

1963

# James Manufacturing Co. v. E. J. Wilson : Brief of Appellant

Utah Supreme Court

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Jackson B. Howard of Howard and Lewis; Attorney for Appellant;

Arthur H. Nielsen; Nielsen, Conder & Hansen; Attorney for Respondent;

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**In the Supreme Court of the  
State of Utah**

JAMES MANUFACTURING COMPANY,  
a corporation,

Plaintiff-Appellant,

vs.

E. I. WILSON,

Defendant-Respondent.

FILED

APR 23 1963

Clerk, Supreme Court, Utah

**CASE**

**NO. 9887**

**APPELLANT'S BRIEF**

Appeal from Judgment of the Fifth District Court of  
Juab County

HON. C. NELSON DAY, Judge

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NEW CENTURY PRINTING CO., PROVO, UTAH

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# In the Supreme Court of the State of Utah

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JAMES MANUFACTURING COMPANY,  
a corporation,

Plaintiff-Appellant,

vs.

E. I. WILSON,

Defendant-Respondent.

**CASE  
NO. 9887**

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## BRIEF OF APPELLANT

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### STATEMENT OF NATURE OF CASE

This is an action against a buyer for recovery of the purchase price of goods purchased from the plaintiff, wherein defendant answered and admitted purchase of the goods, but in addition counterclaimed for alleged breach of both express and implied warranties.

### DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment awarding plaintiff reasonable attorney's fees and

awarding defendant damages upon his counterclaim, plaintiff appeals.

### **RELIEF SOUGHT ON APPEAL**

Plaintiff seeks reversal of the judgment on the counterclaim and judgment in its favor as a matter of law, or that failing, a new trial.

### **STATEMENT OF FACTS**

E. I. Wilson, at the time this action was initiated and for many years prior thereto, was a resident of Nephi, Juab County, Utah. Mr. Wilson had been in the turkey business approximately twelve years in December of 1957. During that time he had raised from 50,000 to 170,000 turkeys a year.

In the fall of 1957, Mr. Wilson designed a turkey brooder coop that would be approximately 400 to 450 feet long by 40 feet wide. He wanted a coop that was large enough to handle 25,000 to 30,000 poults. In the fall of that year, approximately November or December, there was a turkey show held in Salt Lake City. All the manufacturers of turkey equipment sent a manufacturer's representative and framed displays of their products. James Manufacturing Company had a display of turkey feeder units and ventilator systems. Mr. Ray Tuttle was the factory representative. Mr. Wilson had occasion to see the exhibit of James Manufacturing Company and was especially interested in the ventilating system and feeder units. As a result of this exhibit, he contacted Mr. Tuttle in Mr. Tuttle's motel in Salt Lake City. Mr. Wilson explained what he anticipated in the way of construction and what his needs would be. He also stated that he had seen

a sample of the auger feeding unit, (which is the subject of this lawsuit), in operation at the exhibit and thought that it would serve his purposes. He and Mr. Tuttle sat down at the desk and discussed the ventilator system and drew some rough sketches, which Mr. Wilson took with him.

From 1952 to 1958 Mr. Wilson dealt with Utah Poultry and Farmers Co-operative. Utah Poultry and Farmers Co-operative was a dealer for James Manufacturing Company and sold products under the trade name of James Manufacturing Company, to-wit: "Jamesway." Mr. Wilson, both before and after the purchase of the equipment, which is the subject of this suit, bought Jamesway equipment from Utah Poultry and Farmers Co-operative.

On January 8, 1958, Mr. Wilson arranged to purchase from Utah Poultry and Farmers Co-operative eight 26 inch ceiling fans with thermostats and K-D Stimaline ventilators. This purchase was signed on January 8, 1958, under a purchase order and contract of Utah Poultry and Farmers Co-operative (Exhibit P.15). Utah Poultry and Farmers Co-operative took their usual markup and placed the order for this equipment with James Manufacturing Company. The equipment was delivered to E. I. Wilson at Nephi, Utah, from the warehouse and office of Utah Poultry and Farmers Co-operative in Nephi, Utah, on Utah Poultry Company trucks.

Later on February 21, 1958, Mr. Wilson met in the office of Utah Poultry Company with Mr. Tuttle, Mr. Arza Adams, an officer and director of Utah Poultry, a Mr. Hopkinson, the purchasing agent for Utah Poultry, and a Mr. Woods, who was sales manager for Utah Poultry. At that time a conversation was had concerning the purchase of



these feeder units and whether they would be satisfactory for young poults because of the size of the troughs. Mr. Adams and Mr. Tuttle informed Mr. Wilson that they thought the trough was too large and that this equipment would not be suitable for young poults and Mr. Wilson felt that he could build a ramp up to the trough and that it would be satisfactory. Mr. Wilson denied this conversation and claims that it never took place, however, Mr. Tuttle, Mr. Adamson and Mr. Adams all testified to the circumstance and conversation. In any event on February 21, 1958, Mr. Wilson placed an order for 800 feet of auger turkey feeders with the Utah Poultry and Farmers Co-operative. This order was placed upon the contract form of Utah Poultry and Farmers Co-operative (Exhibit P.15—second page). Utah Poultry and Farmers Co-operative ordered the units from Jamesway and they were delivered through Utah Poultry and Farmers Co-operative to E. I. Wilson. It is the contention of Mr. E. I. Wilson that Utah Poultry and Farmers Co-operative was merely the financing agent of E. I. Wilson and that the sales were actually made by James Manufacturing Company.

Mr. Wilson built the turkey brooder coop and installed the ventilator system himself. Prior to the first brood turkeys arriving from the hatchery, Mr. Wilson started the installation of the turkey feeder units. This he was doing himself. The turkeys arrived at a time when one-half of the turkey feeder units, to-wit: 400 feet, had been installed on the south side of the coop. The other 400 feet for the north side was never installed. These turkey feeder units did not work to the satisfaction of Mr. Wilson. He called James Manufacturing Company at Los Angeles and requested their assistance in the installation of the turkey

feeder units and they sent Mr. Persig, an engineer, and helpers from Los Angeles to help correct the defect that Mr. Wilson was complaining of. His complaint was that the auger would not convey the feed more than fifty feet from the hopper when, in fact, to operate effectively it had to convey it 400 feet through the trough. Mr. Tuttle testified that before the engineer and crew left they had the auger working satisfactorily and conveying feed 400 feet. Mr. Wilson denied that they ever got it operating effectively and testified that they left before it was operating to his satisfaction.

Mr. Wilson testified that he found that the feeder unit would not satisfactorily feed young poults, that they would fall in the trough and could not get out, and that the feed could not be conveyed effectively the 400 feet and for that reason he removed the feeder units then installed, did not install the other 400 feet, and took the feeder units and re-installed them in 200 feet sections in his yard for the use of his range turkeys of a larger size. Mr. Tuttle testified that the reason they were removed was that they were never designed for young poults and that Mr. Wilson discovered soon after he had attempted to operate one of them that the trough was too large for young poults and that they could not reach from the outside without placement of two by four planking along the outside for them to stand on and that they would fall in the trough and could not get out and that he had been so advised before he purchased the feeder units. In any event, the feeder units were re-installed by Mr. Wilson in his yard and used by him to the present time in his range yard.

Mr. Wilson replaced the auger feeder units in the coop

with overhead feeder units manufactured by the Steve Regan Company.

After Mr. Wilson discovered the alleged defect in the auger feeder units, he was contacted by Mr. Ray Tuttle, the manufacturer's representative for James Manufacturing Company, at his turkey ranch in Nephi, Utah. This was on or about March 10, 1958. At this time no complaint or mention of the defects in either the ventilator system or the turkey feeder units was made to Mr. Tuttle. Mr. Wilson, on the contrary, wanted to purchase seventy-five 10 foot turkey feeders of a range type. These are barrel type units with trays on the bottom that are placed in the open range for turkeys approaching maturity. Mr. Wilson asked Mr. Tuttle if James Manufacturing Company would sell these units to him direct and finance the units for him. Mr. Tuttle contacted his employer by phone and got the authorization and sold these seventy-five turkey feeders directly to Mr. Wilson for \$5,250.00 on a contract (Exhibit D-10). Mr. Wilson did not pay for the seventy-five turkey feeders. The plaintiff, by numerous letters, attempted to get its financing contracts signed and paid. See Exhibits P-1 dated April 8, 1958; P-2 dated April 22, 1958; P-3 dated May 28, 1958; defendant's letter to plaintiff P-4 dated October 2, 1958; P-5 dated November 5, 1958; P-6 dated December 9, 1958; P-7 dated January 29, 1959. Mr. Wilson, instead of paying the contracts, requested refinancing which was granted on two different occasions (Exhibits P-5, P-14).

After no results were received from the above letters, Mr. Mark Adamson, Jamesway's Utah territory man, obtained a refinancing note and contract (Exhibit P.14) from Mr. Wilson after contacting him personally in Nephi. The original contract called for payments as follows: Exhibit

D-10) \$1,000.00 June 15, 1958; \$1,000.00 September 15, 1958; \$3,250.00 March 15, 1959. These payments were adjusted on February 18, 1959 (Exhibit P.14) to provide for payments as follows; \$1,000.00 on March 15, 1959; \$1,000.00 June 15, 1959; and \$3,250.00 on September 15, 1959. Mr. Adamson testified no protest or complaint was made to him at the time of the execution of the refinancing contract. Neither did he, in any of his letters up to the letter of March 16, 1959, (Exhibit P-8) make any complaint nor did he request any off-set or discount because of alleged defects in the ventilator system or the auger feeder units. The James Manufacturing Company did, however, at Mr. Wilson's request, extend the payment one year.

Eventually, in June of 1959, after no payments had been made, the plaintiff requested payment or the return of the merchandise, and Mr. Wilson refused and the plaintiff instituted this action to repossess the turkey feeders. Upon filing the action the plaintiff repossessed the equipment on a writ of replevin and resold it, and the defendant filed a counterclaim asking for damages because of alleged defects and breach of warranties in the sale of the eight 26 inch ceiling fans with K-D Stimaline ventilators, and in the automatic feeders, auger type. The plaintiff contends that neither items were sold by it, but were sold, in fact, by Utah Poultry and Farmers Co-operative and that there was not, in fact, any breach of warranty under either item.

Testimony was elicited concerning the number of turkeys that died from the period 1958 through 1959 and testimony was obtained from Dr. Royal A. Bagley, a veterinarian who was on call by Mr. Wilson during this period, that the turkeys died from various causes of an epidemic pro-

portion, such as paratyphoid, sulfaquinoxaline poisoning (over-medication), air sack lesion, vent picking, cholera, Newcastle Disease, cerebral hemorage, cannabilism, blue coomb ( a virus infection), and many other causes that would not be related to drafts or ventilating. Mr. Wilson put on testimony concerning drafts and temperature variations that, in his opinion, caused the death of the turkeys. This fact situation is mentioned only insofar as it affects the plaintiff's motion for a new trial based upon newly discovered testimony. There was no dispute on the plaintiff's complaint except as to the amount of attorneys fee and the case was tried on the defendant's counterclaim.

## ARGUMENT

### POINT I

#### THE COURT ERRED IN ORDERING THE JURY TRIAL OVER THE OBJECTION OF THE PLAINTIFF.

The record will disclose that a demand for trial was made by the plaintiff. The demand for trial was on a standard form and requested a non-jury trial (R. 113). Both plaintiff and defendant appeared at the pretrial conference at 10:00 A. M. on the 27th day of August, 1962. At that time the plaintiff appeared by and through Jackson B. Howard and the defendant appeared by and through W. Eugene Hansen. Matters were set down in the pretrial order and the Court instructed the plaintiff to prepare the pretrial order. The pretrial order was prepared in conformity to the Court's instruction and the matter was set for trial without a jury and the estimate of time of trial was two days based upon a non-jury setting. The date of the said trial was to commence on the 30th day of October,

1962. On the late afternoon of October 24, 1962, counsel for the plaintiff called counsel for the defendant to discuss the stipuations that might be entered into in order to expedite the trial. At that time the defendant informed the plaintiff that it was his belief that the trial would be a jury trial. Counsel for the plaintiff informed counsel for the defendant he was not prepared for such a trial and that he would contact the Court concerning it. Because of Court commitments in Richfield on the 25th, the plaintiff had no opportunity to review the file or consult with the Court until the 26th of October, at which time plaintiff talked to the Court by phone concerning the jury trial. The file discloses that the only request for jury trial was in a letter from the defendant's attorney dated September 11, 1962, addressed to the Honorable C. Nelson Day, Judge, Fifth Judicial District, Manti, Utah, a carbon copy of which was sent to the office of the plaintiff's attorney. That letter is not part of the record but is set out as follows:

"September 11, 1962

Honorable C. Nelson Day, Judge  
Fifth Judicial District  
Manti, Utah

Re: James Manufacturing vs. Ernest Wilson  
Civil No. 3937

Dear Judge Day:

I recently received a copy of the Pretrial Order. I had expected that Jackson would mail a copy to us for approval before it was signed ;however, I note he submitted it directly to the Court for signature.

I had written Jackson before receiving the Pre-trial Order indicating that Arthur had an additional issue he wanted included in the Order concerning the sale of the turkey feeders as set forth in Plaintiff's Complaint. The issue being whether or not they obtained the reasonable value of the feeders on their repossession sale.

Arthur is in Washington, D.C. at the present time and I hesitate filing a motion and setting it up for argument on a point which is relatively minor until such time as he returns and either works out the matter upon stipulation with Jackson or personally decides to notice it up for hearing.

I am therefore sending this letter in hopes that this one phase of the Pretrial Order might remain open until Arthurs return. I also mailed a check to the Clerk yesterday to cover the jury fees in the case since it was requested by the client.

Sincerely yours,

W. Eugene Hansen

WEH:bt

cc: Jackson Howard, Attorney"

The very last paragraph is the only reference to a jury trial setting ever made by the defendant and it is merely a statement that "I mailed a check to the Clerk yesterday to cover the jury fee in the case since it was requested by the client." Although it is not a tribute to counsel for the plaintiff, nevertheless, this particular sentence was overlooked inasmuch as the substance of the letter was that

Mr. Nielsen would be back from Washington and would be in contact with the Court and counsel for the plaintiff when he returned. Based upon the assumption that the trial would not be of a jury nature, counsel did not have an opportunity to review the panel, could not determine the background of the jurors and was prohibited from obtaining a new panel under provision 78-46-23. The Court advised counsel for the plaintiff on October 26th that he was going to order the Clerk to secure a jury. October 26, 1962, was the Friday prior to trial, which was Tuesday, October 30th. Under the circumstances, the plaintiff was denied an opportunity to properly analyze the jury panel and, consequently, was forced to select a jury at a considerable handicap. Plaintiff was also prevented from requesting a postponement of trial because subpoenas had been sent to numerous witnesses, witness fees paid, and one witness was enroute from Los Angeles.

It is the contention of the plaintiff that the Court should have refused to grant a jury trial. The plaintiff contends that no proper demand for a jury trial was made in accordance with law. Article I, Section 2, of the Utah Constitution states "a jury in civil cases shall be waived unless demanded." Rule 38 of the Utah Rules of Civil Procedure states that a jury trial can be obtained by demand and defines what demand is under the Constitution. Rule 38(b) states:

"b. Demand. Any party may demand a trial by jury of any issue triable of right by jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than shall be fixed by rule of the court in which the action is



pending. Such demand may be endorsed upon a pleading of the party."

No demand was made in conformity with Rule 38(b) of the Utah Rules of Civil Procedure and the defendant does not contend that one was. The Fifth Judicial District Court apparently has no rule governing this procedure. Inquiry was made both of the Court and the Clerk concerning the rule fixed by the Court concerning such demand and none was available and the Court informed the plaintiff's counsel that it had not established rules. Under these circumstances, it is respectfully urged that to compel the plaintiff to submit to a jury trial on a notice as late as October 26, 1962, was prejudicial and an infringement of its rights.

## POINT II

THE COURT ERRED IN EXCLUDING ALL WITNESSES FOR THE PLAINTIFF AND DENYING THE PLAINTIFF A RIGHT TO HAVE ITS COUNSEL ASSISTED BY ANY WITNESSES FOR A SUBSTANTIAL PART OF THE TRIAL.

The record will disclose that the case was called for trial on Tuesday, October 30, 1962, at the hour of 10:00 A.M. The first order of business, after hearing the motions of the plaintiff to strike the jury trial, was the selection of the jury. After the jury was selected and prior to argument of counsel, plaintiff invoked the exclusion rule (Tr. P.3,L.17). This motion was made at approximately 1:30 P.M., prior to defendant's opening statement to the jury. Each party indicated who their witnesses were to be and the witnesses were sworn, however, at that stage

Mr. Nielsen, Attorney for the defendant, argued to the Court that plaintiff was not entitled to have anyone assist counsel if it invoked the rule because the plaintiff was a corporate entity. It was Mr. Nielsen's contention that a corporate entity can only be represented by its principal officers and that counsel for a corporate entity can retain with him as an assistant during the course of the trial only a corporate officer who stands in the stead of the corporate entity. This was contrary to the plaintiff's view of the case and plaintiff elected to stand by its motion to exclude witnesses.

On the basis of the arguments which were strenuous and heated and cover pages 3, 4, 5, 6 and 7 of the transcript, the Court ruled that Mr. Tuttle, the witness chosen by the plaintiff to assist counsel, would be excluded. From that period of time, approximately 1:30 P.M., until late in the afternoon of the first day of trial, October 30, 1962, the plaintiff was compelled to conduct the trial of the matter without the assistance of its key witness, while the defendant was allowed to remain in the courtroom all during the course of the arguments and trial.

On the conclusion of the defendant's opening statement, during which time all of the witnesses for the plaintiff, including Mr. Tuttle, were absent from the courtroom, the plaintiff again reiterated its motion and objection to the Court's sequestration of its witnesses (Tr. P.8, L. 30 and P.10, L. 20):

"MR. HOWARD: May it please the Court and jury, we would prefer to reserve our argument until the defendant is through with their case in chief. Now, your Honor, I am reluctant to press an issue the Court has ruled upon because I believe it is a matter of prejudicial error. I think

it is important to inform the Court that unless my client is allowed to be represented by a representative they are deprived of their rights because the law says that a party may attend the Court; and the rule does not apply to a party. Now, if Mr. Nielson's argument is sound, the only person who could be a party in a corporate action would be the president, probably, or some officer. Now, if you get the situation were you have a corporate party, that corporate party may be present by any representative it chooses to have present, and the attorney for the plaintiff is me; and I elect to have Mr. Tuttle here. Otherwise, my client is deprived of the right to be present at this trial even though the defendant who is a party is present, which is a gross lack of neutrality in the trial of this case. Otherwise, the corporate client cannot be present because a corporation is an artificial being, there's no personage, there's no party except insofar as it is represented by representatives.

So I say Mr. Tuttle is their representative, He's the one that has knowledge of this situation. He's the one they have selected to be present. He's the one who must be present. You take a corporation like United States Steel, the president and officers have no dealings generally with any of the transactions. They could never be present in Court except by counsel.

MR. NIELSON: I submit to the Court that Mr. Howard made a fine statement in front of the jury about his client but there's nothing wrong with the president or any officer or managing agent of the corporation being present, but he's asked for a salesman to be in here. The corporation doesn't have to be here if it doesn't want to be here; but if they want to be here badly enough, then, why

doesn't one of the officers or managing agent of the corporation be here? If Mr. Wilson doesn't want to be here, he doesn't have to be here. But if he wants to be here, he has got to be here.

MR. HOWARD: The question answers itself, your Honor. I am sure I can find authorities on that subject. I have researched it before and I am confident that they can be present by who they choose. The state has the same privilege. They are not a being. The exception to the rule is the one person they elect to be present for them.

THE COURT: I have already ruled on the matter. I'm going to let that ruling stand unless and until you show me something more than you have."

The trial then commenced and Mr. Wilson was allowed to testify. Mr. Wilson, the defendant, testified for over an hour before the Court took its afternoon recess. The testimony of Mr. Wilson during the period in which all witnesses for the plaintiff were excluded, concerned construction of the brooder coops; the number of trips he made to Salt Lake to the turkey shows, and where he saw the auger feeders in operation; the testimony concerning a paratyphoid outbreak in his brooder coop; testimony concerning his knowledge of turkey operations; his acquaintance with the operations of George Harmon, Milt Harmon, Mr. McKay, Wendell Hansen, a Mr. Gardner, George H. Ostler and George T. Ostler; his testimony concerning normal loss; testimony concerning his knowledge of Jamesway, his discussions with Ray Tuttle at Covey's Motel. All of this testimony was elicited over the objection of the plaintiff outside of the presence of plaintiff's key witness.

After the time of the Court's afternoon recess at approximately 3:00 P.M., the plaintiff again reiterated its ob-

jection to the exclusion of its witness (Tr. P. 11, L. 24-30). Counsel was allowed the opportunity to research in the library for approximately twenty minutes, whereupon the Court reconvened at approximately 3:30 P.M. Page 12 of the transcript shows what transpired after Court was reconvened:

“THE COURT: The record should show that we were delayed for a few minutes because Mr. Howard was using the library to look for some law.

MR. HOWARD: Your Honor, I would like to make a motion and perhaps counsel would prefer we do it outside of the jury.

THE COURT: Let's not send the jury out again. Why don't you come up here to the bench and let's discuss this for just a minute? (DISCUSSION between Court and counsel not reported.)

THE COURT: The record should show that the Jury is in the box and I think we are prepared to go ahead. Mr. Nielson, you may proceed.

MR. NIELSON: I would like the record to show my objection to Mr. Ray Tuttle being in the Courtroom after his counsel has invoked the exclusion rule and will state again I have no objection to Mr. Park Adamson, representative of the company being present if he wants his present; but I object to his bringing into the room Mr. Ray Tuttle after he has invoked the exclusion rule.

THE COURT: The record should show in that regard that pending the recess Mr. Howard has exhibited to the Court a Supreme Court case in the State of Utah which in substance and effect provides that the Court within its discretion may permit a representative of the party to be

in the Courtroom even though the exclusion rule has been invoked; and Mr. Howard has chosen Mr. Ray Tuttle and therefore the Court in its discretion has permitted him to return into the Courtroom. And your objection is denied at this point.

MR. HOWARD: Now, we will withdraw our last objection to the testimony of this witness.

THE COURT: All right."

Prior to Mr. Wilson testifying, an objection had been made to his testimony concerning transactions with plaintiff company or any of its officers or agents and especially with Mr. Tuttle at a time when Mr. Tuttle was not present to assist counsel concerning the testimony. For that reason when Mr. Tuttle was allowed to re-enter the courtroom the plaintiff withdrew its objection to future testimony of the defendant of his transactions and negotiations with Mr. Tuttle.

Although the Court changed its mind concerning the propriety of having witness for the plaintiff present to assist counsel during the course of the trial, it is the position of the plaintiff that such ruling was too late to overcome the handicap inflicted upon the plaintiff by the absence of its witness during a material and substantial portion of the trial. Since Mr. Tuttle at no time had an opportunity to review the transcript or the testimony of Mr. Wilson during the time in which he was outside of the courtroom, it is impossible to tell whether erroneous information was elicited from Mr. Wilson and, therefore, the plaintiff was prevented from properly cross-examining Mr. Wilson concerning the testimony that was elicited during the absence of Mr. Tuttle.

The Court has ruled upon this subject before in the case of *Xenakis, et al vs. Garrett Freight Lines, Inc.*, 268 P.2d 1007, which is a case wherein a party injured in an automobile accident brought suit against the defendant. Apparently the action concerned the alleged negligence of the defendant's truck driven by one of its drivers. It was the contention of the plaintiff that the court erred in granting their motion to exclude witnesses and yet permitting the defendant's truck driver to remain in court during the trial to assist counsel for the defendant. The court ruled on this issue as follows:

"Where witnesses are excluded it is common practice to allow one witness having special knowledge of the facts to remain in the courtroom to advise with counsel concerning the progress and management of the trial. It is not mandatory that this be done, but the entire matter of exclusion of witnesses rests within the sound discretion of the trial court and its action will not be disturbed in the absence of showing clear abuse. The record here shows that he expressly announced that the truck driver Mr. Thompson, could remain in the courtroom and no objection was voiced by the plaintiff."

In this instance, the plaintiff contends that the failure of the court to allow Mr. Tuttle to remain in the courtroom during the course of the testimony of Mr. Wilson was a clear abuse of sound discretion. Mr. Wilson's entire case rested on his alleged transactions with Mr. Tuttle. It was the contention of Mr. Wilson that he purchased the ventilator and the feeders from James Manufacturing Company through their representative, Mr. Tuttle, and that the warranties for which he claimed a breach were made or-

ally by Mr. Tuttle. To deny the plaintiff the right to have Mr. Tuttle present during the course of a substantial amount of Mr. Wilson's testimony was clearly prejudicial and an abuse of discretion.

### POINT III

#### THE COURT ERRED IN ADMITTING EXHIBIT 8 OVER THE OBJECTION OF THE PLAINTIFF.

The plaintiff's objection on this point is restricted to the plaintiff's alleged breach of warranty in respect to the auger type turkey feeders. It is the contention of the plaintiff that there could be no breach of warranty of the auger type feeder units for the following reasons:

1. The auger type feeder units were sold to the defendant by Utah Poultry and Farmers Co-operative and not the plaintiff.

2. The defendant purchased the auger feeder units based upon his observation of a sample.

3. The buyer was an experienced turkey operator who ordered a particular piece of merchandise for his own purposes.

4. The defendant gave the plaintiff no notice as required by law of an alleged claim of breach of warranty.

5. The defendant is estopped from claiming breach of warranty because of his utilization and use of the said auger feeders.

In respect to the question of whether plaintiff sold these auger feeders to the defendant, that matter will be taken up in the subsequent argument. The plaintiff will address itself to the question of warranty and its relationship to this exhibit. It is the contention of the plaintiff



that under the circumstances of this case, defendant is not entitled to claim a breach of warranty.

The facts are that Mr. Wilson saw the particular feeder unit purchased at a display of the same by Jamesway at the Utah Turkey Show in Salt Lake City in November or December of 1957. He was impressed by the operation of the sample unit installed at that show. Mr. Wilson contacted Mr. Tuttle at his hotel room in Salt Lake for the purpose of discussing both the auger feeder units and the ventilator system. Mr. Wilson was a man of great experience in the turkey raising field, having been in the business for more than twelve years and having raised 170,000 turkeys the year preceding the purchase of the auger feeder units. He was well aware of the size of young poults and the mechanical limitations and advantages of the proposed feeder units. This he discussed with Mr. Tuttle in detail. The fact, although disputed, is that he discussed this matter further with Mr. Tuttle, Mr. Adamson, Mr. Orvil Adams, Mr. Wood and Mr. Hopkinson in the office of Utah Poultry on or about the 26th day of February, 1958, and was advised that in their opinion this auger unit was too large for young poults. Mr. Wilson was of the mind that he could place two by four planks along the outside periphery of the trough in order that the young poults could stand on the planks and eat out of the trough supplied by the auger. He was advised by Mr. Adams, who is a turkey grower and a director of the Utah Poultry Company, and Mr. Tuttle that little turkeys might have difficulty eating out of the trough and that if they got in the trough they might have difficulty getting out. Wilson felt that there would be no difficulty in this regard and that he would be willing to take that chance. This testimony is

substantiated by Mr. Wilson's own concern, as expressed in the record (Tr. P. 13, L. 23):

"A. I told him that I had examined the sample feeder and I liked this feeder, except I thought it was a little too deep and I asked him if there was a possibility to make a smaller trough, one that wasn't so high; that I wanted to use this in my coop."

It is obvious from this statement that Mr. Wilson recognized the limited use of this type of feeder unit, but nevertheless that he wanted it for his coop. Under those circumstances Mr. Wilson cannot rely upon an implied warranty that the auger feeder unit was not suitable for his purposes, as expressed to Mr. Tuttle. Authorities in this regard are as follows:

Uniform Sales Act, Title 60-1-15, Sub. Sec. 3 is as follows:

"If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

Under these circumstances, where he has examined the goods, and is cognizant of their construction, he cannot complaint that the goods were not suitable for young poults. This is especially true where he has had the great experience that he has had in the turkey business.

In the case of *Landers & Co. v. Fallows, et al.*, 81 Utah 432, the court took up this particular subject and stated as follows:

"\* \* \* Moreover, there is no warranty of fitness where the buyer orders a specific article for a specific purpose known to the Seller. *Davenport Ladder Company vs. Hines Lumber Company*, (C.C.A.) 43 F2d

63, Sturtevant Company vs. LeMar's Gas Company, 188 Iowa 584, 176 N.W. 338." \* \* \* \* "Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. 55 C.J. 717, Sec. 704; Downey v. Price Chemical Co., 204 Ky. 98, 263 S.W. 690. And in such case, the buyer must protect himself by a special, or promissory, warranty against known or visible defects; which would naturally be the seller's agreement to repair them, so that the machine will do good work."

The above citations are permitted on the question of the suitability of the particular auger feeder units for the purpose required by the defendant. There is no claim whatever by the defendant that the goods received, to-wit: the auger feeder unit, did not comply, at least in form and shape, to the sample he saw. Under those circumstances there can be no implied warranty that as far as the shape and construction of the goods are concerned, that they were not suitable for his purpose.

In addition to the fact that the auger feeder unit was sold by sample and inspection, thereby precluding an implied warranty under Title 60-1-15 Sub. Sec. 3, the warranty would also be unavailable by reason of Title 60-1-15 and 60-1-15 Sub. Sec. 1. These provisions are as follows:

"Implied warranties of quality—Subject to the provisions of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, and it appears

**that the buyer relies on the seller's skill or judgment** (emphasis added) (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

It is plain, therefore, that in order for an implied warranty to arise under these provisions, that the buyer must rely on the seller's skill or judgment in selecting the goods for the particular purpose as stated to him by the buyer. A summary of the law concerning the necessity of the buyer's reliance in general and of his reliance in this type of sale is as follows:

"Extent and Qualifications of General Rule as to Warranty of Fitness; Reliance upon Seller's Judgment, Skill, or Experience — As a general rule, notwithstanding goods are sold for a particular use, if the buyer himself understands what he wants and has a full opportunity to acquire a knowledge of any fact necessary to enable him to form a correct estimate, and selects such goods as he deems adapted to the intended use, there is no warranty of their fitness for such use. The existence or nonexistence of an implied warranty of fitness for a particular purpose must, and necessarily does, depend upon whether the buyer relied upon the skill or judgment of the seller, and this is a question of fact which is ordinarily to be determined by a jury under appropriate instructions." 46 Am. Jur. 532, Sec. 348.

"In Sale of Machinery—The existence of an implied warranty of fitness by a manufacturer or seller of machinery depends upon the same considerations which govern the existence of a warranty of fitness generally. The first inquiry is whether the purchaser under all the circumstances may be deemed to have depended on the judgment, skill, or experience of the

seller, a supposition that cannot exist where the purchaser makes the selection or orders a known and described article of machinery, or specifies certain qualities or characteristics, even though he also discloses the purpose for which he intends to use it."

46 Am. Jur. 534, Sec. 349.

Under the circumstances of this case, where Wilson, a turkey grower with vast experience, with ample opportunity to gain a full knowledge of the auger feeder, and indeed where he made his own selection for his own purposes, it would seem inconceivable that any reliance was placed on the seller's skill or judgment in selecting the goods purchased.

This brings us to the next point in respect to the warranty, and that is whether the auger units would, in fact, convey feed for 400 feet, as required by his coop construction. This is a more difficult question. This question, however, is not related to implied warranty, but is related to express warranty. At this stage of the argument it must be admitted that there cannot be implied warranty of the auger feeder units in this regard and if the defendant has any case at all, it must rest on express warranty concerning the ability of the auger feeder units to convey feed for 400 feet in the coop.

It is Mr. Wilson's contention that he explained to Mr. Tuttle that the feeder units would be 400 feet long and Mr. Tuttle assured him that the auger would convey feed for that distance. The evidence is in dispute as to whether Jamesway eventually got the one feeder unit that was installed working so that it did convey feed for that distance. The plaintiff contends that Mr. Persig and the engineer had the machine operating satisfactorily

when they returned to California, but Mr. Wilson testifies that it never did operate satisfactorily and the greatest distance it would convey after they had repaired it was that it would convey feed two-thirds of the way down (Tr. 22, Line 1). Regardless of that circumstance Mr. Wilson elected, whether for reason that the auger units would not convey 400 feet or because the trough construction was unsuitable for young poults, to remove the one 400 feet unit installed and place that in the yard for the purpose of feeding turkeys of a more mature age of approximately eight weeks. He broke the units into eight units (Tr. P. 47 and 48). He states in his deposition that these units were installed in two hundred foot sections and that he bought seven additional bins to add to the one that he already had so that he had eight feeding units (Tr. P. 33). It would be difficult to see how the 800 feet of auger feeder units purchased from Jamesway could be broken into eight 200 foot feeders, however, the fact remains that these auger feeder units were installed in the yard and actually operated there from March of 1958 until the present time. No complaint was ever registered with Jamesway concerning these auger feeders in all of the correspondence to James Manufacturing Company until the questioned Exhibit 8 (See Exhibits). The testimony concerning the operation of these auger feeder units in the yard is as follows: (Tr. P. 28, L. 7 through L. 13; Tr. P. 52, L. 15 through L. 20).

Q. What I want to know, did you offer to return it to James Way?

A. No, I did not.

Q. What did you do with it?

A. I took it out in the field and installed it in

200 foot sections which we were able to manage reasonably well.

MR. HOWARD: I'm asking—I'm on Page 28 Question 6 talking about these feeders. "Q. Did you make a claim to the James Way Manufacturing Company for loss of your turkeys because of this defective equipment? A. Did I? Q. Yes. A. No, I was trying to get along with James Way Manufacturing Company." That's true, isn't it?

Both in his deposition and in the trial he stated that he had never made any complaint to James Manufacturing Company concerning these turkey feeders because he was trying to get along with them. The fact is that after he discovered the alleged defect in the turkey feeders he purchased 75 additional range feeders of a different construction from James Manufacturing Company. The evidence is also replete with correspondence concerning James Manufacturing Company's efforts to get him to pay for the latter turkey feeders which he had purchased from them. In none of this correspondence is any claim made that the auger turkey feeders were not working satisfactorily or that he wanted any adjustment on them. At the trial of the case Mr. Wilson produces a letter, which has been marked as defendant's Exhibit 8 for introduction. Objection was made to the introduction of this exhibit on the basis that it was a copy of a purported letter supposedly written to the plaintiff, and that no effort had been made by the defendant to obtain the original before the introduction of this exhibit, nor was there any evidence offered that the original was in existence; that the plaintiff had ever received it or seen it before; or, in fact, that it was mailed. The plaintiff

had taken the deposition of the defendant and had inquired specifically whether defendant claimed a notice to the plaintiff in writing. In his deposition the defendant answered and said: (Dp. P. 28, L. 14 through L. 27).

Q. Did you make any claim to the Jamesway Manufacturing Company for the loss of your turkeys because of this defective equipment?

A. Did I?

Q. Yes?

A. No, I was trying to get along with James Manufacturing Company.

Q. You weren't upset about it?

A. I was quite upset about it.

Q. The fact is you bought other equipment after that?

A. Yes, I bought it from Jamesway.

Q. You say you bought it from Jamesway?

A. Yes.

In addition to this, the plaintiff served upon the defendant Interrogatories:

"8. State whether the automatic feeders referred to in the second count of the counterclaim were used subsequent to discovery of their defectiveness."

"A. Yes. These feeders were used at a later date in the field with larger turkeys, after we had modified them and shortened them to 200 feet so that we could operate them at all."

"9. If the defendant made objections or protests to the plaintiff, state to whom and where such protests were made in respect to (a) 8, 26" ceiling fans with thermostats and K-D Stimaline ventilators; (b) the automatic feeders referred to in the second count of defendant's counterclaim."



"A. I objected on several occasions, first in reporting that the equipment didn't work and again very forcibly at the time the representative from California came to my coop to experiment with the short aug and try the feed to travel the whole distance."

"10. In respect to paragraphs 8 and 9 above, if protest or claim for damages were made in writing attach a copy of such claims or protest."

"A. **Protests were made verbally in person.**" (Emphasis added)

Defendant served interrogatories upon the plaintiff requiring the plaintiff to furnish to the defendant copies of all correspondence sent or received. Copies of such correspondence as could be readily located were delivered to the defendant in response to that interrogatory. (See Interrogatories No. 20 and 21 of the defendant). The production of defendant's Exhibit 8 was a complete surprise, for which the plaintiff had no opportunity to rebut or to produce testimony in contradiction thereof. If defendant had in mind that this document was to be introduced, then it was incumbent upon him to submit demand for admission of its authenticity under Rule 36. In the alternative, the defendant could have required us to produce the original under Rule 34, had he let us know that there was a copy in existence. The defendant introduced Exhibit 8 for the purpose of showing notice of breach of warranty, which was a material aspect of his case. All of his answers to his depositions and interrogatories lured the plaintiff into believing there was nothing to be introduced or testified to in respect to breach of warranty except oral conversations between the defendant and em

ployees of the plaintiff. Not only was the introduction of this document a surprise, but has the aspect of entrapment, because the plaintiff had made every effort to discover the evidence the defendant had available for production concerning notice of breach of warranty.

One might think that because of the imperfect quality of the letter that Mr. Wilson decided not to mail it. The court will note that the last paragraph is illegible. There may be many explanations other than the mailing and receipt of this letter. The admission into evidence of this copy is prejudicial and error on the part of the court. Authorities in support of the plaintiff's contention are as follows:

VanLeeuwen vs. Huffaker, 78 Utah 521, 5 P2d 714:

The VanLeeuwen case involves a situation where the plaintiff was the assignee of a real estate broker's fee. The defendant and another person were brought together by the real estate agent, however, before the contract was reduced to finality, the defendant and the other person got together and prepared a contract away from the presence of the real estate broker. Later, both the defendant and the other party told the broker that the contract had been prepared by an attorney and that it provided for the payment of the real estate broker's fee. The plaintiff called the real estate broker to testify as to the contents of the contract. Objection was made to his testimony concerning the contents of the contract on the basis that no foundation had been laid for permitting secondary evidence of the contents of the contract. Notice to produce the original of the contract was given at a former trial. The court held that the previous notice

was sufficient for the second trial. However, the court went on to say, in regards to the objection, that:

"A reading of the transcript shows that the trial court in ruling upon the objection, had in mind only the question of whether or not notice to produce which was served prior to the first trial was sufficient to entitle plaintiff to prove the contents of the contract by secondary evidence; and the court being of opinion that such notice was sufficient, overruled the objection . . . . But the defendant's objection went farther than that. The objection on the ground of incompetency raised another question which the court seemingly did not consider. As the record stood plaintiff had not made any showing which would entitle him to introduce secondary evidence of the contents of the written contract. He had not shown that the original was lost or destroyed, or that the original was in the possession of defendant . . . . Therefore the court was in error when it overruled the objection."

Another Utah case on the subject is the case of *Larsen et al v. Ryan, et al.*, 54 U. 250, 180 P. 178. It was contended in that case that the court erred in admitting in evidence a copy of the execution under which the property was taken by the sheriff. Undoubtedly the sheriff could have produced the original execution, or if that was lost or destroyed, then to have it restored according to the well established rules of law procedure. The court, however, admitted the copy in evidence without following the usual procedure in admitting secondary evidence of a lost document. In doing that the court erred.

In the case of *Wilson vs. Davis, et al*, 103 P.2d 149 the plaintiff was attempting to testify to the contents of

certain deeds. The record discloses that the plaintiff had made a demand for the production of these deeds prior to trial. The deeds were not produced. On that basis she was attempting to testify as to their contents. The court held, concerning the objection raised by the defendant that her testimony was not the best evidence and that no proper foundation was laid for the introduction of her testimony, as follows:

“Here there was no proof of the loss or destruction of the deed . . . so as to permit other evidence of the contents. And obviously, under Section 10516, no demand upon Mr. Poore to produce them at trial in May, 1938, can be effectual as a foundation for such evidence until it has first been shown by evidence that “ ‘the original is in the possession’ ” of Mr. Poore.”

Cases concerning this problem that are analogous are as follows:

Ancrum vs. State Highway Dept., 161 SE 98. In this case the plaintiff brought an action based on the negligent maintenance of a road after a washout. He tried to prove the filing of claims by introducing copies thereof at the trial. Objection was made that the copies were not the best evidence. Notice was not given to the defendant to introduce the originals until the time of trial. The court held that that was not sufficient time for the defendant to comply with the notice, especially where the office of the defendant was thirty-two miles from the trial site and that the notice for the production of this document was not reasonable. A fortiori, in this case

the office of the defendant was 2,000 miles from the place of trial.

Ciccone v. Colonial Life Ins. Co. of America,  
164 A. 444.

In this case suit was brought upon a life insurance policy issued by the defendant on the life of the plaintiff deceased husband. The insurance company defended on the basis of lapse of the policy by failure to pay the premium. The defendant sought to offer a copy of the lapse notice sent to the plaintiff's husband. Objection was sustained to its admittance by the trial court and this objection was appealed by the defendant. The Supreme Court said demand for the original made at the time of the trial was not timely and that the objection should have been sustained. The language of the court is as follows:

"The rule is that notice given or demand made during the trial is not sufficient if the paper is not shown to be in court or readily procurable by the party who is supposed to have it, unless the party denies the existence of the paper, or that it is in his possession or under his control."

#### POINT IV

THE COURT ERRED IN FAILING TO GRANT THE PLAINTIFF'S MOTION TO DISMISS AT THE CLOSE OF THE DEFENDANT'S CASE IN CHIEF AND IN FAILING TO GRANT THE PLAINTIFF'S MOTION FOR A DIRECTED VERDICT .

Plaintiff has cited sufficient reasons in its argument to Point III above concerning the auger feeders to justify

tify deleting that portion of the defendant's cause of action as an issue to be submitted to the jury.

Although the appellant believes that without Exhibit D-8 in evidence the defendant has made no showing of notice of breach of warranty, nevertheless, it is the appellant's contention that the notice (Exhibit D-8) and all oral statements of the defendant are defective as notice of breach of warranty because (1) they were not timely given and (2) they were inadequate to constitute notice of breach of warranty.

Taking up the question of warranty in respect to the ventilator system, the appellant respectfully urges that there was no basis upon which this matter could have been submitted to the jury under any circumstances in light of the defendant's testimony and in light of the exhibits offered. In this case the defendant used the said equipment from February, 1958, until April of 1959, and if his testimony is believed, had thousands of young turkeys die because of ill effects of the ventilating system. At no time from January 8, 1958, when he purchased these ventilators and fans to April 12, 1959 (see correspondence — Exhibits) did he make any claim of breach of warranty or that the system was not operating properly. His notice of alleged breach of warranty is this disputed letter of April 12, 1959, shown as Exhibit D-8. It is the contention of the plaintiff that this exhibit is not admissible for the reasons set forth in the argument to Point III above, but in addition to that the notice given was far from timely. It seems unbelievable that a person would have lost upwards of 30,000 young poults without discovering the cause of it. The evidence and testimony was that Mr. Wilson placed in the coop three different

broods for the years 1958 and 1959, the last brood being in the Spring of 1959, before he discovered that there was an unusual draft in the coop that caused the deaths, in his opinion, complained of. Plaintiff offered substantial evidence that the turkey poults died of causes other than the draft and Dr. Royal Bagley testified concerning the number of poults that died from various bacterial causes. Regardless of causation, however, it is the belief of the plaintiff that no proper notice of breach of warranty was given either orally, by the letter of April 12, 1959, or in a timely manner. Taking the letter of April 12, 1959, at face value, it is the position of the plaintiff that this does not constitute a notice of breach of warranty within the meaning of Utah Code Annotated 60-3-9, set forth as follows:

“Acceptance does not bar action for damages—In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know, of such breach, the seller shall not be liable therefor.”

“Statutory Requirement of Notice—In practically every jurisdiction the provisions of the state statute requiring notice of breach of warranty are the same as Sec. 49 of the Uniform Act. The courts uniformly hold under such statutory provisions requiring notice of breach of warranty “within a reasonable time after the buyer knows or ought to know of such breach,” that as a prerequisite to a recovery for breach of warranty, the purchaser must give notice

to the seller of such breach within a reasonable time after he knew or under the circumstances should have known of the breach. The notice required by Sec. 49 of the Uniform Sales Act is a notice given within such time as a notice would be given by an ordinarily careful man, acting under the same circumstances and with respect to goods of the same character. The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, so that the former may govern his conduct accordingly."

46 Am. Jur. 438, Sec. 257.

"In the absence of a contractual provision for notice, it has been held or recognized that notice must be given by the buyer of goods to enable him to recover damages for the seller's breach of an expressed warranty, it must be given promptly or within a reasonable time." 41 A.L.R. 2d 817."

There are numerous cases supporting the general statement in A.L.R. set forth above.

In the case of *Mawhinney vs. Jensen* (Utah) 232 P.2d 769, an action was brought based upon breach of warranty as to the quantity of personal property sold under the contract. The court held:

"A survey of the cases on this matter shows that timely notice is a vital condition precedent to an action for breach of warranty ,*Esbeco Distilling Corp. v. Owings Mills Distillery*, D.C., 43 F.Supp. 380; *Pearl v. William Filene's Sons Co.*, 317 Mass. 529, 58 N.E. 2d 825; *Baum v. Murray*, 23 Wash. 2d 890, 162 P.2d 801. Thirty-two months is, in law, an unreasonable delay under the circumstances of this case. *Harburger v. Stern Bros.*, Sup., 189 N.Y.S. 74; *Stewart*



v. B.R. Menzel & Co., 181 Minn. 347, 232 N.W. 522. The statute insists on notice within a reasonable time, but laches in equity only arise when the delay has caused prejudicial injury. Therefore the passage of time in and of itself bars the breach of warranty action, but not the remedy of reformation. In the instant case it is impossible to believe that the plaintiffs did not discover, long before 32 months had elapsed, that a couch, a stoker, dishes, sheets and 8 steam radiators, etc., were missing. The complaint states that the defectiveness of the heating system was discovered two weeks after the final contract was signed. The demurrer was properly sustained on the two claims for breach of warranty. The case is reversed and remanded with directions to proceed in accordance with the views expressed herein. Costs awarded to appellant."

As the language of the court indicates, it is impossible to believe, under the circumstances of the present case, that the defendant did not discover long before fourteen months from the date of installation of the ventilator fans that they were defective or causing problems to his turkeys. And, therefore, have been under an obligation to notify plaintiff of such defect.

Not only was the notice not timely, but the plaintiff contends that notice, if given, was not adequate. Notice to be sufficient must at least inform the plaintiff or fairly advise him of the alleged defects, must be in such form as to dispel any inference that the defendant waived any defects, and it must fairly apprise the seller of the buyer's intention to look to him for damages because of the alleged breach. None of those requirements are present.

Authorities as to what is an adequate notice are as follows:

Truslow and Fulle, Inc. vs. Diamond Bottling Corporation 151 Atlantic 492, 71 A.L.R. 1142.

The court here interpreting Section 49 of the Uniform Sales Act which is the same as 60-3-9 says as follows:

"The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly. Such notice need take no special form, but it must be such as fairly to apprise the seller of that intention (many citations). Where the question whether proper notice was given depends upon the construction of a written instrument, or the circumstances are such as to lead to only one reasonable conclusion, it will be one of law; but where the conclusion involves the effect of various circumstances capable of diverse interpretation, it is necessarily one of fact for the trier."

In this case the defendant notified the plaintiff on numerous occasions concerning defects of design of the bottle caps and at all times the plaintiff was aware of the defendant's losses because the defendant kept the plaintiff informed. The court held, however, that these complaints were not sufficient notice that the defendant claimed a breach of warranty and its conduct was such that the plaintiff was not reasonably informed of the defendant's intention to make such a claim.

The Court said:

"We cannot say that they do. It is no doubt true, as Rugg, Chief Justice, said in *Nashua River Paper Co. v. Linday*, 242 Mass. 206, 210, 136 N.E. 358, that complaints as to the quality of goods furnished may be found to constitute a sufficient notice of a breach of warranty. But that can be true only where the complaints under all the circumstances of the case are such as reasonably to apprise the seller that the buyer intends to claim damages for the breach."

Aaron Bodek & Son vs. Aurach, et al. 146 Atlantic 546.

In this case the plaintiff purchased a quantity of Army blankets from the defendant. After delivery to the plaintiff in April the blankets were sold by him. Within one month all the blankets were returned by his customers as not of the grade and quality represented. Plaintiff waited until July and then called defendant and requested that he come over and look at the blankets. Defendant refused to do so. Thereafter, plaintiff wrote defendant a letter expressing his intention to sue for breach of contract. Two years later plaintiff instituted this action. In addition to finding that notice was not given within a reasonable time, the court had the following to say about the adequacy of notice given:

"For another reason notice did not meet the requirements of the statute. The telephone conversation of July was not a notice that the blankets delivered were not in accordance with the contract. The only thing plaintiffs did was ask defendants to go and look at the blankets. There was no assertion that there was anything wrong with them, or if it was, it failed to

state any particulars. Neither does the letter of August 1st state in what respect there was a failure to deliver in accordance with the contract. That letter merely informs defendants that plaintiffs propose to bring suit for breach of contract, without stating the nature of the breach. Plaintiffs buy goods; they deal with them as their own and ultimately sell them. They ought not to be heard to say that the goods were not those contracted for when they never, from the time of delivery down to the date of the filing of the statement of claim, over two years, informed defendants in what respect there had been a breach of contract."

"To this we may add that, where a vendee desires to avail himself of an alleged breach of warranty of quality in a sale of goods, he must, in giving notice of the breach, specify with some reasonable particularity in what it consists."

That is the situation in this case. Even if Mr. Wilson did complain that the auger feeders were defective, he moved them into the yard, utilized them for a number of years, got the use and benefit out of them and never made and claim for damages until after a lawsuit was commenced on another purchase. The same is true in respect to the ventilator fans. A mere complaint is not sufficient notice of breach of warranty to give rise to a cause of action under 60-3-9. The plaintiff further contends that the burden of pleading and proving notice is upon the defendant. (See 71 A.L.R. 1150; 53 A.L.R. 2d 274; W. S. Maxwell Company vs. Southern Oregon Gas Company, 158 Oregon 168, 74 P. 2d 594; 114 A.L.R. 697.

Returning to the basic issue concerning this matter of sale, it is the further position of the plaintiff that no

sale was ever made by the plaintiff to the defendant upon which an action can be brought for breach of warranty. The exhibits clearly show that the defendant purchased from Utah Poultry from time to time, Jamesway products. Utah Poultry was a dealer in Jamesway products. Exhibit P.16 shows that on February 4th, a date midway between the purchase of the ventilator system and the auger feeders, E. I. Wilson purchased from Utah Poultry and Farmers Co-op eighty Jamesway brooders and their attachments. The sale price of this item of \$2,609.60. There never has been any contention that this Jamesway equipment was sold to the defendant by Jamesway itself. The fact is that it was sold to the defendant by Utah Poultry. The defendant admits that in December of 1957 he owed Utah Poultry approximately \$200,000.00 for merchandise and poultry purchased through Utah Poultry. A summary of the law concerning the necessity of privity in this type of sale is as follows:

“The fact a seller warrants the condition or quality of a thing sold does not itself, according to one view, impose any liability on him to third persons who are in no way parties to the contract. In such a case, there is no privity of contract between the seller and such third persons, and this precludes any right on their part to any advantage or benefit to be derived from the warranty. There is authority to the effect that there can be no implied warranty without privity of contract, and it has been held that a manufacturer is not liable for breach of warranty to third persons who are strangers to the contract of manufacture or sale for the results of any defects which may later develop in his product. 46 Am. Jur. 487, Sec. 306.”

The plaintiff will admit that there are cases to the contrary, however the prevailing view and the weight of authority is to the effect that there may be no recovery on the theory of breach of warranty against a manufacturer or seller of a product alleged to have caused injury where there is no privity of contract between the injured person and the defendant manufacturer or seller. Those cases hold that privity is indispensable to a successful warranty action. There are hundreds of cases cited in support of this rule in 75 A.L.R. 2d at Page 46 through Page 54. Utah has not, to the extent of our research, adopted a rule on the subject.

#### POINT V

#### THE COURT MADE NUMEROUS ERRORS INSTRUCTING THE JURY.

The court, in preparing its instructions, took the actual pages submitted by the plaintiff and defendant, which were submitted on different forms of stationery and different type, and attempted to amalgamate them. In doing so the court had occasion to strike certain provisions from the instructions submitted and to correct them by interlineation and ink markings and by the use of further deletions to confirm with what the court felt was proper law. This manner of preparation of instructions could not help but cause confusion, duplication, and improper emphasis to particular segments of the instructions. The appellant addresses itself to the following instructions:

Instruction No. 11 is erroneous and in error for the following reasons:

The Court, in attempting to define proximate cause, is imposing upon a contract a tort principle. Proximate cause is not involved in this case. The respondent's remedies are defined under the Uniform Sales Act, especially 60-5-7 which provides remedies for breach of warranty. The Court, in its definition of proximate cause under Instruction No. 11, adopts the language of J.I.F.U. 15.6 found on Page 49, except that the Court has substituted "result" for the word "injury" in J.I.F.U. instructions. Then to further complicate this instruction, the Court adds the alternative language at the top of Page 50, but substitutes, however, in lieu of "it may operate directly or through intermediate agencies or through conditions created by such agencies", the words "it may operate directly or by putting the intervening agencies in motion." This is strictly a tort instruction. The Court then turns to the language used in J.I.F.U. 15.7 concerning concurring negligence as proximate causes. 15.7 is set forth as follows:

"The law does not necessarily recognize only one proximate cause of an injury, consisting of only one factor, one act, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause and both may be held responsible."

The Court then uses this language in its Instruction No. 11:

"This does not mean that the law seeks recognizes only one proximate cause of a result consisting of only one factor, one act, one element of circumstance,

or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of a result, and in such a case each of the participating acts or omissions is regarded in law as a proximate cause. This is true regardless of the relative degree of the contribution; and where such concurrent conditions exist, it is no defense to say that one cause or condition was more responsible than another."

The net result of this language was to cause the jury to believe that even though the turkeys died as a result of bacterial causes and over medication, which were solely attributable to the defendant, if one turkey died as a result of a draft or getting its head caught in the auger mechanism, or for some other reason that might be attributable to the plaintiff, that the plaintiff would be responsible for all of the damage and loss sustained by the defendant. This type of conclusion would be entirely warranted under the Court's instruction concerning proximate cause and concurring causes. The Court, however, did not, in its application of tort principles to contract issues, instruct the jury as to contributory cause, which would have been a necessary sequel. It would seem entirely inappropriate to instruct concerning proximate cause in a contract case without instructing concerning contributory causes, which, if the analogy is appropriate, would have eliminated any damage being assessed against the plaintiff for reason that birds obviously died as a result of the acts of the defendant.

The appellant most emphatically urges the Court that this instruction is in error.

The Court's Instructions No. 29 and 30 should have



been sufficient to inform the jury as to what they should find, if they should find anything, for the defendant. Authorities for the proposition that intervening causes and contributing causes are only negligence doctrines are found in 38 Am. Jur. 721, Sec. 67 and 15 Am. Jur. 408, Sec. 18. Direct or proximate and remote consequences are only negligence doctrine.

Instruction No. 16 is erroneous for the Court merely instructed the jury as to what a warranty is by implication. The Court neglects to inform the jury concerning the other provisions of 60-1-15 that would be properly applicable to this case, to-wit: Subsections 2 and 3. These provisions state as follows:

“(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.”

“(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.”

Plaintiff requested the Court to give its Instruction No. 5 which would have completely and adequately supplied the deficiency that is had in the Court's Instruction No. 16. The law clearly states that there is no implied warranty in a situation where there is an express warranty covering operational features and that an implied warranty exists only where an express warranty is not one concerning the quality or functionability of the merchandise. Where the buyer has had the opportunity to inspect the commodity and the seller is guilty of no

fraud, there can be no implied warranty of merchantability and the buyer takes the goods as he finds them; provided that the goods he receives are those of the same type and quality as that which he inspected prior to the sale. (See 46 Am. Jur. 525, Sec. 342).

Instruction No. 18 is erroneous because it is unnecessary. The Court here is informing the jury what may or may not be concerning the financial arrangement. This instruction is to the effect that the circumstance could be as the defendant states it, lending credence to a situation that is unsupported by evidence. Because it is not an instruction as to the law on the matter, it is an intrusion by the Court into the prerogatives of the jury.

Instruction No. 33, Verdict Form A and B. From the instruction of the Court and from the Verdict Forms A and B, it is impossible for the jury to find for the defendant on one cause of action and not for him on another cause of action. The instruction and the verdict forms are such that the jury must merge its findings on the first and second cause of action, to-wit: the ventilator system and the auger feeder systems. It is impossible to tell from the verdict form whether they found for or against the plaintiff in respect to either of the said causes of action, which are separate transactions. The forms are couched in such a way that the jury could reasonably believe that they had to find either for or against the plaintiff on both causes. Instruction No. 33 is also erroneous.

## POINT VI

## THE COURT ERRED IN FAILING TO GRANT PLAINTIFF A NEW TRIAL.

The plaintiff made a timely motion for a new trial in writing (R. 84), the principal basis of the motion being newly discovered evidence material for the plaintiff, which the plaintiff could not, with reasonable diligence, have discovered and produced at the trial. Attached to the plaintiff's motion were affidavits (R. 86, R. 87, R. 88, R. 89, R. 90, R. 91, R. 92, R. 93, R. 94, R. 95, R. 96, R. 97, R. 98). That on the very last day of the trial, shortly before the matter was submitted to the jury, the plaintiff was informed by one of the plaintiff's witnesses that there had been a water problem that killed many of the turkeys. This matter came as a complete surprise to the plaintiff and at a time when the plaintiff had no opportunity to adequately prepare concerning the source of water supply. An effort was made, during the trial of the matter, to secure witnesses concerning the water problem, and the plaintiff attempted to secure these witnesses by subpoena. A request was made for a continuance, after the defendant had rested and before rebuttal testimony was had, and the Court allowed the plaintiff a few minutes in which to obtain the necessary witnesses. Unfortunately, the plaintiff was not able to obtain witnesses necessary to establish the facts contained in the affidavits attached to its motion for a new trial. The affidavits of Dr. Lawrence Morris, Professor of Animal Husbandry, the affidavit of Dr. Royal A. Bagley, a Veterinary Surgeon and Bacteriologist, were to the effect that the water used by the defendant for his young turkey poults would be of extreme harm to them, if not

fatal. Based upon the analysis examined and the mineral content of the said water, the water could be a substantial causal factor in the death of the poult, which were the subject of the lawsuit. To deny the plaintiff an opportunity to establish by legal proof the deteriorating effect of this water, was a gross injustice and an abuse of discretion. Counsel made every effort to supply the Court with complete information concerning this newly discovered evidence and the affidavits supplied to the court were persuasive and factual. The affidavits were of the highest caliber and of proven reputation. Their opinion concerning the adverse effect of this water upon poult should have entitled the plaintiff to a new trial. This was a classic basis for granting of a new trial under Rule 59(a-4). The Court, in hearing the argument, conceded that counsel for the plaintiff had no opportunity to establish the evidence supplied in the affidavits attached. The record in the case shows that the plaintiff was well prepared, except for a jury trial, and had utilized full and complete discovery methods and had failed to discover this unusual and unexpected circumstance that explains the loss complained of by the defendant on a ground that completely absolved plaintiff from liability. The Court's refusal to grant the plaintiff a new trial is clearly an abuse of discretion of great harm and prejudice to the plaintiff. The plaintiff's efforts and sizeable expense in obtaining this information should not go unobserved and be unavailing in a situation wherein the law provides a remedy, to-wit: Rule 59.

The plaintiff sets forth other ground in its motion for a new trial, substantial parts of which have been argued above under the other counts of error.

## CONCLUSION

The appellant respectfully urges this Court to find that the judgment in favor of the defendant was erroneous and without basis for the following reasons:

1. There never was a sale from the plaintiff to the defendant.
2. There was never a warranty expressed or implied.
3. If there was a warranty, there was never notice given to the plaintiff in a timely and adequate manner.
4. That defendant suffered no damage as a result of alleged breach of warranty concerning the auger feeder units.
5. The errors committed by the Court in the admission of inadmissible evidence and the erroneous instruction of the jury and the failure of the Court to allow the plaintiff a new trial in order to submit the evidence referred to in the affidavits which offer a reasonable and satisfactory explanation of the losses of the defendant, other than caused by the plaintiff.

Respectfully submitted,

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