained and skilled auditor, Alan Mann, back to check on the last three crop years, 1949, 1950 and 1951 (see second paragraph, page 1, Exh. 28P). When the size of the task became apparent he, after phoning plaintiff, decided to re-examine the 1950 crop records and supplement his examination of January 5, 1950 (Exh. 72D) in which Mr. Mann had shown 4500 pounds of birds as returned to plaintiff prior to January 5, 1950. His detailed studies (Exh. 28P) did not reveal any shortage although he accounted, not for just the grade A birds, but for all birds of all grades. And, as revealed on page 2, Mr. Mann did not, in his

September and October, 1952 investigation, confine himself to the defendant's records—he also traced the turkeys through their storage in the Utah Ice. After his report on his examination, he concluded with a summary of the accounting furnished in these words (middle of page 4 of Exh. 28P) :

“It is my belief that the inventory records on your 1950 crop checks out with the American Fork recap sheets as well as could be expected; it is difficult for me to see how they could vary through the processing plant and into cold storage, the way they are checked and double checked.”

And this tribute to the accuracy of the records follows the detailed comparison on page 3 of the October 2, 1952 report (Exh. 28P) both by weight and head count and lot number, with the ultimate disposition of the turkeys. At no place in this last report does he make the slightest change in his earlier (January 5, 1951 Exh. 72D) report, where a similar detailed report was given and wherein he stated (top of page 2) :

“All birds were accounted for with ten birds over as shown by the following. . . .”

I (f) OBJECTION TO FINDING 15 — ACCESS TO EVISCERATING RECORDS.

The objection that "the evidence does not sustain Finding No. 15" is backed up by plaintiff's statement that there was no evidence that Mr. Mann, plaintiff's auditor, had access to the documents on which plaintiff based his objections above.

The Finding (No. 15) that defendant was

"... cooperative, open, and frank in its relations with the plaintiff and on request, and on several occasions, made all of its records available for the inspection of plaintiff and did not withhold nor conceal anything nor any information and assisted the auditor of plaintiff in getting access to all pertinent records of the Utah Ice & Storage Company."

was amply supported by Mr. Mann's three audits referred to above, namely January 5, 1951 (Exh. 72D), August 21, 1952 (Exh. 17D) and the one undertaken during the five week interval between tendering the final account of August 27, 1952, the check for \$9,350.06, and the release (Exh. 66D) and the final audit dated October 2, 1952 (Exh. 28P).

As Mr. Mann reported (Exh. 28P, p. 1):

"Utah Poultry supplied me with all inventory cards and supporting data for . . ."

and on page 2:

"We checked the inventory cards on the hens to the inventory cards in the files of the Utah lee, and they were identical . . . and neither set of cards indicated any overage or shortage other than minor amounts."

and as Mr. Mann testified (Tr. 1381 L. 21 to 26):

"... I was not aware of anything being withheld from me or any other attitude than one of complete cooperation.

"Q. You didn't ask for any papers that were not made available to you?

"A. That is right."

In the letter (Exh. 65D) from the attorney for defendant to plaintiff tendering the Settlement Sheet of August 27, 1952 (Exh. 32) and a copy of the Release (Exh. 66D) in the conclusion of the next to the last paragraph on page 2 (Exh 65D), it is stated:

"If, however, there is information to which you are entitled, with which you have not been favored, it will be furnished upon your request or your auditors will be permitted to inspect the records. We will therefore await your further word on this point."

There was no evidence of any further request for information, only the third investigation by plaintiff's auditor with the resulting report of October 2, 1952 (Exh. 28P).

There is no merit to the objection to Finding No. 15.

POINT I (g): One Half Cent Deduction For Certificate of Interest.

There was such a provision in the "Turkey Marketing Contract" (Exh. 2P). Plaintiff contends (1) the deduction was taken, but (2) no Certificate of Interest was issued.

It was taken in 1949 under the Deductions in the Settlement Sheets (Exh. 3, 7, 12). The total deducted in 1949 was \$847.01, and a credit was set up on plaintiff's ledger card (Exh. 56P) in that amount, in the fifth column from the left. A previous \$5.41 balance in that account resulted in the issuance of a Certificate of Interest in the amount of \$850, as shown in the fourth column on the next line. This is also reflected on the extreme right side of the ledger card (Exh. 56P) under the heading of "Certificates Issued" where it shows that under date of April 4, 1950 a Certificate of Interest was issued plaintiff in the amount of \$850.

In Exhibit 43P attached to the second letter from Mr. Ferre to plaintiff, dated February 12, 1957, is a

list of the various certificates issued to plaintiff. This shows, under the heading of Turkey Department, the third line down "1950" (the year of issuance of certificate on 1949 business) "Processing R T 3611, 800 sold and transferred to Earl Warner." The "800" is a typing error, it should be "850." The R T 3611 identified the certificate.

So as to our deductions of \$847.01 for 1949, the Certificate of Interest was issued in the amount of \$850, under date of "4/1/50" as shown on the right side of the ledger sheet (Exh. 56P).

The statement that a deduction was taken on the Settlement Sheet (Exh. 21P), dated December 21, 1950, is in error. An item of interest in the amount of \$495.74 was deducted but for that purpose, not for a Certificate of Interest as appears in the deductions in Exhibits 7 and 12. The interest was charged on the two sixteen thousand dollar charges for processing and eviscerating.

Since there was no deduction in 1950 and 1951 of this one-half cent per pound for Certificates of Interest, he has no complaint.

POINT II CLAIM: Defendant as a Fiduciary.

It is admitted that defendant was required to account to plaintiff and other growers for produce delivered for marketing for the account of the respective patron.

Defendant accounted to plaintiff at every stage of the transaction. Before the turkeys left plaintiff's farm, it issued him truckers' receipts, such as he denied receiving (Tr. 430 L. 5 to 7, 868 L. 19 to 26) and later admitted getting (Tr. 868 L. 27 to 870 L. 17), showing the number and sex of the birds. It issued to him a Packing & Loading Manifest, such as Exhibits 4P, 37P and 86P (showing the head count, sex, grade and weight), and a processing invoice, such as Exhibit 98D, showing the same information, plus a statement of charges and of disposition of the turkeys, as soon as the killing, picking, grading, chilling and packing were completed.

In case the turkeys were eviscerated as most of plaintiff's were, it issued plaintiff a further manifest of the same type (excepting there was shown the additional information of the weight of each individual turkey in pounds and ounces) together with the lot number in the Utah Ice under which his turkeys were stored, also an eviscerating invoice such as Exhibit 5P (Tr. 1274 L. 4 to 6). If the turkeys were turned over to defendant for marketing, a Turkey Department receipt (such as the six included in Exhibit 19P) was issued to him covering in general, the same data and acknowledging receipt of the turkeys. When the turkeys were sold, the Settlement Sheet, such as Exhibits 3, 7, 12, 21, 22, 23, 24 and 32, was issued showing the flock sold by reference to the serial number of the Turkey Department Receipt, previously issued to plaintiff and the lot number under which they

were stored, the number of boxes, grade, age, sex, number of head, number of pounds sold at the same price, the gross amount for which those turkeys were sold, together with the deductions for freight, storage, processing, eviscerating, advance, selling expense, miscellaneous charges, etc., and the disposition of the net sales price.

All of these accountings were given plaintiff. It was routine. But plaintiff demanded more and, from the time defendant insisted plaintiff cease selling the mortgaged property in the fall of 1951, there was more and more demanded of defendant by plaintiff. This was coupled with the increasing threats of litigation with the hiring of I. E. Brockbank and later Mr. Lamoreaux and two more audits (Exh. 17D and 28P) and the demand (Exh. 90D) four days after the rendering of the second audit (Exh. 17D). In this August 25, 1952, threatening letter plaintiff said, among other things:

"I herewith renew my demand for such records" (concerning all business transactions between the parties for the last three years.)

"Should you fail to do so within ten days from this date, I have no other recourse but to authorize my attorneys to institute the necessary proceedings in a court of law to obtain the records."
(Emphasis added)

With the delivery of the truckers' receipts, the Packing & Loading Manifest at the American Fork plant, and similar manifest at the eviscerating plant, the turkey department receipt, and the settlement sheets, and the net proceeds of the sales, and the opening of its books and records to the plaintiff and his auditors, defendant fulfilled, meticulously and completely, its duty to account.

~~When the plaintiff hired Mr. Mann to repeatedly audit defendant's accounts and two lawyers to protect his interests with their accompanying demands, he ceased to be an unsuspecting, gullible producer, who relied wholly on the cooperative to protect his interest. He became a protagonist, able, willing and anxious to protect himself. He ceased to rely upon the cooperative to protect his interest and became the aggressive antagonist prepared and belligerently insistent on seeing that his interests were being respected, and quick to charge the agency he selected, with any real or fancied failure to adequately protect his rights. He ceased to be one whose interests must be protected against his ignorance and inexperience and became one against whom others must be guarded to prevent his imposition upon them.~~

This is illustrated by his attempt in this action to take from other producers their property in the cooperative by his claim to recover for 460 head of turkeys (Brief, Point Ib), he never delivered for marketing, and ~~for 15 head~~ (Brief, p. 14, Point I c) likewise never de-

~~livered, and the 2,510 pounds of hens and 1,257 pounds of toms (Brief, Point I e) for which an accounting was made, as pointed out.~~

POINT III—Complaint is made because plaintiff was not treated as one for whom the court must intercede to prevent imposition.

If the Court got that idea, it was from the plaintiff's own actions, and from his selection in 1952 of two able attorneys to protect his interests (Tr. 1185 L. 3 to 8) in the dispute, his Certified Public Accountant, whom he called in on three occasions for investigation to protect his rights. Plaintiff did not rely on defendant nor the court to prevent imposition on him. He was the one who played "all the angles", kept his flock off the market (Tr. 1258 L. 10, 1257 L. 6) until he had lost the Christmas market (Tr. 1252 L. 12 to 25) then insisted on defendant buying his turkeys (Tr. 1252 L. 1 to 8) and then, although they had been eviscerated, demanded that they be purchased at the weights they had before evisceration and at New York dressed prices. (Tr. 1252 L. 6 to 8.)

Plaintiff was the one who mortgaged his 1951 turkey crop to defendant to protect defendant on feed and supplies advanced (Exh. 94D) and then attempted to sell the mortgaged turkeys (See newspaper ad Exh. 95D) and belligerently objected (Exh. 50P and 96D) when defendant requested the store outlet to remit for the turkeys

on checks payable to defendant and plaintiff (middle of 2nd page of Exh. 49P). Plaintiff was the one who then refused to let his 1951 crop go on the market and, when demand was made in May of 1952, that he either release the mortgaged turkeys for sale or refinance elsewhere (Exh. 93D) he hired himself two lawyers, Mr. Brockbank and later Mr. Lamoreaux (Tr. 1185 L. 1 to 8), and rehired Mr. Alan Mann to again investigate defendant's records and demanded under threat of litigation that defendant make the records available to his two lawyers and his accountant (Exh. 90D). When these things happened, plaintiff ceased to be an unwary, gullible patron, easy to be imposed upon. He was ready, willing and able to battle for his rights and anxious to do so.

If he was held at arm's length, he was the one who brought it on himself.

~~Yet he was given every right and every courtesy in an effort to please a patron, and to make available to him all records (See Exh. 65D, next to last sentence, third paragraph from end; also the third audit by his auditor, Mr. Mann, after the tender of the final settlement sheet, Exh. 32D, together with check and release) Surely he cannot complain.~~

APPELLANT'S POINT IV—Court should, when plaintiff failed to prove fraud, have considered mistake to toll the statute of limitations.

DEFENSES:

1. No mistake was proven.
2. If any ~~mistake occurred~~, it was not such a mistake as would toll the Statute.
3. ~~Mistake was not within Pleadings or Pre Trial Order.~~

DEFENSE 1: WHAT MISTAKE WAS PROVEN?

What possible mistake was proven? Plaintiff fails to point out any mistake. If plaintiff overlooked mentioning that the mistake was in not discovering the eviscerating invoice upon which plaintiff now relies as showing a 460-head shortage, let us consider it. At best it could only mean that through some error he was given credit for 460 head more than he delivered.

He had truckers' receipts, though he consistently denied that fact (Tr. 868 L. 9 to 26) until the afternoon of the sixth day of trial, and it was only because of repeated insistence that he must have gotten them, that he finally admitted delivery of the truckers' receipts (Tr. 870 L. 9 to 17) on the flock which he claimed was 460 head short.

But even when he finally told the truth on that subject, did he show that he delivered 460 head more than was covered on the accounting? He did not. He had truckers' receipts for that September, 1949 flock. He had them "when the birds were processed" (Tr. 870 L. 16) and at the time he received the processing invoices at the plant (Tr. 870 L. 26 to 29) and also the manifest (Packing & Loading Report), all three at the time he received his settlement on them and he made no complaint (Tr. 871, L. 20 to 30).

But the processing manifest (Loading & Packing Report, Exhibit 4P) showed 5,232 head as retained by defendant (see recap in the lower righthand corner on the next to the bottom line, opposite the word "total"), the identical number for which accounting was made in the settlement sheet on that flock, Exhibit 3P.

Search of the record has not revealed that plaintiff ever testified that he delivered for marketing any more than the 5,232 head for which an accounting was made in settlement sheet Exhibit 3P.

What mistake is plaintiff relying on to toll the Statute of Limitations? How can he be heard to complain that the court did not let him change his plea, thirteen years late, to one of mistake, unless some mistake is proven?

This alert, aggressive challenger is merely trying to take advantage of what he figures is defendant's mistake. Not that he testifies he delivered 460 head more than those for which we accounted. He merely hopes to take advantage of an error.

But there was no mistake. As Charles Rudd testified, he added these additional turkeys to the lot a customer had purchased from Mr. Tanner and temporarily they continued in Tanner's name (Tr. 731 L. 6 to 21, 733 L. 6 to 734 L. 20).

And so it was with the other claims of shortage, if these are the elements of mistake relied upon. Each has been dealt with and explained in defendant's argument to plaintiff's point one.

DEFENSE 2: MISTAKE WILL NOT TOLL STATUTE OF LIMITATIONS WHERE ITS ONLY FUNCTION IS TO TOLL THE STATUTE.

"A statute of limitation relating to an action for relief on the ground of mistake applies only to actions in which a mistake of fact is the basis or gravamen of the action, and not where the relief on the ground of mistake is merely incidental to, or involved in, another and real cause of action." 53 CJS p. 1069

In *People v. Union Oil Co.*, 310 P.2d 409, 48 Cal. 2d 476, an action was brought to recover interest paid on franchise tax refund, on the ground that payment resulted from a mistake by the Commissioner in interpreting the law. In affirming a recovery by the state below, the court said: (310 P.2d 413)

“(7) Defendant argues that while said mistake of law may have caused the improper interest payments, such mistake is merely incidental to plaintiff’s cause of action as one for money had and received, that no other ground of relief was available to plaintiff, and that therefore the two year statute of limitations applies. . . . But here the mistake of law is not a mere incident to plaintiff’s right to recover. Rather it is the very basis or gravamen of plaintiff’s action and if it were not for such mistake of law by the administrative officers, the cause of action would not have accrued. See *Ind. School District No. 1, etc. vs Common School District No. 1* (56 Idaho 426), 55 P. 2d 144, 148, 105 ALR 1267. Accordingly the applicable statute is the three year statute governing the action for relief on the ground of mistake. Code Civ. Proc. Sec. 338, subd. 4.”

The Utah case of *Haws v. Jensen*, 209 P.2d 229, 116 U. 212, seems in point. There a suit was filed against a daughter who received property from her mother for the benefit of the family, but after the death of the mother, refused to divide with the rest of the family. The court held that the action was one to impose a

constructive trust on the property because the daughter had never promised to divide it. Under these circumstances the court refused to apply the three year limitation applicable to fraud.

Kamas Securities v. Taylor, 226 P.2d 111, 119 U 241, was a case where this court distinguished between the application of the three year limit applicable for deceit and the general statute. The suit was brought against a secretary of a corporation for the loss of security (surrender of stock) pledged to secure a note, after the statute of limitation had run against the note. In applying the restriction of this section of the statute (Sec. 78-12-26-3) the court said on page 118 of the *Pacific Reports*:

"It is true that the allegations of the amended complaint charge that defendant employed deceit, but viewing the charge in its entirety it is clearly one of breach of a fiduciary duty which would mean that the four year statute of limitation would be applicable, 104-2-30. The contention that action was barred by [the three year] limitations was therefore properly overruled." (Matter in brackets, added.)

The action at bar is for the recovery of the value of turkeys which plaintiff now claims he delivered, and for which no accounting was made. The claim of fraud and mistake alike are interposed solely to toll the statute of limitations and not as the ground work for the re-

covery itself. Fraud and mistake are merely incidental to the relief sought. If the action was to reform a deed, or contract, because of fraud or mistake, there would be a case which could come under this statute. But the only purpose of urging either fraud or mistake was to escape the bar of the statute of limitations and that is not sufficient.

~~Neither fraud nor mistake is available to toll the statute, because the case is not based on either fraud or mistake, but on contract, oral or in writing.~~

DEFENSE 3: MISTAKE WAS NOT WITHIN THE PLEADINGS NOR PRE-TRIAL ORDER.

~~Nowhere in the pleadings was mistake mentioned. In the amended complaint (Tr. 142) on which this action was tried, in the first cause of action, in characterizing defendant's actions, "deceit" was alleged (par. 5), "false representation" and "misrepresentation" (par. 5 and 6) and "fraudulently" and "fraudulent" (par. 10 and 11) and "falsity" in the Prayer.~~

~~In the second cause of action plaintiff used the words "falsely" (par. 4) "deceived" (par. 5) and "fraudulent action" (par. 8). In the third cause the plaintiff used the words "fraudulently represented" (par. 4), "wrongfully and unlawfully speculated" (par. 7), and~~

~~"defendant's fraudulent action" (par. 9). In the fourth cause, the plaintiff alleges "defendant . . . fraudulently stated" and "defrauding plaintiff" (par. 4), and "defendant . . . did defraud plaintiff" (par. 5), and "fraudulent action" (par. 7). In the fifth cause of action it is alleged concerning defendant's actions that it "fraudulent made . . . account" and "representation was false" (par. 4), and "falsity of defendant's statements" (par. 5) and of the "fraudulent action" (par. 6). There was plenty of fraud mentioned but no mistake.~~

~~For pre-trial the parties were before the court four times and later a fifth time on the newly filed "Sixth" cause of action, but nowhere is it alleged that mistake is a ground for tolling the statute of limitation. The whole action revolved around alleged fraud.~~

At the completion of his case and near the end of the ninth day of trial (the twelfth day was largely taken up in argument), when the court pointed out the deficiency of the evidence of fraud (Tr. 1159 L. 23 to 1160 L. 13, 26), plaintiff for the first time mentioned "mistake" (1161 L. 14 to 18). The court refused to permit the issues to be enlarged (Tr. 1161 L. 19).

Under Rule 15 (five lines down), it is set forth that pleadings can only be amended with leave of the court, or with consent of the adverse party. Neither was given here.

If plaintiff had been permitted to amend his complaint to include mistake it would have resulted in an entirely new cause (or causes) of action being brought into the case, many years after the statute of limitation had run against the newly alleged cause.

The matter was, under Rule 15, within the discretion of the trial court. The ruling of that court was adverse to broadening the issues still further. His discretion was amply justified.

APPELLANT'S POINT V is:-

~~"That the trial court erred in refusing to accept evidence relating to illegally withheld surplus in the form of margins for each of the years involved in the action."~~

DEFENSES:

1. This last-minute defense, appearing on the ninth day of trial, was not within the issues.
2. The interpretation claimed for the Utah Poultry Articles and By-Laws, is without a basis.
3. Whatever right plaintiff had is now barred by the Release given, the statute of limitations, and an ~~accord and satisfaction.~~

DEFENSE 1: THE ISSUE OF THE OBLIGATION TO REALLOCATE MARGINS TEN TO FIFTEEN YEARS AFTER THE INITIAL ALLOCATION, WAS FIRST PRESENTED IN THE LAWSUIT ON THE NINTH DAY OF TRIAL.

While it is true that margins were mentioned in the pleadings and pre-trial order, what was claimed about them? In the Amended Complaint filed on or about March 31, 1960, in the last of paragraph three of the Fifth Cause of Action (Tr. 147), it was alleged:

“3. . . . credits would be paid when Northwestern Turkey Growers Association accounted to the Utah Poultry & Farmers Cooperative.”

Somewhat similar allegations are found in the fourth paragraph of First and Second Causes of Action and paragraph five of the Third Cause of Action, and paragraph nine of the Fourth Cause of Action.

In plaintiff's second deposition (taken five weeks before the trial on April 14, 1962, although it appears 1961 on the title page thereof), plaintiff testified that that the Norbest patronage refund of margins when received from Norbest was to be turned over to the growers (p. 54, L. 14 to 17). When asked if C. K. Ferre said the producers were to get all margin refunds received from Norbest, plaintiff replied:

“That we would get our dividends, that we would get our margins, that we would get our interest certificates—the whole thing hinged on Norbest.” (P. 54, L. 21 to 23; see also in the same deposition p. 59 L. 19 to 25; p. 60 L. 2 to 8; p. 62 L. 5 to 10; p. 64 L. 28 to p. 65 L. 4.)

The margins and refunds referred to in the pleadings were further expanded on pre-trial (December 5, 1961) (Tr. 259 L. 4) to include a claim to participate in the “reserves and assets”, further defined as “unreasonable reserves and accumulations” (Tr. 277, L. 2).

But nowhere prior to Mr. Barker’s claim (Tr. 1074 L. 10 to 16) on the ninth day of trial was the issue broadened to include a claim to revamp the distribution of margins made ten to fifteen years earlier. This was not even suggested until the ninth day of trial. It was not within the issues.

DEFENSE 2. THE INTERPRETATION OF THE ARTICLES OF INCORPORATION AND BY-LAWS CLAIMED BY PLAINTIFF, IS WITHOUT BASIS.

Mr. Barker states his interpretation in this language:

“ . . . they (defendant) . . . allocated the net profit (Tr. 1074 L. 10, 12, 14, 18). Or net margins of a department, not of an [the] organ-

ization, but of a department to those people who do business with that department. Now I think very clearly the By-Laws we have just quoted requires all departments to be considered as a [single] unit . . ." (Insert in brackets added.)

Article XII of the Articles of Incorporation of defendant cooperative (Exh. 48, p. 7) as it appeared when plaintiff first became a member provided in part:

"This Association shall be operated for the mutual benefits of its patrons and all net margins . . . shall be credited annually to the patrons of the Association upon the basis of the respective contribution of each patron. . . ."

Article XIII provides:

"The property interests of the members in the assets of the Association shall be unequal and shall be fixed upon an *equitable* basis and shall be determined by reference to the source of such assets, the volume of business done with the producer and all other facts relating to the acquirement of such assets."

Observe, please, that the patrons' interest is to be fixed on "an *equitable* basis" and with "reference to the source of such assets" and the "respective contribution of each patron."

By-Law No. 16 (c) 1. provides that after the payment of "all expenses and costs of maintaining and operating the association . . . all net proceeds from marketing produce for patrons remaining undistributed shall be distributed to such patrons ratably according to the respective amounts of business done by each patron with the Association. . . ."

Does that By-Law say all departments must lump all their net proceeds or margins together in one common pot and let those patrons who have contributed nothing to the margins, share in that which the others have contributed? Where, in such an unfair and inequitable interpretation, is the "equitable basis" or the "reference to the source of such assets" as required in Article XIII *supra*? Or the distribution of margins "upon the basis of the respective contribution of each patron." (Article XII *supra*.) While it is urged that there is no conflict between the requirements of these Articles of Incorporation and the By-Law quoted, if there is any conflict, the provisions of the Article prevail.

"A by-law which is not thus consistent with the charter but is in conflict with and repugnant to it is void." 8 Fletcher, Corporations (per. Ed.) Sec. 4190, p. 723.

"By-laws inconsistent with the charter, articles of association or incorporation or governing statute are ultra vires void." Headnote, 18 CJS p. 604.

DEFENSE 3. WHATEVER RIGHT PLAINTIFF HAD IS NOW BARRED BY THE RELEASE OF OCTOBER 7, 1952 (EXHIBIT 66D), BY THE STATUTE OF LIMITATIONS AND AN ACCORD AND SATISFACTION.

~~The defenses are all treated in greater detail below and reference is made to that part of this brief.~~

~~Certainly the last-minute attempt to enlarge the issues on the ninth day of the trial, and ten to fifteen years after the allocation was made and published, and involving the rights of hundreds, perhaps thousands of patrons and the refusal of the Court to permit this new issue does not entitle plaintiff to a new trial.~~

POINT VI—Plaintiff was prejudiced before the Court by defendant, due to the loss of a letter.

DEFENSES:

~~1. Inaccurate statements.~~

~~2. Bill of sale letter of March 20, 1951, was important.~~

~~3. Alleged prejudicial proceedings.~~

~~4. Plaintiff was the author of his own loss of credibility.~~

DEFENSE 1: INACCURATE STATEMENTS:

On his Brief, page 27, plaintiff makes three inaccurate statements. The first, concerning the disappearance of the bill of sale-letter of March 20, 1951, is:

“ . . . there were over a hundred exhibits in evidence. . . . ”

There were only 28 when plaintiff borrowed this disputed letter and had it marked as an exhibit. Then there were two more inaccuracies wherein plaintiff claimed that the lost exhibit (29P) and a photograph of it (52P) were plaintiff's exhibits. The exhibit in question was a bill of sale in the form of a letter signed by the plaintiff and addressed to defendant (See Exh. 52P, or for a clearer copy see Exh. 69D) on which a settlement (Exh. 24P) was made on 183,725 pounds of turkeys. The letter was addressed and delivered to defendant, and obviously belonged to defendant and not plaintiff, as plaintiff now claims. The letter was, in court, borrowed by plaintiff from defendant to introduce in evidence. It was marked as Exhibit 29P at plaintiff's request but was not identified or offered in evidence. (See undenied statement to that effect, Tr. 615 L. 12). The same was true of Exhibit 52P, the photograph of the lost letter. A verifax

photo of an unsigned carbon copy was first offered by plaintiff (Tr. 654 L. 15). Then defendant furnished the verifax copy of the signed letter (Tr. 682 L. 12 to 683 L. 16) which was thereupon substituted for the photo of the unsigned, carbon copy. Neither the signed bill of sale-letter (Exh. 29P) nor the verifax photo of it belonged to plaintiff, although he now so claims.

DEFENSE 2: BILL OF SALE-LETTER OF MARCH 20, 1951 WAS IMPORTANT.

Plaintiff sued in his fourth cause of action (Tr. 147) for \$16,000 actual and \$5,000 punitive damages for alleged withholding of profits from handling his 1950 crop of turkeys. The 183,725 pounds of turkeys covered on Settlement Sheet dated March 20, 1951, was more than half of that crop. After the sale, the market rose (auditor's report of October 2, 1952, Exh. 28P, page 4). The defendant claimed a sale to it under the bill of sale-letter, dated March 20, 1951, addressed to it and signed by plaintiff, which letter was marked as Exhibit 29P, and then disappeared before being introduced. After its disappearance, plaintiff claimed that a verifax photo of an unsigned carbon copy of the lost exhibit was not the way the letter was when it was signed (Tr. 620 L. 9 to 11). Plaintiff testified that there were two different letters (Tr. 619 L. 23, 24), that the letter was changed as to selling to Utah Poultry (Tr. 842 L. 17, 18), that

the birds were not sold to defendant (Tr. 851 L. 29; 842 L. 17), that Nelson changed it so the birds could be marketed (Tr. 842 L. 12 to 14, 851 L. 24).

After the plaintiff obtained possession of Exhibit 29P, and it disappeared, at first plaintiff's counsel refused to admit that the carbon copy he first introduced as Exh. 52P, was a copy of the bill of sale-letter (Exh. 29P) but conceded it bore the same contents, the same message, plaintiff wasn't certain it was an exact copy, the representation and ideas were similar (Tr. 654 L. 27 to 655 L. 4). Later, when plaintiff testified the letter (Exh. 52P) was changed so the turkeys could be marketed (Tr. 851, L. 24) and that part of a paragraph was deleted and changed over the original letter "not that I had sold those turkeys to the Utah Poultry" (Tr. 851 L. 28 to 30), counsel for the plaintiff finally stated:

"I don't know about the change but all I can say is that Ray Tanner signed this letter." (Tr. 852 L. 8, 9)

referring to the verifax photo (Exh. 52P) of the lost Exhibit 29P.

So Exhibit 29P was important, because it established that plaintiff sold to defendant the turkeys covered by it and because the credibility of plaintiff's testimony was destroyed by his vacillation in testifying concerning its

contents after having possession of the original Exhibit 29P and the reluctant admissions as to the wording of the lost Exhibit 29P, after a photo of it (present Exh. 52P) had been produced.

~~DEFENSE 3: TRANSCRIPT OF ALLEGED PRE-JUDICIAL PROCEEDINGS.~~

The transcript of the trial concerning the alleged prejudicing of the Court, is as follows (Tr. 615 L. 12):

~~“MR. CLAWSON: If the Court please, yesterday counsel requested of me a letter dated March the 20th, 1951, signed by Ray S. Tanner for introduction in Court. It was marked for introduction as Exhibit 28 as I recall.~~

~~“THE CLERK: 29~~

~~“MR. CLAWSON: It was not presented and I ask to have the letter returned to me please.~~

~~“Mr. FROST: Your Honor, I don't have the letter in my files. Now I don't know what happened to it. I thought it was together with my—with the other letter that I had here but it is not and my recollection that it was here this morning and I am at a loss to explain where this exhibit is.~~

~~"MR. CLAWSON: This is a letter over which there is controversy. The witness has denied signing any such letter. I am at a loss to understand why counsel would ask for the letter and then not introduce it, just to get it out of my possession. He didn't know I had it until I produces [produced] it at this time. (Word in brackets added.)~~

"THE COURT: Who is the letter written by?

"MR. CLAWSON: Ray S. Tanner, it was the sale of 183,000 pounds, the tail end of a 1950 crop."

(Tr. 616, L. 8):

"MR. FROST: . . . Now, he is implying that I had taken it and mislaid this letter and I have no desire, no intention of doing this whatsoever.

"MR. CLAWSON: That isn't a photostat of the letter you got yesterday, that is a photostat of a copy of the letter, an unsigned copy now.

"MR FROST: This is the letter we took from your files. This is the one I attempted to introduce and you objected to this.

~~"MR. CLAWSON: That isn't the one that was marked here yesterday.~~

~~"MR. FROST: No, I am not saying it is.
This is a copy of that letter.~~

~~"MR. CLAWSON: It sure is but it isn't
the letter. Now I would like the letter. I feel
like I have been bilked, very frankly.~~

~~"MR. FROST: Well, I resent the remarks
because it was his idea that the thing be brought
up.~~

~~"MR. CLAWSON: It wasn't my idea that
you asked me to introduce [produce] it and put it
out where you could introduce it. It wasn't me
that turned it over to the clerk to be marked."
(Word in bracket added.)~~

DEFENSE 4: PLAINTIFF WAS THE AUTHOR OF HIS OWN LOSS OF CREDIBILITY.

If the plaintiff's cause was prejudiced before the court, it was because, after the original Exhibit 29 disappeared, plaintiff attempted to take advantage of the situation by claiming he did not sign the bill of sale-letter of March 20, 1951 (Exh. 29, Exh. 52), etc., as covered in Defense 2 next above.

This was only one of six instances set forth in paragraph 17, sub-paragraphs (a) to (f), of the Findings of Fact, wherein the court found:

“17. That the plaintiff’s testimony before the Court was not frank, but evasive and contradictory.”

Plaintiff was the author of his own loss of credibility.

ENTIRE ACTION IS BARRED BY RELEASE.

CONSIDERATION — SETTLEMENT OF UNLIQUIDATED OR DISPUTED CLAIM IS SUFFICIENT-

LAW.

Black defines a liquidated account as:

“An account whereof the amount is certain and fixed, either by the act and agreement of the parties, or by operation of law.” Black Law Dictionary (Third Ed.) p. 1121.

In I Williston on Contracts (Rev. Ed.) Section 128, page 437, it is said:

“An unliquidated claim is one, the amount of which has not been fixed by agreement or cannot be exactly determined by the application of rules of arithmetic or of law.”

In the case of *Ashton v. Skeen*, 85 Utah 489, 39 P.2d 1073, at 1076, where the defendant had undertaken

a collection for 20% (or 30% if collected by suit), but sought to force his client to pay 50% for a rather difficult collection. The amount due having thus been liquidated, the court said:

“Before there can be an accord and satisfaction by acceptance of a less sum than claimed, there must be an unliquidated claim or a bona fide dispute as to the amount thereof. It is not necessary for the claim to be well founded, but it must be made in good faith, otherwise there is no consideration for an agreement to accept a less sum, and the agreement is void. See 1 C. J. 551 to 556, subparagraphs 71 to 77; Page on Contracts Sec. 615 to 620; Williston on Contracts, Sec. 129; Gray v. Bullen, 50 Utah 270, 167 P. 683; Rohwer v. Burrell, 42 Utah 510, 134 P. 573; Smoot v. Checketts, 41 Utah 211, 125 P. 412, Ann. Cas. 1915 C, 1113.”

Similarly in *Browning v. Equitable Life Assurance Society*, 94 Utah 532, 72 P. 2d 1060, where the insurance company sought to defend on the ground of a purported accord and satisfaction, and the question of consideration was raised, this court (page 1068 of the *Pacific Reporter*) said:

“Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration.”

In *Gray v. Bullen*, 50 Utah 270, 167 P. 683, where the parties agreed in writing that the amount owing by several debtors, jointly, to the plaintiff was \$676, and a compromise was attempted by the payment to the plaintiff of \$50, by one of the debtors, accompanied by a signed release. It was held that the \$676 agreed upon could not be settled by the lesser amount. Concerning the matter of whether the account was liquidated, the court said (167 P. 683 at 684):

“The amount due was fixed and certain.”

In *Smoot v. Checketts*, 41 U. 211, 125 P. 412, a similar result was reached where one-third of an undisputed, liquidated labor claim was paid and a release in full was taken. Upon suit for the other two-thirds, the court refused to honor the release, saying (125 P. 413):

“When it is claimed that the payment by the debtor of a sum of money less than is due and owing to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment standing alone is not controlling. If such a payment is based upon a sufficient independent consideration, or upon a *compromise of a disputed or an unliquidated claim* and under such circumstances the lesser sum is received as payment in discharge of the larger one, the payment is binding upon the creditor.”

THERE WAS A DISPUTE OVER THE 1951 CROP OF TURKEYS.

In the settlement for the 1951 crop, plaintiff, after a five-week delay, received and accepted, in full settlement the sum of \$9,350.06. The plaintiff in the case at bar (Fifth Cause of the Complaint and the Amended Complaint) claimed there was \$4,000 (\$9,000, finally Tr. 148) more owing on the 1951 crop of turkeys. Obviously plaintiff has and does admit there was a dispute as to the amount due.

The plaintiff testified in the trial that there was a dispute over the 1951 crop (Tr. 1165 L. 3.) Plaintiff admitted in his deposition that there was a dispute over the 1951 crop of turkeys:

“We were having a dispute over that 1951 crop.” Plaintiff’s (1959) deposition, page 102, lines 12 and 13.

The trial court found (Findings of Fact, paragraph 7 f, Tr. 295):

“(f) That plaintiff testified there was a dispute and trouble over the 1951 crop.”

Since no objection was taken to that finding, objection to it is waived. *Christensen v. Christensen* 239 P 501, 65 U 597; *Eagle v. Burton*, 220 P 1069, 62 U 491; 5B CJS p. 132.

There was a dispute in the summer of 1952. Plaintiff hired I. E. Brockbank of Provo, who made demands upon defendant. (See Exhibits 14D and 16D, being letters dated June 14 and 24, 1952, from that lawyer demanding information as to turkeys sold.) A month later plaintiff also hired Warwick Lamoreaux,

“Q. I asked if prior, while this dispute was on with the Utah Poultry, and prior to signing the release introduced in evidence here, did you hire Mr. Lamoreaux to assist you in your efforts to get a successful culmination of the dispute?

“A. I did.” (Tr. 1185 L. 3 to 8.)

The Release, executed under date of October 7, 1952, was Exhibit 66D and was admitted (Tr. 827, L. 12). Before its execution, Mr. Lamoreaux made further demands on defendant (See Exh. 67D) in a letter dated July 23, 1952. Both of these lawyers were employed during the same period (see plaintiff's letter of August 25, 1952, Exh. 90D, in which he names both as his lawyers). A letter from Mr. Lamoreaux to plaintiff, dated August 11, 1952 (Exh. 91D) reported his findings to date and reflected the heightening friction between the parties. About the same time, plaintiff had Mr. Alan Mann, a Salt Lake certified public accountant, investigate defendant's records on the matters in litigation in this suit. He reported to plaintiff in his letter of August 21, 1952 (Exh. 17D). In this letter, Mr. Mann reported on the 1949 crop, and in the last paragraph thereof suggested

that before he did more work there should be a conference between Lamoreaux, plaintiff and himself—whether to plan further steps toward litigation or to drop the matter, is not clear.

Four days later, plaintiff wrote his threatening letter of August 25, 1952 (Exh. 90D) demanding that all records relative to his 1949, 1950 and 1951 crops be thrown open to his two attorneys, Mr. Lamoreaux and Mr. Brockbank, and his auditor, Mr. Mann, or he would "institute the necessary proceedings in a court of law to obtain the records." (Second paragraph of plaintiff's August 25, 1952 letter.)

This was the dispute, with its threat of court action, when defendant's letter of September 2, 1952 (Exh. 65D) with the settlement sheet (Exh. 32P) dated August 27, 1952, and check for \$9,350.06, were tendered in full settlement of all disputes, with directions in the letter to the Bank (Also Exh. 65D) not to deliver the check unless the Release was signed. A copy of the letter to the bank went to plaintiff, together with a copy of the Release (see the bottom of both letters for the names of the persons to whom copies were sent. See also plaintiff's admission of receipt of a copy of the letter to the bank: Tr. 1172 L. 9 to 13).

Certainly there was a dispute of significant proportions—one of sufficient size that plaintiff had two law-

yers and had his accountant investigate the records of defendant three times before he was willing to sign the Release. The settlement of the dispute, was sufficient consideration, as pointed out above in the Skeen case (39 P. 2d 1073 at 1076, and the Browning case 72 P. 2d 1060).

THERE WERE UNLIQUIDATED CLAIMS:

There were items which were not liquidated. Concerning this, the trial court in its Findings of Facts (Tr. 296) stated:

“7. . . . (i) That at the time of making up the final settlement for the 1951 crop (Exh. 32P) the credits to be allowed and the charges to be set off against the gross sales of plaintiff's 1951 crop were unliquidated and uncertain in the following items:

(w) Gross amount received by Utah Poultry on the several sales,

(x) Taxes,

(y) Insurance charges,

(z) Storage charges,

and that the amount to be paid by Utah Poultry to plaintiff on the marketing of the 1951 crop, was not one which had, at the time of tendering

such settlement sheet (Exhibit 32), been fixed by agreement between the parties, nor was it possible to determine the exact amount owing by the application of the rules of arithmetic or of law, and the amount owing was unliquidated and disputed."

The gross amount received on each of the sales in each cause of action was, and is even now, an unliquidated item. For instance concerning the Third Cause of Action see plaintiff's brief, page 10, below the middle, where he claims:

"Plaintiff contends that Exhibit 3P does not represent the full market price and that he is entitled to an accounting for actual price received on each classification of birds."

Also, the amount still claimed to be owing in the Fifth Cause of Action on the 1951 crop is about as much as that already paid (Tr. 828 L. 7 to 10). But there were other items in addition to these:

The taxes were not assessed to the grower but all bulked together and assessed to defendant and had to be allocated, and hence were unliquidated. In the last paragraph of his October 2, 1952 report (Exh. 28P) the auditor raised a question about the taxes, saying:

"The main office of the Utah Poultry has not yet secured for me the information on the

charges for property taxes in the amount of \$2,040, which was deducted from your settlement sheet of March 20, 1951. I will follow this further and send it to you."

As noted above, plaintiff has waived objection to the *finding* that the accounts were unliquidated at the time the defendant tendered the \$9,350.06, as being the amount it claimed to owe. That sum was unliquidated and disputed and hence was adequate consideration for the Release demanded in exchange therefor.

Note these matters about the last audit (Exh. 28D), the one made after the Release and check were tendered by defendant to plaintiff: The auditor was evidently instructed to make a complete audit of the three years (not just 1951 crop) as shown by the second paragraph of that report, where he wrote:

"Utah Poultry supplied me with all inventory cards and supporting data for the three years, 1949, 1950 and 1951." (page 1, paragraph 2)

". . . We checked the inventory cards on the hens to the inventory cards in the files of the Utah Ice and they were identical on movement of these birds and neither set of cards indicated any overage or shortage, other than minor amounts." (last paragraph on page 2)

"It is my belief that the inventory records on your 1950 crop checks out with the American Fork

recap sheets as well as could be expected; it is difficult for me to see how they could vary through the processing plant and into cold storage the way they are checked and double checked." (3rd paragraph on page 4.)

And in view of the evident commission to Mr. Mann to again investigate the 1949 crop and also the 1951 crop (sold in 1952) as shown by the second paragraph on the first page (above quoted), his opening and closing sentences of the letter-report are quite significant:

"Having spent quite some time at the offices of Utah Poultry and Utah Ice, it is my feeling I had better report *my findings to date and let you decide the future course . . .*

"Perhaps you will want to have a meeting now with Mr. Lamoreaux and myself, to discuss possible *further procedures.*" (Emphasis added)

Evidently the clean bill of health given defendant by plaintiff's auditor in his October 2, 1952 letter-report (Exhibit 28P) and like approval of the handling of the 1949 crop of turkeys coupled with detailed accounting for the 1951 crop shown in the yellow spread sheets attached to Irwin Clawson's letter to Mr. Lamoreaux, of August 11, 1952 (Exh. 35P), as well as the one accompanying Irwin Clawson's letter to plaintiff, dated September 2, 1952 (Exh. 65D) made plaintiff feel further fighting was profitless for he did not have the conference with Mr. Mann (Tr. 1173 L. 26; 1174 L. 1), as Mr. Mann invited.

However, plaintiff admitted he met with Mr. Lamoreaux and discussed the Mann letter of October 2, 1952 (Exh. 28P; Tr. 1173 L. 26 to Tr. 1174 L. 5). Plaintiff volunteered that Mr. Lamoreaux had a copy of the Release (Exh. 66D) but he didn't recall discussing it with Mr. Lamoreaux (Tr. 1174 L. 6 to 23). He discussed what Mr. Mann referred to as "further procedures" (last words in the letter of October 2, 1952, Exh. 28P):

Transcript page 1174 L. 24:

"Q. You did discuss the matter of *further procedures* against the Utah Poultry, at that time, didn't you?

"A. Yes; we discussed—we did; we discussed that we didn't get what were after with the Mann's reports, simply because we went for the storage holdings, and we didn't get a thing in either one of the reports and the account sales. and we didn't get a thing; and that was what we were after when Mr. Brockbank wrote—was to get these account sales, to know just where I stood with Utah Poultry.

"Q. You had that information with a settlement sheet, didn't you?

"A. No, I have never had the information of account sales of my turkeys." . . . (Emphasis added.)

(Tr. 1175 L. 26):

“Q. You had your opportunity to send Mr. Mann, or any other auditor, or go down yourself or to take your attorney down there, and to go into the records just as much as you wanted; didn’t you?

“A. He went three times, I will admit, and give me a report, but, when we first went to the Utah Ice & Storage to get the records of my storage holdings, he didn’t go there because the Utah Poultry wouldn’t let him go in there.”

(Mr. Mann was thereafter called as a witness and testified that on his investigation the Utah Poultry did all necessary to give him access to the Utah Ice records. See Transcript 1381 L. 27 to 30.)

It is pretty clear that, with the receipt of the third Mann report (Exh. 28P) and his failure to discover grounds for litigation, that the matter of Mr. Tanner abandoning his one-sided fight with defendant was discussed and the decision reached to accept the \$9,350.06 in full settlement of all claims and to sign the Release to get that money. And as noted below everything after that for the next six years indicated that was the plaintiff’s interpretation of the agreement reached—an accord and satisfaction—a complete Release.

RELEASE—CONSTRUCTION OF IT:

In the former hearing before this court, when the case was appealed from a summary judgment, there was a question raised as to the construction of the Release (Exh. 66D). While no such angle has been raised so far, it may be on reply brief, and it might be well to anticipate the question.

The Release expressly covers a discharge from:

“any and all debts, claims, demands and accountings of whatsoever name, nature and description. . . .”

It covers all debts, all claims, all demands and all accountings. Then to make it more certain that everything was included, there is added,

“ . . . of whatsoever name, nature and description.”

The only restriction, the only confinement, that is found in the Release follows these boundless, all embracing words:

“ . . . of whatsoever name, nature and description”

are found in the following clause in the Release:

“excepting only that I reserve the right to receive as the same may become due, whatever sums may be paid from time to time under the certificates of interest issued to me and under the letters to me from the Cooperative advising me that certain credits have been retained.”

“Excepting only”—that is the only restriction found in this broad, limitless Release. Where, in the words which follow “excepting only” is there any confinement of those all inclusive words “any and all debts, claims, demands and accountings” to claims arising from the marketing of the 1951 crop? There is no confinement, no restriction and reservation “excepting only” the right to receive any future payments made on certificates of interest already issued and retains described in advices of credit.

How could it have more clearly stated that “any and all debts” meant all debts and not just those for 1951? Would the addition of the words “from the beginning of time to the present” really have added anything to “any and all debts”? It really wouldn’t.

PLAINTIFF’S OWN INTERPRETATION

There is secondary evidence on the subject. If plaintiff, at the time the Release was executed, understood the Release to mean that it applied to all claims for all years, then of course he is bound.

In his suit-threatening letter of August 25, 1952 (Exh. 90D) for what years did he demand full records and supporting data? The last three years (paragraph 1, Exh. 90D). After he received the defendant's accounting for the 1951 crop (letter of September 2, 1952, Exh. 65D, with its enclosure of a copy of the Release and notice to investigate before signing), what crops did Mr. Mann attempt to investigate? Just the 1951 crop records? No, the last three years 1949, 1950 and 1951 crops. (See the second paragraph of the auditor's report of October 2, 1952, Exh. 28P). When Mr. Mann found the magnitude of the task and phoned plaintiff, he then went back to work again on 1950! (See same paragraph, same exhibit)

It is clear plaintiff knew the release covered not just 1951 crop, but all others.

Plaintiff's subsequent actions showed he understood the release covered all years (excepting only unredeemed patronage refunds for which written advices of credit had been delivered to plaintiff), all as provided in the Release (Exh. 66D).

After getting Mr. Mann's report of October 2, 1952 (Exh. 28P), Mr. Tanner conferred with Mr. Lamoreaux as to "further procedures" and his "future course" as Mr. Mann suggested in that report (Tr. 1174 L. 24). Yet no evidence was introduced of activities, after the sign-

ing of the Release (Exh. 66D), by the two lawyers, who were to institute the necessary proceedings in a court of law to obtain the records, for the past three years, within ten days from that date, according to plaintiff's letter of August 25, 1952 (Exh. 90D), or at all.

No evidence was introduced of further investigation of the records by Mr. Mann.

No further letters, threatening or otherwise, from the plaintiff, were introduced for the years following the execution of the Release until 1957. Until that year, no demands or other actions by plaintiff showed he did not understand perfectly that he had released all causes of action except as expressly reserved to him under the release.

There is not a scintilla of evidence to support plaintiff's claim that, after the Release was signed, he protested the prior accountings, (i.e. those for crops before 1951) excepting plaintiff's own testimony. As to his credibility, the Court (Tr. 1393 L 11) in his decision from the bench, stated plaintiff's testimony was

"... evasive; that he has not willingly disclosed. . ."

followed by the enumeration of three instances (Tr. 1393, line 17 to Tr. 1394 L. 6) where in one case his written

word belied his testimony and two others where, after repeated questions and denials, he finally admitted that he did get the truckers' receipt and that he was influenced by the bank's attorneys about signing the Release, a thing he had denied, all relating to vital matters in the case.

In Findings of Fact 17 (Tr. 298) the Court enumerated a total of six material instances wherein plaintiff misled the Court as sustaining the finding there:

“That plaintiff's testimony before the court was not frank but evasive and contradictory;...”

The claim that the plaintiff understood the Release as applying merely to 1951, has no foundation in the evidence.

The Release (Exh. 66D) discharged all claims sued on herein and was sustained, as to consideration, by the payment of cash, the settlement of disputed claims and the settlement of unliquidated claims.

STATUTE OF LIMITATIONS

Defendant accounted to plaintiff for the several flocks of turkeys on sheets entitled “Settlement Sheet.” Each was tied to the turkeys covered in a serially numbered “Turkey Receipt” specified on the second line on

the top right hand side of the Settlement Sheet. All similarly dressed (New York dressed or eviscerated), graded, birds of the same sex which were sold at the same price were grouped on one line. The dressing of the birds, the grade, head count, number of pounds, price at which sold per pound and the gross sale price were shown. Also shown there were the various deductions for processing and allied services, under some ten various headings and the total shown together with the net price due. If there was no feed advance by defendant for the raising of the turkeys, the settlement sheet and net price was sent to the grower and his mortgagee, if any. If defendant supplied the feed, etc., for the crop, the settlement sheet and check for the "net price" was sent to the feed department which in turn deducted the sums so expended and the balance was paid, and the settlement sheets were sent to grower.

The settlement sheets are dated as follows: Sept. 15 (Exh. 3P) and Dec. 12 (Exh. 7P and 12P), 1949; Nov. 14 (Exh. 22P) and Dec. 21 (Exh. 21P) 1950; March 9 (Exh. 23P) and March 20 (Exh. 24P) 1951; and Aug. 27 (Exh. 32P) 1952. In his second (1962) deposition, plaintiff admitted getting the first three settlement sheets about December 12, 1949 (P. 101, L 16 to 25); the November 14, 1950 one in December 1950 (P. 102, L. 4); the December 21, 1950 one about the first of the year (P. 102, L. 9); the next two settlement sheets about March 23, 1951 (P. 102, L 12 and 15) and the August 27, 1952 one about that time.

All of the settlement sheets were received more than six years before action was commenced. Action, related to the accounting on each, is barred by 78-12-23, UCA 1953.

However, if a shorter period is needed, let us look at the written contracts before the court. As to the March 20, 1951 (Exh. 24P) settlement, that is definitely based on a written contract, either a written offer of Tanner (being his bill of sale-letter, Exhibit 29P which disappeared, a verifax copy of which is in evidence as Exhibit 52P) and its acceptance by defendant as evidenced by the settlement sheet (Exh. 24P) of the same date, or as a recital of the terms of an offer of defendant and plaintiff's written acceptance of the terms followed by defendant acknowledgement in the settlement sheet just mentioned.

But if this one transaction was based on an instrument in writing, the six years expired March 23, 1957, and before the commencement of action.

The settlement of December 12, 1949 (Exh. 7 and 12) was entirely oral, growing out of a new contract entered into when plaintiff insisted that defendant buy him out (Tr. 1251 L. 30 to 1252 L. 29; 1253 L. 28 to 30; 1255 L. 9 to 20). The written contract (Exh. 2P) to market for him was abandoned (Tr. 1252 L. 26 to 29; 1253 L. 28 to 30). So that transaction was clearly governed by the four year term.

The four year term was also applicable to the balance of the transactions. The only written contract (outside of the Exhibits 29P and 52P treated above) was the "Turkey Marketing Contract" (Exh. 2P). That does not qualify as a contract or instrument in writing under Sec. 78-12-23, U.C.A. 1953.

Exhibit 2P binds the plaintiff to deliver all his turkeys to defendant for marketing (with some exceptions), the birds to be delivered "dressed, graded and packed in standard boxes"; the defendant "will endeavor to obtain the best possible market" and the defendant to account to plaintiff after deducting the costs of transporting, storing, and marketing and plaintiff's proportionate share of the overhead, etc.

But the arrangements and charges for transportation, dressing, storing and marketing, taxes, interest, advances, if any, etc. are left for future agreement. Under the case of *Strand v. Union Pacific*, 6 U 2d 279, 312 P. 2d 561, the contract, Exhibit 2P, is insufficient to base a claim for the six year statutory limitation.

But, as above pointed out, even if the six year rule is applied, the period had run on each cause before any action was brought. This was true of the September 2, 1952 accounting on the 1951 crop. More than six years elapsed before suit was started.

TOLLING THE STATUTE OF LIMITATIONS.

The ineffective efforts of plaintiff to toll the running of the statute by allegations of fraud and, on the ninth day of the trial, to get the court to expand the issues to include mistake as a defense have been treated above (brief, pages 47 to 50) and will not be repeated here. The same is true of the issue whether the fraud alleged or the mistake sought to be alleged, could, even if proven, come within the fraud or mistake necessary to toll the statute because neither is the gravamen of this action, but merely a side issue. In other words, this action is for an accounting, not to reform a contract based on fraud or mistake.

FRAUD—MISTAKE — Plaintiff attempted to escape the bar of the Statute of Limitations by alleging fraud on every side. However, none was found. Then, on the ninth day of the twelve days of trial, plaintiff sought to change his plea of fraud, to mistake. But as pointed out above, no mistake was proven. The attempt to rely upon the supposed admission (by eviscerating invoice and storage records) of a larger number of turkeys than those for which accountings were made was ineffective. Though he had the evidence in the shape of truckers' receipts to prove a shortage if any existed, none were produced. Furthermore, when he had his

truckers' receipts at the processing plant, and his processing manifest (Loading & Packing reports) and his processing invoices, settlement sheets, each showing the number of head accounted for, (Tr. 870 L. 9 to 871 L. 9, 20 to 872 L. 18, 873 L. 30, 874 L. 4 to 30, 877 L. 10 to 19, 878 L. 1 to 10,) his failure to raise the question until in the trial, ten to fifteen years later, showed he was not wronged, but is trying to wrong, defendant.

~~PROFIT IN A NON-PROFIT CORPORATION.~~

~~One of the many points which are "thrown in" without numbering, is the question whether a non-profit corporation can make a profit. Hulbert in his Legal Phases of Cooperative Associations, p. 260, says they may buy "small quantities of poultry and eggs from dealers" as well as producers, in order to facilitate the marketing of the balance of the products handled and cites Producers Produce Co. v. Crooks, 2 Fed. Supp. 969, and Eugene Fruit Growers Association v. Commissioner, 37 B.T.A. 993.~~

However, that is now a moot question so far as Internal Revenue is concerned, because cooperatives must report and if a profit is shown, a tax is paid thereon.

However, the ultra vires question was raised squarely in the case of State v. Iowa Agricultural Association, 242 Iowa 860, 48 N.W. 2d 281. There a non-profit corporation of the statute by allegations of fraud and, on the

ration, organized to operate a fair grounds, leased its race track for races to be held from May to November of each year. A competitor in the town brought this action, claiming that the defendant exceeded its powers in so doing, and it was held that the corporation did not exceed its powers. The court said that the corporation was not limited to holding just an annual fair, and that it was not ultra vires to lease its track and property when not otherwise needed.

An interesting aspect of the fact that plaintiff raises this question is found in the two purchases that were made by defendant of the plaintiff's turkeys. It is admitted by the defendant and reported by the plaintiff's auditor, that the purchase on December 12, 1949 of plaintiff's turkeys, resulted in a loss to the defendant of about \$1.00 a head, or approximately \$5,000.00. If the cooperative could not purchase from plaintiff, as plaintiff maintains, then the transaction was a marketing one, and the money paid was merely an advance or a loan to plaintiff.

If plaintiff was consistent, he would, at that point, have offered to repay the association for the over-advance, but he did not do so, nor did he seem to feel any obligation to treat it as an advance. The loan, if it was an advance, was without obligation to repay, should there be a loss.

~~On the other hand, if there was a gain on resale,~~
 then plaintiff felt he should share in that gain. His thinking was characterized by the phrase, "heads I win and tails you lose," or the old adage, that "all is grist that comes to his mill."

He apparently desired to be in partnership, so to speak, with the other owners of the cooperative, so long as there was a profit to be divided, but when there was a loss to be sustained, there was no partnership—the deal was an out-and-out sale. With the \$5,000 loss on the December 12, 1949 turkeys, it resulted from an overpayment to him, but whose money was being paid to him, if it did not belong to his fellow patrons?

While plaintiff in his brief states that the crux of the case is whether the cooperative can make a profit, the real question is whether this man is attempting to take from other producers that to which he has no right. As the servant in the parable said: ". . . thou art an hard man, reaping where thou hast not sown. . . ." St. Matt. 25:24.

Every effort has been made to satisfy, not only the legal obligation to this man but every one which good taste and good business ethics suggests. He has had accountings from the time that his turkeys were picked up at his ranch and before they left, and through each step of the processing and ultimately the sale. If there was one

turkey, or one pound of turkey meat, missing, he has had the opportunity to know about it and to make timely protest. He has also had the benefit of unlimited investigation of the association and its records. Nothing has been denied him which he has requested, except that we give to him someone elses money and even that amount is subject to increase, as was so clearly shown when he was asked (Tr. 1174 L. 24) whether the matter of "further procedures" against the Utah Poultry was discussed, and he admitted that they were and then went on to volunteer that he had not gotten from the Mann reports what he was after, that he hadn't gotten a thing.

He was obviously hunting for some loophole or some mistake of which he could take advantage, as he sought to take advantage of the 460 head of turkeys which were added to the group which he had sold (discussed this brief, pages 14 to 17). He didn't testify that he delivered 460 head more than those for which he received credit, nor did he show that his truckers' receipts revealed that he had delivered 460 head more than those covered in our accounting. He merely attempted to take advantage of what appeared to be an admission, as revealed in a processing invoice which the purchaser of the turkeys paid.

The matters herein sued upon are ten to fifteen years old. The matter should be put to rest and the judgment of the lower court affirmed.

IRWIN CLAWSON

*Attorney for Defendants and
Respondents*

141 East Second South
Salt Lake City, Utah