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Bill of Complaint.

BILL OF COMPLAINT.

Filed July 3, 1920.

In Chancery of New Jersey

*To the Honorable Edwin Robert Walker, Chancellor of
the State of New Jersey:* 10

The complainant, E. William Myers, of the City, County and State of New York, complaining unto your Honor, shows that:

1. On April 15, 1920, and for a period of more than nine years prior thereto, complainant was employed by the defendant, J. Wiss & Sons Company, a corporation of the State of New Jersey, in the capacity of salesman, travelling over territory within the United States, and selling products manufactured by the defendant and by other companies. Complainant's last territory included the States of Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, part of New Jersey, and part of New York. 20

2. For his services so rendered to the defendant, the defendant paid the complainant over said period of years, certain amounts of money for salary, expenses and commissions or percentage, upon the sale of goods of various qualities and prices. 30

3. It has always been the custom of the defendant in dealing with its salesmen, to engage such salesmen upon oral promises and agreements to pay certain salaries, expenses and commissions, and thereafter to write letters usually once in each year, which letters served and were intended to serve as memoranda of the territory and commissions theretofore agreed upon, but not fully expressing all the terms of the contract.

4. At the inception of the employment of the complainant by defendant, it was agreed that he should receive 40

Bill of Complaint.

as compensation, a salary of \$900.00 per year, together with travelling expenses, incurred in the effecting of sales up to the amount of \$14,000.00, and in addition complainant was to receive his travelling expenses and a percentage of the sales price of all goods sold in excess of said last named amount, viz., 5 per cent.

10 5. From time to time during the continuance of the relations between the complainant and defendant, changes were made in the compensation paid to the complainant. All and every of said changes before being put into effect were submitted to complainant for his approval prior to the adoption thereof.

6. Commencing January 1, 1918, the basis upon which complainant was employed was as follows:

20 A salary of \$900.00 per year, expenses incurred for travelling and incidentals in connection with the sale of defendant's goods, and on all sales in excess of \$14,000.00 a commission of 10 per cent. on first quality goods, and 5 per cent. on second quality goods.

7. This arrangement was offered by the defendant to the complainant during the latter part of 1917, and accepted by him, and a letter stating the above terms was sent to complainant by the defendant and signed and returned by him. This letter, if a copy thereof was retained by complainant, has been lost by him.

30 8. In December, 1918, complainant approached C. L. Gairoard, sales manager of the defendant, with regard to his said contract, and it was agreed that the 1918 terms should continue through 1919.

9. On or about the twenty-eighth day of December, 1919, the defendant seeking to modify the existing contractual relations between it and the complainant, caused to be addressed to him, a letter, a true copy of which is as follows:

Bill of Complaint.

Dec. 28th, 1919.

E. W. Myers,
New York City.

Dear Sir:—

Owing to the peculiar conditions of business we find it necessary to make a change in your commissions for goods shipped to customers:

Terms—

\$900.00 per year and traveling expenses up to \$14,000.00 first quality goods.

In excess of \$14,000.00—10% bonus on firsts with the following exceptions;

Distributors orders taken at not lower than 25% on solid steel and 25 and 5% on snips 7½% bonus.

Seconds 5% bonus.

These exceptions are not to be included in arriving at the \$14,000.00 minimum.

This to be effective while you are in our employ and to begin January 1, 1920.

While this will cut down your ratio of commissions we have every reason to believe that the Wiss and Kraeuter factory will ship considerable more in 1920 than they shipped in 1919, which will counter-balance the reduction made in commissions.

This understanding may be cancelled by either of us at any time. Kindly sign and return duplicate copy at your earliest convenience.

J. WISS & SONS Co.

per C. L. Gairoard.

P. S. Kraeuter commissions will remain just as they have been.

E. W. MYERS.

Upon receipt thereof complainant, being in accord with the terms thereof, attached his signature and returned a copy to defendant, indicating his consent thereto.

10. The change as explained to the complainant by C. L. Gairoard, sales manager and agent for the defendant, was that in lieu of the percentage or commission or

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Bill of Complaint.

bonus of 10% on the sales price of certain lines of goods, he would be allowed 10% on "firsts"—7½% on distributors orders taken not lower than 25% on solid steel—and 25 and 5% on snips—and on "seconds" 5% bonus.

10 11. Since the commencement of complainant's relations with the defendant, he has always received compensation based upon monthly statements furnished by the defendant, of goods ordered by customers in complainant's territory, either through him as salesman for said orders, or received by the defendant through the mail whether solicited by complainant or not, such statements being prepared in each instance upon shipment of goods made on such orders during a calendar month, all of which the defendant, at the beginning of said relations, contracted and agreed to do.

20 12. Thereafter on February 6, 1920, the complainant wrote a further letter referring to its letter of December 28, 1919, a true copy of which is as follows:

J. WISS & SONS CO., Newark, N. J.

Date February 6, 1920
Salesman E. W. Myers
Address

subject:

30 One of our salesmen brought up the following question regarding arrangement which began January 1, 1920. He wanted to know whether in the event of a man severing his connections, the arrangement meant that no further commissions would be paid that salesman.

That is just what this arrangement means. In the event of a man leaving our employ, no further payments are to be made that man on account of any goods shipped in the territory which he has relinquished.

40 Our method of figuring salaries is based on the amount of business secured from a territory. If, instead of figuring it in that manner, the salesmen were to get a salary, the salary would cease upon connections being severed.

Bill of Complaint.

Furthermore, at the present time our necessity of a man in a territory is not so much to take orders, but to do other work which at the present moment is of greater value,—such as keeping us in touch with the trade—ascertaining what our competitors are doing—helping us in making collections—furnishing us data required so that we may plan wisely for the future—keeping our trade good natured in the face of our probable poor service—in other words—keep conditions in the territory in such a shape that we will get our share of the business when orders may not be so plentiful. 10

You see, therefore, in the event of a man leaving a territory, it would be necessary for the concern to put on another man at a fixed salary to do this work and the concern would be required to pay two salaries for the work done in that territory.

CLG/HW

Refer to C. L. Gairoard. 20

Whenever Possible Reply
on this Sheet.

This letter was not received by complainant until on or about February 28, 1920.

13. The complainant avers that said letter of February 6, 1920, as above set forth, is a wilful distortion of the true agreement existing between him and the defendant, and was calculated to further modify the existing contract between them for the payment of commissions, salary and expenses. 30

14. Complainant never consented to such modification or alteration of his contract with defendant, and now alleges that under his agreement as existing between him and the defendant, he is entitled to receive and defendant is liable for payments as follows:

A salary of \$900.00 per year payable monthly for each month of service, also travelling expenses incurred up to and including April 15, 1920, a statement of which expenses has been given to the defendant by the complain- 40

Bill of Complaint.

ant; also commissions on sales made and orders taken in 1919, and not shipped during 1919, but which have been shipped since January 1, 1920, and which will be shipped hereafter, and for which complainant has not received compensation, such commissions to be at the rate of 10% on goods of first quality and 5% on goods of second quality; also on sales made by complainant or orders coming from his territory from January 1, 1920, to April 15, 1920, a commission of 10% on all sales or orders of first quality goods—7½% on distributors orders taken at a figure not lower than 25% on solid steel, and 25 and 5% on snips and 5% on second quality goods, excepting a minimum of \$14,000.00 in sales upon which no commissions are to be calculated.

15. The account and transactions between complainant and defendant are intricate and complicated.

20. 16. The defendant has always kept, and now keeps, detailed books of account from which its orders, sales and shipments can be ascertained, and the complainant is without any means of securing information as to the shipment of goods except from the aforesaid books of account of the defendant.

30. 17. Defendant establishes its price and makes changes therein from time to time without the full knowledge of the complainant, and makes, and is entitled to make, changes in the price of goods ordered from complainant's territory by complainant's customers, particularly on mail orders, and complainant has no means of knowing the exact price at which merchandise is quoted or sold.

40. 18. Defendant maintains various price lists in accordance with which it sells identical goods at different prices to different customers within complainant's territory, and complainant is not familiar with prices not quoted by him. Mail orders have been received by the defendant from complainant's territory of which complainant has no knowledge.

Bill of Complaint.

19. On April 15, 1920, complainant resigned his position as salesman and travelling representative for the defendant, since which time no monthly statement or account of goods shipped has been rendered to him.

Complainant is without adequate remedy in the courts of law and therefore prays:

10

1. That the said J. Wiss & Sons Company, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That said defendant may set up and discover all orders received from complainant's territory through the complainant or by mail, and the dates and amounts thereof, and the time of shipment.

3. That an account may be stated under the direction of this Honorable Court, of all orders for merchandise coming from territory of the complainant, up to and including April 15, 1920.

20

4. That an account may be stated under the direction of this Honorable Court of all sums whether of debit or credit, pertaining to the employment of the complainant with the defendant of and concerning all salary, expense, bonus or percentage agreed to be paid, and due to the complainant for and on account of his said employment.

5. That the contract existing between the complainant and the defendant may be construed and interpreted by this Honorable Court.

30

6. That a decree may be made upon said accounts and upon said contract so to be construed, adjudging that the defendant do pay to the complainant such sums of money as may be found to be due to him and such sums as may hereafter become due to him by virtue thereof.

7. That complainant may have such other and further relief as the nature of the case may require.

W. HOWARD DEMAREST,
Solicitor and of Counsel with Complainant.

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Answer.

ANSWER.

Filed August 13, 1920.

IN CHANCERY OF NEW JERSEY.

10 *Between*

E. WILLIAM MYERS,

Complainant,

On Bill, &c.

and

Answer.

J. WISS & SONS COMPANY,

Defendant.

20 The answer of J. Wiss & Sons Company, defendant, to the bill of complaint of E. William Myers, complainant.

This defendant answering the bill of complaint says that:

30 (1) It denies paragraph one of the bill of complaint, except in so far as admitted in the following statement; complainant entered the employment of defendant November 1, 1912; on January 1, 1913 his employment as a salesman commenced and thereafter he travelled in certain designated territory within the United States for the purpose of selling the products of defendant. His territory was changed from time to time, but since the last change his territory included the States of Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware and parts of New Jersey, Maryland and New York.

(2) It admits paragraph two of the bill of complaint.

(3) It admits paragraph three of the bill of complaint.

40 (4) It denies paragraph four of the bill of complaint except as herein admitted; at the commencement of the employment of the complainant, he received \$50.00 per month and from and after January 1, 1913, he received

Answer.

\$75.00 per month and travelling expenses. His compensation was changed from time to time, but at the time he severed his connection with the defendant his compensation was \$75.00 per month and travelling expenses, together with a commission if, on the amount by which the aggregate sales price of products shipped by defendant, during the employment of the complainant, into the territory designated to the complainant, exceeded in any calendar year the sum of \$14,000.00, or a proportionate amount thereof for a shorter period. This commission, however, was subject to certain deductions and the employment to certain conditions fully set forth hereafter. 10

(5) It admits that portion of paragraph five of the bill of complaint that states that from time to time during the continuance of the relations between the complainant and defendant, changes were made in the compensation paid to the complainant. It denies that any of the said changes before being put into effect were submitted to complainant for his approval prior to the adoption thereof. The defendant avers that it reserved to itself the right to change the salary, commission or territory of its salesmen and always called to the attention of the salesmen each change so made and if the salesmen did not agree with the change he was at liberty to sever his connection with the defendant. 20

(6) It admits paragraph six of the bill of complaint, with the exception that such employment was subject to conditions and the compensation was subject to deductions as follows: The complainant was to devote his entire time to the sale of the products of the defendant, except such time as he might devote to the sale of products of Kraeuter & Company, Inc., to keeping the defendant in touch with the trade in the territory which was committed to him, ascertaining what competitors were doing and helping with collections. He was to be governed at all times by the rules adopted by defendant. His employment might be terminated at any time, either by de- 30 40

Answer.

10 defendant or by complainant. His salary was at the rate of \$900.00 per year with expenses incurred in travelling and incidentals in the sale of defendant's products and a commission based on the sales price of products shipped by defendant during the employment of the complainant into the territory designated to the complainant, computed on the excess of such shipments over \$14,000.00 per year, or in that ratio, at the rate of 10% on first quality goods and 5% on second quality goods. If shipments were less than \$14,000.00 per year, or in that ratio, a deduction was to be made. All cancelled accounts, accounts collected by attorney, uncollectible or bankrupt accounts, deductions and goods returned were to be deducted from the gross shipments in computing commissions due.

20 (7) This arrangement was determined upon by defendant and brought to the attention of complainant about January 1, 1918, and was accepted by complainant. Paragraph seven of the bill of complaint, except such parts as are herein admitted is denied.

(8) It admits paragraph eight of the bill of complaint.

(9) It admits paragraph nine of the bill of complaint.

(10) It admits that its sales manager informed the complainant as to the change in the rate of commission to be paid to the complainant, except as herein admitted, paragraph ten of the bill of complaint is denied.

30 (11) It admits paragraph eleven of the bill of complaint.

(12) It admits that portion of paragraph twelve of the bill of complaint that says that defendant wrote the letter of February 6, 1920, as set out in full in said paragraph. It denies that this said letter was not received by the complainant until on or about February 28, 1920, and says that said letter was mailed to complainant on February 6, 1920, and received by him on or about February 9, 1920.

40 (13) It denies as stated in paragraph thirteen of the bill of complaint that the letter of February 6, 1920, was

Answer.

a distortion of the true agreement existing between such complainant and defendant, but the defendant states that this said letter was a correct interpretation of the contract in accordance with the understanding upon which the contract of employment was based.

(14) It denies paragraph fourteen of the bill of complaint. 10

(15) It denies paragraph fifteen of the bill of complaint.

(16) It admits that it has always kept, and now keeps, detailed books of account from which its orders, sales and shipments can be ascertained, but denies that the complainant is without means of securing information as to the shipment of goods, and the defendant says that it has furnished to the complainant, at his request, statements of the shipments made into said territory up to the time, when the complainant left the employ of the defendant. 20

(17) It admits that it establishes its prices and makes changes therein and has a right to do so, but it denies that complainant had no means of knowing such prices and such changes in prices and avers that complainant was immediately notified of any change in same.

(18) It denies paragraph eighteen of the bill of complaint.

(19) It admits paragraph nineteen of the bill of complaint, assuming that complainant means that no statement or account of goods shipped since April 15, 1920, has been rendered to him. 30

(20) The terms of employment of the complainant by defendant are as set out in paragraph six of this answer. Settlement for goods shipped into the territory assigned to the complainant were made monthly, the last settlement being made April 14, 1920, for goods shipped during the month of March, 1920. There is due to the complainant from defendant for salary and commissions on goods 40

Answer.

shipped between April 1, 1920, and April 15, 1920, the sum of \$425.89, as appears from the following statement:

Commission April 1st to April 15th, 1920.

	Firsts	Seconds	
Personal	\$2,755.13	\$753.76	
10 Mail	816.41		
	<hr/>	<hr/>	
	\$3,571.54	753.76	
1/2 of the allotment.....	583.33		
	<hr/>		
	2,988.21		
Returns	31.80		
	<hr/>		
	\$2,956.41		
\$2,956.41 @ 10%.....	295.64		
753.76 @ 5%.....	37.68		
20 Salary 1/2 month.....	37.50		
Expenses	16.00		
	<hr/>		\$386.82
Personal	243.35		
Mail	65.87	163.12	
	<hr/>	<hr/>	
	\$309.22	\$163.12	
\$309.22 @ 10%.....	\$30.92		
163.12 @ 5%.....	8.15		39.07
	<hr/>		<hr/>
30			\$425.89

This amount is subject to deductions for accounts collected by attorney, uncollectible or bankrupt accounts, deductions and goods returned. This sum of \$425.89 has, however, been tendered to the complainant, who has refused to accept the same and the defendant now pays the said sum into court.

REED & REYNOLDS,
Solicitors for Defendant,
and of Counsel with Defendant.

Replication.

REPLICATION.

Filed May 26, 1921.

IN CHANCERY OF NEW JERSEY.

Between

E. WILLIAM MYERS,

Complainant,

and

J. WISS & SONS COMPANY,

Defendant.

On Bill, &c.

Replication.

10

Complainant denies all the material allegations in the answer.

W. HOWARD DEMAREST,

Solicitor for Complainant.

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E. William Myers, direct.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>E. WILLIAM MYERS,</p> <p style="text-align: center;"><i>and</i></p> <p>J. WISS & SONS COMPANY,</p>	<p><i>Complainant,</i></p> <p style="font-size: 2em;">}</p> <p><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p>
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Transcript of shorthand notes of testimony taken on final hearing in above-stated cause, at Newark, February 9, 1922, before his Honor, James F. Fielder, Vice-Chancellor.

Appearances:

- 20 W. Howard Demarest, Esq., for complainant.
Messrs. Reed & Reynolds (Mr. Reed) for defendant.

COMPLAINANT'S CASE.

E. WILLIAM MYERS, the complainant, sworn as a witness in his own behalf, testifies as follows:

Direct examination by Mr. Demarest.

30 Q What was your business from 1911 forward until 1920? A I was employed by J. Wiss & Sons Company.

Q In what capacity? A As salesman, December, 1911. I don't know whether I actually started work before January, 1912, but my arrangements were made in December.

Q When you commenced this employment, in what manner were you compensated? A I was originally employed as a demonstrator at twelve dollars a week and my travelling expenses.

E. William Myers, direct.

Q When did you change from that to some other arrangement? A I took a special trip; I was sent out on a special trip to Texas in the latter part of the year 1912 and came back and was given a trial on the Southern territory, with the understanding that I should be given a trial on the Southern territory—there was a verbal understanding in the beginning, but I was to get five per cent. commission on all goods sold over \$750—

10

Q Per year? A No; \$750 per month.

Q \$9,000 per year? A Yes. It was based on \$750 per month.

Q How long did that continue? A Not very long. The beginning of the following year that was changed and the allotment was raised to \$12,000 of goods sold. In excess of that I was to get five per cent. commission.

Q How long did that arrangement stay in force? A That stayed in force two years.

20

Q What was the next arrangement and what date did it commence? A It commenced either the latter part of 1915 or the first of January, 1916.

Q Was that oral or written? A That was written.

Q Any part of it oral? A Well, there were always some things that were not important that would not be incorporated into the contracts at that time, as I knew them.

Q What form did the written part of the contract take? A The form of compensation was to consist of salary of \$900 a year and travelling expenses and ten per cent. commission on all goods—

30

Mr. Reed. Didn't he say that was in writing?

Q What I was asking, Mr. Myers—it was more in the shape of a letter than a contract? A Yes; it was a letter.

Q I show you a paper dated January 3, 1916, with your name on the top but not signed and ask you what that

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E. William Myers, direct.

paper is? A This is the letter that I received at the time that the change was made in the compensation.

Q I call your attention to the figure "10" apparently over an erasure of the figure "15." Do you know when that was made? A I do not.

10 Q Under that arrangement, what was the rate you were to be compensated at—ten or fifteen per cent.? A Ten per cent.

Mr. Demarest. I offer this in evidence.

(Received in evidence and marked Exhibit C. 1.)

Q How long did this arrangement continue? A It continued until 1918.

Q What was the change made in 1918? A There was a change made on the rate of commissions on seconds.

Q What was that? A Five per cent.

20 Q That is ten per cent on what quality of goods? A On first quality goods and five per cent. on second quality goods.

Q How long did this continue? That included the salary, \$75 a month? A Yes; there was no change made in that part of it.

Q And also travelling expenses? A Travelling expenses.

30 Q And how long did that 1918 arrangement continue? A That continued through to 1920, latter part of the year—yes, 1920.

Q And what happened at the latter part of the year 1919 in reference to your form of contract? A I was told that there were going to be some changes made.

Q Who told you this? A Mr. Gairoard.

Q What connection has he with the defendant? A Sales manager.

Q Has he charge of the salesmen in their operations? A Yes.

Q All alone? A No.

40 Q Anyone else? A There was an assistant there.

E. William Myers, direct.

Q What is his name? A At that time Mr. Brooks.

Q What did Mr. Gairoard tell you with regard to changes in December, 1919? A He said that it would not affect me very much; that it would only apply on certain kinds of orders.

Q What kind of orders? A The distributing trade; orders to distributors. 10

Q Where was this conversation had? A At the Wiss factory.

Q Can you fix the time? A The first week in January, 1920.

Q And at that time had you seen this letter of December 27th or 28th? A No, sir.

Q And when did they present that to you—at this conversation or after it or when? A No; Mr. Brooks handed me the letter.

Q After this conversation? A Yes. 20

Q Will you tell us everything that you remember that Mr. Gairoard said when he told you about these changes? A He said that it would not affect me but very little and that they had provided for increased production and they expected to materially increase their production during 1920, during this year, and he outlined to me what they had done at the different factories to increase production.

Q And what was the nature of the changes as told to you? A The only changes that were made were a change on the rate of commissions on distributors' orders. 30

Q And from what and to what were they changed? A I formerly drew ten per cent. on these, and they were changed to seven and a half per cent.

Q And you were later presented with this letter of December 27th or 28th? A Yes.

Q And you signed that? A Yes, sir.

Q And returned it? A Yes, sir.

Q After signing this letter of December 27th or 28th what did you do? A I left here on a trip, after the con- 40

E. William Myers, direct.

vention was over, two weeks later; I usually left around the twentieth of January; I don't remember the date I left.

Q The change in the contract was satisfactory to you?

A Yes. It didn't mean but very little to me in the way of a change.

Q How long was your next trip? A Six weeks.

10 Q And did you send any orders to the factory during those six weeks? A Yes, sir.

Q In what way did you report your business to the factory? A I reported daily, a report of calls made and sales made and an itemized account of my expenses.

Q And what was the approximate volume of business that you did on that trip? A I have not the figures, but it would exceed any other corresponding period during the time I was with them; I am satisfied on that; in fact, I know it was.

20 Q Were these orders accepted by the factory? A Yes, sir.

Q When did you next hear anything with regard to the contract or commissions payable to you? A When I returned home from the first trip.

Q On what date did you return? A On the twenty—

Q Past midnight of the twenty-seventh? A Yes; on the morning of the twenty-eighth of February, 1920.

Q How do you fix that date? A Through diaries that I kept records in of sales and expense accounts.

30 Q That fixes it as the twenty-eighth of February? A On the twenty-eighth. I arrived after midnight. It was early in the morning.

Q Where did you come from? A I came from Cornville, South Carolina.

Q Was there anything at home awaiting you when you came? A I had several pieces of mail.

Q What was among those pieces of mail? A The letter of February 6th.

40 Q What was the appearance of the envelope with regard to where it had been? A It had been forwarded

E. William Myers, direct.

from Jacksonville, Florida, and it went to Columbus, Georgia, and went to Atlanta, Georgia.

Mr. Reed. That, I suppose, was apparent from the envelope. Have you that?

Mr. Demarest. It has not been kept.

By the Court.

10

Q Jacksonville to Atlanta? A From Jacksonville I went down the coast—

Q From Jacksonville where was the letter forwarded?

A From Jacksonville to Columbus, Georgia.

Q And then to Atlanta? A Then to Atlanta, Georgia, and it was returned to New York.

Q What happened to this letter or envelope; have you it? A No; I haven't the envelope.

Q You have the letter? A Yes.

Q (Showing witness.) Is this the letter? A Yes. 20

(Letter is offered in evidence and marked Exhibit C. 2.)

The Court. You did not offer the letter of December 27th or 28th.

Mr. Demarest. No. I shall offer it. The one I have is not the same as the one Mr. Reed has.

Q I show you a letter dated December 28th, 1918, addressed to you, on a blank sheet, that is, without printing on it, on which your signature appears at the bottom, and I ask you what that is. A This is the letter of December 28th, the contract. 30

Q From whom did you receive that? A From Mr. Brooks, J. Wiss & Sons Company.

Q Did you sign a similar one? A Yes, sir; this is a copy of the one I signed.

Q You gave them the original? A Yes, sir.

Mr. Demarest. Mr. Reed, have you the original of this letter of December 28th? 40

E. William Myers, direct.

Mr. Reed. I have the one he signed. It is dated the twenty-seventh. That is his signature.

Mr. Demarest. I offer the letter produced by the defendant, dated December 27th and signed by both parties.

10 Q You recognize that as your signature? A Yes, sir.

Q That is the contract referred to in the case? A Yes, sir.

(Received in evidence and marked Exhibit C. 3.)

Q Upon receipt of this letter of February 6th at your home on the twenty-eighth of February, 1920, as you say, what did you do? A I went to the factory the following Monday morning.

Q Whom did you see there? A I saw Mr. Brooks.

20 Q And his position is what? A He was assistant to Mr. Gairoard.

Q Did he have anything to do with the salesmen? A Yes.

Q What? A A great deal to do.

Q What was the nature of his transactions with the salesmen? A The majority of matters of this kind were taken care of by Mr. Brooks.

Q And you had talked with him about such things before? A Yes.

30 *By the Court.*

Q How long was the following Monday after February 28th? A Sunday intervened.

Q In other words, you came home Saturday morning? A Early Saturday morning.

By Mr. Demarest.

40 Q Relate the conversation that occurred on this Monday between you and Mr. Brooks. A I laid the letter down on his desk and asked him if the firm expected me

E. William Myers, direct.

to sign that. I said: "That is a ridiculous proposition to me."

Q What did he say? A He said—he shrugged his shoulders—he says: "I think you are supposed to sign it," and I told him that I could not sign it; I could not relinquish the right and equity I had in the orders that I had taken that were still on record, not this year certainly.

10

Q Was anything else said about it? A No.

Q What did you do then? A I spent the day at the factory and started to work, if I remember, the following morning in the New York and New Jersey territory.

Q Did you take orders in that territory at that time? A Yes, sir.

Q And send them in to the factory? A Yes, sir.

Q And were they accepted by the factory? A Yes, sir.

Q Did you get any word as to the objections you had raised as to this letter of February 6th? A No, sir.

20

Q What was the next thing that happened; did you have a talk with anybody else in the Wiss factory? A No.

Q What happened next? A I resigned on the fourteenth or fifteenth of April—the fifteenth of April.

Q To whom did you hand your resignation the time you resigned? A Verbally to Mr. Gairoard.

Q Any conversation that time with reference to the contract or your commissions? A Yes; considerable conversation and it was in reference to the contract. I asked Mr. Gairoard how he wanted to handle the settlement of my commission account.

30

Q Did you and Mr. Gairoard have anything to say with reference to the letter of February 6th? A Yes.

Q What was said? A I asked him how he wanted to handle the commission account, and he says: "Haven't you received your check for your March commissions?" I told him I had, and he says: "Well, your April commissions will be figured and you will get a check next month,

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E. William Myers, direct.

probably before," and then I asked him about the orders I had on file, the commission on those. He says: "You got a letter; that straightened that out in your mind, didn't it?" I says: "I got a letter, yes, but it didn't straighten it out in my mind," and I told him I would like very much to get away without any bad taste; my association had run
 10 over a period of ten years, and I hoped that he would be able to see that I was entitled to the commissions on the orders sold and able to give me a settlement on it, and he told me at that time—he says: "I will have to give this some thought."

Q Was anything said with reference to the letter of February 6th and its effect, on one side or the other; did you make any remark about the letter to him? A Yes.

Q What was that? A That it was certainly a very
 20 unfair proposition to expect anybody to sign—I don't know whether I said "anybody"—to expect me to sign it, and his reply to that—I don't remember just what it was.

Q Did you make any objections to the effect it would have on your commissions? A Yes.

Q What did you say about that? A I told him that I had certainly an equity in the orders I had taken that had not been shipped and that the commissions would be due and payable when the goods were shipped some time, and that I was entitled to the commissions.
 30

By the Court.

Q What did he say? A He concluded it by saying that he would have to give it some thought.

Q You did not sign that letter of February 6th, did you? A No, sir; I did not.

Q Or accept it in any way? A No, sir.

By Mr. Demarest.

Q Did you have any conversation with Mr. Gairoard at
 40 any later time? A A few days later.

E. William Myers, direct.

Q Where was this? A This was in the Kraeuter factory.

Q What connection has the Kraeuter factory with the Wiss factory? A The selling is taken care of through one head.

Q Mr. Gairoard is that head? A Yes.

Q You sold for Kraeuter as well as for the Wiss factory? A Yes. 10

Q What happened at the Kraeuter factory? A I went there one or two days later.

Q Later than what? A Later than the date of my resignation.

Q April 15th? A Yes, sir.

Q Who was there? A Mr. Kraeuter.

Q Did Mr. Gairoard come there? A Yes.

Q What was said when Mr. Gairoard was there with reference to the contract? A We were talking about the contract. Mr. Kraeuter told me he didn't know very much about it; that he had not seen the contract. 20

Q That was on Mr. Gairoard's presence? A I am not sure about that.

Q Just what was said in Mr. Gairoard's presence? A A I had the contract with me and I showed it to Mr. Kraeuter. He made the remark that it covered the rate of commission only, as he saw it.

By Mr. Reed.

Q This is what happened in the presence of Mr. Gairoard? A Part of this. Mr. Gairoard came in. 30

By Mr. Demarest.

Q This particular thing that was said, was that in Mr. Gairoard's presence, when Mr. Kraeuter remarked about what the contract that you showed him covered? A That was in Mr. Gairoard's presence.

Q What did Mr. Gairoard say in response to that, if anything? A He said a letter followed the contract that took care of the understanding. 40

E. William Myers, direct.

Q Anything else? A They seemed to be very much interested as to what I was going to do and questioned me about that.

Q Nothing further about the contract? A No.

Q What did you do next? A I was told that I would hear from them within a few days or a week regarding
10 settlement.

Q Did you hear from them? A No; I didn't hear from them.

Q What did you do? A I waited a week or ten days and telephoned Mr. Gairoard and asked him for his decision in the matter.

Q What was said? A He said, "We have decided that we only owe you your commissions up to the date you left us, April 15th." I asked him about the commissions on the orders that had not been shipped. He
20 says, "You are not entitled to those." He says, "Our contract takes care of that." I asked him if that was a final decision and he said it was.

Q Did you get a response in writing? A Some time later, yes.

Q I show you a letter from Wiss & Son to you, dated June 22. Was that the response? A Yes, sir.

Mr. Demarest. I will offer that letter in evidence.

30 (Letter is marked Exhibit C. 4.)

Q I show you carbon copy of a letter bearing date June 30, 1920, addressed to J. Wiss & Sons, signed by you, and ask you if the original of that letter was sent?
A Yes.

Q Did you send it to Wiss & Son? A Yes, sir. I made it out on my own typewriter.

Q Did you mail it? A I don't know whether it was on my own typewriter—from the office. It was mailed;
40 yes.

E. William Myers, direct.

Mr. Demarest. I offer letter in evidence.
(Marked Exhibit C. 5.)

Q Did you have a response to that letter? A No, sir.

Q Now, Mr. Myers, in regard to the condition of shipments and the time when they were made, comparing the shipment date with the date of the order, what were the conditions at the Wiss factory in 1919 and 1920? A They were a very long ways behind on their orders—filling their orders. 10

Q About how long, if you know, were they behind on shipments? A Oh, I should say seven months, six to seven months at least.

Q How many different price lists were there upon which you sold goods? A There were five.

Q And what was the condition of prices on mail orders; what was the practice in reference to prices on mail orders? A Well, if mail orders came from a regular customer, the goods were shipped and billed, of course, at the established price. For new customers the price was set from the office. 20

Q Did you have any knowledge of such prices? A Sometimes; not always.

Q Would you be able to say what the prices were to different customers and under different circumstances, so as to fix your commissions? A No; I would not. 30

Q It was part of your arrangement, was it not, that you were to be subject to deductions for any cancelled orders, or goods returned, or uncollectible accounts? A Yes, sir.

Q Now, during the entire time of your connection with the firm, what was the basis of your compensation? A The basis was the orders taken.

Q How was compensation paid? A Paid on the goods when they were shipped. 40

E. William Myers, direct.

Q In some of the earlier years, was this done in any other way than monthly? A Yes; when I first went with them.

Q How was it done then? A They were paying on orders taken.

10 Q And when they started to pay when the goods were shipped how was that arranged; was there a drawing account; what was the arrangement? A Yes; I had a drawing account.

Q How was it arranged? A They supplied me with a credit letter, and they deposited to my credit with the bank one hundred dollars on the first and fifteenth of the month. I drew against that. My expenses and my salary had to come out of that.

Q How were you paid your commissions; when were settlements made? A In the beginning, at the end of the year.

20 Q At that time, what commissions would be paid to you at the end of the year? A Excess of \$12,000; on goods sold in excess of \$12,000.

Q And shipped during what term? A Shipped during the year.

Q Then, was there a change made from this annual settlement? A Yes.

Q When was that change made? A 1916, if I recall.

30 Q And to what was the change made? A The yearly allotment was divided up into months, and the settlement was made monthly instead of yearly.

Q And the monthly settlement included goods shipped when? A During the previous month.

Q I show you a statement bearing your name on the Wiss & Son's billhead, and ask you if that is an example of how this was done? A Yes, sir.

Q That says "March" at the top. What year was that? A It was March, 1920. On account of the seven and a half per cent. on the distributor's orders, it must have been March, 1920.

E. William Myers, cross.

Mr. Demarest. I offer statement in evidence.

(Marked Exhibit C. 6.)

Q Was there ever any change made by you and the defendant with reference to the basis of your compensation other than the rate of commission? A No, sir.

Q For how many years were you paid on a basis of orders taken payable when good shipped? A Six years, I should say. 10

Q And were those payments made by check? A Yes, sir.

Q Checks sent to you how often during the last few years? A Monthly.

Cross examination by Mr. Reed.

Q Mr. Myers, you had a conversation you said when Mr. Kraeuter was present with Mr. Gairoard. Was that in relation to the settlement of your claim against Wiss factory or against the Kraeuter factory? A Well, both, I should say. 20

Q Well, Mr. Kraeuter was not interested in the claim against the Wiss factory, was he? A No, sir.

Q And were you there then to see what Kraeuter was going to do or what Wiss was going to do? A I only asked him something as to what his views in the matter were.

Q What the views of Mr. Kraeuter were in regard to what Kraeuter & Company were going to do, not what Wiss was going to do? A Yes. 30

Q That is what you were talking about, is it not? A Yes, sir.

Q Well, what you told us of your conversation with him was in regard to the amount that you claimed to be due from the Kraeuter factory, was it not? A Nothing was said about means at all.

Q Well, the money that you claimed to be due from Kraeuter Company? A Yes. 40

E. William Myers, cross.

By the Court.

Q Well, if that was the sole subject of your conversation, why did Mr. Gairoard say he would see about it; he didn't have anything to do with what Kraeuter & Company owed you, did he? A Yes; under the circumstances.

10 Q Did you discuss with Mr. Gairoard, in Kraeuter's presence, your claim against the Wiss Company? A I discussed it in a general way, against both companies.

Q Did you mention your claim against the Wiss Company? A No, sir.

Q How can you say you discussed it, if you did not mention it?

Mr. Demarest. I think the witness means he discussed the contract.

A The contract itself was the subject of discussion.

20 Q Well, did this contract of December 27, 1919, cover your relation with Kraeuter as well as with Wiss? A The rate of commissions, the schedule of commissions which was a continuation of a former arrangement.

Mr. Demarest. I think we agree that Kraeuter's was a verbal arrangement. On the bottom of the letter it says: "Kraeuter will be the same as above," or something to that effect.

30 *By Mr. Reed.*

Q Now, in regard to your receipt of the letter of February 6th, I understand you to say that it was forwarded from Jacksonville to Atlanta? A Columbus.

Q And from there to Atlanta? A Atlanta.

Q And from there to New York? A Yes.

Q Have you your route; you have a statement of your route, have you not? A Yes; I have a diary.

40 Q Well, I mean, didn't you have a route made out beforehand, a route sheet? A No, sir.

E. William Myers, cross.

Q Never? A I furnished the factory with a weekly route sheet, but I did not keep copies of those.

Q There was a weekly route sheet, was there? A Yes.

Q You went to Atlanta on that trip, you are sure of that? A I went to Atlanta on the way from Rome, Georgia, to Athens. 10

Q Did you stop there to make sales? A I saw one party there.

Q Now, does your record show when you were at Jacksonville? A Yes, sir.

By the Court.

Q When were you at Jacksonville? A In Jacksonville on the night of February 8th. I arrived there on the night of February 8th. That was Sunday and I was there on Monday and up to ten-thirty Tuesday. 20

By Mr. Reed.

Q That is February 9th? A Yes.

Q You left at what time on February 9th? A I don't remember the time of the train. I went to Daytona, and from Daytona I went to West Palm Beach.

Q (Showing witness.) These cards that I show you are cards returned by you to the factory, are they not? A Yes, sir.

Q That card seems to show that on February 10, 1920, you were at Jacksonville, Florida, does it not? A That is right. I left there ten-thirty and went to Daytona. 30

By the Court.

Q I thought you said you left on the 9th? A Tuesday, the tenth. I worked Monday, the ninth, and left there Tuesday, ten-thirty.

Q You arrived in Daytona the same day? A Yes.

Q And went to West Palm Beach on the same day? A Yes. 40

E. William Myers, cross.

By Mr. Reed.

Q Did you receive mail at Jacksonville? A Yes; I got mail there; I don't remember what mail; I had mail from my wife, I know, and I had mail from another one of the Wiss men, who was at that time—

10 Q In the ordinary course of events, how long does mail take to go from Newark to Jacksonville? A That is something I could not say.

Q You don't know that at all? A No.

Q Now, from time to time, during your employment, you received letters, you, as well as the other salesmen, received letters from Mr. Gairoard in regard to what you were to do in your territory, did you not? A In the form of what?

Q Well, letters, notices to salesmen, instructions? A Yes.

20 Q Communications of any kind? A Yes.

Q I show you a letter of April 8, 1916. Do you recall the receipt of that?

Mr. Reed. I ask that this letter addressed to Wiss and Kraeuter salesmen be marked for identification.

(Marked D. 1 for identification.)

30 Q I show you a similar letter dated November 20, 1916, addressed to Wiss and Kraeuter salesmen. Do you recall the receipt of that? A I do not recall that particular letter; no.

Q Do you remember having the substances of that letter called to your attention? A Yes; along that line.

(Letter dated November 20, 1920, addressed to Wiss and Kraeuter salesmen is marked D. 2 for identification.)

40 Q I have here letter dated March 29, 1917, addressed to salesmen, signed by C. L. Gairoard. Do you recall receipt of that? A Yes; I think so.

E. William Myers, cross.

(Letter of March 29, 1917, is marked D. 3 for identification.)

Q What were your duties, Mr. Myers, in your employment by Wiss & Sons? A Taking orders for the territory that was assigned to me.

Q Nothing else? A Well, there is always, in connection with taking orders, of course collections. 10

Q Did you make collections from customers? A Occasionally.

Q When they were slow? A Yes.

Q And what else—any other duties? A I would not say so.

Q Nothing else that you had to do at all, except to take orders and collect the money that you were directed to collect. Well, from 1916 on, was there any difficulty in getting orders? A Why, yes and no. I could answer that both ways. 20

Q Answer "Yes" first and then "No." A Yes; on some of the things we were selling; no, on other things, such as razor straps—

By the Court.

Q Is this Yes or No? A Yes; there was some difficulty.

By Mr. Reed.

Q Razor straps? A Razor straps, razors, safety razor baldes especial difficulty we had; there was difficulty to get orders; it took a lot of work to get orders. 30

Q That comprised all that was difficult to get orders on? A It is more or less difficult to get orders from good people, even at the best of times.

Q Well, during this period I am talking about, during the period from 1916 until the end of your connection with Wiss & Sons? A Well, I would say that orders at any time, if the trade is properly sold, require a lot of work. 40

E. William Myers, cross.

Q I asked you whether during this time there was any difficulty in obtaining orders? A Yes; I would say so.

Q In what respect; in what particulars? A In respect to getting a complete line.

Q Did that cover all the stuff you were selling, I mean? A That is the idea.

10 Q It was difficult, you say, from 1916 to April 15, 1920, to obtain orders? A I claim there is always work to get business.

Q You had to be there, but was there any difficulty in obtaining orders? A Yes, sir.

Q During all that period? A Yes, sir.

Q And in all lines? A I don't know anything about other lines.

Q Well, in all lines that you handled? A Yes, sir.

20 Q I show you a letter dated January 4, 1918, signed by C. L. Gairoard, addressed to salesmen. Do you remember the receipt of that? A No, sir; I do not.

Q You do not recall that? A No, sir; that letter I do not recall.

Q You may have received it? A I hardly think so, on account of the razor phrase in it there.

Q Other than the razor phrase, does it sound familiar? A I would not say so. I do not remember having received that letter.

30 Q Where were you January 4, 1918? A I was here at the office.

Q At the office? A The chances are, yes.

Q In Wiss & Sons' office? A Yes; Wiss & Sons' office.

Q You usually received all communications addressed to salesmen, didn't you? A Yes. It was put in an envelope there for me.

Q And you went there and got whatever was there?

40 A Yes.

E. William Myers, cross.

(Letter of January 4, 1918, marked D. 4 for identification.)

Q Now, the razor phrase. You say you do not recall a reference to razors? A No, sir; we were always after razor business very strong.

Q That was one of your lines, was it? A Yes, sir.

Q Now, this says: "On solid steel barber shears accept no more orders from jobbers. Explain that we are unable to say when we can fill orders," and so on. Do you remember that instruction? A I do not recall that; no.

Q Was that the basis on which you were going at that time? A I was working on a basis of taking care of our regular trade, in as small a way as possible, distribute the goods as far as they would go.

Q Goods were scarce? A And not oversell anybody.

Q Goods were scarce at that time? A Yes; they were scarce.

Q You were distributing the output over as large a part of your territory as you could; was that the case? A Yes, sir.

Q After January 4, 1918, were you accepting orders from jobbers for barbers' shears? A Not to my knowledge. If I got the instructions, I would not accept any.

Q If you got the instructions? A Yes.

Q Do you know whether or not you got the instructions? A Probably verbally. There were instructions, directions—I shouldn't say instructions—verbal talks along that line.

Q Didn't you consider them instructions—talks with Mr. Gairoard? A Yes. They didn't always come from Mr. Gairoard.

Q Those that came from Mr. Gairoard you considered instructions, did you not? A Yes.

Q You are unable to say that you did not receive this order as to barbers' shears? A Well, the barbers'

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E. William Myers, cross.

shear business, at any time, would amount to very little. The customers I had on barbers' shears would come under the head of barber supply house trade.

The Court. What is the purpose of this?

10 *Mr. Reed.* The purpose is to identify this letter. I am trying to recall to his mind that he must have received this letter.

Q I will ask you generally as to these other matters mentioned in this letter, were you following these instructions after January 4, 1918? A Yes; there are some parts of this letter I knew. I don't know whether I received them verbally or how. I knew that pocket scissors were to be discontinued and this item here.

Q That is the last item? A Yes; the scissors, they were discontinued at that time.

20 Q (Showing witness.) I show you letter of January 19, 1918. Did you receive that? That is addressed to salesmen and signed "C. J. Gairoard." A Yes; I think I can safely say I received that.

(Marked D. 5 for identification.)

Q (Showing witness.) I show you a letter addressed to salesmen, dated September 20, 1918, and signed "J. Wiss & Sons Company." Did you receive that letter? A Yes; I think I did.

30 (Marked D. 6 for identification.)

Q (Showing witness.) I show you a letter dated February 24, 1920, addressed to salesmen, and signed "C. L. Gairoard." Did you receive that? A Yes; I think I did.

(Marked D. 7 for identification.)

Q (Showing witness.) I show you a letter dated March 11, 1920. Did you receive that? A Yes.

40 (Marked D. 8 for identification.)

E. William Myers, cross.

Q Mr. Gairoard was the man who gave orders, was he not, in regard to your commissions and so forth? He was the fellow that you made your arrangements with, was it not? A Yes.

Q You never made it with anybody else? A Occasionally it would be forwarded—handed down to an assistant.

Q You mean coming from Mr. Gairoard, through his assistant? A Yes. 10

Q But he was the man who fixed it? A As far as I knew, yes.

Q And the only one, was he, that had authority to do that, except a member of the firm? A I could not say; I could not answer that. I don't know.

Q When you came home around February 28, and went to the factory, you did not attempt to see him, I understand? A It was on Monday morning and he was very busy, and I usually took those things to his assistant, Mr. Brooks, and I did in this case, too. 20

Q You did in this case? A Yes.

Q What do you mean—that you usually made your complaints to Mr. Brooks? A Yes, sir.

Q When had you made one to him before of similar nature? A Not of similar nature.

Q You never made any other one of similar nature? A No.

Q You did not see Mr. Gairoard about that until after you severed your connection with the company? A No; I did not. 30

Q And at all events, you made no further attempt to see him at that time? A No.

Q Please tell me again when you first saw him, when you first spoke to Mr. Gairoard about the letter of February 6th? A The day I resigned.

Q That was April 15th? A That was April 15th.

Q And you saw him then where? A At the Wiss factory, in his office. 40

E. William Myers, cross.

Q Who was present? A No one.

Q What did you say to him? A In regard to what?

Q In regard to the letter of February 6th? A I asked him how he would handle, how he wished to handle the settlement of commissions, and he asked me if I had received my check covering my commissions for the
10 previous month, which was March. I told him I had, and he said that I would get my check covering the April commissions the following month or as soon as he could get to it. I asked him about commissions on orders I had on file, that were yet unshipped, and he asked me if I got the letter and I told him I had but I had not signed or accepted it.

Q Anything else? A I cannot recall that there was anything else outside of he told me he would have to think the matter over and he would let me know.

20 Q That was all that was said in that conversation then? A Yes.

Q And you did not see him again until you went to Mr. Kraeuter? A A few days later.

Q Is Mr. Brooks employed at your plant now? A No, sir.

Q Where are you employed? A I am with the Ford Steel Products Company.

Q Is that in Newark? A Yes, sir.

30 Q Is Mr. Brooks associated with you in any way? A Absolutely not.

Q The terms of your employment were such at all times that it could be ended by either party, could it not; it was not for a year or any definite period? A Well, the terms were ambiguous in that respect. The contracts were supposed to be for a year, but I think the last contract I got had a clause in it that it could be terminated by either party at any time.

40 Q Well, you say that was ambiguous. What do you mean by that? They were ambiguous—your conversations

E. William Myers, cross.

and the letters you received? A I am talking about the contracts now.

Q You mean the written arrangement? A Written.

Q I understood you to say that the written portions, the written feature was only a part of your contract; is that so? A In some cases; yes.

Q In which case was it not, and in which case did it cover the whole thing? A Well, a contract that would read "This is to take effect at once and is to be in force during the year 1921," we might say, and then a further clause saying it could be terminated by either party at any time. 10

Q You mean that is an ambiguity? A Yes.

Q Well, prior to that—prior to 1920—did you have any arrangement which was for a year, in writing? A Yes; I think so. I think my arrangement for 1910—I would call that an arrangement. 20

The Court. Exhibit C. 1 has been referred to by the witness.

Q You consider you were bound for a year and could not terminate your employment before that time? A No, sir; I do not consider I was bound for a year.

Q You could terminate it at any time? A Yes, sir.

Q That was the custom with the salesmen, was it not, that they could terminate it at any time? A I don't know about the other salesmen. 30

Q Was your territory changed during your employment after 1915? A No, sir.

Q You had it continually from 1915? A Yes, sir.

Q Now, between 1913 and 1915 was there a change made in your territory? A Changes that might have added some local territory to what I formerly had. They were minor changes that were made. I don't recall any changes.

Q Well, your instructions that came from Mr. Gairoard from time to time changed the amount of your commis- 40

E. William Myers, cross.

sions and the rate and so forth, did they not? The firm reserved the right to change the amount of commissions at any time, didn't it? A No, sir; not as far as I was concerned, they didn't reserve the right.

Q Was that not done each year? A No, sir.

10 Q Was it not done on various occasions? A No, sir; it was never done to me.

Q No change was made in your commission? A Not unless it was talked over and agreed on.

Q Well, when were changes made in them? A In the rates of commissions?

Q Yes. A They were made—1916 there was a change made—I cannot recall the dates of these changes.

Q What conversation did you have about them? A I don't understand your question.

20 Q You said it was talked over beforehand. Whom did you talk it over with and what was said? A Mr. Gairroad.

Q What was said? A In regard to changing the commissions?

Q Yes. A Whatever the new basis that he had in mind.

Q Did he tell you that that new basis would be effective? A No, sir.

30 Q What did he say? A "This is what we are going to do with you, beginning January 1st,—"

Q That is what he said? A "If it is satisfactory."

Q What did you say? A Well, we would always go over the proposition as it was submitted to me, and if it was satisfactory, we would go ahead with it. If it was not, we would not.

Q Was there ever an occasion when you vetoed what he had arranged for you? A Yes, sir.

Q When was that? A 1916—I am not sure of that time—1916.

E. William Myers, re-direct.

Q What was the proposition and what did you say?
A He offered me a basis of rates of commission compensation.

Q What offer did he make? A Flat rate of so much.

By the Court.

Q In lieu of commissions, do you mean? A Yes, sir. 10

Q A flat rate of salary? A No; a flat rate of commissions.

By Mr. Reed.

Q What did you say? A I told him that I did not feel that I could afford to take the chance. I didn't have any money, and while I could have probably—I would have been taken care of by the J. Wiss & Sons Company—I was taking chances in accepting a flat rate of commissions.

Q Whom did you discuss that with? A Mr. Gairoard.

Q What did he say to that? A He offered me another proposition. 20

Q That was for the coming year, was it? A Well, that is something I could not answer.

Q What do you mean you could not answer—whether it was to last for a year or whether it was to take effect—
A I had an arrangement at one time that was not renewed—which was not written—it was renewed verbally—“We will let this continue for the next year.”

Q “We will let this continue”— A “For the next year.” That was back some time ago. I don't know the date or the year. 30

Q You say you could have left at any time during the year? A That I could have left at any time during the year?

Q Yes. A Yes, sir; I would say so.

Re-direct examination by Mr. Demarest.

Q At the time that you took over the Southern territory, what were the conditions down there with regard

E. William Myers, re-direct.

to the Wiss trade? A Well, it was in very bad shape. There was very little business.

The Court. Is this material?

Mr. Demarest. Only in one point, and that is that the territory of a salesman does not become profitable until it is built up.

10

The Court. Isn't that argument?

Q Mr. Myers, in reference to the conversation which you testified to on cross examination, with Mr. Gairoard, about this letter of February 6th, do you recall anything said about equity in commissions? A Yes; I do; that I had considerable interest and equity in the orders on file.

By Mr. Reed.

20

Q According to the rules, were you not supposed to report if you failed to receive a letter from the firm?

The Court. How could he do that?

Q The letters that were sent to you by the firm, were numbered, were they not? A That system was in effect once, and I think they did away with it.

Q When did they do away with it? A I am not sure about that.

Q You paid no attention to it, however, did you? A No; I did not.

30

COMPLAINANT RESTS.

Camille L. Gairoard, direct.

DEFENDANT'S CASE.

CAMILLE L. GAIROARD, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Reed.

Q You are connected with the defendant company? A I am. 10

Q In what capacity? A Sales manager.

Q How long have you been sales manager? A Twenty-two years.

Q From 1913 on, what assistants did you have, if any? A Perhaps thirty of them.

Q What were their duties; did any of them have authority to arrange for rates of commission or anything of that kind? A No.

Q Who else had in your office? A No one but myself.

Q In December, 1919, what assistants did you have in your office? A Perhaps forty. 20

Q In your sales department? A In the sales department and in other departments.

Q Who was Mr. Brooks? A A clerk who was in my employ.

Q What were his duties? A They were diversified. He was supposed to help me on anything I wanted any help on.

Q Well, did he have anything to do with fixing commissions? A Not at all. 30

Q Complaints, if any were received from salesmen, were they made to him or to you? A To me.

Q Going back to the time when Mr. Myers was employed, when was that, do you remember? A Approximately from 1912 to 1920.

Q What was your arrangement with him; was it in writing or verbal in the beginning? A He was first employed by one of the assistants, Mr. Bodine, in Chicago, as a demonstrator, to work in a show window. 40

Camille L. Gairoard, direct.

Q He was not a salesman? A No; and I think Mr. Bodine made the arrangement, which I approved of, and afterwards Mr. Myers proved to be a man of ability and we tried him on a territory. Whether our arrangement with him was verbal or in writing, I don't remember.

10 Q How many salesmen have you? A Around twenty. What time was that?

Q 1919 and 1920? A About twenty-two.

Q Did that number vary? A It did.

Q When had you less prior to that time? A Perhaps in 1916 we had less.

By the Court.

Q How many less? A Perhaps eighteen or fifteen.

Q You do not mean eighteen or fifteen less? A No. Altogether we had either fifteen or eighteen.

20 Q How many had you in 1921? A Twenty-five.

By Mr. Reed.

Q What was the custom as to the arrangements which were made with salesmen; were they all alike or did they differ?

Mr. Demarest. I object to that as irrelevant and immaterial.

30 *The Court.* If you want to show what the custom was, dealing with salesmen after they had been employed, all right, but if you are trying to show what the custom was in making the contract with him, no.

Mr. Reed. What I want to show is after they were employed.

40 Q After they were employed, what was the custom in dealing with them and instructing them as to their duties and so forth? A Well, my custom was to look over the territory, assign a man to it, make such changes in their

Camille L. Gairoard, direct.

commissions or territory or methods of payment as might prove equitable to both parties.

Q Well, were changes made from time to time? A Very often.

The Court. In what?

Q Were changes made from time to time in instructions to the salesmen? A Very often. 10

Q How was that brought to their attention? A By mail or verbally, whichever happened to be the easiest way.

Q To speak in the case of Mr. Myers particularly, was his compensation changed from time to time, or did it remain the same from the first? A Mr. Myers' arrangement with us was changed from time to time; for instance, he at first started to work for us for twelve dollars a week. Then we paid him a salary of seventy-five dollars a month and travelling expenses. Then we changed it later on to seventy-five dollars a month, travelling expenses and a bonus for the increase of sales, and then the basis on which the bonus was to be paid was changed, and then another change came, one which was necessary, which pertained to the question of paying a commission based on orders taken, and that was changed to a commission when orders were shipped. 20

Q Was that brought to his attention? A Every one of those changes was undoubtedly brought to his attention. 30

Q This last one, I call your attention to D. 2 for identification; what have you to say as to that? A Well, this is a letter which I wrote or dictated rather, and in which I called attention—

The Court. It speaks for itself. What happened to it?

Q What happened to it? A What happened to what? 40

Camille L. Gairoard, direct.

Q That letter. A A letter of that kind was given to salesmen, sent to them.

Q Including Mr. Myers? A Including Mr. Myers, yes.

Mr. Reed. I offer that letter in evidence.

Mr. Demarest. No objection.

10

(Letter heretofore marked D. 2 for identification received in evidence and marked Exhibit D. 2.)

Q I show you Exhibit C. 1. Do you remember that?

A I do.

Q And that is dated January 3, 1916? A It is.

Q That was the compensation paid him at that time?

A At that particular moment.

Q I notice in the expression "Commission on sales over \$14,000", "5%" is crossed over and "10%" written over it? A In January, 1917, it was found necessary, due to the increased cost of living and increase in traveling expenses, to increase the bonus, which we did in this case from five to ten per cent.

20

Q You mean the rate of five per cent. prevailed during 1916? A In 1916, and that was changed on January 1, 1917, to ten per cent.

Q When was the next change made, do you remember, in compensation? A The next change in the amount of compensation was made as per my letter of December, 1919, December 27th.

30

Q What were Mr. Myers' duties as salesman? A A salesman, of course, is hired—

Mr. Demarest. I object to that. Of course, I don't object to the question: What were his duties?

Q What were his duties? A To take orders, to call on our customers; and now I shall talk about his duties particularly in the last three years of his employ, to make sure that no customer secured from us more goods than

40

Camille L. Gairoard, direct.

the customer could just do with; collections; take inventories of stocks on the customer's shelves to make sure that the customer was not getting more goods than he should have; in other words, he was to help us make one little pair of shears or scissors do where three or four were wanted.

Q You spoke of collections. What were his duties with regard to collections? A In the event of an account being past due, every month we would send Mr. Myers a list of accounts past due and he was to help us effect collections at the earliest possible moment. 10

Q And did that affect his commission? A We always considered that—

Q Not what you considered, but what your arrangement was with him. A In case the account had to be placed in the hands of an attorney for collection, or loss of the sale made to that particular individual, his bill was deducted from his amount of business credited during a certain month. 20

Q Now, what were business conditions during those last three years of his employment? A From 1916 to the first of May, 1921, the conditions of the business of J. Wiss & Sons Company was such that their output could have been sold three or four times over, especially during the time when a great part of the output of this company was taken by the Government for the medical department of the army and navy and other departments of the Government to further the war programme. That was in a great way responsible for the scarcity of goods. 30

Q Did you receive during that period any orders from the territory allotted to Mr. Myers by mail? A We did.

Q And in what proportion to those taken by him? A I haven't the figures in my head.

Q Did you call the attention of Mr. Myers to the conditions of the output of J. Wiss & Sons? A I did, verbally and by mail, and he was fully aware of them. 40

Camille L. Gairoard, direct.

Q (Showing witness.) I show you D. 1 for identification. A That is one.

Q Do you recall that? A I recall that.

Mr. Reed. That was one that Mr. Myers admitted he had received, I believe. I offer it in evidence.

10 (Paper heretofore marked D. 1 for identification marked Exhibit D. 1.)

Q (Showing witness.) I show you D. 3 for identification, also admitted I believe. What were the conditions which led to the writing of that letter?

Mr. Demarest. I don't think the conditions are material, if he got the letter. I object.

The Court. Objection sustained.

Mr. Reed. I offer the letter in evidence.

20 (Letter heretofore marked D. 3 for identification marked Exhibit D. 3.)

Q I show you D. 4 for identification. Will you tell me how these letters were sent to salesmen? A By mail.

Q Who mailed them? A The clerk who has charge of the mail.

Q At that time who was the clerk? A I could not tell you. The envelopes are printed with their name, and the only thing that is left to chance, you may say, is that
30 it might be lost out of the mail bag.

Mr. Demarest. I won't admit we got it, but you can put it in evidence for what it is worth.

(Paper heretofore marked D. 4 for identification marked Exhibit D. 4.)

Mr. Reed. I also offer in evidence the letters marked D. 5, D. 6, D. 7 and D. 8 for identification.

(Papers heretofore marked for identification marked Exhibit D. 5, Exhibit D. 6, Exhibit D. 7 and Exhibit D. 8.)

Camille L. Gairoard, direct.

Q Mr. Myers said that under this arrangement, he could leave the employment of the company at any time; was that so? A I suppose it was.

Q Either party could terminate it at any time? A At any time.

Q Mr. Myers said that about the first of March or second of March, 1920, he came home from a trip, and spoke to Mr. Brooks about the letter of February 6. Was that called to your attention? A No. 10

Q When did you see Mr. Myers and talk to him about that, if at all? A Never heard anything from Mr. Myers regarding that letter until I met him at the Kraeuter factory office after he had resigned, and regarding that letter of February 6th, when I called it to his attention at that time, he claimed he had never received it, and that was then after April 15th.

By the Court. 20

Q You mean he claimed he had not received it up to that time? A Not at all up to that time.

By Mr. Reed.

Q How was his resignation to you; was it verbal or written? A Verbal.

Q Where? A At the Wiss office.

Q What date? A I imagine around between perhaps between the twelfth and fifteenth of April. 30

Q Shortly before he left? A Very shortly before he left.

Q At that time did he say anything? A Excuse me. He left the very day he told me he was resigning, and my records do not show that he worked for us on the thirteenth or fourteenth, so I should imagine it may have been the thirteenth or twelfth that he left.

Q Did he at that time say anything to you about the letter of February 6th? A Absolutely not. 40

Camille L. Gairoard, direct.

Q Did he at that time say anything to you about commissions due him? A No, sir.

Q When did he first speak to you about commissions?

A I want to reframe this answer about commissions due him.

10 Q You may. A Mr. Myers came to me about the date of April 12 and notified me that he was going to leave our employ. At that time there was nothing said about commissions or payments particularly. I wished him good luck and told him just as soon as our bookkeeping department could do it, we would take care of his account; and to fix in my mind that very fact that there was no argument as to any commissions or payments, I want to say here that I wished Mr. Myers the best of luck and told him that anybody that would get his services would get a good man, and everything apparently was satisfactory at that moment.

20 Q Did you say to him that you would have to think it over in regard to this amount of commissions that he claimed to have due him on goods when shipped? A Nothing was talked about commissions at that particular time, that is, the time when he resigned.

30 Q Now, then, you say you saw him later? A I saw him later at the Kraeuter factory and he was through talking to Mr. Kraeuter and said to me: "Don't you think I ought to have a certain allowance made for some of the orders I have taken? I understand that you are going to pay me only up to the time when I left." I said to Mr. Myers: "That is according to the contract which exists between us," and he said: "Well, that contract is rather ambiguous." I said: "But you never told me it was, and furthermore, if you look among the letters I have written to you and the other salesmen, you will find I went to the trouble not only to explain what was in my mind when I drew that arrangement, the date of February 6, and this was mailed to you." He replied:
40 "I never got it."

Camille L. Gairoard, cross.

Q Did you see him after that? A I don't remember that I did. I don't recall if I did.

Cross examination by Mr. Demarest.

Q Mr. Gairoard, what was it that caused you to make up this letter of February 6th? A What caused me to make up to write that letter was an associate of Mr. Myers, a Mr. Harry Neff, came to me and said: "Mr. Gairoard, under this contract, if you should happen to die tomorrow and somebody were— 10

Q That was not in Mr. Myers' presence, was it? A Nothing at all in Mr. Myers' presence.

Q Then, never mind what somebody said to you. A You want to know, don't you?

The Court. You are asking the witness a question. You asked him how he came to send that letter and he is telling you. 20

Q All right, proceed. A (Continuing.) "And somebody were to be put in your position, they could discharge me without any warning and I would get absolutely no remuneration after being discharged." I told him: "That is exactly what it means." Then we went on and talked about the condition in his territory. He told me that perhaps some of the salesmen might not feel so good about this contract. I told him I had heard nothing of it; and to prevent any misunderstanding on the part of any of them, I wrote the letter of February 6th. 30

Q You had had some misunderstanding with Mr. Neff, had you not? A Yes, sir.

Q And do you recall some time in the month of December, 1919, you were confined to your bed at home sick? A No; I don't recall.

Q Do you recall directing Mr. Brooks to conduct some correspondence for you? A I do not. 40

Camille L. Gairoard, cross.

Q In your absence, did Mr. Brooks ever conduct correspondence with reference to salesmen and their contracts? A Never.

Q I show you a letter of December 30, addressed to Mr. H. D. Neff, and signed "W. W. Brooks," and ask you to read that to yourself. That is Mr. Brooks' signature,
10 is it not? A That is Mr. Brooks' signature.

Q Now, do you recall authorizing that letter? A I do not.

Q You do not recall being sick at that time? A I do not remember; no.

Q You do not recall directing Mr. Brooks to write and say you were sick? A No; I do not remember.

Mr. Demarest. I ask that the letter shown witness be marked for identification.

20 (Marked C. 7 for identification.)

Q When Mr. Myers said to you that he understood that you were only going to pay commissions to him up to the time when he resigned, what did you say to him? A I told him that was as per our agreement.

Q Was there anything else said in that conversation? A I don't recall.

Q Do you recall that Mr. Myers said to you: "Why, that would cut me off from equities in commissions that
30 are due me on orders on your books"? A I don't remember Mr. Myers every saying that.

Q Now, you say concerning Mr. Brooks, that he was a clerk? A He was.

Q Was he not what you might call your assistant, in the true sense of the word—your right hand man? A I didn't have any more than two or three others there.

Q Did you and he ever discuss these salesmen's contracts? A Sometimes I did and I discussed them with
40 others as well.

Camille L. Gairoard, cross.

Q When you were intending to communicate with salesmen regarding the contracts, was it not through Mr. Brooks that you did communicate with them? A No, sir.

Q Occasionally, didn't that happen, such as in this letter of December 30th? A No, sir.

Q I show you a letter dated July 1st, 1919, signed by yourself for J. Wiss & Sons Company, addressed to Mr. H. L. Smith, Dallas, Texas. Was that sent out by you? A That is my signature. Yes. 10

Q Was the letter sent out? A Very likely it was. I would want to verify it, but I have no doubt—

By the Court.

Q It bears your original signature? A It does.

Mr. Demarest. I offer it for identification.

(Marked C. 8 for identification.) 20

(At this point recess is taken until two o'clock in the afternoon. After recess witness resumes the stand and cross examination continues.)

Q When was it that you first learned that Mr. Myers would not do business with you on the basis of this February 6th letter? A At our meeting at the Kraeuter factory.

Q That was the first knowledge that you had of that? A Yes. 30

By the Court.

Q. That was after his resignation had taken effect? A Yes.

By Mr. Demarest.

Q Had you no information before that, that he would not work on that basis? A None whatever. 40

Camille L. Gairoard, cross.

Q Had it been your opinion that you could change the terms of your contract as to the rate of compensation, with Mr. Myers, at your pleasure? A Yes, sir.

Q So that any time you wanted to say: "Hereafter we will only pay you five per cent. instead of ten per cent.," you might do so? A Yes, sir.

10 Q And how long had that been your opinion? A From the time he came to work for us.

Q Even without his consent? A He had the privilege of resigning.

Q Then, just what did you mean by your direct testimony that it was your custom to change commissions, territory, the payment of commissions, as might prove equitable to both parties? A I meant just what I said.

Q At this conversation at the Kraeuter factory considerable time was consumed, was there not? A Very little time.

20 Q Didn't it last more than an hour? A I wasn't there more than twenty minutes.

Q With reference to Mr. Brooks, he got sixty dollars a week, didn't he? A I don't know. Perhaps he did.

Q Didn't you fix his salary? A I did.

Q Don't you know that he did get sixty dollars per week? A I could trace it and find out.

30 Q Don't you know that is about what he got? A I shouldn't be surprised. If I knew positively, I would tell you.

Q I am referring now to 1919 or 1920. A Yes, sir.

Q When you say you had forty assistants, whom did you classify as your assistants in such number as that? A Everybody from the office boy up.

Q That is the entire office, is it not? A Exactly.

Q That is, not connected with the sales department; that is, they are not all connected with the sales department? A Perhaps not.

40 Q Not "perhaps." Are they or are they not? A If an office boy mails a letter to a salesman, is he connected with the sales department?

Camille L. Gairoard, re-direct.

Q Are they paid by your department, charged as part of your department expenses—all forty? A No.

Q How many are? A None.

Q Who was there that kept the book which had a lock on it, in which were contained contracts or forms of agreements between the company and the salesmen? Wasn't that Mr. Brooks? A The contracts, the forms of agreement, are in my desk, in a private drawer, of which I have the key at all times. 10

Q Isn't there a book which has a lock on it, in which these things are kept? A No.

Q Didn't Mr. Brooks keep such a thing? A No.

Q Is there anyone at the Wiss factory who is designated as assistant general sales manager? A No.

Re-direct examination by Mr. Reed.

Q Is Mr. Brooks with you any more? A No; he is not with us any more. 20

Q When did he leave your employ? A During 1920 some time.

Q One question that I overlooked before: Mr. Myers spoke of having a conversation with you, I think the first week in January, 1920, with respect to the letter of December 27th. Do you recall having a conversation with him? A No.

Q As I recall it, he said that you said that the only change was in the amount of commissions; is that so? A I made no such statement. 30

Q Can you tell me the approximate amount of orders taken by salesmen and mail orders from the territory that he occupied during his employment?

Mr. Demarest. Objected to. Does this mean Mr. Myers or someone else?

Mr. Reed. In Mr. Myers' territory, during his connection, while he had the territory. 40

Norman F. Wiss, direct.

Mr. Demarest. I object as immaterial at any rate. The contract provides for the payment of commissions.

The Court. How is it material?

Mr. Reed. To show the difference in the importance of the work that he did.

10

The Court. Objection sustained.

NORMAN F. WISS, sworn as a witness on the part of the defendant, testifies as follows:

Direct examination by Mr. Reed.

Q You are connected with the defendant company? A Yes.

Q In what capacity? A Assistant treasurer.

20 Q Were you connected with the company in 1917 and 1918? A I was in 1917, and then I enlisted in July, 1917, and went in the army.

Q When did you return? A I returned when I was discharged from the army on February 27, 1919.

Q Did you return to J. Wiss & Sons then? A I did.

Q What position did you hold from then on? A As assistant treasurer, as I was before.

Q Were you familiar with business conditions at that time? A I was.

30 Q What were the conditions with regard to the orders which the factory had and their output? A The conditions were such we didn't need any salesmen at all, as far as getting orders were concerned. The orders came in so fast we were swamped and our output was sold about ten months in advance of our possible output.

Q What were the conditions of the country that produced that condition in your goods?

Mr. Demarest. Objected to.

The Court. Objection sustained.

40

E. William Myers, direct.

Q You said that orders were coming in. Were those orders sent in by salesmen or were they mail orders that you refer to? A Both. The mail orders were very much more numerous than the personal or salesmen's.

No cross examination.

DEFENDANT RESTS.

10

REBUTTAL.

E. WILLIAM MYERS, the complainant, recalled in rebuttal.

Direct examination by Mr. Demarest.

Q I want to draw your attention to the contracts or forms of contracts, between the salesmen, yourself and the other salesmen, and the company, and ask you if you know where they were kept at the factory? A Mr. King. I first noticed it during the time Mr. King was connected with the factory.

20

Q What years? A I cannot tell you that, but Mr. Brooks succeeded him.

Q How long was Mr. Brooks in the factory? A I cannot tell you. I don't know how long. I should say eighteen months.

Q What about the contracts; where were they kept? A He had a binder or a book with a lock on, so that he kept all of the copies of the commissions, rates of commissions and such as that. Of course, I don't know what was in it, in this book. I know he would refer to it when questions of commissions came up.

30

By the Court.

Q When you say "he" whom do you mean? A Mr. Brooks.

40

E. William Myers, direct.

By Mr. Demarest.

Q What was Mr. Brooks' connection with the company; what did he do? A He was an assistant to Mr. Gairoard—

Mr. Reed. He testified to that before.

10 *The Court.* Yes.

Q With reference to a conversation which you testified to, and which has been testified to by Mr. Gairoard, as taking place at the Wiss factory, on or about April 15, at the time of your resignation, was there anything in that conversation to the effect—Mr. Gairoard testified that it consisted wholly to the effect that the bookkeeping department would take care of you as soon as possible? A Something to that effect, after I had asked him when he would handle the commissions that were due me.

20 Q Anything else?

Mr. Reed. I think you went over that conversation on direct examination.

Q Was there anything which fixes this particular conversation in your mind, the time and place of it? A Yes; there is.

Q What is that? A A matter of a tentative offer that was made me to take care of a settlement in full.

30 Q That offer has something in it that fixes this in your mind? A Yes.

Q What is there particularly in it that fixes it in your mind? A The fact, I would say, that they felt liable on the contract.

Q What is there in the offer that he made at that time that fixes this conversation and recalls it to your mind? A The amount that was offered.

No cross examination.

40

Herbert M. Demarest, direct.

HERBERT M. DEMAREST, sworn as a witness on the part of the complainant, in rebuttal.

Direct examination by Mr. Demarest.

Q Were you a salesman for J. Wiss & Sons? A I was.

Q Up until when? A May, 1920; I cannot tell the exact date. 10

Q Do you know a man by the name of William W. Brooks, who was connected with the Wiss Company? A I do.

Q Where was Mr. Brooks' office? A Why, it was outside of Mr. Gairoard's office, probably fifteen feet away—ten feet away.

Q Did Mr. Brooks have any connection with salesmen or their work or contracts? A He did.

Q What did he have to do with these things? A Why, he had a book in which were kept the sales records, the amounts of commissions to be paid each salesman. 20

Q Do you know where that was kept? A Why, I have seen it in Mr. Brooks' desk.

Q And did Mr. Brooks take part in any conferences with salesmen? A Yes.

Q On how many occasions do you know of such things being done? A Well, that would be hard to answer. I would say personally, on personal occasions, two or three times. 30

By the Court.

Q What do you mean by personal occasions—occasions in which you were involved? A Yes, sir.

Q With whom was the conference? A Mr. Gairoard and myself.

By Mr. Demarest.

Q You say Mr. Brooks was present at those? A He was; not always. 40

Herbert M. Demarest, cross.

By the Court.

Q I understood you to say that there were two or three conferences at which he was present? A Yes. There were several conferences that we had with Mr. Gairoard, that Mr. Brooks was not present.

10 *Cross examination by Mr. Reed.*

Q Do you know when and can you fix the dates of these conferences? A That would be very difficult.

Q Can you remember the last one? A In January, 1920; the date I could not say.

Q January, 1920? A Yes, sir.

Q You were travelling then? A Yes, sir.

Q When did you leave, do you remember, to go out into your territory? A Possibly the first of February.

20 Q Was it the latter part of January or not? A I would have to look up my records to give you the exact date. I don't know.

Q Do you remember the subject under discussion? A No; I cannot recall it.

Mr. Demarest. I want to offer in evidence these two letters marked C. 7 and C. 8 for identification.

Mr. Reed. I object to C. 7. It has no bearing on this issue.

30 *The Court.* Objection overruled. I receive it in evidence only as bearing on the question whether Mr. Brooks had any connection with the sales department which authorized him to deal with salesmen—not what he said to the particular salesman.

Mr. Reed. I object to C. 8.

The Court. I will admit it for what it is worth.

(Letters heretofore marked C. 7 and C. 8 for identification marked Exhibit C. 7 and Exhibit C. 8.)

CASE CLOSED.

Exhibit C. 1.

EXHIBIT C. 1.

Newark, N. J., January 3, 1916.

E. W. Myers

Territory—Borough of Richmond, N. Y., Long Island (except Borough of Brooklyn), Borough of Queens, N. Y. New York City starting at 42nd Street West of Broadway as far as and including 59th Street, then everything west of Central Park as far as 110th Street, then from 110th Street, everything West of Lenox Avenue to the Harlem River. 10

In New York City you are not to call on W. E. Pruden of Eighth Avenue, Barnett Bros. Department Store or the auto supply houses on Broadway as far as 78th Street.

In New Jersey you are to have Bloomfield, Bayonne, the Oranges, Elizabeth, Hoboken, Jersey City, Irvington, Newark—except the following dealers: 20

Roe & Conover	J. J. Hockenjos	
Price & Lawrence	Am. Oil & Supply.	
W. S. Row	I. Sabludovsky Samuels	
J. Montigel	W. V. Egbert & Co.	
L. Bamberger & Co.	Grover Bros.	
New York Hdwe Co.	Banister & Pollard	
Hahne & Co.	Baker Printing Co.	
Macknett & Doremus	M. Plum	
Ludlow & Squire	Stein	30
Johnson-Mandeville		

Union Hill, West New York, West Hoboken.

Also Virginia, North Carolina, South Carolina, Georgia, Florida, Delaware, Maryland less Baltimore, Hagerstown and Cumberland.

Salary—\$75.00 per month and traveling expenses.

Commission on sales over \$14,000.00 10% bonus. If less then \$14,000.00 we will deduct 5% from your Kraeuter and Company commissions. 40

Exhibit C. 2.

Exceptions—All cancelled orders, accounts collected by attorney, all uncollectable or bankrupt accounts, deductions and goods returned are to be deducted from gross sales.

10

EXHIBIT C. 2.

J. WISS & SONS CO., Newark, N. J.

Date, February 6, 1920

Salesman, E. W. Myers

Address

Subject:

20 One of our salesmen brought up the following question regarding arrangement which began January 1, 1920. He wanted to know whether in the event of a man severing his connections, the arrangement meant that no further commissions would be paid that salesman.

That is just what this arrangement means. In the event of a man leaving our employ, no further payments are to be made that man on account of any goods shipped in the territory which he has relinquished.

30 Our method of figuring salaries is based on the amount of business secured from a territory. If, instead of figuring it in that manner, the salesmen were to get a salary, the salary would cease upon connections being severed.

40 Furthermore, at the present time our necessity of a man in a territory is not so much to take orders, but to do other work which at the present moment is of greater value—such as keeping us in touch with the trade—ascertaining what our competitors are doing—helping us in making collections—furnishing us data required so that we may plan wisely for the future—keeping our trade good natured in the face of our probable poor service—in others words, keep conditions in the territory in such

Exhibit C. 3.

a shape that we will get our share of the business when orders may not be so plentiful.

You see, therefore, in the event of a man leaving a territory, it would be necessary for the concern to put on another man at a fixed salary to do this work and the concern would be required to pay two salaries for the work done in that territory.

10

CLG/HW

Refer to C. L. Gairoard.

Whenever Possible
Reply on This Sheet

EXHIBIT C. 3.

Letterhead of J. Wiss & Sons Co., Newark, N. J.

Dec. 27, 1919.

20

E. W. Myers,
New York City.

Dear Sir:—

Owing to the peculiar condition of business we find it necessary to make a change in your commissions for goods shipped to customers:

Terms—

\$900.00 per year and traveling expenses up to \$14,000.00 first quality goods.

30

In excess of \$14,000.00—10% bonus on firsts with the following exceptions:

Distributors orders taken at not lower than 25% on Solid Steel and 25 and 5% on snips 7½% bonus. Goods sold at lower than distributors prices 5% bonus.

Seconds 5% bonus.

E. W. Myers.

40

Exhibit C. 4.

These exceptions are not to be included in arriving at the \$14,000.00 minimum.

This is to be effective while you are in our employ and to begin January 1, 1920.

10 While this will cut down your ratio of commissions we have every reason to believe that the Wiss and Kraeuter factory will ship considerably more in 1920 than they shipped in 1919, which will counterbalance the reduction made in commissions.

This understanding may be cancelled by either of us at any time. Kindly sign and return duplicate copy at your earliest convenience.

J. WISS & SONS CO.,
Per C. L. Gairoard.

20 P. S.—Kraeuter commissions remain just as they have been.

EXHIBIT C. 4.

Letterhead of J. Wiss & Sons Co., Newark, N. J.

June 22, 1920.

Mr. E. W. Myers,
408 W. 129th St.,
New York City.

30 Dear Sir:—

In reply to your telephone conversation— We consider that we have always been very liberal in our treatment of the salesmen in our employ and we still consider that the offer we made when you left us is indeed very generous. That offer was to pay you for the entire month of April, which would give you about three weeks extra pay in the face of contract we had with you which called for no payments to be made after a salesman had left a territory.

40

Exhibit C. 5.

This would equal \$609.45 for the Wiss and Heinisch line.
If this meets with your approval advise us to that effect
and we will make payment at once.

Yours very truly,

CLG/HW
J. WISS & SONS CO.,
per C. L. Gairoard. 10

EXHIBIT C. 5.

Copy.

June 30, 1920.

J. Wiss & Sons Co.,
Newark, N. J.

Gentlemen:— 20

Your letter of June 22, responded to a telephone call
of mine about seven weeks previous.

Replying to your letter, I must reject your offer of set-
tlement, and call your attention to our agreements, none
of which called for anything else but payment of commis-
sions on all goods sold, as soon as the goods are shipped.

Yours very truly,

E. W. MYERS. 30
EWM/MG.

*Exhibit C. 6.***EXHIBIT C. 6.**

Statement.

J. WISS & SONS CO.
Newark, N. J.

10	E. W. Myers, Com. a/c March		
	To balance account rendered:		
	To mdse as per bill rendered		
		Firsts	Seconds
	Personal	4088 00	441 18
	Mail	3078 11	1108 18
		<hr/>	<hr/>
		7166 11	1549 36
			<hr/>
20	284.81—Distributors Returns & Deduction.....	46 35	
		<hr/>	
		7119 76	
	Allotment	1166 66	
		<hr/>	
		5953 10	
		<hr/>	
	Expenses		53 32
	Salary		75 00
30	Com. @ 10%.....		595 31
	“ @ 7½		21 36
	“ @ 5%		77 47
			<hr/>
			822 46

Exhibit C. 7.

EXHIBIT C. 7.

Letterhead of J. Wiss & Sons Co., Newark, N. J.

Dec. 30, 1919.

1/1-20—Wrote would be in factory 15th.

Mr. H. D. Neff,
73 Dana Street,
Cambridge, Mass.

at factory 10
1/10-20
N.

Dear Sir:—

Your letter to Mr. Gairoard in reply to the agreement which he forwarded to you December 27th, reached him this morning.

Mr. Gairoard has been in sick in bed with the grippe since Saturday and has asked me to write you as follows:

After reading your letter he can appreciate that as you say, it would be an easy matter to promote direct business and thereby sacrifice the good spirit now existing between your customers who send mail orders and J. Wiss & Sons Co. 20

His object is solely to reduce the selling expense to a slight extent and as he believes there will be a considerable increase in the shipments from Wiss, Kraeuter and Heinisch factories, he is of the opinion that with a slight deduction in commissions the salesmens earning power will be as great as in 1919.

Rather than make your mail order business a straight 5% commissions, he suggests that he make the distributors throughout your territory a straight 7½% and let the remaining business obtain as previously. 30

This would mean that on your distributing accounts for both Wiss and Heinisch you would receive a 7½% commission for direct and mail business and that on the balance of your business, first quality goods would pay a commission of 10% and second quality goods, 5%.

In making you a 5% proposition on mail order business as per the agreement of December 27th, which was for- 40

Exhibit C. 8.

warded to you, Mr. Gairoard had in mind that it was possible during this coming year that there would be occasion for the salesmen not to travel their territory and should this condition occur, it was his object to reduce the mail order business so that while the salesmen who are not travelling and their expense thereby not as great, this 5% would cover their requirements as business will come to us without any effort on their part.

Please advise us if the proposition of 7½% for distributors business would be more acceptable to you.

Yours very truly,

J. WISS & SONS CO.,
per W. W. Brooks.

WWB/EJ

EXHIBIT C. 8.

Letterhead of J. Wiss & Sons Co., Newark, N. J.

July 1, 1919.

H. E. Smith,
4316 Swiss Ave.,
Dallas, Texas.

Dear Sir:—

For some time we have been rather dissatisfied with the poor showing you have made in your territory on the Wiss line. We have felt that a great deal more could be done with our goods in the State of Texas.

Not wishing to jump at conclusions we have sent a man to cover towns where you have sold practically nothing in 1919, and perhaps very little in 1918 or in 1917. The amount of business we have secured from these towns confirms our suspicions. We did not wish to again ask you to do work which perhaps was not to your liking and we have therefore decided to dispense with your services from July 7, 1919.

Exhibit D. 1.

Please send us all your samples and information cards by express at your convenience. Regarding settlement of commissions for orders taken but not yet shipped, we will try to effect settlement at the earliest possible moment mailing you a check monthly for your commission on shipments made until our account is balanced.

We regret very much having to take this step, but in view of the results received there was nothing else left for us to do. We have given this territory into the hands of a man who has shown that he can get the desired results. 10

Yours very truly,

J. WISS & SONS CO.,

CLG/MM

Per Gairoard.

20

EXHIBIT D. 1.

MM J. WISS & SONS CO., Newark, N. J.

Date, April 8, 1916.

Salesman, *Wiss and Kraeuter Salesmen.*

Address

Subject: IMPORTANT.

30

From this date we can only accept orders for immediate delivery—or delivery at our convenience. Any orders taken for future delivery will only be accepted at prices ruling when shipment is made.

In future no datings whatever will be allowed.

Failure to follow above rules may mean cancellation of commission credit on the order or a fine as we may decide.

We are very sorry that some of our salesmen seem to think that our instructions are not to be followed except 40

Exhibit D. 2.

on the threat of their being made to suffer if they do not follow the rules.

To prevent any misunderstanding on the part of these salesmen we are obliged to do same as the law makers—to formulate a ruling and advise what the penalty will be in case the ruling is not followed.

10 Whenever Possible
Reply on This Sheet Refer to C. L. Gairoard.

EXHIBIT D. 2.

J. WISS & SONS CO., Newark, N. J.

Date, November 20, 1916.

Salesman, *Wiss and Kraeuter Salesmen.*

Address

20 Subject:

Some salesmen are paying no attention to our several communications advising them not to take on new customers.

They keep on accepting orders from new customers for scissors and in many instances those dealers are purchasing their trimmers from our competitors.

30 Some are taking orders for gross after gross of solid steel barber shears not only from new customers but from dealers so poorly rated we would not care to accept orders under any condition.

We merely file all these orders for future consideration.

In view of the inability of some salesmen to follow instructions and to prevent too great a congestion in our office we have decided that after January 1, 1917, we will *credit* our salesmen only with amount of goods when shipped. This applies to Wiss, Heinisch and Kraeuter.

This will make unnecessary the crediting of orders when received—and cancelling of small back orders too old to ship or the holding of most orders for credit to salesmen

40

Exhibit D. 3.

when shipped. It will also enable us to handle orders more promptly in the office.

Whenever Possible

Reply on This Sheet

Refer to J. M. King.

EXHIBIT D. 3.**10**

J. WISS & SONS CO.

Corr. No.

L. S.

Date, March 29, 1917.

Salesman—*Salesmen.*

Address

Subject:

Some dealers and even some jobbers seem to object to placing their orders subject to prices ruling at date of shipment.

20

In such cases you are to change the ruling to the following:

This order to be filled as complete as possible at prices ruling at this date. Should prices increase before order is entirely shipped, customer is to be notified and balance will be filled at new prices or cancelled at customers discretion.

It begins to look as if before the end of the year steel will be costing us about 400% more than in 1914. And many other supplies are increasing in similar ratio.

30

The question of labor charges is becoming more acute every day. The eight hour day with time and a half for over eight hours is surely coming. Common labor is very difficult to procure and should the U. S. be involved in war there certainly will be a decrease in outputs. For material will be harder to procure and labor will be much scarcer as well as commanding advanced rates.

Coal is today at a premium—so hard to get that some plants can only work part time.

40

Exhibit D. 4.

In the face of such conditions we do not want to guarantee prices.

Whenever Possible
Reply on This Sheet

Refer to C. L. Gairoard.

10

EXHIBIT D. 4.

MM J. WISS & SONS CO., Newark, N. J.

Date, Jan. 4, 1918.

Salesman, *Salesmen.*

Address

Subject:

20

The solid steel goods situation for 1918 will be worse than it has been heretofore. We now have on hand orders for solid steel goods which at our present ratio of output will take seven months to manufacture.

In addition to this we anticipate that the needs of the Government will be greater in 1918 than they were in 1917. Therefore if we allow our salesmen to take all the orders for solid steel goods that are offered them very few of these orders will be filled during 1918.

30

Here is the rule we want you to follow: On solid steel barber shears accept no more orders from jobbers. Explain that we are unable to say when we can fill orders and do not know at what price. From barber supply houses you may accept orders for not more than one gross at a time at "I" prices only. From the retail trade accept solid steel barber shear orders at "I" prices only. The same rule to apply on razors.

No surgical scissor orders to be accepted as we have more orders for these than we can take care of during 1918.

40

On solid steel scissors accept orders only from trade buying trimmers. No scissor orders to be accepted from

Exhibit D. 4.

customers who can only use scissors—such as silk mills—
or for school work.

In taking orders from customers who also buy trimmers
make it a rule to have the maximum quantity of scissors
not greater than one-half the amount of trimmers ordered.

If these rules are not followed the result will surely be
that within a very short time we shall have to ask our
salesmen to take no more orders for solid steel goods
until further notice. 10

All orders are to be accepted subject to prior sale of
our available capacity which means an order will be only
accepted for shipment at factory's convenience, and sub-
ject to delay due to preference to be given Government
orders.

Until further notice we have decided to discontinue the
entire line of 573 Manicure Scissors—2447 Gun Metal
Handle French Pattern Barber Shears, and also the fol-
lowing numbers: 20

463	364	813½
464	365½	
	366	

Whenever Possible
Reply on This Sheet

Refer to C. L. Gairoard.

30

40

Exhibit D. 5.

EXHIBIT D. 5.

EB J. WISS & SONS CO., Newark, N. J.

Date, July 19, 1918.

Salesman, *Salesmen.*

Address

10 Subject:

Referring to conditions which face us as to our output this fall.....on the Wiss line and the Heinisch line.

On Tinner Snips, tailor shears and steel laid goods the condition is still fairly good. There are several sizes, of course, like the #10N Tailor Shears or #4 I. S. Tailor Shears which we will be out of for perhaps a year. On 10" bent trimmers there very likely will be a scarcity as the Government has ordered thousands of them from us. We are out of 15" and 16" paper shears. On 9" and 10" paper shears we will be rather slow due to the immense quantity ordered by the Government. On the rest of the lines we are in fairly good shape.

On Scissors we are going to be in worse shape than ever before. We have given instructions in the factory to double our surgical scissor production which will mean less domestic scissors.

On Razor strops we are in fairly good shape.

We have but few razors and from time to time we will advise you what we have and you can sell them—otherwise do not make any promise on razors.

On the Krauter line we have been in very bad shape during the last three months—due to the large orders received from the Government for pliers—and on one of these we were obliged to turn out 3,000 pr. per day.

We understand that the Government has some very large orders to place for pliers and if these are received within the next thirty days we will not be able to do any better on the Krauter line than we have done during the first six months of this year—Otherwise if these orders

Exhibit D. 6.

are not received, we see no reason why we should not be able to get out quite a quantity of pliers—but in no case do I believe that we will be able to fill by the first of January the orders which are now on hand. We do not want our salesmen to quote any new customers on the Kraeuter line—no use taking their orders unless they are willing to place these orders to be shipped to them at some indefinite period, and REMEMBER that the ruling on Wiss, Heinisch and Kraeuter as to goods being subject to prices ruling at time of shipment is to remain in force. 10

On the Kraeuter line we have had some private brand orders and we have written to them asking them to write to us to make them partial shipment from time to time on Kraeuter brand. Nearly all replied favorably.

Whenever Possible
Reply on This Sheet

Refer to C. L. Gairoard.

20

EXHIBIT D. 6.

September 20, 1918.

Salesmen.

We expect to receive official orders from the Conservation Division of the War Industries Board cutting our present line to about $\frac{1}{8}$ of the sizes and styles which we have been manufacturing in the past. The same thing is being done on every line from wearing apparel to even food stock. 30

It is possible that some dealers on hearing of this may attempt to place large stock orders. It is our intention to make all efforts possible to treat all our customers alike, therefore for the present and until the conservation order becomes official you are to see that your customers only order what is absolutely essential—and in no case is a customer to be allowed to purchase more than an amount equal to 66 2-3% of the goods that were shipped to him 40

Exhibit D. 6.

during 1917, deducting what may have been shipped to him so far in 1918. From time to time it is likely that this ratio will be changed and you will be advised accordingly.

10 You may say that it will be a pretty difficult matter for you to know exactly what 66 2-3% represents. We will expect you to make a good guess at it and thereby prevent any of your customers from hoarding stock.

20 In some lines the Government is asking the manufacturers to procure from their customers a pledge that the goods which their customers order are absolutely essential, and in turn these manufacturers are required to show these pledges when they require additional raw material for their business. In other words, the Government desires the entire nation to conserve as much as possible so as to successfully put through the war program. The salesmen can do a great deal to help the Government in this respect.

Should we receive from any salesman any orders from new customers we shall have to cancel same. And should any order look too large based on the customer's past business, we will reduce it to whatever amount we may judge proper. Should we find that on any size or style our stock on hand is above normal, you will be advised accordingly.

30 All orders are to be accepted subject to prices ruling at time of shipment and subject to shipment at factory's convenience.

In case that there is anything about the above instructions that you do not clearly understand, kindly write us immediately.

Yours very truly,

J. WISS & SONS CO.,

CLG/MM

Per

Exhibit D. 7.

EXHIBIT D. 7.

Newark, N. J., Feb. 24, 1920.

Salesmen:—

In view of the instructions which we have given you not to take on any new customers—I cannot understand why a salesman should send us an order for \$500.00 worth of goods from a dealer who bought perhaps \$30.00 or \$40.00 of goods in 1918 and nothing in 1919. We received such an order this morning and, of course, we are returning it to the salesman and writing the dealer that we are unable to serve him at this time. But, as you know, letters of this kind on such a subject leave a bitter taste in the mouth of the dealer. 10

Don't think for a minute that we come to a decision such as this if we were not absolutely forced to do so, so we shall expect from every one of our salesmen co-operation on this matter. 20

There seems to be a wild scramble for goods at the present time—more so than we have known since 1914. Unless we use very good judgment we very soon will have two years business on our books. And then when we have that amount of business on our books what shall we do—tell the salesman to go home and rest for six months? I hope it will not come to that, and I am sure it would not happen if the salesman handle this matter with discretion. 30

During the last week our output was slightly better. We have less men on the sick list. But what is the use of talking about output when we receive in a month orders for double the amount of our production in a month.

Yours very truly,

C. L. GAIROARD.

CLG/MM

Exhibit D. 8.

EXHIBIT D. 8.

March 11, 1920.

Salesmen:—

There seems to be no let up to orders we are receiving for shears, scissors, snips and the plier line.

- 10 We again warn you not to take on any new customers and not to sell to any old customers more pairs than in the past. We want to take care of our old customers to the best of our ability.

- 20 You undoubtedly are constantly calling on customers whose stocks are so very low that something should be done. In a case of that kind we want you to make a special memorandum of the condition and attach it to any order you may send in for that customer. Or send a note of the condition on a single sheet of paper so that we can pass it to our shipping room and make whatever efforts can be made to help the customer under the present condition.

This can be abused, of course. Everybody needs goods, and very likely some salesmen will deem it their duty to send us a letter on every dealer they call on—and by doing that they will immediately destroy the good of this suggestion. Use judgment. Be sure that your suggestions will result in some of your good old customers being taken care of in a special manner.

30

Yours very truly,

C. L. GAIROARD.

CLG/MM

Conclusions of Vice-Chancellor.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

E. WILLIAM MYERS,

Complainant,

and

J. WISS & SONS COMPANY,

Defendant.

On Bill, &c.

10

Before his Honor, James F. Fielder, Vice-Chancellor,
at Newark, February 9th, 1922.

W. Howard Demarest, Esq., for complainant.

Hugh B. Reed, Esq. (Reed and Reynolds), for defend- 20
ant.

The Court. (Orally at close of case.) The question I
am called upon to decide is: What was the contract be-
tween the complainant and defendant? My conclusion is
that the contract must be gathered from the letter of De-
cember 27, 1919, which, if clear and explicit in its terms,
will be the only guide in determining the contract and no
extrinsic evidence would be considered to vary the terms
of that contract. If the terms of the letter of December 30
27, 1919, are ambiguous or indefinite in any particular
as to the issue now before the Court, then parol evi-
dence and evidence that can be gathered from the written
communications passing from one party to the other,
prior to the date of the letter in question, will be con-
sidered and that, in my judgment, eliminates consideration
of the letter of February 6, 1920, written by Mr. Gairoard
on behalf of the Wiss Company to the complainant, for
it seems to me, as I have heretofore stated, that what Mr.
Gairoard said by his letter in the latter part of February, 40

Conclusions of Vice-Chancellor.

1920, as what he understood the contract to be, would not make the contract different from what it purports to be, and since has had the right to terminate Mr. Myers' employment with the company, if Mr. Myers did not agree with him as to the terms of the contract, and he did not exercise that option, Mr. Myers' continuing in the employ
10 of the company would be a continuance under the terms of the contract as it really existed and as I must determine it to be. Of course, it is to be noted that there was no notice from Mr. Myers to the company that he did not accept the terms of the letter of February, 1920, until at or about the time he resigned, unless the statement he made to Mr. Brooks about the second of March, 1920, on his return from his trip South, when it appears to me from the evidence he first saw the letter of February, 1920, can be considered notice and if I were called upon to rule upon the question I would say that Mr. Brooks' connection with the company has been proven to be such that what Mr. Myers said to him on that occasion, would be notice to the company, for Mr. Brooks' connection with the sales department appears to have been such that he would be required to communicate that notice to Mr. Gairoard, his superior. But I must determine the issue, I think, by the letter of December, 1919, explained by any evidence as to its ambiguity. The question at issue now is, whether the complainant, according to the terms of his
20 employment, is entitled to receive a commission at the agreed rate on sales made by him prior to the date of his resignation, which took effect in April, 1920, where orders from his territory were accepted by the defendant but not filled until after the date the resignation took effect. Of course, if the contract says that he was not entitled to any compensation by way of commissions on shipments made after his employment terminated, that would settle the whole matter. Of the letters offered in evidence on the point at issue, the only letter I find that bears on the subject, in the letter of November 20, 1916, which letter
30
40

Conclusions of Vice-Chancellor.

I will assume from the testimony in the case, reached Mr. Myers in the due course of business on or about its date. That letter was written three years before the contract which is now the subject matter of dispute, was entered into and it says: "In view of the inability of some salesmen to follow instructions and to prevent too great a congestion in our office, we have decided that after January 1st, 1917, we will credit our salesmen only with the amount of goods when shipped," which I understand to mean: We will credit our salesmen, when shipped, with the amount of orders that we accept and they will not be entitled to such credit until the goods are shipped; that is, they will not be entitled to receive their commission on the sale price of the goods until the goods are shipped. That is the only communication I see in the case that bears on the question written prior to the date this contract was entered into. The letter of December 27, 1919, which upon being accepted by Mr. Myers, makes the contract, starts out with this statement: "Owing to the peculiar condition of business, we find it necessary to make a change in your commissions for goods shipped to customers." That change, from the evidence, appears to have been in rate of commission, and not in any other condition pertaining to the employment as it existed prior to the entering into of this contract. The letter then proceeds to provide for a flat yearly salary and traveling expenses and then, on any excess of sales over \$14,000, percentage bonus to be paid. There is no statement whatever in the letter, as I read it, as to when the payment of the bonus is to be made. I do not read the letter to say that it should be made when the orders are accepted, or when the goods are shipped, but taking into consideration the previous arrangement between the parties under which monthly settlements were made between them, it would seem to me quite clear that payment of the commission or bonus was not to be made until the goods were actually shipped out of the factory to the

Conclusions of Vice-Chancellor.

customer; but I do not understand that to mean that there was not a credit payable at some time to the salesman on orders accepted by defendant. Payment was merely postponed to the date when the salesman would be entitled to receive the amount of that credit by a check or by cash. It would seem to be unfair to a salesman who had
10 worked his territory and was subject to dismissal or could terminate his employment at any time, under the terms of his contract, to say that upon dismissal or other termination of his employment, he would lose the benefit of all orders he had solicited and were accepted by his principal, merely because his employment had terminated before the orders were actually filled. The principal would have the benefit of all profits on such sales, while the salesman would lose his commission. My interpretation of the contract is that upon all orders taken by Mr. Myers and upon orders that came by mail, or that came within
20 the terms of the contract, from the territory over which he had control, he would be entitled to receive commissions at the rate fixed by the contract, notwithstanding the fact that the orders were not filled until after the fifteenth of April, when his resignation went into effect.

I understand that it will be necessary to take an account of the amount of business done within Myers' territory, and of orders filled and the goods shipped after April 15, 1920, in order that a sum may be ascertained on which
30 the commissions will apply and I will send the accounting to a Special Master.

*Order.***ORDER.**

Filed March 22, 1922.

IN CHANCERY OF NEW JERSEY.

Between

E. WILLIAM MYERS,

*Complainant,**and*

J. WISS & SONS COMPANY, a corporation,

*Defendant.**On Bill, &c.**Order.*

10

This matter coming on to be heard on bill, answer and replication, in the presence of W. Howard Demarest, solicitor for the complainant, and Reed & Reynolds, solicitors for defendant, and the evidence having been submitted and the arguments of counsel heard thereon, and the Court having determined that the complainant is entitled to relief, and that matters of accounting are involved;

20

IT IS, on this twenty-second day of March, nineteen hundred and twenty-two, on motion of W. Howard Demarest, solicitor for complainant, ordered, adjudged and decreed:

1. That the contract between the complainant and defendant is as set forth in a letter addressed to complainant by defendant, dated December 27, 1919, under which the complainant was entitled to salary and commissions for goods shipped to customers as follows:

30

\$900 per year and travelling expenses up to \$14,000, first quality goods.

In excess of \$14,000—10% bonus on first quality goods, with the following exceptions:

Distributors orders taken at not more than 25% discount on solid steel and 25% and 5% discount on

40

Order.

snips, 7½% bonus, and on second quality goods 5% bonus.

10 But these exceptions are not to be included in arriving at the \$14,000 minimum; which arrangement was to be effective while complainant was in the employment of defendant, and might be cancelled by either at any time.

20 2. The territory assigned to complainant was the states of Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware, and parts of New Jersey, Maryland and New York, and complainant was to receive commissions on goods shipped to customers in said territory, by defendant, on all orders taken by complainant, or received by mail from customers in that territory, during his employment; but all cancelled accounts, accounts collected through attorneys, accounts which are uncollectible, or accounts in which debtor became bankrupt or insolvent, and goods returned to defendant from customers, were to be deducted from gross shipments in computing commissions due.

30 3. Under the contract above stated, complainant is entitled to commissions on goods shipped on orders taken by him or received by mail from the territory so assigned to him during his employment, upon the shipment of the goods, whether shipped during such employment or after its termination, but subject to deductions as aforesaid.

4. Defendant has paid to complainant commissions due on goods shipped up to and including April 15, 1920.

5. It is therefore referred to Francis Childs, one of the special masters of this court, to take and state an account of commissions due from defendant to complainant, in accordance with the contract interpreted as above stated, from April 15, 1920, to date, making all just allowances to defendant as above stated.

Order.

6. For the purpose of taking and stating said account, defendant is directed to produce to said master such books and records as are necessary for the statement of said account, at such time and place as he, said master, shall direct.

7. All further equity is reserved to the coming in of said master's report.

10

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

20

30

40

Notice of Appeal.

NOTICE OF APPEAL.

Filed May 1, 1922.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>E. WILLIAM MYERS,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>J. WISS & SONS COMPANY, a cor- poration,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>Notice of</i></p> <p><i>Appeal.</i></p>
----	--	--

20 J. Wiss & Sons Company, the defendant in the above-stated cause, hereby appeals from the whole and every part of an order or decree made in this cause bearing date March 22, 1922, except the fourth paragraph thereof which adjudged that the defendant had paid to complainant commissions due on goods shipped up to and including April 15, 1920, to the Court of Errors and Appeals of New Jersey, in the last resort in all causes.

Dated April 28, 1922.

30 REED & REYNOLDS,
Solicitors of Defendant.

PITNEY, HARDIN & SKINNER,
Of Counsel.

I conceive that there is good cause for appeal in the above-stated cause.

ALFRED F. SKINNER,
Of Counsel with Defendant.

Petition of Appeal.

PETITION OF APPEAL.

Filed May 22, 1922.

New Jersey Court of Errors and Appeals

10

Between

E. WILLIAM MYERS,
Complainant-Respondent,

and

J. WISS & SONS COMPANY, a corporation,

Defendant-Appellant.

*On Appeal from
Chancery.*

*Petition of
Appeal.*

*To the Honorable the Court of Errors and Appeals, in
the last resort in all causes:*

20

The petition of J. Wiss & Sons Company, a corporation of the State of New Jersey, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by an order or interlocutory decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the twenty-second day of March, nineteen hundred and twenty-two, wherein said E. William Myers was complainant and the said J. Wiss & Sons Company was defendant, in this respect, to wit: that the said decree adjudges, in paragraph 1 thereof, that the contract between the complainant and defendant is as set forth in a letter addressed to complainant by defendant, dated December 27, 1919, under which the complainant was entitled to salary and commissions for goods shipped to customers as follows:

30

\$900 per year and travelling expenses up to
\$14,000 first quality goods.

40

Petition of Appeal.

In excess of \$14,000 10% bonus on first quality goods with the following exceptions:

Distributors orders taken at not more than 25% discount on solid steel and 25% and 5% discount on snips 7½% bonus and on second quality goods 5% bonus.

10 But these exceptions are not to be included in arriving at the \$14,000 minimum; which arrangement was to be effective while complainant was in the employment of defendant, and might be cancelled by either at any time.

And your petitioner humbly appeals from that part of the order or interlocutory decree of the Chancellor which orders and decrees as aforesaid, upon the ground that the same is erroneous, for that it should have been decreed by the Chancellor in said interlocutory decree
20 that the letter of February 6, 1920, written by Mr. Camille L. Gairoard on behalf of the company to complainant, formed part of the contract between the complainant and the defendant; and that the contract between complainant and defendant provided that if the complainant left the employ of the defendant no further payments would be made to him on account of any goods shipped in his territory after he had left the employ of the defendant.

Your petitioner finds himself further aggrieved by said order or interlocutory decree in this respect, to wit: that
30 the said decree, in paragraph 2, adjudges that the territory assigned to complainant was the states of Florida, Georgia, South Carolina, North Carolina, Virginia, Delaware and parts of New Jersey, Maryland and New York, and complainant was to receive commissions on goods shipped to customers in said territory by defendant on all orders taken by complainant, or received by mail from customers in that territory, during his employment, but all cancelled accounts, accounts collected through attorneys, accounts which were uncollectible, or accounts in
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Petition of Appeal.

which the debtor became bankrupt or insolvent, and goods returned to defendant from customer, were to be deducted from gross shipments in computing commissions due.

And your petitioner humbly appeals from that part of the order or interlocutory decree of the Chancellor which decrees as aforesaid, in said paragraph 2 therein, upon the ground that the same is erroneous, for that it should have been decreed by the Chancellor in said order or interlocutory decree that complainant was only entitled to commissions on goods shipped by defendant to customers in said territory where the orders were taken by complainant, or were received by the defendant by mail from said territory during the term of complainant's employment and the goods were also shipped to said customers during said employment, and that complainant was not entitled to any commissions on any such orders where the goods were not shipped to the customers until after the termination of the employment of the complainant by the defendant.

Your petitioner finds himself further aggrieved by said order or interlocutory decree, in this respect, to wit: that the said decree, in paragraph 3, adjudges that under the contract above-stated, complainant is entitled to commissions on goods shipped or orders taken by him or received by mail from the territory so assigned to him during his employment, upon the shipment of the goods, whether shipped during such employment or after its termination, but subject to deductions as aforesaid.

And your petitioner humbly appeals from that part of said order or interlocutory decree of the Chancellor which decrees, in paragraph 3 therein, as aforesaid, upon the ground that the same is erroneous, for that it should have been decreed that under the contract between complainant and defendant, complainant was entitled to commissions on goods shipped on orders taken by him, or received by mail from the territory so assigned to him, dur-

Petition of Appeal.

ing his employment, upon the shipment of said goods during the term of his said employment, but that said complainant was not entitled to any commissions upon any such goods where the orders were taken by him or received by mail from the territory so assigned to him during the term of his employment but were not shipped to
 10 said customers until after the termination of his employment by defendant.

Your petitioner finds himself further aggrieved by said order or interlocutory decree, in this respect, to wit: that the said order or interlocutory decree adjudges, in paragraphs 5 and 6, that said cause be referred to Francis Childs, one of the Special Masters of this Court, to take and state an account of commissions due from defendant to complainant in accordance with the contract, interpreted as above stated, from April 15, 1920, to date, making all just allowances to defendant as above stated; that
 20 for the purpose of taking and stating said account defendant is directed to produce to said Master such books and records as are necessary for the statement of said account at such time and place as he, the said Master, shall direct.

Your petitioner humbly appeals from that part of said order or interlocutory decree which decrees, in paragraphs 5 and 6 thereof, as aforesaid, upon the ground that the same is erroneous, for that it should have been decreed that the said defendant had paid to said complainant all of the commissions to which he was entitled under
 30 said contract and that said bill of complaint should have been dismissed with costs.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

REED & REYNOLDS.
Solicitors for and of Counsel
with Complainant.

Petition of Appeal.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

HARRY GARDNER, being duly sworn according to law, upon his oath says that he is a clerk in the employ of Pitney, Hardin & Skinner, of counsel for the defendant-appellant in the within suit; that on May 19, 1922, at 5:05 P. M., he served a true copy of the within petition upon W. Howard Demarest, the solicitor for the complainant-respondent in the within suit, by leaving the same in his office, #790 Broad street, Newark, N. J., with Lorene M. Mullaney, a clerk in the employ of said Demarest. 10

HARRY GARDNER.

Subscribed and sworn to before me
 this 20th day of May, 1922.

DANIEL B. SMITH,
Notary Public of New Jersey. 20

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Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed May , 1922.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	<p><i>Between</i></p> <p>E. WILLIAM MYERS, <i>Complainant-Respondent,</i></p> <p style="text-align: center;"><i>and</i></p> <p>J. WISS & SONS COMPANY, a cor- poration, <i>Defendant-Appellant.</i></p>	<p><i>On Appeal from Chancery.</i></p> <p><i>Answer to Petition of Appeal.</i></p>
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20 The answer of the above-named respondent, E. William Myers, to the petition of appeal of the above-named appellant.

30 The respondent not acknowledging any or all of the matters which in said petition of appeal are contained, to be true, for answer thereto nevertheless says and admits, that an order was made on or about March 22nd, 1922, and duly entered in the Court of Chancery in this cause, for the purpose mentioned in the said petition as stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said order is agreeable in equity, and prays that the same may be affirmed with costs to be adjudged to him.

And this respondent reserves all just and legal objections and exceptions to said petition of appeal, both as to form and substance.

W. HOWARD DEMAREST,
*Solicitor for and of Counsel
with Respondent.*

New Jersey Court of Errors and Appeals

Between

E. WILLIAM MYERS,
Complainant-Respondent,

and

J. WISS & SONS COMPANY, a corpora-
tion,

Defendant-Appellant.

On Bill, &c.

*On Appeal from
Chancery.*

RESPONDENT'S POINTS IN REPLY.

Objections as reserved by answer to petition of appeal.

The appeal should be dismissed because of appellant's failure to comply with the rules because neither the petition of appeal nor the points were filed within time.

The notice of appeal was filed May 1, 1922. The petition of appeal was not filed within twenty days as required by Rule 21. It was filed on May 22nd. It was served within time. The answer to the petition of appeal was served on the other side on May 24th and filed May 31, 1922. Appellant served notice of argument on June 3, 1922, notifying complainant-respondent of the bringing on of the argument in the cause on the opening day of the term, which would be June 20, 1922.

The state of the case was served upon counsel, but not within time.

Under Rule 20 the points relied upon by the appellant are to be served fifteen days before the cause is moved. The points in this case were not served upon complainant's counsel until July 7th, which is not fifteen days before the case was moved, but after the Court had ceased to sit to hear cases. It is yet doubtful whether the briefs

can be filed within twenty days from the opening day of the term.

For all these reasons the appeal should be dismissed.

POINTS IN REPLY.

The decree below should be sustained under the general rule that where a decree is supported by evidence it will not be reversed. There is no contention here that the learned Vice-Chancellor disregarded the evidence or arrived at a conclusion in conflict therewith (4 C. J. 901).

This Court has held that upon findings of fact great weight is to be given to the conclusions of the Vice-Chancellor who hears the case below and sees the witnesses and hears them testify, the Appellate Court retaining in all cases the power to ascertain by an analysis of the evidence what the facts are and whether the general finding is sustained thereby (*Carton v. Phelps*, 91 N. J. Eq. 312, 109 Atl. 291).

The Vice-Chancellor in this case concluded that the letter-contract of December 27th was not lacking in ambiguity. The pleadings disclose the contentions of the parties to the suit. The Court accordingly construed the ambiguous contract in the light of testimony and communications between the parties strictly in accordance with the legal principle. The Court from the evidence, oral and written, concludes that the contract was to pay commissions based upon orders taken or received from the salesman's territory, payable when the goods were shipped or, as the Court says:

"I do not read the letter to say that it (payment) should be made when the orders are accepted or when the goods are shipped, but taking into consideration the previous arrangements between the parties under which monthly settlements were made between them, it would seem to me quite clear that payment of the commission or bonus was not to be made until the goods were actually shipped out of the factory to the customer; but I

do not understand that to mean that there was not a credit payable at some time to the salesman on orders accepted by the defendant. Payment was merely postponed to the date when the salesman would be entitled to receive the amount of that credit by a check or by cash (Case, p. 79, l. 33).

This is strictly in accordance with Exhibit D. 2 (Case, p. 68), which includes the phrase: "After January 1, 1917, we will CREDIT our salesmen only with amount of goods when shipped."

For six years commissions had been earned on the basis of orders taken and paid on the basis of goods shipped. The testimony is that the change made by the letter-contract of December, 1920 (Case, p. 3) is in the rate of commissions and that it would affect complainant very little (Case, p. 17, ll. 1-30, ~~ll. 2-20~~). The document itself confirms the point.

There is no merit to the contention that the phrase, "This is to be effective while you are in our employ and to begin January 1, 1920," changes or affects the legal situation or the construction of the contract in any way. The contract and all of its terms were terminable at any time and the plain meaning of the words above quoted is that it applies to the changed rate of commission. Bearing out this argument, it is contended that if the clause were omitted the situation would be precisely the same.

The letter of February 6th attempting to construe the contract in favor of defendant-appellant was not received by Myers until February 28th (Case, p. 18, ll. 25-37). He immediately took the letter to Mr. Brooks, found by the Court to be a person possessed of such authority as to charge defendant with notice (Case, p. 78, l. 19), and protested that he would not accede to so ridiculous a proposition and that he would not waive the equity he had in his orders (Case, p. 21, l. 3). Nothing was done, however, until the matter was again brought up by Mr. Myers at the time he resigned, April 15, 1920. Defendant-appellant having notice of Mr. Myers' refusal to ac-

cept the letter of February 6th had put on it also the burden of terminating the employment if it did not concede to his demands because the contract of employment was subject to change or termination by either party at any time as construed by both sides.

The cases cited by appellant as submitted in typewritten copy of their points do not apply and are not in point. This is a simple case of construing the contract in the light of evidence and correspondence and the conclusions arrived at by the Vice-Chancellor being supported by the evidence the decree should be affirmed.

Respectfully submitted,

W. HOWARD DEMAREST,
Solicitor for and of Counsel
with Complainant-Respondent.

New Jersey Court of Errors and Appeals

Between

E. WILLIAM MYERS,

Complainant-Respondent,

and

J. WISS & SONS COMPANY, a corporation,

Defendant-Appellant.

On Bill, etc.

*On Appeal
from Chancery.*

BRIEF FOR J. WISS & SONS, DEFENDANT-APPELLANT.

This is an appeal from a decree of the Court of Chancery in which that court held that the contract which complainant sought to enforce was to be found within a letter addressed to complainant by defendant dated December 27, 1919 (Exhibit C. 3), and interpreted it as entitling the complainant, Myers, to commissions on all goods sold by him while in defendant Wiss Company's employ though not shipped to the customer until after the employment was terminated. The Court refused to consider another letter of February 6, 1920 (C. 2, Case, p. 60), but held that a letter of November 20, 1916 (D. 2, Case, p. 68), threw light on the meaning of the letter of December 27, 1920.

Appellant contends that the letter of December 27th, standing alone, shows that complainant, Myers, was entitled only to commissions on goods shipped while in the Wiss Company's employ; that the letter of November 20, 1916, strengthens rather than weakens this interpretation; that the conditions surrounding the parties at the time either or both letters were written threw a bright light upon the meaning of the contract, and that this was apparently ignored; and that anyway, whatever be the interpretation of which the letter of December 27th is capa-

ble, alone or in the light of the letter of November 20, 1916, and the surrounding conditions, another letter of February 6, 1920, made clear beyond any question that Myers was not entitled to commissions on goods shipped after he left the Wiss Company's employ and that by remaining in the Wiss Company's employ, not resigning until April 15, 1920, complainant, Myers, accepted the letter of February 6th as correctly setting forth the terms of his employment.

Facts.

Defendant-appellant is a well known manufacturer of scissors, shears, cutlery, etc., with office and factory in Newark, N. J. Complainant-respondent entered its employ as salesman and demonstrator in 1912. He received \$12.00 a week and his traveling expenses. Later in the year he was given in addition, a 5% commission on all goods sold in excess of \$750 per month. The next year there was a slight increase that continued until January 1, 1916 (Case, pp. 14 and 15), when a written contract was made (C. 1, Case, p. 59). He was to get \$75 per month, traveling expenses and a 10% commission or bonus on sales over \$14,000 per year. In 1918 the rate of commission was changed, becoming 10% on first quality goods and 5% on second quality goods (Case, p. 16). Complainant admits that the terms of his employment were that although the contract might specify a year as the length of employment he was at liberty to leave at any time (Case, p. 37) and could be terminated by either party at any time (Case, pp. 36 and 47).

Mr. Camille L. Gairoard was sales manager for defendant-appellant, with a number of clerks in his department and twenty to twenty-five salesmen on the road (Case, pp. 41, 42). He wrote the letter of December 27, 1919. Though this particular letter was addressed to the complainant, similar letters went to the other salesmen. This so appears by Mr. Gairoard's account of a call from

another salesman, Mr. Neff, who wanted to know what the contract meant, and he remarked to Mr. Gairoard:

“Perhaps some of the salesmen might not feel so good about this contract.”

To which Mr. Gairoard replied:

“I told him I had heard nothing of it and to prevent any misunderstanding on the part of any of them I wrote the letter of February 6th.” (Case, p. 49.)

Evidently Neff had received a similar letter and so had the other salesmen. The text of the letter confirms this, for, although addressed to Myers, it is a general statement of a general policy and explanation of a change in Myers' case which shows that similar change had been made in the case of each of the other salesmen (Case, p. 60). It told the salesman that the letter of December 27, 1919, meant just what it said, that no commissions would be paid on sales if the goods were not shipped until after a salesman left the company's employ.

The complainant says that he did not get the letter of February 6th until February 28th; that then he saw Mr. Brooks; that Mr. Brooks was an assistant to Mr. Gairoard having a great deal to do with the salesmen; that he told Mr. Brooks that he would not relinquish the equity he had in orders taken, though shipments had not been made. Having told Brooks that, he went out in his territory taking more orders, and there was no more discussion of the matter between him and anyone representing the Wiss Company. The next thing that happened was that Myers sent in his resignation on April 15th (Case, pp. 20, 21).

I.

The letter of December 27, 1920, standing alone entitles complainant only to commissions on goods shipped while in defendant's employ.

The Vice-Chancellor seems to take for granted that the letter of December 27, 1919, plainly supports the com-

plainant's claim. We submit that right on its face, without support from anything that passed between the parties, either before it or afterwards, it does not; that it presents no ambiguity and requires no explanation. On its face it is a restatement of the entire terms of compensation, salary, expenses, allowances, commissions. The fixed compensation is \$900 a year and traveling expenses "up to \$14,000 first quality goods" and that means that if the complainant sold \$14,000 worth of goods he would be paid \$900 and his traveling expenses. As an incentive to make his total sales in excess of \$14,000 a year he was to receive a commission or bonus, 10% on first quality goods and 7½% on certain others and 5% on second quality goods. On what basis were the commissions to be paid; was it to be on orders sent in and accepted or on orders sent in and accepted and the goods shipped? The answer is found in the first sentence, which, speaking of "Your commissions *for goods shipped* to customers" says:

"This is to be effective while you are in our employ and to begin January 1, 1920."

What did this sentence mean, unless it meant this basis of computation of your commissions can have no effect after you leave our employ and you will get no commissions on goods shipped after you leave our employ. If this were not the meaning and the one that was intended, why use the expression? Everybody knows and understands that when an employment is ended, it is ended and that any obligation to pay is ended. Surely it was not necessary to tell Mr. Myers that, if that was all it meant.

If this view was suggested to the Vice-Chancellor he seems to have passed it by, for he says nothing about it.

II.

The letter of November 20, 1916, and the conditions surrounding the contracting parties in 1916, 1917, 1918 and 1919, support the interpretation of the contract for which appellant contends.

The learned Vice-Chancellor held that the contract must be gathered from the letter of December 27, 1919, except that if ambiguous or indefinite, parol evidence and evidence gathered from other communications prior to its date would be considered.

This is a part of a larger principle, namely that the contract, whether verbal or written, is to be interpreted in the light of the conditions surrounding the parties at the time it is made. The letter of November 20, 1916, said:

“In view of the inability of some salesmen to follow instructions and to prevent too great a congestion in our office we have decided that after January 1, 1917, we will credit our salesmen only with the amount of goods when shipped.”

The Vice-Chancellor interpreted this as meaning the salesmen would not be entitled to receive their commission until the goods are shipped. It seems to us this overlooks the reason given for that letter which was—salesmen were not following instructions and the company wanted to prevent “too great a congestion in our office.” Meaning congestion of orders. It will be remembered that the European war had been on for nearly two years. Production and trade in many foreign nations was almost, if not entirely, suspended. American manufacturers were being called on for more than they could supply. American factories were having no trouble in getting orders. Transportation was congested, coal was scarce, and the wholesale and retail dealers were hard put to obtain goods for their customers. Mr. Gairoard says:

“From 1916 to the 1st of May, 1921, the conditions of the business of J. Wiss & Sons Co. was

such that their output could have been sold three or four times over" (Case, p. 45).

Exhibits D. 1 and D. 2 show this condition. It affected the company's attitude towards the salesmen. Instead of wishing to stimulate salesmen's activities in getting orders the company's anxiety was to get fewer orders. In April the salesmen were told by the letter of April 8, 1916 (Exhibit D. 1), that defendant company undertook to take care of this situation by instruction to the salesmen, saying:

"From this date we can only accept orders for immediate delivery or delivery at our convenience. Any orders taken for future delivery will only be accepted at prices ruling when shipment is made.

In future no datings whatever will be allowed.

Failure to follow above rules may mean *cancellation of commission credit on the order or a fine*, as we may decide."

This shows that at that time the salesman was regarded as having earned his commission when the order came in, and when we turn to the contract in force prior to November 20, 1916 (Ex. C. 1, Case, p. 59), we find he had. That named the same salary and then provided for

"Commissions on sales"

with an addendum that cancelled orders, uncollectible accounts and goods returned were to be deducted from the sales. Plainly under this, Mr. Myers earned his commission when he turned in an order and the company accepted it. If the next day, he told the company he was going to leave, as he had the right to do (Case, p. 62, ll. 13 & 14; p. 60, ll. 23-24; p. 37, l. 27; p. 47, l. 7), and demanded the money due him they could not have refused to pay him commissions on the orders he had sent in the day before, on the ground that they were not shipped during the term of his employment. But the situation, as we say, had changed. Commissions ordinarily are a premium on effort, a stimulus to salesmen to get as many orders as they can. War conditions made it unnecessary to stimu-

late salesmen by any premiums on the account of sales they made. On the contrary, the need was to have the salesmen hold back the flood of orders and discourage customers from buying. Hence the letter of April 8th, putting all sorts of limitations on the company's acceptance of an order; that the customer was to understand that the delivery would be at the company's convenience, no telling when he would get his goods; that he could not even know at what price he was going to get them because the orders taken would be at the prices ruling when the shipments were made, some time in the future. This was intended to make the salesman slow to accept orders. It was an instruction that carried with it a penalty if it was violated, consisting of a cancellation of his commission credit on the order, or a fine. (Note that the commission credit was on the order and not on the shipment.) But this was not as efficacious as was hoped. The salesmen were human, and as long as they were going to earn a commission if they sent in an order and it was accepted, the natural temptation and self-interest put upon them was to violate this rule and to swell the volume of the orders that they sent in. Hence it was that the company sent out the letter of November 20th saying that salesmen were violating instructions, taking orders when they ought not to, and in view of that fact and to discourage the sending in of orders, salesmen would, after January 1st, be credited only with the amount of goods when shipped. In other words, salesmen were to understand that they would not have earned their money by getting an order and sending it in even though the company accepted it. They would not have earned their money until the goods were shipped. The natural effect of this would be as the company wished—it would not be flooded with orders that it could not fill. The self-interest of the salesmen would no longer make it worth while to send in an order that he knew could not be filled for months to come, the failure in the

filling of which would only make another dissatisfied customer. Then the letter added this significant sentence:

“This will make unnecessary the crediting of orders when received.”

showing that the salesman had been recognized as earning his money when the order was received. The learned Vice-Chancellor pointed to the introductory sentence in the letter of December 27, 1919, which spoke of the necessity of making “a change in your commissions for goods shipped” and held that the change was in the rate of commission only, that it did not change the basis on which the salesman’s right to commissions rested. We think that it did, but if the Court be not with us on this, but accept our contention as to the letter of November 20, 1916, the complainant, even under the interpretation given by the Trial Court to the letter of December 27, 1919, is entitled to a reversal of the decree appealed from. If this Court accepts this view it becomes unnecessary to consider the letter of December 27, 1919, or the letter of February 6, 1920. The letter of December 27 can be taken as the Vice-Chancellor took it, as only changing the rate of commission, and it will make no difference when the letter of February 6, 1920, reached the complainant or that it never reached him. If as the Vice-Chancellor thought, neither of these letters limited the complainant’s contract rights as we contended, they certainly did not enlarge them, and under the pre-existing contract, shown by complainant’s admissions and these letters of April 8 and November 20, 1916, the complainant did not earn his commissions until the goods were shipped. A man is not entitled to his money until he earns it and he cannot earn his money after his employment is ended, unless by some special clause in the contract of employment.

III.

The letter of February 6, 1920, became a part of the written contract between the parties and it distinctly stated that complainant was to receive commissions only on goods shipped. Complainant by remaining in defendant-appellant's employ until April 15, accepted its terms not only as in effect from its date but as declaratory of the contract under which he had been working since December 27, 1919.

We may have failed to satisfy this Court that the letter of December 27, 1919, considered by itself and on its face alone, entitled the complainant only to commissions on goods shipped; or that if that letter was as was held by the Court below, a mere change in the rate of commissions to be paid, leaving the basis of computation of the commissions unchanged, that basis, as fixed by the letter of November 20, 1916, was that the salesman was entitled only to commissions on goods shipped. So we may have failed to convince the Court that this last mentioned letter, considered as one of the conditions surrounding the parties and along with other conditions, made it plain that under the letter of December 27, 1919, complainant was entitled only to commissions on goods shipped while in appellant's employ. There still remains the letter of February 6, 1920, and on that we submit this appeal should succeed. The Court below held that it could not go outside of the letter of December 27, 1919, unless it were ambiguous or indefinite, in which case

“parol evidence and evidence that can be gathered from the written communications passing from one party to the other prior to the date of the letter in question will be considered.”

If the contract was embodied in the letter of December 27, we do not question the conclusion of the learned Trial Judge that no extrinsic evidence should be considered to vary its terms, unless to explain something ambiguous or indefinite, nor do we question the statement that such parol evidence, admitted to explain ambiguity, would be

limited to communications between the parties prior to the letter of December 27th. That is what the rule in *Naumberg v. Young* means, that when parties negotiate, whether by word of mouth or by letter, and then attempt to reduce the result of the negotiations to written contract form, neither shall be permitted to offer evidence to show that there was some term of their bargain besides the terms that were put in writing. Varying the contract, in that sense, means proof of a different contract than the one in writing, but as of the same time. We do question the conclusion of the Vice-Chancellor after stating the above when he says:

“and that, in my judgment, *eliminates consideration of the letter of February 6, 1920,* * * * for it seems to me as I have heretofore stated that what Mr. Gairoard said by his letter in the latter part of February, 1920, as what he understood the contract to be, would not make the contract different from what it purports to be, and since he had the right to terminate Mr. Myers’ employment with the company if Mr. Myers did not agree with him as to the terms of the contract and he did not exercise that option, Mr. Myers’ continuing in the employ of the company would be a continuance under the terms of the contract as it really existed” (Case, pp. 77, 78).

The settled rule of law as laid down in *Naumberg v. Young* and other cases, does not mean that the parties may not afterwards make a new contract which shall be a modification of or a complete substitution for the written contract. In other words, while the rule excludes parol evidence to show any other contract at the time of the written one than the writing, it does not exclude parol evidence to show a new contract made thereafter, though it be a change in the written contract. The letter of February 6, 1920, was a writing of equal dignity with the letter of December 27, 1919, and while it is quite true that Mr. Gairoard could not by his statement of what he understood the letter of December 27th to mean, impose that interpretation upon the Court, Mr. Myers, if he ac-

cepted Mr. Gairoard's interpretation could and would by so doing impose it upon himself or in other words make it the real contract between himself and the company. It is uncontradicted that Mr. Myers remained in the employ of the company after the letter of February 6th, defining the terms of his employment as understood by the Wiss Company. We say that such continuation was an implied acceptance of the contract as so interpreted; that such inference is in accord with the custom of this particular company and business custom generally. Nowadays when the business conditions require a decrease or permit an increase of wages or salaries, the employer does not call in each employee, bargain with him on the new terms, have a "meeting of the minds" and then have it reduced to writing or express in words in the presence of a witness or otherwise, nor does he call a mass meeting of the employees and call for a vote or show of hands from those willing to accept the proposed new terms. He posts a notice stating the increase or decrease as effective from a given date and those who are unwilling to accept these terms know that if they do not mean to accept them they must leave; that if they remain they will be regarded as having accepted. The employee may be dissatisfied, he may say to his foreman or to someone else over him, as Mr. Myers did to Mr. Brooks, that he does not propose to accept those terms, but he knows in his heart that what he says is but so much wind if not accompanied by action, namely, leaving the employ. This we say is the general practice necessary for the doing of business on the large scale of today, and part of the change in business methods that have come with the expansion of its volume; that it was a custom in this particular company and that Myers knew it and recognized it. The employment was for no term, year, month or even a day. Myers was free to terminate it at any time and so was the Wiss Company.

Mr. Myers' testimony:

"Q You consider you were bound for a year and could not terminate your employment before

that time? A No, sir; I do not consider I was bound for a year.

Q You could terminate it at any time? A Yes, sir."

(Case, p. 37.)

Mr. Gairoard's testimony:

"Q Had it been your opinion that you could change the terms of your contract as to the rate of compensation, with Mr. Myers, at your pleasure? A Yes, sir.

Q So that any time you wanted to say: 'Hereafter we will only pay you five per cent. instead of ten per cent.' you might do so? A Yes, sir.

Q And how long had that been your opinion? A From the time he came to work for us.

Q Even without his consent? A He had the privilege of resigning.

Q Then, just what did you mean by your direct testimony that it was your custom to change commissions, territory, the payment of commissions, as might prove equitable to both parties? A I meant just what I said."

Apparently cross examining counsel thought that he made such changes as might prove satisfactory to both parties, but what he meant and said was that he made such changes as might prove equitable to both parties, meaning that he was the judge of what was equitable and fair and if the employee was unwilling to accept the changes he had the privilege of resigning. (Case, p. 52, ll. 1 to 20. See also Case, p. 42, ll. 35 to 40, 43 and 44.)

Instructions were constantly going out from Mr. Gairoard to the salesmen under him; prices were being changed; delivery dates were changed. Read Exhibits D. 1, D. 2, D. 3, D. 4, D. 5, D. 6, D. 7, D. 8. They show this control of the subordinate by his superior on matters affecting the terms of his employment. For example, a change of price will affect the amount of the commissions computed as they are, as a percentage of the price. Wiss & Company changed prices as they saw fit. They did not

say to each individual salesman or to the 25 or 30 salesmen collectively:

“We are thinking of changing our prices. That will, of course, affect the amount of commission that you will get. We would like to put it before you and have your individual or collective assent.”

They made the change. It might just as definitely and directly affect the compensation of a salesman as would a change in the rate of commission, but he knew that if he did not intend to accept it, he must leave; that by staying he did accept it. Ordinarily a contract between an employer and a salesman will specify the rate of commission, saying nothing about what the salesman is to do to earn it. But this does not leave him free to loaf on the job. Certainly not, if his hiring is at a fixed salary with commissions as a bonus, as was the case with Mr. Myers. In every such contract it is an implied term that the salesman will do his best to obtain orders, and an implied term that his employers will accept the orders unless the customer is unsatisfactory as to responsibility. Some of these instructions and notices that went from the Wiss Company to their salesmen, including Myers, changed this implied term by telling the salesmen not to take orders from new customers; to keep down the amount of orders from old customers; to do all that they could to reduce the volume of the orders, but it did not occur to Mr. Myers to protest, saying: “That changes my contract of employment and I do not assent to it”; nor did it occur to him to say: “I did not sign any such written modification of my contract and therefore I am not bound by it.” No, he accepted it by staying under those terms and not resigning. The learned Vice-Chancellor held that because Mr. Gairoard had the right to terminate Mr. Myers’ employment if Myers did not agree as to the terms of the contract, and did not exercise that option, Mr. Myers’ continuation in employment would be under the terms of the contract as it then existed without the proposed change, and that the change was only in the rate of commissions. We contend

that the contract as it existed, without this letter, was one for commissions on goods shipped while in the employ of defendant, but if the Court does not agree with us we earnestly urge that thus casting the burden upon the company to terminate the employment if Myers did not agree, was error; that by the method adopted by the company of dealing with its employees, and by large employers of men generally, the burden was upon complainant to terminate, and if he did not, he impliedly accepted. True, the Wiss Company asked him to sign the memorandum agreement of December 27th, 1919, which he did, but there is nothing to show that such signature was regarded as essential. It was desirable but not necessary. Exhibits D. 1 to D. 8, both inclusive, modified existing contracts, but no signature was required. It must be remembered that when the company sought to restate the terms of employment, as in the letter of December 27, 1919, it had no personal interview; the employees addressed were off on the road; unless the employee received the letter he could not be understood to have accepted it by remaining in employment; the signing and returning the copy was to be evidence that he had received it. When he talked with Mr. Brooks he said he would not accept such a ridiculous proposition. Mr. Brooks "shrugged his shoulders. He says, 'I think you are supposed to sign it'."

Mr. Brooks was right. He was supposed to sign it or leave. If he did not sign it and remained, the company might waive the signature that it expected.

After all, the decision of this case in the court below was not so much based upon written contract or interpretation thereof or upon the rules of law excluding parol testimony, but upon the Court's sense of equity. This is shown in the opinion, where after construing the letter of December 27th as changing the existing contract only in the rate of commissions and the time of crediting of

the commissions, as a mere postponement of payment of commissions already earned, the Court says:

“It would seem to be unfair to a salesman who had worked his territory and was subject to dismissal or could terminate his employment at any time, under the terms of his contract, to say that upon dismissal or other termination of his employment, he would lose the benefit of all orders he had solicited and were accepted by his principal, merely because his employment had terminated before the orders were actually filled. The principal would have the benefit of all profits on such sales, while the salesman would lose his commission” (Case, p. 80).

This, we submit, was error. It would be entirely true of a contract for commissions to a salesman made under ordinary conditions. It would be unfair to stimulate a salesman to work for orders and then dismiss him before the goods were shipped and deny him commissions. In obtaining the orders he would have done what his employer wanted him to do. He would have gained for his employer the benefit that was expected from his labor and it would be unfair to keep that benefit and not pay him for his work. But in this case, the situation was entirely different. The Wiss Company did not want the orders. It was not retaining the salesmen in its employ for the purpose of getting orders. It needed no salesmen for that purpose. It wanted the salesmen to persuade the customer not to buy, or if buying to buy as little as possible. It told the salesmen that if they did not obey instructions to take as small orders as possible, the next instructions would be to take none (Case, p. 71, l. 10). The salesmen were to “mark time,” just keeping in touch with the trade and keeping the trade good-natured (Case, p. 60, ll. 30 to 40). The fixed salary and the commissions on the goods shipped were to be the compensation for this and although this would mean reduced compensation for a time, better times would come, when the company would again be eager for orders and able to deliver, when the commissions, though based only on goods

shipped, would be again ample. We respectfully submit that under the conditions recited, with the company embarrassed rather than benefited by any increase in the flood of orders, with the company trying its utmost to limit the activities of its salesmen in that line, there was no unfairness in telling the salesmen, as the company, in effect, did:

“We do not want you to send in orders. We cannot promise deliveries; the orders if taken will have to be upon the condition that the customer will take delivery at our convenience and without definite date. Your interest, Mr. Salesman, may prompt you to violate these instructions and send in the orders. As a check upon that self-interest you must understand that we will only pay commissions upon the goods shipped. It will do you no good to get any more orders than those that we can fill, and this limitation upon the commissions to the goods shipped is to be effective while you are in our employ.”

This we submit is a fair summary of the position taken by the company with its salesmen, as shown by the testimony.

This, as we see it, is not a case where it is necessary to quote many authorities. The rule that parol evidence will not be permitted to make a new contract as of the time that the written contract was made, but will be sufficient to make a subsequent change in that contract, and the rule that the contract is to be interpreted in the light of the conditions surrounding the parties at the time it is made, are so well settled that it is unnecessary, we think, to cite authorities. It is undoubtedly the general rule, too, that an agent selling goods on commission is ordinarily entitled to a commission on the goods sold by him during the continuance of the agency, although they may not be delivered until after the agency is terminated, as well as the general rule that an agent to sell has earned his commission when he has brought a buyer, able, ready and willing to buy. But it is equally well settled that such general rule may be modified by the parties as they see

fit. *Stevenson Company v. Oppenheimer*, 91 N. J. L. 479, and cases there cited, or as is said in *Williston on "Contracts,"* Section 666A, speaking of the making of a contract that makes compensation payable only on a contingency or condition precedent:

"It (the condition precedent) must be performed or happen before liability arises on the promise which the condition qualifies."

So it is well settled that the employer may make an employee's right to commissions on orders subject to the acceptance of the same by the employer or subject to the order being filled by shipment. *Mechem on "Agency,"* Section 1532, states the law as follows:

"Where the contract was interpreted to mean 'that commissions should be earned upon all orders accepted *and filled by shipment*, and not merely upon orders obtained,' held that the agent was not entitled to commissions on orders which were justifiably cancelled by the buyer or rejected by the seller." (In re *Ladue Tate Mfg. Co.*, 135 Fed. 910.)

and the same author says of an agency that may be terminated at will by the principal:

"The agent cannot, if it be revoked, recover damages for this withdrawal of the power to act or for the commissions or compensation he might have earned had the authority not been revoked." (Mechem, Section 1543.)

It is not uncommon for a salesman to be paid a percentage of the profits of the business and it is the universal rule we believe, that profits on goods actually sold after termination of the employee's contract are not to be considered. In *Freudenberger v. Sternberg*, 67 L. 297, the manager of a sales branch of a merchandising business was employed indefinitely as to time at a weekly salary and a commission of 3% on cash receipts less all expenses of the branch in his charge. This Court held on appeal that the commission was to be ascertained by deducting from the cash receipts of the whole year the expenses of that year, and by calculating the agreed per-

centage on the proportionate part of the residue, represented by the manager's time of service during the year. In other words, on the net receipts up to the time of termination of the employment.

In *Walker v. John Hancock Insurance Company*, 80 N. J. L. 342, an agent for a life insurance company was entitled under his agreement to a percentage of the premiums collected. He was held by this court not to be entitled to the agreed percentage on premiums collected after his discharge for cause, and of course, the same rule would have been applied, had he, instead of being discharged for cause, resigned, as did the complainant in the case at bar.

While generally speaking, a contract of employment cannot be modified or rescinded unless by mutual consent—

“An employment terminable at any time is however subject to modification at any time by either party as a condition of its continuance” (26 Cyc. 972) citing *Norton v. Brookline*, 181 Mass. 63 N. E. 930.

and continuing in employment is taken as an acceptance of the conditions of employment though objected to by the employee. See *Lamson v. American Ax & Tool Co.*, 58 N. E. 585.

There are cases which say that the salesman may recover commissions on goods shipped after the employment terminated but they rest upon the reason that under the contract controlling the situation the commissions became due before the employment was terminated. These have no application here because, as plainly as words could express it, the parties agreed that commissions should not become due until the goods were shipped, and, further, that the whole contract and with it the whole right to commissions on any basis was to be effective

“While you are in our employ” (Case, p. 62).

This meant, we submit, that it was to be without effect after the employment ceased.

For the reason then, that under the letter of November 20, 1916, and by the company's practice, accepted by

the salesman, the salesman was not regarded as having earned his commission until the goods were shipped, not until then was he credited; for the reason that the letter of December 27, 1919, if it did not confirm this pre-existing basis for commissions, stated it and made it in effect from that time on; that the letter of February 6, 1920, and Mr. Myers' continuance in the company's employ made this clear if all our other reasons are rejected; and because the interpretation of the employment for which we contend is in accord with the changed conditions surrounding the parties, and in the light of those changed conditions is not unfair or inequitable, we submit that the decree of the Court below should be reversed.

Respectfully submitted,

REED & REYNOLDS,
Solicitors for Defendant.

ALFRED F. SKINNER,
Of Counsel.

The first part of the report is devoted to a general
 description of the work done during the year. It
 is followed by a detailed account of the various
 experiments conducted, and the results obtained.
 The experiments were carried out under the
 supervision of the Director, and the results
 are given in the following tables. The first
 table shows the results of the experiments on
 the effect of temperature on the rate of
 reaction. The second table shows the results
 of the experiments on the effect of pressure
 on the rate of reaction. The third table
 shows the results of the experiments on the
 effect of concentration on the rate of
 reaction. The fourth table shows the results
 of the experiments on the effect of catalyst
 on the rate of reaction. The fifth table
 shows the results of the experiments on the
 effect of solvent on the rate of reaction.
 The results of these experiments are in
 general agreement with the theory of
 reaction rates.



