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Notice of Appeal.

NOTICE OF APPEAL.

Filed March 11, 1920.

New Jersey Supreme Court

10

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, Inc., a corpo-
ration,

Defendant.

Action at Law.

Notice of Appeal.

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause.

20

WOLBER & GILHOOLY,
Attorneys for Defendant.

To MESSRS. HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

Newark, New Jersey,
March 9th, 1920.

30

Sat below: MOUNTAIN, C. C. J.

Service of the within Notice of Appeal is hereby acknowledged this 10th day of March, 1920.

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

40

Grounds of Appeal.

GROUND OF APPEAL.

Filed April 6, 1920.

10 **New Jersey Court of Errors and Appeals**

WILLIAM N. HEITMAN,

Plaintiff-Respondent,

vs.

KALTENBACH & STEPHENS, Inc.,

Defendant-Appellant.

Action at Law.

*Grounds for
Appeal.*

20 The appellant states the following grounds of appeal:

1. The Court refused to non-suit the plaintiff, although a non-suit should have been granted therefore.

2. The letter (Exhibit P. 1), dated March 4, 1918, addressed to Mr. W. Heitman, signed B. Oberndoerfer, was improperly admitted in evidence by the Trial Court.

3. The following question was admitted:

To the witness, Charles E. Kaltenbach:

30

“Q Just a minute, now; I don’t want you to talk. I want you to answer the question. It is true, nevertheless, that when your wife’s uncle got out of a position—

Mr. Wolber. I object, if your Honor please. It seems to me that this is outside of the scope of cross examination. Nothing has developed on the direct examination of this witness—

The Court. What is the purpose of this question?

40

Mr. Bostwick. The purpose of the question is to show the motive for the discharge. I think it is entirely relevant.

The Court. I will admit it.

Defendant’s counsel prays an exception to this ruling of the Court.”

Grounds of Appeal.

4. The Trial Court refused to permit the following question: To the witness, Henry F. Otto:

“Q Who made up the actual figures on which the bonus for 1918 was figured. A I did.

Q Now, will you tell us just how you did it?

Mr. Bostwick. I object. I think it is irrelevant how the bonus that was paid was actually figured. The question is whether Mr. Heitman was to receive a certain bonus. How the bonus was paid after Mr. Heitman had been discharged and after Mr. Graves, another one who participated in the bonus, had been discharged, making it possibly necessary to change the method of division, I think is unimportant here. 10

The Court. Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.” 20

5. The Court charged the jury:

“*The Court.* Gentlemen of the Jury: My attention has been called to two errors that I made, or perhaps to two omissions.

If you find that the plaintiff resigned, but that his resignation was to take effect December 31, 1918, and that he was before that time discharged by the defendant, then, of course, he is entitled to recover. When I used the word ‘resigned’ I meant resigned on the day that he left, not December 31, 1918. If he notified the defendant that he was going to resign at a future date, and then in the meantime was discharged, he is entitled to recover.” 30

6. The Court permitted the following question:

“Q You have heard Mr. Ryan testify on direct examination, or cross examination, criticism of your management of your department, and he testified, as I recall it, one account had given a great deal of trouble on account of lack of efficient management of your department. What have you to say about that? A Why, that is the Reistick matter he brought up. These people had a lot of orders in— (Interrupted.) 40

Mr. Wolber. I think questions of this kind by me were ruled out. It was decided that we were not justifying the alleged discharge on the ground of any un-

Grounds of Appeal.

satisfactory work. It seems to me that the same objection applies to this testimony offered on behalf of the plaintiff.

10

Mr. Bostwick. If your Honor please, Mr. Ryan in his testimony by insinuation made a remark about Mr. Heitman's management of his department, and I think it is only just to him that he should be permitted to explain such of the criticisms as were specified. That is my only purpose and I think it is proper rebuttal on the circumstance of its having been testified to on direct examination.

The Court. I will admit it.

Defendant's counsel prays an exception to this ruling of the Court."

20

7. The Court charged the fourth request of the defendant with qualifications as follows:

30

"Fourth. 'If you find that the bonus was a gratuitous offer upon the part of the defendant company, then there can be no recovery by the plaintiff against the defendant for any portion of the bonus.' Well, I shall qualify that by stating that if that was a bona fide offer made to the plaintiff with the expectation that it would induce the plaintiff to remain in the employ of the defendant, or was an offer of additional consideration, the fourth request to charge would not be proper, because if the plaintiff accepted a bona fide offer, that made a contract. That is a little ambiguous, in my opinion."

8. The Court refused to charge the tenth request of the defendant to charge as follows:

(10) If the defendant company's offer was one that was to be accepted by the salesmen at a later meeting to be called, then the plaintiff cannot recover in this action unless there is evidence in the case that he accepted the offer at such later meeting.

40

WOLBER & GILHOOLY,
Attorneys for Defendant-Appellant.

Service of the within Grounds for Appeal is hereby acknowledged this 5th day of April, 1920.

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

Rule to Show Cause.

RULE TO SHOW CAUSE.

Filed June 26, 1919.

New Jersey Supreme Court

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, Inc., a corporation,

Defendant.

*On Rule to
Show Cause, etc.
Rule.*

10

Application having been made within six days after the rendering of the verdict in this cause, now on motion of Wolber & Blake, attorneys for the defendant, it is on this 21st day of June, Nineteen Hundred and Nineteen,

20

ORDERED, that the plaintiff show cause before the Supreme Court at the next term thereof, why the verdict in this cause should not be set aside and a new trial granted.

And it is further ordered that all exceptions and objections taken by the defendant at the trial of said cause be and they are hereby expressly reserved.

Let this rule be entered.

30

Dated June 21st, 1919.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

Service of a copy of the within rule is hereby acknowledged this 23rd day of June, 1919.

(Signed) HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

40

Summons—Complaint.

SUMMONS.

Issued December 26, 1918.

The State of New Jersey to Kaltenbach & Stephens, Inc., a New Jersey Corporation:

10

You are summoned to answer the annexed complaint of William N. Heitman, in an action at law in the [L. s.] Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-sixth day of December, Nineteen Hundred and Eighteen.

ENOCH L. JOHNSON,
Clerk.

STICKEL, BOSTWICK & NAUGHRIGHT,
Attorneys.

COMPLAINT.

30

Filed December 31, 1918.

The plaintiff, residing at 31 Farley avenue, Newark, New Jersey, says that,—

FIRST COUNT.

40

1. The defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. On or about the second day of January, 1918, the plaintiff and defendant entered into an agreement by the terms of which it was agreed that the plaintiff should devote his time and efforts in the employ and to the service of the defendant throughout the calendar year 1918, and should receive as compensation therefor, as the reasonable value of his services, the sum of \$3,510 for the year, payable in bi-weekly installments of

Complaint.

\$135 each, and in addition thereto a portion or share of a bonus of 2 per centum on all sales of the company's goods for the year 1918 in excess of \$1,500,000.

3. Plaintiff on said second day of January, 1918, entered the employ of said defendant under and pursuant to the said contract as aforesaid, and devoted his time and efforts to the service of the said defendant according to said contract throughout said year of 1918 until the eleventh day of October, 1918, when the defendant, without previous notice to plaintiff and in disregard of plaintiff's rights in the premises under said contract, arbitrarily terminated plaintiff's employment with said defendant company and refused to permit and forbade the plaintiff to continue in his said employment according to the said contract, and refused to pay plaintiff the balance of the salary due him according to said contract for the year 1918, and still refuses so to do.

4. Plaintiff says that the sales of the company's goods for the year 1918, largely as the result of plaintiff's time and efforts devoted as aforesaid to the service of the defendant pursuant to said contract, have greatly exceeded the sum of \$1,500,000, and have approximated the sum of \$3,000,000, and had exceeded by a large sum the amount of \$1,500,000 on said eleventh day of October, 1918, when plaintiff was discharged as aforesaid; that the plaintiff by reason of his duties, and his experience and intimate knowledge of the defendant's market, business operations and methods, was enabled during the period of his employment by the defendant as aforesaid to, and did, negotiate and make many and large sales of the company's goods for the year 1918, aggregating \$500,000, and to aid and assist other salesmen in the employ of the said defendant company in the making of sales of the company's goods for the year 1918, and generally to improve and expand said business and enhance said sales for the year 1918; that by reason of plaintiff's services as aforesaid, under said contract, he is entitled to receive, in addition to the salary so as aforesaid due him, as the reasonable value of his services as aforesaid, out of the said bonus of 2 per centum above referred to, the sum of \$6,000, which defendant has refused and still refuses to pay plaintiff.

Complaint.

5. Plaintiff during the period of his employment as aforesaid under said contract fully performed all his obligations of employment thereunder.

10 6. Plaintiff has made diligent effort to obtain other employment since his discharge as aforesaid from the employment of the defendant, but has been unsuccessful, and is entitled to be paid the balance of his salary of \$3,510 agreed to be paid him under the contract aforesaid for the year 1918, which balance amounts to the sum of \$750.

20 Plaintiff will also claim punitive damages in the amount of \$10,000, charging that the defendant, its officers and agents, have willfully, deliberately and maliciously conspired and schemed together and with others to discourage and prevent plaintiff from obtaining employment or establishing a connection with other persons, firms and corporations engaged in a line of business identical to or allied with that of the defendant, and to misrepresent and depreciate plaintiff to that end, thereby seriously injuring plaintiff and rendering him unable to obtain suitable employment.

SECOND COUNT.

1. Plaintiff makes paragraphs numbered 1, 2 and 3 of the First Count a part of this count.

30 2. Plaintiff says that the sales of the company's goods for the year 1918, largely as the result of plaintiff's time and efforts devoted as aforesaid to the service of the defendant pursuant to said contract, have greatly exceeded the sum of \$1,500,000 and have approximated the sum of \$3,000,000, and had exceeded said sum of \$1,500,000 on said eleventh day of October, 1918, when plaintiff was discharged as aforesaid; that the plaintiff by reason of his duties, and his experience and intimate knowledge of the defendant's market, business operations and methods, was enabled, during the period of his employment by the defendant as aforesaid, to, and did, negotiate and make many and large sales of the company's goods for the year 1918, aggregating the sum of \$500,000, and to aid and 40 assist other salesmen in the employ of said defendant company in the making of sales of the company's goods for the year 1918, and generally to improve and expand said business and enhance said sales for the year 1918; that if plaintiff had been

Complaint.

permitted to continue in his said employment, according to the said contract, for the remainder of said year 1918 and until the expiration thereof and in the performance of the aforesaid duties, according to said contract, he would have still further and very greatly increased the defendant's sales and business for said year 1918, thereby increasing the excess sales upon which said bonus was agreed to be calculated and plaintiff's share thereof under said contract, and that by reason of his discharge as aforesaid plaintiff was deprived of the opportunity to increase said business and sales for the year 1918, and has lost on that account a large sum of money, to-wit, the sum of \$2,000. 10

Plaintiff claims as damages the sum of \$2,000.

THIRD COUNT.

1. The defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. 20

2. In or about the month of November, 1917, the defendant offered the plaintiff an opportunity to enter into a contract with the defendant on the second day of January, 1918, for the year 1918, the terms of which contract were to be that in consideration of the plaintiff entering defendant's employment on said second day of January, 1918, and devoting his time and efforts to the service of the defendant for the year 1918 the plaintiff should be paid a salary of \$3,510 for the year, payable in bi-weekly installments of \$135 each, and in addition should receive a share or portion of a bonus of 2 per centum on all sales of the company's goods for the year 1918 in excess of \$1,500,000, plaintiff's share or portion of such bonus to be determined at a later date. 30

3. On said second day of January, 1918, plaintiff accepted the aforesaid offer of employment, and the terms thereof as aforesaid, for the year 1918, and entered the employment of the said defendant; that he continued in said employment throughout the year 1918, devoting his time and efforts to the service of the defendant, in performance of the terms of said contract, until October 11th, 1918, and received bi-weekly during that period the sum of \$135 on account of his salary of \$3,510 for the year according to the terms of said contract. 40

Complaint.

4. On or about the fifth day of March, 1918, the plaintiff and the defendant agreed that the amount of the additional compensation for the year 1918 which plaintiff should receive under the terms of the said contract should be 10 per centum or one-tenth of the said bonus of 2 per centum on all sales of the company's goods for the year 1918 in excess of \$1,500,000.

5. Plaintiff as aforesaid continued in his employment with the said defendant throughout the year 1918, fulfilling and performing all his obligations under said contract, until October 11th, 1918, when the defendant, ignoring said contract and plaintiff's rights thereunder, arbitrarily terminated the said employment and refused and still refuses to permit the plaintiff to continue in his said employment until the expiration of the year 1918 in accordance with the terms of said contract, or to pay the plaintiff the balance of the salary so as aforesaid provided by said contract to be paid to him, or any part thereof, or to pay to plaintiff his percentage of the bonus agreed in said contract to be paid to him, or any part thereof.

6. Plaintiff says that the sales of the company's goods for the year 1918 have greatly exceeded the sum of \$1,500,000 and have approximated the sum of \$3,000,000, and had greatly exceeded the said sum of \$1,500,000 on the said eleventh day of October, 1918, when plaintiff was discharged as aforesaid, and that plaintiff is entitled, under the terms of said contract, to one-tenth of 2 per centum of all sales of the company's goods for the year 1918 in excess of \$1,500,000, as well as to the balance of his salary for the year 1918, amounting to \$750.

Plaintiff claims as damages the sum of \$4,000.

Plaintiff will also claim punitive damages in the amount of \$10,000, charging that the defendant, its officers and agents, have willfully, deliberately and maliciously conspired and schemed together and with others to discourage and prevent plaintiff from obtaining employment or establishing a connection with other persons, firms and corporations engaged in a line of business identical to or allied with that of the defendant, and to misrepresent and depreciate plaintiff to that end, thereby seriously injuring plaintiff and rendering him unable to obtain suitable employment.

Complaint.

FOURTH COUNT.

1. Plaintiff makes paragraphs numbered 1, 2, 3, 4 and 5 of the Third Count hereof a part of this count.

2. Plaintiff says that if he had been permitted to continue in the employment of the defendant and in the performance of his duties thereunder, in accordance with the aforesaid contract of employment, until the expiration of the year 1918, he would have been able to and would have still further and very greatly increased the business and sales of the company's goods for the year 1918, and consequently the excess upon which said bonus and plaintiff's share or portion thereof was agreed to be calculated, under said contract, and that by reason of his discharge as aforesaid he was deprived of the opportunity of so increasing said business and sales, and thereby lost a large sum of money, to-wit, the sum of \$2,000.

Plaintiff claims as damages the sum of \$2,000.

FIFTH COUNT.

1. Plaintiff makes paragraph 1 of the First Count a part of this count.

2. Plaintiff says that up to the beginning of the year 1918 he had been in the employ of the defendant company and of its predecessor, a partnership doing business under the name of Kaltenbach & Stephens, for a number of years, serving said defendant and said partnership in the capacities of head of the merchandise department, sales manager, supervisor of credits, etc., and that he continued in said employ through the year 1918 until October 11th of said year, receiving as compensation for his services \$135 bi-weekly on account of a yearly salary of \$3,510.

3. On or about the fifth day of March, 1918, the defendant offered to increase plaintiff's compensation for his services for the year 1918, by way of an allowance to him of the one-tenth share or portion of a bonus of 2 per cent. of sales of the company's goods for the year 1918 in excess of \$1,500,000, and plaintiff accepted said offer and agreed to the terms thereof.

4. Plaintiff continued in the employ of said company thereafter, performing all the duties devolving upon him as theretofore, until the eleventh day of October, 1918, when the defendant

Complaint.

arbitrarily and without previous notice to plaintiff, dismissed plaintiff from the employ of said defendant and refused and forbade plaintiff to continue further in his said employment, and refused and still refuses to pay plaintiff the balance of his salary for the year 1918 amounting to \$750 or to pay plaintiff his share of said bonus so as aforesaid agreed to be paid to him or any part thereof, although plaintiff says that the sales of the company's goods for the year 1918 greatly exceeded the sum of \$1,500,000 and have approximated the sum of \$3,000,000, and that said sales had greatly exceeded \$1,500,000 on the date of plaintiff's discharge as aforesaid.

5. Plaintiff claims as damages the sum of \$4,000.

6. Plaintiff will also claim punitive damages in the amount of \$10,000, charging that the defendant, its officers and agents, have willfully, deliberately and maliciously conspired and schemed together and with others to discourage and prevent plaintiff from obtaining employment or establishing a connection with other persons, firms and corporations engaged in a line of business identical to or allied with that of the defendant, and to misrepresent and depreciate plaintiff to that end, thereby seriously injuring plaintiff and rendering him unable to obtain suitable employment.

SIXTH COUNT.

1. Plaintiff makes paragraphs 1, 2 and 3 and 4 of the Fifth Count hereof a part of this count.

2. Plaintiff says that if he had been permitted to continue in said employment and in the performance of the duties thereof until the expiration of the year 1918 he would have still further and very greatly increased the defendant's business and sales and thereby increased the excess sales upon which the said bonus was agreed to be calculated and plaintiff's share thereof under said contract and that by reason of his discharge as aforesaid, plaintiff was deprived of the opportunity to increase said business and sales and lost, on that account, a large sum of money, to-wit, \$2,000.

Plaintiff claims damages in the sum of \$2,000.

STICKEL, BOSTWICK & NAUGHRIGHT,
Attorneys of Plaintiff.

Stipulation—Answer.

STIPULATION.

Filed January 17, 1919.

It is stipulated and agreed between the attorneys for the plaintiff and the attorneys for defendant that the time for answering or making a motion addressed to the complaint herein will be extended from the sixteenth day of January, 1919, for a period of fifteen days. 10

STICKEL, BOSTWICK & NAUGHRIGHT,
Attorneys for Plaintiff.

WOLBER & BLAKE,
Attorneys for Defendant.

ANSWER.

Filed January 31, 1919.

20

The defendant, Kaltenbach & Stephens, Inc., a corporation, having its principal office in the City of Wilmington, State of Delaware, answering, says that:

1. It denies the truth of the matters contained in the complaint.

2. The defendant hereby gives notice that at or before the trial of the above cause it reserves the right to move to strike out the entire complaint or one or more of the counts contained therein upon the ground that the said complaint states conclusions of fact and that the claim for punitive damages is not properly pleaded nor can such damage be recovered under the facts alleged in said complaint. 30

3. The defendant will object that the special damage claimed in the complaint is too remote.

4. Defendant will object that the matters and things alleged in the complaint are not the subject of exemplary damages.

FIRST DEFENSE.

40

1. That on or about the first day of October 1918, the plaintiff demanded an increased compensation for the year 1919. The defendant refused to consider any additional compensation at the time of the making of said demand; whereupon the plaintiff

Reply.

gave notice that he would seek other employment, which was consented to by the defendant.

WOLBER & BLAKE,
Attorneys for Defendant.

10

REPLY TO DEFENDANT'S ANSWER.

Filed February 7, 1919.

The plaintiff, William N. Heitman, replying to the answer of the defendant filed herein, says:

20 1. The plaintiff denies that his employment by the defendant was terminated on October 1st, 1918, or at any other date under the circumstances alleged in the first defense contained in defendant's answer herein, but says that on or about the eleventh day of October, 1918, as alleged in the bill of complaint herein, he was, without notice or warning and against the protest of plaintiff, summarily and pre-emptorily dismissed from defendant's service and forbidden to continue in the same thereafter.

STICKEL, BOSTWICK & NAUGHRIGHT,
Attorneys for Plaintiff.

30

40

Rejoinder—Substitution.

REJOINDER TO PLAINTIFF'S REPLY.

Filed February 15, 1919.

Kaltenbach & Stephens, Inc., the defendant herein, denies that the plaintiff was without notice or warning and against the protest of the plaintiff, summarily and pre-emptorily dismissed from defendant's service. 10

WOLBER & BLAKE,
Attorneys for Defendant.

SUBSTITUTION.

Filed March 22, 1919.

The substitution of Heine, Bostwick & Bradner, attorneys at law, to act as attorneys for the plaintiff in the above-entitled cause in the place and stead of Stickel, Bostwick & Naughtright is hereby consented to. 20

STICKEL, BOSTWICK & NAUGHRIGHT,
Attorneys for Plaintiff.

WOLBER & BLAKE,
Attorneys for Defendant. 30

POSTEA.

Filed June 24, 1919.

This case was tried before Judge Worrall F. Mountain, with a jury, at the Essex Circuit on June 16th and 17th, Nineteen hundred and nineteen, to whom the same was referred for trial. 40

The jury rendered a general verdict against the defendant and in favor of the plaintiff for two thousand six hundred sixty-five dollars and sixty cents (\$2,665.60).

WORRALL F. MOUNTAIN,
Circuit Court Judge.

Motion to Strike Out.

NEW JERSEY SUPREME COURT, ESSEX CIRCUIT.

Monday, June 16, 1919.

10	WILLIAM N. HEITMAN, <i>vs.</i> KALTENBACH & STEPHENS, Inc., a corpo- ration.	}	<i>Action at Law.</i>
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Before Hon. Worrall F. Mountain, *J.*, and a jury.

For plaintiff appear Messrs. Heine, Bostwick & Bradner, by John W. Bostwick, Jr., Esq.

For defendant appear Messrs. Wolber & Blake, by Joseph G. Wolber, Esq.

20 (A jury is called and sworn.)

(By direction of the Court, the jury withdraws.)

30 *Mr. Wolber.* If your Honor please, the plaintiff in his state of demand, in the first count, the sixth paragraph, adds the following language: "Plaintiff will also claim punitive damages in the amount of \$10,000, charging that the defendant, its officers and agents, have willfully, deliberately and maliciously conspired and schemed together and with others to discourage and prevent plaintiff from obtaining employment or establishing a connection with other persons, firms and corporations engaged in a line of business identical to or allied with that of the defendant, and to misrepresent and depreciate plaintiff to that end, thereby seriously injuring the plaintiff and rendering him unable to obtain suitable employment." A similar paragraph is attached to the third count as well as to the sixth count, the sixth paragraph.

40 The defendant in its answer reserved the right to move to strike out the entire complaint or one or more of the counts contained therein on the ground that the complaint states conclusions of fact and that the claim for punitive damages is not properly pleaded, nor can such damages be recovered under the facts alleged in said complaint; that the matters and things alleged in said complaint are not the subject of such damages. The point is that the plaintiff's complaint is evidently predicated

Motion to Strike Out.

on the theory of a breach of contract, and under the principles of law applicable to such a situation the damages are only those damages which naturally flow from a breach of contract, and there is no case that I have been able to find in the State of New Jersey or elsewhere that permits punitive damages to be attached to any case of breach of a contract, with the probable exception of breach of promise, and in such a case there are reasons why the rule of damages should be different to the ordinary rule that applies to cases of breach of contract.

10

In this State the only cases that we meet with are probably those of tort, particularly cases of libel and slander, cases where willfulness and malace are involved, not a case of ordinary breach of contract—as in this case, a breach of contract of employment. And, further, I would argue that the matter, assuming that the rule was otherwise—

The Court. What is your motion?

20

Mr. Wolber. My motion is to strike out that count.

The Court. I cannot do that. A Circuit Court Judge has not the authority to do it. Motions that are directed to striking out pleadings in the New Jersey Supreme Court must be directed to the Chief Justice. I can entertain a motion to non-suit at the conclusion of the plaintiff's case, but I cannot strike out anything.

Mr. Wolber. The Practice Act gives us the right at the trial to take exception to the form in which the pleadings are.

The Court. Oh, yes.

30

Mr. Wolber. But in this position we are powerless.

The Court. I cannot do it in this particular case, because I have not got the authority.

Mr. Wolber. Your authority would be limited even if it were more patent.

The Court. All I can do is to entertain a motion to non-suit at the conclusion of the plaintiff's case, and then in charging the jury modify my charge or adding to it by any suggestions counsel may make in the form of requests to charge.

40

Mr. Wolber. Will the Court at this time permit me to take an exception to the ruling?

The Court. Oh, yes.

Frederick W. Graves, direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Wolber. I have a similar motion directed to the allegation of speculative damages in this complaint.

10 *The Court.* Your motion being to strike out?

Mr. Wolber. To strike out.

The Court. I cannot do that.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury returns into court.)

Mr. Bostwick opens for plaintiff.

20 Mr. Wolber opens for defendant.

Mr. Bostwick. If your Honor please, a deposition was taken, by consent, of a witness who was obliged to depart from the State and who would not be back in time for the trial of this case. I shall read that testimony first.

This is the testimony of Frederick W. Graves, taken before William E. Davenport, a notary public of New Jersey, at the office of Joseph G. Wolber, Esq., Firemen's Building, Newark, N. J., on Saturday, April 19, 1919, at 2 o'clock in the afternoon.

30 The appearances were Mr. John W. Bostwick Jr., of Heine, Bostwick & Bradner, for the plaintiff, and Mr. Joseph G. Wolber, for the defendant

(Reading:)

"FREDERICK W. GRAVES, being duly sworn, testifies as follows:

Direct examination by Mr. Bostwick.

40 Q How old are you, Mr. Graves? A Forty; will be forty-one next month.

Q Where do you live? A New York at present.

Q What is your business? A Salesman with John Cheney Brothers.

Q How long have you been with them? A Since last July.

Frederick W. Graves, direct.

Q By whom were you employed before that time? A Kaltenbach & Stephens.

Q When did you leave them? A January, 1918.

Q How long had you been with them? A Well, I would like to qualify that answer. Do you mean directly employed by them?

10

Q Yes. A Three years.

Q What was your position with them? A Manager of the New York department and salesman.

Q And manager of the New York department means what department? A Well, their New York sales department, I would call it.

Q You were New York sales manager? A Well, yes, that would be what it amounted to. There never was any official title in connection to it.

Q And do you know Mr. Heitman, the plaintiff in this suit? A I do.

20

Q How long have you known him? A About fourteen years.

Q You know he was employed by Kaltenbach & Stephens also, was he not? A He was.

Q During the time you were with them? A He was.

Q And where was he located in his business? A Newark.

Q Do you know what his position was with Kaltenbach & Stephens?"

30

Mr. Wolber. "Mr. Wolber. Objected to as irrelevant because thus far no basis has been laid for the witness' knowledge of the character of the position occupied by Mr. Heitman with Kaltenbach & Stephens."

Mr. Bostwick. The question was, "Do you know what his position was with Kaltenbach & Stephens?"

The Court. I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

40

Exception noted as ground of appeal.

Mr. Bostwick. (Reading:)

"A I know what his position was. His position was, I would say, manager of the order department.

Frederick W. Graves, direct.

Q Did you ever have any relations with Mr. Heitman in connection with the work of your department in New York?

A Every day.

10 Q And what was the character of those relations? I mean to say with respect to what branch of the business of Kaltenbach & Stephens? A Well, any information that had to be given in reference to orders, shipments, the correspondence for goods shipped direct from Newark, had to be taken up with Mr. Heitman.

Q Did you have any relations with Mr. Heitman with respect to sales that were made through the New York department?

A Why, only in an indirect way. We made lots of sales that Mr. Heitman had charge of shipping the goods.

20 Q Did Mr. Heitman have any duties relating to the sales that were made in your department except the shipping of goods; did he make any sales in your department? A No; he didn't.

Q Do you know whether Mr. Heitman had any duties with respect to selling of goods aside from shipping and so on?

A Yes; he did.

Q And what were those duties? A Well, he handled all accounts by mail—that were considered by the mill as house accounts—and shipped from Newark.

30 Q When you say he handled those accounts, do you mean to say that he was responsible for sales that were made and that were known as 'house accounts'? A Well, I don't know just what to say about responsibility. I know he had the handling of all correspondence pertaining to those sales with accounts that were considered house accounts.

Q Perhaps it would be plainer to ask whether you could say Mr. Heitman made the sales that are referred to as house accounts. A Well, a good many of them; not all of them.

Q Have you any knowledge as to the amount of sales annually which Mr. Heitman made? A Well, no; I couldn't give the exact figures myself.

40 Q Do you know what they were approximately? A Why, I wouldn't want to say, because I had nothing to do with the figures over there.

Q You don't know how much the house accounts amounted to all together, do you, approximately? A Well, the total, I believe, that was considered house accounts run somewhere, I

Frederick W. Graves, direct.

should say, in the neighborhood of a million and a half dollars a year.

Q Did Mr. Heitman have more or less general house accounts amounting to a million and a half a year? A Well, he had charge of all the correspondence and shipping of orders pertaining to those accounts; yes.

10

Q Were you present at a meeting held in November or December, 1917, at the office of Kaltenbach & Stephens in Newark?

A Well, what kind of a meeting?

Q A meeting of the officers of the company with the New York salesmen? A I was.

Q Do you remember the date of that meeting? A Well, I don't just recall; I think it was in November, 1917.

Q And who was present there, Mr. Graves? A Mr. Kaltenbach, senior; Mr. Kaltenbach, junior; Mr. Stephens, myself, Mr. Frank J. Ryan, Mr. Frank K. Ruckel, Mr. Anthony Demmerle and Mr. Ralph Hibbard.

20

Q Anybody else? A Yes, Mr. Oberndoerfer.

Q Did you mention Mr. Heitman as being there? A And Mr. Heitman; that's true, yes.

Q What was the purpose of that meeting as it was disclosed to you by what was said by the officers of the company? Or tell us, if you can recall, what was said by any of the officers of the company with respect to the purpose of that meeting?

A Why, it was to take up a proposition of a new arrangement for the selling of the product for the year 1918.

30

Q And who was it that made the explanation for the purpose of that meeting? A Mr. Charles Kaltenbach.

Q And can you recall what was said? If so, what was it? A Well, in a general way he stated that they had gone over the matter very carefully and they would like to change their methods of compensation for the salesmen. He had, as I remember it, a set of figures drawn up which explained the financial method of payments in the year 1917. The proposition, as I remember it, was that they had paid commissions to salesmen approximately at the time of 1 per cent. around a million dollars' worth of sales. He stated that they had about one million dollars and a half worth of accounts which they hadn't paid any commissions on. Their proposal was to divide the house accounts, as this amount of business was considered, among the different salesmen. At the end of the year they

40

Frederick W. Graves, direct.

proposed to pay a bonus figured on the total sales of each salesman at about the rate of 2 per cent.

10 Q Two per cent. upon what? A Well, as I understood it, upon the total sales of each salesman; and they proposed to pay the salesman in lieu of previous commissions a salary or drawing account, whichever way you might consider it, based on the average of their previous three years' earnings on commission. If the ultimate result of their sales were in excess of that amount, figured at a 2 per cent. basis of what they sold, they would divide that as a bonus—that is, they would receive a bonus. For instance, as an example, if a man—”

Mr. Wolber. “Mr. Wolber. Was that stated at that meeting, or are you explaining it now?”

Witness. I was explaining the proposition.

20 *Mr. Wolber.* I object to that explanation on the ground that it is not responsive to the question. If it was part of what was said at the meeting, I have no objection, but if you are trying to put something in the record as to his own idea, I object and move that it be stricken out on the ground as not being responsive.”

30 *Mr. Bostwick.* I think that was taken care of by the next question, in which I say: “You can proceed with your answer, Mr. Graves, to such extent as you can, telling what was said at the meeting, as to what the proposition was, not what you understood it to be or how it was to apply.” He has not answered the question; there was no answer to the question.

Mr. Wolber. He practically started to explain, and I stopped him.

Mr. Bostwick. I will read that question again (reading:)

40 “Q You can proceed with your answer, Mr. Graves, to such extent as you can, telling what was said at the meeting as to what the proposition was, not what you understood it to be or how it was to apply. A Well, my previous answer is practically all that is necessary. They were going to divide the house accounts among the salesmen. They had been paid a certain commission on a certain amount of business done for three years with the exception of one man, and that man had

Frederick W. Graves, direct.

only been with them about a year and a half at that time. Naturally they were to divide these house accounts among them, and they were all going to get more sales than they ever had before, but Kaltenbach & Stephens, or Mr. Charles Kaltenbach, proposed they would pay them at the ratio of 2 per cent.

Q In other words, the salesmen for the year 1918 were to receive returns not only upon such sales as they themselves made, but also upon such sales that were made through correspondence conducted by Mr. Heitman and known as house accounts, is that right? A Yes, that was to be divided among the salesmen according to the account on each man's territory, he was to be given a credit of that amount. 10

Q And this proposition was made to whom? A It was made at the meeting to everybody there.

Q Do you remember whether or not Mr. Kaltenbach stated that these commissions and drawing accounts were to be paid to the salesmen? A No, nothing was said particularly about salesmen. It was just a proposal made without any particular specification. 20

Q Was the 2 per cent. bonus figured in any respect in reference to the total sales of 1918 from all sources? A I so understood it.

Q And upon what proportion of the total sales was the bonus to be figured? A Well, that was subject to the division of the trade on each man's territory.

Q Do you remember whether or not it was specified that the bonus was to be figured upon sales in excess of any certain amount for the year 1918? A No. 30

Q Do you remember whether or not at that meeting it was proposed by Mr. Kaltenbach that this bonus was to be a bonus of 2 per cent. on all sales for the year 1918 in excess of the million and a half dollars? A No, I understood that the bonus was to be paid on the total sales, subject to division, as before stated.

Q Do you know who was to be included in the distribution of that bonus? A Why, it was my understanding that we were all to be included in it. 40

Q Everybody, you mean, at the meeting? A Yes.

Q Except, of course, the officers who represented the company? A Surely.

Frederick W. Graves, direct.

Q And you assume that from the fact of those who were present? A Yes; and for other reasons, too.

Q What other reasons? A Well, at a subsequent meeting of Mr. Stephens and myself I asked if everybody there was to be included in that bonus and he stated yes, and I particularized, and I asked if Mr. Heitman was to be considered, and he said, 'Certainly'."

Mr. Wolber. Take the next question.

Mr. Bostwick. (Reading:)

"Q Do you remember what the total amount was computed to be the cost of the sales for the year 1918 as shown in the calculation of figures that Mr. Kaltenbach had at that meeting?"

Mr. Wolber. I object to that on the ground that the statement itself would be the best evidence.

The Court. I will overrule your objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Bostwick. (Reading:)

"A As I remember it, I think they figured—well, roughly speaking, somewhere in the neighborhood of \$20,000 they had paid in commissions, and then Mr. Heitman's salary and my own was added to that, bringing the total up somewhere between \$28,000 and \$30,000.

Q You stated previously that they figured that they had paid to the sales force of the company approximately 2 per cent. on sales amounting to a million and a half dollars. That would be about \$30,000. Would the amount of costs that you have just spoken of, \$20,000, plus your salary and Mr. Heitman's salary, approximate the sum of \$30,000? A I would say just about that.

Q This proposal by Mr. Kaltenbach at that meeting, was it or not stated to be the intention of the company to carry that out, or was it made in the nature of an offer to those present? A No, it was made in the nature of an offer to be considered and ratified later by the salesmen.

Q You mean to be accepted by them? A Yes.

Frederick W. Graves, cross.

Q It was an open offer made to be accepted, is that what you mean? A Surely."

Mr. Wolber. (Reading:)

"*Cross examination by Mr. Wolber.*

Q Mr. Graves, can you fix the time when you had this conversation about the company's offer with Mr. Stephens? A In regard to Mr. Heitman, you mean? 10

Q Yes. A Why, I should say it was perhaps two or three days afterwards.

Q When did you fix the time of this meeting to be; was it in December? A I think it was in November. I wouldn't be sure about that, because the matter drifted along for quite some time; but I would almost swear it was in November.

Q And this conversation with Mr. Stephens was had several days thereafter? A Two or three days thereafter; I can't tell off-hand. 20

Q Now, were all the persons present at this meeting in November, 1917, with the exception of Mr. Heitman and Mr. Kaltenbach, salesmen of the company? A Why, yes, with the exception of the officers of the company.

Q I say with the exception of the officers of the company? A Yes, all salesmen.

Q Salesmen from what particular district? A Well, they were salesmen selling both from the New York department and from the mill direct. They combined that. Every man that sold goods from New York sold goods direct from the mill also. 30

Q Were all the persons present persons who made sales in New York? A You mean that was located in New York?

Q Yes. A Yes. There was one man from the Pacific coast, a representative from San Francisco, who does not figure in this deal—who wasn't mentioned.

Q All the other employees present were salesmen from the New York district? A Yes, sir.

Q Where was the sales organization of the company at this time, the headquarters of the sales organization? A Well, officially, I would say it was Newark. 40

Q You are sure it wasn't in New York City? A That's where they were located, but absolutely no arrangements were made, nothing done, no question that was in fact involving salesmen that wasn't settled in Newark.

Frederick W. Graves, cross.

Q Weren't the officers of the selling organization in New York City? A No, the officers of the selling organization was the firm right here. I was absolutely sales manager and had no voice in the discharge or hiring of salesmen.

Q Wasn't your office in New York City? A Yes.

10 Q Didn't those men report to you in New York City? A Ask them and they would say absolutely no. If you ask me I would say no, too. I was not a sales manager in the absolute sense. That was only a nominal name that could be applied.

Q Weren't these men reporting to you in New York City on any of the business of the company? A No; not always.

Q Did they ever? A Yes, they did occasionally on the New York business.

Q And you were designated as sales manager of the company?"

20 *Mr. Bostwick.* I said, "He has not said so."

Mr. Wolber. (Reading:)

"A I was manager of the New York department; I would hesitate to state I was ever considered a sales manager in its literal sense of the firm of Kaltenbach & Stephens. I perhaps might explain to you that every order that was taken for direct—well, little ever came to New York. There were salesmen in New York that sold direct shipments and they would ship these orders to Newark and we never saw them. Occasionally we would see a few.

30 Q Didn't the salesmen send their orders to you in New York? A If New York business, Mr. Wolber, yes; but on direct business, no.

Q What do you mean by 'direct business'? A We did in New York in the year 1917, I will say at the maximum, not \$800,000 worth of business. The rest of that two million and a half business was done direct from Newark; goods were shipped from Newark.

40 Q How do you know the goods were shipped from Newark? A Because as manager of the department I knew what goods came in there and what those charges were, for we only charged \$800,000 worth of goods. The rest of their two and a half million was done from here.

Q Do I understand from your answer that the balance of the orders from this \$800,000 you speak of were sent directly

Frederick W. Graves, cross.

into the home office of the company here in Newark? A Yes, direct, all of them. A man might send an order to Newark for \$10,000 of merchandise from Carson, Pirie & Scott, Chicago, and the next \$10,000 might come from them to New York, because there was a memorandum on them to make a certain number of sample cards and have color line, and the way to get them was by ordering the sample cards, and when that was taken care of we were supposed to immediately transfer those orders to Newark. We in New York took care of all sample card work. The only sample card work taken care of in Newark was done, if samples were to be sent out, not from a customer's standpoint.

10

Q Was Mr. Heitman a member of your selling organization in New York? A No, he was not; only as he handled the results of direct business as sold by the New York salesmen.

Q How do you know of your own knowledge that he handled the direct results of the business of the New York salesmen?

20

A Well, officially, he answered all correspondence.

Q You mean he signed the letters that you saw? A Yes, sir.

Q How did he sign them; in what capacity did he sign them?

A Well, they were signed usually, a good many of the original letters were signed by just Heitman, and along towards the last signed 'Kaltenbach & Stephens, per Heitman.'

Q No designation of position by Mr. Heitman? A No.

Q Did Mr. Heitman of your own knowledge ever effect any sale of the goods of the company through the New York office?

A Well, I would say that he had in some instances.

30

Q Do you recall of any instance? A Well, I could recall a good many instances. You don't give a man a chance to finish.

Q I am trying to. If so, say yes or no. A Yes.

Q Recall the order that he sent in to you at the New York office? A You see, I don't just get your question. You see, we had such a complicated business—I mean complicated in its effects and ramifications—that it is very hard to tell.

Q Do you recall, that's the question? Do you know of any order Mr. Heitman effected through the New York office? A To be shipped from New York?

40

Q Yes. A Well, I will have to answer that by stating yes and no. I can't give you a positive answer.

Q Do you know positively yes or no? A Well, I will say no.

Frederick W. Graves, cross.

Q Mr. Graves, do you know whether the Newark office of the company had any selling organization? Yes, or no. A Yes. A Yes.

Q Any sales force? A Well, they had one direct representative that I know of.

10 Q Who was that? A Mr. Jenkins of Philadelphia.

Q Are you sure that he was located in Newark? A Oh, he was located in Philadelphia, selling from Newark.

Q My question was whether there was any sales force in the Newark office? A I beg your pardon. No.

Q Have you any knowledge of your own that Mr. Heitman ever effected any sales for the company? A Yes, sir.

Q How many? A Well, I couldn't tell you that.

Q Do you know of any customer whose order he procured? A Yes, sir.

20 Q Will you name that customer? A American Undergarment Company, H. & W. Manufacturing Company, Benjamin & Johns, and quite a number of others right here in Newark.

Q Do you know about when these orders were effected by Mr. Heitman? A They cover a long period of time.

Q Was it prior or subsequent to this meeting in November, 1917? A Prior.

Q How do you know that he effected those orders? A Well, by my knowledge that the orders have been taken and goods have been shipped; that's all I can tell you.

30 Q How can you tell Mr. Heitman effected these orders; were you with him when he made them? A Well, no; by the fact they told me.

Q Who told you? A Different buyers I had talked with.

Q So, then, as a matter of fact your knowledge of these orders which Mr. Heitman effected is merely the hearsay of the customers? A Well, direct statements.

Q Direct statements by the customers? A Yes.

40 Q So, then, as a matter of fact you don't know of your own knowledge that Mr. Heitman effected any orders for this company; is that so or is it not? A It is not so.

Q Well, what knowledge have you of any orders that he effected other than hearsay statements from the customers? A Well, all I can tell you I seen copies of orders that had been placed.

Q You say you saw copies of orders? A Yes.

Frederick W. Graves, cross.

Q Did they indicate to you who effected the order? A If you put it that way, only through what I was told outside and what was told me by Mr. Heitman and by the firm.

Q So, then, as a matter of fact your whole knowledge of Mr. Heitman effecting orders for the company is based on hearsay statements of customers and what Mr. Heitman told you; is it or not? A Well, it is so. 10

Q So, then, of your own knowledge you don't know whether Mr. Heitman was a salesman of the company; is that so or not? A Well, I have been told by the firm—

Q Answer my question yes or no. I will give you a chance to explain how you know. A What is the question.

Q (Question repeated.) So, then, of your own knowledge you don't know whether Mr. Heitman was a salesman of the company; is that so or not? A It is not so.

Q Now, Mr. Graves, of your own knowledge, what were Mr. Heitman's duties with this company? A He handled all correspondence. 20

Q Now, he handled it. What do you mean by that? A He answered all correspondence pertaining to orders for direct shipments from Newark; had charge of the filling of these orders, circularized and sold goods as far as he possibly could by mail on the direct instructions from the firm.

Q How do you know this? A Because I was told by Mr. Stephens that Mr. Heitman sold more goods than any one man in the organization by mail. 30

Q Are you sure that Mr. Stephens' statement that you mention applied to the whole department rather than to Mr. Heitman? A No, I wouldn't say that, because a good deal of the business was handled by Mr. Kaltenbach, Sr., and Mr. Kaltenbach, Jr., but only local business in the immediate vicinity like New York and Newark.

Q So these orders that were secured here by the home office were not exclusively Mr. Heitman's orders? A Not all of them.

Q The only orders that he secured are the ones that he secured by sending out circulars by mail; is that so? A No, he solicited some accounts personally right here in Newark, as I stated before. 40

Q Those are the ones you heard about, but you don't know that of your own knowledge? A Yes.

Frederick W. Graves, cross.

Q You do know of your own knowledge he filled orders sent to the home office? A He had charge of them; his assistants filled them.

Q You know of your own knowledge he handled the correspondence of the local department? A Yes, sir.

10 Q But any other duties he performed are based upon statements made to you by others; is that so? A Well, are not based on statements; are based on my knowledge of association.

Q What I mean is this; you didn't know it yourself; you didn't see him do it? A No.

Q Will you say, Mr. Graves, that this offer of the firm to pay a bonus based on the percentage of total sales was not directed exclusively to New York salesmen other than Mr. Heitman? A I would not.

20 Q Was anything said by any officer of the company at this conference in November, 1917, which would indicate that this offer was to be exclusively for the New York selling organization? A I don't remember of any such statement.

Q Now, Mr. Graves, will you tell me as briefly as you can just what the operation was after you received an order in New York, taking in the transmittal of it, if so, to the Newark office, and its filling? Tell us just how that was? A If we received an order in New York for shipment direct from the mill the only particular of the record we would need would be whatever request there was for samples. It was then forwarded, and in some instances a record taken and sometimes there wasn't any.

30 Q Where would this record be taken if it was taken in New York? A Our head of stock order clerk downstairs, Mr. W. Trenkamp, had charge. He would take a record of it, and that order was transferred to Newark by mail.

Q To whom would that order be given by you? A Sent to Kaltenbach & Stephens.

Q No employee or officer in particular? A No; those were all sent to Kaltenbach & Stephens, and nine out of ten were forwarded by mail in a regular envelope with nobody's name.

40 Q Wouldn't you fill some of those orders from stock in New York City? A Sometimes we would if they didn't have it in Newark.

Q Would you fill it most of the time from stock in the New York office or the home office? A Never filled it from the stock in the New York office if possible to fill it from Newark.

Frederick W. Graves, cross.

Q You would say that most of your orders effected through your New York selling organization were filled at the office or plant here in Newark? A Yes.

Q Can you say what percentage of the orders that came in through you were filled at the home office? A For direct shipment of goods, there wasn't an order taken, except one or two things for shipment from New York. All shipments were from Newark. We had no option in the matter. If they shipped any goods at all from the New York account the goods were always sent back to Newark. The reason for that was the financial arrangement had with Frederick Vietor & Achelis.

10

Q Mr. Graves, which orders did they fill at the Newark plant? A Well, that's an awful hard question, Mr. Wolber, because we sold a lot of goods direct from New York and sold a lot of some customers' goods direct from Newark. The difference usually was either three or five per cent. trade discount on goods shipped from Newark, while from New York they only got the regular discount.

20

Q Can you just briefly explain to me what you meant by house accounts in your direct examination—what they are? A Why, Kaltenbach & Stephens had a certain number of accounts that they sold direct from Newark and on which there was no credit given to any salesman. Now, among those, as I say, was this man Jenkins. Jenkins was given the account on a five per cent. basis. Anyway, he had a row with the firm and they took the accounts away from him. Now, every one of those accounts Mr. Heitman handled. They were not given to any salesman except to myself. When Philadelphia was transferred to my account to sell among jobbers, there were one or two accounts the firm had sold and thought apparently had lost, and they turned over to me to go call on.

30

Q So, then, the house accounts are the ones Mr. Heitman had charge of here in Newark? A Yes. There were quite a number of New York accounts also.

Q And were those the accounts on which this bonus was to be figured? A Those accounts were to be divided.

Q Are those the accounts for which no salesman was to get any special credit? A Well, they hadn't gotten any special credit.

40

Q Under those arrangements, they were to be parceled out among all you salesmen? A Yes; exactly."

Frederick W. Graves, re-direct.

Mr. Bostwick. (Reading:)

“*Mr. Bostwick.* That is to say parceled out, including Mr. Heitman?”

Mr. Wolber. That is what he said.”

10 *Mr. Wolber.* (Reading:)

“Q What makes you say, Mr. Graves, that Mr. Heitman was a salesman? A Well, I haven’t said that he was a salesman.

Q Now, Mr. Graves, when did you leave the employ of Kaltenbach & Stephens? A The 19th day of January. I wish to state that I didn’t leave their employ.

Q Well, under what circumstances did you sever your relations with the firm? A I was discharged by Mr. Kaltenbach, Sr.

20 Q Are you the plaintiff in a certain action instituted against Kaltenbach & Stephens in New York State for an alleged unlawful discharge from employment? A I am.

Q You are? A Yes.

Q Has that case been decided? A Not yet.

Q Did you ever make any statements that Mr. Heitman while in the employ of Kaltenbach & Stephens, by playing favorites impeded the work of the salesmen of the concern?”

Mr. Bostwick. Go ahead.

Mr. Wolber. (Reading:)

“A I may possibly; I don’t remember just now.

30 Q Did you ever make any statements that Mr. Heitman, by his method of holding back some orders and pushing forward others for completion, interfered with the work of you or any of the salesmen of the company?”

Mr. Bostwick. Go ahead.

Mr. Wolber. (Reading:)

“A Possibly.”

Mr. Bostwick. (Reading:)

“*Re-direct examination* by Mr. Bostwick.

40 Q Mr. Graves, do you know whether or not the salesmen of the New York department reported their sales to Mr. Heitman? A All salesmen reported to Newark, and my understanding was that Mr. Heitman figured the accounts up to the time that they retained an accountant.

Frederick W. Graves, re-direct.

Q And do you know at whose request this was done? A At the request of the firm.

Q Do you know whether or not Mr. Heitman made any sales in your department of goods to be shipped from Newark? A Only where we were requested to ship back goods to fill orders from Newark. As to who those orders were going to I never knew. 10

Q Do you know whether or not Mr. Heitman made any sales in your territory at all? A Why, as before stated; yes.

Q And your territory covered where? A Well, I had New England—the manufacturing part—parts of the manufacturing trade of New York, the jobbers' dry goods trade or Philadelphia and parts of the manufacturing trade. As a matter of fact, I was considered in the light of a general salesman. If Kaltenbach & Stephens had any special work they wanted done in the way of getting an order, they usually sent me after it if it needed personal attention. 20

Q And when you say that Mr. Heitman made sales of goods in New York, you mean the territory covered by your New York office—your jurisdiction, including New England, Philadelphia and New York? A Anywhere. The United States, as far as that is concerned.

Q Were you notified at any time of sales that Mr. Heitman had made in your territory, that had been effected independently of your salesman in New York? A Why, sometimes; it was not a rule of procedure; it wasn't a rule of business procedure. I mean there was no special arrangement whereby we were to be notified. 30

Q You were not required to be notified? A No.

Q But you were notified, as a matter of fact, at different times of sales made by Mr. Heitman in your territory? A Yes, when the case came up. If an individual case it was mentioned, but not as a rule of procedure.

Q Did you recognize his right to make sales in your territory? A You mean my personal territory?

Q The territory of the New York office? A While the firm was always perfectly willing, of course, the salesmen always kicked. 40

Q But you knew it was done? A Why, yes.

Q Do you know whether or not Mr. Heitman performed any duty in the direction of stimulating business in the New York

Frederick W. Graves, re-direct.

territory, circularizing the trade and men who had not been buying goods lately and so on? A That was done on instructions from the firm.

Q I say you know he did that? A I know he did that on several occasions.

10 Q You understand that I am now referring to the territory covered by the New York office—in only your own territory? A Yes; I understand.

Q And what you have said as to Mr. Heitman making sales in your territory and circularizing your territory, applied, does it, to the territory covered by the jurisdiction of the New York office, New England, Philadelphia and so on? A It applies to all the territory that Kaltentbach & Stephens were selling goods in.

Q And that means the United States, does it? A Absolutely.

20 Q Do you know whether or not Mr. Heitman was active in that particular? A Well, I was told by Mr. Stephens that he had been instructed to get the circulars prepared and mail them out.”

Mr. Wolber. (Reading:)

“I move that the answer be stricken out as not responsive to the question.”

The Court. Strike it out.

Mr. Bostwick. (Reading:)

30 “Q Do you, of your own knowledge, aside from anything Mr. Stephens told you, or what anybody else told you, whether or not Mr. Heitman was active and aggressive in his efforts to obtain business for the company of Kaltentbach & Stephens throughout the United States, regardless of whose particular territory he was covering? A He was.

Q How do you know that? A Through the storm of protest uttered by the salesmen.

40 Q And you know that Mr. Heitman on numerous occasions obtained sales in the territory of the New York department that by more energetic, industrious work by salesmen would be procured by them; is that so? A I was so informed.

Q Now, were there any accounts in the territory of the New York office which were more or less isolated, involving a necessary expenditure of money on the part of the individual salesman, which on that account were left to Mr. Heitman to canvass? A There was.

Frederick W. Graves, re-direct.

Q And when you say that there was no sales force connected with the Newark office, do you mean to say that it necessarily followed that all sales that were made from the Newark office were made by either Mr. Kaltenbach or some other member of the firm or Mr. Heitman? A Well, not entirely. Mr. Heitman had the authority to make the sale, but there were quite a number of instances, if I remember, when he would send one or two of his assistants in to accounts like Newark here to see in reference to getting orders when he was too busy to go himself.

10

Q And when you say that there was no sales force at Newark, you mean that literally, or do you mean to say that there was no organization whatsoever at Newark which was organized for the purpose of making sales? A There was no organization there for the purpose of making sales.

Q How do you account, then, for the sales that were made of the accounts which are referred to as the house accounts? A Well, a number of them were taken care of by Mr. Kaltenbach, Jr., and Mr. Kaltenbach, Sr. As a matter of fact, Mr. Stephens sold about two or three accounts, if I remember correctly, which would be considered house accounts, but there were a great many of them that were handled by Mr. Heitman in nearby localities personally and isolated sections by mail.

20

Q Wouldn't you call that an organization for the purpose of selling goods? A My interpretation of an organization meant a number of salesmen.

Q You mean when you say there was no organization, there were no specified men detailed to drum a specified territory? A No; exactly.

30

Q In other words, the territory of Newark, such as it was known, was left to be canvassed by such of the people at the home office as were delegated by reason of their duties to perform that work; is that right? A Yes, sir.

Q The fact that the house accounts exceeded the accounts sold by the salesman is an indication that there was quite an efficient organization? A Oh, yes.

Q Isn't that so? A Yes.

Q Mr. Kaltenbach wasn't a salesman, was he? A Well, only in the sense that he handled some accounts personally. He acted more in an advisory capacity for a great many salesmen. He was called into consultation. I believe there were two, three or four accounts which he handled personally.

40

Frederick W. Graves, re-direct.

Q Do you know who handled most of the house accounts? A You mean from a salesman's standpoint?

Q Who handled most of them; who sold most of the house accounts? A Well, that would be a hard question to answer. Some accounts might run a great deal larger than others, and still there would be more work to secure smaller accounts than big ones. One man might do half a million dollars' worth, and yet it would be more easy to handle than a man selling \$200,000 accounts a year.

Q You don't know how much Mr. Heitman's sales amounted to in the year 1917? A I couldn't say approximately just what his share of the house accounts would be. That was a question and knowledge that was guarded very jealously by the firm. That is information they did not want anybody to get.

Q You and Mr. Heitman, as a matter of fact, to all practical intents and purposes, occupied the same relative positions in New York and Newark, didn't you? A Oh, no.

Q With respect to sales? A Oh, as regards sales?

Q Yes. A I thought you were speaking in reference to orders. I had nothing to do with the handling or shipping of orders.

Q You occupied the same positions in New York and Newark? A Yes, exactly.

Q In other words, he was virtually the sales manager for the Newark office?

Mr. Wolber. I object to that.

Q To all practical intent and purposes, Mr. Heitman was the sales manager of the Newark office; is that so?"

Mr. Wolber. (Reading:)

"I object to that on the ground it is leading."

The Court. I sustain the objection.

Mr. Bostwick. (Reading:)

"Q He was the sales manager of the whole country? A There wasn't any such person as far as I know.

Q Who occupied a position in the company which most nearly corresponded to that of general sales manager of the company?

A I couldn't say—

Q If you can say it, say it? A Well, I think if you will let me finish what I had to say without putting it down, you will understand what I have to say.

Frederick W. Graves, re-direct.

Q If you can say who most nearly corresponded to the position of general sales manager of the company, say what you can about it. A When I say I can't say, I say all policies and questions of selling were taken up and settled by Mr. Kaltenbach and Mr. Stephens together. Now, if that is a direct contradiction, I can't say. If you said 'persons' I would have said Mr. Kaltenbach and Mr. Stephens. 10

Q And they handled all questions of policies with respect to sales? A They did.

Q Was there anybody in the organization that handled all questions in respect to details of sales? A Mr. Heitman and myself would probably come under that head.

Q It is true, isn't it, Mr. Graves, that Mr. Kaltenbach took charge of the manufacturing end of the matter? A Yes.

Q And was in a position and was responsible for the ability of the company to manufacture goods as they were ordered? A Yes. 20

Q And determine the question of the policy of the company with respect to what should be made and what should not be made; is that so? A Yes; Mr. E. J. Kaltenbach.

Q The details of all sales that the company made, with the exception of this small man in California, were handled by you and Mr. Heitman, as you have answered; isn't that so? A No; the whole proposition, including the California man, was handled by Mr. Heitman's department and my department in New York.

Q Now, when you say that Mr. Heitman was not a salesman, what do you mean? A Well; he was not employed in the capacity of a salesman to go out on the road and sell goods. 30

Q In making the statement he was not a salesman, you had the same idea in mind that you had when you stated there was no organization in Newark for selling goods? A Absolutely.

Q Now, as to your discharge from the services of Kaltenbach & Stephens, what was the reason for your discharge, Mr. Graves? A Well, I really don't know.

Q You were dismissed without notice, weren't you? A Absolutely. 40

Q You have no knowledge of why you were discharged? A Well, only what they say.

Q What did they say? A Well, they have answered my complaint by stating that I made slanderous statements regarding the president of the company; that's all I can tell you.

Frederick W. Graves, re-direct.

Q Mr. Heitman handled all the credits, too, didn't he? A You mean the checking of the accounts?

Q Yes. A You mean the direct shipments?

Q Wasn't he known as credit man as well as a man having charge of sales? A Why, he had a great deal of work along the line of credit work, but that he was ever known as credit man I have never heard him called that.

Q Do you know who it was, if anybody, in the organization of Kaltenbach & Stephens that gave authority where it was needed to ship the goods to customers? A Why, yes; Mr. Stephens.

Q You mean Mr. Stephens checked each individual account? A No, not in the ordinary procedure of business. If there was any question regarding a man's credit and Mr. Heitman would O.K. the slip it would go through. Where it was a question of shipping the goods, the ultimate authority on that proposition was Mr. Stephens.

Q That is to say, those questions were referred to Mr. Stephens by your department? A Oh, no; only by goods shipped direct from Newark; that was up to a year and a half or two years ago.

Q You don't know whether Mr. Stephens did that work personally himself or not, do you? A You mean O. K.'d any questionable accounts?

Q Yes. A I so understood it, that unless he O. K.'d the account finally; if there was a question about credit, goods could not be shipped.

Q You don't know, as a matter of fact, Mr. Graves, how that was handled in the home office?"

Mr. Wolber. (Reading:)

"I ask that that answer be stricken out on the ground of not being responsive."

The Court. Strike it out.

Mr. Bostwick. (Reading:)

Q Do you know whether or not each shipment as it went out had any approval mark on it? Did it have an approval mark? A Well, I really don't know. I always assumed that that was part of the routine work over there; that no shipping would go through any firm without having 'O. K.' stamped on it.

Q Did you see the credit O. K. marked on any shipments? A Not to my recollection. I very rarely looked over the sheets."

Frederick W. Graves, re-cross.

Mr. Wolber. (Reading:)

“Re-cross examination by Mr. Wolber.

Q Mr. Graves, isn't it a fact that because of Mr. Heitman's position here in Newark and the character of his duties, that he wasn't considered to be a regular salesman? A Why, officially, he wasn't hired as a salesman. 10

Q Isn't it a fact that in his efforts to sell goods for the company he interfered with the work of your selling organization? A Well, that was a matter that the salesmen took exception to, but the firm considered it O. K.

Q How do you know the firm so considered that? A I was told so.

Q Who told you? A Mr. Stephens and Mr. Kaltenbach.

Q As a matter of fact, most of this testimony about the question of credits is what somebody else told you; you don't know of your own knowledge? A Well, no; if you want to be literal that way, you can trace that through everything. I know what the routine is. I know I couldn't ship a dollar's worth of merchandise until the company O. K.'d same. 20

Q Didn't you know, as a matter of fact, that certain credit could not be extended except upon the approval of Vietor & Achelis? A No, only up to about approximately a year or two years ago. Up to that time all Newark accounts were charged from Newark and the bills paid to Newark. This arrangement that Vietor & Achelis had of O. K.'ing the accounts was an arrangement made afterwards. 30

Q Do you know of your own knowledge that Mr. Heitman procured these orders in your territory, or is it because somebody else told you he did? A Well, I will have to say because somebody told me.

Q Answer it was so if that's the truth. Do you know of your own knowledge whether he procured these orders you mentioned by personal solicitation? Now of your own knowledge, note that. A No.”

Mr. Bostwick. (Reading:)

40

“By Mr. Bostwick.

Q It was your duty as sales manager of the New York department to keep tabs of what went on in your district, wasn't

Frederick W. Graves, re-cross.

it? A No, that wasn't part of my duty. I was supposed to work for the general good of Kaltenbach & Stephens, regardless of how the results were obtained.

Q Wasn't it your duty to see that your territory was covered by your salesman? A Well, that involves a great deal of explanation. Our salesmen covered their own territory. They were on commission and travelled as they pleased. If the results of their work wasn't satisfactory it was up to the firm to handle it as they saw fit.

Q What went on in your territory insofar as it was not followed by you, was checked up at the home office, wasn't it? Oh, yes.

Q Do you know who did that at the home office? A Mr. Heitman, that was part of his duties.

Q Do you know how he did it? A Well, by reporting customers that bought goods or by reporting those that didn't buy.

Q Did he keep any system of accounts or memoranda which enabled him to keep track of the various jurisdictions covered by your salesmen? A Well, I presume so, I never saw any of the records myself.

Q Well, it was his duty, as you know, to follow the work that went on in the various jurisdictions? A Yes, sir.

Q And where the territory was not covered to the satisfaction of the head office, those were the occasions where Mr. Heitman butted in? A Yes, sir.

Q And that was frequently done, wasn't it? A Yes, sir.

By Mr. Wolber.

Q You only know of that by someone telling you? A No, I know it of my own personal knowledge.

Q How? A Well, by seeing letters written by Mr. Heitman soliciting business of my own customers.

Q But that was limited to seeing letters? A Absolutely.

Q You knew nothing more of Mr. Heitman's efforts than the letters that were written, did you? A No.

By Mr. Bostwick.

Q I suppose that Mr. Heitman has telephoned you at various times giving you information of business that your salesmen may not have covered? A Yes.

William N. Heitman, direct.

Q So that is another way in which you know about it?
A Yes.

Q And that was done more or less frequently? A Yes."

WILLIAM N. HEITMAN, plaintiff, sworn in his own behalf.

Direct examination by Mr. Bostwick.

10

Q Mr. Heitman, you are the plaintiff in this suit, are you not? A I am.

Q Where do you live, Mr. Heitman? A Newark.

Q You were formerly employed by the firm of Kaltenbach & Stephens, were you? A I was.

Q How long were you so employed? A For seven years.

Q Where is their business? A Sherman avenue, corner of Bigelow street.

Q What position did you have with them? A Why, the last title that I had was manager of their merchandise department. 20

Q Where was the merchandise department? A The entire second floor, with the exception of a small corner which they had taken over for the accounting department.

Q And you had charge of that department? A Yes.

Q That is to say, of the whole floor? A Of the entire floor.

Q Did you have any employees under your supervision?
A Yes. 30

Q How many? A Well, that varied, according to the business; we usually had about twenty-five or thirty.

Q In November, 1917, did you have any contract with the firm of Kaltenbach & Stephens respecting salary for the year 1918? A Yes, there was an arrangement made at a meeting.

Q When was the meeting held? A About the latter part of November, 1917.

Q Will you tell us about that? A Several days before the meeting came off I was told that they were going to hold a meeting, and I was requested to attend it; in fact, I was told to attend it. 40

Q Were you told what the purpose or objects of the meeting were to be? A I knew nothing about it at all except that there was going to be a meeting.

Q Did you attend the meeting? A I did.

William N. Heitman, direct.

Q Who were present? A Well, the directing members of the firm, Mr. E. J. Kaltenbach, Mr. Charles Kaltenbach, Mr. James Stephens, Mr. Demmerle, Mr. Hibbard, Mr. Ruckle, Mr. Ryan, Mr. Graves and myself.

10 Q Who were the officers, Mr. Heitman? Which of these men were the officers? A The two Mr. Kaltenbachs and Mr. Stephens; they were the directing managers.

Q Who was president? A Mr. E. J. Kaltenbach.

Q Who was vice-president? A Mr. Stephens; he was also treasurer.

Q What office did Mr. Kaltenbach hold? A I think he was secretary and general manager.

20 Q Did any one of the officers open the meeting and state the purpose of it? A Yes, Mr. Kaltenbach, Jr., Mr. Charles Kaltenbach, was the spokesman.

30 Q Tell us what he said, as far as you can recall it. A Well, he said the purpose of the meeting was to arrange for selling goods for 1918. He gave the amount of sales that were made during 1917, showed the amount of the sales on which they had paid commissions, and then he showed the amount of the house accounts, on which no commissions were paid. He said the firm wanted to work up the business, and they thought if they would group the house accounts with the accounts that the salesmen had formerly got commissions on this would stimulate the business. He guaranteed us the same amount of money for 1918 that we earned during 1917, plus a share of the bonus. He said it cost the firm about \$30,000 to sell their goods during 1917, and as this was two per cent. on a million dollars and a half, they would consider the bonus of two per cent. over a million dollars and a half, and this was to be divided.

Q When was that to be divided? A At the end of the year, after the sales were made for the year 1918.

Q Was anything said as to the amount that each man was to receive of that bonus? A No.

40 Q Did you have any reason to suppose that you were to be included in that bonus except for the fact that you were at the meeting? A Well, that was one of the reasons why I knew I was to be included, because I was there, and that there wasn't no individuals that were supposed to—there was no individual names given as to who was to share in that bonus; we took it

William N. Heitman, direct.

that everyone was to be included, and then from what they told me afterwards.

Q Who told you? A The members of the firm, also the salesmen.

Q What did the members of the firm tell you afterwards?
A Well, Mr. Charles Kaltenbach told me that I was to be included in that bonus. 10

Q On what occasion? How did he come to say that? A Why, right after the meeting, after we left the meeting he told me I was to be included.

Q Did you ask him? A Certainly.

Q What did you say to him? A I asked him if I was to be included in the bonus.

Q Did you have any doubt about it? A I didn't think there was any doubt about it at all, but I simply wanted to make sure that I was to be included in that to satisfy myself. 20

Q And he said you were to be included? A He said I was to be included.

Q Did you ask him upon what basis you were to share or how your share was to be figured, or anything of that kind?
A That didn't come up at that time.

Q Did it come up at any later time? A Yes, it came up later.

Q When? A It was after the discharge of Mr. Graves.

Q In what month or months? A Well, I think it was the latter part, or some time during February. 30

Q Of what year? A 1918.

Q Tell us what happened. A Well, after the arrangements were made as to just what customers the salesmen were going to cover and what part I was to take care of, Mr. Graves was discharged and I had part of his duties to take care of, and after he left there was more responsibility thrown on my shoulders, and when I found out that I was doing more work than I had originally figured on doing I wanted to find out where I stood, then I asked what share I was to get because this additional work was thrown on my shoulders. 40

Q How was that additional work thrown on your shoulders, in what way? A I had more territory to take care of, more correspondence to take care of and more detail.

Q And was anything said to you by the officers about your increased responsibility? A Mr. Stephens told me that it was

William N. Heitman, direct.

now up to me to go and see that they got the business, and if they did not get it they were going to get somebody else that could do it.

Q He said it was your responsibility to get the business?

A Yes, sir.

10 Q Who did you speak to about the share that you were to have of the bonus? A When?

Q At that time, when you found that you had increased responsibilities? A Mr. Charles Kaltenbach.

Q And what did he say? A He simply said that they were going to go and spend all the money and they didn't care where it went to, and if I wanted to make an arrangement, I should see the salesmen about it, and what they agreed on would be satisfactory to them.

20 Q Did you have any further conversation with him as to the amount, or share, that you were to get? A Yes, I spoke to him; I asked him what he thought would be a fair share for me to get, and he said about five per cent. on the bonus.

Q But he told you to see the salesmen? A He told me to see the salesmen.

Q And did you see the salesmen? A I did.

Q And where did you see them? A I went to New York—at the New York office.

30 Q Who did you see? A I saw Mr. Frank Ryan and Mr. Obendoerfer, and I saw the other salesmen there, too, but those are the people that I spoke to in the office.

Q Did you come to any understanding? A I did. Excuse me! Mr. Ryan had charge of the New York department after Mr. Graves was discharged, and he was the man that I had to see.

Q Did you come to any understanding with them? A Yes, they agreed that I was to get ten per cent. of the bonus.

Q Was that confirmed in any way to you by them? A Yes, sir; they wrote me a letter confirming that.

40 Q I show you this letter and ask you if that is the letter that they sent you (paper shown to witness)? A Yes, sir.

Q Is that the letter? A Yes, sir.

Q What did you do with this letter when you received it? A I submitted it to the firm to see what they thought about it.

Q To whom did you submit it? A I showed it to Mr. E.

William N. Heitman, direct.

J. Kaltenbach, and I told Mr. Charles Kaltenbach about it, and Mr. Stephens saw it also.

Q Anybody else? A Well, that was all the firm.

Q Do you know when you submitted this to the officers?
A The day I received it. Something like March 5th, wasn't it?

Q I see a memorandum on here with some dates. When was that memorandum made? A That same day that I showed it to them—that is, to the members of the firm. 10

Q Who was the memorandum made by? A I wrote that down.

Q And does that refresh your recollection as to the date when the letter was shown to the members of the firm? A Yes, sir. This is dated the 3rd or 5th, isn't it, or something like that? I know the day I got it I brought it down to the firm.

Q Are those dates accurate? A Absolutely. 20

Mr. Bostwick. I offer this in evidence.

Mr. Wolber. I object to the admission of this letter on the ground that, its contents being put in by a person not representing the defendant, it is not binding on the defendant. This is a letter signed by one B. Oberndoerfer. There is nothing in the testimony thus far to show that statements in writing by Mr. Oberndoerfer are binding upon the defendant.

The Court. Let me ask you a few questions, Mr. Heitman. 30

By the Court.

Q At this time, at this meeting that you speak of, where the members of the defendant firm were present, they told you that you were to get the same salary that you had received the year before? A Well, we were all guaranteed the same amount of money that we earned in 1917.

Q That is, for 1918 you were to get the same amount of money that you received in 1917? A Yes, sir. 40

Q Plus— A Plus a part of the bonus.

Q Plus a bonus? A Yes, sir.

Q Now, I did not understand in regard to that bonus, whether it was two per cent. of one million and a half, or whether it was two per cent. of sales made over? A Over that.

William N. Heitman, direct.

Q So that the bonus was to be divided among the salesmen?

A At that meeting; yes, sir.

Q That was two per cent. of the excess over a million and a half? A Yes, sir.

10 Q Now, then, do I understand that then the question came up as to how this division of bonus should be made? A Well, that was the point that I brought up.

Q That is, you wanted to know how much of that— A What I was going to get?

Q What share you should get? A Yes, sir.

Q Then do I understand that you went to see Mr.— A Frank Ryan—

Q —Charles Kaltenbach? A Oh, yes.

Q And he said to see the salesmen about it? A Yes, sir.

20 Q Who was he, the vice-president? A No, the general manager and the treasurer of the company; that is, Mr. Charles Kaltenbach was.

Q And he said to see the salesmen? A Yes, sir; he said it was perfectly agreeable to them if I could make arrangements with them as to what they were willing to give me; that would be agreeable to them.

Q So that you saw the salesmen? A Yes, sir; in New York.

30 Q And you say they agreed to give you two per cent.? A Yes, sir; of that bonus. Mr. Ryan was the man in charge of the New York office, and Mr. Oberndoerfer, he was the other man present. That letter hasn't been read off.

Q No, we cannot read that yet. What did any members of the firm do to confirm—

The Court. You may object to this, if you want to, gentlemen?

Mr. Bostwick. I was going to develop that, your Honor.

The Court. I am not prepared to rule on the letter yet.

By Mr. Bostwick.

40 Q When you submitted this letter to the officers of the company, what, if anything, did they say? A Why, they said it was satisfactory to them and I was to be included, and, as I told you before, they told me it was up to me to get the business, and if I didn't get the business they would get somebody else who would get it.

William N. Heitman, direct.

By the Court.

Q Who said that? A Mr. Stephens; he told me that in his office.

Q They said it was satisfactory to them, and if you did not get the business they would get somebody else that would get it. A Well, I answered that question about that I would get the business in reply to Mr. Bostwick's question. They told me that it was agreeable to them; that is, the arrangement I made with the salesmen was agreeable to them; they had to pay the money and they didn't care how it was divided. Mr. Bostwick asked me what I thought— 10

Q I don't quite get that. What salesmen did you submit this letter to in New York? A Mr. Frank Ryan; he had charge of it, and Mr. Oberndoerfer; he was the New York representative; he was present at that meeting.

Q Anybody else? A Why, no; that is all that were there when this arrangement was made. And I brought it out at that time. I said, "Is this perfectly satisfactory to the other men?" And they said, yes, there wouldn't be any question about it at all; that they would take care of it. And you will see a note on there, your Honor, where I marked Mr. Ruckel— 20

Q Never mind that. What control, if any, did Mr. Ryan and Mr. Oberndoerfer have over the other men? A Mr. Ryan had charge of the New York department.

Q When did you write this note on there, the same day? A The same day. 30

Q The day after you received it? A Yes, sir; the same time that I saw those people.

Q That is in your handwriting? A Yes, sir.

Q What do the dates indicate, opposite the names, here? A Those are the dates when I saw those people. You see, sometimes they are out of town or away from the business, and I couldn't reach them.

The Court. I will admit the letter.

Defendant's counsel prays an exception to this ruling of the Court. 40

Exception noted as ground of appeal.

(The paper referred to is marked Exhibit P. 1.)

(Mr. Bostwick reads Exhibit P. 1.)

William N. Heitman, direct.

By Mr. Bostwick.

Q Did you confirm that in any way, Mr. Heitman? A I did.

Q In what way? A I wrote a letter to Mr. Ryan in reply to that—an acknowledgment of that letter.

10 Q I show you this and ask you what that is (paper shown to witness)? A This is a copy of the letter. The letter was written in longhand.

20 *Mr. Wolber.* I object to the admission of this copy on the ground that the original copy is the best evidence. This is a letter-press copy. And on the further ground that, again, it was a letter by a person who has no right to make statements that are binding on the defendant, and on the further ground that any arrangements made between the salesmen and Mr. Heitman are not binding on the defendant.

The Court. I will sustain your objection. You must understand that the theory on which the previous letter was introduced was because the contents of that letter were accepted by the defendant. If it was not accepted the jury would not consider it. It was not a matter that was binding upon the defendant. The arrangements that were made were confirmed, and those were part of the arrangements.

30 Q Mr. Heitman, did you have any talk with Mr. Kaltenbach or any other members of the firm after the date in March when this letter was written? A Yes.

Q Respecting the payment to you of a share of that bonus? A Yes.

Q With whom was that conversation had? A Mr. Charles Kaltenbach. It was the latter part of March.

Q (*By the Court.*) March, 1918? A Yes, sir. I spoke to him and requested an advance of \$250 that I needed, and asked him to advance that to me against that bonus, which he did.

40 Q (*By Mr. Bostwick.*) Mr. Charles Kaltenbach advanced that to you against the bonus? A Yes, sir.

Q Did you have any other talk at any time about that? A Yes; we talked the thing over many times, and he told me that I ought to make at least \$2,000 of the bonus; that that was to be my share.

William N. Heitman, direct.

Q How long did you work for the firm of Kaltenbach & Stephens? A Well, while I was in Newark I worked here about seven years; but then I worked in their New York office. I wasn't paid by Kaltenbach & Stephens, but I handled their goods over there to a great extent.

Q Up to what time were you employed by them? A October 11th. 10

Q What year? A 1918.

Q And what were the circumstances under which you left them? A I was discharged.

Q Tell us just how that was accomplished? A On the day of October 11th Mr. Kaltenbach sent word to me—

Q That was Mr. Kaltenbach, Senior or Junior? A Junior. He sent word to me that I was wanted in the office. I went down with the regular papers that I had, as the usual daily routine, thinking that perhaps he wanted me about something or other, and when I went in his offices he told me that my services were not wanted any longer. Well, I asked him the reason for my discharge. He simply said that I was dissatisfied, and a few things along that line, and told me he didn't want me around there any longer, that I should quit. I asked him if I hadn't done my work right, and he said, "If you hadn't done it right you would have been fired long ago." 20

Q And what did you do? A I was told to turn in my keys and take whatever personal things I had out of my desk and turn them over to Mr.—

Q When did you do that? A Right after I was discharged. 30

Q What date? A On October 11th.

Q You mean you did that immediately? A Yes; I hadn't any option at all: I was simply told that I was not wanted any longer.

Q Had you been paid your salary up to that day? A No.

Q Up to when were you paid? A They paid every two weeks then, and I was to be paid up to the following day. I went there on a Monday, and I always figured the week from Monday to Saturday, even though they paid every Thursday or Wednesday. 40

Q Were you paid for the whole year? A No, sir.

Q How much was left of the yearly salary? A Eleven weeks.

Q How much did that amount to? A About \$750.

Q Do you know exactly how much it was? A I could figure it out.

William N. Heitman, cross.

Q Don't you know without figuring it out? A \$742.50, I think it is.

Q How were you paid there as a rule? A Why, everybody in that place got their pay every two weeks, which is the regular method.

10 Q No; how were you paid? A I was paid in the regular way; the same as they paid the other help.

Q Every two weeks? A Every two weeks.

Q Did you get other employment right away? A No.

Q Did you make any effort to? A I made every effort to get another position.

Q What effort did you make? A I saw every ribbon concern, I think, in New York, and even went out of town.

Q Where did you go out of town? A I went to Catasauqua; I went to Allentown and Philadelphia.

20 Q Were you able to find any employment at all among those concerns? A I couldn't get anything there.

Q Why? A Shortage of merchandise and the general conditions. You must understand that I was eighteen years in the ribbon game, and I didn't feel I could get out of it, and I must confine myself to that line.

Q Did you confine your efforts to get a position to these firms that you have mentioned? A Oh, no.

Q Did you advertise? A Yes, sir, and I answered advertisements.

30 Q Did you confine yourself to ribbon manufacturers in your efforts to get employment? A No.

Q What other efforts did you make? A I went to Port Newark and went to the General Electric Company, and followed up ads to the underwear trade.

Q How long a period of time did you continue to make those efforts? A Right up to the end of the year.

Q And you were unsuccessful in finding anything to do, you say? A I couldn't get any position at all.

40 Q Did you receive any share of this bonus that was agreed to be paid to you? A \$250, yes.

Q That is all? A That is all.

Cross examination by Mr. Wolber.

Q How long prior to your discharge did you work for this company, Mr. Heitman? A About seven years; that is, in Newark.

William N. Heitman, cross.

Q What compensation were you paid prior to January 1, 1918? A Well, \$3,510 a year.

Q When was that compensation fixed at that rate? A That ran along from about June.

Q What year? A 1917.

Q Was your compensation for the year 1917 based on any sales that you might effect? A Why, all salaries were based on the amount of work that was done, and the sales. 10

Q Was the \$3,510 based on any percentage of sales that you effected? A I suppose the firm took that into consideration.

Q Do you know? Not what you suppose. Do you know? A Do I know that?

Q Yes. A No; I don't know that.

Q You were paid a certain amount every two weeks, were you not? A The same as the others; that was the usual pay day, every two weeks. 20

Q Do you know of your own knowledge whether the salesmen were paid that way in 1917? A That I don't know anything about.

Q You said all were paid? A We had no salesmen in Newark outside of the regular—

Q I do not mean in Newark. I say Mr. Ryan. Do you know of your own knowledge whether Mr. Ryan was paid in that way? A That was a separate department.

Mr. Bostwick. I object to the line of examination, if your Honor please. It is not cross examination and it is irrelevant. 30

Mr. Wolber. It is relevant to this extent. This man stated that the contract which was made between the company and the salesmen with which he coupled himself was based on commissions, a fixed salary based on commissions made on the sales of previous years.

Mr. Bostwick. He did not say anything like that.

The Court. It will save time if we stick to the issue. This man had a definite contract, he says, with the company, and he has outlined the terms of his contract. He is bringing suit for the breach of the contract. I do not see that the salary of Ryan or anybody else has anything to do with this definite contract which he had and as to which he claims a breach. It will not alter the terms of 40

William N. Heitman, cross.

the contract any to get this testimony in. I will sustain the objection.

At one o'clock P. M. the Court takes a recess of one hour.

10

AFTER RECESS.

WILLIAM N. HEITMAN, plaintiff, resumes the stand in his own behalf.

Cross examination (continued) by Mr. Wolber.

Q Mr. Heitman, were you present at the beginning of this meeting in November or December, 1917? A I was.

Q You are sure that the meeting had not been started when you were called in? A Started before I got there? No, it was not started.

20 Q Was anything said by the officers of the company at this meeting with reference to any deductions from the sales on which the bonus was to be figured? A Absolutely nothing was said about it.

Q Was anything said by any of the officers of the company regarding any deductions for drawing accounts of salesmen? A The salesmen were to get the drawing account, yes; but, of course, that had nothing to do with me at all.

30 Q Well, was anything said at the meeting by any officer of the company with respect to the amount of the drawing account of any of those present? A Well, he said that there was to be an average of their earnings for 1915, 1916 and 1917.

Q Was the word "earnings" used, or "sales"? A "Their earnings," I am almost positive.

Q Was anything said in explanation of earnings, on what? A Well, the only way they could earn anything would be commissions on sales.

Q Was anything said about earnings on sales? A I don't recall anything about earnings on sales; it was about earnings.

40 Q Well, was this conversation directed to any particular individual at the meeting at that time? A No, it was to everybody present; there was no individual mentioned.

Q Was your salary fixed at this meeting? A Well, at that time I was earning \$3,510 a year, and there was nothing said to me about how much I was going to get; that followed later.

William N. Heitman, cross.

Q But at this meeting, I mean, now? A No.

Q Was anything said about any deductions of sales made by the elder Mr. Kaltenbach? A There were no deductions stated at all; they simply talked about the sales of over a million dollars and a half; there was nothing said about any deduction.

Q Was any reference made by any officer of the company to the sales of Edelhoff & Reilly? A No, sir. 10

Q Or the sales of Wellwood? A No.

Q Was any reference made by any officer of the company as to deductions to be made for fixed commissions paid to any persons? A No.

Q Was the offer of the company at this meeting accepted at the meeting in November or December? A Well, there was an offer made subject to acceptance.

Q By whom? A The offer was made by Mr. Charles Kaltenbach. 20

Q To be accepted by whom? A Those present.

Q Do you mean throughout the whole line? A Right throughout.

Q How was the bonus to be distributed, or to be figured? A Well, that was to be decided by Kaltenbach & Stephens.

Q What do you mean by that? A They were the ones to decide how that amount was to be divided.

Q Was any fixed rate mentioned at that meeting? A Absolutely none; there was nothing said at that meeting about that. 30

Q Was any amount of sales for the year 1918 mentioned at that meeting on which the bonus was to be paid? A Sales over a million dollars and a half.

Q Who stated that? A Mr. Charles Kaltenbach.

Q Was Mr. Oberndoerfer present at the meeting in November? A I don't think so; I am almost positive he was not.

Q Although you stated this morning that he was there; isn't that so? A No, sir; I am almost sure he was not there.

Q Did you attend any subsequent meeting of the salesmen and the officers of the company? A No, sir; I didn't know there was going to be any more. 40

The Court. That does not answer the question. Did you attend any?

Witness. No, I did not.

William N. Heitman, cross.

Q Who invited you to this meeting in November, 1917? A I wasn't invited; I was ordered to attend that meeting.

Q Who ordered you? A Mr. Charles Kaltenbach.

10 Q Did Mr. Kaltenbach tell you for what purpose you were wanted at this meeting? A No, sir; he did not. As I told you in my testimony this morning, I did not know what the meeting was going to be for.

Q Did you furnish any information that was discussed at this meeting? A In what respect?

Q Information in your possession that was discussed at this meeting? A In the course of my employment with these people I drew up many different things, but just what you are driving at I don't know.

20 Q Were you asked at any time during this meeting to give information as to the sales of the company? A No, I was not asked anything about that.

Q Were you asked at any time to compile any information for the use of the company that was discussed at this meeting? A I believe that I drew up the papers of the earnings of the salesmen, but at the time I drew them up I had no idea it was going to be used at the meeting.

Q Was this information compiled by you prior to the meeting in November? A Yes, that was this particular thing that we spoke about with the salesmen and the officers.

30 Q Was that information exclusively within your department of the company? A No, I had to get those figures from all over; some were in New York and some were downstairs in the office.

Q Who directed you to procure that? A Mr. Kaltenbach.

Q Did you furnish these figures before or at the meeting in November? A I furnished it before the meeting.

Q Were those figures used by any officers of the company at this meeting in November? A Well, that was where he got the figures of \$30,000.

40 Q Those were deduced from information that you furnished, or that you compiled? A Partly. There were some papers that I had drawn up, but they were missing; they were lost somewhere; but this work was outside of my department.

Q Did those figures include any sales made by you? A Well, the gross sales naturally would be all included in that, because the firm knew what they were, anyway.

William N. Heitman, cross.

Q But the information compiled by you at this time referred to whose sales? A Everybody's sales.

Q Including your sales? A Certainly.

Q Specifically? A No.

Q How were your sales shown? A In the house accounts.

Q Were your sales set apart in the house accounts? A No, 10
no more mine than Mr. Graves' were, or Mr. Kaltenbach's, or Mr. Stephens'; they were all put together, all house accounts.

Q How was that information submitted by you, as house accounts? A Yes.

Q Your sales were included in the amount of the house accounts? A Excuse me a minute! The sales that I have made would also be sometimes to customers on which the salesmen got commission, and it would appear under their heading; they would be credited with the sales. 20

Q The house accounts included other sales than yours? A Yes, sir.

Q Whose sales? A Mr. Kaltenbach's.

Q Which one? A Senior.

Q What was his position with the company? A President.

Q Who else? A Mr. Stephens.

Q What was his position with the company? A Vice-president and treasurer.

Q And who else? A Mr. Charles Kaltenbach's.

Q What was his position? A General manager and secretary. 30

Q Was anybody else's sales included besides yours and the officers of the company? A Well, I had clerks under me that made occasional sales, but they didn't amount to anything.

Q Did you get credit for the sales made by the clerks? A I didn't get credit for those sales; it was under the house accounts. My principle always was to bring up the house accounts as high as possible, and the sales from year to year varied—

Q Did the house accounts include the sales of any other employees or officers of the company? A I don't know of any others. 40

Q Did they include the sales of Mr. Ryan as a salesman?

Witness. I don't think this testimony is hardly relevant, if your Honor please.

William N. Heitman, cross.

10 *Mr. Bostwick.* I object to this. The question is whether Mr. Heitman had a contract with the company to pay him a definite bonus on a definite amount of sales. What the house accounts were seems to be of no relevancy in connection with that issue. I do not know for what purpose Mr. Wolber wants the information. It is not cross examination, either.

Mr. Wolber. This witness testified on direct examination that at the meeting in November a certain proposition was made, and he was present. Now, it seems to me I have a right to search into the circumstances of that meeting. He testified on cross examination that he had submitted a certain account. I am now trying to show what the purpose was of his being present at the meeting.

20 *The Court.* I do not want to curtail your cross examination. I do not see how it is relevant. It may be on account of something that I do not know about yet; but it seems to me that this case is not so difficult or involved. It involves a contract and a breach of the contract. A good deal of time can be taken by going into extrinsic testimony, but I do not think it is relevant, and so I am going to leave it with you, because I do not know just exactly what your defense is going to be. I do not see how it is relevant.

30 *Mr. Wolber.* Well, I have practically ended that line of the cross examination. I do not mean to go into it any further.

(Question read.)

A Mr. Ryan was given credit for the amount of sales under a separate heading.

40 Q When did you accept the offer of the company as stated at this meeting in November, 1917? A After the finish of the meeting I spoke to Mr. Charles Kaltenbach, and when he told me that I was to be included in that bonus I told him that it would be satisfactory to me, and I also finished it by entering their employ on January 2nd.

Q During this conversation with Mr. Kaltenbach after the meeting, when you say he said you were to be included, was anything stated as to the time you were to commence to work

William N. Heitman, cross.

under that arrangement? A The arrangement was made for 1918; naturally it would be from January 2nd—

Q No, what was said by Mr. Kaltenbach or you at that time?
A I accepted the proposition.

Q What was that proposition? A That I was to be included in that bonus. 10

Q When were you to commence your employment under this arrangement? A January 2nd. My time expired on December 31st.

Q Your time expired January 2nd? A December 31st.

Q Had you been under a contract previously? A Certainly.

Q For how long? A From the day of my connection with these people.

Q What was your contract for 1917? A Why, after June I made \$3,510. 20

Q For how long was that?

Mr. Bostwick. Is that relevant, your Honor? I do not like to interrupt if it is relevant.

The Court. I will admit it. The contract as yet, as testified to by your witness, is rather indefinite, as to time. Of course, he says 1918. I am mostly interested in hearing the conversation and not your conclusions. You see what I mean. They really govern the case—not what you think the time was, but what was said about it. What was said by you and what did Mr. Kaltenbach say at this subsequent talk with you about the time when you were to work under the new arrangement, if anything? 30

Witness. There was no time set.

Q Nothing said? A No time stated at all. The idea was that—

Q I do not want your idea; I am asking for the conversation. A I asked him if I was to be included in that bonus and he said yes. 40

Q Was anything said as to when you were to start to work under that new arrangement? A The contract was made—

Q Answer the question. A Not at that meeting, no.

Q Did you say anything to him? A No, not about dates.

William N. Heitman, cross.

Q Was anything said at this conversation by Mr. Kaltenbach as to the amount you were to get of this bonus? A Nobody knew what they were going to get.

10 Q Was anything said at this conversation by Mr. Kaltenbach that the bonus was to be fixed by the company? A That was said at the meeting.

Q Which meeting? A In November, 1917.

Q So you commenced your work for this company under this arrangement as of January 2, 1918? A Yes, sir.

Q Was there at that time any understanding as to the amount of the bonus that you were to receive? A On January 2nd?

Q Yes. A No, sir.

Q How was your share of the bonus arrived at, or fixed, and by whom? A Fixed by whom?

20 Q Yes. When was it fixed? A March 3rd or 4th. The letter shows the exact date on that. That is 1918.

Q Was that when you submitted the Oberndoerfer letter to the officers of the firm? A I submitted that letter to them a day or two afterward. It states March 5th and March 6th. That is, to the firm.

Q Did you submit the letter to Mr. Charles Kaltenbach? A Well, he saw it.

Q You are sure about that? A I am almost positive I showed it to him.

30 Q Was Mr. E. J. Kalterbach active in the business at that time? A Well, he was there.

Q Was Mr. Stephens active in the business at that time? A Mr. Stephens was there, certainly; it was before he was sick.

Q When did you receive the \$250 paid to you on account of the bonus? A The latter part of March or the early part of April.

Q Which year? A 1918.

Q Who paid it to you? A Mr. Charles Kaltenbach.

40 Q How was it paid, in cash or by check? A By check.

Q Whose check? A Mr. Kaltenbach's check.

Q Individual check? A I don't know about that; he signed it.

Q Was it a firm check? A Well, he signed the check; I don't know—

William N. Heitman, cross.

Q Answer my question. Was it a Kaltenbach & Stephens' check? A It didn't have the Kaltenbach & Stephens heading on it, no.

Q Are you familiar with the voucher, the check voucher, that is used by Kaltenbach & Stephens? A Yes.

Q Was it one of those? A No.

Q Was it one of those that he used? A No, it was not one of those. 10

Q Whose name appears on the check that you got? A The signature?

Q Yes. A Mr. Charles Kaltenbach.

Q Was there any identification of any office on that check? A I don't recall.

Q Was it not Mr. Kaltenbach's personal check? A Mr. Charles Kaltenbach gave me the check. Whether it was his personal check or not I don't know; I know it didn't come from the firm. Mr. Kaltenbach told me the facts of the whole thing and I know exactly where it came from. 20

Q Well, you know it was not the firm check? A I am positive it was not.

Q That it was an advance or a payment by Mr. Kaltenbach individually? A That is quite possible, yes; he gave me the check.

Q What were your duties with Kaltenbach & Stephens at the time of this meeting? A I was manager of the merchandise department. 30

Q What did your duties consist of? A I was supposed to have control of the sales, the stock—

Q You say "control of the sales." In what way? A It involved my corresponding with the salesmen, to see that they got the proper amount of business, to keep tabs on the customers—

Q Where were you located? A Newark.

Mr. Bostwick. Let him answer the question. Continue with your duties.

A It was up to me to see that the proper amount of business came in from their customers, and new accounts. 40

Q That was, to check up the salesmen? A To check up the salesmen and make individual sales on the house accounts of my own accord, with the other duties that I had.

Q What other duties were there? A I had charge of credits.

William N. Heitman, cross.

Q What did you have to do with that? A It was up to me to pass on whether an article was going to be shipped, or not.

Q Where would that order come from? A Where would the order come from; from whom, do you mean?

10 Q Yes. A Nobody; I got every order that came in the place and it was up to me to pass on it. If I was familiar with the firm it wasn't necessary to look up and report, provided I knew something about them, but if I didn't know about it I would get references, and if I didn't understand the thing or I wanted to have the firm look it over I would take it down, but it was very, very seldom.

Q Take it to whom? A Mr. Stephens. You know how long Mr. Stephens was out of that place; it was at least six months; I had nobody to take it to at all—

Q Mr. Stephens is dead now, is he not? A Yes, sir.

20 Q And so is Mr. Kaltenbach, Sr.? A Yes. During that period I had nobody to consult at all; it was up to me.

Q Would you pass on the credits yourself during that period? A I would.

Q Did not the younger Mr. Kaltenbach assist you in the credit work during that period? A In what respect?

Q In the determination of the credits. A No.

30 Q Now, in addition to your duties as to the credit work, did you have any other duties as head of the merchandise department? A The merchandise department was under the covering of sales, credits and the stockroom.

Q What did you have to do with the sales? A I explained it to you before.

Q Did you put the sales through for completion by the firm? A We got these orders, and we had to follow the thing right through, outside of the manufacturing part. That was part of the duties of my office. We went down as far as the billing of the goods, have the extensions made, and then the billing department took the thing over.

40 Q Would you have to pass on the order before the goods were shipped out of the plant? A Yes; when I O. K.'d the credit part I also passed on the order itself, if it was in such shape that it should be shipped; I didn't rely on Mr. Stephens to pass on that.

William N. Heitman, cross.

Q How much of your working time would this work take? A I worked from eight o'clock in the morning until half-past five every night, outside of the overtime.

Q Where was the work done? A It was part done in the factory and I took the bulk of it home.

Q When you stated that you did most of the credit work, particularly during Mr. Stephens' absence from the mill, had you considered the part that Vietor & Achelis did? A Surely; how can you bring them in it? 10

Q Never mind that. Did your work on the credits cover the same work as Vietor & Achelis took up? A That was entirely different.

Q How was that different? A Every shipment that left that place was guaranteed by them and I didn't know what Vietor & Achelis was going to check until the 16th or the 17th of the next month. Vietor & Achelis are the bankers for this firm. 20

Q Who are they? A Bankers for Kaltenbach & Stephens and also other people; they are commission people. On the 16th or 17th of the following month these people would decide as to what accounts they were going to take, and you can gamble that they took nothing but the cream and left the rest for Kaltenbach & Stephens to take on their own hook; but they guaranteed every account until they came in on the 16th or 17th of the next month; therefore, the responsibility was up to Kaltenbach & Stephens, or, otherwise, my department.

Q You did not pass on the accounts that Vietor & Achelis took, did you? A I had nothing to do with them. 30

Q Did they represent a substantial part of the sale of the company? A Anywhere from a third to a half of the credits were passed.

Q And with that portion you had nothing to do? A I had everything to do with it, because we didn't know what part these people were going to guarantee until the 16th or 17th of the month. Therefore, the sales from the 1st to the 30th of every month would be guaranteed practically by Kaltenbach & Stephens. 40

By the Court.

Q Directing your attention to the fact that you have stated as a conclusion that your services began on January 2, 1918, on what conversation do you base that conclusion—with whom? A

William N. Heitman, re-direct.

At the meeting; at the meeting the offer was made for the year 1918.

Q That is, as to the bonus? A No; that was as to the salary, too.

Re-direct examination by Mr. Bostwick.

10 Q At that meeting in 1917 was any period specified as to the time that was to be covered by the sales upon which the bonus was to be figured? A Well, for the year 1918.

Q Tell the Court and jury the circumstances under which the check was given to you on account of the bonus, as you testified. A The \$250 check?

Q Yes. A I went to Mr. Kaltenbach about the latter part of March—

20 Q Mr. Kaltenbach, Jr.? A Mr. Kaltenbach, Jr.—and I asked him if I couldn't get \$250 on this bonus. He said, "Yes." He told me to go to the secretary of the firm, and vice-president, he holding the two positions—Mr. Stephens. I went to Mr. Stephens and told him—

30 Q You say the secretary or the treasurer? A I beg your pardon. The treasurer. Mr. Stephens was vice-president and treasurer of the Kaltenbach & Stephens concern. I asked him for the \$250 and told him that I had spoken of it to Mr. Charles Kaltenbach and he said it was all right. Mr. Stephens refused to give me that check. His reason for that was, he said, that I had been making pretty good money and I should have saved a little to meet my obligations, and if I got this \$250 it would only mean that I would spend it again, and he said to go back to Mr. Charles Kaltenbach, and I went back to him and told him the circumstances, and also told him that it had gotten me in quite a muddle, because my policy was due and I needed the money for the policy, and I asked him what I was going to do. He said he would get me the money, or give me a check, and he would fix it up with the firm; he would give me the money and fix it up with the firm. I got the check. It never dawned on me that I was going to have all this muddle. I don't know whether
40 it was a personal check or whatever way you might want to take it.

Q Did you have any other duties in your position aside from the duties respecting the sales and duties with respecting the credits? A Why, yes; I had full charge of the stockroom.

William N. Heitman, re-cross.

Q What did that imply? A Why, that took care of ordering the goods in the raw state, and also the finished product; that is, I took the orders as they came in and found out certain things that were ordered by the customers, and according to that list the firm could guide themselves as to what merchandise was to be ordered, and then I gave the orders for the dyeing and the blocking and the finishing, and from there the goods came up to me in their finished state, and from there they were shipped.

10

Re-cross examination by Mr. Wolber.

Q Mr. Heitman, if the arrangement had been made with Mr. Charles Kaltenbach before the 1st of January, why did you have this talk with Mr. Oberndoerfer and Mr. Ryan in March, 1918? A That was answered before. I told you that after Mr. Graves had been discharged there was more duties thrown on my shoulders, and I simply wanted to go and protect myself, because at the end of the year these people could come to me and say, "Here is \$50; here is your share." I wanted to know just where I stood.

20

Q Why did you go to the salesmen? A The firm gave me instructions to go and see the salesmen.

Q Who gave you those instructions? A Mr. Charles Kaltenbach, and I also spoke to Mr. Stephens about it, but Mr. Kaltenbach didn't know anything about that. They told me that any arrangement I did make with the salesmen would be agreeable to them. The money was going to be doled out by them and they didn't care where it went.

30

Q Is it not a fact that after Mr. Graves left Mr. Ryan took his position? A Yes, he did take it.

Q Didn't that relieve you of these additional onerous duties that were cast upon you? A No, it did not.

Mr. Bostwick. I offer in evidence the stipulation which the parties have entered into, which sets forth the amount of sales for the year 1918 under three different heads. Is there any objection to that, Mr. Wolber?

Mr. Wolber. No.

40

(The paper referred to is marked Exhibit P. 2.)

Mr. Bostwick. This shows that the sales for the year 1918 amounted to \$2,446,769.86.

Plaintiff rests.

Frank J. Ryan, direct.

Mr. Wolber. I desire to make a motion for non-suit on the ground that the plaintiff has not shown a date for the commencement of his employment with the company under the proposed arrangement testified to by him.

10 The Court will see from the pleadings that the first count is based upon an offer of employment made prior to the second day of January, 1918; that the third count provides for a period of employment offered in November, 1917, and for additional compensation fixed on the fifth day of March, 1918.

20 There are counts for punitive damages throughout the pleadings, and none have been proved by the plaintiff. In addition, the pleadings provide in the several counts for speculative damages—profits which, if the plaintiff's theory of the case is correct, he might have earned had he been permitted to continue after the discharge in October, 1918.

As to those I ask for a non-suit.

The Court. The motion will be denied. The damages, if any are proved, will be submitted under the instructions of the Court. I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 FRANK J. RYAN, sworn in behalf of defendant.

Direct examination by Mr. Wolber.

Q Where do you reside, Mr. Ryan? A New York City.

Q By whom are you employed? A Kaltenbach & Stephens.

Q How long have you been in the employ of Kaltenbach & Stephens? A Four years.

Q Were you in their employ in 1917 and 1918? A Yes, sir.

Q Are you acquainted with Mr. Heitman, the plaintiff in this case? A Yes, sir.

40 Q Were you present at a meeting of the officers and salesmen held at the company's mill in December or November, 1917? A Yes, sir.

Q Was Mr. Heitman present? A He was at one part of the meeting.

Frank J. Ryan, direct.

Q What time was the meeting started? A The meeting started about four o'clock in the afternoon, and he was summoned to come down with some books and some papers.

Q Who summoned him? A I believe Mr. Kaltenbach, Jr.

Q What time was that? A Probably ten minutes after four, a few minutes after the meeting started.

10

Q To the best of your recollection, will you tell the Court and jury just what was said by the officers of the company at this meeting in November, or December, 1918? A Yes, sir. At this meeting we had been doing business for quite a few years, and Mr. Kaltenbach made the suggestion—

Q Which Mr. Kaltenbach? A Mr. Kaltenbach, Jr. He made a suggestion at the meeting of the firm, to get on a new basis of sales of the merchandise for 1918; so we took the 1915, 1916 and 1917 sales and based it on that, and he brought the figures out that selling the product cost about \$30,000; that would be two per cent. on \$1,500,000—

20

Mr. Bostwick. One minute, please.

Q Just confine yourself to what was said by the officers of the company and those present, if Mr. Heitman was present. A Well, this preamble was brought up at that meeting.

Q Who brought it up? A Do you mean just what I have said now?

Q Yes. A Mr. Charles Kaltenbach.

Q Now, continue, and confine yourself to what Mr. Charles Kaltenbach said. A That is the exact words that were said at that meeting: that our business cost us as a rule \$30,000, and that would make two per cent. on \$1,500,000, and that on any sales sold in excess of that we would get two per cent. on the entire amount of sales, deducting the drawing accounts of all the salesmen and the expenses of the different departments, the minor expenses; those were to be deducted; and then there was a bonus of two per cent. to be given on all the entire sales.

30

Q Was anything said by an officer of the company respecting the character of sales upon which the bonus was to be paid?

A Yes, sir.

40

Q What was said, and by whom? A There was to be deducted from the sales the accounts of Edelhoff & Reilly.

Q Who stated this? A Mr. Charles Kaltenbach. Edelhoff & Reilly was an entirely different business from the business

Frank J. Ryan, direct.

10 that we do. We were manufacturers of narrow silk ribbon, and for Edelhoff & Reilly we were making wider goods, wide hat bands, which did not enter into the sales of the general salesmen; it did not enter into their sales at all; so the house kept that business to themselves. Then there was a commission account of John C. Wellwood, that took our goods on consignment, and that those sales to them were to be deducted from the business at the end of the year.

Q Was anything said by an officer of the company respecting the minimum amount to be paid to any person?

Objected to as leading.

(Question withdrawn.)

Q Will you tell the jury what else was said by any officer of the company in this meeting of November or December? A
20 Yes. This discussion was in December, and that was the outline of the entire thing. It was made as an offer to the salesmen.

Mr. Bostwick. I object to that testimony and ask that that be stricken out. We want to know what was said.

Witness. That was said.

Mr. Bostwick. I ask that that be stricken out.

The Court. Strike it out.

Q Now, Mr. Ryan, if anything else was said at that meet-
30 ing, tell us what was said. A It was said at that meeting that this was in the form of an offer to the salesmen; they were to consider this offer, and at some future time in January we would take this matter up again in New York and make a decision.

Q Was anything said by Mr. Heitman at this meeting as to his acceptance of the offer? A Nothing at all.

Q Do you recall a conversation with Mr. Heitman respecting this bonus, about March, 1918? A I do.

Q Where did this conversation take place? A Mostly over
40 the telephone.

Q Well, I mean any particular— A One time he met me over in New York, in the office in New York.

Q When was that, about? A In February.

Q What year? A 1918.

Frank J. Ryan, direct.

Q What was the conversation between you and Mr. Heitman on this particular occasion? A Mr. Heitman appealed to me to try to get him in on this bonus, and I said I would talk to the firm, if I possibly could, and lay the matter before them to see what they were going to decide on. I couldn't get any results at all from any member of the firm; they said, "Mr. Heitman had nothing at all to do with it, and it remains with you salesmen in New York whether you want to give him a little extra money at the end of the year in the form of a bonus." Then I went away on a trip, and I told him we would probably be able to give him some money at the end of the year, if he was still in the employ of the firm and if the work was up to the standard, because there were numerous complaints about the way the orders were being filled, and he had got into plenty of trouble about the orders not being filled right, and he said he would work harder than ever to have it done right.

10

20

Q Did you tell Mr. Heitman that maybe the salesmen might agree to let him in on this bonus?

Objected to as irrelevant.

Objection overruled.

A The salesmen would let him in on the bonus if he took care of the business properly, filled their orders right. That was to be understood in that way, because, as I mentioned before, the orders had not been filled right for several years before that; his work had been very inefficient.

Q Had the salesmen accepted this offer of November, 1917, previous to this meeting with Mr. Heitman, in March, 1918?

30

Mr. Bostwick. I object. I do not think that is relevant.

The Court. Yes, I think it is relevant. This offer was made actually to the salesmen. I will admit the question.

A The salesmen agreed in January, 1918, to accept the proposition that Kaltenbach & Stephens had made to them.

Q Was this as the result of a conference with the officers of the company?

Objected to as leading.

40

A This was the result of the meeting—

Mr. Bostwick. I think that question should be stricken out.

Frank J. Ryan, cross.

The Court. I will admit that question.

Witness. This was as a result of the meeting of December, 1917, which was postponed to the meeting in New York in January, 1918.

10 Q Where was this meeting held in January, 1918? A New York City.

Q Who were present at the meeting? A Mr. E. J. Kaltenbach, Mr. C. E. Kaltenbach, Mr. Demmerle, Mr. Graves, Mr. Hibbard, Mr. Ruckel, Mr. Oberndoerfer and myself.

Q Was Mr Heitman present at this meeting? A No, sir.

Q Was it at this meeting in January, 1918, that the arrangement of November, 1917, was accepted by the salesmen? A It was ratified at that meeting—accepted.

20 Q Was anything definite agreed upon at this meeting in January, 1918, as to the amount of bonus that each individual would receive? A No, sir.

Q How was that left? A It was left to the discretion of Kaltenbach & Stephens at their option to divide the bonus; it was left at their discretion.

The Court. I do not understand your answer.

(Question read.)

30 *Witness.* The amount of bonus at that meeting was left to the option of Kaltenbach & Stephens to divide the bonus as they saw fit.

By the Court.

Q It was left to whose option? A To the option of Kaltenbach & Stephens, the firm themselves.

Q And who else? A Kaltenbach & Stephens.

Q Anybody else? A No, your Honor.

Q It was left to their option? A Yes, your Honor; they are the employers.

40 Q It was left to them? A Yes, your Honor.

Cross examination by Mr. Bostwick.

Q Mr. Ryan, you live in New York, do you not? A Yes, sir.

Q You are still employed by Kaltenbach & Stephens? A Yes, sir.

Frank J. Ryan, cross.

Q And any share of this bonus that Mr. Heitman would have received would come partially out of your pocket, would it not?

A Practically, yes.

Q Very largely out of your pocket, too, would it not? A No, I wouldn't consider it very large.

Q What books did Mr. Heitman bring with him to this meeting, do you know? A Some books that he kept for his record.

10

Q You do not know what books, do you? A I really couldn't remember, no.

Q And all that you have said that transpired at that meeting transpired after Mr. Heitman got there? A Well, the major part of it did, yes.

Q Some of it happened before he arrived? A There was a little preliminary discussion that was probably rediscussed after he came in.

20

Q Before Mr. Heitman came there, who was there? A Mr. Hibbard, Mr. Demmerle, Mr. Ruckel, Mr. Graves, Mr. Kaltenbach, Sr. and Jr., and Mr. Stephens and myself.

Q How was Mr. Heitman summoned? A Why, he was told to bring down some books.

Q Who told him? A Mr. Charles Kaltenbach.

Q How did he tell him? A Well, he had some papers upstairs and he ordered him to come downstairs.

Q But how did he reach Mr. Heitman? A By telephone.

Q By telephone, did he? A He telephoned up.

30

Q Did you hear what he said over the telephone? A No, I did not.

Q How do you know that he told him to bring books and papers? A Because he wasn't there at the meeting, and I heard them discussing sending up for Heitman to bring down the books and papers.

Q Whom did he say that to? A Well, he must have said it to the telephone operator.

Q I think you said you did not hear what was said over the telephone? A I heard that said, that he should bring Heitman down with the books and papers.

40

Q Where was the telephone? A It was right handy there, right in the different offices around.

Q In the room where you were sitting? A It might have been right in that room.

Frank J. Ryan, cross.

Q Do you know whether it was or not? A No, I think he told it to the operator outside.

Q You had to get up and go out of the room, did you not?

A We were all standing around; this was before the meeting.

Q You were all talking? A Yes, sir.

10 Q And making a lot of noise? A Yes, sir.

Q Now, at this meeting, tell us what was said by the salesmen, what was said by you? A What was said at the second meeting, in New York?

Q Yes. A This matter was discussed again—

Q What was said by you? A If you ask me what I said, I wouldn't be able to recall it; I don't recall exactly what I said.

Q You do not recall what you said, do you? A I know that I accepted the provisions as they were.

20 Q You do not know what form your acceptance took, do you?

A No, no other form than a general body of men talking, and we accepted the proposition, that is all.

Q What did the other men say about the proposition? A The other men took up the proposition probably in the same light that I did—

Q I know, but what did they say? A They all accepted.

Q You heard them say, "I accept"? A No, not those words.

30 Q Well, what did they say? A I can't recall exactly what words they said in a meeting of that kind.

Q How do you know that they accepted it, if you do not know what they said? A Well, we all adjourned with the thing practically settled.

Q Practically settled? A All settled there in New York.

Q But you do not know what was said? A Yes, I do know what was said.

Q Well, what was said? A Do you want me to rehash the same meeting as we had over here in November or December?

40 Q No, I want you to tell me what was said by you or any of the other men in January, 1918, when you say the matter was accepted. A It was accepted in New York by all the men there. We didn't enter it down in writing, or anything of that kind, but we all accepted and voiced our sentiments.

Q I suppose you nodded your heads? A I wouldn't say that.

Frank J. Ryan, cross.

Q When Kaltenbach & Stephens offered you and these other men a bonus of 2 per cent. on sales that you never made and never expected to make for 1918, adding, perhaps several thousand dollars to your pockets, there is a possibility you nodded your heads in November or December, when the meeting was held, is there not? A I wouldn't say it exactly that way. This proposition of adding \$1,500,000 to our sales did not make it that way. Those were house accounts for 1915, 1916 and 1917. Suppose in 1918 I make sales of \$3,000,000 myself; then if I nod my head I would be losing money. 10

Q Did you ever have that experience? A No.

Q Did you ever make anything like three million dollars of sales? A No, I never did. If you come back in 1917, I was not in the full employ of Kaltenbach & Stephens, and I made considerable sales outside of their merchandise.

Q How much did you ever make for the firm outside of other business? A Probably about \$400,000. 20

Q It was pretty safe for you to nod your head, was it not, in November, as well as in January, when a proposition was put to you to share in a bonus on all sales over a million and a half dollars of sales? You men accepted that proposition in November or December, did you not? A At the discretion of Kaltenbach & Stephens.

Q You say that Mr. Heitman begged you to let him in on this bonus? A Absolutely.

Q And yet Mr. Heitman made more sales than you did for that firm, did he not? A I don't believe so. 30

Q Don't you know that he did? A I know positively that he made no sales for the firm.

Q No sales for the firm? A No sales for the firm as a salesman.

Q Did he make any sales as the head of the merchandise department? A If you let me answer that question in the right way, I will answer it.

Q I want you to answer all questions in the right way. Did he make any sales? A I could get a boy for \$10 a week to listen to the telephone and put it down on a piece of paper and make sales. 40

Q Well, what do you do? A I go out and pay money for traveling expenses, and everything, and solicit; I have made trips eight months in a year.

Frank J. Ryan, cross.

Q Would that be so up to 1918—not in 1918? A No, sir; I couldn't then, because I was sales manager.

Q And you sat there and took it down on a paper, too, did you not? A No, sir.

10 Q Do you mean to say that all the sales that Mr. Heitman made were made by sitting at a telephone and taking the orders? A So far as I know, yes.

Q But you do not know very much about that, do you? A Well, I know that in a great measure I am right.

Q How much do you know about it, as a matter of fact? A What kind of a question is that?

Q How much do you know about what Mr. Heitman did in the way of making sales? A Well, I know that he never went out to solicit any orders or spent anything for traveling expenses to go out of town.

20 Q How do you know that? A From the firm, from being in direct knowledge of the organization.

Q You are over in New York and Mr. Heitman is in Newark? A I was quite often in Newark, too.

Q You mean to say, then, that when you were in Newark, Mr. Heitman was at the office? A Always.

Q And on those occasions he was not out making sales? A He was always in the office.

30 Q But that is all you know about it, is it not? A Every time I called him on the telephone, probably it would be three or four times a day, he was always in the office, and his business was to be in the office all the time.

Q How do you know that? A Because that was his work.

Q Well, how do you know that? He was not under your supervision, was he? A In a general way, no.

Q You only know about it from what somebody told you about it? A I found him at the office all the time when I telephoned.

Q Did you have jurisdiction of any territory in Newark here? A There were very little goods to be sold by our firm in Newark.

40 Q Do you know how much? A I don't believe our entire business in the city of Newark would amount to \$20,000 in any year.

Q Do you know how much it amounted to in Philadelphia last year? A Yes, sir.

Q How much? A Probably practically \$30,000 or \$40,000.

Frank J. Ryan, cross.

Q Do you know whether Newark exceeded or went below that? A I think Newark went below that.

Q Now, Mr. Heitman went over to your office, you say, and begged to be let in on this bonus? A Yes, sir.

Q You did let him in on it, did you not? A Practically. I told him if he was there at the end of the year he would participate in it as part of the salesmen—not from Kaltenbach & Stephens, but as a salesman I would be willing to give him 10 per cent. on the 2 per cent.; I would be willing to give that to him. 10

Q Was that charity? A Well, I practically called it that; yes, sir.

Q You thought it was charity? A Yes, sir.

Q He did not help you in making your sales over there, did he? A No; he might be a great detriment to me.

Q And yet you let him in to the extent of 10 per cent. on the bonus? A I knew the boy a good many years, and it wasn't in that light at all; it wasn't charity. 20

Q It was good business on your part, was it not? A Because the year preceding the business was going backwards and there were too many complaints about the way the orders were handled.

Q What complaints were made? A Well, bickering and fighting by the different salesmen at the way Mr. Heitman handled their accounts.

Q Tell us about the complaints; tell us one of them. A Well, I can mention Reistick's Dry Goods Company, from St. Louis. 30

Q What complaint was that? A They complained that they sent in orders and never got their shipment, or never got their mail answered, or anything of that kind.

Q What did you have to do with answering this mail that they were complaining about? What did you have to do with that particular order? A The goods were originally sold by me to Reistick's Dry Goods Company, and when a man doesn't get his merchandise and get it right they will come back and complain to me, and if I am not in town he would direct his letters direct to Newark, and if he did direct them to Newark he never got any answer. All the customers complained that they never got their mail answered at all. 40

Q Were these complaints made to you? A To me and to the firm direct, at Newark.

Frank J. Ryan, cross.

Q They were made to the firm, and after they couldn't get any response, to you; is that what you say? A No, sir; if I am working for a man and getting a commission for selling those goods, I am in duty bound to see that the goods are delivered; if I don't, I don't get any commission.

10 Q On this occasion do you remember what the complaint was about? A There might be three or four from the same concerns.

Q Well, tell us all about it, the whole thing. A A man will send in an order and the order goes to Newark to be filled—

Q No, tell us in this account what was done? A You have got to tell those things, if you want to tell the truth, in a general way. You can't pin me down to answering one question on something that happened a year and a half ago, or
20 a year ago.

Q Well, then, don't talk about it. A You are asking those questions. The questions that you are asking are very broad, and they have got to be answered in a general way, so that the jury can understand it.

Q You picked out this one account— A You asked me to pick out one and I picked it out.

Q If you can pick out one that you know more about, pick it out. A Every account that I know about I am going to talk right about. These orders were sent to Newark, New Jersey, to be filled, and they wouldn't be filled; they were kept
30 in a pigeon-hole for weeks, not even an answer acknowledging receipt, and this man would write direct to me, saying, "Why don't I get some answer to my letters, or why don't I get my goods?"

Q What would you do then? A I would take it up with Heitman, and he would say, "I will do it in a minute; I will see that he gets his goods right away." He always said that; he always had a very inefficient way of always passing the buck, saying it was the dyes or the fault of the factory or somebody else.

40 Q He did give a reason for it, did he? A Sometimes.

Q You do not know whether those were good reasons or not, do you? A I don't think they were.

Q Well, you do not know, do you? A I know that they were not.

Frank J. Ryan, cross.

Q How do you know? A Because I went over right to the stock and picked out goods from the shelves that would fill that order.

Q Mr. Heitman had charge of the merchandise department, did he not? A Yes, sir.

Q Do you know that the goods on his shelves had already been designated to fill some other order? A No, sir; because he came with me and pulled the goods out and laid them in the aisles and shipped them out after. 10

Q On this account? A On the Reistick's Dry Goods Company.

Q How long had that account been overdue? A Weeks and months.

Q You do not know whether at the time the order was given the goods were there, do you? A It would appear to me that there was dust on the boxes. Would that be proof enough? 20

Q Do you know whether they were there or not? A I don't know whether they were there a year before; it looked to me as if all the—

Q Can't you answer that question yes or no? A I didn't see them put there. I can answer that—

Q Well, can you answer the question whether the goods were there when the orders were sent into the factory? A No,

Q Then you do not know whether the reasons that were given for delay in filling an order may have been perfectly good reasons, do you? A Well I can answer that one way— 30

Q Answer that yes or no. A In a broad scope, I know he had no reason.

Q You say he had a way of passing the buck, and you say you do not know whether the reasons that he assigned for the failure of the department to deliver goods were good or not? A I believe they were lies.

Q You do not know, do you? A No.

Q You believed those were lies, did you? A Yes, sir.

Q And yet you offered to give him one-tenth of the bonus that was to be divided among the salesmen for the inefficient work that he was doing? A Yes, sir. 40

Q Why? A On account of the letter that he wrote and the telephoning that he would do the work better.

Q What letter is that? A A letter that he wrote thanking me and saying that his work would be better the next year.

Frank J. Ryan, re-direct.

Q Where is the letter he wrote you that induced you to let him have that bonus? A I didn't say that induced me.

Q You said it did. A No, I did not; I say it appeared in there that he would do his work better.

Q You thought he would do better, did you? A Yes.

10 Q What reason did you have to hope that he would do better, considering the number of years that you had known this boy? A About three years ago I was over in the factory, and he came to me crying, asking me to help get an advancement, and I was only a salesman there at that time—that is all I am yet—and I said I would go down and try to get him a raise. Heitman came down and said, "If you don't give me a raise I will leave," and Mr. Stephens pulled out his watch and said, "What time are you going to leave?" and I straightened that out.

20 Q Is that the reason you had to hope that he would do better if you gave him 10 per cent. of your 2 per cent. bonus, that somebody pulled out a watch and looked at it? A Oh, no.

Q What is the reason that you thought he might do better if you gave him part of your bonus? A Because I thought he might do more efficient work because of being considered in the bonus.

Q What you did think about it was this, was it not—that he would give you favors for your customers? A He never did me any favors in his life.

30 Q You thought he might favor you, did you not? A If such a thing would be, it might be for 1917, but not for 1918, when I would share in the bonus. My work was almost all Government work in 1918, so that it didn't make any difference.

Re-direct examination by Mr. Wolber.

Q Respecting these complaints about Mr. Heitman's work, did you communicate them to any officer of the company before Mr. Heitman left the employ?

Objected to.

40

A Yes, sir.

Mr. Bostwick. I do not think that is relevant, your Honor.

The Court. I will admit it.

Frank J. Ryan, re-cross.

Q To whom did you communicate those complaints? A As a general rule, to Mr. Charles Kaltenbach and to Mr. Stephens and to Mr. E. J. Kaltenbach.

Q Were any of these complaints communicated by you to officers of the firm after March, 1918? A Yes.

Q And to whom? A To Mr. Charles Kaltenbach.

Q (*By the Court.*) What was the date of the second meeting, in New York, Mr. Ryan? A I think it was the first or second of January; at any rate it was prior to January 19th, your Honor.

Q (*By Mr. Wolber.*) At the time of the second meeting, in January, 1918, was anything said by the officers of the company as to a minimum to be paid to the salesmen?

Objected to as leading.

Objection sustained.

Q Was anything said at the meeting in January, 1918, respecting deductions or drawing accounts? A Yes, sir.

Q By whom? A By Mr. Charles Kaltenbach.

Q What did he say? A That we were to figure on three years previous, and all those salaries were to be paid on that basis, and then all deductions were to be taken off, some traveling expenses and expenses for advertising, and things of that kind, and also deductions of the sales of Edelhoff & Reilly, John C. Wellwood, and, I believe, William Bliss and Company.

Q Was any particular mention made as to the amount each individual present was to receive? A No, those things were fixed up privately; one salesman didn't know exactly how much the other salesman was entitled to or was drawing, or anything else; they were private arrangements made by Kaltenbach & Stephens.

Re-cross examination by Mr. Bostwick.

Q You were going to tell us a moment ago about the sales that Mr. Heitman made. You said he did not make any sales at all as a salesman. Did he make any sales? A Well, that can be answered broadly, that question. If a man is not supposed to be engaged by you as a salesman, and you have a stenographer in the office, and the lady takes a telephone message, or anything else, would you call that a salesman?

Q I am not answering questions. Did Mr. Heitman make any sales, to your knowledge? A Not to my knowledge.

Frank J. Ryan, re-cross.

Q None at all? A Not as a salesman. If a man comes into my place of business, or your place of business, and buys some goods from somebody who is not employed as a salesman, does that make him a salesman?

10 Q Well, you get a commission on sales like that if they come into your office, do you not? A No.

Q Any other salesman would, would he not? A If it was over his territory. That is the obligation of salesmen to each other. One man in our employ goes out West and one goes down South and one up North. I did just as much in that line on the California coast as I would in my own business. It was to my interest.

Q If a sale comes in in the salesman's absence and the order is taken by a— A That applies to his commission; that is in his territory and he is supposed to get the sales from that territory.

20 Q He is a salesman? A Yes.

Q But you admit that he makes a sale so far as the commission is concerned, do you not? A This question could be answered very broadly. I could go into very devious ways and answer the question the way you want me to.

Q You admit that that is a sale? A The sale is made, but if a man—

Q Well, you admit that that is a sale, do you not? A A sale is made; yes, sir.

30 Q And a commission paid on it, is it not? A If it is the territory of the man who—

Q Yes, exactly. A Yes.

Q If it is in the territory of the man who had the jurisdiction of that territory? A Yes, but his contract covers that. He gets every sale, if you made that sale, or Tom Jones, or anybody. If you met that man on the train, and said, "I have taken this order to Kaltenbach & Stephens," he would get the credit for it, because Kaltenbach & Stephens would be in duty bound to credit their salesmen that way.

40 Q And Mr. Heitman had certain territory to take care of, did he not? A None that I know of, no.

Anthony Demmerle, direct.

ANTHONY DEMMERLE, sworn in behalf of the defendant.

Direct examination by Mr. Wolber.

Q Where do you reside, Mr. Demmerle? A Brooklyn.

Q By whom are you now employed? A Kaltenbach & Stephens.

Q How long have you been working for Kaltenbach & Stephens? A Since 1904. 10

Q Were you employed by Kaltenbach & Stephens in 1917? A Pardon me. Kaltenbach & Stephens directly ever since there has been a new arrangement made with the—

Q You think it was at first a partnership, do you? A We were employed in two departments, and we are today; I think possibly about ever since Mr. ————— has left the employ; I think since 1914.

Q In what capacity were you employed by Kaltenbach & Stephens in 1917 and 1918? A A salesman. 20

Q Do you recollect a meeting held at the mill in November or December, 1917? A Yes, sir.

Q Who were present at that meeting from the beginning? A Why, Mr. Kaltenbach, Sr.; Mr. Stephens, Mr. Kaltenbach, Jr.; Mr. Ryan, Mr. Ruckel, Mr. Hibbard, Mr. Heitman—I am not positive whether Mr Heitman was there at the time; I couldn't recall whether he was there when the meeting started or not.

Q Was he there before the meeting adjourned? Do you recall whether Mr. Heitman was there before the meeting adjourned? A Oh, yes. 30

Q Now, will you tell us, to the best of your recollection, just what was said at that meeting respecting employment for 1918, and tell us by whom it was said? A Well, they were talking over making a new arrangement—

Q Who said this? A Mr. Charles Kaltenbach.

Q What did he say about the new arrangement? A That we would eliminate the commissions—as much as to say that we would eliminate the commissions and work on a different basis and divide the profits if the men would share a bonus, and the thing would be taken up at a future date, and the thing was left over and decided on finally in January. 40

Q Were you present at this meeting held in January, 1918? A Yes, sir.

Anthony Demmerle, direct.

Q Do you recall who else was present? A Well, Mr. Kaltenbach, Sr.; Mr. Kaltenbach, Jr.; Mr. Ruckel, Mr. Hibbard and myself and Mr Oberndoerfer.

Q Was Mr. Heitman present? A He was not.

Q Where was this meeting held? A Held in New York, in the New York office

10 Q What was said, if anything, at this meeting by the officers of the company and the salesmen? A Well, that we were to share in the bonus on a certain amount, to be divided as Kaltenbach & Stephens saw fit.

Q Was anything said about the matter being concluded at that meeting, or were you to hold another meeting? A Well, it was understood that we all agreed on those arrangements; we were satisfied; there was nothing said about any future meeting.

20 Q Was anything said at that meeting with reference to Mr. Heitman? A I don't recall his name being mentioned.

By the Court.

Q Were these men who were present at this meeting in 1917 salesmen with the exception of the members of the firm? A Why, yes, Mr. Ryan, myself, Mr. Hibbard and Mr. Ruckel were salesmen.

Q At this second meeting you were all present, these men that you have named? A Yes, sir.

Q And the members of the firm? A That is, eliminating—

30 Q Mr. Charles Kaltenbach was there? A Mr. Charles and—

Q And Mr. Stephens? A No, Mr. Stephens was not at the second meeting—and Mr. Kaltenbach, Sr.

Q And Mr. Charles Kaltenbach and Mr. Kaltenbach, Sr.? A Mr. Charles Kaltenbach and Mr. Kaltenbach, Sr.

By Mr. Wolber.

Q Was the arrangement finally settled at the November meeting? A No, sir; not to my knowledge; I am pretty sure not.

40 *Mr. Bostwick.* He said a minute ago that it was finally settled.

The Court. No, he did not say that.

By Mr. Bostwick.

Q Did you not say that you all agreed at the November meeting that it was satisfactory? A No, it was left over to a subsequent date to be decided. The matter was discussed.

Anthony Demmerle, cross.

Q And when was it finally settled? A In January, in New York.

Cross examination by Mr. Bostwick.

Q You live where? A I live in Brooklyn.

Q You are not subpoenaed here, are you? A No, sir.

Q You are still working for Kaltenbach & Stephens? A Yes, sir. 10

Q And I suppose you got your fair goodly portion of the bonus at the end of the year? A I got what I thought I was entitled to.

Q And you would not have gotten as much as you got if Mr. Heitman had gotten his, would you? A Not if that was the way it was distributed, if that is what I understand you to mean.

Q You knew about this arrangement whereby Mr. Heitman was to get 10 per cent. of the bonus, did you not? A No, sir. 20

Q You did not know of that at all? A No, sir.

Q When did you first learn about it? A I heard that he was to be included; I hadn't heard officially that he was included—that the arrangement was simply made with the salesmen. Mr. Heitman in conversations over the phone kind of intimated that he was included. He would say, "We want to work the business up, we want to get the sales, because we want to get the bonus," but that is the only way I had any clue as to whether he was included. 30

Q I suppose you thought that, considering Mr. Heitman's contribution to the sales, that that was a fair proposition? A What do you mean by that? 30

Objected to.

Q That he was to share in the bonus?

Objected to.

Objection sustained.

Q Mr. Heitman did, as a matter of fact, according to your knowledge, contribute to the sales, did he not? A What do you mean by that, the house accounts? 40

Q Well, the sales made up of house accounts? A Well, those sales would come in over the phone, or, naturally, re-orders.

Anthony Demmerle, re-direct.

Q How do you know that? A Well, they were directed that way. The customers would probably mail their orders to the factory, or occasionally they would phone.

Q You do not admit that Mr. Heitman made any sales either; is that so? A I didn't see any that he made; I don't know that he made any, or seen any sales that he made. I know that
10 he has taken orders and has gotten orders over the phone or through the mail from customers of mine.

Q He has drummed your territory, has he not, in a way? A Why, no.

Q He circularized it, did he not? A Well, he has written to our trade—some of the trade.

Q And he has taken orders from some places where you could not get them? A Well—

Q He got orders from customers where you could not get them? A Where I couldn't get them?
20

Q Where you did not get them, whether you could or not? A I could, possibly, if I went there; I didn't have time.

Q Well, he has got them? A Yes, sir.

Q And you got credit for it in 1918? A Yes, sir; only what I was entitled to.

Q You got credit on the sales that Mr. Heitman made in your territory in 1918, did you not? A Yes, sir.

Q And you get commissions on those sales? A Yes, sir.

Q Simply because the house accounts were to be thrown into a pot with all the rest of them? A Yes, sir.
30

Q And you get your share on those sales? A Yes, sir.

Re-direct examination by Mr. Wolber.

Q Mr. Demmerle, at this meeting in January, 1918, what was said there as to the manner in which this bonus was to be figured? How was this bonus to be arrived at? A What meeting was that?

Q The last meeting, in January, 1918. A Well, we were to receive 2 per cent.

Q On what? A On a certain amount above the expenses.
40

Q A certain amount of what? A A certain amount of the business.

Q Of the company? A Of the company—deducting expenses.

Q Deducting what expenses? A Several accounts.

Ralph G. Hibbard, direct.

Q Which accounts? Can you specify them, as you recollect?
A Well, there were three or four or five. I don't recall all of them. I know Edelhoff & Reilly was one, and John C. Wellwood and Bliss; I know those three.

Q Was anything else to be deducted? A Not that I know of.

Q So that your testimony as to what was agreed upon is that from the net sales the three or four accounts that you have mentioned were to be deducted; is that right? A Yes, sir.

Q Was anything said about any other commissions being deducted? A Not to my knowledge, no, sir; I hadn't heard of it.

Q Did Mr. Heitman ever make any application to you for a share of this bonus? A No, sir.

Q (*By the Court.*) Did you ever agree that he should have any share of it? A I was never approached; no, sir.

Re-cross examination by Mr. Bostwick.

Q Who was your employer, your superior, your immediate superior, during 1918? A You mean who had charge of the department?

Q Yes. A We considered Mr. Ryan the manager of the New York department; Mr. Kaltenbach was the official head.

RALPH G. HIBBARD, sworn in behalf of the defendant.

Direct examination by Mr Wolber.

Q Mr Hibbard, where do you live? A Richmond Hill, Long Island.

Q By whom are you employed now? A Kaltenbach & Stephens.

Q How long have you been employed by them? A Four years.

Q In what capacity were you employed by Kaltenbach & Stephens in 1917 and 1918? A Traveling salesman, the Southern territory.

Q Were you present at the meeting of the salesmen and officers and Mr. Heitman in November, 1917? A Yes, sir.

Q Will you state, to the best of your recollection, exactly what was said by the parties present at this meeting? A Well, they called us over there, as I understand, to make new arrangements—

Ralph G. Hibbard, direct.

Mr. Bostwick. One moment.

Q Who said that?

Mr. Bostwick. Give the conversation.

Q Tell us who said it and what was said. A Mr. Kaltenbach.

10 Q Which Mr Kaltenbach? A Junior. He called us over there to make new arrangements for 1918.

Q Was anything else said? A We were to receive a bonus.

Q Was Mr. Heitman present while this conversation was going on? A He was not present at the start.

Q About what time was this meeting called? A Around 4 o'clock.

Q When did Mr. Heitman come into the meeting? A Well, a short time after, about ten or fifteen minutes.

20 Q Did Mr. Heitman take part in this discussion? A No more than any of the rest of us, I guess.

Q Was anything said about concluding the matter that day? A Well, it wasn't settled that day.

Q What was said, and by whom? A It was to be settled at a future meeting.

Q Was anything said at this meeting as to the manner in which this bonus was to be arrived at? A It was just discussed and—

30 Q Well, what was said, and by whom? A Two per cent. on all over a million and a half business.

Q On what? Was anything said as to how that was to be arrived at? A Anything over a million and a half business.

Q Business of the company? A Yes.

Q Was that all that was said as to the manner in which this arrangement should be carried out? A Exclusive of three or four accounts.

Q Were those accounts mentioned by name at this conference? A Yes, sir.

40 Q What was said, and who said it? A Mr. Charles Kaltenbach said that Edelhoff & Reilly, John C. Wellwood and William Bliss were not to be included.

Q About what time did this meeting adjourn? A Around 6 o'clock.

Q Were you present at the subsequent meeting held in January, 1918? A Yes.

Ralph G. Hibbard, cross.

Q Can you tell us who was present at that meeting? A Mr. Kaltenbach, Sr.; Mr. Charles Kaltenbach, Mr. Ryan, Mr. Demmerle, Mr. Ruckel, Mr. Oberndoerfer and myself.

Q Was Mr. Heitman present at that meeting? A No.

Q Where was that meeting held? A In New York.

Q What was talked about at that meeting, and by whom? 10
A Why, it was finally settled—the arrangement was settled for 1918 that we were to receive a 2 per cent. bonus on the total sales of the business, deducting expenses, also three accounts, William Bliss, Edelhoff & Reilly and John C. Wellwood.

Q Was anything said about any other deductions? A There might be some advertising, and like that, which would be included.

Q Was anything said about the matter being concluded or left open at that meeting? A Finally settled; we all agreed upon it. 20

Q So that the arrangement stated there was agreed to by all present? A Yes.

Q Were you or were you not subsequent to that meeting approached by Mr. Heitman with reference to sharing in this bonus? A I was not.

Q Have you had any conversation with Mr. Heitman respecting the bonus? A Well, he came over to New York, and I would speak to him. As I understood it, he expected to get the bonus.

Q Was that your understanding of the matter? A Only what he said, that is all. 30

Cross examination by Mr. Bostwick.

Q You were the first one at this meeting in November, 1917?
A I was the first one?

Q Yes. A What do you mean by that?

Q You were the first one to arrive, were you not? A Why, no; I came over there with several others.

Q Who else? A Mr. Demmerle and Mr. Ruckel and myself; three of us came over from the New York store.

Q Were you the first one to arrive? A Yes, we three were. 40
I am not certain about that; Mr. Ryan might have been there first; I think he was out to lunch.

Q You do not know whether Mr. Ryan was there or not?
A He was not there when I got to the mill, but I believe they were out to dinner together—Mr. Kaltenbach and Mr. Ryan.

Ralph G. Hibbard, cross.

Q You do not know whether Mr. Heitman was out to dinner with Mr. Ryan and Mr. Kaltenbach, do you? A Mr. Heitman was out to lunch.

Q You do not know whether he was out with Mr. Ryan or not, do you? A No.

10 Q Who was the next to arrive after you three arrived? A Why, I think Mr. Heitman got back, Mr. Charles Kaltenbach and Mr. Ryan.

Q They all came right in together? A I don't know whether they all came in together or not, but I was in the other office; I wasn't at the door where they came in at the time.

Q So far as you now recall, they were all there together; is that right? A Well, Mr. Ruckel and Mr. Demmerle and myself came there first. It was around lunch time.

20 Q I suppose the others came in afterwards? A Yes, sir.

Q One at a time, or were they all together? A That I didn't take notice.

Q But you did take notice that Mr. Heitman arrived rather behind the others, did you not? A No.

Q Well, he was not there, you say, at first? A No.

Q He came in about fifteen minutes later? A I don't know exactly whether it was fifteen minutes or twenty minutes.

30 Q But you do remember that he was so much further behind the others than any of the others were behind others? A I was in Mr. Kaltenbach's office, and finally Mr. Ryan came in, and then Mr. Kaltenbach, Jr., and Mr. Stephens. The operator told me that Mr. Heitman and the rest of them were all out at lunch

Q Did you hear Mr. Kaltenbach call for Mr. Heitman to come up? A To come down?

Q To come down. A Yes, sir.

Q How did he do it? A I think he sent for him.

Q Well, you say you know. A What do you mean by that?

40 Q You said that you heard them call for him? A The meeting was started, and he said, "Have Mr. Heitman come down-stairs."

Q Whom did he say that to? A I couldn't say just who it was; I think somebody went upstairs for him.

Q Well, he said, "Have Mr. Heitman come down"? A Yes, sir.

Ralph G. Hibbard, cross.

Q Is that all he said? A I believe he came down with some books, some papers, that they needed at the meeting.

Q Did you hear him say what books he wanted? A No.

Q Well, didn't you hear him tell him what books he wanted? A No, I did not.

Q He did not say, "Have him come down with some books and papers," did he? A Some records, of some kind. 10

Q He did not say what they were? A No.

Q You heard him say, "Have Mr. Heitman come down with some records"? A Some records, some papers.

Q That is just what he said—"Have Mr. Heitman come down with some records and some papers"; is that right? A Yes, sir; because he needed some figures there, and Mr. Heitman brought these figures.

Q Did he bring them down? A Yes, sir.

Q What did he come down with? A Just a few minutes after they sent up for him— 20

Q What did he come down with? A He came down with some books, a memorandum.

Q Well, was it books or a memorandum; which was it? A I don't know whether it was books or papers; I can't remember.

Q It might have been a broom, might it not? A Oh, no; it was something relating to figures.

Q But you do not know whether it was a book or a memorandum? A It might have been papers or it might have been a book; I can't remember. 30

Q How do you remember that he had anything at all, if you do not remember whether it was a book or a paper? A Mr. Charles Kaltenbach wanted some papers, the sales or something, to get a total of the business, and he sent for him; that is all I know.

Q You do not know how he sent or whether he sent somebody from the meeting there? He did not go out of the room, did he? A Who?

Q Mr. Charles Kaltenbach. A No.

Q He sent somebody? A Yes, sir. 40

Q You do not know what the man was told? A No, sir.

Q You were satisfied with the result of the meeting of December, were you? A Everything was settled.

Q You remember that very distinctly, do you not? A Yes, sir.

Ralph G. Hibbard, cross.

Q It is very important to remember that, is it not? A Well, I remember that.

Q You have been told to remember that, have you not? A Not that I know of. There was to be another meeting held.

Q What for? A To settle the matter, and we were to think
10 it over and see whether we wanted to go on that basis or not, and the meeting was held in January.

Q It was a very difficult question to decide, wasn't it? A No; we didn't have to decide right away; we were supposed to think it over.

Q As I understand it, you men were getting two per cent. on the sales that you were making, and the company was going to offer you two per cent. on a million and a half in addition to that, and it was a serious question whether you should accept that or not, was it not? It was a very serious question? A We
20 were supposed to get time to think it over and decide.

Q It was difficult to decide that question, whether you should get a bonus? A We were to decide.

Q And you were guaranteed at least the amount of drawing account that you got in 1917, were you not? A No; it was based on a three years' basis, total sales.

Q But you had a drawing account based on the average of your sales for three years; is that right? A Yes, sir.

Q But you were guaranteed as your ultimate compensation
30 at least the amount that you got in 1917; isn't that so? A Yes, sir.

Q So that you were bound to get that anyway, were you not? A Yes, sir.

Q You could not get any less than that, and you were to have added to the normal sales of the concern, out of which you took a share, a million and a half of sales, to which a bonus of 2 per cent. was to be added, \$30,000, to be distributed among you and five or six other salesmen, and it was a very serious question whether you should accept that, and your meeting ad-
40 journed to meet and have another meeting at some time two months off, giving you two months to think about it; is that right? A That is right.

Q Have you ever been convicted of a crime, Mr. Hibbard? A No, sir.

Ralph G. Hibbard, re-direct—re-cross.

Re-direct examination by Mr. Wolber.

Q Mr. Hibbard, did you in your dealings with the home office become familiar with some of the duties performed by Mr. Heitman? A Well, I had very little to do with Mr. Heitman, because all the goods that I sold or pretty near all the goods that I sold, were shipped from the New York office. 10

Q Do you recall any orders that you forwarded to Mr. Heitman at the Newark mills? A Yes, I do; principally Robert Chapman, of Brooklyn.

Q Was that one of your customers, of your territory? A It was given to me.

Q How would you communicate with Mr. Heitman with respect to an order taken that way? A I sent the order over to the mill and I addressed it to Mr. Heitman.

Q You addressed it to Mr. Heitman? A Yes, sir.

Q Would any efforts on your part to follow up the order be taken up with Mr. Heitman? A I would get him on the 'phone and ask him about the delivery of the goods, how soon, and like that. 20

Q So that you would get information from Mr. Heitman as to how soon the goods would be shipped to your customers? A Yes, sir.

Q Now, Mr. Hibbard, I want you to refresh your recollection. I think I understood from the question asked by counsel on the other side that you said that the figure of \$1,500,000 was used as representing the house accounts. Do I understand you to testify that at this meeting reference was made to \$1,500,000 worth of house accounts? A No, sir. 30

Q What was the reference made to? A \$1,500,000 worth of sales. During the first meeting it was suggested that anything over and above a million and a half would be divided among the salesmen.

Q Was there any figures given as to the amount of the house accounts? A No.

Re-cross examination by Mr. Bostwick.

Q Mr. Hibbard, you live in New York, do you not? A I live in Richmond Hill. 40

Q And you are not subpoenaed? A No, sir.

Q You came voluntarily? A Yes, sir.

Q As an employee of Kaltenbach & Stephens? A Yes, sir.

Ralph G. Hibbard, further direct.

Q And your share of this bonus for the year 1918 would have been somewhat less than it was if Mr. Heitman had received the share that was agreed to be paid him, would it not? A I don't know; I don't know how it was divided.

10 Q You know that if Mr. Heitman got a share of the bonus in which you were to share that your share would be smaller if he got his than if he did not, do you not? A I don't know.

Q You never figured that out, did you? A I really don't know anything about that. My bonus was handed to me, and that was all there was to it; I don't know whether Mr. Heitman got anything or not.

Q You did not care, did you, either? A I don't say I didn't care; I don't know; I don't know whether he got it.

Further direct examination by Mr. Wolber.

20 Q Mr. Hibbard, do you recollect whether anything was said at this meeting in January, 1918, figuring the amount that each individual present should receive of this bonus? A That was left to the firm to decide. There was no figures given what each man was to receive.

Q Which firm? A Kaltenbach & Stephens.

Q Was that the understanding under which the matter was concluded? A Yes, sir.

Adjourned until tomorrow, Tuesday, June 17, 1919, at ten o'clock A. M.

30

40

Charles E. Kaltenbach, direct.

SECOND DAY.

Tuesday, June 9, 1919.

WILLIAM N. HEITMAN

vs.

KALTENBACH & STEPHENS, Inc., a corporation.

10

Met pursuant to adjournment.

Present counsel as before stated.

CHARLES E. KALTENBACH, sworn on the part of the defendant.

20

Direct examination by Mr. Wolber.

Q Where do you reside? A Cranford, New Jersey.

Q Are you an officer of Kaltenbach & Stephens? A I am.

Q What position do you occupy with the company? A President.

Q How long have you been president of the company? A Since the last meeting—last stockholders' meeting, in February.

Q Are you acquainted with Mr. Heitman? A I am.

Q Do you know what the terms of Mr. Heitman's employment with your company were in 1917?

30

Mr. Bostwick. I object. I do not think it is relevant.

The Court. I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A The terms were changed in the middle of the year. He got a regular salary, \$67.50 a week.

Q Later? A He got a change in salary—got a raise in July, I believe it was, of \$67.50, given by the then president and treasurer and—is that what you mean by terms?

40

Q That is it. What position did Mr. Heitman occupy with your company in 1917? A He was manager of the merchandise department.

Charles E. Kaltenbach, direct.

Q Now, Mr. Kaltenbach, do you recall a meeting of the employees of your company about November or December, of 1917?

A Yes, sir.

Q Where was that meeting held? A In the main office in Newark.

10 Q Who called the meeting? A Well, I did, at the request of the president and treasurer.

Q Who was the president of the company at that time? A My father, E. J. Kaltenbach.

Q Who was the vice-president? A Vice-president and treasurer, Mr. Stephens.

Q Who were present at that meeting? A Well, a Mr. Ryan, a Mr. Ruckel, Mr. Demmerle, Mr.—I forget the name—Hibbard.

Q Was Mr. Heitman present at that meeting? A Mr. Heitman was present at the meeting.

20 Q Who sent for—who invited Mr. Heitman at this meeting? A I needed some records—before the meeting I had asked Mr. Heitman to make some records up which I thought we might possibly need, showing the salesmen's sales for the year—different records—and I asked him to have them ready at the meeting, so after the meeting was started I asked him—I had him sent for—and he brought the records down.

30 Q What was said by you at this meeting? A Well, I felt that our selling organization was not working as good as it should, and I wanted to make a new deal, and I thought putting them on a different basis would make it more efficient and much better for the company, so I suggested that instead of paying a commission, as they had done, on sales of salesmen, that they would in the future, or for the following year, figure the sales—the total sales—less two accounts—take two per cent. of them and consider that the total selling expense for the year. In other words, this two per cent. on the total sale was to include the drawings of the salesmen which we would specify later, and which could be averaged on the three years' commissions practically. From that they were to deduct—and also from this two per cent.

40 —we were to deduct travelling expenses and other selling expenses which were strictly selling expenses or commissions. There were few salesmen who were still on commission salary—salesmen who handled small accounts—and this was also to be deducted from this two per cent. And I figured that the total expenses would be about \$30,000, and if we had a \$2,000,000 sales

Charles E. Kaltenbach, direct.

that would leave—two per cent. out of the \$2,000,000 would be \$40,000, and the difference between thirty and forty thousand dollars was to be given out as a bonus to be divided among the salesmen as the firm or company saw fit.

Q To whom did you direct this offer of the company at this meeting? A To all the salesmen.

10

Q Was that offer directed to Mr. Heitman? A Positively not.

Q Was this matter of bonus concluded at that meeting? A No; it was to be considered and worked out by the salesmen and to be decided on later.

Q Was any time mentioned when the matter was to be decided upon? A Well, just said later. The supposition was that it would be soon after—either by the first of the year or soon after.

Q Now, Mr. Kaltenbach, were you in court yesterday? A I was.

20

Q Did you hear Mr. Heitman's testimony? A I did.

Q Did you hear him say that a few days after this meeting he asked you whether he was to be included in this bonus? A I did.

Q Now, what have you to say to that statement? A Well, it is not so; I would never promise Heitman any share in the bonus. Some time after the second meeting and the thing was decided—
(Interrupted.)

Q Wait a minute; I will let you come to that. Now, Mr. Kaltenbach, do you recall a meeting with the salesmen of your company in New York some time in January, 1918? A I do.

30

Q Where was that meeting held? A At our New York office.

Q Where is that located? A In the building occupied by Vietor & Achelis.

Q Will you tell us who were present at this meeting? A Mr. Ryan, Mr. Demmerle, Mr. Hibbard, Ruckel, Graves and Mr. Kaltenbach, senior, and myself, and Mr. Oberndoerfer.

Q Was Mr. Heitman present at this meeting? A He was not.

Q Was anything agreed upon at this meeting between the company and those present as to the bonus to be paid for 1918? A Yes, sir; it was decided—

40

Q What was the conversation, Mr. Kaltenbach? A I did the talking, and it was practically agreed—it was agreed, as I originally suggested, that the total selling expense should be two per cent. on our net business, after deducting two accounts, John C. Wellwood and Edelhoff & Reilly—it was agreed that we take

Charles E. Kaltenbach, direct.

two per cent. of this remainder, allow each salesman a drawing account, which would, we told these salesmen personally, be figured approximately on their earnings or commissions for three years, and the balance, after deducting travelling expenses or incidental expenses—which were purely selling expenses—the
 10 balance was to be given to the salesman after the end of the year at the option of the company.

Q Now, Mr. Kaltenbach, was anything said at that meeting as to the proportion of the bonus that any one person was to receive? A Yes, sir; it was stated that we had the right to give the whole bonus to one man or divide it among two men or three men or four men, as we saw fit, or divide it exactly as we saw fit—but we had to give the whole bonus.

Q Was the same thing said at the November meeting? A Practically, yes; the same thing.

20 Q I think you stated at the November meeting, in determining how the bonus should be arrived at, a deduction should be made of two accounts. Which two accounts were mentioned at that meeting? A Edelhoff & Reilly and John C. Wellwood.

Q The same accounts that you now mention, at the January meeting? A The same.

Q At this meeting in January, 1918, in New York was any reference made to Mr. Heitman? A No.

30 Q Was anything said by you as to including his salary in any deductions to be made? A No, because Mr. Heitman was not a salesman—was not part of our selling force.

Q Now, after this meeting in January, 1918, what, if any, conversation did you have with Mr. Heitman respecting the bonus? A Well, Mr. Heitman came to me and asked me—

Q When did he come to you—about when? A I couldn't say; he came several times on the same subject. I think it was right after he heard that the thing was decided he asked me if I didn't think he ought to have a share in the bonus.

40 Q What did you say? A I said, "That is entirely up to the salesman—to the salesman; if they want to give you any it is all right; I do not think they do, but as far as K. & S. is concerned we have nothing to do with it. It is entirely up to the salesmen."

Q Mr. Kaltenbach, I show you a letter of B. Oberndoerfer, directed to Mr. William N. Heitman, and dated March 4, 1918, marked Exhibit P. 1. Did you hear Mr. Heitman yesterday

Charles E. Kaltenbach, direct.

testify to the fact that he had submitted this letter to you? A I did.

Q Now, I ask you, Mr. Kaltenbach, whether you ever saw that letter before I submit it to you now? A Not until yesterday; I saw the lawyer hand it to you.

Q Exhibit P. 1? A This letter was never submitted to me. 10

Q Was it ever submitted to you by Mr. Heitman? A No.

Q Or anyone else? A No; Heitman often said that he had a letter, but never showed it.

Q Now, Mr. Kaltenbach, did you, subsequently to the time you mentioned, have any conversation with Mr. Heitman regarding the bonus or his compensation? A Yes, sir; he talked about the bonus several times, and he asked me what I thought the salesmen ought to give him, and I said, "Well, that is entirely up to the salesmen." "Well, don't you think I am worth some money to the salesmen, to turn out their work much better if I get something out of it?" I said, "That also is up to the salesmen." So Mr. Heitman said, "Will you speak to the salesmen for me? Will you speak to Mr. Ryan?" I said, "No; you speak to him yourself about it; that is between you and the rest of the men." 20

Q Now, Mr. Kaltenbach, did you hear the testimony of Mr. Heitman as to an advance by you? A I did.

Q Towards the payment of the bonus? A I did.

Q I show you check drawn on the Manufacturers' National Bank, No. 174, Newark, New Jersey, April 30th, 1918, and ask you whether that is your signature? A That is my signature. 30

Q Do you know Mr. Heitman's signature? A Yes, sir.

Q Is that his endorsement on the back of that voucher? A Yes, sir.

Mr. Wolber. Now, I desire to offer this check in evidence.

Check marked Exhibit D. 1.

Q Now, I ask you whether this check is your personal check or not? A Yes, sir.

Q Drawn on your personal account? A Yes, sir. 40

Q Now, will you tell us the circumstances under which this check was given by you to Mr. Heitman? A Yes, sir. Mr. Heitman came to me and told me he needed money, and I said, "Why don't you ask Mr. Stephens to advance it to you?" And he said, "Well, I have been to see Mr. Stephens and he won't

Charles E. Kaltenbach, direct.

10 give it to me." He says, "Won't you ask him for it?" So I said "All right, I will see Mr. Stephens," and I did, and I said that Heitman claims that the salesmen are going to give him part of their bonus and it amounted to \$250, ought to be safe enough. I thought Heitman was good for it and why not give it to him, and Mr. Stephens says "I will not. Heitman is getting more than he is worth now," and he says, "I will advise you not to give it to him yourself"; so when Heitman asked me about it again I felt sorry for him, and I thought he was perfectly good, so I gave him a check for \$250.

Q Was that check given by you as a personal loan or payment on account of the bonus? A Absolutely nothing to do with the bonus. It was a personal proposition purely and simply, and Heitman said that he would give it back by the first of the year when they expected to have some money.

20 Q Did you hear Mr. Heitman's testimony yesterday that you agreed to give him this money personally and then arrange it with the company so that it would be repaid out of the bonus?

A I did.

Q What have you to say to that testimony? A Absolutely not so. It was particularly a personal loan from myself to Mr. Heitman.

Q Under what terms was Mr. Heitman employed by the company during the year 1918? A Well, on weekly basis or by weekly basis of about \$67.50, I think it was.

30 Q Do you know of any definite time being fixed to Mr. Heitman's employment? A No, there was not.

Q Had any commissions of any kind been paid to Mr. Heitman during 1917? A No.

Q Now, Mr. Kaltenbach, will you tell us of a conversation which you had with Mr. Heitman about the first of October, 1918, regarding his employment by your father? A Yes, sir; Mr. Heitman wanted to know—

40 Q Who solicited—who asked for the appointment? A Well, Mr. Heitman came down to the office and wanted to see me and had—well, he started off in the usual way that he was working hard and this was a time when everybody could advance himself and there were plenty of good positions open, and he hoped I wouldn't take it amiss if he tried to better himself, and asked to get some promise from me for more money and I says, "Heitman, conditions are very uncertain, I don't know where we

Charles E. Kaltenbach, direct.

stand, this war may continue indefinitely or it may end over night, and at the present time we are not going to discuss anything in advance—any raise.” He says, “Won’t you make an exception in my case?” I said, “No, there wouldn’t be any exceptions in anybody’s case.” “Well, there will have to be an exception in my case.” I said, “Heitman, there doesn’t have to be any exception,” I said, “we positively cannot.” “Well, then, I will have to look for another job.” And the interview terminated. I didn’t say anything further. 10

Q Subsequent to that interview did you have another interview with Mr. Heitman? A Yes, sir.

Q How long afterwards? A Oh, about ten days or two weeks, I should say—11th of October.

Q Which year? A 1918.

Q Where were these two interviews held? A In the Newark office. 20

Q In whose office? A Well, the first one was in my office, and the second one in the little private office that isn’t used much now. We were in that little private office, the second one.

Q What was the conversation had between Mr. Heitman and you? A You mean at the 11th?

Q The 11th. A I asked Mr. Otto and Mr. Neades to be present at the interview. The conversation was very short. I simply told Heitman that his services—that there had been too much trouble and that his services were not satisfactory and that he better look for another position, or better take another position, that he had been looking for. 30

Q Do you recall whether you said anything further? A Mr. Heitman wanted to see me alone, and he mentioned the \$250 that he owed me.

Q What did he say about the \$250? A He said, “I can’t pay you now, but I will pay you later; I will pay you as soon as I can.”

Q Was anything else said by Mr. Heitman to you at this interview? A Well, he wanted to explain something or other. I told him there wasn’t any use, that whatever was said wouldn’t change the situation any, that he hadn’t been satisfactory, that he hadn’t been doing his work properly, and as long as he had been looking for another position he could—better take it. 40

Q Now, Mr. Kaltenbach, how do you know Mr. Heitman’s work was unsatisfactory? A Well, just through complaints.

Charles E. Kaltenbach, direct.

Q Complaints from whom? A From customers and salesmen.

10 *Mr. Bostwick.* The only defense that is made in the answer filed in this case is that the defendant left voluntarily—that the plaintiff left his employment voluntarily. If the defendant is now seeking to prove or make justification for a discharge I think the testimony is entirely out of order. He either left voluntarily or was discharged. I do not blame him for trying to make a defense, but that kind of testimony is not relevant.

Mr. Wolber. I am not trying to show justification for any discharge. Mr. Kaltenbach has testified that he told Mr. Heitman at the time of his leaving that his work was generally unsatisfactory. I am trying to show in what respect.

20 *Mr. Bostwick.* I object to the testimony on the ground that it is irrelevant and immaterial.

Mr. Wolber. The plaintiff testified to the contrary. The plaintiff alleges in his complaint that he faithfully and diligently performed the duties of his position.

30 *Mr. Bostwick.* He performed the obligations of his contract. If this defendant wishes to raise an issue as to whether or not the plaintiff's services were satisfactory for the purpose of making a foundation for a justification of discharge he must plead it. He cannot expect to come into court and raise any issue he pleases on a pleading which is based upon a general denial merely and one specific defense that the plaintiff voluntarily left his employment.

40 *The Court.* The pleading here on the part of the plaintiff indicates that the plaintiff demanded an increased compensation for the year 1919, the defendant refused to consider any additional compensation at the time of the making of the said demand, whereupon the plaintiff gave notice that he would seek further employment, which was consented to by the defendant. Now, there is nothing in that to indicate that the defendant intended to show that he discharged the plaintiff for cause. If you want to amend that—

Charles E. Kaltenbach, direct.

Mr. Wolber. I do not mean to show that, if your Honor please, not justification.

Mr. Bostwick. How is it relevant?

Mr. Wolber. To explain this conversation the plaintiff testified that he had at the time of the alleged discharge. He testified that the statement had been made by Mr. Kaltenbach that—or, that he had asked him why he hadn't been discharged before if his services were unsatisfactory. I am now trying to show exactly what happened at that conversation and on that ground I think the testimony is relevant. 10

Mr. Bostwick. The testimony that Mr. Wolber refers to is not exactly as he states it to be.

The Court. The testimony was, if you will pardon me for interrupting you, and I am only quoting from my notes which may be in error, on the part of Mr. Heitman, quoting Mr. Kaltenbach as saying "If you hadn't done it right you would have been fired long ago." That is what I have here. 20

Mr. Bostwick. That is my recollection.

Mr. Wolber. That is the substance of it.

The Court. Your purpose is to show Mr. Kaltenbach's version of that conversation?

Mr. Wolber. Yes, sir. 30

The Court. I see your point. What is the question?

"Q Now, Mr. Kaltenbach, how do you know Mr. Heitman's work was unsatisfactory? A Well, just through complaints.

Q Complaints from whom? A From customers and salesmen."

The Court. I think the objection is properly made. I will sustain the objection. I think Mr. Kaltenbach just testified that he told Heitman that there had been too much trouble and his services were not satisfactory and he better get another job. 40

Mr. Wolber. I will ask him that question.

The Court. He just testified to that. Now, that is equivalent I should think, or seems to be, to words indicat-

Charles E. Kaltenbach, cross.

ing a discharge. Now, if you are going to prove a discharge I think you ought to plead it.

Mr. Wolber. I am not going to prove it.

Mr. Bostwick. He has testified to it.

The Court. All right.

10 Q Mr. Kaltenbach, were any of your salesmen under contract? A When?

Q In 1918? A No—I beg your pardon; there was one, a western man.

Q What is his name? Mr. Clar.

Q Was he the only one under contract for the year 1918? A That is the only one, excepting this agreement just mentioned.

20 Q Were any other employees of the company under contract for the year 1918? A No.

Cross examination by Mr. Bostwick.

Q Mr. Kaltenbach, how long have you been with the company of Kaltenbach & Stephens? A Since its beginning.

Q Since when? A Since it was incorporated. I was with the old partnership before that.

Q When was that? A The corporation was in September, 1916.

30 Q And when was Mr. Heitman employed? A He started with the company, at the same time.

Q About when was that? A 1916, September 1st.

Q Whatever arrangement he had for salary with the partnership was continued with the corporation, wasn't it? A Yes, sir.

Q Now, under what circumstances did Mr. Heitman's employment with the partnership begin? A I do not get you.

40 Q Under what circumstances did Mr. Heitman's employment with the partnership begin? A Well, we were in Brooklyn at the time, eight or nine years ago, I should say.

Q Yes? A And he was hired as a bookkeeper first and we gradually worked him into the department which he now had.

Q What was his salary when he came to you? A I don't remember, about \$30 a week.

Charles E. Kaltenbach, cross.

Q Did you have anything to do with the arrangements of his employment by the partnership? A No.

Q You don't know then about that, do you? A About what?

Q You don't know what the arrangement was? A Well, he was just employed as everybody else was. 10

Q You didn't have anything to do with those arrangements, did you? A No personal knowledge.

Q Then what do you know about it? A I know he was employed the same as everybody else.

Q How do you know that? A From general inference.

Q Inference, is that all? A Yes, sir.

Q So far as you know he may have been employed by the year by the partnership? A No, he would not, because that was against the policy of the concern; it never had been done. 20

Q It never had been done with him? A With anybody.

Q You don't know as to him, do you? A No.

Q The testimony which you have just given, I understand you discharged Mr. Heitman on October 11th, is that right? A Well, it was subsequent to his statement that he was going to leave.

Q But you discharged him on October 11th, didn't you? A Yes.

Q Then the statement in your pleading that he voluntarily left is not true, is it? A He stated that he was going to leave. 30

Q I say the statement in your pleading that the manner in which he left your employment was voluntarily, is not true, is it? A Would you read the statement? May I have a copy of it?

Mr. Wolber. I think that is a little bit outside of the scope of cross examination here.

The Court. I will admit it.

Q Your pleading reads that on or about the first day of October, 1918, plaintiff demanded an increase of compensation for the year 1919, the defendant refused to consider additional compensation at the time of making said demand, whereupon the plaintiff gave notice that he would seek other employment, which was consented to by the defendant? A Yes, sir. 40

Q And he left under those circumstances? A Yes, sir.

Charles E. Kaltenbach, cross.

Q Then you did not discharge him? A Well, you can call it one thing or the other.

Q What would you call it? A He said he was going to leave and I picked out the day he was to leave on. I chose the day that he was to leave on.

10 Q Then you did not discharge him? A I don't know what you would technically call it. It was about fifty-fifty, I should say.

Q You think he may be safe in assuming that he was discharged. A It is a technical point.

Q Didn't give him any notice, did you? A No, he gave us notice.

Q What he had to do was to put on his hat and coat and go upstairs and get out, didn't he? A He gave us notice.

20 Q On October 11th, when you saw him, what he had to do—after you spoke to him—what he had to do was to go upstairs and get his hat and coat on, and get out, is that right? A I didn't put it in those words.

Q That is all he had to do, wasn't it? A I told him to turn over his keys.

Q Yes. The records you had Mr. Heitman prepare for this meeting—when were they prepared? A Previous to the meeting.

Q How long before the meeting? A I couldn't say.

30 Q The thing had been considered for a week or a couple of weeks; I don't recollect.

Q More than a month or two months? A It might have been, yes.

Q Did you tell Mr. Heitman, at the time you asked him to make up these figures what they were to be used for? A I don't believe so.

Q And what message did you send him on the day of the meeting? A To come down with the records that I asked him to make up.

40 Q Were they the only records that he had made up for you? A He knew he was making up records for this meeting.

Q How did you know that? You say you didn't tell him the purpose for which they were being made? A I didn't tell him the purpose of the meeting; I told him I wanted them for the meeting.

Charles E. Kaltenbach, cross.

Q When did you decide upon the meeting? A That I can't answer positively; it was some time before the meeting.

Q How long before the meeting? A I couldn't say.

Q Approximately? A Oh—

Q A week and a half? A Oh, a couple of weeks, perhaps, maybe a week; may have been a few days only.

Q May have been a few days only? A I can't answer that.

Q That is when you decided upon having the meeting, is that it? And yet it may have been two months before that meeting that you asked Mr. Heitman to make these figures up for the meeting, is that right? A That is possible, but I do not believe so.

Q You say it may have been? A It is possible, but I do not think so.

Q And then you did not decide upon the meeting until some days, possibly, before the meeting. And what figures did he make up for you? A I am not quite certain about that. It is really unimportant as far as the case is concerned. I believe it was to show the earnings of the salesmen for the year up to that time.

Q Did it show any basis of cost? A What do you mean?

Q Statement of the cost of your business for the previous year? A That would be in the salesman's commissions—it would be cost, naturally.

Q And you still have that paper, haven't you? A No.

Q Where is it? A I have no idea. It was a memorandum.

Q Had you seen it before the meeting? A I couldn't answer that.

Q You mean to say you went into this meeting to make this proposition to these men without knowing what those figures showed as to cost of your business? A This proposition was a tentative arrangement to be decided on later and what figures we drew up were simply to show what had been done in the past and what we would figure on in the future; in other words, we were willing to allow it to cost us more money for us to sell our goods to get added efficiency by co-operation.

Q But at the time you called the meeting you did not know what the cost of the business was for the previous year? A How do you mean, cost of the business?

Q Earnings of your salesmen, if you want to put it that way. A That was a matter of record.

Charles E. Kaltenbach, cross.

Q I say you didn't know, did you? A It was a matter of record.

Q You had to get Mr. Heitman to make it up for you? A Oh, naturally.

Q You didn't know what it was; that was the reason you had him make it up, wasn't it? A Exactly.

10 Q You didn't know what it was going to be before the meeting was held? You called the meeting to make this proposition and yet at that time you didn't know what the cost of your business was or the amount of commissions to your salesmen was for the previous year? A Those things are a matter of record. You do not clog up your mind with little details of that kind.

Q And you didn't care what the cost of your business was for the previous year? A What makes you say that?

20 Q You didn't ask for the papers before the meeting? Mr. Heitman had been asked to make them up perhaps two months before that and you hadn't seen them? A It had nothing to do with us. It was simply to show the salesmen.

Q You wanted it just to show the salesmen then—had nothing to do with you? A No.

Q Had nothing to do with your proposition to the salesmen? A It may have had something to do—it is so long past—

Q It was unimportant? A It wasn't unimportant—the result wasn't unimportant, but the details of the way it was arrived at were unimportant.

30 Q The total result was important? A The total result was further efficiency on the part of the selling corps; that is what they were looking for.

Q These figures were not important? A I do not recall just what the figures were, so I can't answer definitely.

Q You had to have them before the meeting started? A I wanted the figures, whatever they were, at the time. It wasn't of any importance so far as the results were concerned.

40 Q Do you know what they showed? A I told you I do not remember exactly.

Q Generally? A I answered that.

Q Do you know what it included? A How do you mean? What it included?

Q What items were included to make up the total cost of \$30,000? A I am not sure that was the total cost.

Charles E. Kaltenbach, cross.

Q Well, now, you said in your direct examination that you figured that the total cost of your business for 1917 had been \$30,000, that is to say, the cost of selling the goods, \$30,000, and that if you made total sales for the year 1918 of \$2,000,000, that two per cent. of that would be \$40,000, and that you would have \$10,000 to distribute as a bonus among the salesmen. That is what you stated? A Those were arbitrary figures that I used, for an example. 10

Q You do not think they arrived at \$30,000, is that what you mean? A I am not sure.

Q Or they may have exceeded that? A I am not sure.

Q You don't know what it included? A Selling expenses, commissions.

Q You would be willing to say, I suppose, notwithstanding the fact that you do not know what was in that statement—you will be willing to say Mr. Heitman's salary was not included as part of the cost of selling the goods? A It was not figured in. 20

Q You are willing to say that it wasn't in that statement, aren't you? A I am not sure what was in that statement.

Q It may have been? A Well, anything could be possible.

Q Yes. I suppose it is possible to include my salary in it, but you and I are supposed to be reasonable men—you were the manager of that business, weren't you? A No, sir.

Q You were secretary of the business? A I was secretary; yes, sir. 30

Q You were practically the manager of it? A I was practically the manager.

Q Then you are quibbling when you say you are not manager? A I wasn't manager until I was officially called manager.

Q Mr. Heitman's salary of \$3,510 for the year 1917, so far as you know, may have been included as part of the cost of selling your goods in 1917? A I do not see why it should have been put in.

Q It may have been, I say. You don't know? A I don't see why it should have been included. 40

Q Do you know how you could make up \$30,000 without including it? A It depends on what you take as your basis.

Q You have no figures here to show that? A No; I have not figures here. Of course we can make them up.

Charles E. Kaltenbach, cross.

Q You testified, Mr. Kaltenbach, that two accounts were left out—were to be left out in figuring up the bonus? A Yes, sir.

Q Edelhoff & Reilly, is it? A Right.

Q And Wellwood? A Yes, sir.

Q Bliss was not to be left out? A Not that year.

10 Q The testimony of your witnesses that Bliss was also to be left out was wrong? A They were mistaken with this year's list.

Q Do you remember any other mistakes they made? A Nothing definite. There was something, some part of the testimony there, I didn't get, of one of the witnesses; I am not sure.

Q You say that your talk in this meeting was directed to the salesmen? A Yes, sir.

Q And the salesmen only? A Yes, sir.

20 Q Now, what was it you said at that meeting that would indicate that your talk was directly to the salesmen alone? A Because the salesmen were in the habit of getting a commission on sales.

Q Tell us what you said at the meeting, please? You are the one that made the statement. Perhaps you have it better in mind than anybody else. A I went over that in the testimony.

Q I do not remember it. A You want that repeated?

30 Q What you said at that meeting, please? A I can't remember the exact words, but I can give you the idea. We were to take the total sales of the year, the following year, multiply—or take two per cent. of it, less these two accounts mentioned, Edelhoff & Reilly and Wellwood—less those two accounts, then the salesmen were to each get a drawing account based on their—

40 Q Now, you are telling us, Mr. Kaltenbach, what they were to do. I am asking you what you said at the meeting? A That is what I said, that they were to get a drawing account based approximately upon their earnings for the past three years, which drawing account, plus unusual travelling expenses or commissions for other irregular salesmen, and little amounts that didn't amount to very much, were to be deducted from the two per cent. gross, and the balance of that two per cent. was to be given to the salesmen at the end of the year as salary to be distributed as we saw fit, and I explained that by further stating we should give all to one man if we felt that was the best thing

Charles E. Kaltenbach, cross.

to do or we would divide it up according to any idea which we had.

Q Now, Mr. Heitman was at that meeting, was he? A Yes, sir.

Q Stayed there throughout? A Oh, yes.

Q Did he help you any? A Well, Mr. Heitman had charge of the records upstairs. It was necessary for him to know these details, because all bills that were sent out or all memorandum of shipments the customers made—or with the customer's order the salesman's name was attached. Mr. Heitman had charge of that. 10

Q You thought it was necessary for him to know what? A To know that we had changed the system.

Q Then you changed the system at the November meeting, is that right? A We were going to.

Q You changed it at the November meeting? A No; it wasn't decided. It was tentative. We later knew it was going to be put through positively. 20

Q Why was it necessary for Mr. Heitman to be there if that was a mere tentative arrangement? A I supposed before the meeting started, or when it was half way through, that it would probably be definitely decided, and everybody thought it was better to consider—to think it over—figure out whether the additional accounts that we were giving them to make up for the lower rate of discount. The salesmen were getting from two and a half to three per cent. for sales, and this arrangement, with more customers added, we were only paying two per cent. 30

Q Mr. Heitman stayed until the meeting was over? A I believe he did.

Q You are not sure about that? A No, I am not sure, but I think he did.

Q You had him there not for the purpose then of taking up the records, but for the purpose of keeping records, is that right? A Well, how do you mean, keeping records?

Q Taking memorandum of what happened at the meeting? A No; I do not think he took any memoranda. 40

Q What did you have him there for, to bring records or to take memoranda? A To bring the records. He came down and brought records of expenses, anything that was needed, or any added information.

Charles E. Kaltenbach, cross.

Q Did he explain anything to you? A I do not think he had to, because the salesmen decided to think it over. The meeting didn't last very long.

Q This statement he made out, did that need explanation?
A I do not remember whether that statement—whether it was
10 used at all.

Q You remember very well it was in there? A I remember that the necessary memorandum came down.

Q That is very clear? A I remember him coming in the room with these records.

Q Do you remember that you were very careful in making your statement, to speak of the fact that the salesmen were the men who were to get the bonus? A Oh, positively.

Q You were very careful all through the period of Mr. Heitman's employment after that meeting not to say anything to him which would encourage him to believe that he was to share in that bonus, weren't you? A Mr. Heitman was never considered as a salesman; never had anything to do with the bonus. The only thing was that he tried to get the bonus from the salesmen, which K. & S. absolutely had nothing to do with.
20

Q Did you ever give him any encouragement at all in anything you said? A What do you mean by encouragement?

Q Encouragement to believe that he would get a share of the bonus? A I discouraged him very much to think that he would get anything from K. & S.
30

Q You were careful to do that? A I was careful to do that, and so was Mr. Stephens and my father. That is, if the salesmen wanted to give him any share of their bonus it was entirely up to the salesmen to do so.

Q You were satisfied that if the salesmen arrived at an agreement with Mr. Heitman to give him a share of the bonus, you were satisfied to divide that bonus with Mr. Heitman? A No, sir.

Q You were not satisfied? A That was for the salesmen themselves to do. We were not to be a party to it, because our agreement was solely with the salesman.
40

Q You wouldn't pay it out of your pocket? A No, sir.

Q You wouldn't distribute the bonus yourself; it would go to the salesmen? A That was the salesmen's private agreement with Mr. Heitman.

Charles E. Kaltenbach, cross.

Q Mr. Heitman—you say he didn't show you this letter? A No, he did not; he referred to it.

Q Never saw that until today, did you? A Yesterday.

Q You say he told you he had it? A He said he had got a letter. I don't know if he mentioned Mr. Ryan or Mr. Oberndoerfer—he got a letter agreeing to the bonus. 10

Q And did he tell you what the agreement was? A No.

Q Don't remember that? A He did say that he was going to get ten per cent. of the bonus.

Q The salesman said that he was to get ten per cent.? A That is what he told me.

Q What did you say to that? A I said, "That is very nice for you; hope you will earn it;" some such remark.

Q What is that? A I told him I hoped he would earn it.

Q You hoped he would earn it. That is all you said, "It is very nice;" is that all? A That is all I remember. I may have made some other remark; it wasn't important. 20

Q You may have said, "All right; I am satisfied"? A Well, that wasn't up to me, to be satisfied.

Q I say you may have said that? A I don't think so, because it wasn't up to me to be satisfied.

Q You may have said something else that you don't know? A Yes, but I wouldn't have said anything like that because that wasn't up to me.

Q You would have been very careful not to do that, wouldn't you? A Yes, sir; I would. 30

Q Because, while you were satisfied that he was to get a bonus or share of it, you were not satisfied with the money to be actually paid to him by Kaltenbach & Stephens; you wanted it paid by the salesman? A Absolutely.

Q Why? A Because it was an agreement between two outside parties, which had nothing to do with K. & S., Incorporated.

Q Now, Mr. Kaltenbach, isn't it true that long before Mr. Heitman was discharged by you that you had planned to discharge him? A No. 40

Q When the first favorable opportunity arose? A Absolutely not.

Q On account of incompatibility? A Absolutely not.

Q Services were not satisfactory, were they? A Well—

Q What? A They were not wholly satisfactory.

Charles E. Kaltenbach, cross.

Q But you were not going to discharge him absolutely? A No, sir.

Q You hadn't planned to discharge him? A No.

Q Isn't it true that you and Mr. Stephens, one of the other officers of that company, a friend of Mr. Heitman, had been at
10 loggerheads for a long period of time over the management of your company—that Mr. Heitman had refused to close his department while all the other departments in the business closed out of loyalty to your personality, while Mr. Heitman's department continued to run in the interests of the firm itself, as a whole, and that on that account, as well as on account of other instances, when Mr. Heitman showed his indifference to personality—isn't that the reason why you sought to discharge him? A You are stating a lot of things that you are taking as facts which are not facts.

20 Q Those are not facts? A No. You are intimating that I shut down the mill, and because Mr. Heitman would not shut down I had a feeling against him.

Q And that is not true? A I will state this—

Q I say is that true? A What is that? That I had a feeling against him?

Q On account of his— A No, absolutely not.

Q None whatsoever? A No.

Q Just a minute now; I don't want you to talk. I want you to answer the question. It is true, nevertheless, that when your
30 wife's uncle got out of a position—

Mr. Wolber. I object, if your Honor please. It seems to me that this is outside of the scope of cross examination. Nothing has developed on the direct examination of this witness—

The Court. What is the purpose of this question?

Mr. Bostwick. The purpose of the question is to show the motive for the discharge. I think it is entirely relevant.

The Court. I will admit it.

40 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Isn't it true that when your wife's uncle, who had been general sales manager for the H. A. Saunders Motor Corpora-

Charles E. Kaltenbach, cross.

tion, found it necessary to make a change in his position because that corporation went into bankruptcy or insolvency, that it was a very convenient time for you to place him in a position and satisfy your feelings against Mr. Heitman, even though Mr. Neal had never had any experience in this business and didn't know anything about it? A That is absolutely not so.

10

Q Well, it is so you put him there? A I put him there with a great deal of hesitation and fear.

Q He went there on the Monday following the discharge, didn't he? A Yes.

Q There wasn't much hesitation about that, was there? A I had been looking for two weeks—since Heitman said he was going to leave I tried to find a man, and I couldn't, and this man happened to be available on that Monday and I took him on.

By the Court.

Q How long did he stay there? A Who, this new man?

20

Q Yes. A He has been there—he has had the position ever since, and the department is running much more satisfactory than ever before.

By Mr. Bostwick.

Q Well, we always have to add those little innuendoes to the testimony, although that is not your defense.

The Court. Do not argue with the witness; ask him questions.

30

Mr. Bostwick. I beg your Honor's pardon.

The Court. Ask the question again. Reframe your question.

Q Your defense in this suit, Mr. Kaltenbach, is that Mr. Heitman left voluntarily; that is the defense made in the pleading? A I didn't know you asked a question. I thought you made a statement.

Q (Question read.)

Mr. Wolber. I object to the question on the ground that it is at variance with the defense set forth in the pleadings.

40

The Court. I will admit the question.

Defendant's counsel pray exception to this ruling of the Court.

Exception noted as ground of appeal.

Charles E. Kaltenbach, cross.

Q (Question read.) A Well, whatever is in the plea I have got to stand by.

Q Well, is not that a proper defense? A Well, he did quit, but we decided the day that he was to quit on; it is fifty-fifty. He stated he was going to leave.

10 Q He was unsatisfactory, wasn't he? A He was unsatisfactory a long ways.

Q You increased his salary in June just prior to this by \$17.50 a week?

Mr. Wolber. I object on the ground that it is not in the evidence in any way.

Mr. Bostwick. I beg your pardon, Mr. Wolber; you are right; it was June, 1917.

The Court. I will admit the question; I think Mr. Wolber is right, though.

20

Mr. Bostwick. He is right. I made a mistake.

Q It is true, however, that just before the date when you decided that Mr. Heitman's services were unsatisfactory, that you, in Mr. Heitman's questionnaire, in your own handwriting, made a claim that he was indispensable to your company, didn't you? A Indispensable, no; I said he was necessary.

Q Necessary to the adequate and effective operation of your company? A Yes.

30 Q Asking for exemption or deferred classification for him on the ground of his employment by you? A Yes, sir.

Q Although his services were not satisfactory to you? A They were in lots of respects unsatisfactory.

Q Your firm, at the time you drew this check to Mr. Heitman, had an account with the Manufacturers' bank, didn't they; same bank? A The firm has had an account there; yes, sir.

Q And you are sure, are you, that Mr. Heitman, when he came to you about the \$250 told you that he had been to see Mr. Stephens? A He asked me to see Mr. Stephens for him.

40 Q He didn't say that he had seen Mr. Stephens? A He had seen Mr. Stephens and he wanted me to see Mr. Stephens, and I had seen Mr. Stephens subsequently and gotten the answer which I testified to.

Q You were not sure that he had seen Mr. Stephens first? A I think—I am pretty sure he did.

Charles E. Kaltenbach, re-direct.

Q I think that was your testimony on direct examination? A That is what Heitman stated.

Q You are sure he said he had seen Mr. Stephens first, and Mr. Stephens was treasurer of the company, was he? A He was treasurer.

Q And the proper person to go to, I suppose? A Naturally. 10

Q The first one that wanted an advance on his salary. You hoped to get the return of this money out of Mr. Heitman's share of the bonus, didn't you? A That is what he said; he had an agreement with the salesmen to get the bonus and he would give it to me the first of the year.

Q You expected that was where he would get it? A I had no expectations. I thought Heitman was good for it.

Q Wasn't that a reasonable expectation? A It was a reasonable expectation.

Q You say you thought he was good for it? A I thought he was good for it. I felt sorry for him that he was up against it and I gave him the money. 20

Q Didn't you tell Mr. Heitman at one time during the year that—more than one time—many times during the year—that he ought to get about \$2,000 on that bonus—out of that bonus as his share of it? A No, sir.

Q Didn't say anything like that? A He was often figuring out what his share of the bonus—

Q You think he was always doing that? A He was often figuring out what his share would be. 30

Q You say he was often figuring it out. How do you know that? A Well, he told me—he often remarked, "We are going to have \$10,000 or \$15,000—got it so far"—little remarks; didn't amount to anything—always thinking about the bonus.

Q He was always thinking about it? A Often thought—

Q You helped him to think about it a good many times? A How do you mean?

Q You helped him by saying you thought he ought to get \$2,000. A I don't remember ever making a statement of that kind. 40

Q You may have? A It is possible.

Re-direct examination.

Q Mr. Kaltenbach, Mr. Stephens is dead? A Yes, sir.

Charles E. Kaltenbach, re-cross.

Q Your father, Mr. Ernest J. Kaltenbach, is dead? A Yes, sir.

Q Was the question of the bonus finally settled at the January, 1918, meeting? A Yes, sir.

Re-cross examination.

10 — Q Who called this meeting for January? A We informed the salesmen—I don't remember whether it was my father or myself—that we would be over on a certain morning.

Q Do you know how far in advance of the meeting it was called? A No; I do not.

Q How long did the meeting last? A Very short; I don't think it was over fifteen minutes or half an hour.

Q And what you did there principally was to figure out what the salesmen's drawing accounts were to be? A No, I don't
20 believe that was mentioned there.

Q When was that fixed, in November meeting? A We fixed that with each individual separately—personally; it wasn't at any meeting; some by telephone; I think some by letter.

Q When was that done? A At different times; some were not fixed until quite late in the spring.

Q It was quite important to find that out, wasn't it, just after the first of the year? A Well, it wasn't important. All the men could have what they needed; they could always draw a little bit in advance, if they wanted it.

30 Q But January would be the natural time? A It should have been done; yes, sir.

Q But it wasn't done? A It wasn't done with everybody, I do not believe. I know it was quite a long period of time between the—because some of them were given definite statements—

Q It was done with some at the meeting, wasn't it? A I do not believe so. I think everything was with the individual himself. There was no general meeting where it was worked out, but the premises that we were to take—that we were to use in arriving at this drawing account was the three years' average or
40 average of three years' salary or commission, and they knew approximately what it was going to be.

Q You didn't have any of those details to discuss at the January meeting? A I do not believe so. I think it was just agreed at that time to try it out for a year.

Charles E. Kaltenbach, re-cross.

Q In what manner? A They were willing to leave that to me.

Q In what manner was it agreed? A They all assented; it was all right.

Q No details, you say, were discussed as to the drawing account? A No; we told them that they would all be informed, with those premises as a minimum.

10

Q Of course, if that meeting was held for the purpose of getting the assent of the men to the proposition it would not be necessary to ask Mr. Heitman to be present if he had already assented, would it? A Well, Mr. Heitman was not in it.

Q Well, I say if he had been in it? A Well, that is a theoretical case which had nothing to do with it.

Q If he had been in it and had already assented he would not have been asked for the January meeting, which was only held for the purpose of getting the assent of those who were in it?

20

Mr. Wolber. I object on the ground that it is argumentative.

The Court. I will admit it.

Witness. I said it was an academic question. Would you mind stating that again?

The Court. I think you have answered it, Mr. Kaltenbach.

Witness. It was an academic question.

Q You do not want to answer that, yes or no? A I will answer it; if your premises were true, then your conclusion would have been true.

30

Q The question has been permitted to be asked. A Then your conclusion is right. If Heitman had been part of the selling force and had given his assent previous to the meeting, he probably would not have been asked over to the meeting.

Q And he was not asked over to the meeting? A He was not asked over to the meeting; no.

A Juror. I understand the witness has testified that Mr. Heitman was not considered part of the sales force; is that right?

40

Witness. No; he is not.

A Juror. I also understand he has charge of the circularizing and advertising.

Charles E. Kaltenbach, re-cross.

Witness. Circularizing?

A Juror. And advertising.

Witness. No; we never did much of that; practically none.

10 *A Juror.* I understand from the previous testimony from various salesmen that there were circular letters written?

Witness. You mean letters—circulars?

A Juror. Yes.

Witness. He would have to have it mimeographed and sent out to customers.

A Juror. Did the advertising come under Mr. Heitman?

Witness. No; there was so little advertising it was practically negligible.

20 *The Court.* Suppose you tell the jury what his duties were?

A Juror. May I ask one other question. I also understand from the testimony that certain advertising costs were deducted from the commissions of the two per cent. on the gross sales in obtaining the bonus for the salesmen; is that right?

Witness. I believe that was suggested, but it was left out later; there wasn't any in it; it was such a small amount—I think less than \$500.

30 *A Juror.* If it had been a large amount you would have included it in the deduction?

Witness. We would have put it in the present year. We would not have put it in last year. It was first discussed, but it was a small amount.

Another Juror. These salesmen were considered yearly positions; all these salesmen you made arrangements with?

Witness. No, we used to engage them—well, I think most of them had a yearly contract.

40 *A Juror.* Their salary was to be for 1918; salary for a year?

Witness. 1917; and at that meeting we said that all contracts were off and a new arrangement was going to be made for the year which we were tentatively discussing at

Charles E. Kaltenbach, re-direct.

that meeting. Then, in 1918 we fixed the sum at—well, this drawing account.

A Juror. Yearly salary for 1918?

Witness. It wasn't yearly salary.

A Juror. And a share in the bonus.

Witness. Nothing was said about it being yearly. That was discussed. Of course, the salesmen stay generally year after year. 10

Further cross examination.

Q A salesman would not get any share in the bonus unless he stayed for the year, would he? A Well, that was left entirely optional to K. & S., Incorporated.

Q You did as you pleased about that? A That was the agreement—they left it to our fairness—they always found us fair and were willing to leave it to us. 20

Re-direct examination.

Q Mr. Kaltenbach, was this proposition in November, 1917, or 1917 meeting, assented to by Mr. Heitman before the January meeting of the salesmen? A He had nothing to assent—there was nothing to assent to.

Q Mr. Kaltenbach, the Court asked you a minute ago to explain to the jury exactly what Mr. Heitman's duties were. I wish you would do that? A Mr. Heitman was in charge of most of the second floor, on which we kept a large amount of stock ready to ship out. His duties were to take charge of the employees on that floor, the stock, stock room, see that sufficient goods were ordered up and different matters—to take care of orders as they came in, and he had charge of the correspondence incident to his duties, and gave the different salesmen credit for the accounts; that is, for instance, the total amount of each account credited to each salesman was recorded by Mr. Heitman, so that he always knew just how much the commissions of each salesman was to be; then he got the bills ready for the billing department; and that was about his duties. He also saw some customers; we have a great many large customers; that is, customers who buy large amounts of goods; and they generally like to come over and go over the head of the salesmen sometimes; just to come over and get to headquarters to see how goods was going—to see what 30 40

Charles E. Kaltenbach, further cross.

the market condition was, &c. Sometimes they would come over, sometimes to see father and sometimes myself, and when we were busy, sometimes Mr. Heitman. He used to see them quite often, some of them; sometimes he would take them out to lunch when we were too busy to go; he used to give them the information, as far as he could, what they wanted to know.

10 Q When he first came with you you were a partnership? A Yes, sir.

Q Then you incorporated? A Yes, sir.

Q Did the corporation to your knowledge at any other time ever make any agreement with Mr. Heitman as to employment? A No.

Q Or was he just kept along? A No; he was just the same as everybody else. We do not make contracts with our employees excepting—just one exception of the Western salesman—has a written contract.

20 Q You mean you do not make contracts for time? A No.

Re-direct examination.

Q Mr. Kaltenbach, what does this advertising consist of? What way was the money spent, this small sum of money for advertising? A Sometimes a magazine would want an ad or something of that kind.

Q You said that amounted to how much a year? A Oh, I don't know; this year it would be a little heavier; might amount to a thousand or fifteen hundred dollars.

30 Q No more? A I do not believe so.

Further cross examination.

Q You say Mr. Heitman sometimes saw the buyers from the New York firms. You admit also that he sold those buyers when they came there to see him? A Sometimes they left the orders that they brought with them, surely.

Q You do not admit that he ever sold them any goods? A I don't know what you mean by "selling." If it is just receiving an order, yes, he sold them.

40 Q You mean the buyer came there from New York with his order already made up, knowing just what he could get; just came in, asked for Mr. Heitman, gave him his order and Mr. Heitman took him out? A No. He discussed with Mr. Heitman what he thought could be delivered—how soon it could be de-

Charles E. Kaltenbach, further cross.

livered, and all those points. I suppose gave the buyer an idea what she should buy.

Q That is the same information he would have gotten from you if you hadn't been so busy? A He could have got a good deal of it from the salesman, but they all had a feeling they better come to headquarters.

Q The main services rendered by Mr. Heitman were the same services which you would have rendered, or the man could have got his information, as you say, from the salesman? A Sometimes.

10

Q And it frequently occurred for the buyer to come from New York to see Mr. Heitman, didn't it? A Well, I should say we had on the average about two a week, perhaps.

Q Two a week, and a good many of them large customers? A Only the large ones came over.

Q Who took the orders from those buyers? A They were all accounts handled by salesmen. As far as taking the order is concerned, any man could have taken the order.

20

Q Who handled Bliss? A Well, Bliss never had much handling. He placed the order that he wanted.

Q Where did he place his orders? A Bliss placed them all in Newark; sent them by mail or telephone or came over.

Q It isn't true that they were all handled by salesmen? A No; I didn't say that.

Q I understood you to say they were all handled by salesmen? A If I did it is an error. They are not all handled by salesmen.

30

Q Mr. Heitman also solicited business in Newark, didn't he? A Some small accounts. Sometimes Mr. Heitman went and sometimes he sent one of his assistants.

Q Do you know how large the H. & W. Manufacturing Co. account is? A Well, we have been selling there for many years. I don't know how big it is now.

Q Is it a large account or a small? A It used to be large. I don't know whether it is for the last year or two; I am not sure.

Q Would you say they were small accounts, then? You are not sure, then, when you are considering that, whether this particular one is large or small, are you? A Well, not very important; don't depend on the size at all; none of them very large in comparison with our New York accounts.

40

Q I suppose they require just as much attention, however? A Everything needs attention.

Charles E. Kaltenbach, further cross.

Q Is there any salesman assigned to the Newark territory? A Well, yes; I believe so.

Q What does he do here, do you know? A No; I do not.

Q Do you know whether he handles anybody but Bamberger, Plaut and Hahne? A I couldn't answer that.

Q You don't know what he handles, do you? A No.

10 Q You don't know to what extent Mr. Heitman sells in Newark? A Well, we never considered Mr. Heitman's sales; those were all house accounts.

Q They were sales, were they not? A We sell—send anybody after them, Mr. Heitman; sometimes Mr. Heitman sent his assistant; even I have gone down to see Plaut, for instance.

Q What? A I have gone down myself to see Plaut once or twice.

Q As one of Mr. Heitman's assistants? A Not necessarily, no. I went down to see Mr. Plaut, or my father has gone down. This is just one of the house accounts that anybody could go after.

Q Why should you go? A Just happened to have a little time and I went down.

Q Just out of mere curiosity? Just spend the time? A We do not do business for curiosity, no.

Q In describing to the Court Mr. Heitman's duties you did not say anything about Mr. Heitman's duties with respect to credits? A No, I think I did overlook that. It was Mr. Heitman's duty though to see that nobody's credit was extended too far; that is say a customer had a credit limit of \$10,000 a month, or \$10,000 credit, that he should not owe us any more than \$10,000 at any one time. It was up to Mr. Heitman to see that no more than \$10,000 worth of open accounts were on the books for that customer. Say a customer owed \$10,000, with a credit of \$10,000, he was not to ship any more goods until part of that \$10,000 was paid. Mr. Stephens generally took care of the credit end of it and decided what credit to extend to each customer, or to the biggest customers. The rest of them—(interrupted).

40 Q Who decided—who gave these instructions as to what was to be allowed the different accounts? A It depended on the size. Important accounts—take big accounts—they were generally decided by Mr. Stephens, then we got that information from Frederick Vietor & Achelis.

Charles E. Kaltenbach, further cross.

Q I say, who gave the instructions to Mr. Heitman as to what credit to allow? A Mr. Stephens had charge of that.

Q And Mr. Stephens had been sick for a long while, hadn't he? A Yes, sir.

A And that covered a period of a couple of years, hadn't it? A Oh, no.

Q On and off? A No; Mr. Stephens was ill, I believe, from the latter part of May. 10

Q Who gave the instructions in his absence? A The credit limit had been established with practically all of our customers at that time.

Q And not altered? A There weren't any changes made except based on what information Mr. Heitman got from Frederick Vietor & Achelis.

Q When you say Mr. Stephens gave those instructions you mean it was part of Mr. Stephens duty to supervise the credits. You don't know whether he actually did it or not? A I have heard him once or twice say, "This man has overreached his credit—has too much credit." 20

Q You don't know to what extent that was left to Mr. Stephens? A No; that was Mr. Stephens' province.

Q You don't know up to what extent that was left to Mr. Heitman? A I do not.

Q Now, did Mr. Heitman have any duties respecting the buying of goods? A No; except to order up what he needed for his customers—to fill orders. 30

Q I beg pardon? A To fill his orders he had to tell what he needed.

Q Did he have anything to do with deciding the style in which the goods should be gotten up? A Only according to what he had an order from customers.

Q Did he have anything to do with anticipating orders? A Yes, sir.

Q Anticipating the market? A Yes, sir; and every once in a while I would ask him if he couldn't get orders anticipating demands. 40

Q Didn't you rely upon him as to his information as to the state of the market? A Yes, sir, I did, sometimes.

Q And didn't you rely upon him for your information upon which you based your instructions to the dye men, as to how to dye the goods? A That was part of his work to prepare

Charles E. Kaltenbach, further cross.

dyeing and blocking instructions, depending on the orders he had or what he anticipated the orders would be.

Q Now, your sales for the year 1918, according to Exhibit P. 2, known as direct sales, were \$1,670,692.17, and the store sales, by which I presume is meant Vietor & Achelis account—

A Yes, sir.

10 Q —\$610,767. In other words, the house account exceeded the Vietor & Achelis account by about a million dollars? A No. You are calling a lot of those house accounts which are not house accounts; lot of the shipments from Newark are not house accounts as we used to know them. Of course, there is no such thing as a house account, but at that time we had house accounts shipped from Newark and also a great many other accounts were shipped from Newark, accounts were ordered which salesmen sent in which had nothing to do with the house account.

20 Q You say there were no house accounts? You have eliminated— A That is, with the new arrangement there was nothing considered house accounts.

Q These sales are what under the old arrangement would be considered house accounts, isn't that so? A Not the million and a half, they were not house accounts because a good deal of that business was sent in by salesmen.

30 Q That is business which formerly, however, came under the head of house accounts, isn't that so? A No, no; they were sent in by salesmen—orders—that includes shipment to a great many big concerns—New York jobbers—and one salesman alone, I think, has a credit of about five or six hundred thousand dollars of that million and a half, just one salesman in New York has a credit of about five or six hundred thousand dollars of this one million and a half that is under discussion.

Q A very considerable amount of these sales known as direct sales were handled from your home office, weren't they? A Well, what do you mean, "considerable amount"? What would you call "considerable"?

40 Q How much of the total? A Oh, I couldn't answer as to percentage at all.

Q Very considerably under the total? A Yes, sir.

Q What would you say about that? A All I can say is about eighty per cent—twenty per cent. was house accounts.

Q Twenty per cent. You mean twenty per cent. were accounts handled from the home office? A Well, by house

Charles E. Kaltenbach, further cross.

accounts it is pretty hard to give a percentage, I cannot do it. I do not like to guess at anything like that. The only thing I can tell you is that of that million and a half, or whatever the amount is you call house accounts, five hundred thousand at least was sold by one salesman.

Q What salesman? A Mr. Oberndoerfer, and Mr. Ryan, I know, had quite a bit in that, and practically all of them—all but one man, I believe, had his customers. 10

Q What you mean by that is that Mr. Oberndoerfer received commission on that amount of sales? A No, his customers; customers that had been given to him.

Q You do not mean that he made the sales? A Yes; they were his customers; he verified the sales; he sent them over.

Q Were not a great many of the sales on which Mr. Oberndoerfer received commissions in 1918 sales made in the home office, or sales at least not made by Mr. Oberndoerfer? A It is pretty hard to explain just how that was worked. We did not force a customer to send an order to the salesman, or the salesman send it to us, then the salesman received credit for it. Any customer given to a salesman could send in an order any way he wished, by mail or telephone or deliver it to me or to Mr. Heitman, or to anybody, or deliver it to the salesman, but the salesman would receive credit for it. 20

Q A great many times Mr. Oberndoerfer, for instance, would not make the sale, or have anything to do with it, isn't that so? A Well, a customer, when they needed the stuff, they were in the habit of telephoning over or sending over for it. 30

Q And if they didn't do that it was somebody's duty to prompt him, wasn't it? A Yes, sir; it was up to the salesman to take care of that.

Q And they didn't always do it, did they? A I don't know where you get that.

Q Did they always do it? A As far as I know; yes, sir.

Q Did Mr. Heitman have anything to do with the stimulating of purchases by customers? A I don't know how you mean.

Q Did he have anything to do with stimulating purchases by customers? A We all tried to do that as much as possible. 40

Q Did he have anything to do with it? A He was supposed to.

Q Well, did he? A He was supposed to see to that; yes, he had—

Charles E. Kaltenbach, further cross.

Q What did he do? A He had charge of the system showing how much customers bought—each individual customer, and if that customer did not buy enough goods or seemed to be falling behind, the salesman who handled that account was to be notified.

10 Q And who notified him? A Mr. Heitman was supposed to.

Q And he had his hands pretty full doing that, too, didn't he? A Well, Mr. Heitman should have had enough to keep him busy.

Q You looked to him, didn't you, to see that the business was kept up to standard in 1918, with the salesmen, didn't you?

A I am sorry to say I did.

Q And you have been doing that for several years, haven't you? A Yes, sir.

20 Q And Mr. Heitman had the responsibility of going into the territories of salesmen, designated districts? A How do you mean?

Q Didn't Mr. Heitman have the responsibility and duty of going into any district or territory that he saw fit and get after a customer who had made a purchase perhaps a year before and hadn't made one recently? A He was supposed to take that up with Mr. Ryan.

Q He was supposed to see that Mr. Ryan got his salesmen on the job? A He was supposed to give Mr. Ryan any information we had at our disposition in Newark.

30 Q Mr. Heitman sometimes made sales to those customers? A I suppose so.

Q Didn't he, on account of circulars or letters that he sent out under your direction, bring in sales to your company? A Sales, and also trouble—storms of protest sometimes from our bigger customers.

40 Q And as to that many times you told him that he was expected to be the goat, didn't you? A Well, I was always willing to admit that I figured Heitman was in a position where he was apt—where he was between the customer and the salesman to a large extent—

Q You told him? A Yes; I told him that; I do not hesitate to admit that.

Q And a lot of the trouble which arose, which he had to stand criticism for from the salesman and from the customers,

Charles E. Kaltenbach, further cross.

was things that Mr. Heitman really was not responsible for?

A Well, the most trouble arose from—(interrupted).

Q Answer that question please? A What is that?

Q Question read. A No.

Q The net result of Mr. Heitman's work for the company as head of the merchandise department and the various responsibilities was a great many sales, isn't that true? A The net result was a great many sales? 10

Q The net result was a great many sales? A I do not see how. That's a pretty hard thing to say, you cannot tell. It is a pretty hard thing to say who is responsible. I had a lot of accounts myself that I had to see and some of them Heitman was supposed to take care of.

Q Didn't you tell him that it was up to him to see that the sales were kept up? A No; that wasn't up to him at all. 20

Q It wasn't? A It was up to him to take care of his department, to see that the merchandise was handled in a proper way.

Q You say he had charge of the correspondence? A Yes, sir; correspondence—answering—letting the customers know when they were going to get things or if they were not going to get them to let them know.

Q Well, he wrote them in anticipation of orders, too, didn't he? A Just circular letters which we sent out; we had this or that thing to offer to the trade, and he got his files and went through them. 30

Q Who drew up the circulars? A If they were important I did, otherwise just give him the general information along what lines to send out the circulars. It wasn't very often done; very seldom.

Q How many circulars did you draw? A Oh, I have no idea.

Q You say it wasn't very often done? A Very seldom done. I do not recall any definite instance now.

Q You do not remember any one instance where you drew a circular, do you? A I do not just this minute. I know I have given orders occasionally, but unimportant—I mean they were unimportant as far as money is concerned. They were not details that I could remember offhand. 40

Q Mr. Heitman then drew whatever circulars were given to him to be sent out and mailed them without anybody criticising

Thomas Meade, direct.

them or approving them? A His mail was very seldom looked over.

Q Can't you answer that question? A I can't say yes or no to it, because there may have been exceptions.

10 Q Well, what was the general rule? A I can say generally his mails and circulars went out without supervision after they were ready to go out.

A Juror. Was it the custom of your company to make agreements with employees or salesmen in writing?

Witness. We never had any agreement. We do not make agreements with employees. We consider it a bad policy, because it is generally unfair to one or the other.

A Juror. Was the contract made with regard to this bonus in writing?

20 *Witness.* No; not the first bonus. The second one was. This year I have a memorandum—

A Juror. 1918?

Witness. I have a memorandum of the meeting which each salesman got a copy of.

Further direct examination.

Q Was there any memorandum of the meeting of 1918 bonus?
A No, sir.

30 THOMAS MEADE, sworn on the part of the defendant.

Direct examination by Mr. Wolber.

Q Where do you reside? A Newark, New Jersey.

Q By whom are you employed? A Kaltenbach & Stephens.

Q At the present time? A At the present time.

Q Do you recall overhearing a conversation between Mr. Charles D. Kaltenbach and Mr. Heitman about the first of October, 1918? A Yes, sir.

40 Q Will you tell us just what you heard? A Walking in the office one afternoon—

Q Where is this office? A This was the little private office that Mr. Kaltenbach then used to do his work in, to handle his help, and all. He wanted to see me, and I went to this little private office and I heard them there—Mr. Heitman and Mr.

Thomas Meade, cross.

Kaltenbach at the time I was in the office was sitting at the desk talking over some matters—just what it was at the time I don't know—but after being in there about half a minute or possibly a minute, Mr. Heitman picked up some papers and asked Mr. Kaltenbach, "Charles," he said, "you won't tell me anything that you can do in my matter." Mr. Kaltenbach whirled around in his chair and he said to him, "No, Heitman, I will make no promise."

10

Q Did you hear Mr. Heitman say anything in reply to Mr.—
A Mr. Heitman then raised from his seat, picked up the books, papers, whatever they may be I don't know, but says, "Then I must quit."

Q Now, Mr. Meade, did you overhear or were you present at a subsequent conversation between Mr. Kaltenbach and Mr. Heitman in October, 1918? A Just what time it was I couldn't say, but shortly after that—

20

Q After what? A After this visit when Mr. Heitman had told Mr. Kaltenbach that he was going to quit, Mr. Kaltenbach had sent for me to come to the office where he had dismissed Mr. Heitman from the employ.

Cross examination by Mr. Bostwick.

Q I didn't hear that last answer. A Mr. Kaltenbach sent for me to come to the office. Mr. Heitman and, if I am not mistaken, I think Mr. Otto, was in the office at the time when Mr. Kaltenbach told him that his services were no longer required by the firm and Mr. Heitman asked Mr. Kaltenbach could he speak to him personally. Charles said "There is no need, Mr. Heitman"; so Heitman left the office then.

30

Q You didn't know what they were talking about, did you, the first meeting you speak of? A At the first meeting, not before I went in, I do not. I only heard those few words that I told you.

Q You don't know what the conversation was about at all. A Absolutely no. Whether they were talking business or whether they were talking other things I don't know.

40

Q And you don't remember the date, do you? A No; I couldn't say that I just remember the date.

Q You don't know whether it was October 1st or June 1st, do you, as a matter of fact? A Yes, I know that it was later than June 1st.

Thomas Meade, cross.

Q How do you know that? A How do I know it?

Q Yes, how do you know it? A How do I know it? Well, for the reason why in many things in that business, into the manufacturing end of the business and special things which is never used in June 1st is used in the latter end of the year.

10 Q Well, I don't see how that connects up? A Why not?

Q How does this tell you whether it was June 1st or October 1st? A Well, because we handle so many different things in the end—around the holidays—that we never handle in July.

Q Is October 1st around the holidays? A Getting ready for the holidays; yes, sir.

Q What particular thing is it that makes you sure of October 1st instead of June 1st? A Well, there is a lot of Christmas ribbon and a lot of small stuff that we use, assorted boxes and
20 all such things as that that is used up around that time of the year, getting prepared for the holidays, which we never start in June or July.

Q Well, what was it—did you see the place decorated with this stuff at the time you heard this conversation? A No, we do not decorate the place with that kind of stuff, we simply manufacture that stuff in order to sell, we do not do any decorating.

Q What was there about this holiday stuff that makes you think it was around October 1st? A Because of the printing
30 of ribbon—ribbons that are never printed around July and August, Christmas ribbons which everybody uses for tying up Christmas bundles and such as that.

Q You are still employed, aren't you, by Kaltenbach & Stephens? A I am.

Q You are not subpoenaed, are you? A I am not.

Q Come voluntarily? A Yes, sir.

Q Did I understand you on your direct examination to say that you understood Mr. Kaltenbach to tell Mr. Heitman that
40 he was discharged? A I did not use the word "discharged."

Q What did you say, dismissed? A Dismissed.

Q Did you hear him say that to Mr. Heitman? A That was at the second one, not at the first.

Q That he was dismissed? A Yes, sir.

Henry F. Otto, direct.

Re-direct examination.

Q Mr. Meade, you were requested to come to the court room by me this morning? A Yes, sir.

Re-cross examination.

Q You were here yesterday, weren't you, Mr. Meade? A 10
By request.

Re-direct examination.

Q By my request yesterday, Mr. Meade? A Yes, sir.

HENRY F. OTTO, sworn on the part of the defendant.

Direct examination by Mr. Wolber.

Q Where do you reside, Mr. Otto? A 192 Chadwick avenue,
Newark. 20

Q By whom are you employed? A Kaltenbach & Stephens.

Q How long have you been working for Kaltenbach & Stephens? A Since November 1st, 1916.

Q What position do you occupy with them? A Charge of the accounting department and also of the billing.

Q You were in charge of the accounting department of the company in 1918? A Yes, sir.

Q Have you brought your records with you to show the total amount of the sales to Edelhoff & Reilly? A Yes, sir, I have statements that I have made up from the ledger; yes, sir. 30

Q Have you the ledger here today? A Yes, sir.

Q Turning to your memoranda, will you tell us the total sales of the company to Edelhoff & Reilly during 1918? A On the net amount on which we would base a salesman's compensation, taking off ten per cent. and nine per cent. discount—total amount \$80,000; that is round figures; possibly there may be a few thousand dollars more or less.

Q Now, turning to your records again, or your memoranda, will you give me the total amount of the consigned sales to Wellwood for the year 1918? A Our consigned sales, \$180,000. 40

Q How much about? A About \$180,000.

Q I mean the net amount of the Wellwood consignment? A Taking off discounts—

Q I show you this (showing witness paper). A That \$165,000 is after taking off the returns and several discounts.

Henry F. Otto, direct.

Q What is that amount? A \$165,310.39.

Q Have you your memorandum with you? A No, I have not.

Q I will let you have it; I want you to give me the figures as you take them from the record. Now, turning to your record again, have you the amount of any Wellwood sales called house
10 accounts? A Why, yes, sir; about \$6,506.42.

Q Now, turning to your memoranda, will you let me have the exact amount of sales to Edelhoff & Reilly for the year 1918? A The amount here, \$84,291.60.

Q Is that net? A Yes, sir.

Q Can you give me the amount of the expenses of the salesmen paid by the company? A Well, those expenses were very small. They were merely travelling expenses of Mr. Ryan and Mr. Smith and amount to \$614.52.

Q Can you tell me the total amount of the commissions paid
20 by the company in 1918 on a fixed basis other than to the salesmen? A Yes, sir; the fixed basis was \$7,156.85.

Q Now, Mr. Otto, do you recall having any conversation with Mr. Heitman prior to October, 1918, with reference to his employment with the company?

Mr. Bostwick. I object.

The Court. Admitted.

A Why, it was, I guess, about the middle of October—no, prior to that; about the middle of September.

30

The Court. 1917?

Witness. No, sir; 1918.

The Court. The question was prior to 1918.

Q Prior to October, 1918? A Why, it was only a short conversation. It was on the second floor.

Mr. Bostwick. Exception prayed.

The Court. State the ground.

40

Mr. Bostwick. I think it is irrelevant, your Honor. Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Mr. Heitman met me on the second floor and entered into some conversation, and the windup of that little meeting was

Henry F. Otto, direct.

that he mentioned that he was going to put in up to the firm to get either a greater salary or make some sort of a deal; that he was going to put it up to the firm to make some sort of a deal or arrangements for a greater salary or possibly a different basis of compensation, and he made the remark that if he didn't get it he was going to quit. My parting shot was, "You better be careful what you do," and that was all.

10

Q Now, Mr. Otto, subsequent to this conversation with Mr. Heitman, didn't you overhear or were you present at a conversation between Mr. Charles D. Kaltenbach and Mr. Heitman, in October, 1918? A I was; yes, sir.

Q What was said by Mr. Kaltenbach and Mr. Heitman at that conversation? A I was in this private office. Mr. Kaltenbach was at this desk, and my desk is in the same office. Mr. Kaltenbach and Mr. Heitman come downstairs. Mr. Heitman entered and Mr. Kaltenbach said, "Mr. Heitman, I am going to leave you go." Heitman says, "Now, or later"? Mr. Kaltenbach says, "This afternoon," and Heitman says, "Well, you know, Charles, I have always tried to do my duty and look out for the interests of the concern," and I don't know just what Mr. Charles—what remark he made to that, but, anyhow, Mr. Heitman wanted to see Mr. Charles outside, because I was in there and Mr. Meade was in the office—Mr. Charles says, "Never mind," he said; "we do not need to go into details," he said; "it will take too long to go into details." "All right," he says; "all right"; he says, "Charles, how about that \$250 I owe you. I haven't got it now. Haven't any money now to pay you." Mr. Charles says, "Never mind; pay me later." That is the upshot of that whole conversation.

20

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Q Now, Mr. Otto, I show you a statement of the K. & S. direct sales amounting to \$1,670,695.15, and I will ask you to explain to the Court and jury just what is meant by "direct sales"? A Direct sales are all sales that are made in Newark and billed from Newark. We have two billing places, one New York store and one Newark. Now, the bulk of the shipments are made from New York and most of the billing is all done in Newark, and I do that billing. Now, this direct sales is just simply the distinction between the Newark store sales and the New York stores sales; that is why we call them K. & S. direct—come direct from the mills. Now, included in that one million six

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Henry F. Otto, direct.

hundred and seven thousand are all the salesmen and house accounts.

10 Q Now, Mr. Otto, referring to your record, what was the amount of the house accounts for 1918? A The net amount, after deducting the returns and discounts, of the house accounts was \$379,456.09; that is taking off Edelhoff & Reilly, which was \$84,391.60. To answer Mr. Wolber's question direct, the net amount of the house account was really about \$163,847.69. That was the total as charged on our ledgers as house accounts.

20 Q How did you arrive at what were house accounts? A Well, the shipping slips that come from Mr. Heitman's department, merchandise department, had on it the salesmen's names; that is, the house accounts, which were not credited to any of the salesmen, bore the title "house accounts," and I had charge of the billing, making up my invoice slips each day, would take right from the shipping slips that came from merchandise department, the designation, Oberndoerfer, Ryan, &c., put it on my invoice list and segregate it each day, so that at the end of the year I can tell exactly what each salesman made and also house accounts. I had to do that in 1917, for the reason we had a different basis for compensation to the salesmen based on their sales.

Q So the information as to how these sales were to be classified emanated in Mr. Heitman's department? A Yes, sir.

Q So that out of this total of \$1,600,000 of direct sales there were how many house accounts? A You mean the direct house accounts?

30 Q The total? A The total is 463.

Q Some \$463,000 represented house accounts? A Yes, sir.

Q Now, how was the balance of the orders of the \$1,600,000 classified or given to the various salesmen, to Mr. Ryan, Mr. Ruckel, Mr. Demmerle, Mr. Hibbard and Oberndoerfer? A There were others, for instance, like export, sent in small orders that didn't amount—I couldn't give you offhand how much they would be—small amounts comparatively speaking, and those salesmen got a fixed commission, some five per cent. and some two and a half.

40 Q Did Mr. Heitman's name ever appear on any of the shipping slips that came to you? A No, sir; never.

Q Was anything ever said to you by any officer of the firm about Mr. Heitman being included in this arrangement with the salesmen? A No, sir.

Henry F. Otto, cross.

Q Who determined the manner in which the bonus was figured for the year 1918? A You mean from whom I got my instructions?

Q Yes.

Mr. Bostwick. I object; I do not think it is relevant.

Mr. Wolber. Question withdrawn.

10

Q Who made up the actual figures on which the bonus for 1918 was figured? A I did.

Q Now, will you tell us just how you did it?

Mr. Bostwick. I object. I think it is irrelevant how the bonus that was paid was actually figured. The question is whether Mr. Heitman was to receive a certain bonus. How the bonus was paid after Mr. Heitman had been discharged and after Mr. Graves, another one who participated in the bonus, had been discharged, making it possibly necessary to change the method of division, I think is unimportant here.

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The Court. Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Bostwick.

Q Mr. Otto, you don't know, I suppose, whether any other sales that were indicated on these orders which came through as being orders which should be credited to salesmen were ever sales which had been made by persons other than **the** salesmen themselves, or no? A I couldn't say.

30

Q You don't know? A I have no information on that.

Q For instance, the account of Bliss, in New York, that Mr. Kaltenbach testified to; that was not handled by a salesman? A Yes, sir.

Q That would be included in sales of which—which were credited to some salesman, wouldn't they; the Bliss account? A I think the Bliss account is a house account; I wouldn't say positively. There are some I know that salesmen do not solicit and which are credited to salesmen, and others that are not. Bliss, I think, is a house account.

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Henry F. Otto, cross.

Q Is the Kress account a house account? A No, sir; Kress account is Oberndoerfer account.

Q And the goods are sold by Mr. Kaltenbach, aren't they? A Yes, sir.

10 Q That is one instance where, although the salesman is given credit for the sales and gets commission, he did not make the sales. That is an account which under the old system would have been considered a house account; is that so? A If I am not mistaken, the S. H. Kress Company account in 1917 was an Oberndoerfer, and also in 1918.

Q You think that is a house account—Oberndoerfer? A Yes, sir; Oberndoerfer. I am positive about that.

20 Q What do you mean by that, that it is an Oberndoerfer account; do you mean it is an account for which Mr. Oberndoerfer is given credit? A In the sense that his name appears on the shipping slip, and if Mr. Kaltenbach would ask me what is the total of Oberndoerfer's sales, I would give him that total which included this S. H. Kress Company account.

Q Do you know who sold the Campe account? A No, sir; I do not.

Q You know that was an Oberndoerfer account, do you not?

A I couldn't say positively. There are many of those accounts I don't know the name of the salesmen.

Q You don't know whether Mr. Heitman made that—sold that account? A He may have.

30 Q You know, as a matter of fact, don't you, Mr. Otto, that a large number of sales which were credited to the various salesmen in 1918 were made by Mr. Heitman, or by his department? As a practical matter, you know that, don't you? A No, sir; I do not.

Q Do you deny that it is so? A I don't know that Mr. Heitman ever made the sales except two or three, which he told me himself.

40 Q You don't know, I say? A No, I don't know for a certitude. I never saw Mr. Heitman take the order, or anything of that nature.

Q Now, you say that you heard Mr. Heitman say before October, 1918, to Mr. Kaltenbach, "Well, I must quit"? A No; I didn't make that assertion.

Q I must have misunderstood you. I understood on your direct examination that you said you overheard a conversation

William N. Heitman, direct.

between Mr. Heitman and Mr. Kaltenbach, in which Mr. Heitman said, as the last remark of the conversation, "Well, I must quit."

The Court. That was Mr. Meade that testified to that; the former witness.

Witness. I was not present at that conversation at all.

Q Oh, you didn't hear that? A No.

Q You did testify to Mr. Heitman saying that he would quit or something like that if another arrangement was not made? A Yes, sir.

Q He didn't say when he would quit? A No, he didn't say when.

Q He didn't say that he would quit then? A No, sir.

DEFENDANT RESTS.

WILLIAM N. HEITMAN, recalled for plaintiff.

Direct examination by Mr. Bostwick.

Q Mr. Heitman, you have heard the testimony of Charles Kaltenbach, Mr. Meade and Mr. Otto, respecting a conversation that you had with Mr. Kaltenbach about the 1st of October, 1918, regarding your employment there. Did you have any conversation with Mr. Kaltenbach about the 1st of October, 1918, on that subject? A I did.

Q Tell us about that, please; what was said and the circumstances under which the conversation was had? A Why, I felt from the duties that I was performing and from the results I was getting from those duties that I was entitled to more money, and I had other opportunities before me for employment for 1919, and I asked these people—asked Mr. Kaltenbach if I would get—what arrangement he was going to make with me for 1919. I didn't ask him for any written contract, but I wanted to know where I stood for the year. He simply said that he wouldn't discuss the thing at all, talking of the conditions, &c., and he said they would have to leave that lay over until the latter part of the year, that I should leave it to his judgment. If I left everything to the judgment of Kaltenbach & Stephens I would starve to death.

Mr. Wolber. I move that that be stricken out.

The Court. It will be stricken out.

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William N. Heitman, direct.

Q Go ahead and tell us the conversation? A And he accepted my resignation for—

The Court. What did you say?

Witness. He accepted my resignation.

10 Q I asked you to tell about the conversation at that meeting and you were telling about the discussion that you were having for the employment of 1919? A For 1919.

Q What was the whole conversation? A He said that this matter would have to lay over until the latter part of December, that he wouldn't do anything before then.

Q What did you say? A I told him that I wanted to find out just where I stood. I couldn't wait that long. And if we couldn't agree, why then I would have to leave, and I gave him notice then that I was going to leave on December 31st,
20 on the expiration of the contract that I had made with these people.

Q And what did he say to that? A He accepted it.

Q On that day? A On that date.

The Court. What was that date?

Witness. The early part of October.

Q Was it the first of October? A No; I think it was between the 1st and the 3rd; I am almost sure it was around the 3rd.

30 *The Court.* What was the date of that conversation?

Witness. 1918, October.

Q And was anything further said about your resignation by either you or Mr. Kaltenbach or by Mr. Kaltenbach to you after that? A Why, that was final, until October 11th.

Q On October 11th, you have heard the testimony of Mr. Otto, as to what transpired on the morning of that day with Mr. Kaltenbach, among other things, and Mr. Otto said you told Mr. Kaltenbach that you could not return the \$250 to him, that
40 you would return it later. What have you to say about that? A That didn't happen in the morning. That happened in the afternoon. I didn't see Mr. Kaltenbach all that day until—I should say it was between four and half-past four in the afternoon.

William N. Heitman, direct.

Q Well, did anything with reference to the \$250 happen in the morning? A Yes, Mr. Otto brought a note in to me on the morning of October 11th, and wanted me to sign it.

Q What was that note? A That was for \$250 that Mr. Kaltenbach had advanced to me.

Q Mr. Otto brought that to you? A He brought it out to me. 10

Q What did he say about it? A He wanted me to sign it.

Q And what did you say? A Why, I told him I wouldn't sign anything like that because Mr. Kaltenbach had advanced me that money to be paid as soon as I got my bonus. That was clearly understood at that time.

Q And what else did you say about it? A I told him that I would see Mr. Kaltenbach about it.

Q Did you see him about it? A I spoke to him after he had discharged me. I called his attention that Mr. Otto had brought that note to me and I didn't sign it, and I told him the reason why I didn't sign it. 20

Q And this note was brought to you on the morning of that day? A On the morning of October 11th.

Q Are you sure of that? A Positive of that.

Q Before any information was given to you that you were to be discharged? A Yes; certainly.

Q Now, did you tell Mr. Otto at any time before October 18th that you were going to quit immediately? A That I was going to quit immediately? 30

Q Yes. A No, I never would say a thing like that because I felt obligated—

Q Did you ever tell anybody that? A No.

Q That you were going to quit? A Certainly not.

Q When you went to New York to see Mr. Ryan about this bonus did you say to him, as Mr. Ryan says, to let you in on the bonus? A I certainly did not.

Q What was the character of your conversation with him about that? A Why, we were speaking it over, and I told him I thought I was entitled to know just where I stood—I gave this in my testimony yesterday—that they could have handed me a fifty-dollar bill and say "this is your share," and so I wanted to know just exactly where I did stand on the thing and wanted a guaranteed amount. But they wouldn't consider 40

William N. Heitman, direct.

anything like that. They told me the only way they would agree to would be on a commission basis, that is commission on that bonus—proportion of that bonus—a percentage.

10 Q You have heard Mr. Ryan testify on direct examination, or cross examination, criticism of your management of your department, and he testified, as I recall it, one account had given a great deal of trouble on account of lack of efficient management of your department. What have you to say about that? A Why, that is the Reistick matter he brought up. These people had a lot of orders in—(interrupted).

Mr. Wolber. I think questions of this kind by me were ruled out. It was decided that we were not justifying the alleged discharge on the ground of any unsatisfactory work. It seems to me that the same objection applies to this testimony offered on behalf of the plaintiff.

20 *Mr. Bostwick.* If your Honor please, Mr. Ryan in his testimony by insinuation made a remark about Mr. Heitman's management of his department and I think it is only just to him that he should be permitted to explain such of the criticisms as were specified. That is my only purpose and I think it is proper rebuttal on the circumstance of its having been testified to on direct examination.

The Court. I will admit it.

30 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Witness. Do you want to know what I know about that instance?

40 Q Yes. A These people had quite a number of orders with us and the bulk of those things were what they called weighted goods, and this was a process in which they made the silk heavier, artificially heavier—to give it a heavier appearance, and in this department to which this merchandise had to go, it was sometimes greatly delayed, and through the course of that delay our merchandise was held up considerably longer than the regular goods that were not weighted would take, and of course, if we had the order there, why, we had to stand the blame and abuse for delay, although that was no fault of ours.

William N. Heitman, direct.

That is something over which I had no control. I gave the order to the department to fix the merchandise a certain way. If they delayed delivering the goods that was up to them. I couldn't force it. It had to take a certain length of time—certain process.

Q That was up to whom? A That was up to Mr. Kaltenhach. That was part of his duty; he had charge of that particular end of it. 10

Q You perhaps heard Mr. Ryan as to his particular item or account. He called at the mill one day and with you picked out from the stock on hand goods to make—to meet with his order. What do you say about that? A Why, in the first place, I never picked out the order. I had clerks to do that. But the supervision was with me, of course. If Mr. Ryan came over, Mr. Ryan always came up to see me and we went through the stock a good many times for the purpose of substitution. Mr. Ryan had that privilege of substituting whatever goods or whatever colors he might see fit, and if he did it it would be apt to get me in trouble. 20

Q Just what do you mean by that substitution? A Why substitution in shades.

Q In this case? A That hasn't happened once, it has happened several times; that he has been there and substituted colors such as lighter shade of blue for a darker shade or dark shade for medium shade, or something like that.

Q You mean if a customer ordered a certain shade of blue that wasn't in stock that he would be given a different shade of blue? A Why, that is what Mr. Ryan referred to. Those goods that he picked out. 30

Q In this particular case do you remember whether that was done? A Or, perhaps the order clerk might have slipped up on a few boxes. Of course we have so many orders there that we can't lay out two boxes for this man and five for another; we had to wait until we got sufficient shipments in to send by freight, so the most convenient place to put them in was the stock room.

Q Do you remember whether a substitution was made in this case? A In almost every case. 40

Q Was it made in this case? A He testified—give the date of the instance—I am almost positive that it was the only way that happened.

William N. Heitman, direct.

Q Did you neglect your correspondence as Mr. Ryan indicated? A Did I neglect?

Q Yes. A The bulk of that correspondence went to Mr. Ryan himself.

Q Did you ever get it? A Did I ever get it?

10 Q Yes. A I might get it in time, yes, but as a rule I never got any of his correspondence. That was always something that he took care of.

Q You heard the testimony as to certain exceptions being made to the sales upon which this bonus was to be figured. You attended the meeting in November, 1917? A I did.

Q Did you hear any remarks made of the exceptions to that? A There was no exception made whatsoever.

20 Q How did you come to go to that meeting, under what circumstances? A Several days before the meeting I was told to attend it, that I was wanted there. The day of the meeting I was called to attend the meeting.

Q Well, on the day of the meeting did you know there was going to be a meeting that day? A The day of the meeting; yes, sir.

Q Why weren't you there? A Why wasn't I there?

Q Without being called? A My duties kept me busy at all times. I couldn't sit around there waiting for these people to come in, because you couldn't tell when they were going to come. Sometimes they would get there at twelve o'clock and sometimes didn't get there until later in the afternoon.

30 Q Were you expected to be notified of it? A Yes, sir; I was told I would be notified.

Q Who told you that? A Mr. Kaltenbach. He knew that I was going to be busy.

Q Were you notified? A Was I notified?

Q When the men had all arrived? A Yes, sir.

Q Do you remember who notified you? A No; I do not.

40 Q Were you instructed to bring up any papers or books or documents or data? A No; I brought no papers down to that meeting.

Q Were you requested to? A No. I was told that the meeting was ready to proceed and they told me to come down immediately.

Q Had you at any time before this meeting made up any data for Mr. Kaltenbach? A I made up data many times.

William N. Heitman, direct.

Q Had you made up any data respecting the cost of the selling—business for the previous year? A Why, I made figures of that kind; yes, sir.

Q How long before the meeting was that made up? A Oh, this must have been a week before.

Q A week before. Were you told for what purpose the figures were wanted? A No, sir. 10

Q Did you know for what purpose they were wanted? A I didn't know for what purpose they were wanted, outside of to get the cost, that was all; but just exactly what they were driving at I didn't know.

Q When you arrived at the meeting was everybody there but you? A Yes, sir; I was the last one there.

Q And Mr. Kaltenbach, then, both senior and junior, and Mr. Stephens, were all there? A Oh, yes; they were all at the meeting. 20

Q And had the meeting started? A No.

Q Who started the meeting? A Mr. Charles Kaltenbach.

Q You were there when he started, were you? A I was.

Q Do you know whether or not they were waiting for you? A They were waiting for me?

Q Do you know whether they were, or not? A No; I can't say that. All the indications showed, I think, they were waiting because—(interrupted).

Mr. Wolber. I object. 30

Witness. I want to bring it out.

Mr. Wolber. It is not up to you to bring it out. That is why I object to it.

Q Mr. Heitman, you heard Mr. Kaltenbach's testimony as to your duties. Was that a complete statement of your duties? A Was that a complete statement?

Q Yes. A Why, I don't think he gave me the credit I was entitled to at all.

Q In what respect was it incomplete? A About the credit part of it, for one. 40

Q Well, you have already testified to that on your direct examination? A I did.

Q Now, as to these orders that were sent in from your department on which were the names of the salesmen who would

William N. Heitman, direct.

get credit for the sales? It was testified that some of these orders had the mark "house account" on them. Who had charge of those house accounts? A All direct sales I had charge of—every sale that left Newark was under my supervision.

10 Q I mean as to the filling of it? A As to the filling, well, it all depends as to what they specified them at; might have been sales made by Mr. Kaltenbach, senior. I do not think Mr. Kaltenbach, senior, made any sales in 1918—Mr. Kaltenbach, junior, and myself.

Q And these other sales that were made that were credited to other salesmen; were they all made by the salesmen who would get credit for them? A No; the sales weren't always made by the salesman. They were given credit for it; yes, sir.

Q That was under the new arrangement? A Under the new arrangement.

20 Q Who would make sales besides the salesman of the account? A I made a great many; Mr. Kaltenbach made a great many.

Q You had some responsibility, did you, regarding the buying of the goods, did you? A I did.

Q What did you have to do with that? A Why, I had a system there by which I could tell just what goods we had sold, the grade and color, and I ordered goods accordingly, unless there was some reason why we wanted to anticipate on goods in stock.

30 Q Shortly after this meeting in November, 1917, did you have any other responsibilities regarding the selling of goods and the circularizing with regard to the salesmen themselves? A Newark was the territory that I was to run.

Q Did you have any other territory besides Newark? A Oh, yes; we had customers in a good many towns in which the salesmen did not get to on account of the expense or otherwise, too far away, or for some reason or another they would decide they wouldn't call on these people. That correspondence was up to me to take care of.

40 Q You had a system that has been spoken of whereby you followed up the salesmen? A Yes, sir.

Q When was that installed? A Why, that was installed the early part of—I believe I started that system in December, right after that meeting, when I knew I was to be included in the bonus.

William N. Heitman, cross.

Q Did Mr. Kaltenbach know anything about that? A Yes, sir; he knew about that.

Q What did he say about it, if anything? A He thought it was a good way.

Q What did it require you to do? A It required me to get reports from the salesmen. 10

Q Get reports from the salesmen? A Yes, sir.

Q How were you to get reports from the salesmen? A Why, the salesmen would report the customers that they had seen, and if they were not getting any business from them—weren't getting business and anything connected with it, any matter that they might have seen in the course of the day; and those were supposed to be sent in daily.

Q You say they were to report to you? A Yes, sir; there was a report to be sent in. 20

Q Who told you that they were to report to you? A Who told me that they were to report?

Q Yes. A That was the arrangement that was made with Mr. Charles Kaltenbach. He insisted on having those reports sent in.

Q What were you expected to do? A Why, from that I took my records on this certain system that I had, to keep tabs on the different customers, so that I could tell right at a glance when they weren't doing any business, or, if they were to be open for business at a certain period, would call attention of the salesman or otherwise write to the customers themselves. 30

Q You would follow it up with the salesman in that way? A Oh, yes. The correspondence there will show that.

Cross examination by Mr. Wolber.

Q Mr. Heitman, are you sure that you sent out circulars in 1918? A Am I sure?

Q In 1918? A Yes, sir. You can call a letter a circular, can't you?

Q What kind of a letter may it be? A Why, if any new samples were made up—I can call these circulars—if any new sample was made up, didn't make any difference what it was, it was up to me to submit those samples to people and they would buy them. 40

Q You would submit them by sending them through the mail, wouldn't you? A Yes, sir.

William N. Heitman, cross.

Q This is all done from the home office of the company in Newark, wasn't it? A Yes, sir.

Q Are you sure that this arrangement of designating accounts by name of salesman and house accounts was first installed in 1918? A Was it first installed then? Why, no; that has been going on for some time.

10 Q I thought you said on your direct examination that was a new system? A When they took the house accounts away that new system—they divided the house accounts up among the salesmen—between them.

Q But the cards made up in your office were not changed? A I didn't have that system then.

Q I want to know whether that system of designating the cards from the orders— A The cards had nothing to do with the orders.

20 Q Was it first installed in 1918? A The cards had nothing to do with the orders. These cards were an entirely different proposition.

Q The orders—your designation of the salesman's name on the orders, was that first installed by you in 1918? A No; because some salesmen had orders there since we started in Newark, and they received commissions—for instance, Mr. Oberndoerfer, he has been shipping goods over there right along, and, of course, any order he might sent out, of course his name was marked on the order.

30 Q That system existed prior to 1918? A Exactly.

Q Isn't it a fact that by reason of your position as head of the merchandise department in Newark, all the correspondence—all these orders of the company first came—went through your hands at the mill? A They did not come through my hands first, no. They did for a while.

Q Whose hands did they reach? A The foreman or secretary of the firm, or, later on, Mr. Otto.

Q Wouldn't every order of direct sales of Kaltenbach & Stephens go through your hands? A Eventually it would come to me, yes, sir; in the course of the day.

40 Q Wouldn't the order directly go to you? A No, it would not.

Q Whose department would the order be left in? A You said it came direct to me. You mean by mail, which was directed to me?

William N. Heitman, cross.

Q In any way. A All the mail was opened by the secretary of the firm or foreman or Mr. Otto—Mr. Otto had charge of that towards the end—and he would classify it according to the different departments as to where the orders—letter or order—whatever it might be, was to go, and from there I got it.

Q Wouldn't your department have a record of every sale made by the company? A Why, certainly. 10

Q That was part of your duties, wasn't it? A Yes, sir; it was part of the duties that I installed there, not by any instruction from the firm.

Q That is what you did? A I did myself; yes, sir.

Q So that all these sales, amounting to over a million and a half dollars, in some way went through your hands, didn't they? A They all went through my hands.

Q That was irrespective of who procured the sale? A Exactly.

Q That was part of your duties as head of the merchandise department? A Yes, sir. 20

Q I think you testified to a note having been presented to you by Mr. Otto. What do you mean by a note? A What do I mean by a note? Why, there was a note written there, printed note filled in, dated October 11th, \$250 to be paid at the Manufacturers Bank January 2nd, 1919.

Q To whose order was the note drawn? A Charles Kaltenbach.

RECESS.

30

Q (Last question and answer read.) Individually? A His name was marked on the note, yes, sir; I did not sign it.

Q Now, Mr. Heitman, did you notice Mr. Meade in the room when you had this conversation with Mr. Kaltenbach about your resignation? A Yes, sir.

Q Mr. Heitman, do you recall that in your testimony yesterday you stated that you were summarily discharged by Mr. Kaltenbach without notice? A I was discharged without notice whatsoever.

Q Now, how do you reconcile that with your testimony this morning that your resignation was accepted by Mr. Kaltenbach in the early part of October, 1918? A Mr. Kaltenbach accepted my resignation for December 31st, and that was definitely said at the time. 40

William N. Heitman, cross.

Q How do you square that with the statement in your testimony yesterday that on the 11th of October you were summarily discharged without notice? A I was discharged by Kaltenbach & Stephens October 11th, but I offered my resignation on December 31st.

10 Q Then you had notice of it previously? A I had notice?

Q Yes. A I thought I was going to be in their employ until December 31st, but that didn't have anything to do with my discharge October 11th.

Q But you did have notice of the fact that your employment would cease with Kaltenbach & Stephens? A On December 31st.

Q In October, 1918, you had that notice? A In the early part of October I had an understanding with Mr. Charles Kaltenbach. That is, I had his acceptance of my resignation on December 31st of the year 1918.

20 Q Now, in your examination this morning you said—your first statement was that your resignation was accepted. A It was accepted.

Q Then later on you said it was to take effect December 31st, 1918. Now, is that later statement an afterthought? A Why, certainly not. He accepted my resignation on December 31st.

Q Now, did he accept it on that day? A He did.

Q On December 31st, 1918? A He accepted it the early part of October for December 31st.

30 Q So it was before you were actually out of the employ of the company that you made this statement that your resignation was to take effect as of December 31st, 1918? A I did.

Q You are positive that December 31st, 1918, was part of your resignation? A It certainly was.

Q You heard the testimony of Mr. Meade and Mr. Kaltenbach; you think that they are mistaken? A Why, they certainly are. If they are not mistaken it is wrong.

40 Q How was this resignation given to Mr. Kaltenbach? You speak of a resignation. Was it in writing? A It was given verbally; it was accepted verbally.

Q Will you repeat the conversation between you and Mr. Kaltenbach at the time you say your resignation was accepted? A Word for word?

Q Yes. A As near as I can remember—

William N. Heitman, re-direct—re-cross.

Q Without your own impression—what Mr. Kaltenbach said first? A Well, as near as I can remember, as I gave my testimony, we couldn't agree about my salary for 1919, and I was dissatisfied and I thought that these people didn't appreciate my services—

Q I am asking you to give me the conversation. You cannot remember the words; I want the substance of it, but I do not want impressions. A As we couldn't agree, I simply told him that I would leave their employ on December 31st. 10

Q What did he say? A He said, "All right, Heitman."

Re-direct examination.

Q You were formerly employed by Vietor & Achelis? A I was; yes, sir.

Q And you were taken from them by Kaltenbach & Stephens? A I was.

Q Now, what was your salary with Vietor & Achelis? A Well, I started in there \$180 a year. 20

Q What did you receive at the time you changed your employment from them to Kaltenbach & Stephens? A \$1,000.

Q \$1,000 for what period? A For a year.

Q And what was your arrangement with Kaltenbach & Stephens upon your employment? A Why, when the question of salary came up they wanted to know what I wanted and I told them \$1,300, and I was hired for \$1,300 a year.

Q And you changed your employment then to Kaltenbach & Stephens? A I did. 30

Q For \$1,300 a year? A For \$1,300 a year.

Q And your employment since that time—on what basis has it been? A It has always been figured for a year.

Re-cross examination.

Q Mr. Heitman, when did you leave Vietor & Achelis? A December 31st, 1911.

Q So that was eleven years before, or ten years before you left Kaltenbach & Stephens—1907, did you say? A No, sir; 40

Q Seven years? A Seven years. That was the only concern I ever worked for.

Q Of course, it is true that your salary with Kaltenbach & Stephens was raised to the amount that you received when

Charles E. Kaltenbach, direct—cross.

you left them in June or July, 1917, is it not? A I did receive an increase in salary in June as per promise made me.

Q Was it June, 1917? A Yes, sir; June, 1917.

By the Court.

10 Q Just a minute. You went with Kaltenbach & Stephens when they were partners? A Yes, sir; when I went with them.

Q Then after they were incorporated what, if any, agreement did you have with the corporation as to your employment?

A Nothing was said at all. They simply took hold of the same help they had before that, with possibly some changes.

Q Nothing said at all? A Nothing said at all.

Q And your payments were made bi-weekly? A Every two weeks.

Q Which was \$25. A Yes, sir; all the employees were paid the same way in the factory, and in the office, too.

20

PLAINTIFF RESTS.

CHARLES KALTENBACH, recalled in rebuttal.

Direct examination by Mr. Wolber.

Q Mr. Kaltenbach, you heard the statement of Mr. Heitman, that about the first of October, 1918, he submitted to you his resignation to take effect as of December 31st, 1918, did you?

A I heard it.

30 Q You also heard him say that you accepted that resignation? A I heard it.

Q What, if anything, have you to say as to that? A That is absolutely not so. No date was mentioned. The only thing that he said was that he was going to leave. No time specified. I didn't know if he meant that day or the next or the following week or when it was. There was nothing mentioned about the date.

Cross examination by Mr. Bostwick.

40 Q Did you ask Mr. Heitman when he was going to leave? A I did not.

Q Weren't you interested? A No.

Q You had nobody to take his place, did you? A No, I did not.

Q You could have put Mr. Neal in, I suppose? A I would not—I didn't know anything about Mr. Neal at the time.

Charles E. Kaltenbach, cross.

Q You were not interested when he left? A I was interested, yes, sir.

Q Didn't care when he left? A I was naturally interested.

Q You didn't care enough to ask him when he was going to leave? A He made the statement. It was up to him to leave it if he felt so inclined.

10

Q You had every reason to expect he was going to leave you on that day? A And I immediately tried to find someone to take his place.

Q Did you plan then to tell him on October 11th that he was dismissed? A I didn't make any plan except to find somebody to take his place.

Q But you were willing that he should quit on that day, leave your merchandise department untaken care of? A That was up to him. I couldn't hold him.

Q Didn't ask him to stay a few weeks? A No.

20

Q That is right in the height of your busy season, isn't it? A It is.

Q There were several men important in that organization that were away ill, weren't there, at that time? A There were, and I had my hands full.

Q You are satisfied that he said he was going to leave immediately? A No; I didn't say. He said he was going to quit.

Q Didn't say when he was going to quit? A No, didn't mention the day.

30

Q Do you know what words he used? A He either said—I am not sure whether he said he was going to get another job or he was going to quit. My impression was that he was going to quit.

Q Well, he may have said, "I will have to make some arrangements"? A No; he didn't say that.

Q You expected he would take some time to do that? A I found out subsequently he was inquiring for a position before October 1st.

Q From whom did you find that out? A I got that first information a few days later from one of our customers asking if Heitman was going to leave because he was asking—he was trying to get a position with one of our competitors.

40

Q Who was it? A Mr. Wallace Jacobson.

William N. Heitman, direct.

Q Did he tell you when Mr. Heitman planned to go with Wallace Jacobson? A No.

Q Did he tell you he had a vacancy for Mr. Heitman? A It wasn't with Mr. Jacobson. Somebody asked Mr. Jacobson why Heitman was leaving, and Jacobson asked me.

10 *The Court.* That was before he left you?

Witness. That was before the eleventh, but after the first conversation.

Q Just exactly what was your information? A Well, simply that some concerned had asked Wallace Jacobson what he knew about Heitman and why he was leaving, and Wallace Jacobson thought he would try to find out directly from me what the situation is, or was.

20 Q Was there anything said about when Mr. Heitman was leaving? A No.

Q Didn't you assume it would be at the end of this period of employment? A There wasn't any period of employment.

Q There was no period of employment? A Absolutely not. He was a free man to go or stay as long as he liked, unless he was discharged.

DEFENDANT RESTS.

WILLIAM N. HEITMAN, recalled in surrebuttal.

30 *Direct examination* by Mr. Bostwick.

Q You have just heard the testimony of Mr. Kaltenbach with reference to the suggestion that you had applied to Wallace Jacobson for employment before the day that you were discharged. What have you to say about that? A I never applied—

Mr. Wolber. I didn't understand that that was the testimony. That wasn't what Mr. Kaltenbach just said.

Mr. Bostwick. I may have misunderstood it.

40 *The Court.* Yes, that wasn't what he said.

Q What have you to say, Mr. Heitman, about the testimony of Mr. Kaltenbach with reference to Wallace Jacobson? A Well, as he stated, I did not go to ask for any job of Wallace Jacobson. I did, after I told Mr. Kaltenbach I was going to leave

William N. Heitman, direct.

on December 31st—I made provisions—that is, I made overtures to get another position after the first of the year and I saw two people—I saw two concerns.

Mr. Wolber. I object and ask that the latter portion of the answer be stricken out as not responsive.

The Court. Confine yourself to Jacobson on this question. 10

Witness. I did not apply, as I said, to Mr. Jacobson for a position.

The Court. He did not say he did. He said that he had obtained information through Mr. Jacobson that you had made some application to somebody for a position.

Witness. Yes, sir; I said I saw two people.

Q You heard Mr. Kaltenbach's denial that you named any day when you were going to leave at the time when you told him you were going to leave? A I did. 20

Q What have you to say about that? A Why, I positively did tell him that.

Q You are a married man? A I am.

Q With a family? A Yes, sir.

Q Any independent means? A Absolutely none.

Q You were earning \$135 every two weeks at this place?

A Yes, sir.

Mr. Wolber. I object. That is not proper rebuttal. 30

The Court. Objection sustained.

PLAINTIFF RESTS.

*Charge to Jury.***CHARGE.**

The Court charges the jury as follows:

MOUNTAIN, J.

10 Gentlemen of the jury: The plaintiff brought this action in this court to recover damages against the defendant. The theory of his action is based on two contracts, one of which is his salary contract and the other what I might call his bonus contract. The first thing that you should consider in your deliberations, in my opinion, is the proof offered of the two contracts, because he is suing for the breach of both of them.

20 Without attempting to give a technical definition of a contract, it ordinarily involves a meeting of minds. In contracts of employment you usually expect to find a consideration given by the employer to the employee, and perhaps some term of employment. Sometimes the term of service is purposely omitted. Sometimes the salary for a definite period is indicated, but that does not necessarily indicate the term of the contract; that merely indicates the approximate value of the services for that term. When you consider this salary contract you have a right to consider those angles of it and the testimony of all the witnesses on that subject.

30 It appears that the plaintiff was in the employ of a partnership, consisting, I think, of Kaltenbach & Stephens. Subsequently that was incorporated, and his employment was continued. What contract was made by this new corporation with the plaintiff? Because it was a distinct and different entity from the partnership. What were the terms of the contract? How long did the contract run? The plaintiff claims that he had a yearly contract, and he indicates the amount of salary that he obtained a year. He said that he considered at the time of this meeting, which, I think, took place in 1917, that his contract expired on the 31st day of December of that year. On the question of this salary contract, the defendant does not

40 deny that there was a contract (because, of course, if there had not been a contract, Heitman would not have been in their employ), but does deny that there was a term in the contract. The defendant admits that it paid him a certain amount of money, but indicates that its policy to hire from a given period

Charge to Jury.

to a given period was otherwise than as has been stated by the plaintiff.

You see, the first question for you to decide is whether there was a contract or not, and if there was, what it was? Then, I should say, in the ordinary progression of your deliberations, you would go to the second contract, what I would call the bonus contract. Did such a contract exist? If it did exist, what were the terms of that contract and what did the respective parties bind themselves to do?

10

The plaintiff claims that he was present at a meeting of certain of the salesmen of the defendant corporation, which, I think, was in November, 1917, and that at that meeting the corporation, by its authorized officers, made an offer to the salesmen and that that offer was subsequently accepted by the salesmen and himself; because if he did not accept it after it was offered of course, there would be no contract. The plaintiff claims, moreover, that Mr. Kaltenbach, the gentleman who was on the stand, who, it appears, was the president of the corporation, subsequently to that meeting said that the plaintiff was to share in the bonus. That is denied by the defendant, or by Mr. Kaltenbach. Consequently that is a question of veracity to be determined by you.

20

The defendant takes the position, as I understand it, that the plaintiff was not a salesman, but that he was engaged for another purpose, and that the bonus contract applied only to salesmen.

30

There is some indication in the testimony of the fact that the defendant admitted that, if the salesmen were satisfied to have the plaintiff share in the bonus, the defendant would be satisfied. Was that done? That is a question for you to determine. In other words, you have got to fix the contract between the plaintiff and the defendant, not between the plaintiff and the salesmen, because the salesmen are not parties to this action—it must be between the plaintiff and the defendant—and then you must find a breach of the contract in order to enable the plaintiff to recover.

40

I must warn you that my narration of what I understand to be the facts must not be taken by you as facts, because I am not a witness in this case, but that is my best recollection. You must rely on the testimony as you recollect it. On the law

Charge to Jury.

I am supposed to be the last word—that is, until the upper courts pass on it—and on the facts you are the last word.

10 In this case, as in all other cases of this kind, the burden of proof is on the plaintiff, who must prove his case by the greater weight of evidence. The plaintiff in this case must satisfy you by a preponderance of evidence that he is entitled to your verdict before you can find in his favor.

20 Assuming that you find that there was a contract of employment, I am going to read the law of this State which would be applicable to this particular case. It has been held that an employee who is wrongfully discharged before the end of the term fixed by the contract of employment is entitled to recover from his employer as damages for such wrongful discharge the amount which he would have earned if he had been permitted to continue his service until the expiration of the time during which the contract had to run, after deducting such sum as he might reasonably earn between the time of his discharge and the end of the term fixed by the contract.

30 As to the latter part of that quotation I shall revert for a moment to the testimony of the plaintiff, who said that he had not been able from the time he left the employment of the defendant until the first day of the following January to find any employment, although he had made diligent effort to do so. That is a question for you to determine. As I recollect it, there is no contradiction of that. I think that period was about eleven weeks, and during that eleven weeks he was by law bound to make an effort to find another position. He could not just stay at home and let the damages pile up, or try to make them as much as he could. He says he tried, and he gave us the names of places where he went to obtain employment, and he claims, on the theory that I have indicated, that he should recover the amount of his salary for that period, provided you find in accordance with the charge as I have suggested. Assuming that you find that the plaintiff is entitled to any amount, that is the amount that he would be entitled to on the salary claim.

40 I am not going into the detail of the bonus contract. If that contract was made, if you find that the plaintiff has sustained the burden of proof, he would be entitled to an amount which I have not calculated, although I know about what it was, but which has been outlined in a stipulation, which you will have

Charge to Jury.

in the jury room, which sets forth all the figures. He is also entitled to recover interest at six per cent. on the amount that you decide should be paid him from the first day of January, 1919.

Another point before I take up the requests to charge. The defendant in this matter contends that the plaintiff left the employ of the defendant, or, to use the words of Mr. Kaltenbach, "The plaintiff quit." One part of the testimony of the plaintiff himself was to the effect that he resigned. Of course, there is other illuminating testimony from other witnesses as to just what took place at that time. 10

If there was a yearly contract between the plaintiff and the defendant in existence and the plaintiff resigned, he could not come into a court of law and recover anything, and, naturally, if he did that, he could not recover the bonus to which he would be entitled from the defendant from the date of his resignation, if you find that to be the fact. 20

I have had several requests to charge given me which are so comprehensive that, without going into my own charge as to each, I shall read them and comment on them as I take them up.

I am asked by the plaintiff to charge that "The mere fact that the number of the defendant's witnesses exceeds the number of witnesses for the plaintiff does not in itself signify a preponderance of evidence, and if you find the truth respecting the material facts to rest with the plaintiff he is entitled to your verdict." My only qualification of that would be the usual qualification, saying that, of course, you must find that the plaintiff has proven his case by the greater weight of evidence. 30

Second. "The question of the plaintiff's efficiency in his employment is not in issue. The sole defense, in addition to a general denial of plaintiff's case, is that plaintiff left his employment voluntarily."

I am asked by the defendant to charge as follows:

First. "If you find that the plaintiff had no contract of employment from January 2, 1918, to the end of the year 1918 with the defendant company, then he cannot recover anything as to salary from the time he left the employment of the defendant, as he is not entitled to any notice of the termination of his employment." 40

Charge to Jury.

Second. "Whether the plaintiff had a contract for a year or not, if he notified the defendant that he would quit, then he can recover nothing from the time he left the employment of the defendant." I so charge.

10 Third. "If you find that the plaintiff had an agreement with the salesmen, and not the defendant company, that the salesmen would pay him, the said plaintiff, a share of the bonus which the company was to distribute among the salesmen, he can recover no part of the bonus from the company, even though the defendant company assented to such an agreement between Heitman and the salesmen." He naturally could not, because, as I said, if the plaintiff made a contract with the salesmen and not with the defendant, he could not hold the defendant for a breach of the contract.

20 Fourth. "If you find that the bonus was a gratuitous offer upon the part of the defendant company, then there can be no recovery by the plaintiff against the defendant for any portion of the bonus." Well, I shall qualify that by stating that if that was a *bona fide* offer made to the plaintiff with the expectation that it would induce the plaintiff to remain in the employ of the defendant, or was an offer of additional consideration, the fourth request to charge would not be proper, because if the plaintiff accepted a *bona fide* offer, that made a contract. That is a little ambiguous, in my opinion.

30 I shall charge the fifth request differently from the manner in which it has been handed to me.

I do not remember the names of the salesmen, and I do not know whom you mean by "the salesmen." There may be some question about that.

Mr. Wolber. I mean all the salesmen.

The Court. You mean all the salesmen exclusive of the plaintiff, or, rather, you mean all the gentlemen who were present at the first meeting exclusive of the plaintiff.

Mr. Wolber. Yes.

40 *The Court.* As to this request, when I say "salesmen" I do not include the plaintiff in this case. "If you find that the agreement between the salesmen and the defendant company was to distribute the bonus in a manner which the company considered

Charge to Jury.

equitable and just, then the plaintiff can recover no part of any bonus agreed to be paid."

Sixth. "In assessing damages for the breach of the contract of employment in this case, if any, punitive damages cannot be awarded by you."

Seventh. "The measure of damages, if the jury find for the plaintiff in this case, must be the balance of the salary of Heitman for the year 1918, provided you find he had a contract with the defendant for that year, together with his share of the bonus, if you find that he was to participate in the same." 10

Eighth. "That if the jury find for the plaintiff, it cannot consider any share of Heitman in an enlarged bonus figured on sales of the company which might have been effected by Heitman had he continued in its employ to the end of the year 1918, in addition to the sales of the company which were actually effected." I do not know that there was any testimony upon which you could found any such thing. That last paragraph I refuse to charge you, because I do not think there is any testimony upon which that could be based. If there were, that request would be all right. 20

Ninth. "That the letter from Oberndoerfer to Heitman is in no wise conclusive of a contract between Heitman and the company, either of a hiring for one year or a promise of the company to pay Heitman a portion of the bonus, or both." Of course, that letter was not between the company and the plaintiff, but between one of the salesmen and the plaintiff. 30

I refuse to charge the tenth request.

I charge the eleventh request: "If you find that the plaintiff was not included in the offer of the company to the salesmen at the November meeting, then you must find for the defendant."

(The jury retires.)

Mr. Bostwick. If your Honor please, I want to call your Honor's attention to this: I wish to except to your Honor's charge that, if the plaintiff resigned or said he was going to quit, he could not recover. I think the jury might possibly get the idea that if he resigned, 40

Charge to Jury.

even if he resigned to take effect December 31st, he could not recover. It was not qualified in the charge.

The Court. That is true; I ought to qualify that. I shall call the jury back.

10 *Mr. Bostwick.* I except to the charging of the fifth request as requested by the defendant.

Exception noted as ground of appeal.

20 *Mr. Wolber.* I want an exception, if your Honor please, to that portion of your Honor's charge in which you instructed the jury that any contract between the corporation and the plaintiff at the time Kaltenbach & Stephens was incorporated could be used by them in arriving at any determination of the case, because the plaintiff claims that he has proved that he was offered a contract in November, and therefore any previous arrangement with the company at the time of its incorporation did not matter.

Exception noted as ground of appeal.

30 *Mr. Wolber.* I want to take a further exception to that portion of your Honor's charge in which you informed the jury that all the figures were contained in the stipulation which would go into the jury room, on the ground that the said stipulation does not contain all the figures of the house accounts, the Wellwood or Edelhoff & Reilly accounts, testified to by the defendant's witnesses.

The Court. I thought that was all in there.

Mr. Wolber. No, it is not.

The Court. I shall call the jury back.

(By direction of the Court the jury returns into court.)

The Court. Gentlemen of the jury: My attention has been called to two errors that I made, or perhaps to two omissions.

40 If you find that the plaintiff resigned, but that his resignation was to take effect December 31, 1918, and that he was before that time discharged by the defendant, then, of course, he is entitled to recover. When I used the work "resigned" I meant resigned on the day that he left, not December 31, 1918. If he notified the

Plaintiff's Requests and Exceptions.

defendant that he was going to resign at a future date, and then in the meantime was discharged, he is entitled to recover.

I further direct your attention to the fact that I indicated to you that the figures in this case were all on a sheet of paper. I am informed by counsel that there is certain testimony which was given to you by the witnesses which is not included on that sheet; namely, the sales to Wellwood and Edelhoff & Reilly, the house accounts, the salesmen's expenses and the commissions paid at fixed rates. You will have to rely on your memory for those.

10

(The jury again retires.)

Mr. Wolber. I except to that portion of the charge which says that if the plaintiff resigned to take effect December 31, 1918, he is entitled to recover, on the ground that such instruction admits of a finality on all the evidence in the case.

20

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS AND EXCEPTIONS.

Plaintiff's counsel requests the Court to charge the jury as follows:

(1) The mere fact that the number of the defendant's witnesses exceeds the number of witnesses for the plaintiff does not in itself signify a preponderance of evidence, and if you find the truth respecting the material facts to rest with the plaintiff, he is entitled to your verdict.

30

(Charged with qualification.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(2) The question of the plaintiff's efficiency in his employment is not in issue. The sole defense, in addition to a general denial of plaintiff's case, is that plaintiff left his employment voluntarily.

40

(Charged.)

*Defendant's Requests and Exceptions.***DEFENDANT'S REQUESTS AND EXCEPTIONS.**

Defendant's counsel requests the Court to charge the jury as follows:

10 (1) If you find that the plaintiff had no contract of employment from January 2, 1918, to the end of the year 1918 with the defendant company, then he cannot recover anything as salary from the time he left the employment of the defendant, as he is not entitled to any notice of the termination of his employment.

(Charged.)

20 (2) Whether the plaintiff had a contract for a year or not, if he notified the defendant that he would quit, then he can recover nothing from the time he left the employment of the defendant.

(Charged.)

(3) If you find that the plaintiff had an agreement with the salesmen, and not the defendant company, that the salesmen would pay him, the said plaintiff, a share of the bonus which the company was to distribute among the salesmen, he can recover no part of the bonus from the company, even though the defendant company assented to such an arrangement between Heitman and the salesmen.

(Charged.)

30 (4) If you find that the bonus was a gratuitous offer upon the part of the defendant company, then there can be no recovery by the plaintiff against the defendant for any portion of the bonus.

(Charged with qualification.)

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

40 (5) If you find that the agreement between the salesmen and the defendant company was to distribute the bonus in a manner which the company considered equitable and just, then the plaintiff can recover no part of any bonus agreed to be paid.

(Charged as modified.)

Defendant's Requests and Exceptions.

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(6) In assessing damages for the breach of the contract of employment in this case, if any, punitive damages cannot be awarded by you.

10

(Charged.)

(7) The measure of damages, if the jury find for the plaintiff in this case, must be the balance of the salary of Heitman for the year 1918, provided you find he had a contract with the defendant for that year, together with his share of the bonus, if you find he was to participate in the same.

(Charged.)

(8) That if the jury find for the plaintiff, it cannot consider any share of Heitman in an enlarged bonus figured on sales of the company which might have been effected by Heitman had he continued in its employ to the end of the year 1918, in addition to the sales of the company which were actually effected.

20

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(9) That the letter from Oberndoerfer to Heitman is in no wise conclusive of a contract between Heitman and the company, either of a hiring for one year or a promise of the company to pay Heitman a portion of the bonus, or both.

30

(Charged.)

(10) If the defendant company's offer was one that was to be accepted by the salesmen at a later meeting to be called, then the plaintiff cannot recover in this action unless there is evidence in the case that he accepted the offer at such later meeting.

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(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Verdict—Exhibit P. 1.

(11) If you find that the plaintiff was not included in the offer of the company to the salesman at the November meeting, then you must find for the defendant.

(Charged.)

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VERDICT.

The jury returned a verdict in favor of plaintiff, William N. Heitman, in the sum of \$2,665.60.

EXHIBIT P. 1.

20 Phone, Madison Square 9600

Allentown, Pa.

Newark, N. J.

KALTENBACH & STEPHENS, INC.

Manufacturers

NARROW SILK RIBBON FABRICS

38 East 25th Street

New York, N. Y., March 4th, 1918.

MR. N. HEITMAN,

Dear Sir:—

30

As per request of Mr. Ryan beg to inform you, that it is understood, that you are to receive 10% of the Bonus, as per conversation we had on March 1st, 1918.

Yours very truly,

B. OBERNDOERFER.

Satisfactory to

Mr. E. J. Kaltenbach, Mr. Chas. Kaltenbach, March 5, 1918.

Mr. J. B. Stephens, March 6.

Mr. Frank Ruckel, March 6.

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Exhibit D. 1.

SUMMARY.

	K & S Direct Sales	\$1,670,692.15
	Store Sales	610,767.32
	J. C. Welwood Consigned Sales	165,310.39
10		<hr/> \$2,446,769.86

Dated May 20th, 1919.

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

WOLBER & BLAKE,
Attorneys for Defendant.

20

EXHIBIT D. 1.

55-8

No. 174

Newark, N. J. Apr 30 1918

THE MANUFACTURERS NATIONAL BANK

Pay to the Order of

Wm Heitman

Two hundred and fifty/00

Dollars

\$250.00

CHAS. E. KALTENBACH

30

Endorsed: Wm. Heitman.

Paid.

40

Reasons.

REASONS.

Filed July 20, 1919.

New Jersey Supreme Court

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ESSEX COUNTY.

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, Inc., a corporation,

Defendant.

Action at Law.

On Rule to Show Cause.

Reasons for New Trial.

20

The following are the reasons upon which the defendant rests a motion for a new trial of the above-stated cause:

1. The judge who tried said cause at the circuit of said trial excluded legal evidence offered by the defendant, and which would have been beneficial to the defendant.

2. The said judge at said trial admitted illegal evidence against the objection and to the prejudice of the defendant.

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3. The charge of said judge at said trial was contrary to law.

4. The verdict of the jury at said trial was contrary to the charge of said judge.

5. The verdict of the jury at said trial was contrary to the weight of evidence.

6. The verdict of the jury at said trial was contrary to the law.

7. The damages found by the verdict of the jury were excessive.

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8. The damages found by the verdict of the jury at said trial were based upon an error in the assessment of the amount of recovery, said assessment being too large under any evidence in the case.

Reasons.

9. The said cause should have been decided in favor of the defendant.

Dated July 18th, 1919.

WOLBER & BLAKE,
Attorneys of Defendant.

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Service of the within reasons is hereby acknowledged this 19th day of July, A. D. 1919.

HEINE, BOSTWICK & BRADNER,
Attorneys of Plaintiff.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed March 2, 1920.

NEW JERSEY SUPREME COURT.

No. 47, November Term, 1919.

10

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, Inc.,

Defendants.

*On Rule to
Show Cause.*

Submitted November Term, 1919; decided March 2, 1920.

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Before Gummere, Chief Justice, and Justices Minturn and Black.

For plaintiff, Messrs. Heine, Bostwick & Bradner.

For defendant, Messrs. Wolber & Blake.

Per curiam.

The action in this case was instituted to recover damages arising from the breach of a contract of employment for the year 1918. The theory of the action is based on two contracts, one of which may be called a salary contract and the other a bonus contract. The trial resulted in a verdict for the plaintiff for \$2,665.60. The defendant obtained the rule to show cause and sets down nine reasons for a new trial, which are argued by the plaintiff under two heads in the brief: First, the verdict is contrary to the weight of evidence, we cannot disturb the verdict on this ground; second, the damages awarded by the jury are excessive, being too large under any evidence in the record, that \$721.40 should be deducted from the verdict of \$2,665.60, equals \$1,994.20. The item of \$721.40 is composed of \$471.40 excessive damages and \$250 which the plaintiff testified was advanced to him on account of the bonus. We think these items should be subtracted from the amount of the verdict. If the plaintiff will remit the excess, the sum of \$721.40, the rule to show cause will be discharged, otherwise it will be made absolute.

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Notice of Acceptance of Reduced Judgment.

NOTICE OF ACCEPTANCE OF REDUCED JUDGMENT.

Filed March 8, 1920.

*To Wolber & Blake, Esqs., Attorneys for Defendant, Firemen's
Building, Newark, N. J.:*

10 SIRS:

Take notice that the plaintiff hereby consents to the reduction of the verdict obtained in his favor in the above-entitled action to the sum of \$1,944.20.

Respectfully yours,

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

Dated March 4, 1920.

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Rule Reducing Judgment.

**RULE REDUCING JUDGMENT AND DISCHARGING RULE
TO SHOW CAUSE.**

Entered March 9, 1920.

An opinion having been entered herein on March 2, 1920, ordering that if the plaintiff would remit the sum of \$721.40, reducing the verdict rendered in this cause from \$2,665.60 to \$1,944.20, the rule to show cause heretofore entered herein why the verdict herein should not be set aside and a new trial granted, would be discharged and the motion to set aside the verdict denied and the plaintiff by his attorneys hereby consenting that the said judgment be reduced from \$2,665.60 to \$1,994.20 as required by said rule; 10

It is hereby on this ninth day of March, 1920, on motion of Heine, Bostwick & Bradner, attorneys of plaintiff, 20

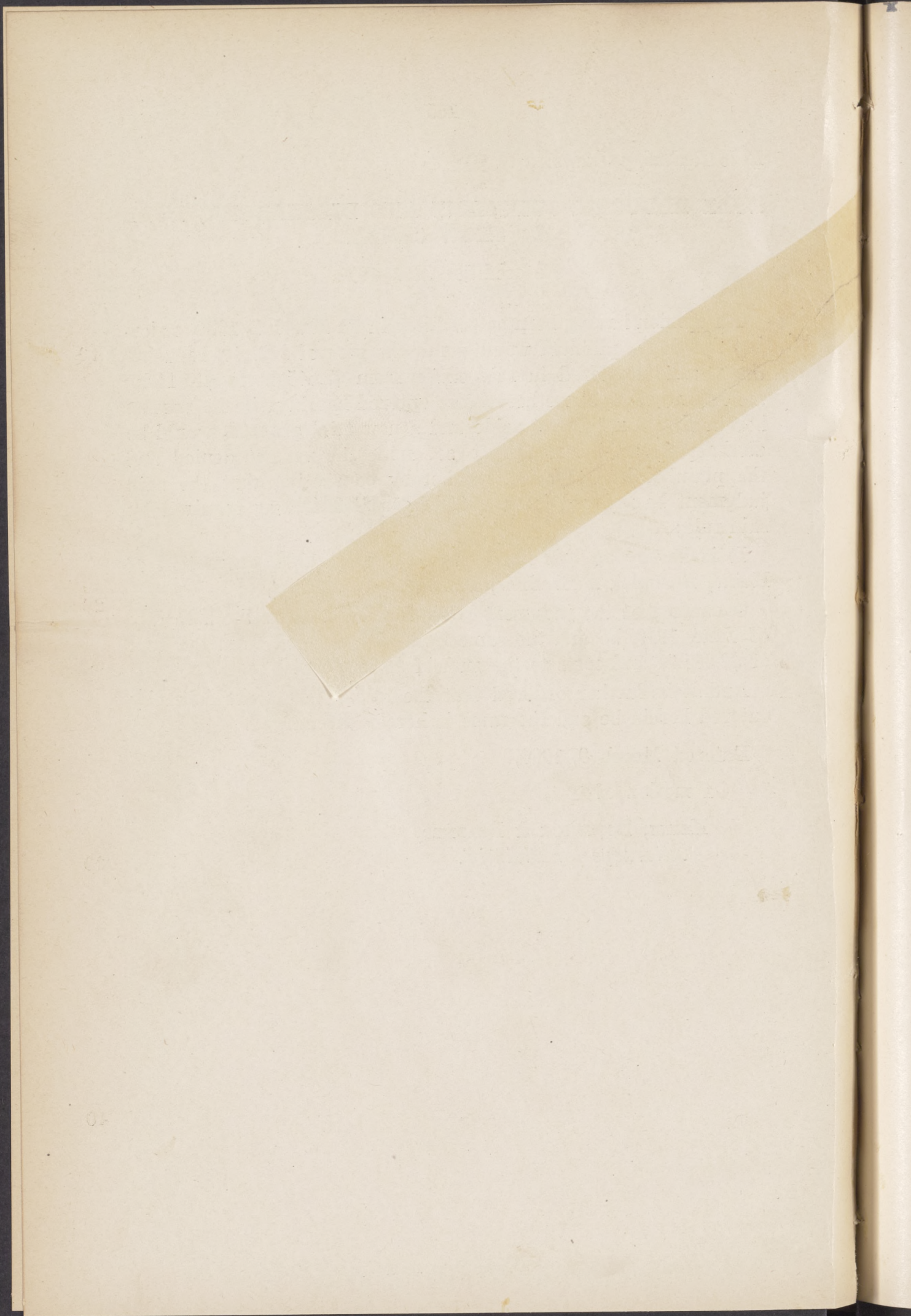
ORDERED that the judgment heretofore entered on the 20th day of June, 1919, be and the same is hereby reduced from the sum of \$2,665.60 and costs to the sum of \$1,944.20 and costs.

And it is further ordered that the rule to show cause hereby entered herein be and the same is hereby discharged.

Entered March 9, 1920,

On motion of

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff. 30



New Jersey Court of Errors and Appeals

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, INC., a corpora-
tion,

Defendant.

Action at Law.

On Appeal

from
Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

This action was instituted to recover damages arising from the breach of a contract of employment for the year 1918. The main facts may be outlined as follows:

The plaintiff had been employed by the defendant corporation from its incorporation and by its predecessor, a partnership, for a number of years, and always by the year. (Case, p. 143, l. 15). He was manager of the merchandise department, and among other things had general supervision over what were known as the house accounts. Defendants are manufacturers of narrow silk ribbons. A considerable portion of the output was sold by salesmen having designated territories, and the plaintiff had charge of all accounts (house accounts) which had not been specifically assigned to some salesman and on which no commissions were paid, and these accounts constituted a very large part of the total sales of the company's goods. (Case, p. 16, l. 22.) In June, 1917, plaintiff's salary was increased from \$2,600 per year to \$3,510 per year, and he was paid bi-weekly \$135.00. In November, 1917, the officers of the defendant company held a meeting at the factory in Newark, which was attended by the officers of the company, the New York salesmen and the plaintiff. (Case, p. 37.)

The officers there stated that those present would be paid for their services in 1918 on a different basis; that is to say, instead of paying to each salesman the commissions actually earned upon sales made by him or in his territory, the house accounts (viz., those accounts that should be sold independently of the salesmen, and over which plaintiff exercised supervision) would be added to the total amount of sales made by salesmen in their

respective territories, and a bonus declared amounting to 2% of the total sales so arrived at, in excess of \$1,500,000, said bonus to be distributed at the end of the year 1918, and as the officers of the company should determine. (Case, p. 38, l. 17.)

Plaintiff desired to ascertain what portion of the bonus would be paid to him, and accordingly inquired of the company's officers, who told him that the defendant company would be satisfied to pay him such portion as the New York salesmen might indicate would be satisfactory to them, and that he should see these salesmen. Plaintiff did so, and received a letter from them stating that it was understood that plaintiff should receive 10% of the bonus. (Case, p. 39, l. 23, and Case, p. 158, Ex. P.1.) Plaintiff submitted this letter to the officers of the defendant company, all of whom thereupon signified their acquiescence. (Case, p. 40, l. 40.)

On October 11, 1918, one of defendant's officers summarily dismissed the plaintiff from his employment, this action constituting the breach upon which this suit is based. (Case, p. 45, l. 15.)

It is desired to comment upon the following paragraph in defendant's brief:

"The defense to the action was a denial that the plaintiff had a contract with the defendant company for the year 1918, and a denial that the plaintiff was to share in the bonus to be given by the company, and as a further defense that the plaintiff on October 1, 1918, demanded an increased compensation for the year 1919, which the defendant refused to consider at the time; whereupon the plaintiff gave notice that he would seek other employment, which was consented to by the defendant."

Reference to the defendant's answer as filed (case, p. 9, l. 20) will show that the defendant, answering, said:

"1. It denies the truth of the matters contained in the complaint."

It is only by this general denial that the issue as to plaintiff's contract was joined. The only specific defense raised by the answer was that plaintiff voluntarily left his employment. (Case, p. 9, l. 40.) To this specific defense plaintiff replied (case, p. 10) and defendant rejoined (case, p. 11).

The trial resulted in a judgment for the plaintiff in the sum of two thousand six hundred sixty-five dollars and sixty cents (\$2,665.60) on June 17, 1919. The defendant obtained a rule to

show cause why the verdict should not be set aside on the ground that it was excessive and contrary to the weight of the evidence; and the Supreme Court reduced the judgment by the sum of seven hundred twenty-one dollars and forty cents (\$721.40), which sum was made up of two hundred and fifty dollars (\$250.00), which the plaintiff, on his own direct testimony, stated had been advanced to him on account of the bonus, and four hundred and seventy-one dollars and forty cents (\$471.40) excessive damages. (See opinion of the Supreme Court, case, p. 163.)

ANSWER TO POINT I.

The circumstances, under which the letter (Exhibit P.1) was introduced in evidence at the trial are fully set forth in the testimony of the plaintiff (case, p. 40, l. 10, to p. 43, l. 40), showing that the brief of the defendant-appellant wholly misapprehends the nature and character of the testimony. The defendant-appellant's brief bases its argument upon the theory that this letter (Exhibit P.1) was offered in evidence because it was signed by one who was in the employ of defendant, which is not so. It was offered because the letter itself and its contents were shown to the responsible officers of the company, by the plaintiff, and acquiesced in by such officers. It binds the defendant not because it was signed by one of defendant's employee's, but because it was acquiesced in by responsible officers of the defendant company. If it had been an unsigned memorandum and had been shown to these officers and they had acquiesced, it would have had quite as much value as evidence.

This distinction was pointed out to defendant-appellant's attorney at the trial immediately after the Court had admitted the letter (Exhibit P.1) above referred to, when plaintiff's attorney offered in evidence a letter in carbon purporting to be a copy of a letter written by plaintiff to defendant's sales manager in New York City, replying to and confirming the letter (Exhibit P.1) and which the Court very properly refused to admit in evidence, upon the objection of defendant's counsel, the Court stating (case, p. 44, l. 20):

"I will sustain your objection. You must understand that the theory on which the previous letter was introduced was because the contents of that letter were accepted by the defendant. If it was not accepted the jury would not consider it." * * *

This particular phase of the testimony was carefully covered by the Court's charge to the jury, as requested by defendant (see case, p. 156, l. 23):

“(3) If you find that the plaintiff had an agreement with the salesmen, and not the defendant company, that the salesmen would pay him, the said plaintiff, a share of the bonus which the company was to distribute among the salesmen, he can recover no part of the bonus from the company, even though the defendant company assented to such an arrangement between Heitman and the salesmen.”

and also:

“(9) That the letter from Oberndoerfer to Heitman is in nowise conclusive of a contract between Heitman and the company, either of a hiring for one year or a promise of the company to pay Heitman a portion of the bonus, or both.”

The essence of this testimony lies in the fact that it formed the subject of a relevant conversation between plaintiff and the responsible officers of defendant company, and it was, therefore, clearly admissible.

Even if plaintiff had been obliged to rely upon this letter (Exhibit P.1) merely as an admission made by defendant company's employee on the theory that such employee had authority to bind the company, which, of course, plaintiff was not obliged to do, it would have been admissible in the light of plaintiff's testimony (case, p. 40, ll. 10 to 19) which we quote as follows:

“Q Who did you speak to about the share that you were to have of the bonus? A When?

Q At that time, when you found that you had increased responsibilities? A Mr. Charles Kaltenbach.

Q And what did he say? A He simply said that they were going to go and spend all the money and they didn't care where it went to, and if I wanted to make an arrangement, I should see the salesmen about it, and what they agreed on would be satisfactory to them.”

Mr. Charles Kaltenbach was secretary and general manager of the company at that time, and was spokesman for the officers at the meeting in November, 1917, which was attended by the other officers of the company.

Plaintiff says that he saw the salesmen, as suggested by Mr. Kaltenbach, the letter (Exhibit P.1) being the result. (See p. 40, ll. 20 to 40.)

In other words, Mr. Kaltenbach had told plaintiff that the company would be satisfied to pay to plaintiff such portion of the bonus as the salesmen might agree should be paid to him.

On the other hand, adopting the supposition that plaintiff was obliged to rely upon the letter itself as binding upon the company and supposing further that Oberndoerfer who signed it could not be regarded as having authority to bind the company, by virtue of Mr. Kaltenbach's statement to plaintiff, as above quoted, nevertheless, his actions in writing the letter were ratified by the officers of the company in conversations which took place when the letter in question was submitted to them by the plaintiff.

It is not necessary, however, to decide this question. The letter was offered, not because Oberndoerfer signed it, but because it was a memorandum by which the officers of the defendant company agreed to be bound, and we may add the jury believed the plaintiff's testimony.

ANSWER TO POINT II.

The defendant-appellant contends that the testimony of Mr. Otto as to how the actual figures on which the bonus for 1918 was figured was improperly excluded. The plaintiff-appellee's objection to this testimony (case, p. 29, l. 15) was based upon the fact that Mr. Graves, a former sales manager, and the plaintiff-appellee formerly head of the merchandise department, had both been discharged before the end of the year 1918 and that consequently the figures on which the bonus for that year was figured had no relevant bearing upon the question of the share or portion of the bonus to which plaintiff was entitled. That is to say, if defendant's counsel had laid a foundation showing that the bonus as figured for the year 1918 conformed to either the contract alleged by the plaintiff or that alleged by the defendant, the testimony that was excluded would have been admissible. In its form, as objected to, however, it was clearly irrelevant as it sought to scrutinize computations and arrangements which were not necessarily involved in the ascertainment of the amount of the bonus to be distributed under the terms of the contract.

Appellant's brief contends that the bonus was to be given on the total sales of the company less certain deductions and states that the purpose of the question asked of Mr. Otto was to show the amount of the sales less the deductions claimed by the defendants which would leave the net figure on which the bonus

was computed. If this was the purpose of the question it was unfortunately worded and moreover was repetitive for the witness had already given this information as to deductions in his testimony (case, p. 125, l. 30, to p. 126, l. 21) and the total amount of sales made were for the purposes of the trial stipulated (case, pp. 159 and 60). So that the witness Otto as well as the jury could very easily have made a computation based upon the figures already given. But the question as asked would not have brought that result necessarily. It might have produced a very different result, disregarding these figures or treating them in some manner not strictly in accordance with the contract. Defendant's brief on the rule to show cause relies upon the figures so given by the witness Otto, as follows:

“The total sales were stipulated as \$2,446,769.86. (Case, p. 159, Exhibit P. 2.)

Deductions which should have been made are as follows:

\$ 1,500,000.00	as above set forth.
165,310.39	Wellwood (Case, p. 125, l. 40).
6,506.42	Wellwood (Case, p. 126, l. 1).
84,291.60	Edelhoff & Reilly (Case, p. 126, l. 11).
614.52	Traveling Expenses.
7,156.85	Commission on fixed basis (Case, p. 88, l. 27).

\$ 1,763,879.78 Total deductions.

2,446,769.86 Total sales.

1,763,879.78 Deductions.

\$ 682,890.08

.02

\$ 13,657.80 Total bonus.”

Of course, if the question was repetitive and it was excluded erroneously, it was harmless error.

The real purpose of the question, as stated in appellant's brief was to show “completely the total amount of the bonus actually paid.” This we claim to be irrelevant because the plaintiff and Mr. Graves, formerly sales manager, who was admittedly a party to the bonus agreement and would have participated in the distribution of the bonus, had been discharged, making it necessary, possibly, to change the method of division of the bonus.

In other words, what the company actually paid as a bonus or how the bonus actually paid was figured is not relevant unless such bonus and such figures conformed to the terms of the contract either as claimed by the plaintiff or as claimed by the defendant.

We will point out in closing that appellant stated no grounds in taking exception to the original ruling of the Trial Court and that this point is raised as an afterthought and improperly.

ANSWER TO POINT III.

It is to be borne in mind that in charging the jury, as referred to under this point, the Court had in mind what had been said by him in his original charge upon the question of appellee's resignation, to which his attention had been called by the exception made by appellee's counsel as shown in case, page 153, line 49. In the original charge the Court had said (case, p. 151, ll. 15 to 20):

"If there was a yearly contract between the plaintiff and the defendant in existence and the plaintiff resigned, he could not come into a court of law and recover anything, and, naturally, if he did that, he could not recover the bonus to which he would be entitled from the defendant from the date of his resignation, if you find that to be the fact."

Appellee's counsel in excepting to this portion of the Court's charge, said (case, p. 153, l. 40):

"I wish to except to your Honor's charge that, if the plaintiff resigned or said he was going to quit, he could not recover. I think the jury might possibly get the idea that if he resigned, even if he resigned to take effect December 31st, he could not recover. It was not qualified in the charge.

The Court. That is true; I ought to qualify that. I shall call the jury back."

Subsequently, the jury was returned, and the Court thereupon addressed them as indicated in Point III of appellant's brief, with the important exception that the Court said (as will be seen on l. 42, p. 154), "when I *used* the word resigned," and not as quoted in appellant's brief, "when I *use* the word resigned." The Court here expressly referred in discussing the word "resigned," to what had been said by him about that word during his original charge, and the whole address is clearly indicative of the Court's intention to correct what he regarded as having

been errors in his original charge, or to supply what he regarded as omissions.

Appellant's complaint of error is based on the decision reported in the case of *Bliss v. Schaeffer*, 67 Law, p. 29. In that case the Court charged the jury, whereupon two requests to charge were handed up by the counsel of the plaintiff, and the Court then said:

"Plaintiff has handed me a request since I began to speak and I will look at it.

I think these two requests state the law, and, therefore, I will charge them.

First, if the driver could have seen the boy, by looking before turning the corner, and did not see him, then he is guilty of negligence."

This case is clearly distinguishable from the case at bar. The Court's direction in the *Bliss* case, as quoted, was not stated to be a correction of what had already been said, nor as supplying an omission, but was clearly, "selecting a single circumstance that bore on the question at issue, and presented it to the jury, as sufficient of itself to warrant a verdict for the plaintiff," and was "an isolated proposition, out of all setting with the rest of the charge." It made no express reference to what had already been said, but clearly purported to state the law, for the control of the jury.

In the case at bar the Court expressly referred to what had already been said and proceeded to modify it. We have no difficulty, upon reading the charge, in understanding that this was the Court's intention; and the jury, who had listened to the trial and to the charge, can not be presumed, when the Court expressly stated that he was supplying omissions in or completing his charge, to have understood that he was proceeding to substitute something for everything else that had been said, with the purpose to limit the scope of the jury's deliberation to the single question presented in this short paragraph.

There was another paragraph, wherein the Court announced his desire to correct his charge, which paragraph commences with the following words (case, p. 155, l. 3):

"I further direct your attention to the fact that I indicated to you," * * *

again reminding the jury that he was simply correcting and completing the charge already given. Surely, no jury would be presumed to have understood this language as being intended

to completely supersede what had already been said, considering the manner of its introduction and the absence of explicit instructions to that effect. If such a presumption could be entertained for a moment it would be placing upon the intelligence of a jury a very low estimate; and there is hardly a charge to which an exception, as well founded, could not be made.

The jury must be presumed to have listened attentively to all that the Court had said, and to have had the intelligence to have understood the Court's carefully chosen words, and to have comprehended his instruction; and especially where the Court was as careful as it was in this case, to explain to the jury his intention in further discussing the case.

ANSWER TO POINT IV.

A further complaint is based upon the Court's refusal to charge the tenth request of the defendant, as follows:

“(10) If the defendant company's offer was one that was to be accepted by the salesmen at a later meeting to be called, then the plaintiff can not recover in this action, unless there is evidence in the case that he accepted the offer at such later meeting.”

A complete answer to appellant's contention is to be found in the testimony of Mr. Kaltenbach on re-cross examination (see case, p. 111, ll. 10 to 38) as follows:

“Q Of course, if that meeting was held for the purpose of getting the assent of the men to the proposition it would not be necessary to ask Mr. Heitman to be present if he had already assented, would it? A Well, Mr. Heitman was not in it.

Q Well, I say if he had been in it? A Well, that is a theoretical case which had nothing to do with it.

Q If he had been in it and had already assented he would not have been asked for the January meeting, which was only held for the purpose of getting the assent of those who were in it.

Mr. Wolber. I object on the ground that it is argumentative.

The Court. I will admit it.

Witness. I said it was an academic question. Would you mind stating that again?

The Court. I think you have answered it, Mr. Kaltenbach.

Witness. It was an academic question.

Q You do not want to answer that, yes or no? A I will answer it; if your premises were true, then your conclusion would have been true.

Q The question has been permitted to be asked. A Then your conclusion is right. If Heitman had been part of the selling force and had given his assent previous to the meeting, he probably would not have been asked over to the meeting.

Q And he was not asked over to the meeting? A He was not asked over to the meeting; no."

Plaintiff had already testified that he had accepted the company's offer made after the first meeting (see case, p. 39, ll. 8 to 21).

Clearly it would have been reversible error for the Court to have charged the jury as requested by defendant's tenth request to charge, for such charge would have ignored the testimony given at the trial, and would have deprived the jury of the opportunity and duty that it had to determine, from the testimony, what were, as a matter of fact, the terms of the contract. It would have involved the conclusion, regardless of the testimony, that the proposition made to a group of employees at the meeting held for that purpose, to be considered by them, with the understanding that a later meeting would be held to give such employees an opportunity to decide whether or not they would accept the proposition; was not a proposition which could be accepted in any manner, at any time, or at any place other than at such later meeting. This would have been absurd both in law and in fact.

It might be said that it was not the intention of the defendant company that this proposition should be carried through without the assent of all the employees concerned, but certainly there is no testimony in the case which would justify the conclusion that the defendant would receive no acceptances unless they were made in assembly at the later meeting. The defendant-appellant's witnesses made an effort to be unanimous in their insistence that the proposition outlined at the November meeting was in the nature of an offer to be accepted at the later meeting, and at no other time or place; but plaintiff-appellee's testimony, and the testimony of the witnesses for the defendant-appellant, on cross examination, completely destroyed this insistence and it was a question for the jury, whether or not, that was one of the terms of the contract. The testimony of Mr. Charles Kaltenschach (see case, p. 110, l. 10) throws some light upon the importance of the later meeting as follows:

"Q Who called this January meeting? A We informed the salesmen—I don't remember whether it was

my father or myself—that we would be over on a certain day.

Q Do you know how far in advance of the meeting it was called? A No; I do not.

Q How long did the meeting last? A Very short; I don't think it was over fifteen minutes or half an hour.

Q And what you did there principally was to figure out what the salesmen's drawing accounts were to be? A No, I don't believe that was mentioned there.

Q When was that fixed, in November meeting? A We fixed that with each individual separately—personally; it wasn't at any meeting; some by telephone; I think some by letter.

Q When was that done? A At different times; some were not fixed until quite late in the spring."

The Court would not have properly charged the jury, if it had charged as requested, unless it had added to the request submitted, the following: "unless you find that the plaintiff was permitted to accept the offer otherwise than at such meeting and did so accept."

It is respectfully submitted that the grounds of appeal upon which the defendant-appellant relies are inconsequential and do not represent errors in the trial of the case of sufficient weight to warrant the granting of a new trial. The defendant-appellant thus makes a last desperate effort to accomplish a triumph over a faithful employee, who had grown up with the business, and who had had the temerity to offer to resign upon the refusal of his employer to deal with him justly in the matter of compensation for services performed in the carrying out of his duties, involving tremendous responsibilities, and who was thereupon discharged without notice.

It is significant that the appellant's appeal is not in the slightest degree based upon the only defense raised in the pleadings, viz., that the plaintiff left his employment voluntarily.

Respectfully submitted,

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff-Appellee.

PALMER BRADNER,
Of Counsel.

JOHN W. BOSTWICK, JR.,
On Brief.

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The first part of the book is devoted to a general introduction to the subject of the history of the world. The author discusses the various theories of the origin of life and the development of the human race. He also touches upon the different stages of civilization and the progress of science and art.

The second part of the book is a detailed account of the history of the world from the beginning of time to the present day. The author follows a chronological order, starting with the earliest known civilizations and ending with the modern world. He covers the major events, wars, and discoveries that have shaped the course of human history.

The third part of the book is a critical analysis of the various historical sources and theories. The author examines the reliability of different accounts and offers his own conclusions based on a thorough study of the evidence. He also discusses the influence of religion and philosophy on the development of human thought and action.

The fourth part of the book is a summary of the main points discussed in the previous sections. The author emphasizes the importance of understanding the past in order to better understand the present and the future. He concludes by expressing his hope that the book will provide a valuable and interesting read for all those who are interested in the history of the world.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM N. HEITMAN,

Plaintiff,

vs.

KALTENBACH & STEPHENS, INC.,

Defendant.

Action at Law.

*On Appeal from
Supreme Court.*

BRIEF OF DEFENDANT-APPELLANT.

This action was brought to recover damages for an alleged breach of contract between William N. Heitman and Kaltenbach & Stephens, Inc., for personal services for the year 1918, and also a share of a bonus of two per cent. of all sales of the company's goods for the year 1918 in excess of \$1,500,000. The plaintiff alleges that his share was to be ten per cent. of the two per cent. aforesaid. The breach alleged was the wrongful discharge of the plaintiff by the defendant on October 11, 1918, and the failure of the defendant to pay the salary of the plaintiff for the balance of that year and also plaintiff's share of the said bonus.

The defense to the action was a denial that the plaintiff had a contract with the defendant company for the year 1918, and a denial that the plaintiff was to share in the bonus to be given by the company, and a further defense that the plaintiff, on October 1, 1918, demanded an increased compensation for the year 1919, which the defendant refused to consider at the time; whereupon the plaintiff gave notice that he would seek other employment, which was consented to by the defendant.

At the trial plaintiff recovered a judgment in the sum of twenty-six hundred sixty-five dollars and sixty cents, which judgment was reduced to nineteen hundred ninety-four dollars and twenty cents by the Supreme Court on a Rule to Show Cause why the verdict should not be set aside on the ground that the damages awarded by the jury were excessive, being too large under any evidence in the record (Case 163).

Appeal is now taken to this Court, on the exceptions taken at the trial in the New Jersey Supreme Court at the Essex Circuit, the defendant's exceptions having been expressly reserved by the Trial Court when allowing the Rule to Show Cause (Case 1).

POINT 1.

The letter (Exhibit P. 1.) dated March 4, 1918, addressed to Mr. W. Heitman, signed by B. Oberendoerfer, was improperly admitted in evidence by the Trial Court.

This letter was written to the plaintiff by B. Oberendoerfer, on the stationery of Kaltenbach & Stephens, Inc. Mr. Oberendoerfer was a salesman of the defendant company (Case 43, line 16), and there is no testimony in the case to show that the salesman, B. Oberendoerfer, had any authority to bind the company, either by contract or by a statement. This man was one of the salesmen employed by the defendant company to sell its goods. There was no testimony whatsoever that he had any greater authority.

It is the settled law of this State that admissions by an agent must be made in pursuance of a duty to the employer.

Blackman v. West Jersey & S. R. Company, 68 N. J. Law 1, 52 Atl. 370.

The defendant is bound only by the admissions of its agents, only as they are within the scope of his general employment or have been specially trusted to his agency by the principal.

Huebner v. Erie R. Co., 69 N. J. Law 327, 55 Atl. 273.

A principal is bound by the admissions of an agent only when such admissions are within the scope of the agent's employment or are otherwise authorized by the principal.

Hill v. Adams Express Co., 74 N. J. Law 338, 68 Atl. 94;
Yoshim v. U. S. Express Co., 78 N. J. Law 281, 73 Atl. 45.

From the plaintiff's own testimony it is clear that Mr. Charles Kaltenbach did not authorize Mr. Oberendoerfer to make a statement which would in any wise bind the defendant company.

Mr. Heitman testified as follows (Case 42, line 22):

“Q And he said to see the salesman? A Yes, sir; he said it was perfectly agreeable to them if I could make arrangements with them as to what they would be willing to give me, that would be agreeable to them.”

On the plaintiff's own showing it is manifest that Oberendoerfer was not given authority to bind the company, and it is clear from this statement that the plaintiff was permitted to see the salesman for the purpose of obtaining some part of the bonus from the salesmen and not from the company; otherwise the words, “If I could make arrangements with them as to what they were willing to give me,” would not have been used. He was given permission to make arrangements with the salesmen

and from his, the plaintiff's, own statements, it is apparent that the company was not to give him a share of the bonus.

The bonus was to be divided as the company saw fit. (Case 38, line 38, plaintiff's testimony.)

“Q Was anything said as to the amount that each man was to receive of that bonus? A No.”

Also Case 89, lines 1-8, and Case 76, line 10.

It is apparent that the company, under the bonus arrangement, even assuming that the plaintiff was included, could have promised the plaintiff a certain portion without sending him to the salesman. It is this feature, and from the plaintiff's own testimony given just prior to the offer of the letter in evidence, that indicated that no authority was given any salesman to make a statement for the company.

From the testimony of the plaintiff it is also manifest that even had the officers of the defendant company assented to the contents of the letter as plaintiff testifies they did, they merely assented to the arrangement the plaintiff had with the salesmen. The plaintiff was told to see the salesmen as to what *they would give him* and he did, making an arrangement with them for ten per cent. of the bonus. The words, “Satisfactory to Mr. E. J. Kaltenbach, Mr. Charles Kaltenbach, March 5, 1918, Mr. J. A. Stephens, March 6, Mr. Frank Ruckle, March 6,” were written on said letter as a memorandum by the plaintiff (Case 41, line 10).

Mr. Charles Kaltenbach, the only surviving officer of the company, at the time of the trial, denies that the letter was ever submitted to him; but the testimony of the plaintiff before the letter was offered, showed that the arrangement with the salesmen was a matter to which the company was not to be a party, was not a party, and that Mr. Oberendoerfer was never authorized to speak for the company and that when plaintiff testifies that the contents of the letter was confirmed by the officers mentioned, they did nothing to bind the company in any contractual obligation between said company and the plaintiff.

The letter was written on the stationery of the defendant company, by a man who had no authority to bind the company, and it is respectfully contended that it was prejudicial to the defendant for the letter to go to the jury.

It is therefore respectfully submitted that the Trial Judge committed reversible error in permitting the letter (Exhibit P. 1) to go to the jury.

POINT 2.

The Trial Judge improperly excluded certain testimony.

The following question was asked of the witness, Henry F. Otto (Case 129, line 11.)

“Q Who made up the actual figures on which the bonus for 1918 was figured? A I did.

Q Now, will you tell us just how you did it?

Mr. Bostwick. I object. I think it is irrelevant how the bonus that was paid was actually figured. The question is whether Mr. Heitman was to receive a certain bonus. How the bonus was paid after Mr. Heitman had been discharged and after Mr. Graves, another one who participated, in the bonus, had been discharged, making it possibly necessary to change the method of division, I think is unimportant here.

The Court. Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The plaintiff alleged in his complaint that he was entitled to a share in a bonus to be paid by the company. At the trial he testified that the bonus was to be two per cent. of the total sales of the year in excess of \$1,500,000. The defendant contends that the bonus was to be given on the total sales of the company, less the salesmen's drawing accounts, traveling expenses, sales of certain specified companies, traveling expenses of salesmen and other selling expenses, and the bonus was to be distributed as the company saw fit. Mr. Kaltenbach so testified (Case 88, line 26). Frank J. Ryan testified (Case 61, line 30; Case 64, line 18). The purpose of the question asked of Mr. Otto was to show the amount of the sales, less the deductions claimed by the defendant, which would leave the net figure on which the bonus was computed.

The Trial Court's refusal to permit the question precluded the defense from showing completely the total amount of the bonus actually paid. The plaintiff recovered a verdict of \$2,665, which was later reduced to \$1,944.20 on the Rule to Show Cause. The balance of the salary claimed was \$742.50 (Case 46, line 1), which would give the plaintiff, under this finding the sum of \$1,201.70, as his share of the bonus. The defense could not show the total amount of the bonus paid to all the salesmen. The witness, Mr. Otto, was in charge of the accounting department of defendant (Case 25, line 23), and the only man in the defendant's employ who could give the total sales of the company, and the total deductions claimed, and the refusal of the Trial Court to permit

the question prevented the defense from giving the jury for their consideration the actual figure claimed by the defendant. The question was objected to on the ground that it was irrelevant. How the bonus was paid after Mr. Heitman had been discharged, and after Mr. Graves, another who participated in the bonus, was discharged, making it possibly necessary to change the method of division, was urged by the plaintiff's counsel at the trial. This argument assumes a controverted fact, namely, that Mr. Heitman was to be included. It is respectfully urged that it was relevant to show how the bonus was figured. The plaintiff does not claim that the defendant company promised to pay a definite sum in the form of a bonus. He testified that the bonus was to be two per cent. of all sales above \$1,500,000. The defendant's contention was different, and it was contended that certain deductions were to be made. If the inquiry was to determine whether the plaintiff was or was not included in a fixed sum to be paid, then it is admitted that the question asked of this witness was objectionable; but in this case the jury was to determine not only whether the plaintiff was included, but also to ascertain the amount of the bonus. Assuming, for the purpose of this argument, that Mr. Heitman and Mr. Graves were included in the bonus, the actual amount paid would not be affected. The whole amount was paid whether Graves and Heitman shared or not, and it was relevant to the issue to show that it had been paid.

From the Trial Court's refusal to allow the question asked of the witness, Henry Otto, it is respectfully submitted that the Trial Court committed reversible error, and a new trial should be granted.

POINT 3.

The Trial Court improperly charged the jury in charging, as follows:

The Court—"Gentlemen of the Jury: My attention has been called to two errors that I made, or, perhaps, to two omissions.

If you find that the plaintiff resigned, but that his resignation was to take effect December 31, 1918, and that he was before that time discharged by the defendant, then, of course, he is entitled to recover. When I use the word 'resigned' I meant resigned on the day that he left, not December 31, 1918. If he notified the defendant that he was going to resign on a future date, and then in the meantime was discharged, he is entitled to recover."

The jury had retired to find their verdict, and were called back by the Judge for the purpose of correcting what he deemed an error in his charge (Case 154, line 3). It is contended that the Trial Judge erred in charging the jury as above stated, after he called them back to the court room. The Court advised the jury that he had made two errors, or perhaps two omissions, and then charged the words herein complained of. Here was a situation where the Trial Judge told the jury that he had made an error, and then proceeded to tell them that if they found one certain feature of the case in favor of the plaintiff, that he, the plaintiff, could recover. What could the plaintiff recover? On the salary contract? On the bonus contract? Or on both?

Plaintiff claims salary from October to December 31, 1918, and also a certain portion of a bonus to be given by the company. The defendant company contended that it had no contract for any definite term with plaintiff and also contended that plaintiff was not included in the offer of a bonus (Case 89, line 11; Case 92, line 27). It was further contended that plaintiff resigned and was not discharged. Several definite issues of fact were raised and called for a determination by the jury. The Trial Court did not tell the jury that the charge was to be considered in all other respects as previously charged, nor did he tell them that he was only correcting the charge in that one particular, nor did he tell them that if they found in favor of the plaintiff on the other issues he could recover, but he told them if the plaintiff resigned to take effect December 31, 1918, he could recover.

It is contended that the Court in so charging marked a finality on all the evidence of the case, and in fact directed a verdict for the plaintiff, providing the jury should determine this one ques-

tion in favor of the plaintiff. In the case of *Bliss v. F. & M. Schaeffer Brewing Co.*, 67 N. J. Law 29, 50 Atl. 351, the Trial Court, after completing his charge to the jury, charged a request of the plaintiff as follows:

“First, if the driver could have seen the boy by looking before turning the corner, and did not see him, then he is guilty of negligence.”

On appeal the Supreme Court said:

“This was clearly an erroneous instruction. The special fault is that it selected a single circumstance from the many that bore upon the question at issue and presented it to the jury as sufficient of itself to warrant a verdict for the plaintiff. Its general vice was that it ignored the real issue, which was the lack of reasonable care on the part of the driver and substituted for it a circumstance that might or might not have been the result of culpable conduct. Coming in where it did, as an isolated proposition, out of all setting with the rest of the charge, and purporting to state the law for the control of the jury, it must be deemed to have been given that weight by them in reaching their verdict.”

The jury, having retired, was not in a position to know what might have taken place between counsel and the Court and could reasonably have concluded from the corrected charge that the Court had decided to take all other issues from them and that they were to decide on that one question alone, as well as to assess the damages. Timely objection to this part of the charge was taken (Case 155, line 14).

It is therefore respectfully submitted that the Trial Court committed reversible error in so charging the jury and a new trial should be awarded.

POINT 4.

The Court refused to charge the tenth request of the defendant to charge as follows:

(10) If the defendant company's offer was one that was to be accepted by the salesman at a later meeting to be called, then the plaintiff cannot recover in this action, unless there is evidence in the case that he accepted the offer at such later meeting.

There was considerable evidence in the case that the offer made at the November meeting in 1917 was to be considered and taken up at a later meeting to be called for the purpose of having the salesman give their assent and accept the new offer of the company.

Frank Ryan (Case 62, line 29; Case 63, line 40).

Anthony Demmerle (Case 75, line 37; Case 76- to line 20.)

Charles Kaltenbach (Case 89, line 11; Case 89, line 27.)

There was also testimony to like effect given by plaintiff's witness, Frederick W. Graves (Case 20, line 39).

It is elementary law of contracts that an offer can only be accepted in the manner provided for in the offer. In this case there was a definite offer made and there was considerable testimony that the offer was to be accepted in a particular manner. It was to be accepted at a later meeting to be called for that purpose. The plaintiff was not present at the later meeting, which was held in New York in January, 1918. (Case 64, lines 9 to 14; Case 75, line 44, and Case 76, lines 1 to 4; Case 89, line 26; Case 49, line 39.)

The plaintiff testified that the offer made in November was subject to acceptance and that it was not accepted at that time (Case 49, line 17). He testified that he accepted the offer of the company at the close of the meeting in November (Case 52, line 36).

There was a conflict in the testimony as to what the offer of the company really was. There was testimony that the offer was to be taken up and accepted at a later meeting and also testimony on the part of the plaintiff that the offer could be accepted in a different manner. A jury question was thereby raised.

It is contended that the defendant was entitled to have the tenth request charged. By the Trial Court's refusal to so charge the defendant was denied the jury's determination on this question of fact. Plaintiff was suing for the breach of an express contract and if he had never accepted defendant's offer there could, of course, be no contract. There was no testimony in the case that the offer of the company had been changed in any particular so as to permit an acceptance in a manner other than that called for in the original offer. The defendant was entitled to have the jury pass on the testimony given at the trial as to what the terms of the offer were, and the Trial Court's refusal to charge the tenth request denied this right and for the Court's refusal to so charge, it is respectfully contended that the Trial Court committed reversible error and a new trial should be granted.

Respectfully submitted,

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