

1952

## R. M. Scoville v. Kellogg Sales Company : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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R. M. SCOVILLE,

*Appellant,*

— vs. —

KELLOGG SALES COMPANY,

*Respondent.*

Case No.  
7824

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APPELLANT'S REPLY BRIEF

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FILED

FEB 25 1933

E. R. CALLISTER, JR.

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Clerk, Supreme Court *Attorneys for Appellant*

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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The first and second ground stated by the Company for a directed verdict are general and in substance state only that the plaintiff failed to prove a prima facie case; and that a verdict of no cause of action should be granted. The first two grounds are necessarily included in the third ground or conversely the third ground merely lends specification to the first two grounds. The trial judge granted a motion to strike parole evidence as being in violation of the 1948-1949 writings. The trial judge then

directed a verdict of no cause of action without specifying grounds for the verdict. The granting of the motion to strike the evidence in effect held that the 1949 writing set out the contract of Mr. Scoville and the Company. It follows that the affirmative defenses were not ruled upon. However, as the Company has raised the questions of the affirmative defenses in its brief, the lack of merit in the Company's defenses will be pointed out in the argument to follow.

### I.

WHERE THERE WAS SUFFICIENT EVIDENCE TO SUBSTANTIATE A VERDICT THAT TIMELY OBJECTION WAS MADE TO AN ACCOUNT AND THE REBUTTAL OF ANY PRESUMPTION OF ACCURACY OF AN ACCOUNT IT WAS ERROR TO DIRECT A VERDICT FOR A PARTY RELYING ON AN ACCOUNT STATED AS A DEFENSE TO AN ACTION ON A CONTRACT.

### II.

WHERE THERE WAS NO EVIDENCE THAT PAYMENT OF AN AMOUNT ADMITTED TO BE DUE WAS MADE UPON THE CONDITION THAT ACCEPTANCE OF SUCH PAYMENT SHOULD BE IN FULL SATISFACTION OF ALL CLAIMS, IT WAS ERROR TO DIRECT A VERDICT FOR THE PARTY RELYING UPON PURPORTED ACCORD AND SATISFACTION AS A DEFENSE TO AN ACTION ON A CONTRACT.

### III.

WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT A VERDICT THAT TIMELY OBJECTION WAS MADE TO WRITING PURPORTED TO BE CONTRACT, AND ELEMENTS OF ESTOPPEL WERE NOT IN EVIDENCE, IT WAS ERROR TO DIRECT A VERDICT FOR A PARTY RELYING UPON ESTOPPEL TO ASSERT THE CONTRACT OF THE OTHER PARTY.

## I.

WHERE THERE WAS SUFFICIENT EVIDENCE TO SUBSTANTIATE A VERDICT THAT TIMELY OBJECTION WAS MADE TO AN ACCOUNT AND THE REBUTTAL OF ANY PRESUMPTION OF ACCURACY OF AN ACCOUNT IT WAS ERROR TO DIRECT A VERDICT FOR A PARTY RELYING ON AN ACCOUNT STATED AS A DEFENSE TO AN ACTION ON A CONTRACT.

Mr. Scoville testified as to protests made as to the 1949 writing (R. 28, 61, 62, 71, and 72). Such protests were made to Mr. Williams and to Mr. Borsum. These protests were made subsequent to the 1949 writing. In January 1950 Mr. Borsum stated to Mr. Scoville that Mr. Scoville should go along with the 1949 writing. If Mr. Scoville complained to higher-ups in the company, Mr. Borsum, Mr. Scoville, and Mr. Williams would all lose their jobs. On January 30, 1950, the Company sent a check accompanied with a statement which statement reflected a sum equal to the sum stated on the check and setting out the word "Bonus." This check was returned to the Company for the purpose of having all withholding tax taken out which was done. The Company attempts to rely upon this statement as an account stated upon the ground that Mr. Scoville would not protest such statement for quite some time. Where an account is received and no protest is made within a reasonable time, a presumption arises that such account is an agreed account. This presumption of accuracy is rebuttable. The prior protest of Mr. Scoville, his illness, his fear of losing his job, and his consideration for the loss of jobs by other employees, i.e., Mr. Williams and Mr. Borsum, were all

facts which should have been submitted to the jury for the purpose of determining whether or not Mr. Scoville made protest within a reasonable time. The conversations Mr. Scoville had regarding the \$2 per ton credit for 1949, his protests regarding the 1949 writing, the fact that he was ill during February and March of 1950, the fear of losing his job, and the fact that nothing more could be done by Mr. Scoville other than leave the service of the company at considerable financial loss to him and his age which would act as a detriment to him in obtaining a new job should have gone to the jury as evidence of rebuttal as evidence of accuracy of the account. There was no evidence of actual assent to the 1949 writing. It was error for the trial court to direct a verdict on the ground that there was an account stated between Mr. Scoville and the Company.

In WM. F. GODBE v. BRIGHAM YOUNG, 1 Utah 55, the plaintiff advanced goods to the defendant of the value of \$10,020.27. On February 12, 1856, an account was rendered to the plaintiff by the defendant for said sum to which the defendant made no objection. On May 30, 1868, the defendant paid the plaintiff the sum of \$5000. The plaintiff claimed judgment for the balance. The defendant in his answer denied an account stated.

The jury rendered a verdict for the plaintiff, and the defendant appealed. While other grounds were assigned as error, this honorable court at page 58 states:

“The Court was correct in charging the jury that if the defendant did not object within a reasonable time to an account presented to him, his assent may be presumed, and will support an ac-

tion upon an account stated; and also that, 'If when an account is rendered no objection is made to it, it is to be considered liquidated from the time it is rendered.' (Walden v. Sherburne, 15 Johns., 409; Hall v. Morrison, 3 Bosw. 520; Case v. Hotchkiss, 3 Abb. N. S. 381; Hutchinson v. Bank, 48 Barb., 302; Crane v. Hardman, 4 E. D. Smith, 448; Bainbridge v. Wilcocks, Baldw., 536—3rd Circ. Pa.)”

The Godbe case was affirmed as to the account stated and was reversed on a question regarding interest payments and other matters not determinative in this action. (82 US 250, 15 Wall 562).

In BENITES v. HAMPTON, (Utah, 1884), 3 Utah 369, plaintiff brought an action on an account stated for goods sold and delivered. Plaintiff at the time of trial did not establish that the defendant was a party to the account or grounds upon which the defendant was to be held or the time which the defendant held the account without protest. This honorable court held that it was correct not to submit the case to the jury. In so holding, the court set out the rule regarding the failure to protest an account within a reasonable time.

At page 373, this honorable court stated: (See following).

“The effect of an account stated is to establish prima facie the accuracy of the balance found due without other proof. The burden of proving that an account is stated or settled is upon the party making such allegation; but it is not always necessary in proving an account stated to show an actual examination of the items of account or de-

mands of the respective parties thereto, or that there has been an express assent or agreement on the part of the party sought to be held liable upon an alleged account stated that it is correct. This may be implied from circumstances. If an account be presented for payment by one party thereto to the other, and the other party, upon an examination of it and after a reasonable time has elapsed, makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and this presumption is so strong that a suit can be maintained upon the account as an account stated, without proof other than that the account was presented with a demand for payment, that reasonable time and opportunity have passed since its presentation for a proper examination of it, and to make objections to it if there be any: *Lockwood v. Thorne*, 11 N. Y. 170. The same rule applies where a party to an account sends for payment to the other, by mail; if the party to whom it is sent does not, after a reasonable time has passed, express any objection to it, his silence unexplained is an implied admission that he has none, that the account is correct, and truly thought not conclusively stated: *Terry v. Sickels*, 13 Cal. 427.

“But it is not an estoppel; its effect is to establish prima facie the accuracy of balance due as stated in the account without further proof: *Lockwood v. Thorne*, 18 N.Y. 285.”

In *BURRASTON v. FIRST NATIONAL BANK OF NEPHI*, (Utah, 1900) 22 Utah 328, plaintiff brought an action to recover a sum of money alleged to be due the plaintiff on deposits of money made with the defendant between 1886 and 1894. Defendant alleged an account stated. The plaintiff during the period in question made

numerous deposits, issued numerous checks and signed notes charged against the account. The bank from time to time sent statements to the plaintiff showing the condition of the account and returning the cancelled checks and notes which were paid. During the entire period no objections to the account as reflected by the statement were made; nor did the plaintiff challenge the validity or genuineness of the checks and notes so returned.

After the account was closed and final statement rendered, the plaintiff and one Hague went to the defendant's place of business for the purpose of examining the account. After such examination, plaintiff made the statement to the president of the bank that the account was "all right." Subsequent to the examination with Hague the plaintiff returned to the bank with an attorney for the purpose of examining the account. After this second examination, the attorney expressed himself as being satisfied with the account and stated that it was all right. The plaintiff made no objection for nearly three years after he received the itemized account.

At page 337, the court stated:

"The record shows that the notes and checks in question when paid were returned to Burraston, many of which were handed to him in person by the cashier at different times, and others were transmitted to him through the mail; and on no occasion did he make any objection to or challenge the validity of the notes so paid by him, or the checks issued against his account that were paid, cancelled and sent or handed to him by the bank. This, coupled with the fact that he received from time to time statements showing the condition of

his account while he was doing business with the bank, to which statements he made no objections and offered no corrections, together with the further fact that after he ceased doing business with the bank, he received an itemized statement of all the different transactions, including those relating to the notes, he had with the bank, to which statement he made no objection for more than three years after its receipt by him, we think was, at least prima facie proof of the execution of the notes and the issuing of the checks in question by Burraston. We are of the opinion and so hold that the books, notes and checks were properly admitted in evidence.

“Counsel for defendant contend that there was an account stated between the parties which completely ended plaintiff’s right of action. We have made a critical examination of the record and are decidedly of the opinion that the evidence conclusively showed that there was an account stated. There was no conflict in the evidence on this point. In fact the testimony of Burraston tended to support this theory of the case.

“Defendant’s motion for a non-suit, made at the conclusion of the testimony for plaintiff, and after he had rested his case, should have been granted, as he failed to make out a prima facie case against the defendant.”

In this case the Company attempts to assert failure to object by Mr. Scoville which at most would give rise to a presumption of correctness as was held in the Burraston, supra, regarding establishing the correct of the notes and checks.

Mr. Scoville did not go over his account with the

Company and state it was "all right" as Burraston stated in the Burraston case, *supra*. Mr. Scoville did not go over the Company's books with his attorney to the satisfaction of the attorney.

There may have been agreement between the parties as to tonnages, but agreement as to tonnages would not operate to foreclose a question as to the credit per ton as the settlement of the credit was not within the contemplation of the parties. *Salt Lake Engineering Works v. Utah Concrete Pipe Co.*, (1916) 49 Utah 53, and *Eagle Lumber Co. v. Burton Lumber Co.*, (1923) 62 Utah 491.

In 1 C.J.S., section 37, page 715

"Retention for an unreasonable time, without objection, of a statement of an account rendered showing the net balance due *prima facie* shows assent to its correctness and, therefore, is *prima facie* evidence of an account stated. Assent to the correctness of a statement of accounts is ordinarily implied from failure to object to it within a reasonable time, and, in the absence of extenuating circumstances, as shown *infra* Section 37 b, the account becomes an account stated.

"Failure to object to an account does not, as against the party to whom it was presented, conclusively establish its character as an account stated, but merely raises a presumption to that effect, and his conduct therein is open to explanation.

"The presumption of assent to the correctness of an account retained without objection may be rebutted by showing facts inconsistent with it or tending to negative assent, as by showing that the party to whom it was rendered was ill or absent

from home, that he had no opportunity to examine the account, that he was waiting for a more detailed account which he had requested or which had been promised him, that he had no knowledge of his interests in the matters contained in the account, that he expected shortly to see the other party and make his objections in person, or that the expected meeting was prevented or delayed by some unforeseen casualty. So the natural inference to be drawn from an omission to object might be rebutted by a showing that the parties were in litigation with reference to the matter when the account was rendered or within a short time thereafter, that they had agreed to determine the amount at a later time, or had agreed expressly or by course of dealing that no technical defaults should be insisted upon.

“Failure to object to the statement of an account may be explained by a showing that there had been an acquiescence in a previous, different statement involving the same transactions, or that the parties had already come to a disagreement when the account was rendered, as where the party sought to be charged had protested at his first opportunity and the account was never corrected, or where there had been a previous disclaimer of all liability on the account. So, where previous protests had gone unheeded and nothing more could be done except break a contract, which would entail great financial risk, failure to make further protests cannot be interpreted as assent.”

In 1 C.J.S., section 65, page 754

“In an action on an account stated questions of fact should ordinarily be submitted to the jury. Thus, where a settlement of dates, names, and figures so arranged as not to be self-explanatory,

the question as to whether a particular transaction is included therein is for the jury; but where it contains no words of doubtful meaning the construction of the stated account is a matter of law for the court.

“Where the facts are undisputed, the question as to whether an account was stated is for the court, as where the statement is evidenced wholly by correspondence; but where the evidence is conflicting the question must be determined by the jury under proper instructions.

“Under the rule that an account rendered and retained for an unreasonable time without objection becomes an account stated, the authorities are in apparent conflict as to whether the question of what constitutes a reasonable time should be determined by the court as a matter of law or by the jury as a matter of fact. In some jurisdictions it is held that when the facts are clear the question of the length of time deemed reasonable is determinable by the court as a matter of law and that where the evidence is not clear, or conflict appears therein, the facts should be submitted to the jury under appropriate instructions. In other jurisdictions, however, it is held that what is a reasonable time, whether the failure to object was for such length of time as would warrant an inference of assent, and whether the person to whom an account is rendered ought sooner to have discovered the errors therein, are questions of fact for the jury.

“Where defendants made their objections to a person falsely claiming to represent plaintiff, it is a question of fact whether under the circumstances any inference of assent could be drawn from his failure to object to plaintiff.”

It is evident that further protest regarding the state-

ment in question to Mr. Borsum or Mr. Williams would be an idle gesture by him. Mr. Scoville was relegated to the position of making protests to persons higher in the hierarchy of the Company. Protests to the person rendering the statement should be sufficient. In this case it was enclosed in the letter from Mr. Williams dated January 30, 1950. There was evidence that protests regarding the credits to Mr. Williams account were made. Evidence of these protests should have gone to the jury for their consideration. As excuse for any further protest by Mr. Scoville at the time or subsequent to receipt of any account received by Mr. Scoville.

Evidence of the protests to Williams and Borsum about the 1949 writing, the illness of Mr. Scoville early in 1950, and the loss of employment by Mr. Scoville should have gone to jury as evidence or rebuttal of the presumption of accuracy, if any such presumption arose.

It was error for the trial to direct a verdict for the Company on the ground of account stated, there being sufficient evidence to establish that protest was made within a reasonable time and sufficient evidence to rebut any presumption that might have arisen.

## II.

WHERE THERE WAS NO EVIDENCE THAT PAYMENT OF AN AMOUNT ADMITTED TO BE DUE WAS MADE UPON THE CONDITION THAT ACCEPTANCE OF SUCH PAYMENT SHOULD BE IN FULL SATISFACTION OF ALL CLAIMS, IT WAS ERROR TO DIRECT A VERDICT FOR THE PARTY RELYING UPON PURPORTED ACCORD AND SATISFACTION AS A DEFENSE TO AN ACTION ON A CONTRACT.

Mr. Scoville testified as to protests made about the

1949 writing (R. 28, 61, 62, 71, and 72). He also testified as to a conversation during which Mr. Borsum stated that he should go along with the 1949 writing or that Mr. Scoville, Mr. Williams and Mr. Borsum would lose their jobs. There was no evidence regarding any conversations or circumstances showing any intent to settle a disputed claim. In January 1950, the Company enclosed a check in a letter stating that the check was "to cover a Bonus for the year 1949." This check was returned by Mr. Scoville for the purpose of having withholding taxes deducted. Another check was sent to him in the sum equal to the first check less the withholding taxes. There is no statement on the check regarding it being in settlement of all the claims Mr. Scoville had against the Company. This would not establish a defense of accord and satisfaction. The payment of an amount conceded to be due is not sufficient consideration upon which to found a contract of accord and satisfaction. The payment of a sum conceded to be due upon the consideration that, if accepted it shall be in full settlement of the claim, may be sufficient consideration, but no such condition was made. The conversations, the check or the statement setting out a figure as "Bonus" equal to the amount of the first check do not in anyway establish a condition.

The last check was enclosed in a letter stating "Attached find check in the amount of \$1,026.88 representing balance due on your Bonus for 1949." The check itself did not have any condition as to acceptance written on it.

The mere statement "balance due on your Bonus for 1949" is not a statement of condition that the check is

tendered upon the condition that, if accepted, such acceptance is in full settlement of all claims for bonus for the year 1949. The statement is more indicative of an intent to show that such sum represents the credits in favor of Mr. Scoville in his account and makes no indication of condition of settlement.

There is no evidence upon which a contract of accord and satisfaction could be founded.

The trial court having directed a verdict, the facts must be considered and applied in the most favorable light to the plaintiff's cause of action.

In *RALPH A. BADGER & CO. v. FIDELITY BUILDING & LOAN ASS'N.*, (Utah, 1938) 75 Pac. 2d. 669, 94 Utah 97, the court at page 676 quotes with approval 1 Am. Jur. page 217, section 4, that:

"The discharge of claims by way of Accord and Satisfaction is dependent upon a contract express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of Accord and Satisfaction. Therefore, the following elements are essential: (1) a proper subject matter, (2) competent parties, (3) an assent or meeting of the minds of the parties, and (4) a consideration.

"To the same effect see 1 C.J.S., Accord and Satisfaction, page 469, section 3 (a). This court in a number of cases has followed the rule thus enunciated: *SMOOT v. CHECKETTS*, 41 Utah 211, 125 P. 412, Ann. Cas. 1915c, 1113; *ROHWER v. BURRELL*, 42 Utah 510, 134 P. 573; *GRAY v. BULLEN*, 50 Utah 270, 167 P. 683; *ASHTON v. SKEEN*, 85 Utah 489, 39 P. 2d 1073; *SULLIVAN v. BENEFICIAL LIFE INS. CO.*, Utah, 64 P. 2d

351; *BROWNING v. EQUITABLE LIFE ASSUR. SOC. OF U.S.*, Utah, 72 P. 2d 1060, 1068. In the case last cited we said: 'An Accord is an agreement between parties, one to give or perform, the other to receive or accept, such agreed payment or performance in satisfaction of a claim. The "satisfaction" is the consummation of such agreement. There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration. Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration.'

In *SULLIVAN v. BENEFICIAL LIFE INSURANCE COMPANY*, (Utah, 1937), 94 Utah 532, 64 Pac. 2nd. 351, the defendant asserted accord and satisfaction was established by a letter returning a premium and the check enclosed therewith in which this court held that there is nothing in the correspondence or the check itself or in the attitude of the defendant company to show any intent or attempt to settle a disputed claim.

In *BROWNING v. EQUITABLE LIFE ASSUR. SOC. OF THE U.S.* (Utah, 1937), 72 Pac. 2nd. 1060, 94 Utah 532, plaintiff brought an action to recover the difference between payments made under an insurance policy for partial and total disabilities which were paid in full by the defendant. Defendant relied upon the accord and satisfaction as a defense. This honorable court held there was no accord and satisfaction, that payment by the company was merely the payment of an amount

less than was owed, there being no dispute as to the amount of the claim. That the plaintiff's claim was merely for less than was actually due.

In *BELL v. JONES* (Utah, 1941), 110 Pac. 2nd. 327, 100 Utah 87, where an agreement provided that \$150 be accepted "in full satisfaction of the existing obligation of \$400." And there was nothing stated that the \$400 obligation was the only obligation existing between the parties. This honorable court held there was no indication of an intent to release any other obligation due upon the payment of \$150 other than the payment of the obligation of \$400.

In *ASHTON v. SKEEN et al*, (Utah, 1935), 39 Pac. 2nd. 1073, 85 Utah 489, the matter was disposed of on grounds that accord and satisfaction did not apply because of the attorney-client relationship. The court through Mr. Justice Wade stated at page 1077 regarding cases set out in the opinion in that case:

"These cases generally lay down the rule that, where there is an unliquidated claim or a bona fide dispute, the tender of a sum less than claimed, on condition that, if accepted, it will be in full satisfaction of the greater claim, amounts to an Accord and Satisfaction. A number of these cases hold that, where a personal check is tendered *on the condition*, if cashed, it will be in full satisfaction of the disputed claim, and the party receiving it cashes it and at the same time or later notifies the sender that it is only applied on account, it can only be accepted on the same conditions as it is tendered, and, as a matter of law, amounts to an accord and satisfaction." (*Italics added.*)

The Company raised the defense of accord and satis-

faction. The Company had the burden of establishing all of the elements of a contract of accord and satisfaction. As the case was disposed of upon a motion for a directed verdict all of the evidence must be considered and applied in the most favorable light to the plaintiff and if there is any substantial evidence upon which the jury could find for the plaintiff under the pleadings the trial court must submit the issue to the jury and cannot direct a verdict.

Under the rule as announced by this honorable court, the facts must establish (1) that the claim was unliquidated or that a bona fide dispute existed between Mr. Scoville and the company; (2) that the Company agree to give in payment of the claim and that Mr. Scoville agree to accept a payment in satisfaction of the claim; (3) that such payment was made and accepted in satisfaction of the claim.

In this case there was no accord and satisfaction between Mr. Scoville and the Company. There is no evidence in the record which would substantiate an agreement of payment and the acceptance of that payment as being in full satisfaction of Mr. Scoville's claim for credits due his account computed at the rate of \$2 per ton feed sold. Nor is there any evidence that there was any payment made upon the condition that it be accepted as full satisfaction of Mr. Scoville's claim.

The Company attempts to rely upon rules regarding the tending of payment of an amount conceded to be due upon the condition that if accepted the payment would be in full satisfaction of all of the claims of Mr. Scoville. Such a condition did not exist. There is no evidence to

support such a theory. There is no evidence in the record that the payments made to Mr. Scoville were made upon a condition that, if accepted, such payments would operate as a satisfaction of any claim that Mr. Scoville might have. Such payments were made under statements and circumstances indicating that they were mere payments of amounts conceded to be due Mr. Scoville. Such payments will not establish accord and satisfaction.

The Company relies upon the case of CALIFORNIA BEAN GROWERS' ASSOCIATION v. RINDGE LAND & NAVIGATION COMPANY, 248 Pac. 658, 47 A.L.R. 904, (Cal., 1926). The wording in the letters relied upon to establish an accord and satisfaction read as follows:

"We have pleasure in enclosing herewith our check No. 2525 for \$22,744.73 representing a final settlement of the 1918 account, with the exception of two small lots which remain unsold; these were enumerated on a statement which we recently forwarded to you."

and:

"This amount represents the final settlement on your 1918 account."

The words used in the letters sent by the Company in this case do not indicate the settlement of any claim as the words used in the California Bean Growers' case, *Supra*. The words used in the letter of January 30, 1950, were "Please find enclosed our check in the amount of \$3544.35 to cover Bonus for the year 1949."

The words used in the letter of April 25, 1950, sent by Mr. Borsum are "Attached find check in the amount of \$1,026.88 representing balance due on your bonus for

1949.” These words do not indicate that there is a settlement of any claim; nor is there any testimony which would even indicate that at the time of the letters it was within the contemplation of the parties that a settlement or compromise of a claim was intended.

The checks received and endorsed by Mr. Scoville did not indicate that they were sent in settlement of a claim.

The Company in its brief states that in *WALLACE v. CRAWFORD*, 69 Pac. 2nd. 455 (Cal., 1937), “Where an accounting on rice payments was sent and received and showed the amount sold to defendant by plaintiff together with a check for that amount. It was held that such constituted an account stated and accord and satisfaction:” (Respondent’s Brief page 37).

Such statement is incorrect. In that case the court at page 461 said:

“Since the court failed to adopt findings regarding the question of a stated account and with respect to the doctrine of accord and satisfaction, we shall not attempt to determine whether the conduct of the parties under all the circumstances of this case determinese this action adversely to the appellant on those issues. We are of the opinion it is unnecessary to do so.”

In *HANSEN v. FRESNO JERSEY FARM DAIRY CO.*, 31 Pac. 2nd. 359, plaintiff and defendant entered into an agreement under the terms of which the plaintiff was to sell and deliver to the defendant so many gallons of milk per day at an agreed price. The defendant, each month sent to the plaintiff a statement of milk delivered

during the preceding month accompanied by a check covering the amount shown to be due by the statement, but which amount was subject to certain deductions made by the defendant. The amount in the statement was less than the agreed price and allowable deductions. The plaintiff retained the proceeds from the checks. Plaintiff protested the reductions to the defendant and Dairymans League. The defendant alleged an account stated upon each of the accounts defendant had rendered and paid to the plaintiff of the contract.

Upon appeal, the Supreme Court of California held that in view of the protest made by the plaintiff and in view of the contractual relationship between the parties and the requirement for monthly accounts and payments such court could not say that the trial court was not justified in concluding that there was no assent on the part of the plaintiff to the accuracy of the account. The court held that assuming the question in accord and satisfaction was raised. This court did not feel justified in disturbing the trial court's conclusion that there was no accord and satisfaction.

In 1 California Jurisprudence p. 134, section 10, it is said:

“The great weight of authority in American courts undoubtedly supports the rule that where the amount due is in dispute and a check for an amount less than that claimed is sent to the creditor *with a statement that it is sent in full satisfaction of the claim*, and the tender is accomplished by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim,

*and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction.*" (Italics added.)

In 1 Am. Jur., pp. 225-6, section 24 of the chapter on Accord and satisfaction, it is said:

"The creditor to whom a check is sent or other remittance made as payment in full has the option either of accepting it on the conditions on which it is sent, or of rejecting it. *When a claim is in dispute, and the debtor sends to his creditor a check or other remittance which he clearly states is in full payment of the claim and the creditor accepts the remittance or collects the check without objection* it is generally recognized that this constitutes a good accord and satisfaction. The moment the creditor endorses and collects the check, *with knowledge that it was offered only upon condition,* he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete. It is not necessary that it be shown that the creditor knows the legal effect of his acceptance of the check, as the mere acceptance will be regarded as assent." (Italics added.)

It should be noted that according to the above authorities the payment must be sent to the creditor with a statement that it is sent in "full satisfaction of the claim" or that such tender of payment must be accomplished by such actions or declarations as to amount, to a condition that if the check is accepted it is accepted in full satisfaction and that the creditor must so understand

that the acceptance by him constitutes an accord and satisfaction. These conditions do not exist in this case. The words used by the Company do not establish that they are tendered in full satisfaction by all the claims of Mr. Scoville against the Company. The words of condition cannot be read into the letters in which the checks were transmitted, and there was no statement of condition set out on the checks.

In *KRUGER v. GEER*, (Supreme Court of New York, Appellate Term, 1899), 56 N. Y. Supp. 1015, plaintiff brought an action to recover balance due on collection of judgment. Defendant as attorney for the plaintiff collected a judgment of which the defendant was admittedly entitled to \$372.62. Defendant sent plaintiff \$168.86, retaining the balance for services rendered, as he claims, in other matters. Accompanying the check was a receipted statement and a letter. The material part of the letter stated: "Enclosed you will find a statement of account, my receipted bill for professional services since our last settlement, and a check for \$166.86, being the balance due you." The check did not make any declaration, or even indication, that it was intended as full settlement. Upon receipt of the letter the plaintiff complained to the defendant. The testimony was conflicting as to whether the defendant stated to the plaintiff that he could retain the check as full settlement or return it to the defendant at the time the plaintiff complained to the defendant. Verdict and judgment for the plaintiff and defendant appealed the Supreme Court of New York held that the verdict of the jury resolved the conflicting

testimony, and unless an implied agreement can be inferred from the conceded facts, there was no accord and satisfaction. At page 1016 et seq the Court said:

“The only fact from which such an inference could be drawn is the retention by the plaintiff of the receipted statement, and of a check which was not coupled with any condition that it should be received in full payment. That isolated fact is insufficient to meet the requirements of an accord, and, in connection with the surrounding circumstances, strips the defense of all merit.”

In *INGRAM v. SAUSET et al*, (Supreme Court of Washington, 1922), 209 Pac. 699, defendant mailed purported statement to the plaintiff which was itemized and set out the words “Balance due — \$232.16.” and enclosed a check in the sum admitted by the statement to be due. Plaintiff testified that he had the idea from the statement that the defendant intended that the check should be payment in full. The Supreme Court of Washington held that whatever the intention was the check was not offered in full satisfaction of the plaintiff’s claim. Though the defendant hoped it would be so accepted.

In *LONG v. NEW ENGLAND SECURITIES CO.*, Springfield Court of Appeals, 1927, 297 SW 715, the plaintiff brought an action to recover the balance due on a commission having received checks enclosed in a letter stating: “And we enclose herewith check \$225 and \$360, respectively, in payment of your commission.” The court held the letter and checks did not constitute an offer in full satisfaction of the claim of the creditor.

In 34 A.L.R. at page 1052, the editors state:

“When the assent of the creditor is sought to be inferred from the acceptance of a less sum than that claimed to be due, *the fact that such amount is offered in full discharge of the whole claim must have been communicated to the creditor in some unmistakable manner.*”

Mere payment of an amount admittedly due on a claim for a greater sum is not sufficient consideration for a contract of accord and satisfaction of the greater claim. As set out by the foregoing authorities the payment of the amount admittedly due must be made upon the condition that payment and the acceptance of such payment is in full satisfaction of the claim. Such condition must be communicated to the person to whom tender is made in some unmistakable manner. The Company did not tender any payments upon condition that acceptance be made as satisfaction of Mr. Scoville's entire claim. Mere use of the terms “balance due,” or a check accompanied by a statement setting out a sum equal to that of a check reciting that the sum is “Bonus” is not enough.

It would be error for the trial court to direct a verdict for the Company on the ground that there was an accord and satisfaction.

### III.

WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT A VERDICT THAT TIMELY OBJECTION WAS MADE TO WRITING PURPORTED TO BE CONTRACT, AND ELEMENTS OF ESTOPPEL WERE NOT IN EVIDENCE, IT WAS ERROR TO DIRECT A VERDICT FOR A PARTY RELYING UPON ESTOPPEL TO ASSERT THE CONTRACT OF THE OTHER PARTY.

The primary duty of Mr. Scoville was the sale of

feed sold by the Company. The great bulk of the feed sold by Mr. Scoville was sold under a turkey finance program. The feed was sold under contracts entered into by the Company and the turkey raisers. The contracts were entered into and approved by the Company by July 1, 1949. The sales of the Company had been contracted for and the primary purpose of Mr. Scoville's employment had been served. During the latter part of July or early August the Company attempts to assert a writing as the contract between Mr. Scoville and the Company. There is sufficient evidence to sustain a verdict that Mr. Scoville protested to Mr. Williams who signed the Bulletin setting out the bonus plan for 1948, and to Mr. Borsum who signed the writing upon which the Company relies to establish a contract for the year 1949.

The last protest to Mr. Williams or Mr. Borsum was made on January 10, 1950. It is apparent that further protest to these gentlemen would be futile. At this point in so far as the year 1949 is concerned a debtor creditor relationship existed. It cannot be said that there was a further continuance of any agreement of the year of 1949. At this point Mr. Scoville was entitled to rely upon his remedies as a creditor.

There was sufficient evidence to support a verdict that timely objection was made, that there was no continuation of performance under the purported contract between Mr. Scoville and the Company.

There is no evidence, in fact every fact is to the contrary, that there was an acceptance of benefits and an attempt to avoid the obligations under the purported contract.

Nor is there any evidence that there was any misrepresentation by Mr. Scoville upon which the Company relied to their detriment.

It was error for the trial court to direct a verdict for the Company on the ground that there was an estoppel.

### CONCLUSION

Mr. Scoville's theory of the case, that a contract implied in fact and in law arose in January, 1949, to the effect that a \$2.00 per ton of feed sold be credited to his account during the year 1949, should have gone to the jury. There was sufficient evidence, when considered in the most favorable light for Mr. Scoville to require submission of the case to the jury.

In addition to the evidence regarding an implied contract in fact there was a presumption giving rise to a contract providing for \$2.00 per ton of feed sold for the year, 1949. The plan was based on annual production. His employment under the Company's plan was on a yearly basis. The continuation of Mr. Scoville in his employment in law and in fact created a new contract providing for the \$2.00 per ton of feed sold credited to his account.

There is no merit to the claim of the Company that they have affirmative defenses as a matter of law.

There was sufficient evidence upon which to sustain a verdict by the jury that objection to the purported account rendered by the Company was made by Mr. Scoville within a reasonable time. There was also sufficient evidence to sustain a verdict by the jury that if objection was not made within a reasonable time, the presumption of accuracy of the account was rebutted.

There is no evidence that payment by the Company of 1949 bonus checks were made upon the condition that acceptance would be in full satisfaction of Mr. Scoville's claim in support of the Company's theory of accord and satisfaction.

The case is not a proper case for the application of the concept of estoppel. Protest regarding the 1949 writing was made and there was no contradiction of the evidence. The Company did not change its position to its detriment. There is no evidence of misrepresentation or reliance. The Company attempted to foist a writing upon Mr. Scoville as being the agreement of the parties. Such writing was not the contract of the parties. Mr. Scoville is not estopped to assert the true agreement of the parties.

Respectfully submitted,

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