

1953

R. M. Scoville v. Kellogg Sales Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

R. M. SCOVILLE,

vs.

KELLOGG SALES COMPANY,

Appellant.

Respondent.

FILED

FEB 6 1953

Clerk, Supreme Court, Utah

Case No.

7824

RESPONDENT'S BRIEF

RAY, QUINNEY & NEBEKER,
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INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	2
ARGUMENT	
POINT 1 — THE COURT PROPERLY EXCLUDED PAROL EVIDENCE OFFERED BY APPELLANT TO VARY, MODIFY OR CONTRADICT A WRITTEN INSTRUMENT	3
POINT 2 — THE COURT PROPERLY EXCLUDED CERTAIN TESTIMONY OF THE WITNESS, BOR- SUM, ON THE GROUND SUCH TESTIMONY WAS NOT BINDING UPON KELLOGG SALES COM- PANY	21
POINT 3 — THE COURT PROPERLY DIRECTED A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF	27
CONCLUSION	42

CASES CITED

Anderson v. Thomas, 108 Utah, 252, 159 P. 2d 142	24
Ashton v. Skeen, 85 Utah 489, 39 P. 2d 1073 (1935)	38
Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n., 94 Utah 97, 75 P. 2d 669 (1938)	39
Bell v. Jones, 100 Utah 87, 110 P. 2d 327 (Utah 1941)	39
Benites v. Hampton 3 Utah 369	33
S. W. Bridges & Co. v. Candland et al., 88 Utah 373 54 P. 2d 842	25
Browning v. Equitable Life Assur. Soc. of the United States, 94 Utah 532, 72 P. 2d 1060 (Utah, 1937)	39
Burraston v. First National Bank of Nephi, 22 Utah 328	33
California Bean Growers' Association v. Rindge Land & Navigation Company, 248 Pac. 658, 47 A.L.R. 904, (Cal. 1926)	34, 38
Cole v. Myers, 128 Conn. 223, 21 A. 2d 396, 136 A.L.R. 226	23

INDEX—(Continued)

	Page
Fish Lake Resort Co. v. Industrial Commission of Utah et al., 73 Utah 479, 275 P. 580	25
Wm. S. Godbe v. Brigham Young, 1 Utah 55	32, 42
Hogan v. Swayze, 65 Utah 380, 237 Pac. 1097 (Utah 1925).....	3, 8, 16
Parker v. Weber County Irr. Dist., 65 Utah 354, 236 Pac. 1105 (Utah 1925)	3
State et al v. Campbell Bldg. Co. et al, 94 Utah 326, 77 P. 2d 341 (Utah 1938)	40
Sullivan v. Beneficial Life Ins. Co., 90 Utah 405, 64 P. 2d 351 (Utah 1937)	39
Sweatman v. Linton et al., 66 Utah 208, 241 P. 309	25
Wallace v. Crawford, 69 P. 2d 455 (Cal. 1937)	37

TEXTS CITED

18 A.L.R. 887-895	33
34 A.L.R. 1035, 1036	40
75 A.L.R. 905	40, 41
1 Am. Jur. pages 225-6, section 24; pages 228-9, section 26; page 230, section 29; pages 255-6, section 72	39, 40
20 Am. Jur. page 508, sections 597, 598	23, 24
31 C.J.S., section 343, pages 1115-18	24
32 C. J. S., section 1004, pages 1008-1010	3, 8

IN THE SUPREME COURT of the STATE OF UTAH

R. M. SCOVILLE,

Appellant,

vs.

KELLOGG SALES COMPANY,

Respondent.

Case No.
7824

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with appellant's statement of facts where such are facts and not arguments or mere conclusions. Because of the length of the facts set out, we believe it will serve the interest and convenience of the court to refrain from restating all of the facts but to merely point out a few of the following:

On page 4 in the last sentence in the first paragraph, the word "building" should be "billing."

In the first paragraph on page 5, Mr. Leslie Carl Borsum should be designated as an employee of Kellogg Company, (R. 84) and that appellant testified that Mr.

Borsum was sales manager for the U. S. for Kellogg Sales Company.

In all three paragraphs on page 5, appellant indulges in arguments and conclusions by stating that reasonable inferences "could be," "can be" and "may be" drawn from the respective conversations. The conversations are set out in the record and the briefs and speak for themselves. In like manner the last paragraph beginning on page 5 and ending on page 6 contains the statement that an inference may be drawn from a letter written July 24, 1949. This letter (Exhibit 10) speaks for itself.

In the last paragraph on page 6, the statement that Mr. Scoville protested several times orally to Mr. Williams and Mr. Borsum should conform to the record. A more accurate condensation of this would be that Mr. Scoville talked with Mr. Williams several times about the bonus, but what was said about these things would be just short and he couldn't repeat them for the court. (R. 28) He protested in several talks with Mr. Williams and Mr. Borsum in Minneapolis the following January. (R. 72).

The third paragraph on page 8 should state the check for \$1,026.98 transmitted by the letter dated April 25, 1950, was specified in the letter as representing the balance due on Mr. Scoville's bonus for 1949.

STATEMENT OF POINTS

POINT 1

THE COURT PROPERLY EXCLUDED PAROL EVIDENCE OFFERED BY APPELLANT TO VARY, MODIFY OR CONTRADICT A WRITTEN INSTRUMENT.

POINT 2

THE COURT PROPERLY EXCLUDED CERTAIN TESTIMONY OF THE WITNESS, BORSUM, ON THE GROUND SUCH TESTIMONY WAS NOT BINDING UPON KELLOGG SALES COMPANY.

POINT 3

THE COURT PROPERLY DIRECTED A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF

POINT I

THE COURT PROPERLY EXCLUDED PAROL EVIDENCE OFFERED BY APPELLANT TO VARY, MODIFY OR CONTRADICT A WRITTEN INSTRUMENT.

Respondent respectfully points out to this court that Points I and II of appellant's brief are diametrically opposed to each other and so inconsistent as to preclude relief under either. Because of this inconsistency, we will discuss Points I and II of appellant's brief together.

We do not quarrel with appellant's authorities cited in Point I which support the rule that a *subsequent agreement* may be shown by parol evidence to vary or modify a written instrument. *Parker vs. Weber County Irr. Dist.*, 65 Utah 354, 236 Pac. 1105 (Utah 1925); *Hogan vs. Swayze*, 65 Utah 380, 237 Pac. 1097 (Utah 1925); 32 C. J. S., Section 1004, at page 1008. Under Point I appellant apparently claims that the alleged conversations were admissible because they were made prior to the 1949 written instrument and were made to modify, vary or contradict the 1948 bonus plan, yet he seeks to recover on the terms of the 1948 written instrument on

the theory that such instrument remained in effect for him for services performed in 1949.

In Point II he asserts that such conversations were admissible, though prior to the receipt and acknowledgment of the 1949 instrument, to show that a different agreement existed between the parties than was represented in the 1949 instrument. In other words, parol evidence or conversations prior in time to the 1949 instrument were purportedly admissible to show that Scoville, the appellant and plaintiff, had never assented to the 1949 agreement before it was written and, therefore, the conversations were admissible to abrogate the same.

We submit that the following facts are undisputed in the record. First, that the 1949 written instrument, called the 1949 Bonus Plan, was received and acknowledged by Scoville in 1949. Second, that Scoville received a statement of his account and payments under the 1949 bonus plan. Third, that the conversations designated in Point I as admissible were made *prior* to the receipt of the 1949 written instrument.

Considering the assertion that the alleged conversations related to the 1948 instrument, we cite from the general rule given as authority by appellant and contained in 32 C. J. S., Section 1004 at pages 1009-10.

“ * * * 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. * * * ” (italics ours.)

The conversations Mr. Scoville testified to and relied upon by *inference* to alter, vary or contradict a written instrument speak for themselves. Here are the pertinent parts:

At breakfast in Portland Mr. Borsum allegedly said:

"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. 23-24.) (*italics ours*)

In the hotel room in Omaha, Nebraska, the pertinent parts of the conversation as related by Mr. Scoville were:

"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. 25-26)

Mrs. Scoville testified about the same conversation in general terms. (R. 79)

Appellant claims that these statements, made prior to the 1949 written instrument, infer "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 [sic] is the same rate provided in the agreement of 1948."

We agree that the parties inferred that there would be a bonus for 1949. The only conclusion that *can* be reached is that a bonus plan for 1949 *was anticipated*. The last paragraph of the 1948 bonus plan specifically so provides:

"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."

To designate a statement made by one of the parties that he "saw no reason why the bonus *should* be changed *at that time*" as having the effect of an offer that it *wouldn't* be changed *in the future* does violence to even

an inference. It is interesting to note that whenever Mr. Scoville mentioned a sum of \$30,000.00, the other party returned with a statement similar to "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. 24, 78) Similarly, no inference such as appellant seeks can be found in either the statement "You are going to pay me a lot of bonus too" or the answer "We have got money to pay the bonus, you sell the feed." Although Mrs. Scoville was not a party to the agreement, she testified that the conversation just referred to took place *prior* to the time the 1949 bonus plan was received by her husband.

If we must indulge in inferences in an attempt to vary a written instrument, the most that can be inferred is that a plan for 1949 was expected to be announced some time in 1949. Mrs. Scoville knew her husband received or had received the 1949 bonus plan in July or August of 1949 and she had read it. (R. 79-80)

She also knew that it had been discussed and anticipated:

"I know there was a lot of quibble, a lot of quibble going on the latter part of July about the payment of this. It is possible Mr. Scoville did get a letter from them with reference to it, but this did not come out until after the correspondence in July was concluded." (R. 80)

We respectfully submit to this court that all conversations upon which appellant attempted to rely refer to the 1949 written instrument providing for a bonus plan in that year, and nowhere in the record is there any affirmative evidence of a promise or offer of

anything different. The most comfort appellant can glean from such conversations would be that they were "merely negotiations or representations," and such are insufficient to establish any substantial "agreement." 32 C. J. S. Section 1004, pp. 1008-10.

In the case of *Hogan vs. Swayze*, *supra*, the elementary rule is given:

"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."

By plaintiff's very pleading and testimony, he seeks to recover on the theory that the bonus plan for 1949 received in July or August of that year was varied, changed or modified by *prior* oral conversations or agreements, and thus it did not apply to him. It is the terms of the 1949 bonus plan that plaintiff seeks to escape and in open court so stated as shown by the record at page 23, set out in appellant's brief at page 13:

"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."

It should not now be counsel's pleasure to say he did not mean what he said.

The 1948 bonus plan expired at the end of 1948, and Mr. Scoville was paid according thereto for his serv-

ices for that year. As set out heretofore, the 1948 bonus plan specifically stated that it was the bonus plan for 1948 and that it would be reexamined at the end of that year.

Subsequent to the conversations testified to by Mr. Scoville, the 1949 writing was sent to Mr. Scoville who acknowledged receipt of it (R. 18, 19, 32, 56, 62, 63). He thereafter acknowledged a statement of his accounts and payments in accordance with such writing and made no formal protest until some seventeen months after he received it. This bonus plan was admitted into evidence without objection as Mr. Scoville's Exhibit "B" and in part provides as follows:

"It is the company's desire to be fair to its employees, to its stockholders, and to the company itself.

"It is management's thinking that each man is worthy of his hire, but we do have certain limitations which we must consider on an all over basis insofar as the company is concerned.

"The bonus plan covered in Bulletin #148-3 dated January 29, 1948 expired as of December 31, 1948. The bonus plan for 1949 which we feel is fair to all concerned is as follows:

CREDIT TOWARD BONUS

First 2,000 tons of feed sold (hog, cattle, turkey and poultry)	.50 per ton allowance
Balance of financed feed sold	1.00 per ton allowance

All non-financed feeds
sold

2.00 per ton allowance

"Against your bonus credit will be charged your territory expense and salary. We feel that the above bonus plan is an equitable one as far as the company and the salesmen are concerned, especially when you consider that most of the salesmen in the feed department are now members of the Kellogg Sales Company Savings Plan and participate in the profits of the company.

* * *

"The above bonus plan covers 1949 operation only."

* * *

There is no ambiguity in this statement, "The bonus plan covered in Bulletin #148-3 dated January 29, 1948 expired as of December 31, 1948." The only purported conversation testified to *after* the bonus plan for 1949 was received by him allegedly took place in Minneapolis on January 9, 1949, when the following was said:

"A. Mr. Borsum told me I would have to follow the new schedule of the bonus which was issued in August, that he had sent out, and that he didn't think it was a good thing that I should make any trouble about it or say anything, or discuss it, because that is the way it was and that is the way it had to be.

"That if anything was said, if I took it up with the higher-ups both him and Mr. Williams and myself would all lose our jobs, and if I kept my

mouth shut I could stay on indefinitely as long as I was doing the job." (R. 29)

Here certainly is no protest nor does it indicate anything but an acceptance of the 1949 writing, and the subsequent events confirm such acceptance. A letter dated January 10, 1950 was written by Mr. Williams to Mr. Scoville. It is designated as Exhibit "3" and provides:

"Dear Ray:

"We are discontinuing the Bonus Plan which was in effect in 1949 and we will not have a Bonus Plan for 1950.

"We are advancing your salary effective January 1, 1950 from \$325.00 per month to \$375.00 per month.

"This will confirm our recent conversation."

It is apparent from this letter that the company and Mr. Williams had considered the bonus plan for 1949 in effect, for it was specifically discontinued. Thereafter, on January 30, 1950, Mr. Williams wrote to Mr. Scoville enclosing a check for his bonus for the year 1949 and a statement of the sales and calculations. The letter (Exhibit "6") is only two paragraphs long, and for the convenience of the court we cite these two paragraphs:

"Dear Ray:

"Please find enclosed our check in the amount of \$3544.35 to cover Bonus for the year 1949. Also find enclosed a statement showing the feed sales, whether financed or non-financed, and the calculation based on the Bonus Plan for 1949.

"It was necessary to go ahead and clean this matter up based on the figures we have, but subject to revision, if the figures which you are sending prove ours to be incorrect. We will appreciate having you forward Helen's figures as soon as possible so we can check this out, but we did have to close our books for 1949 and that is the reason for going ahead and making the calculation."

It is apparent the check and statement were for payment under the 1949 bonus plan. In fact, Exhibit "7", a letter written February 10, 1950 acknowledges receipt of the check, for Mr. Scoville had returned it due to an error in the deduction of withholding tax. Mr. Scoville does not deny the circumstances surrounding the letter. In fact, he admitted having the original. (R. 49-50).

On February 6, 1950, a check in the amount of \$2,981.92 representing the amount of the previous check less withholding tax was drawn payable to Scoville and received, endorsed and cashed by him. (R. 51-52). On April 25, 1950 a letter was sent to Mr. Scoville enclosing a check in the amount of \$1,026.88 representing the balance due on his bonus for 1949. (Exhibit "8"). Mr. Scoville was praised for his work for 1949, and told that the company had a great deal of money outstanding on his accounts in this area and that they were going to hold him responsible for getting the money in. The following statement in that letter requires no further explanation:

"Attached find check in the amount of \$1,026.88 representing balance due on your bonus for 1949."

Exhibit "9" is a statement of Mr. Scoville's account under the 1949 plan. It was the subject of some controversy, but Mr. Scoville admitted receiving a statement of his accounts and for feed tonnage (R. 52) and that Exhibit "9" may or may not be the statement he received. (R. 53). Subsequently he adopted the figures therein as his own and the exhibit was admitted in evidence (R. 74). Mr. Scoville accepted the checks, endorsed and cashed them. Thereafter no protest, complaint nor demands of any kind were made by Mr. Scoville until December 30, 1950, the day before his retirement became effective. Appellant alleges in his brief that Mr. Scoville protested several times orally to Mr. Williams concerning the 1949 writing (appellant's brief 24-25). The record shows what is relied on for a positive protest *orally* in the excerpted references to the record.

"Q. Now, after receiving that bulletin, Exhibit B, did you enter a protest or talk with any of the officials of the company?

"A. Not at the — I wrote them a letter at that time but there was nothing more said about it.

"Q. Did you ever have any conversation with Mr. Williams subsequently to the time you received that bonus — that exhibit?

"A. Well, Mr. Williams and I talked a lot of times whenever he was with me, about the bonus, but what was said about these things would just be very short and I can't repeat it." (R. 28)

* * *

"Q. I am asking, and you have told me, it is

you were afraid of losing your job was the reason you didn't protest before, — I am asking if there were any other reasons you didn't make active protest?

"A. I had made several in talks, in conversations to Mr. Williams and Mr. Borsum when in Minneapolis in January, I wasn't in a shape to accept anything, I accepted anything they had in mind because I wasn't all together." (R. 72)

Appellant gives as a reason for no protest after receiving the letters set out above and the receipt of the figures and the cashing of checks, that he feared losing his job. The cross examination of Mr. Scoville is revealing:

"BY MR. AADNESEN:

"Q. Just one or two more questions. Do you have any idea of the policy of the company at the time you joined it, as to the age of retirement?

"A. Did I have?

"Q. Yes.

"Q. When was that?

"A. They could retire me at 60, or could retire me at 65. (R. 72-73)

* * *

"Q. Mr. Scoville, Mr. Aadnesen also asked you on cross examination about your retiring from Kellogg's, will you explain retiring from Kellogg's?

"A. I retired January 1, 1951.

"Q. Was that voluntary upon your part?

"A. They make it voluntary in a nice way.
(R. 68)

* * *

"Q. 1950. Now, at that time what was your status with the company?

"A. I was on my way out.

"Q. You were retired, weren't you?

"A. Yes sir.

"Q. And you retired, did you not?

"A. What?

"Q. You retired, did you not?

"A. As far as Kellogg's were concerned.

"Q. And you had retired effective what date?

"A. January 1, 1951.

"Q. So this was written just on the eve of your effective date of retirement, was it not?

"A. Yes sir." (R. 62)

The record shows that Mr. Scoville was 65 years of age in April, 1952. He was subject to retirement and could have retired or been retired any time since 1947, and he knew it

In Point I of his brief, appellant seeks to escape the elementary rule of parol evidence announced by our court in *Hogan vs. Swayze, supra*, by alleging that all conversations relating to bonus payments for services performed in 1949 related to the 1948 bonus plan. It is perforce admitted by appellant that if these related to the 1949 bonus plan they were made *prior* to the acknowledgment and receipt of the 1949 plan and would be inadmissible under the foregoing rule. We submit that the only affirmative evidence in the record conclusively establishes that such conversations referred to a bonus plan for 1949 and show concern for what the terms of such a plan would be. Most certainly, as Mr. Callister informed the court, they are an "attempt to vary one not received until July or August, 1949." (R. 23). The court was most certainly entitled to rely upon information from counsel as to the purpose of these conversations, and appellant should not now attempt to escape their inadmissibility by claiming they relate to a prior or an entirely separate agreement.

In Point II of appellant's brief, the position is taken that parol evidence to prove a *prior oral agreement* different in its terms from a purported written agreement is admissible. This statement is in direct conflict with the authorities cited in Point I. Appellant then goes on to say that 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. Appellant then states at page 23 of his brief "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." The inconsistency between Point I and Point II is readily apparent and conclusive upon the appellant that the only purpose of the alleged conversations could be to modify, vary or abrogate the 1949 writing.

Appellant asserts that he never assented to the 1949 bonus plan, and hence it was not the agreement between the parties. We respectfully submit that both the 1948 and the 1949 plans were letters similar in form and content. They were sent and received and payment computed in accordance to their respective terms at the expiration of the 1948 and 1949 periods. The only affirmative, undisputed evidence is that Mr. Scoville received and acknowledged the 1949 plan.

"Q. (BY MR. CALLISTER) Well, Mr. Scoville, did you ever receive any communication by word, or by letter, or bulletin, that the 1948 bonus arrangement was terminated?

"A. Yes sir.

"Q. And when was that?

"A. In August is the first, the last of July or August.

"Q. Of what years?

"A. 1949. (R. 18)

* * *

"Q. Do you recall writing to the company on January 24th, 1949, from Idaho Falls, Idaho?

"A. I couldn't tell you what the date was, I wrote so many letters — we wrote so many letters, I don't know whether I wrote from Idaho Falls or not. I was all over this western territory. — I wouldn't answer it that way.

"Q. Perhaps I can refresh your recollection, did you write this letter?

"A. I did.

"Q. The first part of which you read,—right here, — and tell me whether you know now the date of the bonus plan of 1949?

"A. Which paragraph do you mean?

"Right here where you have your thumb.

"A. Right here?

'Also your letter of July 11th, regarding the bonus plan, which of course is very important to me, I have read it very carefully, but I am not ready to give you my thoughts on it for my feed business is practically assured from the start. And from the wording of this letter I can see where it could be changed to where I would not get any bonus.

'Not only that Les, —'

"Q. That has nothing to do with it.

"A. It is still in the paragraph.

MR. QUINNEY: Let him read it.

"Q. (by Mr. Aadnesen) Do you want to read it?

"A. It doesn't make any difference to me, if you don't want to read.

"Q. You acknowledged receipt of the bonus plan for 1949, didn't you?

"A. Yes sir.

"Q. That is dated July 11th, isn't that correct?

"A. According to that letter it is talked about.

"Q. This is your letter, Mr. Scoville?

"A. That is right." (R. 32-33)

Even the alleged conversation in Minneapolis indicates that he accepted it because he did not want to lose his job. He stated that he received a statement of his accounts for 1949 under this agreement which appellant designates as "purported," and thereafter received and returned one check because no withholding tax had been deducted. He received, endorsed and cashed two subsequent checks representing payments under the 1949 writing. All this he did without murmur or complaint and then waited nearly a year to register a complaint.

There is no dispute to this evidence and appellant admits it in his brief. No jury question presents itself

from undisputed evidence, and the court was faced with a question of law, upon which he ruled. As will be pointed out hereafter under another point appellant was estopped to deny the 1949 writing and his actions established accord and satisfaction or an account stated, upon which grounds the court properly granted a directed verdict for the defendant.

Appellant indicates that Mr. Scoville had done all of his work and all of the contracts had been sent in to the company prior to July 1, 1949, and that the 1949 bonus plan received thereafter could not apply to him. The record reflects the procedure of Mr. Scoville and the company in selling and in reality shows the contrary. The 1948 bonus applied to all feeds as did the 1949 bonus plan. However, the 1949 bonus plan provided a bonus of 50 cents per ton on the first 2,000 tons of financed feed, and \$1.00 per ton on the balance of financed feed sold. All nonfinanced feed sold carried a bonus of \$2.00 per ton. Exhibit "9" shows Mr. Scoville received a credit of \$1,330.00 for 665 tons of nonfinanced feed at \$2.00 per ton, \$1,000.00 for 2,000 tons of financed feed at 50 cents a ton, and \$12,452.00 for 12,452 tons at \$1.00 per ton. In fact, after deducting his salary and expenses paid him during the year amounting to \$10,971.67 he received an additional \$4,742.33 in bonus, a total for the year of \$15,714.00. The Kellogg Sales Company had its own turkey financing program and they wanted all the feed possible. Mr. Scoville was to call on the dealers and customers that used the feed and the dealers would get the turkey men to sign the contracts. The dealers would check the contracts off and send them to Mr. Williams at

Omaha. The Omaha office would take care of them and send the contracts containing the program for the customers to use during that year back to Scoville and the customer after they were approved. These were estimates of the amount of feed the customer would require and some would use less than the estimate and some wouldn't use any but cancel out. During the year, the dealers of Scoville notified Omaha what amount of feed was needed and it took about ten days to come out. When it was shipped, Scoville received invoices, and these invoices are what he used for his tonnage figures to figure his bonus payments. He had no idea how much feed was shipped *prior* to July, 1949. We respectfully submit that the court may take judicial notice of the feeding habits of turkeys during the year and the fact that Thanksgiving was late in November, 1949.

POINT 2

THE COURT PROPERLY EXCLUDED CERTAIN TESTIMONY OF THE WITNESS, BORSUM, ON THE GROUND SUCH TESTIMONY WAS NOT BINDING UPON KELLOGG SALES COMPANY.

Mr. Scoville was employed by Kellogg Sales Company. He knew there were two companies, Kellogg Sales Company and Kellogg Company.

"BY MR. AADNESEN:

"Q. I have just a few questions, Mr. Scoville, I think it best to begin at the beginning where you did.

"You stated you were first employed August 15, 1944?

"A. Yes, I think that is correct.

"Q. That is the Kellogg Sales Company?

"A. Yes.

"Q. You have never worked for Kellogg Company?

"A. At that time I think both of them were more or less together.

"Q. Do you know?

"A. If anybody could keep up with them, I couldn't, whether they was single companies or whether they was parent companies.

"Kellogg Company is —

"Q. You understand they are two separate companies?

"A. Yes sir.

"Q. You worked for Kellogg Sales Company, is that correct?

"A. I had a savings fund in Kellogg Company, as well as Kellogg Sales Company." (R. 29)

Mr. Scoville also stated that he knew Mr. Borsum was sales manager for the U. S. for the Kellogg Sales Company. He testified that he knew this of his own knowledge be-

cause he got the information from Mr. Borsum himself. The general rule of law regarding an admissible statement and declarations by one alleged to be the agent of another is well stated in 20 Am. Jur. 508, §598:

“There is a general rule that the admissions, statements, and declarations of one alleged to be the agent of another, other than his testimony in the case in which the issue arises, are not admissible either to prove the fact of his agency or the extent of his authority as an agent. It follows that as a general rule the preliminary proof of agency requisite to render the statements of one person admissible against another must be made by evidence other than declarations of the alleged agent, not brought to the knowledge of the principal.”

The case of *Cole v. Myers*, 128 Conn. 223, 21 A. 2d 396, 136 ALR 226, reiterates the rule:

“It is well settled that authority of an agent cannot be proven by declarations of the agent, *Bailey v. Bobeck*, 117 Conn. 653, 654, 166 A 677; *Voegeli v. Waterbury Yellow Cab Co.*, 111 Conn. 407, 411, 150 A 303, 69 ALR 902; *Taylor v. Commercial Bank*, 174 NY 181, 191, 66 NE 726, 62 LRA 783, 95 Am St. Rep 564; 2 Am Jur 357.”

What Mr. Kellogg said Mr. Borsum had said does not constitute evidence sufficient to establish Mr. Borsum as having the authority to bind Kellogg Sales Company.

Mr. Borsum was called as a witness and testified that he was employed by Kellogg Company. (R. 83). Appellant had ample opportunity to inquire as to length of serv-

ice and authority to bind the corporate defendant when Mr. Borsum was on the stand. If such was the case as they maintain, appellant cannot now rely upon the lack of testimony resulting from his failure to adduce testimony. *Anderson v. Thomas*, 108 Utah 252, 159 P. 2d 142.

The burden of proof is upon the plaintiff to prove his case and to now say there was no evidence that during the time in question in this action Mr. Borsum was not employed by Kellogg Sales Company, or that it can be inferred that he had authority to bind Kellogg Sales Company at the time of the conversations, is an attempt to place this burden upon the defendant. The authorities are all in agreement upon such a proposition. In 20 Am. Jur. 508, § 597, the rule is stated:

“The burden of proof lies upon the party who introduces the statements of an agent for the purpose of binding the principal to show that the declarations were within the agent’s authority.”

This burden of proof requires more than a mere statement, and it must be shown that not only was there competency, but the admissions must have been made in the discharge of the agent’s duty and must be a statement of fact rather than an expression of opinion. This rule is well stated in 31 C.J.S., § 343 at page 1115.

“Competency of the agent to make admissions on the subject is not alone sufficient; the admission which it is sought to use must have been made in connection with the discharge of the agent’s duty, and must be a statement of fact, rather than an expression of opinion.”

S. W. Bridges & Co. v. Candland et al., 88 Utah 373, 54 P. 2d 842. This principle was adopted in a direct quotation from *Corpus Juris* in the case of *Fish Lake Resort Co. v. Industrial Commission of Utah et al.*, 73 Utah 479, 275 P. 580.

A reexamination of the statements alleged to have been made by Mr. Borsum could only result in the conclusion that they are not statements of fact but conclusions. The only statements alleged to have been made were to the effect that the amount of feed Mr. Scoville said he would sell would be a lot of feed, and that the company had money to pay a bonus if he sold the feed, and that he didn't see any reason why the bonus should be changed at that time. There is nowhere in the record any clear or convincing evidence of any statement by Mr. Borsum which could constitute any basis upon which Mr. Scoville could predicate a recovery in this case.

Much has been said about the conversations of Mr. Borsum in Minneapolis, and it has been pointed out that Mr. Scoville apparently accepted Mr. Borsum's statement to the effect that he had to accept the 1949 bonus as it was and that was the way it had to be. This very statement that if anything was said, or if Mr. Borsum talked to the higher-ups, he and Mr. Williams and Mr. Scoville would lose their jobs, negatives authority to bind the company rather than support it. In *Sweatman v. Linton et al.*, 66 Utah 208, 241 P. 309, this court ruled on a similar statement. There the purported agent and his principal were sued for malicious prosecution. In reversing the judgment for the plaintiff and in ruling that the motions

for non-suit and directed verdict on behalf of the Packing Company should have been granted, the court discussed the following:

" * * Plaintiff was again placed upon the witness stand and, over objection by defendants, testified that after his arrest and return to Price, and while he was out on bail, he met Linton on a street in that city. He also testified (quoting from the bill of exceptions) further as follows:

" 'After we met and he offered me his hand, he said 'I'm glad to see you.' I put my hand behind me and I said, 'I can't say as much for you.' I kind of rebuffed him and expressed some feeling. He stepped off and said: 'Mr. Sweatman, I'm sorry you feel that way about it. It was nothing that I could help. I was ordered to do this by the company.' I argued with Crum (secretary of the packing company) that I didn't want to do it, but he says, 'You go and do it,' and I was working for him, and it was up to me to do it or quit.'

"The packing company assigns the admission of that testimony as error. In our judgment the testimony was clearly inadmissible for the purpose of binding the packing company. It was not a statement of the agent as to the limit or extent of his authority in the transaction of any business intrusted to him under his general employment, even if it be contended that it was admissible as defining the extent of his agency. The introduction of the evidence was an attempt by hearsay to bind the company upon a question admittedly not within the general scope of the agent's duty. * * *"

The similarity between this statement and the statement allegedly made by Mr. Borsum is most striking.

We submit that these alleged statements were inadmissible under the rules set out above and that the evidence was insufficient to affirmatively establish that Mr. Borsum had authority to bind Kellogg Sales Company. We respectfully point out to the court also that the ruling by the court could not constitute prejudicial error where appellant's counsel informed the court they were introduced to vary or modify a written instrument.

POINT III

THE COURT PROPERLY DIRECTED A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

The defendant moved the court for a directed verdict, which motion the court granted. In Point IV of appellant's brief he asserts that "The trial court erred in directing a verdict for the company *after wrongly excluded testimony which tended to establish the case for Mr. Scoville.*" This statement acknowledges that if the testimony which was excluded was not considered by the court, the granting of a directed verdict is correct, with which proposition we agree. Respondent moved the court for a directed verdict upon the following grounds and for the following reasons:

"1. The only competent evidence shows, 1948 bonus plan ended December 31, 1948, and any objection, and any allegation, or contention that said plan continue into all, or part of 1949 is against the law and evidence in this case.

"2. The evidence shows the 1949 bonus plan

specifically is unambiguous and with certainty provided the method for payment for all bonuses or commissions for the year 1949, and the whole thereof, and in like manner verified and specified the termination of the 1948 bonus plan as of December 31, 1948.

"3. The contracts for bonuses for 1948-1949 are not ambiguous or uncertain, and cannot be varied by parol evidence as a matter of law, and must be strictly construed by this court, and so construed specifically provide and require the application of the bonus provision of 1949 only to apply to the commissions of the plaintiff for that year.

"4. The undisputed evidence shows that plaintiff received and acknowledged receipt of the 1949 bonus contract from the defendant in July of 1949. That he continued in his employment thereafter, and that subsequent to 1949 he received a final statement of his account for bonuses for 1949, together with checks in payment therefor.

"That he failed to object thereto until many months thereafter.

"That, by reason of this conduct he is estopped to deny the existence or validity of the 1949 contract, and that contract was made as payment in full.

"5. The undisputed evidence establishes the receipt of a statement of account for the balance of plaintiff's bonus for 1949, and checks therefor, which plaintiff cashed without protest or offer

to return, coupled with a failure to object to that within a reasonable time, and therefore said account became an account stated, or further, by reason of the circumstances and conduct of the parties prior to said acceptance and cashing, such constituted an accord and satisfaction, and in either event are conclusive upon him, and plaintiff cannot recover." (R. 85-86)

Since appellant's position is limited to a consideration by the court of evidence which was not the subject of a motion to strike because it was inadmissible, only the third ground of the motion for a directed verdict appears to be complained of by him. We have already discussed the question of the admissibility of parol evidence and will not revert to that argument. Admittedly, then, if any of the other four grounds upon which the motion for a directed verdict is good, the court did not err.

But even if we consider the evidence with the stricken testimony back in the record, and considering all the evidence in a light most favorable to the plaintiff, we find the following to be wholly undisputed in the record:

1. The plaintiff received and acknowledged receipt of the 1949 Bonus Plan from the defendant in July or August of 1949.
2. The 1949 Bonus Plan specifically stated that the 1948 Bonus Plan was terminated as of December 31, 1948.
3. In January of 1950 plaintiff received notification that the Bonus Plan which had been in effect for 1949 was discontinued and his salary was increased to \$375 per month, without any Bonus Plan for 1950.

4. Plaintiff received a letter dated January 30, 1950 enclosing a check for \$3,544.35 to cover his Bonus for 1949, calculated on the terms of the 1949 bonus plan and subject to revision if the figures plaintiff was sending to the company proved the company's figures incorrect.

5. Because of an error in failing to deduct his withholding tax plaintiff returned the check for \$3,544.35 and thereafter received a letter dated February 10, 1950 thanking him for returning it and informing him that another check for the same amount less withholding tax had been sent to him. The letter also stated that the company was in the process of checking Mrs. Scoville's figures on shipments and would make a complete adjustment as soon as those figures had been audited. The check for \$2,981.92 was received by Mr. Scoville.

6. Plaintiff received a letter dated April 25, 1950 enclosing a check for \$1,026.88. The letter specifically stated the check represented the balance due on plaintiff's bonus for 1949.

7. The checks for \$2,981.92 and \$1,026.88 were endorsed and cashed by plaintiff.

8. Plaintiff informed the company of his retirement effective January 1, 1951 and wrote his first protest on the eve of his retirement, December 30, 1950, some seventeen months after receipt of the 1949 Bonus Plan and some eight months after a final statement of his 1949 bonus had been rendered and payment made thereunder.

These foregoing facts are in chronological order and are wholly undisputed in the record. It is clear from these

facts that the conduct and actions of Scoville in accepting his statement of account and his payments for 1949 computed according to the 1949 plan, preclude any present contention by him that he did so under protest. By such conduct he is estopped to deny the existence or validity of the 1949 plan and its application to him. He had many opportunities to protest, and if he seriously thought at those times that he was entitled to bonus payments under the 1948 plan or any other agreement different than the 1949 plan, he surely would have registered some complaint. Twice in January he was written, once informing him of the termination of the 1949 Bonus Plan and once enclosing a check to pay him his bonus in 1949 according to the 1949 plan. No protest occurred—in fact, he even sent the check back because of a tax deduction error, without complaint or even politely informing his company that the 1949 plan didn't apply to him. After the alleged conversations such as "With the bonus figured the way they are now, I am going to make a lot of money, around \$30,000.00," and "You are also going to pay me a lot of bonus too," he cannot be heard to assert that the difference between \$3,544.35 and the additional \$16,183.53 alleged in his complaint went unnoticed. Nor did he protest about the check for \$2,981.92 even after his wife's figures were sent and audited and he knew the 1949 Bonus Plan was used to compute the amount due. And even when the final check for \$1,026.88 and a letter explaining that the check represented "balance due on your bonus for 1949" arrived, Mr. and Mrs. Scoville remained mute for some eight months about the failure to receive a sum in excess of \$16,000.00, more than once again as much as he had received for the whole year of 1949 in salary,

bonuses and expenses. He also knew he would receive no bonus for 1950 and only a salary of \$375.00 per month and expenses.

Appellant has filled his brief with "inferences," but here are the stark, unadorned facts, not mere inferences, facts conclusively establishing an account stated or accord and satisfaction. These principles of law are stated in the alternative because of their distinct application to the undisputed facts in this case, and a discussion of the two principles will better illustrate this.

The legal principle of an account stated has been recognized and applied by this court since the first volume of the Utah Reports. In *Wm. S. Godbe v. Brigham Young*, 1 Utah 55, the plaintiff had in the spring of 1865 advanced to the defendant goods of the value of \$10,020.27 to be used in the construction of the Deseret Irrigation and Canal Co. Thereafter on the 12th day of February, 1866, the plaintiff properly rendered an account to the defendant for the stated balance to which defendant made no protest. The court held that an account was stated and was conclusive:

"* * '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 action 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 Barv., 302; Crane v. Hardman, 4 E. D. Smith,

448; *Bainbridge v. Wilcocks*, Baldw., 536—3d Cir. Pa.)”

This case was affirmed as to the account stated and reversed as to the question of interest payments and other matters not controlling here in 82 US 250, 15 Wall 562.

A few years later in *Benites v. Hampton*, 3 Utah 369 (1884), this court paid recognition to the rule that a lapse of a reasonable time without objection creates an account stated.

Again in 1900 in *Burraston v. First National Bank of Nephi*, 22 Utah 328, this court applied the rule of an account stated. The plaintiff deposited money in the bank, drew checks and signed notes to the bank, but made no objection to the statements sent by the bank to him from time to time. Even when his account was closed he made no objection to the final statement sent by the bank until some three years later. This court held that an account stated ended plaintiff's right of action and defendant's motion for a non-suit should have been granted.

The foregoing cases are in point with the undisputed facts in our case. Since the facts are undisputed and clear as to the events subsequent to the letter of January 10, 1950, the weight of authority holds that what constitutes a reasonable time within which objection must be made to an account rendered in order to preclude a presumption of acquiescence therein is always a question exclusively for the court. 18 A.L.R. 887, 895: “What is a reasonable time where the facts are clear, is always a question exclusively for the court.” The Annotation in 18 A.L.R. 887 is:

"What is a reasonable time within which to object to an account so as to prevent its becoming an account stated." See Subheadings page 888 *et seq.*

The legal principle of accord and satisfaction is also applicable to the facts in this case. Defendant alleged this defense in the motion for a directed verdict in the alternative with an account stated and the authorities have applied both in such cases.

In *California Bean Growers' Association v. Rindge Land & Navigation Company*, 248 Pac. 658, 47 A.L.R. 904, (Cal. 1926) the Supreme Court affirmed a judgment for the plaintiff, a marketing association, against a defendant member for liquidated damages as specified in a contract for failure of defendant member to deliver certain bean crops. As to the defendant's counter-claim the court found there had been an account stated and an accord and satisfaction.

"In answer to the defendant's cross-complaint, which contains the same matters set up as a set-off and as a counterclaim the plaintiff, in addition to denials of such matters, alleged, and the court found, that there had been an account stated between the parties and an accord and satisfaction as to the proceeds of the 1918 crop of beans.

* * *

"During the time the beans were held in storage the plaintiff from time to time sent to defendant statements of sales made and of charges debited to the defendant's account, such as insurance, cleaning, and resacking beans, patching sacks, etc.,

and the defendant often replied with complaints that the charges were excessive. September 16, 1920, defendant wrote plaintiff, demanding a settlement, and, among other things, saying: 'Your auditor's report which was submitted to us some time ago made the amazing statement that the money realized from the 1918 beans was actually used to finance the 1919 crop. This seems to us incredible. If true, the directors have made themselves personally responsible, as they undoubtedly did by refusing to sell the beans when a good price was offered early in 1919. We shall be obliged to take legal steps along these lines if a check is not promptly sent to us. We shall also take very decided exceptions to your expense accounts as they are extravagant beyond all reason. You have no right under the agreement to deduct more than \$1.00 per ton for such expenses, and § 4 provides for the return of any unused portions of the \$1.00 per ton.' Thereafter the plaintiff furnished the defendant with a complete statement of all receipts and disbursements in connection with the defendant's 1918 beans, showing that all of such beans, except 3,500 pounds which were damaged, had been sold, and that the defendant had been credited with a net balance on account of beans sold in the sum of \$22,744.72.

* * *

"November 29, 1920, the plaintiff sent the defendant a check for \$22,744.73, inclosed with a letter reading as follows: 'We have pleasure in inclosing 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 state-

ment which we recently forwarded to you.' On the following day the defendant acknowledged receipt of the check in a letter reading as follows: 'We are in receipt of your letter of November 29th, inclosing your check No. 3536 for \$22,744.73.' February 24, 1951, plaintiff wrote defendant, inclosing statement of sale of the damaged beans and a check for the net proceeds thereof, amounting to \$66.51, and saying: 'This amount represents the final settlement on your 1918 account.' The defendant cashed the first check November 30, 1920, and the second one February 26, 1921. The record does not show that the defendant made any objection to the settlement until its answer was filed herein August 18, 1921.

" 'The foregoing evidence is sufficient to support the finding of the court to the effect that there was an account stated between the parties and an accord and satisfaction. *Berger v. Lane*, 190 Cal. 443, 447, 213 Pac. 45; *Lapp-Gifford Co. v. Muscoy Water Co.* 166 Cal. 25, 27, 134 Pac. 989; *Creighton v. Gregory*, 142 Cal. 34, 39, 75 Pac. 569; *Schneider v. Oakman Consol. Min. Co.* 38 Cal. App. 338, 342, 176 Pac. 177; *Johnston v. Burnett*, 17 Cal. App. 497, 120 Pac. 436, 34 A.L.R. 1036, note.

* * *

"In defendant's letter of September 16, 1920, it said: 'You have no right under the agreement to deduct more than \$1 per ton for such expenses, and § 4 provides for the return of any unused portions of the \$1 per ton.' It must be presumed, therefore, that the settlement disposed of that controversy. The payments of November 29, 1920,

and February 24, 1921, were made expressly as 'a final settlement of the 1918 account,' and it must be presumed that the settlement included all credits to which the defendant was entitled. The stated account and the accord and satisfaction are not attacked on the ground of fraud or mistake in the procurement thereof."

We have cited from this case at considerable length due to the similarity in facts to our case. It appears from the cases that if no real dispute as to the account as rendered existed, or if acquiescence is presumed from lack of objection for a reasonable time, an account is stated and plaintiff is precluded from recovery. If it appears that any dispute existed and payment is made thereon and defendant indicates that it is in final settlement, the acceptance of such by the plaintiff constitutes accord and satisfaction. This is well set out in *Wallace v. Crawford*, 69 P. 2d 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:

"It is a general rule of law that the acceptance of payment of a balance shown to be due on an account rendered by a debtor to his creditor ordinarily constitutes an account stated as against the party accepting the payment which precludes the creditor from thereafter questioning the accuracy of the account. *Hansen v. Fresno Jersey Farm Dairy Company*, 220 Cal. 402, 31 P. (2d) 359; 1 C.J. 689 § 270.

* * *

“* * In 1 California Jurisprudence, p. 134, § 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.’ ”

The general rule of law announced in the *California Bean Growers' Association* case, *supra*, was approved by this court in *Ashton v. Skeen*, 85 Utah 489, 39 P. 2d 1073, (1935). At page 496 of the Utah reports this court noted the elements of accord and satisfaction:

“Appellant next urges that the delivery by him to Ford Bros. of the cashier's check for \$2,500, indorsed as the evidence shows it was, which they have not returned but continue to hold, constituted an accord and satisfaction of any claim which they had against him for the money collected on the Foss account, and that he was therefore entitled to judgment. Before there can be an accord and satisfaction by acceptance of a less sum than claimed, there must be an unliquidated claim or a bona fide dispute as to the amount thereof. It is not necessary for the claim to be well founded, but it must be made in good faith, otherwise there is no consideration for an agreement to accept a less sum, and the agreement is void. See 1 C. J. 551 to

556, §§ 71 to 77; Page on Contracts, §§ 615 to 620; Williston on Contracts § 129; *Gray v. Bullen*, 50 Utah 270, 167 P. 683, *Robwer v. Burrell*, 42 Utah 510, 134 P. 573; *Smoot v. Cbecketts*, 41 Utah 211, 125 P. 412, Ann. Cas. 1915C, 113."

These principles are recognized in the following cases: *Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n.*, 94 Utah 97, 75 P. 2d 669 (1938); *Browning v. Equitable Life Assur. Soc. of the United States*, 94 Utah 532, 72 P. 2d 1060 (Utah, 1937); *Sullivan v. Beneficial Life Ins. Co.*, 90 Utah 405, 64 P. 2nd 351 (Utah, 1937); *Bell v. Jones*, 100 Utah 87, 110 P. 2d 327 (Utah 1941). 1 Am. Jur. 225-6, § 24 of the Chapter on Accord and Satisfaction has this to say, and without qualification:

"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 indorses 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."

Section 26 of the same authority at pages 228-229 states the further rule that the fact that the creditor protests against accepting the tender in full payment will not prevent the transaction from constituting a good accord and satisfaction, and even if it is accepted under the mistake of law that it will not operate as a satisfaction. Section 29 at page 230 points out that even the retention of a check for an unreasonable length of time without returning it might constitute full satisfaction. And the conclusiveness of accord and satisfaction is found in Section 72 at pages 255 to 256:

“As inherent in the definition, an accord and satisfaction operates as a final bar to the demand or subject-matter of the agreement for accord and satisfaction. And where the accord or new agreement itself is accepted in satisfaction, no action can be maintained on the old obligation. As a consequence, a valid accord and satisfaction renders unnecessary a consideration of the defense of the Statute of Frauds or of any defense on the merits to the items which were originally in dispute. Moreover, a debt which is satisfied by an accord and satisfaction is extinguished for all purposes and cannot constitute the consideration for a new promise to pay the balance.”

Reference is made in the foregoing citations to the annotation in 75 ALR at page 905. “Acceptance by check purporting to be ‘in full’ or accompanied by indications of debtor’s intention that it be so regarded.” This annotation supplements the same annotation in 34 ALR 1035 and both are referred to in *State et al v. Campbell Bldg. Co., et al*, 94 Utah 326, 77 P. 2d 341 (Utah, 1938). The general rule in 34 ALR at page 1036 is given:

"By the great weight of authority the acceptance and use of a remittance by check, purporting to be 'in full,' or employing words of similar import, or accompanied by a letter to that effect, amount to an accord and satisfaction of the larger claim of the creditor, assuming that the claim was unliquidated or disputed, so that an express agreement to accept, and the actual acceptance of, the smaller amount in full satisfaction, would have been binding."

75 ALR 905 provides:

"The following cases reiterate and follow the general rule announced in the earlier annotation, to the effect that the acceptance and use of a remittance by check, purporting to be 'in full,' or employing words of similar import, or accompanied by a letter to that effect, constitute an accord and satisfaction of the larger claim of the creditor, assuming that the claim was unliquidated or disputed, so that an express agreement to accept, and the actual acceptance of, the smaller amount in full satisfaction, would have been binding."

The cases cited therein are also so numerous as to prohibit excerpting them, and the illustrations provide many, many cases directly in point with our instant case, all holding an accord and satisfaction proved.

We respectfully submit that appellant's facts place him squarely into an account stated or an accord and satisfaction, and he is estopped to deny it. His account was computed according to the 1949 bonus and is presumed and conclusive when he cashed the checks and failed to object within a reasonable time, such account being

considered liquidated from the time it was rendered. *Wm. S. Godbe v. Brigham Young et al, supra*. If Scoville claims such account was disputed, then his cashing of the check representing the balance due for his bonus for 1949 constituted an accord and satisfaction.

We have stated that the evidence is undisputed as to the facts establishing an account stated or accord and satisfaction and such are established without any of the testimony claimed by appellant to have been wrongly excluded. Even if such testimony were admitted it would be of little aid to appellant, for it would likewise conclusively establish accord and satisfaction for appellant's only contention is that it "tended" to establish a dispute *prior* to the receipt of his account and the checks which checks he cashed without protest.

CONCLUSION

The record clearly shows: That all alleged conversations between Mr. Scoville and Mr. Williams or Mr. Borsum were offered by appellant in an attempt to vary, modify or abrogate the 1949 writing. That these conversations were *prior* to the receipt and acknowledgment of the 1949 writing. That counsel for appellant advised the court during the trial that the very purpose of such conversation was to vary the 1949 written contract not received until some time after the conversation took place. The trial court was entitled to rely upon the statement of plaintiff's counsel in considering the admissibility of the conversations. That the conversations themselves, read separately or considered as a whole, and indulging in all the *inferences*

for which appellant contends, do not elevate themselves to the dignity of an agreement, separate and distinct from the writings introduced into evidence. The undisputed evidence clearly shows that Mr. Scoville accepted the terms of the 1949 writing and his conduct and actions preclude any contention on his part of non-assent.

Under the law and the facts in this case, these alleged conversations were clearly inadmissible and the trial court properly granted defendant's motion to strike them as violating the rule against parol evidence.

Not only were the alleged conversations with Mr. Borsum inadmissible because they violate the parol evidence rule, they were subject to the further objection that they were offered in an attempt to bind Kellogg Sales Company when no adequate showing of his authority to so bind was made. The burden of proof was appellant's and no conjecture as to why such proof is lacking, or that such proof is provided by inferences, is sufficient to sustain that burden. Nor can the hearsay evidence of Mr. Scoville as to what the purported agent himself told him fill the gap. In fact, the alleged conversation in Minneapolis actually negatives the cloak of authority and indicates that Mr. Borsum would lose his job if he assumed it. The trial court properly granted defendant's motion to strike such testimony.

All of the evidence, either with or without the excluded testimony, establishes an account stated or accord and satisfaction. The 1949 writing was unambiguous and the evidence shows its receipt. Mr. Scoville received an accounting in accordance with its terms, and if he did

not then dispute such account and the evidence is clear that he thereafter received, endorsed and cashed checks for payments in accordance with the account, an account is stated and he is precluded from recovery. His alleged conversations lend him no comfort, for if they infer anything, they either *infer* a dispute or they don't and if a dispute in fact existed, then accord and satisfaction is conclusive upon him. All of the facts and circumstances of this case are clear in the record. No conjecture is needed and the pattern is distinct. The trial court properly applied the law governing all the evidence adduced and granted defendant's motion for a directed verdict.

Respectfully submitted,

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