

1952

# R. M. Scoville v. Kellogg Sales Company : Brief of Appellant

Utah Supreme Court

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E. R. Callister, Jr.; Reese C. Anderson; Attorneys for Appellant;

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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 BRIEF

Appeal from the District Court of Salt Lake County,  
Utah, Clarence E. Baker, Judge

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FILED  
NOV 10 1902

E. R. CALLISTER, JR.  
REESE C. ANDERSON  
*Attorneys for Appellant*

Clerk, Supreme Court, Utah

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In the  
Supreme Court of the State of  
Utah

H. M. Giblee, Plaintiff, Appellant

vs. V.S.

Mrs. Emma Lowrey, Defendant,  
Respondent

Brief for Appellant

Lucy H. Rigley

Counsel for Appellant

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## Opinions Below

The opinion of the District Court Sanpete County Utah <sup>7TH District</sup> reported on page 15 of the Abstract of Transcript of the Record.

## Jurisdiction

The judgment of the Seventh District Court of Sanpete County, Utah was entered September 27, 1938. ~~(15)~~ for the defendant and against the plaintiff <sup>(15)</sup> move notice of intention to file for a new trial was filed by appellant October 10, 1938 (15) motion for New Trial was filed October 17, 1938 (16) Order denying motion for new trial was filed June 19, 1939. Order denying motion for a new trial filed June 19, 1939. ~~At~~ (19) Notice of Appeal. filed December 15, 1939 (19) Bill of Exceptions filed January 7, 1940

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IN THE SUPREME COURT  
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STATE OF UTAH

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R. M. SCOVILLE,

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— vs. —

KELLOGG SALES COMPANY,

*Respondent.*

Case No. 7824

---

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an action on a contract seeking to recover certain bonus payments claimed by the appellant for the year 1949 while the appellant was employed by respondent. The case was tried in the District Court of Salt Lake County, State of Utah. Trial was before a Judge and jury. The trial Judge granted certain of the respondent's motions to strike certain testimony on the ground that it violates the Parol Evidence Rule (R. 87), and certain other testimony on the ground that the witness, Leslie Carl Borsum had no authority to bind the Kellogg Sales Company (R. 87). The trial Judge then di-



rected a verdict and judgment was entered thereon on the 8th day of February, 1952 (R. 93). Notice of appeal was filed March 5, 1952 (R. 94). Designation of record on appeal was filed March 5, 1952 (R. 95), and an order extending the time for filing the record on appeal to the 21st day of April, 1952 was entered on the 11th day of April, 1952 (R. 97).

## STATEMENT OF FACTS

The appellant, Mr. R. M. Scoville, 65 years of age in April 1952 (R. 13), of Salt Lake City, Utah, was employed by the respondent, Kellogg Sales Company, as a salesman and serviceman on August 15, 1944 (R. 13). For convenience and clarity the appellant will hereinafter be referred to as Mr. Scoville and the respondent will hereinafter be referred to as the Company. At that time his territory included the State of Nebraska and Kansas (R. 13). In July of 1946 Mr. Scoville was transferred to Battle Creek, Michigan (R. 13) where he conducted fur feed business for the Company. In March of 1947 Mr. Scoville was transferred to the western territory for the purpose of conducting fur feed business for the Company (R. 14). This territory consisted of that area from Denver to the west coast of the United States (R. 14). At this time Mr. Scoville was paid a salary, given expenses and furnished an automobile (R. 14). In April of 1947, Mrs. Tena Jensen, the Production Manager of the Company's Omaha plant, requested Mr. Scoville to undertake to sell turkey feed produced by the Companys' plant in Omaha, Nebraska (R. 17).

The Company sells turkey feed under a plan known as a turkey finance program (R. 57). The Company furnished Mr. Scoville and the dealers with contract forms (R. 57). Under the terms of this agreement the Company agreed to finance the feed for turkeys raised by the farmers. Estimates of the consumers need for feed would be set out in the contract (R. 59). In the fall of the year the jobbers handling the feed would have the contract forms. The dealers would then get the farmers to sign the contracts (R. 58). After these contracts were signed by the farmers they were then sent to Mr. Williams, an employee of the Company (R. 24), at Omaha (R. 58). After the contracts were approved by the Company's Omaha office, a copy of the contract was then sent to Mr. Scoville (R. 58). The farmers generally used more than the estimates contained in the contracts (R. 59). Of the farmers entering into the contracts, very few terminated or cancelled the contracts (R. 59). As the turkey growing season progressed the dealer or Mr. Scoville would notify the Omaha plant how much feed to ship at a given time (R. 60). At the time this feed was shipped by the Omaha plant a copy of the invoice was sent to Mr. Scoville (R. 60), and from these invoices the tonnages were figured by Mr. Scoville (R. 60). The feed was shipped to the jobber or sub-dealers and the jobber or sub-dealer would then deliver to the farmers (R. 59). All of the contracts were written and signed by the 1st of July, 1949 (R. 81). The last contract accepted on turkey feed by July 1, 1949 (R. 81).

During the year 1947, Mr. Scoville sold approxi-

mately 100 cars of turkey feed, averaging 30 tons per car (R. 17). In the last part of January, 1948, Mr. Scoville was advised that he would receive a bonus of \$2.00 a ton on all protein feed sold in the territory (R. 14). This notification consisted of a bulletin which was introduced and admitted (R. 16) as appellant's Exhibit A, which is Bulletin 148-3, dated January 29, 1948, and initialed by W. H. Williams, Jr., Sales Manager, Mixed Feed Department, Omaha Plant (R. 14). For the year 1948 appellant did not receive any bonus under this arrangement (R. 18). The reason for not receiving any bonus being that Mr. Scoville's expenses had used up practically all of his bonus and he was building for another year during the year 1948 (R. 18).

During the fall of 1948 the respondent started talking about the 1949 contracts with the farmers (R. 20). This discussion of the 1949 contracts was started as soon as the dressing of the 1948 turkeys was commenced. When the 1949 contracts were sold in the fall of the year 1948, they were added to the next year's business. Contracts for the sale of turkey feed were written from the fall of 1948 until June or July of 1949 (R. 20).

After receipt of Bulletin 148-3, appellant's Exhibit A, Mr. Scoville worked longer hours, worked Saturdays and Sundays (R. 71) and increased the accounts (R. 70) and the supply of feed that was shipped to the western territory (R. 71). In 1948 when the business became quite large, Mrs. Scoville, wife of the appellant, accompanied Mr. Scoville at all times and kept all the records

with respect to the conduct of the business (R. 76).

On November 4, 1948, Mr. Leslie Carl Borsum, Sales Manager for the United States for the Company (R. 21) and Mrs. Scoville had breakfast together. The conversation which took place was such that a reasonable inference could be drawn that the bonus plan for 1949 would be the same as that for 1948 (R. 23-24, 77-78).

On April 16, 1949, while Mr. Scoville, Mr. L. C. Borsum and Mr. W. H. Williams, an employee of the Kellogg Sales Company (R. 24), were attending a sales meeting (R. 24) in Omaha, Nebraska, these gentlemen and Mrs. Scoville met in Mr. Scoville's hotel room. At that time there was some conversation about the number of contracts for that year, the amount of feed that it would take to fill the amount of the contracts, and whether or not the Company could make that amount of feed (R. 25). This conversation took place before the regular sales meeting (R. 25). At this time there was a conversation from which the only reasonable inference that can be drawn is that the 1949 bonus would be computed at the same rate as the 1948 bonus was computed, i.e., a \$2.00 per ton bonus.

During late July or early August, 1949, at a sales meeting in Omaha, Nebraska, Mr. Scoville had a conversation with Mr. Borsum from which the only inference that may be drawn is that the bonus of \$2.00 per ton of feed would be paid on the sales made by Mr. Scoville for the year 1949 (R. 27).

On July 24, 1949, Mr. Scoville wrote a letter to Mr. Borsum (which was admitted as the Company's Exhibit

10), from which an inference may be drawn that Mr. Borsum had written to Mr. Scoville with respect to a bonus plan for 1949, in which letter Mr. Scoville said he could not give his immediate reaction to the proposal of Mr. Borsum in that it might be taken that Mr. Scoville would receive no bonus for 1949.

On August 2, 1949, Mr. Borsum wrote to Mr. Scoville stating that with reference to a bonus plan for 1949, Mr. Scoville was practically assured of a bonus, and invited Mr. Scoville to attend a sales meeting in Omaha, Nebraska on August 8th and 9th, 1949, (this letter was admitted in evidence as the Company's exhibit number 11 (R. 65) ).

During the last part of July or early part of August, Mr. Scoville received a writing which is captioned "Bonus Plan for 1949" (and which was admitted as Mr. Scoville's Exhibit B) (R. 20) setting out certain figures to be paid as a bonus on sales for the year 1949. This was the first written notice received by Mr. Scoville which indicated that the figures to be used by the Company in computing the 1949 bonus would be different than that used to compute the 1948 bonus (R. 19). Mr. Scoville protested several times orally to Mr. Williams and Mr. Borsum about the writing which he received as setting out figures to be used by the Company in computing the 1949 bonus (R. 72, R. 28). Mr. Scoville did not make too active a protest about the 1949 writing because he was afraid of losing his job. He felt that he was too old a man to lose the job and have to go out and hunt for a new one (R. 71).



On January 9, 1950, Mr. Williams, Mr. Borsum and Mr. Scoville attended the Turkey Show in Minneapolis, Minnesota (R. 28). After Mr. Scoville and Mr. Borsum had retired, they had a conversation during which it was said by Mr. Borsum that Mr. Scoville would have to follow the new schedule of the bonus which was issued in August, that if Mr. Scoville took it up with the higher-ups, Mr. Borsum, Mr. Williams and Mr. Scoville would all lose their jobs, that if Mr. Scoville would keep his mouth shut, Mr. Scoville could stay on indefinitely as long as he was doing the job (R. 29). (Also, R. 71, which is not quite as strong.)

On January 10, 1950, Mr. Williams wrote to Mr. Scoville, stating that there would be no bonus plan for 1950, but that Mr. Scoville's wages were raised for the year 1950. (Company's Exhibit 3, admitted in evidence - R. 45).

On January 30, 1950, Mr. Williams wrote to Mr. Scoville enclosing a check drawn in the sum of \$3,544.35, in which it was stated that the amount of the bonus was based on Mr. William's figures, and that such was subject to change. (Admitted in evidence as Company's Exhibit 6 at R. 49). On February 10, 1950, Mr. Williams wrote to Mr. Scoville acknowledging receipt of the check in the sum of \$3,544.35, and stated that the Battle Creek office had been instructed to forward a check less Mr. Scoville's withholding tax. Mr. Williams also stated that a corrected check would be sent as soon as Mrs. Helen L. Scoville's (R. 49) figures had been audited (admitted as the Company's Exhibit 7, R. 50).

On February 3, 1950, while in Billings, Montana, Mr. Scoville became ill (R. 56); he was suffering from high blood pressure (R. 68). He left Billings, Montana and went to Phoenix, Arizona, as prescribed by a doctor (R. 68). He remained in Phoenix, Arizona until April 1, 1950, (R. 68) at which time he returned to Utah and his employment (R. 56).

On February 6, 1950, a check in the sum of \$2,981.92, was drawn by the Company (admitted as the Company's Exhibit 4, at R. 54). This check was endorsed by Mr. Scoville (R. 48).

On April 24, 1950, a check was drawn by the Kellogg Sales Company in the sum of \$1,026.98, upon a Battle Creek, Michigan Bank (admitted as the Company's Exhibit 4, R. 54) which was transmitted by a letter written by Mr. Borsum (R. 51) dated April 25, 1950, which mentioned the check (letter admitted as the Company's Exhibit 8, R. 51). This check was endorsed by Mr. Scoville (R. 48).

On January 1, 1951, Mr. Scoville was retired from the Company (R. 68). Prior to his retirement Mr. Borsum offered Mr. Scoville a position in Ohio, under the terms of which Mr. Scoville was required to sell so many tons of feed every month to stay in the position, if he did not make the sales, he was out of the job (R. 69). On December 30, 1950, Mr. Scoville wrote to Mr. Lyle C. Roll, an employee of the Company, protesting the handling of the bonus for 1949, (letter admitted as the Company's Exhibit 12, R. 67). On January 27, 1951, Mr. Scoville wrote to Mr. Roll, protesting the handling of the

1949 bonus, and denying that the signing of the checks paid by the Company was an acceptance of settlement of his claim. (Letter admitted as the Company's Exhibit 13, R. 68).

At the close of Mr. Scoville's case, the Company, through counsel, renewed its motion to strike the conversations objected to during the trial on the ground that they attempted to vary the terms of the 1948-1949 contracts by parol evidence and the Company's motion to strike statements made by Mr. Borsum on the ground that his conversations would not bind the Company in that he was not an employee of the Company, but the employee of a different Company (R. 84-85). The Company then moved for a dismissal on a directed verdict (R. 85). The court granted the Company's motions to strike the testimony and directed a verdict (R. 87) upon which judgment was entered thereon (R. 93).

## STATEMENT OF POINTS

### POINT I

PAROL EVIDENCE OF AN ORAL AGREEMENT WHICH IS SEPARATE AND APART FROM A PRIOR WRITTEN AGREEMENT OR A MODIFICATION OF A PRIOR WRITTEN AGREEMENT MAY BE ADMITTED IN EVIDENCE AND THE TRIAL COURT ERRED IN EXCLUDING SUCH PAROL EVIDENCE AS BEING IN VIOLATION OF THE PAROL EVIDENCE RULE.

### POINT II

PAROL EVIDENCE TO PROVE A PRIOR ORAL AGREEMENT DIFFERENT IN ITS TERMS FROM A PURPORTED



WRITTEN AGREEMENT IS ADMISSIBLE AND THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ADDUCED TO PROVE THE VERBAL AGREEMENT DIFFERENT IN ITS TERMS FROM THE PURPORTED WRITTEN AGREEMENT, WHICH WAS NEVER ASSENTED TO.

### POINT III

THE TESTIMONY OF MR. SCOVILLE WAS TO THE EFFECT THAT L. C. BORSUM WAS THE SALES MANAGER FOR THE ENTIRE UNITED STATES OF THE KELLOGG SALES COMPANY. CONVERSATIONS BETWEEN THE SAID MR. SCOVILLE AND THE SAID L. C. BORSUM TENDED TO ESTABLISH THE RELATIONSHIP OF A SALESMAN AND HIS SUPERIOR IN THE SAME ORGANIZATION, AND THE DOCUMENTARY EVIDENCE INTRODUCED AT TRIAL WAS CONSISTENT WITH AND TENDED TO ESTABLISH THE SAME FACTS AS TESTIFIED TO BY MR. SCOVILLE. THE TRIAL COURT ERRED IN STRIKING SUCH TESTIMONY ON THE GROUNDS THAT SUCH WAS NOT BINDING UPON THE KELLOGG SALES COMPANY.

### POINT IV

THE TRIAL COURT ERRED IN DIRECTING A VERDICT FOR THE COMPANY AFTER WRONGLY EXCLUDING TESTIMONY WHICH TENDED TO ESTABLISH THE CASE FOR MR. SCOVILLE.

### POINT I

PAROL EVIDENCE OF AN ORAL AGREEMENT WHICH IS SEPARATE AND APART FROM A PRIOR WRITTEN AGREEMENT OR A MODIFICATION OF A PRIOR WRITTEN AGREEMENT MAY BE ADMITTED IN EVIDENCE AND THE TRIAL COURT ERRED IN EXCLUDING SUCH PAROL EVIDENCE AS BEING IN VIOLATION OF THE PAROL EVIDENCE RULE.

On January 29, 1948, the Company put in writing a bonus plan for the year 1948, called Bulletin 148-3. This bonus plan was to end, be changed or continue at the end of 1948 as per the terms of the writing. On November 4, 1948, Mr. Scoville entered into a conversation with Mr. Borsum from which a reasonable inference might be drawn that the same rate would be used in determining a 1949 bonus. On April 16, 1949, Mr. Scoville, Mr. Borsum, Mr. Williams and Mrs. Scoville had a conversation from which it might be found that the rate used in determining the 1949 bonus would be the same as that used in 1948, and which was accepted. The trial court granted the Company's motion to strike the testimony as to such conversations on the grounds that they altered or varied the written bonus plan for 1948. These conversations either created a new agreement with respect to the 1949 bonus, modified the 1948 writing to include 1949, or were in complete conformity with the 1948 Bulletin.

In January of 1948, Kellogg Sales Company sent out a Bulletin numbered 148-3 which was introduced at the trial as Exhibit A for Mr. Scoville (admitted R. 16) which stated as follows:

"Bulletin 148-3  
Omaha, Nebraska  
January 29, 1948

Field Servicemen:

As we discussed in our meeting at Battle Creek, the bonus plan for 1948 will be as follows. We will credit your account on the basis of \$2.00 per ton allowance on all feed including Sweet Mix

Pellets, but not including Hominy Feed, and charge against your account what is paid to you in the way of salary, expenses, operation of the car and your living expenses, but not including automobile depreciation. At the close of 1948 whatever amount is over will be paid at the end of the year.

Of course this means that we will look at the situation at the end of 1948 and see if this is the best possible bonus arrangement, both from the standpoint of the individual salesman and the Kellogg Company.

W. H. Williams, Jr.  
Sales Manager  
Mixed Feed Dept.  
Omaha Plant

WHW :mc

(s) W. H. W. Jr."

On November 4, 1948, Mr. Leslie Carl Borsum, Sales Manager for the United States for the Company (R. 21), Mr. Scoville and Mrs. Helen Scoville, had breakfast together at Portland, Oregon, while attending the Oregon Fur Show. Mr. Scoville testified as follows:

R. 22:

Q. Will you state, Mr. Scoville, the best you can recall what was said by yourself, or Mr. Borsum, or by your wife?

MR. AADNESEN: Just a minute, a question on voir dire.

VOIR DIRE EXAMINATION  
BY MR. AADNESEN:

Q. Is this conversation purporting to relate to any bonus plans?

A. I think it does.

MR. AADNESEN: Your Honor, I object to it on the basis it would be parole evidence to attempt to vary any written contracts which are not before this court and upon the further ground it would be inadmissible under the circumstances just discussed with you on the matter it is an attempt to bind Kellogg Sales Company by a statement of Kellogg Company.

MR. CALLISTER: If the court please, it is no attempt to vary a written contract, it is an attempt to vary one not received until July or August, 1949. This conversation took place the latter part of 1948.

THE COURT: The objection is overruled.

Q. (BY MR. CALLISTER) Do you recall my last question, Mr. Scoville?

A. What was said at the breakfast table, is that correct?

Q. That is correct.

A. Well, I had sent Mr. Borsum a letter on what I figured I would do in the year 1949 and he asked me if I honestly thought I would sell 500 cars of feed and I told him the figures absolutely showed that way.

And he said, "That is a lot of feed."

I said: "I know it, and it is going to mean a lot of hard work," and I said: "With the bonus figured the way they are now, I am also going to make a lot of money, around \$30,000.00."

He said he didn't see any reason why the bonus should be changed at that time, there

was nothing that should be changed in the setup for 1949. He also stated the thing he would want me to do, when I got my bonus, was to buy a home and settle down in it. I had been traveling too much.

He said: "I think if you would spend about \$4,000.00 for a home it would be adequate for you and Helen to live in." (R. 24).

Mrs. Helen L. Scoville testified with respect to certain conversations as follows:

R. 76, 77, 78:

Q. Mrs. Scoville, you have heard your husband testify to a conversation that took place late in November or early in December, 1948 at the Multnomah Hotel in Portland, Oregon?

A. Yes.

Q. Between Mr. Scoville and Mr. Borsum and yourself?

A. That is right.

Q. Will you relate what was said at that conversation between the parties present?

A. Well, I think I can relate —

MR. AADNESEN: Of course my objection will be renewed to this, may I request the record show any conversations that may be brought out, my objection goes to them and subject to my motion to strike made heretofore, and kept under advisement until arguments?

THE COURT: Yes.

Q. (BY MR. CALLISTER) Will you relate the conversation?



- A. As nearly as I can recall, of course, we had all been interested in the two-dollar-per-ton bonus because it meant quite a lot to us.

This morning, under discussion at the breakfast table, at the Multnomah, between Mr. Borsum, Mr. Scoville and myself, they were talking about tonnage.

Mr. Scoville told Mr. Borsum the approximate tonnage for 1949, and it was at this fox and mink show, and, of course, our discussion on the tonnage was in regard to turkey business in this section of the country, and Mr. Scoville told Mr. Borsum it would be close to 500 cars of feed. And Mr. Borsum said: "Well, that was an awful lot of feed, and if it was possible to sell that much out here, Mr. Scoville would certainly be justified in having some help."

Mr. Scoville said yes he would try to manage it alone until late summer or early fall, then he would like to have help, and he called attention to the fact —

MR. AADNESEN: I object to it, I think counsel should ask questions and have them answer. We are getting an extraneous matter in here.

- Q. (BY MR. CALLISTER) State who said what.

- A. Mr. Scoville said: "Mr. Borsum, this will run into quite a lot of bonus for us, this \$2.00 per ton."

MR. AADNESEN: I would like at this time to have questions and answers so we can make objections if we desire.

Q. (BY MR. CALLISTER) What did Mr. Borsum say to that?

A. They were interested in the feed business, the volume of the feed business, he realized we would get quite a bonus out of it, and the tonnage had been up to that time 500 cars, which would net us about \$30,000.00.

He emphatically stated he would like very much for us to find a home somewhere and buy it, he thought a \$4,000.00 home would be adequate for us. (R. 78).

On April 16, 1949, while Mr. Scoville, Mr. Leslie Carl Borsum and Mr. W. H. Williams, an employee of the Kellogg Sales Company, (R. 24) were attending a sales meeting (R. 24) in Omaha, Nebraska, these gentlemen and Mrs. Scoville met in Mr. Scoville's hotel room. At this time a conversation took place about which Mr. Scoville testified as follows:

R. 25-26:

Q. And will you state when and where that conversation took place, and who was present?

A. Well, before the meeting took place Mr. Borsum and Mr. Williams both were in our room upstairs, and my wife and myself was there. And we talked about the number of contracts in and the amount of feed it would take to fill the amount of contracts that was in, and whether they could make the feed or not at that time.

Q. Mr. Scoville, will you say, as best you can, what you said and what any other individual said?

A. Well, I asked —

MR. AADNESEN: Your Honor, on the same basis as before, one question on voir dire.

Q. (Voir Dire by Mr. Aadnesen) Did this conversation pertain to anything about 1948 and '49 bonus?

A. It will.

MR. AADNESEN: I renew my objection on the basis it is an attempt to vary written evidence before the Court on parole evidence, and on the ground it is an attempt to bind the employees of one organization against another.

THE COURT: Well, the objection is overruled.

Q. (BY MR. CALLISTER) Well, go ahead, Mr. Scoville, and relate that conversation and designate who said what?

A. I asked both Mr. Borsum and Mr. Williams if they thought I had about enough turkey contracts in this territory.

And Mr. Williams stated I should go ahead and sell all the contracts I could. He could make the feed. He was in charge of the Omaha Plant.

I said: "You are also going to pay me a lot of bonus too."

He said: "We have got money to pay the bonus, you sell the feed."

Then we left the room and started downstairs.

Q. Who left the room?

A. Mr. Borsum, Mr. Williams and myself left the room to go downstairs.



I said: "Bill, it will take a lot of feed, and I will get a lot of bonus, it is pretty near time to shut off out there."

He said: "We will take care of you, Kellogg has got plenty of money and we will make the feed." (R. 26).

Mrs. Helen L. Scoville testified with respect to such conversation as follows:

R. 79:

Q. You heard your husband testify to a conversation which took place in your hotel room at the Fontenell Hotel in Omaha, Nebraska?

A. Yes.

Q. April 16, 1949?

A. Yes.

Q. Were you present?

A. I was.

Q. Who else was present?

A. Mr. Borsum, Mr. Williams and Mr. Scoville.

Q. Was anything else said at that time regarding bonus, or amount of feed to be sold in this territory? Answer "yes" or "no."

A. Yes.

Q. Who said it?

A. Mr. Scoville asked —

MR. AADNESEN: The record still shows my objection?

THE COURT: Yes.

A. Mr. Scoville said that the amount of contracts

he had written would be between four hundred thousand and four hundred fifty thousand turkeys, and he suggested they not take any more contracts and Mr. Williams said they were "feed hungry," and they would continue to take contracts as long as they were justified. Mr. Scoville reminded him again that \$2.00 bonus was still in effect, and there was never anything contrary said to that. (R. 79).

In *Parker vs. Webber County Irrigation District*, 1925, 65 Utah 354 236 Pac. 1105, an employee brought an action on a written contract of employment to recover for the employee's services. The employer offered to prove that the terms of the contract respecting the date it should become effective were modified by mutual agreement between the employee and the employer. The trial court rejected the proffered evidence upon the ground that the modification is made on the same day that the contract is dated and ruled that if the evidence were admitted, it would, in effect, vary the terms of the written instrument by parol evidence. Upon appeal it was held by this Honorable Court that a written instrument may be modified at anytime after the execution of that written instrument. The court stating that the time intervening between the execution of the instrument and its modification is not controlling. It is the intention of the parties to modify the agreement in some particular that controls.

In *Hogan vs. Swayze*, 1925, 65 Utah 380, 237 Pac. 1097 at page 389, the court said:

It may be said in passing, however, that the

rule that parol evidence is inadmissible to vary the terms of a plain, unambiguous instrument, in writing, is elementary in this and every other jurisdiction of the country. Consequently it is not necessary to cite the authorities relied on by appellants. Such authorities apply only to prior or contemporaneous agreements, and not to agreements subsequently made. Prior or contemporaneous agreements are held to be merged in the written contract, and therefore not admissible in evidence.

In 32 C.J.S., Section 1004, at page 1008, the rule is stated as follows:

The rule forbidding the admission of parol or extrinsic evidence to alter, vary, or contradict a written instrument does not apply so as to prohibit the establishment by parol of an agreement between the parties to a writing, entered into subsequent to the time when the written instrument was executed, notwithstanding such agreement may have the effect of adding to, changing, modifying, or even altogether abrogating the contract of the parties as evidenced by the writing; for the parol evidence does not in any way deny that the original agreement of the parties was that which the writing purports to express, but merely goes to show that the parties have exercised their right to change or abrogate the same, or to make a new and independent contract. It must appear, however, that there was a subsequent agreement, mere negotiations or representations being insufficient; and it is usually necessary that such subsequent agreement be founded on a consideration, although a contrary view has been asserted. Where the statutes prohibit, as they do in some jurisdictions, the alteration of a written contract

by a subsequent unexecuted parol agreement, such an agreement cannot of course be shown. However, proof of alteration by an executed oral agreement is usually permitted under such statutes; and such a statute has been held inapplicable to an entirely new agreement valid in itself. While parol evidence of a subsequent agreement between the parties on a point not covered by the original contract is admissible, such evidence is inadmissible for the purpose of explaining or interpreting an unambiguous written contract.

By inference from the last paragraph in Bulletin 148-3, Exhibit A for Mr. Scoville, the rate used in computing the bonus for 1948 would either cease and determine as of the end of the year 1948; continue for the year 1949 at the same rate, or a new rate would be determined and used in computing a 1949 bonus. The only inference which may be drawn from the conversations which were objected to by the Company are that there would be a bonus for the year 1949 and that such bonus would be computed at the rate of \$2.00 per ton of feed sold as which is the same rate provided in the agreement of 1948.

If the view is taken that the 1948 bonus plan ceased and determined at the end of the year 1948, then such conversations would establish a new oral agreement providing for a bonus at the rate of \$2.00 per ton for the year 1949. This in effect would be entering into a new bonus contract and admission of the testimony would be permissible under the Parol Evidence Rule.

If the view is taken that the conversations extended the 1948 agreement to include the year 1949, then such

parol evidence would be an oral modification of a prior written agreement. Parol evidence of an oral modification of a prior written agreement is admissible under the Parol Evidence Rule.

If the view is taken that such conversations indicated that the Company had taken a look at the situation at the end of 1948 and determined that the \$2.00 bonus "is the best possible bonus arrangement, both from the standpoint of the individual salesmen and the Kellogg Company," then such conversations are completely in accord with the writing referred to as Bulletin 148-3, and such testimony is not subject to objection upon the ground that it violates the Parol Evidence Rule in that such is entirely consistent with the writing and does not alter, vary or contradict the writing, and consequently is admissible.

The conversations objected to and stricken did not alter, did not vary, and did not contradict the written instrument. Such conversations either formed a subsequent new agreement, modified the old agreement, or were in complete conformity with the written instrument.

## POINT II

PAROL EVIDENCE TO PROVE A PRIOR ORAL AGREEMENT DIFFERENT IN ITS TERMS FROM A PURPORTED WRITTEN AGREEMENT IS ADMISSIBLE AND THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY ADDUCED TO PROVE THE VERBAL AGREEMENT DIFFERENT IN ITS TERMS FROM THE PURPORTED WRITTEN AGREEMENT, WHICH WAS NEVER ASSENTED TO.

Mr. Scoville offered certain parol evidence of an



oral agreement for the payment of a bonus in the year 1949. The conversations out of which such oral agreement arose took place in 1948 and April of 1949. There is also a presumption in law that an implied agreement as to the payment of a bonus at the rate claimed by Mr. Scoville arose. A writing was introduced in evidence which was subsequent to the conversations and the implied agreement, which writing the Company contended was a written agreement which could not be modified by parol evidence.

There was no evidence from which it could be found as a matter of law that Mr. Scoville gave his assent to the written instrument as being the agreement of the parties. Mr. Scoville contested the written instrument as not being the agreement of the parties. The trial court granted the Company's motion to strike the parol evidence of the oral agreement on the ground that it was an attempt to alter or vary the terms of the 1949 writing.

The trial court erred in granting such motion as the writing was not admitted to be the agreement of the parties and parol evidence is admissible to show that a different agreement existed and the writing was not assented to as being the agreement of the parties.

The Bulletin numbered 148-3, dated January 29, 1948, set out under Point I, *supra*, which established a 1948 bonus plan, was such that it might be inferred that the rate used in computing the bonus for 1948 would either cease and determine as of the end of the year 1948, continue for the year 1949 at the same rate, or that the Company would determine a new rate to be used in computing a 1949 bonus.

The conversation that took place on November 4, 1948 between Mr. Scoville, Mr. Borsum and Mrs. Helen L. Scoville, was such that a reasonable inference that might be drawn therefrom is that a bonus plan would be established providing the same bonus for the year 1949 as was used to compute the bonus for 1948. The testimony as to this conversation is set out under Point I, *supra*.

The conversation which took place on April 16, 1949, the testimony as to which is set out under Point I, is such that a reasonable inference that might be drawn was that a definite offer of \$2.00 a ton bonus for the year 1949 to be computed at \$2.00 a ton which was the same rate as the 1948 bonus was computed at, was made by Mr. W. H. Williams at that time, and the conversation and the conduct of the parties was such that there was an acceptance of such offer out of which a contract or an agreement of employment with a bonus at the rate of \$2.00 a ton arose.

During the last part of July or early August of 1949, Mr. Scoville received a writing which is captioned "Bonus Plan For 1949" and which was admitted as Mr. Scoville's Exhibit 3 at R. 20, setting out certain figures to be paid as a bonus on sales for the year 1949. This was the first written notice received by Mr. Scoville which indicated that the figures to be used by the Company in computing the 1949 bonus would be different than that used to compute the 1948 bonus (R. 19).

Mr. Scoville protested several times, orally, to Mr. Williams (R. 28) concerning this writing and to Mr.

Borsum (R. 72). On January 9, 1950, Mr. Williams, Mr. Borsum and Mr. Scoville attended the turkey show in Minneapolis, Minnesota (R. 28). At this time Mr. Borsum told Mr. Scoville that if he, Mr. Scoville, took it up with the higher-ups, Mr. Borsum, Mr. Williams and Mr. Scoville would all lose their jobs. That if Mr. Scoville would keep his mouth shut, Mr. Scoville could stay on indefinitely as long as he was doing the job (R. 29). Mr. Scoville felt that he was too old a man to lose the job and have to go out and hunt for a new one (R. 71).

On February 3, 1950, Mr. Scoville became ill (R. 56). He left Billings, Montana, and went to Phoenix, Arizona, as prescribed by a doctor (R. 68). He remained in Phoenix, Arizona until April 1, 1950 (R. 68) at which time he returned to Utah and his employment (R. 56).

On December 30, 1950, Mr. Scoville wrote to Mr. Lyle C. Roll, protesting the handling of the bonus for 1949. Letter admitted as Company's Exhibit 12 at R. 67.

On January 27, 1951, Mr. Scoville again wrote to Mr. Roll, protesting the handling of the 1949 bonus and denying that the signing of checks paid by the Company was an acceptance of the settlement of his claim (letter admitted as the Company's Exhibit 13 at R. 68). In spite of the above protest and the evidence of an oral agreement for the year 1949, the honorable trial judge granted the Company's motion to strike the testimony as to the conversations which took place in 1948 and 1949.

In *Goldstein vs. Robert Dollar Company*, Supreme Court of Oregon 1928, 270 Pac. 903, 127 Ore. 29, the ship-



per of an automobile made arrangements with the carrier for the shipment of his automobile. These arrangements were made orally. Subsequent to these oral arrangements for the shipment of the automobile the carrier issued a bill of lading which was received by the shipper without objection. The shipper's automobile was damaged while in the possession of the carrier. The shipper brought this action on an oral contract, attempting to establish the liability of the carrier on a basis of the oral contract. The case went to the jury which returned a verdict for the shipper. The trial court granted a new trial on the ground that the trial court should have instructed the jury that the bill of lading as issued by the carrier was the contract. The shipper appealed and on appeal it was held that the question of assent to the bill of lading by the shipper was a question of fact for the jury. The shipper was entitled to submit to the jury his theory of the case on the ground that the assent to the bill of lading is a question of fact and the oral contract which might have arisen prior to the bill of lading was also a question of fact. The court observed that had the oral contract been made contemporaneously with the written bill of lading the parol evidence would be inadmissible.

In *Bruce vs. Snow*, 18 N. H. 514, it was held that parol evidence is admissible only when the writing has been approved to be the agreement of the parties, and in *Hoag vs. Owen*, 57 N. Y. 644, it was held that where the writing is in dispute, oral evidence is admissible to show an oral agreement different than the writing.

The editors of *Corpus Juris Secundum* have stated

the rule as follows in 32 C.J.S., Section 967 at Page 932:

The rule which excludes parol evidence to contradict or vary the terms of a written agreement can be applied only when a written agreement is proved to exist between the parties, and consequently parol evidence is admissible to show that a writing, although purporting on its face to be a contract, was not in fact intended by the parties to be such. Furthermore, where a paper set up as an agreement is not admitted to be such by the party sought to be affected by it and there is a conflict of evidence on the question whether it is such agreement or not, the court will not exclude testimony adduced to prove a verbal agreement differing in its terms from the written one, but will merely direct the jury to disregard such testimony in case they find the writing to be the agreement of the parties.

Mr. Scoville is also aided by an implied contract that the bonus for 1949 would be computed at the same rate as the bonus for 1948 was computed.

In *Holton vs. Hart Mill Co.*, Sup. Ct. of Wash. 1946, 166 Pac. 2d 186, an employee brought an action to recover damages for a breach of contract for personal services. From a judgment in the employee's favor, the employer appealed. The contract was based upon a letter written by the employer to the effect that he would undertake to keep the payroll records of the employer for a period of one year at a flat fee of \$2,100.00. The employer answered by way of a letter stating that the employment for a period of one year at a flat fee of \$2,100.-00 would be agreeable. The employee performed the services for the period of one year and continued with

the work after the expiration of the initial year. After expiration of the initial year provided for by the letters, the employer told the employee to "stay and continue as theretofore" after which the employee continued with the work. The trial court found that the contract established by the letters was renewed. The employer appealed and the Supreme Court of Washington held that the finding of the trial court was warranted in fact and in law. The Supreme Court stating at page 187, "furthermore where a contract of employment for a definite term expires and the employee continues to render the same services, the presumption is that he is serving under a new contract having the same terms and conditions."

In 56 C.J.S., Section 10 at Page 82, the editors have stated the rule as follows:

As a general rule, sometimes by virtue of statutory provisions, where one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract, and provisions and restrictions forming essential parts of the contract, although collateral to the employment itself, continue in force. A change in one of the terms does not destroy the presumption as to the other terms. Thus, a mere change in the contract with respect to the amount of salary will not affect the applicability of the rule.

While it has been held that, where the original term is for more than a year, a continuance in employment will not support a presumption of a renewal for the full period of the original term,

but only of employment from year to year thereafter, where the hiring is for a definite term less than a year, it has been held that a renewal for that term will be implied, but there is authority to the contrary. Unless the original contract was for an entire year and the service rendered under it continued for at least a year, no presumption of renewal for another year on the same terms arises by reason of continuance in the same service.

It has been held, however, that the presumption will not arise where the original contract is absolutely void, or where the services rendered after the expiration of the term are of a different character from that called for by the contract, and it may be rebutted by showing a new agreement or that a different hiring was in fact intended by the parties. A new contract may arise, although it is shown under an agreement which is in terms an express renewal of the original contract. Also, when, at the close of a definite term, negotiations are pending for a new contract, it has been held that the law will not conclude them by a presumption of an implied contract, and when such negotiations have been in fact concluded by the parties, and a new arrangement agreed on, it is immaterial that, although contemplated, the new agreement has not been reduced to writing.

#### Rights and obligations under former contract.

Where separate and independent contracts of employment for successive periods of time contain no statement of a settlement of prior dealing with the parties, there is no presumption that their mutual claims up to the date of making a contract had been adjusted.

In *Otten vs. San Francisco Hotel Owners Association, et al*, District Court of Appeals of California, 1946, 168 Pac. 2d 739, the court observes the codification of a common law rule in the State of California. In this case recovery is not allowed as the plaintiff in the action was found to be an independent contractor and not a servant.

The conversations of Mr. Scoville and representatives of the Company as set out supra under Point I, is consistent with and gives weight to an agreement providing for the 1949 bonus. A contract for a bonus for the year 1949 having been entered into by Mr. Scoville and the Company, the Company attempts to make a writing; delivers it to Mr. Scoville; contends that the writing is the agreement and then proceeds to exclude any evidence of any other agreement which arose previous thereto on the ground that the writing is the agreement. In order that this agreement be taken as the agreement between the parties, the Company has the burden of proving that it was an acceptance. The only inference that can be drawn from the earlier conversation is that there was no acceptance of the 1949 writing.

There is substantial evidence that there was a contract prior to the 1949 writing and there is substantial evidence in the record that the 1949 writing was never accepted. Mere continuation in the employment of the Company does not constitute an acceptance and mere delay in this case does not constitute an acceptance. There is considerable evidence in the record explaining the reason for the delays and protests. There is also evidence in the record that states oral protests were made to rep-

representatives of the Company. The only evidence of delay and protest to representatives in the Company is that the delay was with respect to those representatives of the Company higher in the hierarchy of the Company, which delay is explained by Mr. Scoville's fear of losing his job.

The court erred in striking this evidence as being in violation of the Parol Evidence Rule. Parol evidence of a prior existing, oral agreement is admissible when a writing purported to be the agreement is contested by the person showing the prior oral agreement. The case should have gone to the jury. The jury should have been instructed that in event the jury found that there had been an assent to the writing, then the jury was to disregard the parol evidence as to the oral agreement. On the other hand, if the jury chose to believe that there was a prior existing oral agreement and there was no assent to the writing and the writing did not become a binding agreement between the parties, then the jury was to disregard the writing.

### POINT III

THE TESTIMONY OF MR. SCOVILLE WAS TO THE EFFECT THAT L. C. BORSUM WAS THE SALES MANAGER FOR THE ENTIRE UNITED STATES OF THE KELLOGG SALES COMPANY. CONVERSATIONS BETWEEN THE SAID MR. SCOVILLE AND THE SAID L. C. BORSUM TENDED TO ESTABLISH THE RELATIONSHIP OF A SALESMAN AND HIS SUPERIOR IN THE SAME ORGANIZATION, AND THE DOCUMENTARY EVIDENCE INTRODUCED AT TRIAL WAS CONSISTENT WITH AND TENDED TO ESTABLISH THE SAME FACTS AS TESTIFIED TO BY MR. SCOVILLE. THE TRIAL COURT ERRED IN STRIKING



SUCH TESTIMONY ON THE GROUNDS THAT SUCH WAS NOT BINDING UPON THE KELLOGG SALES COMPANY.

The testimony of Mr. Scoville established that Mr. Leslie Carl Borsum was the Sales Manager for the United States for the Kellogg Sales Company and that he had authority to bind the Kellogg Sales Company during the dates in question. Certain of the exhibits admitted in evidence tend to establish that Mr. Borsum was an employee of the Kellogg Sales Company and had authority to bind the Kellogg Sales Company. The only evidence of other employment is the testimony of Mr. Borsum that at the time of trial he was employed by the Kellogg Company. This is not conflicting with the testimony of Mr. Scoville. There was no evidence that during the dates in question in this action, Mr. Borsum was not employed by the Kellogg Sales Company or that he did not have authority to bind the Kellogg Sales Company at the times of the conversations in question.

The trial court erred in striking the testimony as to the conversations had by Mr. Scoville with Mr. Borsum.

Mr. Scoville testified that Mr. Leslie Carl Borsum is the Sales Manager for the United States for the Kellogg Sales Company (R. 21). On voir dire examination Mr. Scoville testified that Mr. Borsum was the Sales Manager of the Kellogg Sales Company and that he knew such of his own knowledge. On cross examination, Mr. Scoville testified that he knew there were two companies, that is, the Kellogg Company and the Kellogg Sales Company (R. 30).

On examination of Mr. Borsum, the testimony was as follows:

DIRECT EXAMINATION.

BY MR. CALLISTER:

Q. Mr. Borsum, will you state your name, please?

A. Leslie Carl Borsum.

Q. Where do you reside?

A. Battle Creek, Michigan.

Q. By whom are you employed?

A. By the Kellogg Company.

Q. Now, Mr. Borsum, how much was paid to Mr. Scoville, if you recall offhand for the year 1949 in the way of bonus?

A. I can't recall offhand the exact amount without looking at the checks he was paid in accordance with the 1949 bonus plan.

Q. That is what I want to know. In other words, he was paid according to the terms of Exhibit B, was he not?

A. Yes sir.

Q. His tonnage was computed and then applied to this schedule set out in Exhibit B, and he was paid accordingly, is that not correct?

A. Yes sir.

Q. So that you figured all that Mr. Scoville had coming to him was what you paid him under this?

A. Yes sir.

Q. MR. CALLISTER: That is all.

MR. AADNESEN: No questions. (R. 84)

The writing captioned "Bonus Plan for 1949" intro-



duced and admitted as Mr. Scoville's Exhibit B at R. 20, was signed by Mr. Leslie Carl Borsum.

The letter dated April 25, 1950, from Mr. Borsum to Mr. Scoville, transmitting the check in the sum of \$1,026.88, (Company's Exhibit 8 admitted at R. 5) representing the balance due Mr. Scoville on the 1949 bonus as computed by the Company under the 1949 writing was signed by Mr. Borsum. (See R. 51, as to stipulation of signature).

The letter dated July 24, 1949 to Mr. L. C. Borsum from Mr. Scoville, (admitted as the Company's Exhibit 10 at R. 61), was addressed to Mr. L. C. Borsum, Kellogg Sales Company, Battle Creek, Michigan.

A letter dated August 2, 1949 to Mr. Scoville (admitted as the Company's Exhibit 11 at R. 65) which was from Mr. L. C. Borsum (R. 64) contained the following paragraph which appeared as the last paragraph therein:

"We are having a sales meeting in Omaha on August 8 and 9, and I think that you should be there at that time. Will be looking forward to seeing you."

The Company, through counsel, objected to the testimony of the conversations had with Mr. Borsum on the ground that the testimony with respect to such conversations would be an attempt to bind the Kellogg Sales Company by a statement of the Kellogg Company (R. 23). The Company objected to such conversations on the ground that it is an attempt to bind the employee of one organization against another (R. 25). These objections were renewed and appear elsewhere in the record. The

Honorable Trial Judge granted the Company's motion to strike such testimony on the grounds as stated.

The testimony of Mr. Scoville established that Mr. Leslie Carl Borsum is the Sales Manager for the United States for the Kellogg Sales Company. The conversations by their very nature, by inference, tend to establish the position and the authority of Mr. Borsum to bind the Kellogg Sales Company. The writing captioned "Bonus Plan for 1949" was signed "L. C. Borsum." This is the very writing by which the Company attempted to bind Mr. Scoville and the Kellogg Sales Company. This writing was received subsequent to any conversations had by Mr. Scoville and Mr. Borsum. If the view is taken that Mr. Borsum did not have authority to bind the Kellogg Sales Company, then he certainly had no authority by which to establish the 1949 writing as an agreement between the Company and Mr. Scoville.

The letter dated April 25, 1950, enclosing the check in the sum of \$1,026.88, which represented the balance due, computed at the rate contended for by the Kellogg Sales Company, was signed by Mr. Borsum. At the time of trial, in answer to the question "so that you figured all that Mr. Scoville had coming to him was what you paid him under this?", Mr. Borsum answered "Yes sir." The only inferences that can be drawn from this question and answer is that Mr. Borsum was an employee of the Kellogg Sales Company; that he figured the amount of the bonus at the rate contended for by the Kellogg Sales Company and paid Mr. Scoville; that Mr. Borsum was an employee of the Kellogg Sales Company.

All of the evidence that was adduced at the trial was consistent with the testimony of Mr. Scoville that Mr. Borsum was the Sales Manager of the entire United States for the Kellogg Sales Company. There were no inconsistencies. The only statement made that Mr. Borsum was an employee of someone other than the Kellogg Sales Company was the statement of Mr. Borsum that at the time of the trial he was employed by the Kellogg Company, which is not inconsistent with prior employment with the Kellogg Sales Company.

By inference Mr. Borsum had authority to set bonus plans as per the writing captioned "Bonus Plan for 1949," (Scoville's Exhibit B, admitted at R. 20). By inference Mr. Borsum had authority to require the attendance of Mr. Scoville at sales meetings as per the letter of August 2, 1949, (Company's Exhibit 11) and by inference Mr. Borsum had authority to make payments of wages to Mr. Scoville as per the letter dated April 25, 1950.

The trial court erred in striking the testimony with regard to conversations had between Mr. Scoville and Mr. L. C. Borsum.

#### POINT IV

THE TRIAL COURT ERRED IN DIRECTING A VERDICT FOR THE COMPANY AFTER WRONGLY EXCLUDED TESTIMONY WHICH TENDED TO ESTABLISH THE CASE FOR MR. SCOVILLE.

Mr. Scoville's testimony as to conversations with Mr. Williams and Mr. Borsum was substantial evidence establishing his case for recovery of the balance due as his bonus for the year 1949. The trial court was in error

as shown under Points I, II and III in excluding the conversations with Mr. Borsum. The court erred as shown under Points I and II in excluding the testimony of Mr. Seoville as to his conversation with Mr. Williams. These conversations created a bonus plan for 1949. They established the rate of such bonus to be \$2.00 per ton of feed sold. If such conversations had been considered and applied in the most favorable light to the plaintiff's cause of action, the court could not have directed a verdict for the Company. The trial court erred in directing a verdict.

The rule is followed in this state that where defendant moves for a directed verdict, the evidence must be considered and applied in the most favorable light to the plaintiff's cause of action. *Groesbeck vs. Lake Side Printing Company*, Sup. Ct. of Utah, 1919, 55 Utah 335, 186 Pac. 103. In applying this rule the court must (1) take all facts proved by the evidence; (2) take all facts tended to be proved by the evidence; and (3) draw all inferences from the evidence for the plaintiff.

It is also a well established rule in this state that where there is any substantial evidence upon which the jury could find for the plaintiff under the pleadings, the trial court must submit the issues to the jury and cannot direct a verdict. *A. W. Sewell Company vs. Commercial Casualty Company*, Sup. Ct. of Utah 1932, 15 Pac. 2d 327.

As shown in Points I, II and III the testimony as to conversations in question should have been admitted in evidence.

The only inferences which may be drawn from the conversation which took place on November 4, 1948 between Mr. Scoville and Mr. Borsum as set out under Point I, supra, is that there would be a bonus for the year 1949; that such bonus would be at the rate of \$2.00 per ton of feed sold of the same type as that described in Bulletin 148-3 as set out under Point I, supra.

Mr. Scoville testified with respect to the conversation which took place on April 16, 1949, as follows:

R. 25, 26:

A. I asked both Mr. Borsum and Mr. Williams if they thought I had about enough turkey contracts in this territory.

And Mr. Williams stated I should go ahead and sell all the contracts I could. He could make the feed. He was in charge of the Omaha Plant.

I said: "You are also going to pay me a lot of bonus too."

He said: "We have got money to pay the bonus, you sell the feed."

Then we left the room and started downstairs.

Q. Who left the room?

A. Mr. Borsum, Mr. Williams and myself left the room to go downstairs.

I said: "Bill, it will take a lot of feed, and I will get a lot of bonus, it is pretty near time to shut off out there."

He said: "We will take care of you, Kellogg has got plenty of money and we will make the feed." (R. 26).

Mrs. Scoville testified with respect to the conversation which took place on April 16, 1949 as follows:

R. 79:

Mr. Scoville said that the amount of contracts he had written would be between four hundred thousand and four hundred fifty thousand turkeys, and he suggested they not take any more contracts and Mr. Williams said they were "feed hungry," and they would continue to take contracts as long as they were justified. Mr. Scoville reminded him again that \$2.00 bonus was still in effect, and there was never anything contrary said to that. (R. 79).

The only inference which can be drawn from this conversation is that the 1949 bonus would be computed at the rate of \$2.00 per ton of feed sold. An acceptance of this arrangement can be found in the continuation of sales by Mr. Scoville during the year 1949.

It must also be noted that Mr. Scoville's cause is aided by a presumption that in continuing in the service of the Company, the terms of his employment would be the same for the year 1949 as they were for the year 1948. *Holton vs. Hart Mill Co.*, cited supra, Sup. Ct. of Wash., 1946, 166 Pac. 2d 186.

During the last part of July or early part of August, Mr. Scoville received a writing which is captioned "Bonus Plan for 1949" (and which was admitted as Mr. Scoville's Exhibit B) (R. 20) setting out certain figures to be paid as a bonus on sales for the year 1949. This was the first written notice received by Mr. Scoville which indicated that the figures to be used by the Company in computing the 1949 bonus would be different than that



used to computed the 1948 bonus (R. 19). Mr. Scoville protested several times orally to Mr. Williams and Mr. Borsum about the writing which he received as setting out figures to be used by the Company in computing the 1949 bonus (R. 72, R. 28). Mr. Scoville's fear of losing his job explains the manner in which he conducted his protest about the 1949 writing. He felt that he was too old a man to lose the job and have to go out and hunt for a new one (R. 71).

The facts as recited above would support a verdict that an oral agreement providing for a \$2.00 a ton bonus for the year 1949 was entered into. The evidence introduced at the trial would support a verdict by the jury that there was no assent to the 1949 writing captioned "Bonus Plan for 1949." Such evidence being substantial and such that it would have supported a verdict.

The trial court erred in directing a verdict for the Company.

## CONCLUSION

The Company's Bulletin numbered 148-3, dated January 29, 1948, established a bonus plan for the year 1948. Parol evidence was offered which tended to establish a subsequent oral agreement to the 1948 bonus plan under which Mr. Scoville would be entitled to a \$2.00 per ton bonus for feed sold for the Company during the year 1949, this parol evidence was stricken on the grounds that it was a variation or alteration of the 1948 Bulletin 148-3. The trial court erred in striking such evidence in that it is permissible to modify a prior writ-

ten agreement by parol or to enter into a subsequent oral agreement regarding the same subject matter but as to a different period of time.

The trial court also erred in striking parol evidence to prove a prior oral agreement which was different from the terms of a purported written agreement, which writing was contested as not being the written agreement of the parties. There was substantial evidence to establish that there was no assent to the purported written agreement, i.e., the 1949 writing captioned "Bonus Plan for 1949." It is not in violation of the Parol Evidence Rule to allow parol evidence of a prior oral agreement where the instrument contended to be the written agreement is contested and there is evidence that there was no assent to such writing; the Parol Evidence Rule, presuming the existence of a written agreement. In this case the writing is contested as being a written agreement.

The trial court erred in striking the testimony of Mr. L. C. Borsum on the grounds that Mr. Borsum was not an employee of the Kellogg Sales Company but of the Kellogg Company. The only evidence being to the effect that during the times in question, Mr. L. C. Borsum was an employee of the Kellogg Sales Company. The only evidence of any other employment was that Mr. Borsum was an employee of the Kellogg Company at the time of trial.

The evidence, having been stricken, was not considered by the Trial Judge in directing a verdict. Had the Trial Judge considered such evidence, he would not have

been able to direct a verdict under the rules followed in Utah in directing a verdict.

It can be seen that Mr. Scoville was denied the consideration of that evidence which should have been considered by the Trial Judge in directing a verdict. It is also quite evident that Mr. Scoville was deprived of his right to have all of his evidence considered by the jury. Mr. Scoville's theory of the case was not at anytime considered by the Trial Judge nor was it allowed to go to the jury. There is substantial evidence in the record to support the theory of Mr. Scoville's case. Having been deprived of the consideration of his theory and the consideration of the evidence in support of his theory he has been precluded from obtaining the consideration of his recovery of a bonus on sales, which when computed upon the basis of the tonnages stipulated to by counsel (R. 12) as shown by the amended complaint (R. 1) would amount to the sum of \$16,183.53.

It is respectfully submitted that the testimony of conversations with Mr. Borsum and Mr. Williams should not have been stricken. That the trial court erred in directing a verdict; that the trial court should be reversed and the case remanded with instructions for a new trial.

Respectfully submitted,

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