

1950

# Walter P. Henoch v. W. H. Bintz Company : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Critchlow, Watson & Warnock; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Henoch v. Bintz Co.*, No. 7578 (Utah Supreme Court, 1950).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1344](https://digitalcommons.law.byu.edu/uofu_sc1/1344)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

Case No. 7578

---

IN THE SUPREME COURT  
of the  
STATE OF UTAH

WALTER P. HENOCH,

*Respondent,*

vs.

W. H. BINTZ COMPANY,  
a corporation,

*Appellant.*

BRIEF OF APPELLANT

FILED

NOV 15 1935 CRITCHLOW, WATSON & WARNOCK,  
1320 Continental Bank Bldg.  
Salt Lake City 1, Utah

Clerk, Supreme Court,

*Attorneys for Appellant*

---

# INDEX

|   | Page |
|---|------|
| STATEMENT OF FACTS .....  | 2    |
| THE COMPLAINT .....   | 2    |
| THE ANSWER .....  | 3    |
| THE EVIDENCE .....  | 3    |
| STATEMENT OF POINTS .....   | 11   |
| ARGUMENT:   |      |
| POINT I.—The evidence is uncontradicted that if Sorenson promised the plaintiff a bonus of \$500.00 in addition to his salary for the period from August 25, 1947 to the end of the fiscal year, March 1, 1948, Henoch received all that was promised.....  | 14   |
| POINT II.—The promise, if made, to put Henoch on "The incentive plan the same as other salesmen" beginning March 1, 1948 is unenforceable because it is not certain and definite as to the methods or factors upon which incentive pay was to be computed...                                      | 16   |
| POINT III.—Even if the claimed promise to put Henoch on "The incentive plan the same as the other salesmen" beginning March 1, 1948 were enforceable, the undisputed evidence is that Henoch was actually paid an amount in excess of a sum computed on the same basis as the other salesmen..... | 19   |
| POINT IV.—The evidence is undisputed that Henoch was informed at the beginning of the fiscal year 1948-1949, and again in November or December, 1948, that Sorenson had no authority to bind the company to pay incentive pay.....  | 22   |
| POINT V.—The evidence is undisputed that sales made by sellers other than the Bintz Company were not included in the basis for the computation of incentive pay for the other salesmen or for Mr. Henoch. ....  | 23   |
| POINT VI.—The evidence is undisputed that the plaintiff severed his employment with the defendant before the end of the fiscal year 1949-1950, and had not earned incentive pay according to the alleged promise. ....  | 29   |
| POINT VII.—Under the undisputed evidence there was a complete accord and satisfaction between the parties at the end of each pay period.....  | 30   |
| POINT VIII.—The court erred in denying the defendant's motions for non-suit, for directed verdict, for judgment notwithstanding and for a new trial.....  | 31   |
| CONCLUSION .....  | 34   |

## AUTHORITIES CITED

|  |    |
|--|----|
| Ashton vs. Skeen, 85 Utah 489 at 496, 39 Pac. (2d) 1073..... | 31 |
|--|----|

# INDEX

|   | Page |
|---|------|
| STATEMENT OF FACTS .....  | 2    |
| THE COMPLAINT .....   | 2    |
| THE ANSWER .....  | 3    |
| THE EVIDENCE .....  | 3    |
| STATEMENT OF POINTS .....   | 11   |
| ARGUMENT:   |      |
| POINT I.—The evidence is uncontradicted that if Sorenson promised the plaintiff a bonus of \$500.00 in addition to his salary for the period from August 25, 1947 to the end of the fiscal year, March 1, 1948, Henoch received all that was promised.....  | 14   |
| POINT II.—The promise, if made, to put Henoch on "The incentive plan the same as other salesmen" beginning March 1, 1948 is unenforceable because it is not certain and definite as to the methods or factors upon which incentive pay was to be computed...                                      | 16   |
| POINT III.—Even if the claimed promise to put Henoch on "The incentive plan the same as the other salesmen" beginning March 1, 1948 were enforceable, the undisputed evidence is that Henoch was actually paid an amount in excess of a sum computed on the same basis as the other salesmen..... | 19   |
| POINT IV.—The evidence is undisputed that Henoch was informed at the beginning of the fiscal year 1948-1949, and again in November or December, 1948, that Sorenson had no authority to bind the company to pay incentive pay.....  | 22   |
| POINT V.—The evidence is undisputed that sales made by sellers other than the Bintz Company were not included in the basis for the computation of incentive pay for the other salesmen or for Mr. Henoch. ....  | 23   |
| POINT VI.—The evidence is undisputed that the plaintiff severed his employment with the defendant before the end of the fiscal year 1949-1950, and had not earned incentive pay according to the alleged promise. ....  | 29   |
| POINT VII.—Under the undisputed evidence there was a complete accord and satisfaction between the parties at the end of each pay period.....  | 30   |
| POINT VIII.—The court erred in denying the defendant's motions for non-suit, for directed verdict, for judgment notwithstanding and for a new trial.....  | 31   |
| CONCLUSION .....  | 34   |

## AUTHORITIES CITED

|  |    |
|--|----|
| Ashton vs. Skeen, 85 Utah 489 at 496, 39 Pac. (2d) 1073..... | 31 |
|--|----|

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

WALTER P. HENOCH,

*Respondent,*

vs.

W. H. BINTZ COMPANY,  
a corporation,

*Appellant.*

Case No. 7578

---

BRIEF OF APPELLANT

---

INTRODUCTION

This is an appeal from a judgment in the District Court for Salt Lake County upon the verdict of the jury in the sum of \$1,630.98 in favor of the plaintiff and against the defendant.

In view of the fact that this appeal is based upon the contention that there is no evidence to support the verdict of the jury and that the Appellant's motion

for a directed verdict should have been granted, much of the testimony and evidence will of necessity be referred to or quoted in support of Appellant's arguments. For this reason there will bound to be some repetition in this Brief but we believe this is inevitable to give the Court a clear understanding of the case and at the same time comply with the rules of the Court requiring a statement of facts. We concede the rule that in a case such as this the evidence must be interpreted and construed most favorably to the plaintiff, that the jury are the judges of the credibility of the witnesses and the weight of the evidence, and this Brief has been written with that in mind.

## STATEMENT OF FACTS

### THE COMPLAINT

The plaintiff sued on a short form complaint for \$1,839.69 for services alleged to have been rendered by him at the request of the defendant from the 25th day of August, 1947 to the 15th day of December, 1949. By answer to interrogatories directed to him (R. pp. 4-7 incl.) it was developed that the plaintiff was employed by the defendant as a salesman in its dairy department at a monthly salary of \$250.00, later increased to \$300.00, all of which had been paid him. He contended, however, that at the time of his employment in August, 1947 he had been promised a bonus of \$500.00 at the end of the Company's current fiscal year, which would be February 29, 1948, and that he

had been paid only \$400.00 in addition to \$100.00 paid him at Christmas time in 1947. He also claimed that he had been promised a bonus of one percent commission on sales of \$198,969.00 (of dairy equipment and supplies) made by the defendant during its fiscal year ending February 28, 1949, of which he had been paid \$1,000.00 on about March 15, 1949, leaving a balance owing of \$989.69; and that he had been promised a bonus of one percent of sales of such merchandise in his territory between March 1, 1949 to the date of the termination of his employment amounting to approximately \$750.00, no part of which had been paid. He also admitted having been paid at Christmas time in 1948 and 1949 \$100.00 and \$50.00 respectively.

#### THE ANSWER

The answer admitted the employment, denied that there was anything owing to plaintiff, and alleges that it had paid plaintiff in full for all services rendered by him by check which he had accepted and cashed and that plaintiff had rendered no services for which he had not been paid in full.

#### THE EVIDENCE

The plaintiff testified that in June and July, 1947 he had several talks with Sorensen, who was the manager of the dairy department of the defendant, with regard to employment. Henoah told Sorensen that he had a job lined up and if Sorensen wanted him he would

have to tell him definitely what salary he would get and what conditions he would work under. According to Henoch, Sorensen told him that the salary would be \$250.00 a month plus expenses and a car allowance, that the Company had an incentive plan of compensation which at that time provided for payment of two percent of all sales in a territory over a certain minimum quota, but that plan was in process of being changed, that it wouldn't be fair to put Henoch on the incentive plan at that time and give him credit for sales which other salesmen had lined up but that he would be given a flat bonus of \$500.00 and that at the end of the fiscal year (February 29, 1948) he would go on the incentive plan the same as the other fellows in the dairy department (R. pp. 21-23). However, Mr. Henoch testified there was no agreement regarding the incentive plan at that time (R. p. 40).

Sorensen told him at that time, according to Henoch, that he had the authority to hire whom he pleased and to fix their compensation but that he did not want to appear too high handed about it and wanted Henoch to meet Mr. DeVine, the general manager, and Mr. Bintz (R. p. 39). Sorensen took Henoch up to Mr. DeVine's office where they talked about the business of the Company but nothing was said about salary or pay or Sorensen's authority (R. p. 40).

Henoch started to work August 25, 1947 and was paid his salary regularly and was given \$100.00 at Christmas time 1947 and at the end of the fiscal year



was given an additional check for \$400.00. When he was given the \$400.00 check he asked Sorensen why it was not \$500.00 and Sorensen said that the accounting office or officials upstairs had probably deducted the \$100.00 check he had been given at Christmas time (R. pp. 25-26). Henoch also said he spoke to Mr. DeVine about the check and told him what Bob (Sorensen) had promised. DeVine told him in effect that notwithstanding what Bob had promised, \$400.00 was what he got and was all he was going to get. Henoch took the check, cashed it and continued to work for the Company (R. p. 41).

The check which he received, as did all the checks he had from the Company during the entire period of his employment (R. p. 114), had a stub attached which listed the type of items and deductions making up the amount of the check (see Exhibit 3) and also the statement:

“Your endorsement of the attached check is an acknowledgment of its correctness. This is an exact copy of our payroll record. W. H. Bintz Co. payroll receipt.”

During the next fiscal year Henoch was given his salary checks regularly. His salary was raised about June 1, 1948 to \$300.00 per month (R. p. 5, Answer to Interrogatory No. 5). During the year he learned from Sorensen that the method of computing incentive pay which was still in process of revision would probably provide for payment of one percent of all sales in a particular territory if a certain yearly “quota” for

that territory was made, but no "quota" had been set up for Henoch's territory (R. p. 34) and Sorensen would let him know later what the quotas would be. Late in the year 1948 Henoch testified that before Henoch had his talk with Mr. DeVine in November or December mentioned later, Sorensen told him his quota was \$100,000.00 (R. pp. 43-44).

In November or December, 1948 Mr. DeVine called Mr. Henoch into his office. Mr. DeVine had before him the sales report for Henoch's territory which showed sales billed through October of about \$60,000.00. DeVine told him that on the basis he was going, if they assumed that the remaining four months of the year would represent fifty percent of the performance during the first eight months, he would have a total volume of about \$90,000.00 at the end of the fiscal year, which was not satisfactory, but the Company had confidence in him and didn't want him to get discouraged and quit and so the Company would give him \$1,000.00 at the end of the year (R. pp. 98-99). Mr. Henoch said he objected because he knew that the sales in his territory would be over \$100,000.00 by the end of the year, that he had been told that his quota was \$100,000.00, that the sales would go over that exclusive of the boilers and dryer sales, and that he had made sales which hadn't been billed out and so had not then been credited to his territory and these would bring the sales up to \$104,000.00 or \$105,000.00. Mr. DeVine said, "Well, it will only go over a few dollars anyway." (As it turned out, the sales in Henoch's territory did

reach \$105,860.00 by the end of the fiscal year, February 28, 1949, R. p. 29.) Then Henoch asked DeVine about the commission on the sales of the boilers and dryer and DeVine told him that he would not get any commission on those items. DeVine told Henoch he would get a flat amount of \$1,000.00 and Henoch told him that that wasn't the agreement he was working under according to his understanding because Mr. Sorensen had told him that he was on the incentive plan and that his quota was \$100,000.00 and that is what he wanted to get paid on. About the sales of the boilers and the dryer in Star Valley, DeVine said sales like that don't count (R. p. 34). Henoch testified also that at this conversation Mr. DeVine told him that Mr. Sorensen had no authority to arrange bonus payments for him or for anyone else (R. p. 59).

With regard to the reference to the boilers and dryer, Mr. Henoch testified (R. pp. 31-33) that some boilers and a whey dryer had been sold to the Star Valley Swiss Cheese Association at Thayne, Wyoming, which was in Henoch's territory. He said that the price of the boilers was roughly \$50,000.00 and the dryer over \$40,000.00, that Sorensen had been instrumental in selling them, that the boilers were handled by or through the Pace Turpin Company of Salt Lake and that five percent had been added to the cost of the boilers and, he guessed, that Pace Turpin Company had a profit of five percent on the deal.

With regard to the dryer, Mr. Henoch testified that this had been sold by the C. E. Rogers Company

of Detroit to the Swiss Cheese Association and that the defendant received a ten percent commission on the deal (R. pp. 31-32).

The facts regarding these boiler and dryer transactions were related by Mr. Sorensen (R. pp. 75-76). He testified as follows: In 1946 the Bintz Company had sold three boilers to the Star Valley Swiss Cheese Association and had delivered one, the others being on order from the manufacturer. Later Mr. Brog, the manager of the Cheese Association, changed his mind about the type of boiler he wanted, cancelled the order from the Bintz Company and ordered Keeler boilers from Pace Turpin Company. The Bintz Company took back the boiler which had been delivered and cancelled its order with the manufacturer, paying the manufacturer some \$560.00. In addition the Bintz Company had gone to considerable expense. Mr. Brog arranged with the Pace Turpin Company to add five percent to the price of the Keeler boilers which they had sold the Cheese Association and to pay it to the Bintz Company to compensate them for the loss. The original sale and cancellation was made prior to Mr. Henoch's employment but the payment of the added five percent, which amounted to \$2,463.54, was paid to the Bintz Company in 1948.

The dryer transaction was a sale made by the C. E. Rogers Company of Detroit to the Cheese Association for \$42,423.00 on which the Bintz Company received a brokerage commission of five percent,

\$2,121.15. The dryer was sold by the Rogers Company in 1946 before Henoch's employment but the check for the commission was received in 1948 (R. pp. 77-78).

Brokerage or commissions were frequently received on sales made by other companies but none of the salesmen ever received any incentive pay derived from such sales. They were not even tabulated as department sales (Sorensen, p. 78; DeVine, p. 100).

Shortly after Mr. Henoch had this conversation with Mr. DeVine in November or December, 1948 in which DeVine had told him he would be given a \$1,000.00 bonus and the subject of the dryer and boiler sales was brought up, Mr. Henoch wrote a letter to Mr. DeVine (Exhibit 1), in which he reviewed his conversation with DeVine and related his activities in connection with his work for the Company. In it Mr. Henoch said:

"I am writing this in connection with our recent conversation concerning the incentive plan, territory quotas, etc. In the first place I have been rather in the dark about this plan, and I have had very little definite concrete information to go on. I knew there was some sort of a plan; quotas have been mentioned at times, but how this plan operated, and what factors it was based, has been rather obscure, in my case at least."

He concluded his letter with these words:

" \* \* \* I am bringing out all these points merely to show the extent and amount of work

I have done and to attempt to see that due recognizance is granted when my worth as an employee comes up for consideration.”

There is no evidence that Mr. DeVine ever answered this letter but Mr. Henoch continued to work, drew his salary, was given a \$100.00 check at Christmas and about March 1, 1949 was given a check for \$1,000.00 as DeVine had promised. He accepted and cashed all the checks, each of which had the stub bearing the notation referred to above.

Mr. Henoch testified that when he accepted the check he did not regard it as full settlement but hoped some way to get the rest of it (R. p. 35).

Mr. Henoch continued to work for the Company from March 1, 1949, the beginning of the next fiscal year, until December 15, 1949 when his services ended. At that time the sales credited to his territory were not more than \$62,452.18 (R. p. 37). He had been paid his regular monthly salary and in December, 1949 he was given another check for \$50.00 which he accepted and cashed.

There is no evidence in the record of the reason for the termination of his employment, except Mr. DeVine's testimony that he, Henoch, severed his employment with the Company (R. p. 10), while Henoch in his answer to Interrogatory 10 (R. p. 6) refers to December 15, 1949 as the “date of discharge”. If he was discharged the cause therefor was never brought out.

## STATEMENT OF POINTS

## POINT I.

THE EVIDENCE IS UNCONTRADICTED THAT IF SORENSEN PROMISED THE PLAINTIFF A BONUS OF \$500.00 IN ADDITION TO HIS SALARY FOR THE PERIOD FROM AUGUST 25, 1947 TO THE END OF THE FISCAL YEAR, MARCH 1, 1948, HENOCH RECEIVED ALL THAT WAS PROMISED.

## POINT II.

THE PROMISE, IF MADE, TO PUT HENOCH ON "THE INCENTIVE PLAN THE SAME AS THE OTHER SALESMEN" BEGINNING MARCH 1, 1948 IS UNENFORCEABLE BECAUSE IT IS NOT CERTAIN AND DEFINITE AS TO THE METHODS OR FACTORS UPON WHICH INCENTIVE PAY WAS TO BE COMPUTED.

## POINT III.

EVEN IF THE CLAIMED PROMISE TO PUT HENOCH ON "THE INCENTIVE PLAN THE SAME AS THE OTHER SALESMEN" BEGINNING MARCH 1, 1948 WERE ENFORCEABLE, THE UNDISPUTED EVIDENCE IS THAT HENOCH WAS ACTUALLY PAID AN AMOUNT IN EXCESS OF A SUM COMPUTED ON THE SAME BASIS AS THE OTHER SALESMEN.

## POINT IV.

THE EVIDENCE IS UNDISPUTED THAT HENOCH WAS INFORMED AT THE BEGINNING OF THE FISCAL YEAR 1948-1949, AND AGAIN IN NOVEMBER OR DECEMBER, 1948 THAT SORENSEN HAD NO AUTHORITY TO BIND THE COMPANY TO PAY INCENTIVE PAY.

## POINT V.

THE EVIDENCE IS UNDISPUTED THAT SALES MADE BY SELLERS OTHER THAN THE BINTZ COMPANY WERE NOT INCLUDED IN THE BASIS FOR THE COMPUTATION OF INCENTIVE PAY FOR THE OTHER SALESMEN OR FOR MR. HENOCK.

## POINT VI.

THE EVIDENCE IS UNDISPUTED THAT THE PLAINTIFF SEVERED HIS EMPLOYMENT WITH THE DEFENDANT BEFORE THE END OF THE FISCAL YEAR 1949-1950, AND HAD NOT EARNED INCENTIVE PAY ACCORDING TO THE ALLEGED PROMISE.

## POINT VII.

UNDER THE UNDISPUTED EVIDENCE THERE WAS A COMPLETE ACCORD AND SATISFACTION BETWEEN THE PARTIES AT THE END OF EACH PAY PERIOD.

## POINT VIII.

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR NON-SUIT, FOR DIRECTED VERDICT, FOR JUDGMENT NOTWITHSTANDING AND FOR NEW TRIAL.

## ARGUMENT

Three periods of time are involved in this case. The first period commences with plaintiff's employment on August 27, 1947 and extends to the end of the defendant's fiscal year on February 29, 1948. The second period extends through the defendant's fiscal year which commenced on March 1, 1948 and ended



February 28, 1949. The third period extended from March 1, 1949 to plaintiff's separation from employment on December 15, 1949.

The only matter in dispute in the case concerns compensation in addition to plaintiff's fixed monthly salary of \$250.00 for the first eight months and \$300.00 thereafter, car allowance and expenses, all of which was paid regularly by check, received and cashed by the plaintiff. In addition to these regular checks the plaintiff was paid:

- |  |            |
|--|------------|
| 1. For the first period—December 1947..... | \$ 100.00  |
| March 1948.....                            | 400.00     |
|  | <hr/>      |
|  | \$ 500.00  |
| 2. For the second period—December 1948.... | \$ 100.00  |
| March 1949.....                            | 1,000.00   |
|  | <hr/>      |
|  | \$1,100.00 |
| 3. For the third period—December 1949..... | \$ 50.00   |

The claims of the plaintiff are that he should have been paid an additional \$100 in March, 1948, one percent of \$197,553.00 or \$1,975.53 less the \$1,000 paid in March, 1949 and one percent of \$62,453.18 at the time of the termination of his employment (R. p. 6). Summarized, his claim was as follows:

|   |           |
|---|-----------|
| Due March 1, 1948—\$500 less \$400 paid.... | \$ 100.00 |
| Due March 1, 1949—1% of total sales of      |           |
| \$197,553.00 less \$1,000 paid.....         | 975.53    |

|                        |            |
|------------------------|------------|
| Due December 15, 1949, |            |
| 1% of \$62,453.18..... | 624.53     |
|                        | <hr/>      |
| Total.....             | \$1,700.06 |

The figure of \$197,553.00 represents the sum of \$105,860.00 which is the total of sales credited to plaintiff's territory plus \$49,270.80 which was the purchase price of certain boilers sold by Pace Turpin Company to the Star Valley Swiss Cheese Association, and \$42,423.00 which was the purchase price of a whey dryer sold by C. E. Rogers Company of Detroit, Michigan, to the same company.

The figure of \$62,453.18 represents the total of sales credited to Henoch's territory from March 1, 1949 to December 31, 1949, 16 days after he left the employ of the defendant.

The jury returned a verdict of \$1,630.98. Just how they could have arrived at this figure is not disclosed but it is apparent that it had to include at least part of each of the foregoing items, as there was not the slightest evidence which by the remotest stretch of the imagination, and then only by disregarding the plaintiff's testimony, can be argued as supporting any other figure than either \$1,700.06 or \$1,600.06.

## POINT I.

THE EVIDENCE IS UNCONTRADICTED THAT IF SORENSEN PROMISED THE PLAINTIFF A BONUS OF \$500.00 IN ADDITION TO HIS SALARY FOR THE PERIOD

FROM AUGUST 25, 1947 TO THE END OF THE FISCAL YEAR, MARCH 1, 1948, HENOCH RECEIVED ALL THAT WAS PROMISED.

The testimony most favorable to the plaintiff under this point is that Sorensen, the manager of the dairy department, had told him before he accepted employment that the Bintz Company had a plan of incentive pay, in addition to salary, of two percent of sales of dairy merchandise sold in a particular territory over a stipulated quota, but that that plan was in process of being changed; that it wouldn't be fair to put Henoch on that plan at first and so give him credit for sales that the other men had worked up, and so he would not go on the incentive plan until the first of the next fiscal year, which would be March 1, 1948. However, Sorensen told him he would get a bonus of \$500.00 (R. p. 23-24).

Relying upon this, and upon Sorensen's representation (according to Henoch) that he had authority to hire and fix the compensation, Henoch took the job.

He was paid his salary checks of \$250.00 per month regularly, and at Christmas time was paid \$100.00 and at the end of the fiscal year received a check for \$400.00 (R. p. 24). When he was given the check for \$400.00 he complained to Sorensen and DeVine, the general manager of the company, that the check should have been \$500.00. Sorensen said (according to Henoch) that the management had probably deducted the \$100.00 payment made at Christmas time.

(R. p. 26). DeVine made him understand that \$400.00 was all he was going to get.

He accepted the check which carried a stub on which the amounts and type of payments were listed and the notice, "Your endorsement of the attached check is an acknowledgment of its correctness. This is an exact copy of your payroll record" (Exhibit 3 and R. p. 114).

He continued to work and there is no evidence that he made any attempt to have the payroll record corrected if he thought that it was wrong.

In his testimony Mr. Henoch called the \$100.00 payment a "Christmas present" and volunteered that he didn't think it was the policy of the Bintz Company to deduct "Christmas presents" (R. p. 26).

It is clear that if Sorensen did promise a bonus of \$500.00 (which Sorensen denied), Henoch got all that was promised.

## POINT II.

THE PROMISE, IF MADE, TO PUT HENOCH ON "THE INCENTIVE PLAN THE SAME AS THE OTHER SALESMEN" BEGINNING MARCH 1, 1948 IS UNENFORCEABLE BECAUSE IT IS NOT CERTAIN AND DEFINITE AS TO THE METHODS OR FACTORS UPON WHICH INCENTIVE PAY WAS TO BE COMPUTED.

The testimony most favorable to Henoch under this point (disputed by Sorensen again) was that at the time of the employment Sorensen had told him

he would go under the incentive plan "the same as the other salesmen" at the beginning of the fiscal year 1948-1949 (R. p. 24; 48, 63). That the existing plan contemplated payment of two percent of the amount of the sales made in a salesman's territory over a specified minimum, but that he couldn't assign him, Henoch, a territory or a quota at that time and that the plan was in the process of being changed.

Assuming for the sake of argument that such a promise was made, it is clear that at the time it was made the terms of payment were uncertain and indefinite. No territory was assigned, nor any quota fixed as a basis on which to apply a rate of incentive pay to the plaintiff. Moreover, it developed in the testimony that at that time the two salesmen in the dairy department were working on two different methods of computation of incentive pay, the one on a basis which paid him two percent upon all sales in his particular territory in excess of \$60,000 during the year, the other on a basis which paid him two percent on all sales in his territory in excess of \$105,000.00 (R. p. 101-102). If Henoch relied on such a promise, he had nothing definite and certain to go on. There was no promise of any definite rate or any definite territory or any definite quota of sales. Moreover, the plan was subject to change and he knew it.

That the terms and conditions of incentive pay for Mr. Henoch were indefinite and uncertain is conclusively established by the letter which Mr. Henoch wrote to Mr. DeVine in November or December, 1948

(R. p. 45-46) after Mr. DeVine had told him his performance as shown on the sales sheet was not satisfactory but so that he would not get discouraged they would give him a bonus of \$1,000.00 (R. 98). Mr. Henoch wrote (Exhibit 1):

*“I am writing this in connection with our recent conversation concerning the incentive plan, territory quotas, etc. In the first place I have been rather in the dark about this plan. I have had very little definite concrete information to go on. I knew there was some sort of plan; quotas have been mentioned at times, but how the plan operated, and what factors it was based, has been rather obscure, in my case at least. I suppose I have a great deal of faith in the Bintz Company because I have not been particularly concerned about all the varied details of the plan, but I have been more concerned rather with doing a good job, believing that rewards commensurate with my efforts would be forthcoming at the end of the fiscal year. However, after our discussions this latter supposition now causes me a little concern, and other developments I must confess, have me a bit puzzled.”* (Italics ours.)

After relating at length the work he had done during his employment with the Company and the amount of sales he claimed he had made which had not been reported on the sales records up to November 1, 1948, he concluded:

“Now one point I would like to make clear, and that is in no way whatsoever do I wish to

detract one iota from the fine work that Eddie (Kilgore) has been doing in his territory by any mention of work which I have done for his customers, and certainly I expect no monetary consideration for my efforts at his expense. Since I have been with the W. H. Bintz Company I have served as an architect, a designer, and engineer, a salesman, and for a considerable time I was in charge of the department, and I am bringing out these points merely to show the extent and amount of work I have done and to attempt to see that *due recognition is granted when my worth as an employee comes up for consideration.*" (Italics ours.)

This letter is a clear admission by Mr. Henoeh that up to that time there was nothing definite or certain regarding incentive pay for him, and that he knew that whatever would be given him would be determined *when his worth as an employee comes up for consideration.*

There is accordingly no evidence of any meeting of minds upon an agreement for incentive pay whose terms were sufficiently definite and certain to create a binding contract between the parties.

### POINT III.

EVEN IF THE CLAIMED PROMISE TO PUT HENOCH ON "THE INCENTIVE PLAN THE SAME AS THE OTHER SALESMEN" BEGINNING MARCH 1, 1948 WERE ENFORCEABLE, THE UNDISPUTED EVIDENCE IS THAT HENOCH WAS ACTUALLY PAID AN AMOUNT IN EX-

CESS OF A SUM COMPUTED ON THE SAME BASIS AS THE OTHER SALESMEN.

There is evidence in the record that in January, 1949 the method of computing incentive pay for Cole and Kilgore, the other two salesmen in the dairy department, was changed so as to give them incentive pay of one percent of all sales (of dairy merchandise) in their respective territories if the sales during the year exceeded \$100,000.00. Their territories were revised to equalize as to sales potentials, and this revised plan was made retroactive to begin at March 1, 1948 as to these two men. Each was given a written statement as to the revised terms and they were paid on this basis (R. p. 101, 202, 108). No such statement was given to Henoch.

Meanwhile, and during the year, Henoch had been told by Sorensen (and this is also denied by Sorensen) that the plan which was still in process of being changed would be on a basis of one percent of all sales in the salesman's territory and that his territorial quota would be \$100,000.00. He testified that he was given this quota late in 1948 and fixed the time by reference to the time when the plan was changed, January, 1949, but stated that it was prior to his conversation with Mr. Devine in November or December, 1948 (R. p. 43).

Accordingly, even if it could be said that the promise made prior to March 1, 1948 to put the plaintiff on the incentive plan the same as the other salesmen can



be made certain and definite by reference (1) to the plans under which the other two salesmen were working until January, 1949 or (2) to the plans under which they were placed in January, 1949 retroactive to aMrch 1, 1948, in neither case was Henoch entitled to more than he actually received for that fiscal year.

We need not consider whether the first of the two alternatives is applicable. Mr. Henoch elected to choose the second one. In his answer to Interrogatory No. 10A he admitted that he had been paid "\$1,000.00 bonus on sales from March 1, 1948 to February 28, 1949, leaving a balance due and owing plaintiff in the approximate sum of \$989.69, *being the balance due on 1% commission bonus on sales*" (R. p. 6).

It is undisputed that during this fiscal year Mr. Henoch was paid \$1,100.00, \$100.00 in December, 1948 and \$1,000.00 in March, 1949. It was stipulated that by March 1, 1949 the sales credited to Henoch's territory during the year were \$105,860.00, not including the transactions concerning the boilers and whey dryer purchased by the Star Valley Swiss Cheese Association, transactions which according to the undisputed evidence were of a type which were not included in the base for computing incentive pay for the other salesmen (R. p. 78, 109).

Thus, according to plaintiff's own theory, he had been paid more than had been promised and there was nothing due and owing him for this period.

Again it will be noted that he accepted, cashed and retained the checks with the same memo and a statement on the stubs, "Your endorsement of the attached check in an acknowledgement of its correctness" and continued to work for the Company.

#### POINT IV.

THE EVIDENCE IS UNDISPUTED THAT HENOCH WAS INFORMED AT THE BEGINNING OF THE FISCAL YEAR 1948-1949, AND AGAIN IN NOVEMBER OR DECEMBER, 1948 THAT SORENSEN HAD NO AUTHORITY TO BIND THE COMPANY TO PAY INCENTIVE PAY.

The evidence of the plaintiff under this point is that although Sorensen had told him at the time of his employment that he would not be put on the incentive plan before the following fiscal year but would be given a bonus of \$500.00 and that he, Sorensen, had authority to hire and fix the pay, Henoch coupled it with testimony which casts considerable doubt upon his right to rely upon Sorensen's representation of authority, if made. Henoch testified that at the time Sorensen said he had this authority he also said that he "didn't want to appear too high handed about it and he would like him to meet Mr. DeVine and Mr. Bintz" (R. p. 39).

But regardless of this, it is certain and uncontradicted that when Mr. Henoch received the bonus check for \$400.00 about March 1, 1948 he was very definitely given to understand that Sorensen had no authority

to promise bonuses or fix incentive pay for the Company. Henoch testified that in spite of his claim that Sorensen had promised \$500.00, DeVine made it clear to him that \$400.00 was his bonus and that was all he was going to get (R. p. 42). He took the \$400.00 and continued to work.

Mr. Henoch admitted (R. p. 59) that in November, 1948 when he had his talk with Mr. DeVine, DeVine told him again that Sorensen had no authority to arrange bonus payments for him or for any one else.

It is clear from this testimony that regardless of what Mr. Sorensen's representations were in August, 1947 and regardless of what Mr. Sorensen's apparent authority was by reason of his position as manager of the dairy department, Mr. Henoch had no right to rely upon such representations or apparent authority for bonus or incentive pay for the year 1948-1949 or thereafter.

## POINT V.

THE EVIDENCE IS UNDISPUTED THAT SALES MADE BY SELLERS OTHER THAN THE BINTZ COMPANY WERE NOT INCLUDED IN THE BASIS FOR THE COMPUTATION OF INCENTIVE PAY FOR THE OTHER SALESMEN OR FOR MR. HENOCH.

In November or December, 1948 Mr. Henoch was called into Mr. DeVine's office where Mr. DeVine told him that the sales record through October, 1948 indicated that the total volume for the full fiscal year

would be only \$90,000.00 which was unsatisfactory, but to keep him from getting discouraged the Company would give him a bonus of \$1,000.00 at the end of the fiscal year (R. p. 32, 42, 98-100).

Mr. Henoch tried to show Mr. DeVine that the record to that date did not give a true picture of his performance and that he knew of sales which when they got on the books would bring his total up to over \$100,000.00 not including sales of boilers and dryer to the Star Valley Swiss Cheese Association on which the Company had received commissions. Mr. DeVine told him that such transactions were not sales by the Company and were not counted, and that the bonus would be \$1,000.00 (R. 58, 99). Mr. Henoch testified that he considered them sales and that Sorensen had been instrumental in making them.

The facts regarding these transactions concerning the boilers and dryer, as shown by the undisputed evidence, were these (R. pp. 74-75). In 1946 before Mr. Henoch was employed the Bintz Company had sold the Star Valley Company some boilers that they handled. One was shipped to Star Valley and then Mr. Brog, the manager, changed his mind about them, ordered the Keeler Boilers from Pace Turpin at a price of \$49,-270.00 and cancelled the order and the Bintz Company took back the one which had been delivered. The Bintz Company cancelled out its order for the other boilers from the manufacturer and had to pay the manufacturer \$560-odd dollars. In addition the Bintz Company had

gone to considerable expense in connection with the cancelled sale so in order to reimburse the Bintz Company for its loss on the transaction Mr. Brog authorized Pace Turpin to add five percent to the cost of the Keeler Boilers and remit the amount to Bintz Company. This was done and the Bintz Company received Pace Turpin's check for the five percent—\$2,463.54.

With regard to the dryer, the uncontradicted evidence is (R. p. 76 et seq) that the defendant had received a commission of \$2,121.00 on the sale of a dryer to the Star Valley Association by the C. E. Rogers Company of Detroit in 1946 (R. p. 78) prior to Henoch's employment. The price charged by the Rogers Company was \$42,422.00 which was billed by the Rogers Company to the Star Valley Cheese Association and paid by the latter. The dryer was installed and the Bintz Company received the commission from the Rogers Company in 1948. The Bintz Company did not install it nor was it a party to or have any responsibility under the contract of sale. He also testified that such commissions had been paid on other sales not only in the dairy department of the Company but in other departments and the salesmen never received any incentive derived from such transactions, they were never tabulated in department sales and he had so told Mr. Henoch (R. pp. 78, 88, 89).

From the testimony abstracted above, it is obvious that even if there had been a definite agreement upon the part of the defendant to pay additional compensa-

tion of a certain definite percentage of sales by the Company upon or over a definite amount during a given period, these transactions were not "sales" made by the Company. The amount received by the Company from Pace Turpin was in reimbursement for loss sustained by Bintz Company on a sale which had been made and cancelled long before Henoch was employed by the Company. This method of reimbursement was adopted by Mr. Brog for his own reasons.

The dryer was sold by Rogers Company on direct dealings with the Cheese Association. The Bintz Company had no part in the transaction except probably to recommend the Rogers dryer to the Cheese Association. Bintz Company had no responsibility either to Rogers or to the Cheese Association, and it could not possibly be called a sale by the defendant.

Moreover, the only evidence of any promise to pay Henoch incentive pay for the year 1948-1949 (excepting, of course, Mr. DeVine's agreement that he would be given \$1,000.00) was that he was to be put on the incentive plan "the same as the other salesmen". There is evidence which is undisputed that sales made by other houses on which the Bintz Company was paid a commission were never included in computing the incentive pay of other salesmen (R. 78, 109).

Notwithstanding this evidence, and in spite of the fact that there is none to the contrary, the jury returned a verdict awarding the plaintiff \$1,630.98. To

arrive at this figure they must have decided that the plaintiff was entitled to one percent of \$197,553.00 which included the credited sales of \$105,860.00 and also \$91,623.80, the sum of \$49,270.80, the amount received by Pace Turpin Company for the boilers which it sold, and \$42,423.00, the amount which the C. E. Rogers Company received for the dryer which it had sold.

No doubt the Respondent will contend that Mr. Henoch's testimony on these points was sufficient to support the verdict of the jury, but we submit that his testimony on direct as modified by his cross-examination clearly supports the explanation of these transactions as given by Messrs. Sorensen and DeVine and as stated above. Mr. Henoch testified that Mr. Sorensen made a trip to Star Valley and was instrumental in selling the boilers. The whole transaction was handled by Pace Turpin Company and five percent was added on the cost of the boilers and the Bintz Company made a profit on the transaction (R. p. 31). He said he had a little bit to do with the installation of the boilers, took some measurements and "I think I had the contracts between the Star Valley Swiss Cheese Company—I had those signed" (R. p. 55). There were quotations on them by the Bintz Company, the Bintz Company didn't install them.

He further testified that his attorney had these documents but when asked to produce them the attorney produced a letter from Pace Turpin Company

to Mr. Ernest Brog of Freedom, Wyoming, dated October 17, 1947. He then said he had given his attorney another document from the Bintz Company to Ernest Brog on the same boilers where they deducted five percent. Upon being asked to produce it, Mr. Richards, plaintiff's attorney, said "I don't have anything like that" (R. pp. 56, 57). He conceded that the letter produced was a quotation by Pace Turpin Company to Mr. Brog on certain boilers and that these were the boilers actually installed but said, "Well, I maintain they were sold by the W. H. Bintz Company" (R. p. 57). There is no evidence in the record as to when the boilers were sold other than the quotation from Pace Turpin Company dated October 17, 1947, which of course was in the period for which Mr. Henoch admitted that he had no incentive agreement other than a flat bonus of \$500.00. The only evidence in the record is that the whey dryer was sold by the Rogers Company in 1946 (R. p. 78), and there is no evidence in the record of when either the Pace Turpin Company or the Rogers Company were paid for these sales. The only evidence in the record to associate these transactions with any period while Henoch was in the employ of the Company was the fact that the Bintz Company received the reimbursement for its loss and expenses in 1948 and received the brokerage on the Rogers sale in the same year.

The inclusion of these items for the consideration of the jury as sales upon which incentive pay to



the plaintiff should be computed is clearly erroneous and the verdict of the jury is unsupported to the extent of \$916.23.

## POINT VI.

THE EVIDENCE IS UNDISPUTED THAT THE PLAINTIFF SEVERED HIS EMPLOYMENT WITH THE DEFENDANT BEFORE THE END OF THE FISCAL YEAR 1949-1950, AND HAD NOT EARNED INCENTIVE PAY ACCORDING TO THE ALLEGED PROMISE.

The evidence is quite clear that the only quota upon which incentive compensation was based was quota of sales of \$100,000.00 of dairy department merchandise made to customers in a salesman's territory during the *entire fiscal year*. There is no evidence whatever that any salesman was paid incentive pay if he left the employ of the Company during the fiscal year and there is no evidence whatsoever that Mr. Henoch did not sever his connection voluntarily about December 15, 1949 or that his discharge, if he was discharged, was not for cause. Up to and including December 31, 1949 sales in Henoch's territory had totalled only \$62,453.18 (R. p. 38). Nevertheless the plaintiff claimed to be entitled to one percent on sales from March 1, 1949 to date of discharge (Answer to Interrogatory 10B, R. p. 6) and there is no way to explain the verdict of the jury on the evidence except by the assumption that it included the \$624.53 so claimed.

## POINT VII.

UNDER THE UNDISPUTED EVIDENCE THERE WAS A COMPLETE ACCORD AND SATISFACTION BETWEEN THE PARTIES AT THE END OF EACH PAY PERIOD.

As noted above, each of the checks given to Henoch during the period of his employment had attached a stub on which appeared the items making up the earnings paid by the check as shown by the payroll record with symbols representing the type or character of the several amounts making up the total earnings, i.e., whether salary, overtime, expenses, car allowance or other bonus, and designating the various deductions from earnings, such as income tax withheld, Federal Old Age Benefits tax withheld, etc. At the bottom of the stub appeared the words "*your endorsement of the attached check in an acknowledgment of its correctness. This is an exact copy of our payroll record. W. H. Bintz Co. Payroll Receipt.*"

Mr. Henoch endorsed each of these checks including the one for \$400.00 in March, 1948 and the \$1,000.00 check in March, 1949 and in each case continued to work. If the payroll record was wrong or if he thought it was wrong in that it did not correctly record the pay to which he was entitled, the record is barren of any act on his part of an effort to have it corrected. He continued to work without any real protest except as to the first check of \$400.00 which he claimed should have been \$500.00, but after being assured that no matter what Sorensen may have told him before, \$400.00

was all he was going to get, he cashed the check. The \$1,000.00 check he accepted without protest but as he claimed at the time of the trial with mental reservation that he hoped to get the rest some way (R. p. 35). The \$250.00 he was paid in December of 1947, 1948 and 1949 he dismissed as gratuities and not as part of his compensation.

We submit that these payments made under these circumstances to a person of the intelligence that Henoch appeared to have constitute a complete accord and satisfaction of any dispute or misunderstanding theretofore existing.

*Ashton v. Skeen*, 85 Utah 489 at 496.

## POINT VIII.

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR NON-SUIT, FOR DIRECTED VERDICT, FOR JUDGMENT NOTWITHSTANDING AND FOR NEW TRIAL.

In our arguments under the preceding points we have fully and we think fairly stated the evidence upon which the motions for judgment and new trial were based. We have, of course, not commented on the testimony on behalf of the defendant except where it was not in conflict with that of the plaintiff. We submit that upon the evidence, giving it the benefit of every intendment and construction which a reasonable person could draw from it, the verdict cannot be sustained.

In any event the judgment should be reduced by the following amounts:

(a) \$492.70, representing one percent on the price paid by the Star Valley Swiss Cheese Association to Pace Turpin Company for the boilers, for the reason that the boilers were not sold by the defendant, that the amount received by it from Pace Turpin Company was not a commission or payment, that there is no evidence that the sale of the boilers was made during the term of the plaintiff's employment, and that the evidence is undisputed that such transactions were not included in the quota for determining incentive pay for other salesmen.

(b) \$424.23, representing one percent on the price paid by the Star Valley Swiss Cheese Association to C. E. Rogers Company for the dryer, for the reason that the dryer was not sold by the defendant, that there is no evidence that the sale of the dryer was made during the term of plaintiff's employment, and that transactions of such character were never included in the quota for determining incentive pay for its other salesmen.

(c) \$624.53, representing one percent of \$62,453.00 of sales of dairy department merchandise sold in plaintiff's territory from March 1, 1949 to December 31, 1949, for the reason that the evidence is uncontradicted that the only quota basis for the computation

of incentive pay to any salesmen was \$100,000.00 of dairy department merchandise sold during the entire fiscal year, that there is no evidence of any promise or agreement to pay incentive compensation to the plaintiff or to any of the other salesmen unless that volume were sold in the year, that there is no evidence in the record that the plaintiff did not voluntarily quit the employ of the defendant before the end of the fiscal year or that he was discharged without cause on December 15, 1949 before the end of the fiscal year.

(d) \$41.40, representing one percent of \$105,860.00, the total sales of dairy department merchandise sold in plaintiff's territory in the fiscal year 1948-1949, less the \$1,100.00 paid to plaintiff by defendant in addition to his salary allowances, etc. for that year, for the reason that there is no evidence that the advance payment of \$100.00 in December, 1948 was not on account of incentive pay the same as the other salesmen.

(e) \$100.00, representing the balance between the \$500.00 bonus claimed by plaintiff as due at the end of the fiscal year 1947-1948 and the \$400.00 paid at that time, for the reason that there is no evidence that the \$100.00 paid plaintiff in December, 1947 was not an advance against the \$500.00 bonus, if promised by Sorensen.

## CONCLUSION

In conclusion, we submit that there is no substantial evidence to support the verdict and judgment and that the same should be reversed.

Respectfully submitted,

GEO. A. CRITCHLOW,

*Attorney for Appellant*

CRITCHLOW, WATSON & WARNOCK,  
1320 Continental Bank Bldg.  
Salt Lake City 1, Utah

*Attorneys for Appellant*