

1963

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

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 10 1963

JAMES MANUFACTURING CO.,  
a corporation,

*Plaintiff-Appellant,*

vs.

E. I. WILSON,

*Defendant-Respondent.*

Clerk, Supreme Court, Utah

Case No.  
9887

## BRIEF OF RESPONDENT

Appeal from Judgment of the Fifth District Court of  
Juab County

HON. C. NELSON DAY, *Judge*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES MANUFACTURING CO., a corporation,	}	Case No. 9887
<i>Plaintiff-Appellant,</i>		
vs.		
E. I. WILSON,	}	
<i>Defendant-Respondent.</i>		

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

At the outset Respondent cannot agree with Appellant's Statement of the Facts. Indeed, Respondent is constrained to quote the following from a very recent opinion of this Court in the case of *Ortega vs. Thomas*, (Utah 1963) 383 P2d 406:

"In setting forth the basis for appeal defendant's counsel have recited the facts according to their own view of the evidence. The rule is so fundamental that the facts must be viewed in the light most favorable to the party who prevailed below, that it is an indefensible imposition upon this court and opposing counsel not to follow it."

Not only has Appellant failed to refer to any of the reported testimony to support the facts stated by it; but it has failed to have the entire record transmitted to this Court to enable the Court to ascertain what the facts are from the record. This likewise leaves counsel for Respondent at a distinct disadvantage because he cannot refer to portions of the transcript of testimony to correct the Statement of Facts reported by Appellant.

On Page 2 of its brief, Appellant states that Mr. Wilson contacted Mr. Tuttle, a representative of James Manufacturing Company, after Mr. Wilson had seen a sample of a turkey feeder consisting of a small section in operation at a turkey show in Salt Lake City. This does not tell the full story. At the conference with Mr. Tuttle in Salt Lake City, Respondent advised that he needed equipment which would feed 20,000 to 30,000 young turkey poults to be brooded in the coop and adequately provide for their needs. Mr. Tuttle gave him the assurance that the turkey feeder which he had seen in a small section of about twelve feet could be and would be able to operate in lengths of 400 feet (the entire length of Mr. Wilson's proposed coop) and that it was being successfully operated in other places where it had been installed. (Tr. 13) Mr. Tuttle further stated the small turkeys would have no trouble eating from the larger trough (Tr. 14) and Respondent had no reason to doubt him because the small length he had seen operated was filled to the brim. (Tr. 48) Respondent testified that he explained his needs to Mr. Tuttle and relied upon Mr. Tuttle's judgment and skill in determin-

ing whether or not the turkey feeder equipment would operate so as to provide adequate feed for the small turkey poults. Mr. Tuttle also designed and engineered for Mr. Wilson the ventilating system for Respondent's coop and stated that the system would properly ventilate the size coop which Mr. Wilson contemplated constructing and would maintain and provide a uniform temperature for the small turkey poults.

On Page 3 of its brief, Appellant states that from 1952 to 1958 Mr. Wilson dealt with Utah Poultry and Farmers Co-op. While this statement is true, the succeeding statement that Mr. Wilson purchased Jamesway Equipment from Utah Poultry and Farmers Co-op is not correct. Mr. Wilson purchased the feeder equipment and ventilating equipment (involved in the instant action) from Mr. Tuttle, the representative of James Manufacturing Company, Appellant herein. This has been the clam of Mr. Wilson from the inception of this litigation, and was testified to by him both in his deposition and in the trial of the case. The fact that the equipment was purchased from James Manufacturing Company through its representative Ray Tuttle was also acknowledged by Appellant in a letter which it wrote to Mr. Wilson on April 7, 1959. This letter appears as an Exhibit introduced in evidence both by Appellant and Respondent. (Exhibit P-9 and Exhibit No. D-7) In this letter, which was written by A. F. Kellenburg of the Appellant company to Mr. E. I. Wilson, the following statement appears:

“Mr. Ray Tuttle, *who sold this equipment*, is, of course, very familiar with the use of 26-inch ceiling exhaust fans and roof ventilators.” (Emphasis supplied.)

It is, therefore, apparent that the statement on Page 3 of Appellant’s brief that “Mr. Wilson arranged to purchase from Utah Poultry and Farmers Cooperative eight 26 inch ceiling fans” is also incorrect.

Again on Page 3 Appellant states that on February 21, 1958, Mr. Wilson met in the office of Utah Poultry with various representatives of Appellant company and the Utah Poultry, at which time a discussion ensued concerning the practicality of using the feeder equipment sold by James Manufacturing Company. However, as stated on Page 4 of the Statement of Facts, “Mr. Wilson denied this conversation and claims that it never took place.” This is just one of a number of instances in which the evidence is in conflict.

Appellant refers to its Exhibit, P-15, as being evidence of the fact that Respondent purchased the equipment from Utah Poultry and Farmers Co-operative rather than from Appellant company. The Exhibit in question merely indicates that it was billed to Mr. Wilson’s account by Utah Poultry. Mr. Wilson’s testimony and other exhibits show that Respondent was being financed during the 1958 turkey-growing season by Utah Poultry and that all purchases made by him were approved for financing and paid by Utah Poultry, including the purchase of turkey poults and other equipment. The invoice referred to was issued by Utah Poultry to

Respondent in order to charge the item to the latter's account.

Again on Page 4 of the Appellant's brief appears the statement that "Mr. Wilson built the turkey brooder coop and installed the ventilator system himself." While this is true, it is also true that the ventilating system was designed by Mr. Ray Tuttle, a representative of James Manufacturing Company; and the plans and drawings were given to Mr. Wilson, who installed the ventilating system in accordance with such design and plan and upon the representation by Mr. Tuttle that the ventilating equipment would properly ventilate and control the air in the turkey brooding coop. There is no question but that both the ventilating system and the feeding units were installed as they were supposed to be installed, but the issue was whether they worked properly. Although the ventilating system appeared to work satisfactorily, it in fact permitted drafts of air to descend upon the small turkey poults in one area of the coop while air was being withdrawn through the ventilators in another area of the coop thereby chilling the turkey poults and causing their death.

With respect to the feeding equipment, when the feeding equipment was installed in lengths of 400 feet as it was originally intended should be done, the worm-auger designed to carry and distribute the turkey feed uniformly throughout the length of the coop failed to work properly and distribute adequate quantities of feed along the trough. Respondent's evidence was to the effect that the augers would not push the feed more than

approximately fifty feet. (Tr. 17) This was the testimony not only of Mr. Wilson but also of other witnesses. There is no question but that the representatives of James Manufacturing Company came to Nephi to attempt to get the feeder equipment to work properly. In fact, there is a dispute in the testimony as to whether it worked properly when they left, while Mr. Wilson denied that it did. (Tr. 51) Thereafter, Respondent spent considerable time and effort in trying to modify the auger so as to get the equipment to work. (Tr. 21-27) As late as September 1958 Respondent was still adjusting the equipment. Exhibit D-14 is an invoice showing a purchase by Respondent from Appellant of 7 augers which were being modified and "leaded in" to make the equipment work at all. By this process of adjustment and the repeated changing of these augers and adjusting them to the equipment it was finally possible to get them to work to some extent out in the field, although they never did work in the brooding coop. (Tr. 50)

On Page 6 of its brief, Appellant states that after the alleged defect in the feeding units was discovered there was a conversation between Mr. Wilson and Mr. Tuttle at Mr. Wilson's turkey ranch in Nephi, Utah, on or about March 10, 1958. Appellant states: "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." This is not the fact. Mr. Wilson testified and claimed throughout these proceedings that complaint was made to the James Manufacturing Company representatives of the defective feeder equipment, that they sent representatives up to attempt to make

the equipment work, and that they failed to get it to work by the time that they left, so that they were aware at that time of the defective condition of the feeding equipment and of Mr. Wilson's claim in respect thereto. (Tr. 51) Concerning the ventilating equipment, it is true that no claim was made until the early spring of 1959 since it was not discovered until February of 1959 that the ventilating equipment was functioning improperly. As the testimony in the case discloses, drafts were created because the ventilators were not equipped with dampers to prevent a back draft when they were not working.

The statement on Page 6 of Appellant's brief that "Mr. Wilson asked Mr. Tuttle if James Manufacturing Company would sell these units to him direct and finance the units for him" (referring to other turkey feeders which were subsequently purchased) leaves a false impression. It is true that Mr. Wilson purchased these units from James Manufacturing Company just as he purchased the other feeding equipment and ventilating equipment from James Manufacturing Company. The only difference was that the first units were financed through Utah Poultry while the last purchase was financed by James Manufacturing Company. According to Respondent, at no time did he purchase any James Manufacturing Company equipment from the Utah Poultry and Farmers Co-operative.

Appellant's brief goes on to state purported facts with reference to Respondent's failure to give notice of the alleged defective equipment and his claim in respect

thereto. However, we must again advise the Court that all of the testimony with respect to this matter is not before the Court. Respondent testified that he advised the Appellant company representatives from time to time of the defective equipment and his claim in respect thereto. Appellant refers to several items of correspondence between the parties as indicating that no claim was made by Respondent. However, the first letter dated October 2, 1958 from Respondent to James Manufacturing Company's Reliable division at Los Angeles, California (Exhibit P-4) contains the following statement:

“After I had to take out your automatic feeders from my coop I had to buy another type to replace it, and that is what has caused me to have to change my plans on the way I will be able to pay for this. I thought at the time that I had to make this change, that I told you and Ray Tuttle that there would have to be some changes in the arrangements to pay, but from what I can gather from Mark Adamson that doesn't seem to be the case.”

This was not the first notice that the feeder equipment was defective. The matter was first brought to the attention of Appellant when the feeders were installed in the coop in March of 1958 and during the subsequent attempts to correct the feeding equipment so as to get it to work.

Finally, Appellant on Page 7 and 8 of its brief refers to testimony elicited from Dr. Toyal A. Bagley concerning the cause of death of various turkeys. While Dr. Bagley testified that from time to time he “posted”

(that is, examined dead birds by an autopsy) and determined that certain specific birds showed evidence of certain diseases or conditions sufficient to cause death, he also testified that there were many birds examined that did not show definite signs of disease or evidenced conditions which could have been caused by draft or improper ventilation. Nor was he the only person to testify on this matter. Not only did Mr. Wilson testify concerning death from piling up, smothering, and other causes directly attributable to the defective feeding equipment and the ventilating equipment, but also others experienced in the business of brooding and raising turkeys testified concerning their opinion as to the cause of death. None of this testimony is before the Court. In fact, it is significant to point out that the trial of this case lasted a total of four days, during which numerous witnesses were called by the Respondent as well as several by Appellant. The testimony of none of these witnesses has been transcribed and reported to this Court. Only a small part of the testimony of Mr. Wilson is in the record.

The foregoing in brief points out the differences between Respondent and Appellant as to what the facts of this case are; and since the record is not before the Court it must be presumed that the evidence supports the verdict below.

## STATEMENT OF POINTS

Respondent will discuss the various points raised by Appellant in its brief in the same order under the following headings:

### POINT I

ALLEGED ERROR IN ORDERING A JURY TRIAL OVER OBJECTION OF PLAINTIFF.

### POINT II

ALLEGED ERROR OF THE COURT IN EXCLUDING ONE OF PLAINTIFF'S WITNESSES FROM THE COURT-ROOM WHEN PLAINTIFF INVOKED THE EXCLUSION RULE.

### POINT III

ALLEGED ERROR OF THE COURT IN ADMITTING DEFENDANT'S EXHIBIT 8.

### POINT IV

ALLEGED ERROR OF THE COURT IN FAILING TO GRANT PLAINTIFF'S MOTION TO DISMISS AT THE END OF DEFENDANT'S CASE AND IN FAILING TO GRANT A MOTION FOR A DIRECTED VERDICT.

### POINT V

ALLEGED ERRORS IN INSTRUCTIONS.

### POINT VI

ALLEGED ERROR IN FAILING TO GRANT PLAINTIFF A NEW TRIAL.

## ARGUMENT

### POINT I

ALLEGED ERROR IN ORDERING A JURY TRIAL OVER OBJECTION OF PLAINTIFF.

Appellant in its brief states that it requested a non-jury trial, and refers to its Notice of Readiness as evidence thereof. While this writer has not seen the original Notice which was filed (it is apparently not with the record in the Supreme Court), he has seen the copy which was served upon him as counsel for Respondent, and that form does not show that either a jury or a non-jury trial is requested. In fact, that particular line is left blank so that both the words "non" and "jury" appear before the word "trial."

While counsel for Appellant now claims that he was prejudiced by a jury trial, he points to nothing in the record which would so indicate nor does he show that he was unable to prepare for trial before a jury. Actually he should have been aware of the fact that the case was to be tried before a jury on or about September 11 when he received a copy of the letter sent to the trial judge referring to the fact that the jury fee had been paid. He admits he became aware of it on October 24, six days before the trial. Thereafter, the Court further advised counsel for Appellant that if he felt he would be unable to be ready for trial by October 30, the trial could be continued in order to give him more time adequately to prepare. At that time Appellant's position was that Respondent was not entitled to a jury trial because no proper demand had been made and not because of any inconvenience or hardship.

This Court has on several occasions had before it the question of whether a jury trial should be allowed where no proper demand has been made; and in each

instance it has held that the granting or denial of a jury trial is within the discretion of the trial court.

In the case of *Wood vs. R. G. W. Ry. Co.*, 28 U 351, 79 P 182, the Court held that the granting of a jury trial when no proper demand had been made was discretionary with the trial court. We quote:

“We are of the opinion that the court below possessed discretionary authority to direct a trial by jury notwithstanding the parties to the suit may have waived the same.”

In the case of *Davis vs. D. & R. G. Ry. Co.*, 45 U 11, 142 P 705, the Court held:

“Finally it is contended that the court erred in permitting a jury to be called to try the case for the reason that the jury fee was not paid until a few minutes before the case was called for trial. Our constitution (article 1, 10) provides: ‘A jury in civil cases shall be waived unless demanded.’ Comp. Laws 1907, 3129, among other things, provides that a jury must be demanded in writing ‘prior to the time of setting such action for trial, or within such reasonable time thereafter as the court may order, or orally in open court at the time of such setting,’ and the party demanding a jury ‘must at the same time deposit with the clerk the sum of \$5.00, whereupon it shall be the duty of the court to order jurors to be in attendance at the time set for the trial of the cause.’ In this case a jury was properly demanded, but the fee was not paid except as above stated. *The purpose of the demand, as appears from the foregoing statute, is to enable the court to have a jury in attendance when the case comes on for trial.* We think that where a jury is in fact present so that the trial may forthwith proceed

without delay, the adverse party cannot successfully interpose the objection that the jury has not been demanded or the jury fee paid in the precise manner and at the precise time prescribed by the statute. *The provisions in the statute are not intended for the benefit of an adversary.* No doubt if the demand and payment are not made as required by the statute the party has waived his right to require the court to call a jury, but we cannot see how the adverse party can complain if the court, in its discretion, permits a jury to try the case if one is in fact in attendance and no delay is occasioned in proceeding with the case. In our judgment, where a jury is in attendance the court may permit a party to pay the jury fee at any time before a trial, and may impanel a jury to try the case. In principle we see no difference between the case at bar and Ogden Valley, etc., Co. v. Lewis, 125 Pac. 687, where we held the question of calling a jury, where the right to demand one has been waived, to be largely within the discretion of the court, and that the calling of a jury by the court to try a case where a jury has been waived is not error." (Emphasis added.)

Appellant cites no authority in support of its claim, but counsel does state that he was "prohibited from obtaining a new panel under provision 78-46-23." There can be no justification for this statement, because under the provisions of Section 78-46-23, U.C.A. 1953 any person may obtain a new jury venire by paying the fee prescribed by the statute not later than the day preceding the trial. In the instant case Appellant had five days after receiving actual notice of the fact that the case was to be tried to a jury in which to determine whether it was satisfied with the regular panel or whether to ask for a special venire.

As the trial court advised Appellant's counsel, there being no rule in the 5th Judicial District fixing any time in which a Demand for a Jury Trial must be made, the Court had as a practice granted a jury trial when requested at any time prior to the date set for the trial.

## POINT II

### ALLEGED ERROR OF THE COURT IN EXCLUDING ONE OF PLAINTIFF'S WITNESSES FROM THE COURTROOM WHEN PLAINTIFF INVOKED THE EXCLUSION RULE.

Appellant contends that it was prejudiced by the Court excluding all of the witnesses from the Courtroom, including a witness which Appellant planned to use as its chief witness for a "substantial part of the trial". While it is true that the Court, *upon Appellant's request*, did exclude all witnesses, including Ray Tuttle, a sales representative for Appellant Company, who had most of the negotiations and conversations with Respondent concerning the purchase of the equipment, it was not for a substantial part of the trial. The trial lasted four days during which Respondent was on the witness stand for approximately a day and a half. Mr. Tuttle was actually absent from the courtroom less than an hour during the early part of Mr. Wilson's testimony. The record before the Court discloses that the Court convened at 1:30 in the afternoon of October 30th after having impaneled the jury in the forenoon. (Tr. 2) At that time the motion to exclude the witnesses was made by Appellant's counsel and a considerable discussion took place between counsel and the Court concerning whether Mr. Tuttle should also be excluded if other witnesses were excused.

This involved some time as the record shows. (Tr. 2-8) Thereafter, counsel for Defendant made his opening statement which took up a substantial period of time so that Mr. Wilson had just begun to testify at the time of the afternoon recess. As a matter of fact, as stated by Appellant in its brief, objection was made to the testimony of Mr. Wilson with respect to his conversation with Mr. Tuttle because Mr. Tuttle was not in the courtroom and it was at this point that the Court took the afternoon recess. Upon convening after the recess, the Court allowed Mr. Tuttle to come into the courtroom over Respondent's objection, the Court stating:

“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 to the Courtroom. And your objection is denied at this point.” (Tr. 12-13) (Emphasis added.)

As the trial court pointed out, in the case of *Xanakis vs. Garrett Freight Lines, Inc.*, 1 U2d 299, 265 P2d 100, this Court held that it is discretionary with the trial court whether a representative of the opposing party may remain the courtroom although he is not an officer and may be used as a witness. However, it is significant to point out that in the *Xanakis Case* the Plaintiff had invoked the exclusion rule; and the Defendant requested

the privilege of retaining one person in the courtroom. In the present instance, it was the Plaintiff who asked that the rule be invoked and at the same time claimed the right to an exception thereto. As stated in *53 Am. Jur. TRIALS*, Section 32, Page 47 :

“It has been said that where the rule regarding the exclusion of witnesses from the courtroom is invoked, unless some good reason is shown, all of the witnesses should be included.”

This is in keeping with the provisions of Rule 43(f) of the Utah Rules of Civil Procedure, which provides :

“Upon motion of either party, the court shall exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witnesses.”

To the same effect is Section 78-7-4, *U.C.A. 1953*, which provides in part :

“In any cause the Court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause.”

Appellant does not show any prejudice by the witness being absent from the courtroom. As a matter of fact, the testimony elicited from Respondent during the time that Ray Tuttle was absent from the courtroom was preliminary and did not relate to any matters which would have been of direct concern to Mr. Tuttle. However, if counsel for Appellant had been really concerned, he could have obtained a transcript of that testimony from the court reporter with very little expense.

### POINT III

#### ALLEGED ERROR OF THE COURT IN ADMITTING DEFENDANT'S EXHIBIT 8.

While Appellant's point is that the Court improperly admitted Defendant's Exhibit 8 over the objection of the Plaintiff, the discussion in the brief goes to the merits of the controversy and particularly to the sufficiency of the evidence to sustain this verdict. Unfortunately the testimony relating to this matter has not been transcribed and submitted to this Court as a part of the record. However, Respondent will present this matter under Point IV and limit the present discussion to the issue expressed in the heading, whether the trial court erred in admitting into evidence Defendant's Exhibit No. 8. While all of the evidence does not appear to have been transcribed with respect to this matter (Respondent's testimony on cross-examination as to when he located his copy of the letter and the circumstances surrounding its being written), the initial proceedings under which the Exhibit was offered and received do appear to be transcribed and before this Court. (See Tr. pp 37-42)

In his Interrogatories to the Plaintiff, Defendant requested the Plaintiff to answer any written correspondence had taken place between the parties in respect to the performance or use of the equipment or the alleged failure of such equipment to function properly, and asked that copies of all such correspondence whether sent or received be attached to the answer. (R. 11) In its Answers to such inquiry, Appellant stated that one

letter, dated October 2, 1958, was attachd and went on to say, "This does not purport to be all of the correspondence which Mr. Wilson may have engaged in with representatives of James Manufacturing Company. It does represent the only correspondence presently located at the home office." (Tr. 18)

Again at the trial Respondent called upon Appellant to produce the original copy of the letter which Respondent testified had been sent to it. Appellant did not do so and in fact did not at any time during the trial, which lasted for four days, ever attempt to explain why the original of the letter was not produced in court. Under such circumstances the Exhibit (a carbon copy of a letter sent to Appellant by Respondent) would have been admissible as secondary evidence of the contents of the original letter. See Sec. 78-25-16, U.C.A. 1953. However, this Court has previously adopted the view that a carbon copy of a document made in connection with the typing of the original thereof is of equal effect as the original copy and may be received in evidence without first establishing the whereabouts of the original copy.

In the case of *De Michele vs. Insurance Company*, 40 U 312, 120 P 846, this Court laid down the rule of law which has since been applied in this state in respect to the admissability of a carbon copy of a document:

"In *International Harvester Co. of America vs. Elfstrom*, 101 Minn. 263, 112 N. W. 252, 12 L.R.A. (N.S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107, the rule that governs under such circumstances is stated in the headnote as follows:

“ ‘The different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals and either may be introduced in evidence without accounting for the nonproduction of the other.’

“A mere inspection of the proofs of loss kept by Mr. Davis, a duplicate of which had been served on Mr. Brummitt, discloses that it was what is commonly called a carbon copy and was thus a duplicate original within the rule stated by the Supreme Court of Minnesota in the Elfstrom Case just referred to. The precise question here involved was before the Missouri Court of Appeals in *Catron v. Ins. Co.*, 67 Mo. App. 544. In that case the copy of the proofs of loss that was retained by the insured was, over the objection of the company, admitted in evidence without serving notice upon the company to produce the one served upon it and without accounting for that one. The court held that the paper was properly admitted in evidence under the rule which applies to duplicate originals. To the same effect is the case of *Westbrook v. Fulton*, 79 Ala. 510. The district court, therefore, did not err in admitting in evidence respondent's proofs of loss.”

See also *American Surety Company vs. Blake*, 54 Idaho 1, 27 P2d 972, where the Court held that a carbon impression of a letter which was testified was mailed to the Plaintiff company was admissible without showing that a previous demand had been made upon the company to produce the original, quoting from two cases from other jurisdictions, as follows :

“In the case of *Martin & Lanier Paint Co. vs. Daniels*, 27 Ga. App. 302, 108 S. E. 246, the second paragraph of the syllabus reads: ‘Duplicate or carbon copies of letters made by the same pencil at the same time are not ‘copies’, but duplicate originals, and could be introduced in evidence without notice to produce.’ In the case of *Prescott, Wright, Snider Co. v. City of Cherryvale*, 134 Kan. 53 4 P.(2d) 457, 459, the court uses this language: ‘The carbon impression of the letter written on a typewriter made with the same stroke of the keys as was done here may be treated as original, and hence either may be received as primary evidence.’ ”

Respondent submits that it was not necessary to make a prior demand upon Appellant for production of the original copy of the letter; but that in any event such a demand was made through the Interrogatories and at the time of trial, and that Appellant had adequate time to have searched its records to see if it had the original of the letter, the carbon copy of which was introduced in evidence.

#### POINT IV

ALLEGED ERROR OF THE COURT IN FAILING TO GRANT PLAINTIFF’S MOTION TO DISMISS AT THE END OF DEFENDANT’S CASE AND IN FAILING TO GRANT A MOTION FOR A DIRECTED VERDICT.

The general rule as to the review of the weight and sufficiency of the evidence where a full report of the evidence is not brought to the attention of the reviewing court is well stated in 4 *Am. Jur. 2d*, APPEAL AND ERROR, Sec. 523, p. 958, as follows:

“The weight and sufficiency of the evidence cannot ordinarily be reviewed unless all of the evidence is brought before the appellate court by a bill of exceptions or its equivalent.”

The cases cited under this statement include the case of *Sandall vs. Sandall*, 57 U. 150, 193 P 1093, 15 ALR 620, decided by this Court in 1920. As there stated by this Court, alleged error as to the insufficiency of the evidence will not be considered by the Court on appeal where the evidence is not reported to the Court, citing numerous Utah cases. The most recent case on this point is *In Re Voorhees Estate*, 12 U 2d 361, 366 P2d 977, where the Court held that since no transcript of the hearing was made and submitted to the Supreme Court the findings of the trial court would be assumed to be supported by the evidence.

This is in keeping also with the statement of law found in 4 *Am. Jur. 2d*, APPEAL AND ERROR, Section 523, p. 959, as follows :

“If the evidence is not in the record, the presumption is that it was sufficient to sustain the judgment, and that it supported all Findings of Fact and all facts pleaded and essential to the judgment. If only part of the evidence is in the record, the presumption is that the omitted evidence supports the judgment, and that it is sufficient to cure any defects in the evidence brought up.”

In the case of *Grand Truck R. Co. vs. Cummings*, 106 U.S. 700, 27 L.ed 266, 1 S. Ct. 493, the Supreme Court of the United States held that although a refusal to

direct a verdict for the Defendant at the close of Plaintiff's evidence may have been error at the time, when the Defendant afterward introduced evidence in his own behalf, which is not in the record on appeal, it must be presume that at the close of the case the evidence was sufficient to go to the jury.

Appellant contends that there could be no breach of warranty for the feeder units for five reasons, which are set forth on page 19 of its brief. These reasons represent Appellant's position during the trial but unfortunately for it the jury did not accept its theory but found the evidence in favor of Respondent.

1. Appellant claims the auger-type feeder units were sold to Respondent by Utah Poultry and Farmers Co-op and not by Plaintiff. This was an issue which was submitted to the jury (See Instruction 19, R-58) and resolved against the Plaintiff. As a matter of fact, the testimony of Respondent as well as the documentary evidence in this case shows that the feeder units were purchased from Jamesway Manufacturing Company through its agent Ray Tuttle (See Exhibits P-9 and D-7).

2. Appellant claims Defendant purchased the feeder units based upon his observation of a sample. This is not correct. Respondent testified that he contacted Ray Tuttle, Appellant's representative, because he had seen a twelve-foot section of the feeder unit in operation and was interested in it, but that he bought the unit based upon the representations made to him by Ray Tuttle that the auger-type equipment would push the feed for a distance of 400 feet filling the trough with

feed so that the small turkey poults could eat therefrom. (Tr. 13, 14, 48)

3. Appellant further claims the buyer was an experienced turkey operator who ordered a particular piece of merchandise for his own purposes. We agree that Respondent was an experienced turkey operator, but he was not an experienced equipment man and went to Ray Tuttle, who was a sales representative, in order to determine whether the equipment which he had seen would be suitable for his operation and meet his needs. This is similar to the situation involved in the case of *Carver vs. Dunn*, 117 U. 180, 214 P2d, 118, where William G. Carver of Carver Sheet Metal Works in connection with air conditioning equipment which the latter company thereafter sold and installed. Upon a subsequent claim being made by Carver that he was an installer only rather than a seller, the Supreme Court sustained a finding of the trial court that: "The implied warranty of fitness for a particular purpose is not negatived by the Seller's use of a brand name when it is used merely for convenience in identifying the equipment to be installed."

Likewise the Court rejected the claim of the Plaintiff in that case that he was merely an installer instead of a seller and that the purchaser did not rely upon the judgment and skill of the seller in respect to the equipment purchased.

4. Appellant next claims that Respondent gave no notice of the alleged breach of warranty. This is not the case, as the testimony and the documents before

the trial court would show. However, we submit that the matter was properly submitted to the jury and that the jury found the issue against the Appellant in that respect. Instruction No. 25 (R. 65) reads as follows:

“You are instructed that in order to find in favor of the defendant and against the plaintiff on the defendant’s counterclaim you must find that the defendant gave notice to the plaintiff of the alleged breach of promise or warranty within a reasonable time after he knew, or should have known, of such breach of promise or warranty; and you are further instructed that the notice of breach of warranty need take no special form, however, it must refer to particular sales so far as that is practicable, it must fairly advise the seller of the alleged defects, and it must be such as to repel any reference that the buyer has waived the said defects. It must further advise the seller that the buyer intends to look to him for damages for breach.”

5. Finally, Appellant claims that Respondent is estopped from claiming a breach because of his utilization of the equipment. Of course, the statute specifically provides that a buyer of equipment may retain the equipment without waiving his claim for damages. See Section 60-3-9, *U.C.A.* 1953.

Appellant contends not only that the evidence is insufficient to show notice of claimed breach of warranty in respect to the feeder equipment but also in respect to the ventilator equipment which was purchased and installed in February of 1958. As shown by the testimony in this case, discovery of the defective ventilating equipment did not take place until February 1959. (See

Exhibit D-9) The testimony which has not been transcribed would disclose that in the forepart of February, 1959, Respondent was told by Dr. Royal Bagley, (the veterinarian who had made several inspections of the coop and the turkeys, during the 1958 season to attempt to discover the cause of the high death loss) that during an inspection in January 1959 he had observed a downward draft through the ventilators. Respondent immediately checked the ventilating system and determined that when ventilators in one part of the coop were in operation discharging air from the coop, air would be drawn through other ventilators in another part of the coop because there were no dampers to shut out the air. It was further discovered that the canyon breezes which were prevalent during the night time would blow air down through the ventilators into the coops directly onto the small turkeys that were then being brooded in the coops. Immediately steps were taken to correct the situation by the installation of damper-like devices to prevent the air from being drawn into the coops. As Exhibit D-9 discloses the mortality very quickly subsided to practically none.

Appellant states in its brief on page 33 that "it seems unbelievable that a person would have lost upwards of 30,000 young poults without discovering the cause of it." However, there was considerable testimony as to the attempts made to ascertain the cause of the high mortality. Dr. Bagley and others were called in to assist in determining the cause of the loss but the real cause was not discovered until February 1959.

Respondent does not question the provisions of the statute (Section 60-3-9, U.C.A. 1953) requiring notice to the seller of the breach of a promise or warranty within a reasonable time "after the buyer knows, or ought to know, of such breach." Whether such notice has been given, however, is ordinarily a question for the jury. In the case of *Baum vs. Murray*, 23 Wash. 2d 890, 162 P2d 801 (cited with approval by this Court in *Mawhinney vs. Jensen*, 120 U. 142, 232 P2d 769) appears the following:

"The appellant urges that even though it be held that the notice given was sufficient it was not given within a reasonable time and hence usually a mixed question of law and fact. It depends upon such a variety of facts and circumstances in each particular case that it usually resolves itself into a question of fact to be determined by the jury upon proper instructions by the court. . . .

Although it may be said that the facts as to when the notice was given are not in dispute, reasonable minds may well differ as to the conclusion to be drawn from them, and that being the case we would not be justified in holding as a matter of law that the notice either was or was not given within a reasonable time."

The Washington court also went on to say that in giving notice all that is necessary is that the Seller be informed of the facts in some manner sufficient to advise him that a claim is being made to that effect so that the Seller may govern himself accordingly.

Appellant has quoted from the annotation in 41

ALR 2d. 812, 817, but failed to quote that portion of the annotation relating to whether the issue is one for the court or the jury. At page 825 of the annotation appears the following general statement:

“Usually, the question of what constitutes a reasonable time for the buyer to give notice to the seller of a breach of an express warranty, is one of fact for the jury. It has been so held or recognized in the following cases:”

Thereafter appear a great number of cases from various jurisdictions, including California, Georgia, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island and Wisconsin.

In the case of *Whitfield vs. Jessup*, 31 Cal. 2d 826, 193 P2d 1, the Supreme Court of California states:

“Having in mind the appropriate rule under this provision of the law of sales, that ‘It may be taken as axiomatic that what constitutes a reasonable time must be determined from the particular circumstances in the individual case’ (Columbia Axle Co. v. American Automobile Ins. Co., supra, 63 F.2d at page 208), this court cannot say as a matter of law that an unreasonable time had elapsed. Certainly the time did not commence to run before Mrs. Whitfield knew the disease was undulant fever. . . . What constitutes a reasonable time where the goods sold are foods containing latent defects, which are immediately consumed, presents a different question than does the ordinary sale where the article is subject to examination and use which will reveal its defect.”

A Fortiori when all of the evidence as to the time and nature of the notice given for the alleged breach

of warranty is not before this Court, the rule stated in 4 *Am. Jur.* 2d. APPEAL AND ERROR, Section 523, applies, to the effect that the weight and sufficiency of the evidence will be presumed in favor of the judgment.

Respondent respectfully submits that there was no error committed by the trial court in refusing Appellant's motion for dismissal or motion for a directed verdict.

#### POINT V

##### ALLEGED ERRORS IN INSTRUCTIONS.

Complaint is made that the court erred in giving certain instructions to the jury. Although the instructions given by the court are in the record on appeal, there is nothing in the record to indicate to which of these instructions, if any, Appellant ~~ac~~cepted. Rule 5 of the *Utah Rules of Civil Procedure* provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection."

While the Rule further states that notwithstanding the foregoing requirement this Court may in its discretion and in the interests of justice consider alleged error in the giving or failure to give of instructions, there is no way for this Court to know whether the instructions were or were not proper without having the evidence before it on which the instructions were based.

Again referring to 4*Am. Jur.* 2d APPEAL AND ERROR, Section 536, we find the following statement of law:

“Insofar as the correctness of the charge may turn on evidence, its correctness is not open to consideration on appeal when the evidence is not in the record, at least where there is no sufficient statement of facts showing what the evidence tended to prove or that it raised the questions on which the instructions are based.”

As stated above the only matter which can be reviewed by the appellant courts where the evidence is not before it is whether the charge is a correct statement of law. In this respect there is no question but that Instruction No. 11 contains a correct statement of the law.

Section 60-5-7, U.C.A. 1953, (subparagraphs 6 & 7), sets forth the measure of damages for breach of a warranty as follows:

“6. The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing *proximate damage* of a greater amount, is the difference between the value of goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.” (Emphasis added)

Under the foregoing provisions of the statute it was necessary for the Court to define the phrase proximate

damage or proximate cause. However, the pertinent instruction on the measure of damages is Instruction No. 29 (R. 69) which reads as follows:

“You are instructed that Section 60-5-7, Utah Code Annotated 1953, insofar as applicable here provides that ‘The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.’

If you find the issues in favor of the Defendant and against the Plaintiff on Defendant’s Counterclaim, it will be your duty to award the Defendant such damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate him for the damage he has sustained as a proximate result of the breach of warranty.”

Insofar as this writer can remember, this instruction was never excepted by Appellant, although Appellant did object to the definition of the term “proximate cause” as given by the Court in Instruction No. 11 after it had been given.

There was considerable testimony from experts other than Dr. Bagley as to the effect the drafts and exposure caused by the defective equipment would have on the young turkey poults. They gave as their opinion that death under the circumstances related was caused by such condition.

The fact that the jury found in favor of the Respondent against Appellant for only \$8,000.00 of the claim which excluded \$25,000.00 in actual damage is

indicative of the fact that the jury also determined that some of the loss was due to other factors and causes. It seems that Appellant has no basis for complaint when the jury has exonerated it from liability for a substantial portion of the loss which Respondent sustained.

Appellant complains of Instruction No. 16 because it does not give all of the provisions of the statute with respect to implied warranty. However, Respondent overlooks the fact that Instruction No. 23 relates to the exceptions given under the statute and was given at the instance of Appellant to cover the particular situation which Appellant urges in his brief. If Appellant felt that this instruction did not adequately cover the matter he should have directed the Court's attention to it in order that the Court could have given a more complete instruction. However, Respondent's position is that the evidence did not justify the submission to the jury of either of the items contained in subsections 2 or 3 of Section 60-1-15, and therefore that the Court should not have given even the instruction No. 23 referred to.

Insofar as this writer is able to ascertain no exception was taken to the Court's Instruction No. 18. The only claim now made is that is permitted the jury to inquire as to whether the financial transactions were such as were claimed by the Plaintiff in this case or as claimed by the Defendant. Since this was a matter which was in issue between the parties and on which evidence was introduced, there seems to be no reason why this instruction should not have been given.

The Appellant further complains because the Court gave Instruction No. 33 relating to two verdict forms, one verdict form which required the Jury to find against the Defendant on the counterclaim and the other which permitted the Jury to find in favor of the Defendant on the counterclaim without specifying whether it was one or both of the Counts. The form of the verdict is within the discretion of the trial court. The verdict forms permitted the Jury to find against Respondent or in his favor and to assess the amount of the damages if they found he was entitled to recover. Since the evidence was sufficient to find in favor of the Respondent on both counts there can be no reason why Appellant should complain because they were not separated in the verdict form.

## POINT VI

### ALLEGED ERROR IN FAILING TO GRANT PLAINTIFF A NEW TRIAL.

Appellant complains because the Court failed to grant its motion for a new trial. In stating the circumstances giving rise to the matter of moving for a new trial on the grounds of newly discovered evidence, Appellant states that "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 attached to its motion for a new trial." The fact of the matter is that near the close of the trial and some

time before it concluded, Appellant re-subpoened one of Plaintiff's witnesses, to-wit: Glen Wilson, to come back into Court, and also issued a subpoena for two other individuals, one of whom was in fact subpoenaed and came to Court. Mr. Glen Wilson was interrogated at some length by counsel for Appellant in respect to the matter of the water used in connection with the turkey operation in the year in question, and specifically asked whether the water may have caused the death of any of the turkeys. Mr. Wilson testified that turkeys had been brooded on the property for many years prior to 1958-59 with no difficulty and that in the years subsequent thereto the same water had been used until 1962 and that there had been no abnormal mortality resulting therefrom. This evidence was introduced by Appellant, who had subpoenaed Glen Wilson. The other witness did not arrive at the courtroom at the time the case was concluded, and the Court thereupon continued the matter for approximately an hour in order for the witness to be located and brought into court. When the witness arrived, counsel for Appellant asked for a recess for him to interrogate the witness and did so, after which he returned to the courtroom and stated that he did not wish to call this person as a witness. This, of course, could be construed only as indicating that this witness would not testify as the Appellant hoped he would do. Insofar as any other witness is concerned, Appellant asked for no continuance in the

trial in order to obtain additional evidence, nor did he ask the Court to grant permission for further time in which to investigate the matters which apparently he claims came to his attention during the trial.

In view of these circumstances, it is our position that the case of *Lindsey vs. Eccles Hotel Company*, 3 U. 2d 364, 284 P2d 477. is applicable. There the Plaintiff urged that a new trial should have been granted because of newly discovered evidence when the Plaintiff had two days before the trial discovered a material witness who was ill. He did not, however, request the Court for a continuance of the trial or state that one of his important witnesses would not be available at the trial. Thereafter, upon losing the case he filed a motion for a new trial based upon newly discovered evidence. The motion was denied. On appeal this Court affirmed, stating: "In such an atmosphere we cannot say the trial court abused its discretion in refusing to grant a new trial under Rule 59 (a) (4), Utah Rules of Civil Procedure."

Again in the case of *Thorley vs. Kolob Fish and Game Club*, 13 U. 2d 294, 373 P2d 574, in affirming the trial court's refusal to grant a new trial, this Court said:

"Insofar as the denial of appellant's motion for a new trial or for leave to reopen is concerned, we are not persuaded that the court abused its discretion in denying the motion. The main ground for the motion was newly discovered evidence which consisted of testimony of an engineer who has by affidavit stated that the plaintiff could not be credited with placing 8,400 cubic

yards of material in the dam since there was only 3,500 cubic yards moved; and therefore, the plaintiff must have been paid on a lump sum figure basis, and not on a cost per yard basis. This testimony has the tendency of impeaching the plaintiff and there is no reason shown why appellant did not produce such evidence at the trial. This motion was properly denied by the lower court because the appellants did not comply with Rule 59(c) in filing the affidavit timely. (The affidavit was filed 43 days after the entry of judgment). We do not ordinarily disturb the ruling of the trial court in denying a motion for a new trial unless there has been abuse on the part of the trial judge, which is not present here."

In the instant case Appellant assigns no reason why the testimony, if any, which would now be produced could not have been produced at the initial trial. In any event there is no testimony and would be no testimony to the effect that the mineral content of the water used in the year 1958-1959 was the same as that tested by the chemists in the year 1962. Appellant had adequate opportunity to check the water before trial and called two witnesses in respect to the matter. However, Appellant's argument at the time of trial was that the mortality of the turkeys was due to specific diseases which were identified in the autopsies on one or two of the birds and that death did not occur because of any other factors. It now seeks to reverse its position and claim some other cause or contributing cause which is not supported by the evidence since we have no way of determining what the mineral content of the water was in 1958-1959.

We respectfully submit that the matter of whether a new trial should be granted upon newly discovered evidence or otherwise is one which rests in the sound discretion of the trial court, and that in the absence of a clear abuse of discretion the determination of the trial court should not be overruled. Again, since the testimony at the trial is put before this Court, it must presume that the trial court was more familiar with the facts and the evidence and that it acted within its judicial prerogative in denying Appellant's motion for a new trial.

## CONCLUSION

Respondent respectfully urges that the matters raised by Appellant in its brief are without merit and that no error was committed by the trial court in any of the matters referred to. In any event, Respondent desires to refer the Court to Rule 61, U.R.C.P. which provides:

“No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order or anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties.”

In this connection, Respondent respectfully submits that Appellant has failed to show wherein anything done or omitted to be done by the trial court resulted in any substantial injustice, and therefore the judgment should be affirmed.

Respectfully submitted,

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