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R. M. Scoville v. Kellogg Sales Company : Brief of Respondent in Support of Its Petition for Rehearing

Utah Supreme Court

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In the Supreme Court of the State of Utah

R. M. SCOVILLE,

Appellant,

vs.

KELLOGG SALES COMPANY,

Respondent.

Case No. 7824

RESPONDENT'S BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING

FILED

DEC 29 1953

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Clerk, Supreme Court, Utah

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STATEMENT OF FACTS

The facts have been fully set forth in appellant's and respondent's briefs, as well as being reviewed in the majority and the dissenting opinions of this court. For this reason the facts are not set forth again herein.

STATEMENT OF POINTS

POINT 1.

THE EVIDENCE ADDUCED IN THE CASE WAS THE PLAINTIFF'S ONLY, AND, THERE BEING NO DISPUTE, THE PLAINTIFF IS NOT ENTITLED TO HAVE THE COURT VIEW THE EVIDENCE IN ANY MORE FAVORABLE LIGHT THAN HIS OWN TESTIMONY PROVIDES.

POINT 2.

WHETHER THE PLAINTIFF ASSENTED TO THE TERMS OF THE 1949 BONUS PLAN OR NOT IS IMMATERIAL, FOR IN EITHER INSTANCE RULES OF LAW APPLY.

POINT 3.

THE DEFENSES OF ACCORD AND SATISFACTION AND ACCOUNT STATED ARE RULES OF LAW FOR THE COURT TO APPLY AND NOT QUESTIONS OF FACT FOR A JURY TO DETERMINE.

POINT 4.

THE COURT IMPROPERLY AMENDED THE FACTS ADDUCED AT THE TRIAL.

POINT 5.

THE PAROL EVIDENCE RULE IS A RULE OF EVIDENCE TO BE APPLIED BY THE COURT AND THE COURT IS BOUND BY THE PURPOSE FOR WHICH EVIDENCE SUBJECT TO SUCH RULE WAS INTRODUCED BY THE PLAINTIFF.

POINT I.

THE EVIDENCE ADDUCED IN THE CASE WAS THE PLAINTIFF'S ONLY, AND, THERE BEING NO DISPUTE, THE PLAINTIFF IS NOT ENTITLED TO HAVE THE COURT VIEW THE EVIDENCE IN ANY MORE FAVORABLE LIGHT THAN HIS OWN TESTIMONY PROVIDES.

The defendant respectfully submits that subsequent to the introduction of evidence by the plaintiff, and before any evidence had been introduced by the defendant,

the defendant moved the court for an involuntary dismissal under Rule 41 (b), Utah Rules of Civil Procedure, or a directed verdict. This was granted by the court. The only evidence in this case is that of the plaintiff. Plaintiff cannot have the benefit of the evidence most favorable to him to the exclusion of that evidence which he also introduced and which is inconsistent with any otherwise favorable evidence. The testimony of a witness is no stronger than it is left by his further examination or his cross-examination.

In *Sullivan v. Beneficial Life Insurance Co.*, 91 Utah 405, 64 P. (2d) 351, (Utah 1937) this court quoted from *Fowler v. Pleasant Valley Coal Co.*, 16 Utah 348, 52 P. 594, 596:

“* * * If there be a contradiction, it arises from the plaintiff's own testimony. In such a case, where a nonsuit is asked, the trial court may consider such testimony true as bears the most strongly against the interest of the plaintiff.”

This court then quoted and reaffirmed the rule laid down as follows:

“In *Putnam v. Industrial Commission*, 80 Utah 187, 14 P. (2d) 973, 981, this court says:

“‘In considering the testimony of the applicant on the issue as to whose employ he was in, we must look, not alone to the answers made by him to leading questions, or on assumptions that he was in the employ of Putnam, but to the whole of the testimony bearing on the subject. As to that, the familiar rule is applicable that testimony of a witness on his direct examination is no stronger

than as modified or left by his further examination or by his cross-examination. A particular part of his testimony may not be singled out to the exclusion of other parts of equal importance bearing on the subject.'

"In Corpus Juris the rule is again stated:

" 'To determine whether the evidence makes an issue of fact, the whole of the evidence and not merely certain selected parts thereof is to be considered.' "

If plaintiff introduced evidence, or agreed to its introduction during cross-examination, or testified to certain facts and circumstances, he is bound by such evidence. 32 C.J.S., Sec. 1040, pp. 1104, 1111.

POINT II.

WHETHER THE PLAINTIFF ASSENTED TO THE TERMS OF THE 1949 BONUS PLAN OR NOT IS IMMATERIAL, FOR IN EITHER INSTANCE RULES OF LAW APPLY.

There is no contradiction nor dispute of any kind upon which reasonable minds could differ as to the following facts and circumstances which were proved by the plaintiff:

1. The Bonus Plan for 1948 contained these limitations:

"* * * As we discussed in our meeting at Battle Creek, the Bonus Plan for 1948 will be as follows. * * *

"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 * * *" (Ex. "A").

2. The 1949 Bonus Plan contained these limitations:

"The Bonus Plan covered in Bulletin No. 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: * * *

"The above Bonus Plan covers 1949 operations only." (Ex. "B")

3. The plaintiff received both of the foregoing plans and in each instance continued to work for the defendant. He worked for the defendant for some 17 months after receiving the 1949 Bonus Plan.

4. In January of 1950 plaintiff received a letter referring to the 1949 Bonus Plan. This letter also referred to a conversation which he had had about the 1949 plan:

"Dear Ray:

"We are discontinuing bonus plan which was in effect and we will not have a bonus plan for 1950. We are advancing your salary, effective January 1, 1950 from \$325.00 to \$375.00 per month. This will confirm our recent conversation. * * *" (Ex. 3)

5. On January 30, 1950 the plaintiff received a check and a letter in payment for the 1949 bonus and in accordance with the 1949 Bonus Plan. The letter unmistakably contained an invitation to object, if such objection he had:

"Please find enclosed our check in the amount of \$3544.35 to cover bonus for the year 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 you are sending prove ours to be incorrect. We will appreciate having you forward Helen's figures (plaintiff's wife who kept his files, books and records) 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." (Ex. 6)

6. Plaintiff returned the foregoing check because no withholding tax had been deducted, and on February 6, 1950 a check in the amount of \$2,981.92 was drawn by the Kellogg Sales Company in favor of the plaintiff. He received, endorsed and cashed the check. (R. 48, Ex. 4)

7. Later, on April 24th, another check for the balance due on his 1949 bonus was drawn and transmitted to the plaintiff with the following specific information:

"* * * Attached find check in the amount of \$1,026.88 representing the balance due on your bonus for 1949." (Ex. 8)

Plaintiff received, endorsed and cashed that check.

The foregoing facts stand undisputed in the record, testified to by the plaintiff.

This court states in its majority opinion that "Scoville denies that he assented to the terms of the Bonus Plan for 1949." The foregoing facts must be considered without the benefit of any favorable light in determining whether such assent existed or not. Any statements made or let-

ters written upon which plaintiff relies as negating an assent are as follows:

1. November 4, 1948 at breakfast in Portland, Oregon, plaintiff testifies that Mr. Borsum said:

“* * * ‘That is a lot of feed.’ I said: ‘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 set up, for 1949.’” (Italics ours) (R. 23, 24)

2. On April 16, 1949 in plaintiff’s hotel room in Omaha Mr. Scoville said:

“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.’

* * *

“I said: ‘Bill (apparently W. H. Williams), 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)

3. In July or August, 1949, at a sales meeting in Omaha, and, according to Mr. Scoville, just a few days before he received the 1949 Bonus Plan, he had the following conversation:

“A. I asked Mr. Borsum if it was going to make any difference with my territory, as I was

told several times my territory operated different than anything back there.

"He said, 'No, we will work that out, whatever change is made I will let you know.'

"And he said: 'I don't think it will make a bit of change, Ray, in your set up.' " (R. 27)

4. On July 24, 1949, according to Mr. Scoville's testimony, he had written a letter discussing the 1949 Bonus Plan. This letter said in part:

"* * * Also your letter of July 11, 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. * * * " (Ex. 10)

He received the following response to his letter:

"* * * With further reference to the bonus plan for 1949, you are practically assured of one and a good one at that." (Ex. 11)

At the trial Mr. Scoville testified, in response to a question as to whether after receiving the 1949 Bonus Plan he had entered a protest or talked with any of the officials of the company, as follows:

"Not at the—I wrote them a letter at that time but there was nothing more said about it." (R. 28)

5. By plaintiff's own testimony the only indication of a conversation about the 1949 plan after its receipt was on January 9, 1950, some five to six months after the

1949 Bonus Plan must have been received. This conversation was at a turkey show in Minneapolis, Minnesota and Mr. Scoville testified to the following conversation:

“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)

Thereafter the checks and letters heretofore described followed. Seventeen months after receiving the Bonus Plan, and nearly a year after receipt of the first check, comes the first protest, written to an official of the Kellogg Company. In that letter plaintiff refers to the Bonus Plan of 1949 and acknowledges receipt of it. He avers that the conversations he had with Mr. Borsum and Mr. Williams several times regarding how this would affect him, made the plan inapplicable to him. A material portion of that letter is as follows:

“* * * This bonus plan was not changed until July 1949, at which time my feed was practically all sold for 1949, and this letter was sent out by Mr. L. C. Borsum saying the company had changed their minds regarding the 1948 bonus plan, and making this change retroactive to January 1st, 1949. Now Mr. Roll, I had talked with both Mr. Williams and Mr. Borsum several times regarding

how this would effect (sic) me, and each told me it made absolutely no difference as long as I sold the feed, but especially in April of 1949 did I discuss this with them at a sales meeting in Omaha, and was assured again that it made no difference, that I would get the \$2.00 per ton bonus on all feed I sold that year. And at that time I gave them approximately what the figures for the year 1949 would be." (Ex. 12)

A comparison of the conversations testified to by the plaintiff with the charges made in the letter leaves no doubt in reasonable minds as to what was said. The plaintiff testified to the conversations and, apparently in their entirety, such statements as, "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," "We have got the money to pay the bonus, you sell the feed," "Whatever change is made we will let you know," are phrases from plaintiff's testimony. They testify to a change and the anticipation of one on the part of the plaintiff. Certainly they cannot be construed to mean anything other than they say. In connection with this there can be no denial or misinterpretation of the phrase in the 1948 Bonus Plan that "As we discussed in our meeting at Battle Creek the Bonus Plan for 1948 will be as follows:" and "Of course this means that we will look at the situation at the end of 1948 * * * ."

There can be no question upon which reasonable minds could differ as to the testimony of the plaintiff. His knowledge of the 1948 and the 1949 plan, his acceptance of all the checks, endorsing and cashing them, and his information that they were paid on the basis of the

1949 plan, leaves nothing upon which any different conclusion could be based.

Regardless of the foregoing, the majority opinion indicates that the question of whether plaintiff assented to the terms of the 1949 plan or not was for a jury to determine. We respectfully submit that whether plaintiff did or did not assent thereto is immaterial, for in either instance a rule of law, not a question of fact, becomes applicable. If plaintiff did not assent to the 1949 plan prior to the acceptance of the checks and the statements, then a dispute existed, and the rule of law of accord and satisfaction applies. If plaintiff accepted the Bonus Plan of 1949 then he cannot subsequently repudiate it, and the rule of law of an account stated applies.

The very recent case of *Weis v. Duro Chrome Corp.*, 207 F. (2d) 298 (C.C.A. 8th, October 14, 1953), will illustrate the application of accord and satisfaction and is directly in point. In that case an employee brought an action against his employer to recover the difference between the amount of commissions originally provided in his employment contract and the amount he received after a reduction of the commissions by the employer. In affirming a judgment adverse to the employee the court held:

“* * * In April, 1947, plaintiff and defendant entered into a written contract by the terms of which defendant employed plaintiff to solicit orders for the defendant's products in the territory therein described upon a commission basis under a schedule therein contained. The contract contained the following provision:

“ ‘We (defendant) reserve the right to change commissions, discounts, or prices at any time we

may deem necessary without giving prior notice—regardless of existing catalogue, bulletin or circular prices (either net or list) as shown in any printed or typewritten literature which may be in your possession or in the hands of the trade.’ The contract also contained a provision that it might be terminated by either party on 30 days notice in writing. Plaintiff’s commissions as provided by the written contract were 10%. On January 28, 1948, claiming to act pursuant to the above quoted provision of the contract, defendant gave written notice to plaintiff of a reduction in his commissions from 10% to 8%, and on December 3, 1948, by written notice defendant advised plaintiff of a further reduction in his commissions to 7½%. During all the times here involved defendant sent to plaintiff monthly statements showing a complete record of the business written the previous month and the percentage upon which the commissions were based, and enclosed a check for commissions as shown. These checks were cashed by the plaintiff and so far as appears from the record without protest for more than one year, the plaintiff stating in his testimony that he thought the difference between the commissions stated in the contract and the reduced rate was being accumulated until the defendant was operating at a profit. In the present action plaintiff seeks to recover the difference between the amount of commissions calculated at 10% as originally provided in the contract and the amount which he received under the reductions made by defendant.

* * *

“* * * In the course of performance of the contract subsequent to the action of defendant in reducing plaintiff’s commissions, plaintiff received compensation evidenced by checks based upon the

reduced schedule of commissions. These checks were received and cashed by him. In these circumstances he cannot now be heard to contend that they were not accepted by him in full payment. The statements specifically indicated the amount due plaintiff and the checks received and accepted by him represent that amount. It is contended by plaintiff, however, that the acceptance and cashing of the checks by him did not estop him from seeking to recover what he now claims to be due him because the amount due was a liquidated amount. The trouble with this contention is that the amount claimed to be due was not liquidated. There was a denial by the defendant that any amount in excess of the amounts shown by the statements and checks submitted was due him. If there was any reasonable contention between the parties as to the correct amount due plaintiff the submission of these statements with the checks amounted to an accord and when accepted by the defendant the transaction constituted an accord and satisfaction. *Phillips Petroleum Co. v. Rau Const. Co.*, *supra*; *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S. W. 981; *Zinke v. Knights of the Maccabees*, 275 Mo. 660, 205 S. W. 1; *Whitmire v. Lawrence, etc.*, Mo. App., 286 S. W. 842; *Ellis v. Mansfield*, 215 Mo. App. 292, 256 S. W. 165.”

See *California Bean Growers' Association v. Rindge Land & Navigation Co.*, 248 Pac. 658, 47 A.L.R. 904, (Cal. 1926); *Benites v. Hampton*, 3 Utah 369; *Ashton v. Skeen*, 85 Utah 489, 39 P. (2d) 1073 (1935); *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. (2d) 351 (*Utah*, 1937); *Bell v. Jones*, 100 *Utah* 87, 110 P. (2d) 327 (*Utah* 1941). See, also, the annotations at 34 A.L.R. 1035, 1036, and 75 A.L.R. 905, both annotations being referred to in *State, et al. v. Campbell Bldg. Co., et al.*, 94 *Utah* 326, 77 P. (2d) 341 (*Utah* 1938). In the annotation of 34 A.L.R. at page 1036, the general rule 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.”

As hereafter pointed out, the dissenting opinion sets out this rule of law and quotes it quite fully from Corbin on Contracts.

Defendant is entitled to the benefit of any controversies in the evidence produced by the cross-examination or in plaintiff's own evidence. The burden of proof is upon the plaintiff to establish his case. If plaintiff, in support of such burden, created a question of fact for a jury susceptible of two interpretations, we submit that he is not entitled to select the interpretation most favorable to him.

The majority opinion indicates that the question as to whether plaintiff's action constituted an acceptance or not was a question for the jury. It is apparent that regardless of the determination of the jury as to that fact,

such determination would lead only to an application of a rule of law by the court that accord and satisfaction had been reached or that an account stated resulted.

POINT III.

THE DEFENSES OF ACCORD AND SATISFACTION AND ACCOUNT STATED ARE RULES OF LAW FOR THE COURT TO APPLY AND NOT QUESTIONS OF FACT FOR A JURY TO DETERMINE.

The majority opinion states that whether plaintiff's actions constituted an accord and satisfaction, or whether his actions bound him to an account stated, are questions for the jury.

We again point out that all the testimony in this case was adduced by the plaintiff. The weight of authority as to whether such defenses are rules of law when applied to uncontroverted facts adduced at trial, is in favor of such application as a rule of law. The majority opinion seems to indicate that the application of such rules, including the rule of estoppel, is a question of law for the court, when it said:

“As to the estoppel claimed by the defendant, it is difficult to find in the record any representation knowingly made by plaintiff upon which he intended defendant to rely and which the defendant, having done so, acted to its legal detriment.”

This would seem to preclude the application of the rule of law to the facts in the case as adduced by the plaintiff. Conversely, such language would indicate that the facts

support the application of the rule of law of accord and satisfaction and accounts stated.

The dissenting opinion disagrees with the majority as to whether it was a jury question on accord and satisfaction and quotes from *Corbin On Contracts*, Sec. 1279, Vol. 6, p. 97:

“Where the amount due is in dispute, and the debtor sends cash or check for less than the amount claimed, clearly expressing his intention that it is sent as a settlement in full, and not on account or in part payment, the retention and use of the money or the cashing of the check is almost always held to be an acceptance of the offer operating as full satisfaction, even though the creditor may assert or send word to the debtor that the sum is received only in part payment. The creditor’s action in such case is quite inconsistent with his words. It may, indeed, be clear that he does not in fact assent to the offer made by the debtor, so that there is no actual ‘meeting of the minds.’ But this is merely another illustration of the fact that the making of a contract frequently does not require such an actual meeting. . . . It has seemed to the courts more beneficial to hold that the creditor’s action speaks louder than his words and is operative as an acceptance of the offer as made.

“The cashing, or the certification, of a check expressly sent in full settlement of a disputed claim, operates as an accord and satisfaction if, at the time, no word of dissent is sent to the party offering it in satisfaction.

“In these cases it is held that it makes no difference that the creditor did not know that the effect of his cashing the check or keeping the money

would be the discharge of his entire claim. This is supported by fundamental legal doctrine. The acceptance of an offer makes a contract even though the parties do not know the law or the legal consequences of their agreement.”

Other authorities agreeing with the dissenting opinion are numerous and appear to represent the great weight of authority. In 1 C.J.S., *Sec.* 49, *pp.* 567, 569, the rule of law is stated at page 567:

“Where there is substantially no dispute as to the facts on which a claim of accord and satisfaction is based, the question of the creditor’s assent is one of law to be determined by the court.”

At page 569 the following rule of law is given:

“The court may direct a verdict for defendant where he has established accord and satisfaction by conclusive and undisputed evidence, or where the facts in evidence give rise to a conclusive presumption of acceptance in satisfaction; but it may and should refuse to do so where accord and satisfaction has not been proved or where the question is one for determination by the jury, as where the evidence is in conflict or the facts necessary to establish accord and satisfaction are in dispute.”

POINT IV.

THE COURT IMPROPERLY AMENDED THE FACTS ADDUCED AT THE TRIAL.

The majority opinion contains the following statement in summarizing the testimony of the plaintiff:

“* * * That he saw no reason why the bonus should be changed at that time and that nothing would be changed in the 1949 setup.”

We respectfully submit that the use of the word “would” is incorrect. Mr. Scoville, in his testimony, used the word “should.” The dissenting opinion discusses this change in the testimony. The word “should” imparts the flavor of “might be” to the conversation. This flavor continues throughout subsequent conversations and attacks any inference that the 1948 Bonus Plan “would not” be changed. Conjecture and speculation arise to cloud any *probability*.

POINT V.

THE PAROL EVIDENCE RULE IS A RULE OF EVIDENCE TO BE APPLIED BY THE COURT AND THE COURT IS BOUND BY THE PURPOSE FOR WHICH EVIDENCE SUBJECT TO SUCH RULE WAS INTRODUCED BY THE PLAINTIFF.

In passing on the question of the admissibility of statements made by the plaintiff and others prior to the issuance of the Bonus Plan for 1949 under the parol evidence rule, the majority opinion designates the statements as relating to the question of acceptance or non-acceptance of the 1949 Bonus Plan. The majority opinion states:

“Defendant urges that the trial court did not err in striking as inadmissible under the parol evidence rule, all statements made prior to issuance of the ‘Bonus Plan for 1949,’ whether they had resulted in agreement or not, since they were merged in the later agreement. Such contention assumes the most important fact in this case,—whether Scoville accepted the terms of the ‘Bonus Plan for 1949.’

The facts most favorable to plaintiff are not such as would require all reasonable minds to conclude that there was such an acceptance, hence whether Scoville's actions were such as to constitute an acceptance also was a jury question."

The rule governing the inadmissibility of parol evidence is directed not at an assumption nor the end result or interpretation of the proffered evidence. Whether Scoville accepted the 1949 Bonus Plan or not does not alter the admissibility of statements made prior to its issuance. The importance of applying the parol evidence rule lies in the court's statement that such contention assumes the most important fact in this case,—whether Scoville accepted the terms of the Bonus Plan for 1949. It stands uncontradicted in the record that the purpose for which such evidence was introduced by the plaintiff was in an attempt to vary the 1949 Bonus Plan. We respectfully submit that the trial court and this court was and is bound to accept the purpose and intent for which such evidence was introduced as specifically and undeniably offered by the plaintiff.

"MR. CALLISTER: If the court please, it is no attempt to vary the 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." (R. 23)

We respectfully submit that it does not now lie in the province of this court to state that such evidence was offered to indicate lack of assent to the 1949 plan, when it was specifically announced by plaintiff in open court that its purpose was to vary the 1949 plan.

To hold that such parol evidence is admissible because to strike it might eliminate the possibility that reasonable minds would have to conclude that there was no acceptance, seems to overrule the parol evidence rule as such has been established and adopted by this court and applied many times. Certainly the admissibility of such evidence is a question for the trial court, not the jury, and should be separated from the effect such evidence, if admitted, might have on the acceptance or lack of acceptance on the part of the plaintiff. Not only was the evidence not introduced by the plaintiff for such purpose, but the question of acceptance or non-acceptance should properly be determined from the statements and actions of the plaintiff and others subsequent to the 1949 Bonus Plan after it was received and acknowledged by the plaintiff.

The evidence is admissible or not admissible under the parol evidence rule, and whether its effect assumes the most important fact in the case does not alter its admissibility under such rule. To hold otherwise seems to adulterate the purpose of the parol evidence rule and overrules it as it has been accepted and established in the courts of this state and every other jurisdiction of the country.

In *Hogan v. Swayze*, 65 *Ut.* 380, 230 *P.* 1097 (*Utah* 1925), this 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.”

CONCLUSION

The majority opinion considered the evidence in the light most favorable to plaintiff's theory of the case. This court should not have so viewed the evidence where the only evidence adduced was that of the plaintiff, and there being no dispute in the evidence defendant was entitled to the benefit of any discrepancies, contradictions or testimony supporting the defenses and objections raised at the trial. Plaintiff was bound by such testimony, unfavorable though it may be.

Plaintiff's undisputed evidence showed he anticipated and received the 1949 Bonus Plan, that he thereafter discussed it, received a statement of his bonus thereunder, together with checks therefor, which checks he endorsed and cashed without protest. He received the 1949 Bonus Plan some seventeen months before registering any complaint and he had received statements and cashed checks without complaint until nearly a year had elapsed. The evidence he alone adduced established the defense of accord and satisfaction or account stated.

Whether he assented to the 1949 Bonus Plan or not is immaterial, for if it could possibly be found from the evidence that he did not assent to the 1949 Bonus Plan then a dispute existed and accord and satisfaction applies precluding recovery. On the other hand, if it were found that he did not assent, then he cannot be heard to repudiate the 1949 Bonus Plan and an account stated precludes his recovery.

Accord and satisfaction and account stated are rules of law to be applied by the court and not questions of

fact for the jury where the facts are not in dispute. The facts cannot be in dispute in this case where such were adduced by plaintiff alone.

The majority opinion substituted the word "would" for the word "should" and neither the inference such a word as "would" might otherwise support nor the substance of the word itself is found in the record.

The parol evidence rule should be applied to the evidence introduced by the plaintiff where the specific purpose for which such evidence was introduced was announced by the plaintiff in open court. Evidence of conversations had prior to and purporting to vary a written instrument is inadmissible under the parol evidence rule, and this is so regardless of any possible indications of intent to accept such instrument which might be otherwise inferred from the substance of such conversations. The majority opinion in effect overrules the parol evidence rule and the decisions heretofore given by this court approving the rule in this jurisdiction.

We respectfully submit to this court that the dissenting opinion not only recognizes that the facts stand undisputed in the record as having been introduced by the plaintiff alone, but also correctly states the law applicable to such facts. The petition for rehearing should be granted and the judgment of the lower court should be affirmed.

Respectfully submitted,

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