(21)

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Note: By agreement between counsel, printing of such portions of the judgment record as are herein omitted, to wit: transcript of affidavit in attachment, writ of attachment, appearance, and notice of appearance is hereby waived.

Filed, December 23, 1926

SUPREME COURT OF NEW JERSEY

HOWARD STORY, *Plaintiff,* vs STUTZ FIRE ENGINE CO., (BODY CORPORATE) *Defendant.*	COMPLAINT

The Plaintiff, Howard Story, residing in the City of Asbury Park, County of Monmouth, State of New Jersey, says that:

FIRST COUNT

1. On the 29th day of November, 1919, the defendant and the plaintiff, at Indianapolis, in the State of Indiana, to wit, Freehold, Monmouth County, New Jersey, entered into an agreement, whereby the plaintiff became the agent of the defendant, to sell its engines and other products, and upon the terms and conditions set forth in said agreement, a copy of which is hereunto annexed, made a part thereof and marked agreement No. 1. The plaintiff on his part has fulfilled all the conditions of the agreement.

2. At the time of the making of the agreement in the preceding paragraph mentioned, the corporate name of the defendant was the Stutz High Duty Fire Engine Co., a corporation of the State of Indiana, that on or about February 20, 1920, the Stutz High Duty Fire Engine Co., changed its corporate name to the Stutz Fire Engine Co.

3. The agreement herebefore referred to, provided among other things that the plaintiff should receive from the defendant 12½% of the amount of all sales made by him, agent of the defendant. The sum to be paid to him as respective payments for the sales were received and collected by the plaintiff from the purchasers.

4. The plaintiff, during the life of the aforesaid agreement sold certain fire engines and other products of the defendant of the value of $89,200, which said sum was received by the defendant for the respective sales. The plaintiff was entitled to and should have received from the defendant 12½% per cent of the $89,200, amounting to $11,150. The defendant has paid to the plaintiff, $10,850 and is still indebted to him in the amount of $334.54, which the defendant has refused and still refuses to pay. The list of the sales in this paragraph mentioned is hereunto annexed and made a part thereof, and marked schedule No. 1.

The plaintiff demands as damages the sum of $334.54 together with interest thereon.

SECOND COUNT

1. The agreement mentioned in the first count of this complaint was superseded by a sales agreement entered into between the defendant and plaintiff on February 4, 1922, but effective from January 1st, 1923, at Indianapolis, in the State of Indiana, to wit, at Freehold, Monmouth County, New Jersey, a copy of the said sales agreement is annexed hereto made a part hereof and marked sales agreement No. 2. The plaintiff on his part has fulfilled all the conditions of the agreement.

2. The agreement in this count mentioned provided among other things that the plaintiff should receive 12½% on the amount of all sales made by him, after war tax was deducted, except on the 350 gallon pumper, upon which he should receive 15%, as the respective payments were received and collected from the purchasers.

3. The plaintiff sold, as the representative and salesman of the defendant, products of the defendant of the value of $149,600, which said sum was received by the defendant for the respective sales; of the aforesaid sum of $149,600, $36,000 was for Model K 350 gallon Pumpers, from this amount the defendant deducted $1,080 for war tax, as provided for in said agreement, and paid the plaintiff the commission of 15% on the balance of $3,920, to wit, $5,238. The war tax of $1,080, paid by the defendant to the United States of America, was at a date unknown to the plaintiff, refunded to the defendant and the defendant owes to the plaintiff 15% of $1,080, amounting to $162, which the defendant has refused and still refuses to pay, due on the sale of the 350 gallon Pumpers, aforesaid. $113,600 of the aforesaid $149,600, represented the sale of other products of the defendant other than the 350 gallon Pumpers, mentioned in this paragraph. From the $113,600, the defendant deducted $3,408, for war tax, as provided for in said agreement, and paid the plaintiff the commission of 12½% on the balance of $110,192, to wit, $13,774. The war tax of $3,408, paid by the defendant to the United States of America was at a date unknown to the plaintiff, refunded to the defendant and the defendant owes to the plaintiff

12½% of $3,408, amounting to $426, which the defendant has refused and still refuses to pay, due on the sale of other products in this paragraph mentioned. A list of the sales in this paragraph mentioned is hereunto annexed and made a part hereof, and marked schedule No. 2.

The plaintiff demands as damages the sum of $588, with interest thereon.

THIRD COUNT

1. The agreement mentioned in the second count of this complaint was superseded by a sales agreement entered into between the defendant and the plaintiff on the 4th day of March, 1924, but effective from January 1, 1924, at Indianapolis in the State of Indiana, to wit, at Freehold, Monmouth County, New Jersey, a copy of the said sales agreement is annexed hereto, made a part thereof and marked sales agreement No. 3. The plaintiff on his part has fulfilled all of the agreement.

2. The agreement mentioned in this count, provided among other things that the plaintiff should receive 15% of the amount of all sales made by the plaintiff, after war tax was deducted, of all regular models, as the respective payments were received and collected from the purchasers.

3. The plaintiff sold as the representative and salesman of the defendant, products of the defendant of the value of $237,000, which said sum was received by the defendant for the respective sales. From this amount the defendant deducted $7,110, for war tax, as provided for in said agreement, but the defendant only paid to the United States of America, as war tax, aforesaid, the sum of $5,586, as it paid no war tax on the last five sales set forth in schedule No. 3, but deducted as an alleged war

tax, $1,524, from the amount due from it to the plaintiff. The war tax of $5,586, actually paid by the defendant to the United States of America, was at a date unknown to the plaintiff, refunded to the defendant and the defendant owes to the plaintiff 15% of $7,110, amounting to $1,166.50, due on the sales of apparatus and other products, aforesaid. A list of the sales in this paragraph mentioned is hereunto annexed and made a part thereof, and marked schedule No. 3.

The plaintiff demands as damages the sum of $1,066.00, with interest thereon.

Joseph M. Turner,
Attorney for Plaintiff.

AGREEMENT NO. 1

AGREEMENT made and entered into by and between the Stutz High Duty Fire Engine Company, of Indianapolis, Indiana, party of the first part, and Howard Story, of Asbury Park, New Jersey, party of the second part, WITNESSETH:—

1. The said party of the first part hereby grants to the party of the second part the exclusive right to sell its engines and other products for the period of one (1) year from this day, for the following territory: The counties of Monmouth, Ocean, Camden, Gloucester, Cumberland, Mercer, Burlington, Atlantic, Salem and Cape May in the State of New Jersey and the counties of Bucks, Montgomery, Carbon, Berks, Chester, York, Dauphin, North Hampton, Lehigh, Schuylkill, Delaware, Lancaster and Lebanon in the State of Pennsylvania, and none other unless in writing by both parties.

2. All sales of said engines and other products shall be made subject in all things to the approval of party of the first part in writing.

3. In consideration of the grant of said exclusive right for said territory, the party of the second part agrees to devote his entire time and use his best endeavors in the promotion of the sale of the engines and other products of the party of the first part.

4. The party of the first part agrees to pay to the party of the second part twelve and one-half per cent. (12½%) of the amount of all sales made by him, the same to be paid to the party of the second part as the respective payments are received and collected from the purchasers.

5. All checks, notes and other evidences of indebtedness executed by purchasers of said engines and other products of the party of the first part shall be made payable to the order of the party of the first part and not otherwise, unless authorized in writing by party of the first part.

6. All selling expenses, except freight and delivery charges shall be paid by the party of the second part, and party of the first part shall not be liable for the same. Freight and delivery charges of such sales to be paid by party of the first unless otherwise agreed upon.

7. It is expressly agreed by the parties that the party of the first part does not employ the party of the second part as its agent, and that it shall not be liable for or authorize any of his acts in making any sales, except as may be agreed upon in writing by party of the first part in each sale made by him.

8. Either party may cancel this agreement before the expiration thereof by giving to the other party not less than thirty days' written notice of such cancellation.

9. In witness whereof, the parties have hereunto set their hands and seals this 29th day of November, (1919)

Nineteen Nineteen this agreement being executed in duplicate.

STUTZ HIGH DUTY FIRE ENGINE COMPANY
Per Charles D. Lillie
Its Sales Mgr.

HOWARD STORY

Witness:
Charles P. De Vose
M. E. Story

SCHEDULE NO. 1.

Motor Fire Apparatus Sold Under Contract Dated, November 29, 1919

Date	Type of Engine	Sold to	Price
3-5-20,	Pumper & Comb.,	Clayton, N. J.,	$15,000.00
3-31-20,	Pumper,	Bridgeton, N. J.,	9,500.00
4-22-20,	Pumper	Broad Street Park (Trenton, N. J.)	10,350.00
4-24-20	Pumper,	Clifton Heights, Pa.	9,850.00
2-11-21,	Pumper,	Newark, Del.,	12,500.00
4-30-21,	Pumper,	Wenonah, N. J.,	9,500.00
4-30-21,	Pumper,	Phoenixville, Pa.,	12,500.00
6-23-21,	Pumper,	West Long Branch, N. J.,	10,000.00
			$89,200.00

SALES AGREEMENT NO. 2

AGREEMENT made and entered into by and between the STUTZ FIRE ENGINE COMPANY of Indianapolis, Indiana, hereinafter known as the Party of the

First Part, and Howard Story, of Asbury, Park, New Jersey, hereinafter known as Party of the Second Part, WITNESSETH:

1. The Party of the First Part hereby agrees to engage the Party of the Second Part, as their representative, to act as salesman, with headquarters at Asbury Park, New Jersey, for the purpose of selling the products of the Party of the First Part, in the following territory:

All of the State of New Jersey; all of the State of Delaware, and the following twenty-seven Counties in the State of Pennsylvania: Philadelphia, Delaware, Bucks, Chester, Montgomery, Lackawanna, Berks, Lancaster, Lebanon, Dauphin, Northumberland, Columbia, Schuylkill, Carbon, Northampton, Monroe, Pike, Wayne, Lehigh, Luzerne, Wyoming, Susquehanna, Bradford, Sullivan, Lycoming, Tioga, and Montour, these counties being practically the Eastern half of the State,—
and none other, unless specifically provided for by written agreement, or upon notification from party of the first part.

2. All sales of said apparatus and other products, shall be made subject in all things to the approval of the party of the First Part, in writing.

3. In consideration of the grant of these rights for said territory, the party of the Second Part agrees to devote his entire time and use his best endeavor in the promotion of the sale of apparatus and other products of the Party of the First Part.

4. It is further agreed that all selling expenses, with the exception of freight and delivery charges, shall be paid by the party of the second part, and the Party of the First Part shall not in any wise be liable for the same.

5. It is further agreed that all checks, notes and other evidences of indebtedness, executed by the purchaser of

the products of the Party of the First Part, shall be made payable to the Party of the First Part, and not otherwise, and shall be immediately sent to the Party of the First Part, at its home office.

6. Party of the First Part agrees to pay to the party of the Second Part, twelve and one-half per cent (12½%) of the amount of all sales made by him, after war tax is deducted, except on the 350 Gallon Pumper, in which case fifteen percent (15%) is allowed, as the respective payments are received and collected from the purchasers.

7. It is further agreed that this contract does not cover repairs or rebuilding contracted for direct from factory, by municipalities, for machines demolished or broken through accident.

8. It is further agreed that either party may cancel this agreement at any time, by giving to the other party not less than thirty (30) days' written notice of such cancellation.

In witness whereof, the parties have hereunto set their hands and seals this 4th day of February, 1922, this agreement being executed in duplicate.

STUTZ FIRE ENGINE COMPANY
By: H. M. Cochran, Treas.

Witness: Harry C. Boozer

HOWARD STORY

SCHEDULE NO. 2

Under Contract Dated, February 4, 1922

Date	Type of Engine	Sold to	Price
2-15-22,	Pumper,	Baltimore, Maryland,....	$11,250.00
7-24-22,	Pumper,	Havre-de-Grace, Md.,...	7,000.00
7-24-22,	Pumper,	Havre-de-Grace, Md.,...	10,750.00

10-10-22,	Pumper, Manchester, Md., ...	7,000.00
9- 7-22,	Hook & Ladder Truck, Spring Lake, N. J., ...	9,100.00
12- 9-22,	Pumper, Clifton, Heights, Pa.,....	12,500.00
12-29-22,	Pumper, Leonardo, N. J., ...	7,000.00
1-10-23,	Pumper, Baltimore, Maryland,...	12,850.00
3-12-23,	Pumper, East Greenville, Pa., ...	10,750.00
3-17-23,	Pumper, Palymra, Pa., ...	12,500.00
4-10-23,	Pumper, Amityville, N. Y.,.....	10,250.00
4-21-23,	Pumper, Newton, N. J., ...	10,750.00
8-13-23,	Pumper, Whitehall Twp., Pa., ...	10,000.00
8-11-23,	Pumper, Stockton, N. J., ...	7,500.00
12-12-23,	Pumper, Trevorton, Pa., ...	7,500.00
12-10-23,	Pumper Rebuild, Whitehall Township, Pa.	2,900.00
		$149,600.00

SALES AGREEMENT NO. 3

AGREEMENT made and entered into by and between the STUTZ FIRE ENGINE COMPANY of Indianapolis, Indiana, hereinafter known as Party of the First Part, and HOWARD STORY, of Asbury Park, New Jersey, hereinafter known as Party of the Second Part, WITNESSETH:

I.

The Party of the First Party hereby agrees to engage the Party of the Second Part, as its representative, to act as salesman, with headquarters at Asbury Park, New Jersey, for the purpose of selling the products of the Party of the First Part, in the following territory:

All of the State of New Jersey; all of the State of Delaware, Maryland, Long Island, in New York, and the following twenty-seven (27) counties in the Eastern half of the State of Pennsylvania, and none other, unless specifically provided for by written agreement, or upon notification from party of the first part: Philadelphia, Delaware, Bucks, Chester, Montgomery, Lackawanna, Berks, Lancaster, Lebanon, Dauphin, Northumberland, Columbia, Schuylkill, Carbon, Northampton, Monroe, Pike, Wayne, Lehigh, Luzerne, Wyoming, Susquehanna, Bradford, Sullivan, Lycoming, Tioga, and Montour.

II.

All sales of said apparatus and other products, shall be made subject in all things to the approval of the party of the First Part, in writing.

III.

In consideration of the grant of these rights for said territory, the Party of the Second Part agrees to devote his entire time and use his best endeavors in the promotion of the sale of apparatus and other products of the Party of the First Part.

IV.

It is further agreed that all selling expenses, with the exception of freight, delivery charges, and war tax shall be paid by the Party of the Second Part, and the Party of the First Part shall not in any wise be liable for the same.

V.

It is further agreed that all checks, notes and other evidences of indebtedness, executed by the purchaser of the products of the Party of the First Part, shall be made payable to the Party of the First Part and not otherwise, and shall be immediately sent to the Party of the First Part, at its home office.

VI.

Party of the First Part agrees to pay to the Party of the Second Part, fifteen (15%) percent of the amount of

all sales made by him, after war tax is deducted on all regular models, as the respective payments are received and collected from the purchasers.

VII.

It is further agreed that this contract does not cover repairs or rebuilding contracted for direct from factory, by municipalities, for machines demolished or broken through accident.

VIII.

It is further agreed that wherever extra equipment is desired other than covered by our regular specification, and wherein the cost shall exceed One Hundred ($100.00) Dollars, this cost shall be divided equally between the Parties of the First and Second Part. And that, wherever trade-ins or discounts are necessary from regular list price, such deductions shall be mutually agreed upon in writing, Party of the First Part in no case to assume to exceed twenty-five (25%) percent of such reductions. All property or apparatus taken in trade-ins to revert to the possession of the Party of the Second Part, to be disposed of as he sees fit.

IX.

Party of the First Part retains the right to accept or reject any contract, and no verbal agreements as to changes in specifications of any contract awarded shall be binding on Party of First Part, all such changes to be in writing in contract over signatures of those legally entitled to sign contracts. Whenever any such changes may be found necessary in order to get acceptance by Party of the First Part of any of its products, any and all expenses incident to such exchanges shall be deducted from the commission due and Party of the Second Part, provided it is a mistake in making up specifications conform to verbal promises only.

X.

This agreement shall be binding only as long as mutually agreeable to both parties, but can be cancelled by either party by giving ninety (90) days' written notice of such cancellation.

XI.

No discounts or trade-ins under any circumstances will be allowed or assumed by Party of the First Part in the sale of Models "K"—"K-2"—"K-3" or "G-1", and on any contract for a Model "K," where the specifications call for the use of four and three-quarter (4¾) inch bore type of motor Two Hundred ($200.00) Dollars will be deducted from the regular commission due on such job to Party of the Second Part, the party of the Second Part in these cases being privileged to add this amount to his bidding or selling price.

XII.

It is further a greed that whenever paper or time deals become necessary, on Model "K"—"K-2"—"K-3"—"G-1", only, the Party of the First Part will retain the right to deduct two (2%) per cent of the face value of all deferred payments from the commission due Party of the Second Part on any such deals, and all deferred payments shall carry interest at not less than six (6%) percent.

XIII.

Party of the First Part agrees to advance the sum of One Hundred ($100.00) Dollars each month beginning January 1, 1924, towards the expense of local branch maintained at Asbury Park. Party of the Second Part agrees to pay all local license fees, taxes, and to carry a sufficient amount of insurance to cover adequately all demonstrators and parts in his possession.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 4th day of March, 1924, this agreement being executed in duplicate.

STUTZ FIRE ENGINE COMPANY
By: H. M. Cochran, Treas.
HOWARD STORY

Witness: A. M. Elder.

SCHEDULE NO. 3

Under Contract Date, March 4, 1924, But in Force From Date of January 2nd, 1924, When Agreement Was Made in Indianapolis, Verbally.

Date	Type of Engine	Sold to	Price
1-22-24,	Pumper,	South Orange, N. J.,	$ 11,750.00
2-14-24,	Pumper,	West Long Branch, N. J.,	10,000.00
2-26-24,	Pumper,	Bridgeton, N. J.,	12,500.00
2-26-24,	Hook & Ladder Truck,	Bridgeton, N. J.,	9,150.00
2-15-24,	Pumper,	Baltimore, Maryland,	12,500.00
3-12-24,	Hook & Ladder with Pumper,	Hillside, N. J.,	11,375.00
4- 3-24,	Pumper,	Belmar, N. J.,	12,000.00
4- 3-24,	Hook & Ladder and Pumper,	Havre-de-Grace, Maryland.	14,500.00
4-28-24,	Pumper,	Montoursville, Pa.,	7,000.00
5-5-24,	Chemical and Hose Car,	Sea Cliff, New York,	6,500.00
5-23-24,	Pumper,	Fords, N. J.,	12,500.00
6- 5-24,	Pumper,	Whitesville, N. J.,	7,000.00
8-26-24,	Pumper and Hook & Ladder,	Dunmore, Pa.,	20,500.00
9-23-24,	Hook & Ladder Truck,	Mineola, New York,	9,700.00
9-23-24,	Pumper,	Mineola, N. Y.,	10,000.00
12-22-24,	Hook and Ladder with Pumper,	Allenhurst, N. J.,	11,375.00
2- 5-25,	Pumper,	Union Bridge, Maryland,	7,850.00
3- 2-25,	Pumper,	Raritan Township, N. J.,	11,500.00
4- 7-25,	Pumper,	Roslyn Heights, N. Y.,	13,000.00
4-13-25,	Hook & Ladder Truck,	Newton, New Jersey	9,430.00
6-12-25,	Pumper,	Harrington Park, N. J.,	9,500.00
9-22-25,	Pumper,	Washington Crossing, New Jersey,	8,350.00
			$237,000.00

July 16, 1925.

Mr. Howard Story,
807 Asbury Ave.,
Asbury Park, N. J.

Re: *Additional Counties added to your territory.*

Dear Mr. Story:—

In accordance with your request, we are adding the following counties in central Pennsylvania to your territory:

Clinton
Union
Snyder
Mifflin
Huntingdon
Fulton
Franklin
Adams
York
Cumberland

Perry
Bedford
Blair
Potter
Center
Juniata

You will note that we have added Potter, Center and Juniata Counties, in addition to the list of counties asked for by you, and we respectfully ask that you likewise accept these counties, for we would like to block out our territorial assignments.

Under this arrangement you will have all of Pennsylvania East of Potter, Clinton, Center, Blair and Bedford Counties, leaving us a straight divisional line through the North and South center of the State.

The above mentioned Counties will be added to your territory, already specified under your sales agreement contract, dated March 4, 1924, and this writing is being made a part of the above mentioned Sales Agreement Contract.

We desire that you attach copy of this letter to your copy of the SALES AGREEMENT CONTRACT, so that this arrangement can be made a matter of record.

Trusting that the above mentioned territory will net you a nice volume of business in the future, we beg to remain,

Yours very truly,
STUTZ FIRE ENGINE COMPANY
Howard A. Long,
General Sales Manager

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY,
Plaintiff,
vs
STUTZ FIRE ENGINE CO.,
Defendant.

IN ATTACHMENT
STIPULATION

It is hereby stipulated and agreed that the venue in the above entitled cause be laid in the County of Monmouth.

JOSEPH M. TURNER,
Attorney for Plaintiff.

GERAN & MATLACK,
Attorney for Defendant.

Filed Feb. 9, 1927

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY,
Plaintiff,
vs
STUTZ FIRE ENGINE CO.,
(BODY CORPORATE)
Defendant.

ANSWER

ENDORSED: Filing of within answer consented to as within time.

JOSEPH M. TURNER,
Attorney for Plaintiff.

Defendant, a corporation of the State of Indiana, answering the complaint of the plaintiff filed herein, says that:

FIRST COUNT

1. Defendant admits paragraph 1 of the first count.
2. Defendant admits paragraph 2 of the first count.
3. Defendant says that it is a corporation organized and existing under the laws of the State of Indiana, with its principal office and place of business in the City of Indianapolis, Indiana, and that the object of its corporate existence, as stated in its articles of association ,is "to manufacture and sell fire apparatus of all types and descriptions, particularly a water pumping engine named and

known as a high duty fire pumping engine." And defendant says that from the time of its incorporation down to and including the present time said defendant did not manufacture of sell any kind of apparatus or thing whatsoever other than various types of motor driven fire apparatus and parts to be used in connection therewith; and defendant says that said motor driven fire apparatus so manufacture or sell any kind of apparatus or thing what- to various municipalities and governmental units for the exclusive purpose of putting out fires or for rescuing persons or property from fire.

4. That at and before the execution of the agreement referred to in paragraph 1 of the first count of the complaint, and during the life of said agreement, the Federal Reserve Act of 1918 (Section 900, Title 9 of the Revenue Act of 1918, which went into effect as Title 9, February 25, 1919) was in full force and effect. That said Section 900 reads as follows:

"Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories thereof, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3 Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision

(1) or (2) sold to any person other than a manufacturer or producer of any of the articles, enumerated in subdivision (1) or (2), 5 per centum."

5. That on March 3, 1920, the Treasury Department of the Government of the United States of America promulgated and published a regulation that fire apparatus, including fire engines, hose carts, hook and ladders truck and water tire trucks were all taxable under said Section 900 of the Revenue Act of 1918, as automobile trucks and automobile wagons, which tax, as provided in said Section 900, amounted to 3 per centum of the sale price.

6. That the Government of the United States of America, through its Commissioner of Internal Revenue, and its Collector of Internal Revenue for the District of Indiana, at and before the execution of the said agreement, and during the life of said agreement, demanded of defendant that it report its sales of fire apparatus to the said Collector of Internal Revenue, as by law required, and pay to said Collector said sale or excise tax of 3 per centum of the price for which such fire apparatus were sold, in accordance with the Act of Congress and the regulation of said Treasury Department hereinbefore referred to.

7. That the sale price of each fire apparatus sold by plaintiff for defendant, during the life of said agreement, was fixed by defendant to include said tax of 3 per centum, and said tax was in fact paid each month by defendant to the Collector of Internal Revenue of the United States for the District of Indiana for the United States of America, on the price for which apparatus was sold by plaintiff for defendant in the preceding month.

8. That plaintiff and defendant, at and before the time of the execution of said agreement, believed that defendant would be called upon by the said government of the United States, during the life of said agreement, to pay a 3 per centum sales or excise tax on the sale price of all fire apparatus manufactured and sold by defendant under and pursuant to said Federal Revenue Act of 1918 and the said regulations of said Treasury Department. And plaintiff further knew that the defendant from time to time during the life of said agreement paid to the Collector of Internal Revenue of the District of Indiana for the United States of America, out of the $89,200 mentioned in Paragraph 4 of the first count, a sum equal to 3 per centum of said amount, or $2,676, as a sales or excise tax, and that defendant paid the plaintiff out of said $89,200 the sum of $10,850 as plaintiff's commission of 12½ per centum of the said sum of $89,200, after deducting therefrom said $2,676.

9. That at the time or times plaintiff received from defendant said sum or sums aggregating $10,850 out of said $89,200, the defendant intended said payment or payments and plaintiff accepted said payment or payments as and in full settlement of plaintiff's claim against the defendant, and said payment or payments of said $10,850 so made by said defendant to said plaintiff out of said $89,200 was or were in fact a full and complete settlement of all the claims plaintiff had or has against the defendant under said agreement sued on in the first count of plaintiff's complaint.

SPECIAL DEFENSE

So much as is claimed for commissions on apparatus sold during the year 1920 is barred by the Statute of Limitations, and defendant pleads the Statute of Limitations, as a bar to any action for said items.

SECOND COUNT

1. The defendant admits paragraph one of the second count.

2. The defendant admits paragraph two of the second count.

3. Defendant repeats paragraph three of the first count.

4. That at and before the execution of the agreement referred to in Paragraph one of the second count of the complaint, and during the life of said agreement, the Federal Reserve Act of 1918 (Section 900, Title 9 of the Revenue Act of 1918, which went into effect as Title 9, February 25, 1919) was in full force and effect. That said Section 900 reads as follows:

> "Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which sold or leased.
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

> "(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories thereof, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.
>
> "(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2) sold to any person other than a manufacturer or producer of any of the articles, enumerated in subdivision (1) or (2), 5 per centum."

5. Defendant repeats paragraph five of the first count.

6. Defendant repeats paragraph six of the first count.

7. Defendant repeats paragraph seven of the first count.

8. The defendant admits that plaintiff sold, as representative and salesman of the defendant, under said agreement, referred to in Paragraph one of Count two of the complaint, products of the defendent, the selling price of which amounted to $149,600, and that said sum was received by the defendant for said respective sales; and defendant alleges that the amounts paid by defendant to plaintiff, as alleged in Paragraph three of the second count of the complaint, were in compliance and in accordance with the provisions of said agreement; that as the respective payment or payments for said fire apparatus so sold by plaintiff for defendant under said agreement was or were received and collected from the purchaser thereof, the defendant made settlement with plaintiff by paying him a sum or sums equal to the percentage named in said agreement of the price for which such fire apparatus was or were sold, after first deducting

from said price a sum equal to 3 per centum of said price, to pay the sale or excise tax on said sale, or to cover the amount of such sale or excise tax, as provided in said agreement. Defendant further admits that the said sale or excise tax paid by it to the Government of the United States on the sale price of all fire apparatus sold by plaintiff for defendant, as alleged in plaintiff's second count, was refunded to the defendant by the Government of the United States of America on the 14th day of December, 1925, but defendant alleges plaintiff, under the agreement sued on in the second count of the complaint, is not entitled to a commission on any part of said or excise tax so refunded to defendant.

9. That plaintiff and defendant, at and before the time of the execution of the agreement sued on in the second count of the complaint, assumed that the defendant would be called upon by the Government of the United States to pay a 3 per centum sales or excise tax on the sale price of all fire apparatus sold by the defendant because of said Revenue Act of 1918 and the said regulations of said Treasury Department, and that assumption in mind, plaintiff and defendant fixed and determined upon and expressed in the said agreement sued on in the second count of the complaint the percentage of commissions plaintiff would be entitled to receive on the sale price of all fire apparatus sold by plaintiff, after a deduction from said sale price of an amount equal to the said sale or excise tax provided for in said Federal Revenue Act of 1918.

10. That the words "War Tax" used in the said agreement, referred to in the second count of the complaint, mean, and were by the plaintiff and the defendant at the time of the execution of said agreement, intended

to mean a sales or excise tax as defined and covered by said Federal Revenue Act of 1918, and the said published regulations of the Treasury Department of the Government of the United States of America.

THIRD COUNT

1. The defendant admits paragraph one of the third count.

2. The defendant admits paragraph two of the third count.

3. The defendant repeats paragraph three of the first count.

4. That at and before the execution of the agreement referred to in Paragraph one of the third count of the complaint, and during the life of said agreement, the Federal Reserve Act of 1918 (Section 900, Title 9 of the Revenue Act of 1918, which went into effect as Title 9, February 25, 1919.) was in full force and effect. That said Section 900 reads as follows:

> "Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased.
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.
>
> "(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories thereof, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2) sold to any person other than a manufacturer or producer of any of the articles, enumerated in subdivision (1) or (2), 5 per centum."

5. The defendant repeats paragraph five of the first count.

6. That the Government of the United States of America, through its Commissioner of Internal Revenue, and its Collector of Internal Revenue for the District of Indiana, at and before the execution of the said agreement, and from the beginning of said agreement up to January 31, 1925, demanded of defendant that it report its sales of fire apparatus to the said Collector of Internal Revenue, as by law required, and pay to said Collector said sale or excise tax of 3 per centum of the price for which such fire apparatus were sold, in accordance with the Act of Congress and the regulation of said Treasury Department hereinbefore referred to.

7. That the sale price of each fire apparatus sold by plaintiff for defendant, during the life of said agreement, was fixed by defendant to include said tax of 3 per centum, and said tax was in fact paid each month by defendant to the Collector of Internal Revenue of the United States for the District of Indiana for the United States of America, on the price for which said apparatus was sold by plaintiff for defendant in the preceding month, except as to sales of fire apparatus sold after January 31, 1925, on the sale price of which defendant paid no sale or excise tax.

8. The defendant admits that plaintiff sold, as representative and salesman of the defendant, under said agreement referred to in Paragraph one of third count of the

complaint, products of the defendant, the selling price of which amounted to $237,000, and that said sum was received by the defendant for said respective sales; and defendant alleges that the amounts paid by defendant to plaintiff, as alleged in paragraph three of the third count of the complaint, were in compliance and in accordance with the provisions of said agreement; that as the respective payment or payments for said fire apparatus so sold by plaintiff for defendant under said agreement was or were received and collected from the purchaser thereof, the defendant made settlement with plaintiff by paying him a sum or sums equal to the percentage named in said agreement of the price for which such fire apparatus was or were sold, after first deducting from said price a sum equal to 3 per centum of said price, to pay the sale or excise tax, on said sale, or to cover the amount of such sale or excise tax, as provided in said agreement. Defendant further admits that the said sale or excise tax paid by it to the Government of the United States on the sale price of certain fire apparatus sold by plaintiff for defendant, as alleged in plaintiff's third count, was refunded to defendant by the Government of the United States of America on the 14th day of December, 1925, but defendant alleges plaintiff, under the agreement sued on in the third count of the complaint, is not entitled to a commission on any part of said sale or excise tax so refunded to defendant, or on any part of the said sum equaling 3 per centum of said sale price so deducted from said sale price.

9. That plaintiff and defendant at and before the time of the execution of the agreement sued on in the third count of the complaint, assumed that the defendant would be called upon by the Government of the United States to pay a 3 per centum sales or excise tax on the sale price of all fire apparatus sold by the defendant because of

said Revenue Act of 1918 and the said regulations of said Treasury Department, and with that assumption in mind, plaintiff and defendant fixed and determined upon, and expressed in the said agreement sued upon in the second count of the complaint, the percentage of commissions plaintiff would be entitled to receive on the sale price of all fire apparatus sold by plaintiff, after a deduction from said sale price of an amount equal to the said sale or excise tax provided for in said Federal Revenue Act of 1918.

10. That the words "War Tax" used in the said agreement, referred to in the third count of the complaint, mean, and were, by the plaintiff and the defendant at the time of the execution of said agreement, intended to mean a tax known as a sales or excise tax as defined and covered by said Federal Revenue Act of 1918, and the said published regulations of the Treasury Department of the Government of the United States of America.

GERAN & MATLACK,
Attorneys for Defendant.

Filed March 4, 1927

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY,
Plaintiff,
vs
STUTZ FIRE ENGINE CO.,
(BODY CORPORATE)
Defendant.

REPLY

ENDORSED: Service of within reply acknowledged as within time.

GERAN & MATLACK,
Attorneys for Defendant.

1. The Plaintiff admits paragraph one, two and three, of the first count of the defendant's answer.

2. The plaintiff denies that the Federal Reserve Act of 1918, referred to in paragraph four of the first count of the defendant's answer, has any application to the contract referred to in the first count of the plaintiff's complaint.

3. The plaintiff has no information sufficient to form a reply to paragraph five, six and seven of the first count of the defendant's answer.

4. The plaintiff has no information sufficient to form a reply as to the payment alleged to have been made by the defendant, as set forth in paragraph eight of the first count of defendant's answer, but denies the rest of said paragraph.

5. The plaintiff denies paragraph nine of the first count of defendant's answer.

6. The plaintiff has no information sufficient to form a reply to paragraph four of the second count of the defendant's answer.

8. The plaintiff in replying to paragraph eight of the second count of the defendant's answer denies that the amounts paid by the defendant to the plaintiff, as referred to therein, were in compliance and in accordance with the provisions of the agreement, therein referred to, and insists that he is entitled to a commission on the moneys paid to the Government of the United States of America, by the defendant as the Excise Tax, which said sums were refunded to the defendant.

9. The plaintiff denies paragraph nine in the second count of the defendant's answer.

10. The plaintiff denies paragraph nine in the second count of the defendant's answer.

11. The plaintiff has no information sufficient to form a reply to paragraph four of the third count of the defendant's answer.

12. The plaintiff has no information sufficient to form a reply to paragraph six of the third count of the defendant's answer.

13. The plaintiff has no information sufficient to form a reply to paragraph seven of the third count of the defendant's answer.

14. The plaintiff denies that the payment made to him by the defendant as alleged in paragraph eight of the third count of defendant's answer, were in full settlement of the amount due him as set forth in the third paragraph of the third count of the complaint, and insists that he is entitled to a commission on the excise tax refunded to the defendant, as set forth in paragraph eight of the third count of defendant's answer.

15. The plaintiff denies paragraph nine of the third count of the defendant's answer.

16. The plaintiff admits paragraph ten of the third count of the defendant's answer.

JOSEPH M. TURNER,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY, *Plaintiff,* vs STUTZ FIRE ENGINE CO., (BODY CORPORATE) *Defendant.*	ACTION AT LAW, POSTEA.

This case was tried before Hon. Rulif V. Lawrence, Circuit Court Judge, with a jury at the Monmouth Circuit, on March, the fourteenth, nineteen hundred and twenty-seven.

The said judge directed the jury to return a verdict against the defendant and in favor of the plaintiff for two thousand three hundred, twelve dollars, and forty-two cents ($2,312.42), and the jury did accordingly return a verdict against the defendant and in favor of the plaintiff for the said sum of two thousand three hundred, twelve dollars, and forty-two cents ($2,312.42).

RULIF V. LAWRENCE,
Judge.

Filed March 30, 1927

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY,
Plaintiff,
vs
STUTZ FIRE ENGINE CO.,
(BODY CORPORATE)
Defendant.

NOTICE AND GROUNDS OF APPEAL

Filed March 30, 1927

NEW JERSEY SUPREME COURT

To Joseph M. Turner,
Attorney of Plaintiff:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this case upon the following grounds:

1. The trial court directed a verdict against the defendant and in favor of the plaintiff when thereunto moved by counsel for the plaintiff, whereas said court should have denied said motion.

2. The trial court refused to direct a verdict in favor of defendant and against the plaintiff when thereunto moved by counsel for the defendant, whereas said court should have granted said motion.

GERAN & MATLACK,
Attorneys for Appellant.

NEW JERSEY SUPREME COURT
MONMOUTH COUNTY

HOWARD STORY,
Plaintiff,
vs
STUTZ FIRE ENGINE COMPANY
Defendant.

ACTION AT LAW

TRANSCRIPT OF TESTIMONY

Freehold, N. J., March 11, 1927

(Mr. Turner opens for the plaintiff.)

MR. TURNER: There is no dispute as to the sales. Geran & Matlack and myself, in order to expedite the trial of this cause and to save unnecessary offering of proof which we know to be true, have stipulated, and I will read the stipulation.

THE COURT: Read the stipulation into the record so we will understand the issue.

MR. TURNER: Before I go into the stipulation, it is further admitted that the Stutz Fire Engine Company is a corporation of the State of Indiana and has never filed a certificate enabling it or entitling it to do business in this

state. It was for that reason that this action was instituted as an attachment.

THE COURT: I think, under the circumstances, we had better let Mr. Matlack make his opening and then after that you put your stipulation on the record.

MR. TURNER: All right, your Honor.

(Mr. Turner continues opening.)

MR. TURNER: I think, your Honor, that there arises in this one instance, as to the second few contracts—on the first I think it is a question of fact, because there will be testimony on our part relative to the deduction of this tax.

THE COURT: They will admit that.

MR. MATLACK: We will admit that.

MR. TURNER: We will claim as to the repayment of a portion of it.

(Concludes opening.)

(Mr. Matlack opens for the defense.)

THE COURT: Even the statute of limitations is a question of law as to its application to the first count?

MR. MATLACK: Yes. So that we have raised no question of fact for the jury, in my opinion.

THE COURT: That being so, gentlemen, then I think you should enter your stipulations on the record. Mr. Turner, you may enter your stipulation.

MR. TURNER: It is all in one; both of us have signed this stipulation, to apply to the terms. But I will claim there is an element of fact instead of law as to the agreement we made with the company relative to refunding it.

THE COURT: Well, we will ascertain just how far you can go with the stipulation.

MR. TURNER: I think we have covered pretty much all of it.

THE COURT: You had better read them into the record.

MR. TURNER: It is hereby stipulated and agreed by and between the respective attorneys for the parties, that the following facts shall be taken to be true and admitted:

1. That the sales as set forth in schedules 1, 2 and 3 of the complaint are correct, and that from the sales prices set forth in the schedules was deducted a sum of three per cent (3%) to cover an excise tax levied by the federal government.

2. It is further agreed that the Stutz Fire Engine Company paid to the government a sum of three per cent (3%) of the total sales price on all items in schedules 1, 2 and 3, except the last six items on schedule 3, upon which no war tax was paid by the Stutz Fire Engine Co., but an amount equal to three per cent (3%) of the sales price was deducted from the last six items shown on said schedule.

3. The government of the United States has refunded to the defendant the moneys which it collected from the

Stutz Fire Engine Co. as three per cent (3%) war tax or excise tax.

4. The said tax was imposed under the Revenue Act of 1918, Section 900, and the regulation of the Treasury Department of the United States, dated March 3, 1920, which regulations were declared invalid as to the tax on fire engine trucks by the United States Circuit Court of Appeals, Second Judicial District of New York, in the case of the American La France Fire Engine Co. v. Riordan.

HOWARD STORY, Sworn for Plaintiff.

MR. TURNER: Your Honor and gentlemen of the jury: The court of course understands it, but I would like to make clear to the minds of the jury that we are not going into the proof as to all of these sales, as that is admitted. I am simply going to confine my examination of Mr. Story to the fact of whether or not he consented to the deduction from the first contract, which made no provision for taking that money out, and he has claimed—or rather, to the effect, as we allege, that the Stutz Fire Engine Company that if this tax was not held good—there was a doubt then as to whether it was legal—and if it was illegal that he would stay with them and work, he was not to quit—

MR. MATLACK: I object to this statement to the jury.

THE COURT: Yes, just examine him.

DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Story, how long were you with the Stutz Fire Engine Company? A. I have been with them since 1919.

Q. Under your contract with them on the 29th day of November, 1919, was there any provision for the—

THE COURT: Hand him the three contracts and ask him if they are the contracts involving his employment.

Q. Are these the three contracts upon which we are suing? A. They are. I know them very well.

MR. TURNER: I offer them.

THE COURT: Mark them as exhibits.

(Papers marked Exhibits P 1, P 2 and P 3.)

Q. Contract No. 1 made no provision of any kind, nature or description as to war tax, did it?

MR. MATLACK: I object. It speaks for itself.

MR. TURNER: It speaks for itself.

THE COURT: Get right down to the issue.

Q. Did you authorize the deduction of your commissions under contract No. 1 for the payment of war tax? A. No, I objected to it until such times as I was assured that I would have a return.

Q. Under what circumstances was the return to be made to you? A. If the government returned the war tax I was to get my commission.

Q. Who was then the head of the Stutz Fire Engine Company? A. If my memory serves me right—there has been so many changes—Harry Stutz.

Q. And your arrangement was at that time made with the officials of your— A. Stutz Fire Engine Company.

Q. Do you know Mr. Thomas R. Johnson? A. Yes, he was at that time general manager.

Q. Was he general manager on December 20, 1920? A. He was.

Q. I show you a letter from Mr. Johnson. Do you know his signature? A. Yes, I have seen it a number of times.

Q. And you have had any number of letters from him? A. Yes.

MR. MATLACK: I desire to have an objection on the record that it is varying the terms of a written contract.

THE COURT: Put your questions and objections on. They are all questions of law. I will examine the whole number of them.

Q. Was it under those conditions, those terms of repayment to you, that you continued to work for the Stutz Fire Engine Company? A. It was.

MR. MATLACK: Are you relying on that letter?

MR. TURNER: No, I have his own testimony now.

THE COURT: Now offer this letter. There is no objection to it.

MR. TURNER: There is no objection to it?

MR. MATLACK: No.

(Letter marked Exhibit P 4.)

MR. TURNER: Your Honor and gentlemen of the jury: this letter was written to Mr. Howard Story.

MR. MATLACK: I only object to it in this sense: that I do not admit that the man who wrote it was the general manager of the company. I will admit he received that letter from somebody named Johnson.

MR. TURNER: I will show that.

Q. You knew Mr. Johnson a number of years, did you not? A. Sure.

Q. What was his position in the StSutz Fire Engine Company on December 20, 1920? A. He was general manager, sales manager.

BY THE COURT:

Q. You know that of your own knowledge, do you, Mr. Story? A. Yes, because I can show you letters where he signed his name over that title.

Q. Had transactions with him? A. Absolutely.

Q. Covering a period of how long? A. A period of at least two years.

MR. MATLACK: Now he has changed his testimony and says he was sales manager.

A. Well, he was general sales manager. He was the man whom I was doing business with.

MR. MATLACK: We will admit that he was sales manager but not general manager.

MR. TURNER: I said general manager; I don't think he said that.

BY MR. TURNER:

Q. This is the letter that you received from him dated December 20, 1920? A. Yes, sir.

(Mr. Turner reads the letter.)

MR. MATLACK: I move that that be stricken out as immaterial and irrelevant.

THE COURT: Why?

MR. MATLACK: On the ground that it has no reference to any promise to Mr. Story to repay him commission.

THE COURT: I think it indicates the purpose for which deductions were made.

(After argument.)

THE COURT: I think that is a matter of law and not for the jury. I am going to pass on these questions of law. I think it does get to be a question of law I must handle.

THE WITNESS: If your Honor will allow me, I think I have a letter right here with sales manager's—

THE COURT: Is this the letter?

THE WITNESS: Yes.

THE COURT: That is where he signed himself as general sales manager?

THE WITNESS: Yes.

THE COURT: There seems to be no question of that, that he was general sales manager.

MR. MATLACK: We admit he was general sales manager of the company.

Q. Did you discuss this war tax with Mr. Saurbier, the present president of the Stutz Fire Engine Company? A. I did, on February 10, 1926.

Q. Where? A. In my office.

Q. At that time did you direct his attention that the war tax paid by his company to the federal government had been refunded? A. I did, and asked him for a refund.

Q. What did he say? A. Well, he didn't say anything in particular about the refund of the other tax, excepting the last six items.

Q. What did he say as to the last six times? A. Well, he said that we should never have been charged—or it should never have been deducted from our commissions.

Q. Why? A. From the fact that after April of 1925, they had ceased to pay war tax.

MR. MATLACK: I object to all this on the ground that it seems to vary a written contract.

THE COURT: I think not.

(After argument.)

THE COURT: I will pass on that, gentlemen, as a question of law and will take time and reflect on it.

CROSS EXAMINATION BY MR. MATLACK:

Q. When did you say that you had conversation with Mr. Johnson? A. With Mr. Johnson—

THE COURT: No, not Johnson.

MR. TURNER: Saurbier.

Q. I am speaking, getting back to your first contract. Who were you talking to about the first contract at the time they first began to deduct war tax? Didn't you say you talked to Mr. Johnson? A. No, I didn't talk to Mr. Johnson about it, I wrote him about it.

Q. And this letter is the only communication you had about it? A. No, I have had various talks since then, but that was the first of the particular year's.

Q. This letter is the result of a letter that you wrote to him at that time? A. Yes.

Q. And this is the first communication that you say that you had that they would return the war tax? A. Well, that is the first time that they promised to return it, yes.

Q. And the last conversation with Mr. Saurbier was last year, was it? A. February 10th, yes.

Q. And that was simply about these last two contract, wasn't it, the last six items— A. About the whole amount. I had been claiming that I had a right to a refund of all the war tax and I couldn't get any satisfaction.

Q. But it was with particular reference to the last six items? A. Well, we got in conversation about the last six items and Mr. Saurbier said that they had no right to have taken that off in April, but they did it just the same.

Q. You don't know what authority Mr. Johnson had or Mr. Saurbier had when he talked to you? A. Why, he is supposed to be president of the Stutz Fire Engine Company.

Q. I didn't ask you that. I asked you do you know what authority he had. A. Nothing more than he signed himself president. I should think that would be some authority.

Q. And Mr. Johnson signed himself the sales manager? A. Not with Mr. Johnson, Mr. Saurbier.

Q. You talked to him, didn't you? A. Yes.

Q. And you didn't know anything about Mr. Johnson except what he signed, as sales manager? That was the only thing you knew about his authority, wasn't it? A. Well, simply a matter of getting a letter I haven't got at the present time.

Q. I say you didn't know anything about it? That is what I want. Did you know anything about his authority at the time he wrote the letter? A. Yes, I did.

Q. What did you know about it? A. I had a letter from the secretary of the company stating that he had been appointed general sales manager.

Q. Did it say that he was authorized to enter into general contracts? A. Didn't say anything about that.

Q. Your contract with the company was not entered into by Mr. Johnson, was it? A. No.

Q. Your contract was signed by the president and secretary of the company, wasn't it?

MR. TURNER: No, it was signed by the treasurer.

MR. MATLACK: The president and treasurer?

MR. TURNER: No, by the treasurer.

MR. MATLACK: This is the first one?

MR. TURNER: No, that is the last one, No. 3.

PLAINTIFF RESTS

DEFENDANT'S TESTIMONY

EDWARD D. SAURBIER, Sworn for Defendant.

DIRECT EXAMINATION BY MR. MATLACK:

Q. Mr. Saurbier, are you president of the Stutz Fire Engine Company? A. Yes.

Q. And your plant is in Indianapolis? A. Yes.

Q. And you do business from Indianapolis? A. Yes.

Q. Mr. Story was one of the agents of the company in this territory? A. Yes, sir.

Q. And had been for some years? A. Yes.

Q. Were you with the company in 1919? A. Yes, sir.

Q. And what was your position with the company at that time? A. I have been either president or vice, all the time. I have had to make a change then, being the president, because I was on the board of directors.

BY THE COURT:

Q. Directors? A. Yes. Well, not only that, but I got in politics.

Which took you out of the company? A. Yes.

Q. For the time being? A. Yes. So otherwise I have been either—

Q. President or vice president since 1919? A. All the time. As a matter of fact, I have financed the place.

BY MR. MATLACK:

Q. And you know Mr. Johnson, Thomas R. Johnson? A. Very well.

Q. And what was his position with the company? A. Well, he was not the first man.

By The Court:

Q. What was his position?

By Mr. Matlack:

Q. What was his position? A. Well, we had a man by the name of Lillie first.

By The Court:

Q. What was he, sales manager? A Sales manager, yes.

Q. And then Johnson succeeded Lillie as sales manager? A. Yes.

Q. In fact, Johnson was sales manager from the time he was employed? A. Yes, I would say yes.

By Mr. Matlack:

Q. Did Johnson have authority to enter into contracts in behalf of the company?

Mr. Turner: I object to asking what Johnson's authority was.

The Court: It is a mere form. Turn it around the other way. What were his duties? A. Trying to get jobs. He was out practically all the time.

By The Court:

Q. Wasn't in the home office? A. He was out in the field endeavoring to promote sales of fire engines, that is all.

Q. For the company? A. Yes.

Q. And he had agents, I suppose, under him? A. No, he didn't.

Q. He didn't? A. No. Well, he had that—well, I don't know what you might call it, but he was out just the same as the other men were.

Q. Just the same as Mr. Story, for example? A. Yes.

By Mr. Matlack:

Q. Did he have any authority to enter into contracts with agents or other persons? A. Not at all.

Q. And did he as a matter of fact make any contracts with the agents? A. None. He never got a man.

Cross-Examination By Mr. Turner:

Q. He was stationed mainly in the home office, was he not? A. No, he was out. He was out on the west coast for a year.

Q. Well, during 1920, he was in the home office? A. I don't know whether he was there at all at that time, I am not sure.

Q. Do you know his signature? A. I don't know.

(Signature shown witness.)

A. I am not sure, but it might be.

Q. Now as a matter of fact, as sales manager he supervised the other salesmen, did he not? A. No, he didn't.

Q. Did he have any control over the other salesmen? A. No, sir.

Q. Who handled the correspondence in the home office from your various salesmen? A. Macklenburg.

Q. In 1920? A. Yes.

Q. Would any of the mail in 1920 addressed to the Stutz Fire Engine Company be given to Mr. Johnson for his attention? A. No, he was not around the place practically any time.

Q. Well, in other words, then he had no authority to write this letter, you contend, in August, 1920? A. He was not authorized to do anything, only to get jobs.

Q. His name doesn't appear on any of your contracts? A. Not that I know of.

Q. When was Mr. Lang your general sales manager? A. He never was.

Q. Why did he sign himself as such? A. I don't know.

Q. Here is a letter and contract No. 3, whereby Mr. Lang increased the territory of Mr. Story. Just read that letter and see if this man Lang had any authority to write it.

MR. MATLACK: I object. That has nothing to do with Mr. Johnson's authority.

THE COURT: Evidently he is attempting to show that these sales managers, so-called, did have authority.

MR. TURNER: Yes, that is the object of this cross-examination.

A. He didn't have that.

Q. How do you account for that gentleman writing that letter? A. Well, if you talked to him a little you would find out very quickly.

Q. Your company increased the territory of Mr. Story, didn't it? Mr. Story's territory was increased as set forth in this letter; was that true? Read the letter. A. It was never taken up with the company.

Q. And did he sell machines in this additional territory for you? A. Did who?

Q. Story. A. Story has been with the company ever since—

Q. Let me read and see if I can get you straightened out. In his original contract, or the contract mentioned here, he had definite territory in which he could sell; is that true? A. I think so.

Q. You know that, don't you? A. Well, some things I don't know.

Q. Do you want me to read it to you then? Let's get contract No. 3.

THE COURT: I don't think I would waste much time on it.

MR. TURNER: Well, your Honor, here is the man that had authority.

THE COURT: I think that it gets down to deduction of tax rather than exceeding authority.

BY THE COURT:

Q. What do you know about the deduction of this federal tax, you yourself? Do you know anything about it? A. Well, I know I worked on it personally as attorney,

and subsequently it was declared illegal and the tax paid by the company returned to the company.

Q. By the federal government? A. Yes.

Q. And as a matter of fact a portion of the tax was deducted from these sales, from the commissions otherwise due to salesmen? A. Yes.

Q. Now why haven't you paid Mr. Story this money, Mr. Saurbier? Why haven't you paid him? A. Because I didn't think it belonged to him.

Q. Why, under the contract? A. Well, one of the things is it cost a lot of money to get the money back. We didn't get near what you would think we got.

Q. There was a refund, but you had to pay lawyers and others a good deal of money to get it back; is that right? A. About fifty per cent, it cost me.

Q. How much did you get back? A. Ninety-one, I think.

Q. Ninety-one thousand? A. Yes.

Q. So you really only got about forty thousand net, eh? A. That is all we got.

By Mr. Turner:

Q. Did you sue the government to get this money back? A. No.

Q. It returned it voluntarily without suit?

The Court: Oh, well, of course he says he employed lawyers. Anybody who has anything to do with the red tape of the United States government must know he has got to do it.

Now is there anything more, gentlemen? This is a question of law. I will allow you to put on the record, Mr. Matlack, a motion for a direction.

Mr. Turner: That is what I was about to ask.

By The Court:

Q. Mr. Saurbier, do you remember having the conversation with Mr. Story that he refers to in February, 1926? A. Yes, I was down to see him, talked to him, and he asked me about two or three or four or five or six cars. He said that he should get that money and I said, "Well, I think you are right."

Q. They were those sales that he had made? A. I don't know. I can't tell you what it was.

Mr. Turner: Yes, it was those upon which they deducted a tax when they had never paid it, and Mr. Saurbier told him he thought he was right and he ought to get it.

The Court: Which were they?

Mr. Turner: They were the last six sales in count three. The war tax was refunded. It never paid the government.

The Court: He has never paid that?

Mr. Turner: No.

The Court: Then I think he is entitled to commission on that.

Mr. Matlack: I don't think so, your Honor, if you read the contract.

MR. TURNER: I would like to ask him why they deducted that.

BY MR. TURNER:

Q. Why did your company deduct a war tax after it had ceased to pay a war tax to the government?

MR. MATLACK: I object to why they did it. It calls for a conclusion.

BY THE COURT:

Q. Do you know why it was done? A. No, I don't.

BY MR. TURNER:

Q. You said that you told Mr. Story on December 20th that they ought not to have done that and he ought to get it back; you just testified to that. A. I don't know just what the words were but—

Q. To that effect? A. "If it was coming to you you ought to have it," that is what I said.

MR. TURNER: I would now ask for a direction of a verdict, if Mr. Matlack has closed.

THE COURT: You make your motion for a direction of a verdict in favor of the plaintiff?

MR. TURNER: For the full amount. And I think I should at this time answer the question of law—

THE COURT: No, I haven't time to listen to you on the question of law.

MR. TURNER: The statute of limitations, I want to direct the court's attention to that.

THE COURT: Hand up whatever authority you have on it and I will look at it later.

MR. MATLACK: I move for the direction of a verdict in favor of the defendant.

THE COURT: There is a motion for a direction in favor of the plaintiff and in favor of the defendant. I shall reserve rulings on those motions. The jury will return Monday and I will then pass on the motion. Apparently the matter involved is a question of law, not one of fact. There is nothing of fact involved here at all. This jury will return Monday anyway, but you will report at the usual time and then I will tell you when you will be called back. I think we had better fix two o'clock Monday.

Adjourned till March 14, 1927, at 2 P. M.

Freehold, N. J., March 14, 1927.

Trial of the cause resumed at 2.00 P. M.

CHARGE OF THE COURT

Gentlemen of the jury: In this case at the conclusion of the session on Friday two motions were made: one on behalf of the defendant for a direction in its favor and the other on the part of the plaintiff for a direction in his favor. On reflection I have decided to deny the motion for a direction in favor of the defendant and to grant the motion for a direction in favor of the plaintiff.

There appears to be no question of disputed fact involved in the case; it is purely a question of law for the disposition of the court; and being of the opinion that it was clearly the intent of the parties in this case to deduct from the compensation agreed to be paid by the defendent the amount of the so-called war tax in the event that it was legally assessable and actually collected by government, it is not disputed that under the first contract there was no reference at all to a deduction of war tax; there was an assessment made, however, by the federal authorities of a tax which it appears was paid, and consequently deducted from the compensation found to be due and owing plaintiff under that contract.

As to the second contract, as I now recall, there was a special provision that the war tax should be deducted, and likewise under the terms of the third contract. It is apparently clear enough, the parties do not deny, that if the federal government was not to collect a tax that therefore the compensation due the plaintiff was not to be diminished; but in the event that the federal government did levy a tax and sustain it as a valid assessment and collect the amount thereof, even though it was afterwards refunded by the government when found to be illegal, as appears to have been the case, it seems clear to me as a matter of law that it was never the intention of the parties to have anything deducted, or if deducted, that the plaintiff would impliedly, at least, be entitled to any benefit that might accrue to him in the event of the government refunding the tax. Now that is the situation here. As a matter of fact there was a tax levied and paid and the proportionate amount thereof deducted from plaintiff's compensation. Under the second contract there was an assesment made, as I now recall, but at about that time, in view of a decision in one of the United States circuit courts in the district where this defendant company had its main office, it was held that the government had no right to levy a federal tax in the circumstances. The result was that subsequently the tax that had been paid was refunded and this issue now turns upon the right of the plaintiff to recover of the defendant company his proportionate amount under his contract for compensation involved in those tax payments.

Now that being so, I see no other outcome than that the plaintiff is entitled to recover that which he claims; and since this is a mere matter of calculation as to fig-

ures, the parties having agreed, it would seem that there is nothing for the court to do but to direct a verdict in favor of the plaintiff.

The amounts are as follows: under the first contract, $334.50 with interest from the date of the last item, June 23, 1921, a period of five years, eight months and twenty-one days, which is a mere matter of mathematical calculation and which you may figure if you so desire. I have ascertained that amount to be $114.90, or a total under the first contract of $449.40. Under the second contract, the amount of $588, with interest from December 10, 1923, or $115.05, making a total of $703.05. And under the third contract the amount being $1,066.50, with interest from September 22, 1925, or $93.47, making a total of $1,159.97; making an aggregate sum of $2,312.42, which the court will direct the jury to return in favor of the plaintiff and against the defendant, with this further observation; that as to part of the sales made under the first contract the plea of the statute of limitations was made. In view of the fact that it is admitted that this company was a foreign corporation to the state of New Jersey, I hold that the statute of limitations does not apply, since the interpretation of the act appears to be that as against non-residents of persons not residents of the state, when a cause of action accures the statute has no applications. That being so and the facts not being in dispute and the issues involved being thus disposed of by the court, you are directed to return a verdict in favor of the plaintiff and against the defendant for $2,312.42, with this reservation: if any of you gentlemen desire to calculate the interest I will allow you to do it; or you may accept the court's figures if you are satisfied generally they are correct. It is a pure matter of

calculation, and if I make an error I have no doubt it can be easily corrected; but I am leaving it to you gentlemen to decide on the question of interest. Now decide among yourselves and calculate the figures if you like.

A JUROR: We will take the judge's figures.

THE COURT: I may add, for the purpose of the record, an exception is allowed to the refusal of the court to grant the motion for direction in favor of the defendant, and likewise an exception is allowed to the ruling of the court in favor of the plaintiff. The jury may return a verdict for the figures given, in favor of the plaintiff and against the defendant.

(Ex. P. 4)

STUTZ FIRE ENGINE CO.

Indianapolis, Ind.

Dec. 20, 1920.

Portland, Ore.
San Francisco, Cal.
Jamestown, N. Y.

Asbury Park, N. J.
Boston, Mass.
Los Angeles, Cal.

In Replying Address
Central Eastern Branch
807 Asbury Avenue
Asbury Park, New Jersey

Mr. Howard Story,
Asbury Park, N. J.,

Dear Mr. Story:—

Your not in reference to my letter of Sept. 22nd, relative to War Tax, is received.

Will say at this time, there seems to be no way of getting away from this Tax. We have been paying it right along although under protest, as that is the only thing we can do, but if we do get the law set aside as far as the Fire Apparatus is concerned, I assure you that all who are entitled to any commission, where commissions have been withheld on that account, will get it as we do not want anything that does not belong to us, but what is coming to us, we of course want to get.

Now, relative to the Hook & Ladder Truck, which you speak of in your letter of the 17th. It was my intention to get a better Blue Print, but we have been so busy on other things in that Department, on account of the changes which we have been making,

and the drafting end of the Engineering Department has been kept busy almost night and day. At this writing, I do not know whether I will be able to get out another Blue Print or not.

We will have a picture of this Truck sometime in January, and you will then be in position to have everything you will need in this line. I think this will be the better plan, any way—just to wait until we can get this picture for you.

You need have no hesitancy at all in going to your friends and making the flat statement, that we are going to turn out—in fact we are now building, what we consider the finest Service Truck which has ever been put in the Fire Service, and I am satisfied that with your strong persuasive powers, convey to your customers a confidence in your statements, which will award you the contract, without any comments or hesitation on their part. I know it hardly looks like business, but I have done it—and so have you—sold them on practically nothing but your word. You have demonstrated that to us by your early contracts. You have the specifications, and all ladder trucks are about alike—, although we intend putting in some detail work on our truck which has always before been neglected, and like our other machines—it will be the "LAST WORD" in truck building.

Trusting you will be able to get the results as above outlined, and wishing you a Very Merry Christmas and Happy New Year, I am,

Yours very truly,

(Signed Thomas R. Johnston

J*K

New Jersey Court of Errors and Appeals

HOWARD STORY, Plaintiff-Appellee, vs. STUTZ FIRE ENGINE CO., (Body corporate) Defendant-Appellant	Action at Law BRIEF FOR APPELLEE.

Brief for Appellee

JOSEPH N. TURNER

Attorney for and of Counsel with
Plaintiff-Appellee.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

HOWARD STORY,
Plaintiff-Appellee,

vs.

STUTZ FIRE ENGINE CO.,
(Body corporate)
Defendant-Appellant

Action at Law

BRIEF FOR APPELLEE.

STATEMENT OF FACTS

This action was brought to recover commissions due the plaintiff upon certain fire apparatus sold by him as agent of the defendant. The sales were made under three successive contracts, (S.C. p. 55, l. 18; S.C. p. 7, l. 30; S.C. p. 10, l. 20) between the plaintiff and the defendant, which contracts and sales thereunder were undisputed (S.C. p. 7, l. 12; S.C. p. 9, l. 30; S.C. p. 14, l. 10), and further it was admitted that the defendant deducted 3% upon all of the sales before paying the plaintiff any commissions. These deductions to cover a war or excise tax levied by the Federal Government, upon the sales in question (S.C. p. 35, l. 27). It is undisputed that the defendant did pay the Federal Government 3% of the total sale price on all the items in schedule 1, 2, and 3, except upon the last six items in schedule 3. Upon these last no war tax was paid, but an amount equal to 3% of the sale price of the last six items was deducted and retained by the defendant before paying the plaintiff the commission due him, upon these six sales, (S.C. p. 35, l. 26). These last deductions were unquestionably made over the protest of the plaintiff.

It was also admitted that the Federal Government refunded to the defendant all the monies which it had collected from it as war or excise tax, (S.C. p. 35, l. 33).

ARGUMENTS

In view of the aforesaid admission, stipulation, and testimony, the sole question before the Court was the interpretation of the three agreements or contracts upon which this action was brought.

The first contract bearing date, November 29, 1919, in paragraph 4, provided that the party of the first part should pay to the party of the second part 12½% of the amount of all sales made by him and in it there was no reference to any deductions to be made from this amount by the defendant. At this time the United States Internal Revenue Act of 1918, section 900, paragraph 2, was in effect and provided:

> "That there shall be levied, assessed, collected and paid upon automobile trucks and automobile wagons sold or leased by the manufacturers, a tax of three per cent (3%) of the price for which so sold or leased."

On or about March 3, 1920, the Treasury Department in the Treasury decision 2989, referred to in the defendant's brief, ruled that the provisions of the Internal Revenue Act were applicable to the sale of fire apparatus, and thereupon proceeded to collect 3% excise tax on the price of automobile fire apparatus, such as was manufactured and sold by the defendant, whereupon the defendant, in violation of the agreement between itself and the plaintiff, deducted 3% from the sale price of all fire apparatus sold by the plaintiff, from March 5, 1920, until the expiration of the contract in question, and paid the

plaintiff 12½% of the sale price of these apparatus after the aforesaid 3% had been deducted therefrom. The plaintiff never consented to this deduction but insisted that he was entitled to 12½% as provided in the contract between himself and the defendant. The testimony of the plaintiff, that he protested against this deduction (S.C. p. 37, l. 33) must be accepted as true since it was in no wise denied or controverted. The deduction made by the defendant as aforesaid, amounted to the sum of $588.00 (S.C. p. 4, l. 7), and the brief of the defendant admits that:

> "This was undoubtedly not warranted by the terms of the contract existing between the plaintiff and the defendant at this time."

As a special defense the defendant also pleaded the statute of limitation, saying:

> "That so much as is claimed for commission on apparatus sold during the year 1920 is barred by the statutes of limitations."

There is no merit to the special defense as the defendant being a foreign corporation and not having complied with the statutes of our state enabling it to do business in New Jersey, can not avail itself of our statutes of limitations (S.C. p. 56, l. 21); nor is the theory of accord and satisfaction available to the defendant as a defense or as a justification of the deduction.

In Corpus Juris, Volume 1, at page 523, it is said:

> "An accord is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other

than or different from what he is or considers himself entitled to; and a satisfaction is the execution of such agreement."

In the case at bar, the plaintiff never agreed to accept a lessor sum than the 12½% to which he was entitled under the contract in question. Not only did the plaintiff refuse to consent to this deduction but demanded that the money so withheld be turned over to him, and in response to a letter of the plaintiff the defendant, through its sales manager, Thomas R. Johnston, (S.C. p. 58, l. 19), did on December 20, 1920, write to the plaintiff and among other things say:

"Your note in reference to my letter of Sept. 22nd, relative to War Tax, is received. Will say at this time, there seems to be no way of getting away from this Tax. We have been paying it right along although *under protest*, as that is the only thig we can do, but if we do get the law set aside as far as the Fire Apparatus is concerned, I assure you that all who are entitled to any commission, where commissions have been withheld on that account, will get it as we do not want anything that does not belong to us, but what is coming to us, we of course want to get."

This contract was superseded by one dated, February 1st, 1923, but effective from January 1st of that year. Section Six, of this contract, provided among other things that the party of the second part —the plaintiff herein—should receive "12½% of the amount of all sales made by him, *after war tax is deducted*", except on the350 gallon pumpers, in which case 15% is allowed. This contract was in turn superseded by one bearing date 9th day of March, 1924, in which Section Six provided:

"Party of the First Part agrees to pay to the Party of the Second Part, fifteen (15%) percent of the amount of all sales made by him, *after war tax is deducted* on all regular models, as the respective payments are received and collected from the purchasers."

This remained in effect until its termination, by mutual consent in November, 1926.

For the purpose of construction, the same rule of law would apply to contract two as to the third contract, and consequently they can be construed as one.

The plaintiff agrees with the defendant that there is no ambiguity in either of these contracts; that they are clear and unmistakenable in their terms; both providing for specific payments of commission by the defendant to the plaintiff, "after war tax is deducted"; that war tax meant an excise tax levied by the United States Government, upon fire apparatus such as was sold by the defendant. While there is no ambiguity either in the second or third contract, the court has the right and it is in duty bound to take into consideration the surrounding circumstances, which led up to its execution.

The Plaintiff agrees with the holdings in Silverthorn v. Silverthorn (Penna. 120 Atlantic 656) also cited in the defendant's brief, which says:

"A familiar rule of construction is that a contract will be construed in the light of the subject matter and conditions existing at the time of its execution, and that it comprehends only those things in respect to which it appears that parties proposed to contract, and its provisions will not be extended to cover others apparently not thought of or intended to be included."

Now let us consider the "surrounding circumstances" not for the purpose of clarifying an ambiguity, but for the purpose of ascertaining the meeting of the minds of the parties to the contracts in question, and from that discover the true intent of the parties thereto and what they meant by "after war tax is deducted," and the purpose of inserting that provision together with the legal effect thereof.

Under the rule of law, enuniciated in the case of American-La France Fire Engine Co., Inc. vs. Riordan, Collector, etc. (6 Federal 2nd, 1964) which action was brought by the plaintiff to recover the excise tax paid by it, under Section 900, paragraph 2 of the U. S. Internal Revenue Act of 1918. The Court held that the sale of fire apparatus was not subject to the tax imposed by section 900, paragraph 2 of the Internal Revenue Act of 1918, and as a result of this holding the monies paid to the Federal Government by the American La France Fire Engine Co., were returned to it.

Following the rule in the American-La France Fire Engine Co. vs. Riordan, Collector, etc., supra, the Stutz Fire Engine Co., endeavored to obtain a refund from the United States Government of all the excise or sale tax it had paid, under the former ruling of the Internal Revenue Department, on fire apparatus sold by it; and in January 1926, the claim of the Stutz Fire Engine Company for a refund was allowed and paid. (S.C. p. 35, l. 34). This is also admitted in the brief of the defendant and testified to by Edward G. Saurbier, President of the Stutz Fire Engine Co., (S.C. p. 49, l. 33).

Yet after this refund the defendant continued to deduct 3% war tax upon the last six sales, set forth in schedule 3, of plaintiff's complaint, as was admitted by the defendant, (S.C. p. 35, l. 29), before paying him his commission upon the sales. Thus the defendant assumed the Governmental prerogative of taxation, or acted upon the equally fallacious theory that it could tax its own products and pay this tax to itself, arbitrarily fixing the amount thereof as nothing in section six of either the second or third contract respectively specified the amount of "war tax to be deducted."

Under the decision of the American-La France Fire Engine Co., v. Riordan, Collector, etc., supra, the cessation of the Government to collect an excise tax from the defendant and the return to the Stutz Fire Engine Co., of all monies collected by the Federal Government for such tax, it must be conceded that there was a change in the conditions which had induced the plaintiff and defendant to provide for the deduction of "war tax" as was done in the second and third contracts.

The rule on this point as given in Corpus Juris Volume 13, page 642, Paragraph 717, is as follows:

> "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, *or cessation of existence of the condition,* will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified. The rule extends to a contract based on the assumed existence and continuance of a condition, or on the continuance of a subject matter, which is not the direct object of the contract. It is necessary however, that the existence of the person or thing, or condition, be the basis and foundation of the contract; otherwise the death or destruction of the person or thing, or the failure of the condition to continue, will not discharge the parties.

Following this theory, it is apparent that, where according to the terms of contract, money was to be retained by one of the parties thereto, for a specific purpose and that purpose was later declared illegal, therefore the one who consented to the retention of the money by the other party, is entitled to his share or proportion of the money so retained. In the present instance the plaintiff is entitled to the commissions specified in contracts two and three without any deductions being made therefrom.

The defense that the present case comes within the rule "a mistake of law," can have no application to the case at bar, as no where in the pleadings or testimony in the court below, was this defense interposed. Furthermore, the monies sued for in this action were not paid by the plaintiff to the defendant, but were retained by the defendant for an expressed purpose which failed. The amount kept by the Stutz Fire Engine Co., as set forth in the first count of the plaintiff's complaint, was as admitted in defendants brief, "unwarranted," and the testimony shows this was done over the protest of the plaintiff.

The deductions authorized in the second and third contract, as "war tax" which was admitted to mean an excise tax of 3%, levied by the Federal Government upon the sale price of fire apparatus. These two contracts provided as herein before recited that the plaintiff should receive specified commissions "after war tax is deducted," from the sale price of all fire apparatus sold by the plaintiff as set forth in his complaint. The defendant had deducted 3% representing the entire war or excise tax paid to the Federal Government, upon all the fire apparatus sold by the plaintiff except, upon the last six sales, set forth in the third count of the plaintiff's Complaint. The entire burden of this tax was borne by the plaintiff. In view of this it is quite proper that the defendant, in paying the Federal excise tax, which it admittedly did pay, acted as the agent of the

plaintiff. It was money deducted from the commission of the plaintiff which the Federal Government received as excise tax, upon the fire apparatus sold by him. The Federal Government returned this money to the defendant without litigation and in both law and equity it, the Stutz Fire Engine Co., should turn the monies, so refunded, over to the plaintiff, the man who paid them. The United States of America did not impose the defense of "a mistake of law" as against the Stutz Fire Engine Co. and now for this defendant to endeavor to avail himself of this defense is without merit and an affront to justice.

Assuming for the moment that the defendant might be heard upon the defense of payment "under mistake of law,"—What constitutes such a mistake? Corpus Juris, Volume 40, page 1228, says:

> MISTAKE OF LAW. "A mistake which occurs when a person having full knowledge of facts comes to an erroneous conclusion as to their legal effect; an erroneous conclusion as to the legal effect of known facts."

In the case at bar there was no erroneous conclusion on the part of the defendant. That this excise or war tax was paid under protest is undeniable. This fact is evident from the letter of Thomas R. Johnston, Sales Manager (S.C. p. 46, l. 22) of the defendant corporation, to the plaintiff, dated December 20, 1920, in reply to the letter from the plaintiff, (S. C. p. 58, l. 19), hereinbefore quoted in this brief. From the testimony of Edward G. Saurbier, President of the defendant corporation, in reply to a question by the Court, (S.C. p. 49, l 30) likewise shows that this payment was not made voluntary, but under protest. From this testimony it is proper to assume that he, Edward G. Saurbier, President of the defendant corporation, believed the

excise tax in question, an illegal one, which he did not voluntarily pay, but paid under protest and of which he was endeavoring to obtain the refund, consequently it does not come within the rule fo money paid under "a mistake of law", there being no erroneous conclusion as to "the legal effect of the excise tax paid by it."

It is respectfully submitted that no error occured in the trial below and that therefore this appeal should be dismissed and the judgment should be confirmed with costs.

JOSEPH N. TURNER,

Attorney for and of Counsel
with Plaintiff-Appellee.

New Jersey Court of Errors and Appeals

HOWARD STORY, Plaintiff-Appellee, vs. STUTZ FIRE ENGINE CO., (Body corporate) Defendant-Appellant	Action at Law On Appeal from Supreme Court

Brief for Defendant

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Plaintiff-Appellee.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

HOWARD STORY,
Plaintiff-Appellee,

vs.

STUTZ FIRE ENGINE CO.,
(Body corporate)
Defendant-Appellant

Action at Law

STATEMENT OF FACTS

This is an appeal from a directed verdict for the plaintiff at the Supreme Court circuit of Monmouth County. The following are the grounds of appeal:

Because the trial judge, upon the trial of said cause, directed a verdict in favor of the plaintiff and against the defendant, whereas said trial judge should have directed a verdict in favor of the defendant.

On or about November 29, 1919, Stutz Fire Engine Co. entered into a contract with the plaintiff, Howard Story, wherein and whereby Story was employed as defendant's representative with headquarters at Asbury Park, N. J., for the purpose of selling fire engine trucks and fire equipment in the territory designated in the contract. Paragraph four of said contract, in which the Stutz Fire Engine Co. is designated as the party of the first part, reads as follows:

> "Party of the First Part agrees to pay to the party of the second part twelve and one-half per cent (12½%) of the amount of all sales made by him, the same to be paid to the party

of the second part as the respective payments are received and collected from the purchasers."

At the time this contract was entered into, the United States Internal Revenue Act of 1918, section 900, paragraph 2, provided

"That there shall be levied, assessed, collected and paid upon automobile trucks and automobile wagons sold or leased by the manufacturers, a tax of three per cent (3%) of the price for which so sold or leased."

On March 3, 1920, the Treasury Department, in Treasury Decision 2989 ruled that the provision of the Internal Revenue Act hereinabove set forth was applicable to the sale of automobile fire apparatus, and thereafter began to collect a three per cent (3%) excise tax on the price of automobile fire apparatus.

Thereafter, defendant deducted three per cent (3%) tax from the list price of automobile fire engines before paying to the plaintiff his commission upon the sale price of same. This was undoubtedly not warranted by the terms of the contract existing between the plaintiff and defendant at that time. There apparently was no serious objection, if any, by the plaintiff to this deduction. The plaintiff testified (S. C. p. 37 l. 31) that he did not consent to the deduction but there is no evidence of any attempt to compel the payment at that time. On the contrary, two years after the defendant began to deduct the excise tax before paying the commission, the plaintiff, Story, entered into a new contract with the defendant, paragraph six of which provided

"Party of the first part agrees to pay to the party of the second part twelve and one half per cent (12½%) of the amount of all sales

made by him after war tax is deducted, except on the 350 gallon pumper, in which case fifteen per cent (15%) is allowed, as the respective payments are received and collected from the purchasers."

Defendant continued to deduct the three per cent (3%) excise tax before paying the commission, during the entire term of the contract.

Thereafter, on March 4, 1924, a third contract was executed between the parties, the sixth paragraph of which reads

"Party of the first part agrees to pay to the party of the second part, fifteen per cent (15%) of the amount of all sales made by him, after war tax is deducted, on all regular models, as the respective payments are received and collected from the purchasers."

This latter contract remained in force until the institution of this suit, when it was terminated.

Under the several contracts, Story, as sales representative of the company, sold fire equipment, and in each instance the company, in fixing the sale price of each equipment sold, added on an amount with which to pay the 3% excise or sale tax (referred to in contracts as war tax) which the company believed it was obligated to pay, and which it in fact paid to the United States Government under the Revenue Act of 1918.

On March 7, 1925, the United States Circuit Court of Appeals for the Second Circuit, in the case of American La France Fire Engine Company Inc., plaintiff in error, vs. Vincent H. Riordan, Collector of Internal Revenue (6 Fed 2d 964), held that the sale of fire apparatus was not subject to the tax imposed by section 900, paragraph 2 of the Internal Revenue Act of 1918.

Following the ruling in American La France v. Riordan, the Stutz Fire Engine Company filed a claim for refund with the United States Government to recover back all the excise or sales taxes it had paid on fire apparatus sold by it, and in January, 1926, the claim of the Stutz Company for a refund was allowed and paid to it.

Included in the amount refunded by the government to the Stutz Company is the sum of approximately $14,214, representing three per cent (3%) of the sales of fire apparatus made by Story under his several contracts.

Plaintiff Story at the time of the sales under the several contracts, was paid by the Stutz Company his commissions, as set out in his contracts enumerated above, on the amount of sales made by him, after deducting the three per cent (3%) excise or sales tax, which is designated as "war tax" in the contracts.

Plaintiff claims that since the Stutz Company has been refunded by the Government approximately $14,214, which was erroneously paid by the company to the Government as excise or sale tax on sales of apparatus made by Story, that Story is entitled to a commission on the $14,214, which commission he says amounts to $2132.10.

The defendant contends the contracts involved in this action are not ambiguous, and fully set forth the agreement between the parties. Defendant further contends that the first contract should be considered by itself, and the second and third contracts together.

The only questions to be considered are:

First: May Story, having accepted his commissions after the deduction of the three per cent (3%) excise tax under the first contract, and making new contracts, now after nearly eight years, claim commissions thereunder?

Second: Under the second and third contracts, the parties having agreed that the war tax should be

deducted, will the fact that said tax was refunded by the Government operate to alter the terms of the contract?

PLAINTIFF IS ESTOPPED TO CLAIM COMMISSIONS UNDER THE FIRST CONTRACT

Even though the first contract contained no provision for the deduction of war tax, nevertheless the plaintiff, having accepted the commissions knowing full well that there had been deducted a three per cent excise tax before paying him the commission, and having accepted the amount tendered in the light of the new contract that was being negotiated by the parties at that time, and which contained a provision for the deduction of war tax before computing the commissions earned, plaintiff is estopped after a period of nearly eight years to claim commissions on the amount deducted under the first contract.

Story testified (S.C. p. 37 l. 30) that he protested against the deduction. Nevertheless, he accepted the payments and at that time or shortly thereafter, negotiated a new contract in which was provided the deduction of a war tax. The question of the deduction of a war tax under the first contract was in dispute between the parties, and consequently the acceptance of a lesser sum by Story and the making of a new contract between the parties, providing for the deduction of a war tax, was an acceptance and satisfaction by Story of the dispute. Story's entry into the new contract with the defendant was a representation to the defendant that the matter had been adjusted, and the defendant having relied upon the same, plaintiff is now estopped to claim commissions under the first contract.

THE SECOND AND THIRD CONTRACTS WERE CLEAR AND UNAMBIGUOUS.

When a contract is clear and unambiguous, its interpretation by the court must be made without extrinsic evidence, the court limiting itself to the exact language and words employed by the parties in the drawing of the contract, no matter if the terms be harsh and unbearable in the face of an unforseen contingency and regardless of whatever post-contractual conception one of the parties may seek to give to the contract.

In 13 Corpus Juris, page 541, it is said:

"It is not the province of the court to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed, if by so doing the terms of a contract are ignored, for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced, if such is the clear meaning of the language used, and the intention of the parties using that language."

In Vandalia Coal Co. v. Underwood, 55 Ind. App. 91, 101 N. E. 1047, the court said:

"In construing any instrument, the first duty of the court is to examine the instrument itself, and if the language employed expresses a definite meaning involving no absurdity or contradiction, then extraneous matter cannot be considered and the instrument must be enforced according to its tenor."

In San Pedro L. A. & S. L. Ry vs. Atichison T. & S. F. Ry, the court said: (191 Pac. 536) (Cal.)

"An unforseen contingency or event, not considered by the parties at the time they entered into a contract can in no manner affect the same." (Am. Digest-Contract Section 303 (1) unforseen contingencies.)

In Weinstein v. Sheer, 98 N. J. L. 511, the court said:

"The rule is that where parties have freely chosen their own unambiguous verbal formula to define their rights and duties, they are bound by the plain terms of the contract, and the court cannot reconstruct the contract for the purpose of making its terms accord with a post contractual conception more suitable to the situation of the parties."

In McLaren v. Marmon-Oldsmobile Co., 95 N. J. L. 520, the court said:

"In a written contract where there is no ambiguity in its terms, its interpretation is a question of law for the judge and should not be left to the jury."

In Wolf v. Moran, 133 Atl. 350 (Supreme Court Rhode Island 1926) the action was upon two promissory notes given by the defendant, and the defendant under a non-assumpsit set out that he had never owed the money but that they did enter into a written contract relative to the same, and the contract when offered, set forth that the defendant acknowledges himself indebted to the plaintiff for the sum, and set forth that he had given the two promissory notes in satisfaction of the indebtedness and further, the contract set forth that the defendant was to be plainiff's agent for selling cotton in Providence, and that on the sale of this cotton he was to get $1 per

bale commission and that this was to be credited towards his indebtedness on the notes. Defendant sought to introduce evidence that plaintiff had never given defendant cotton to sell although repeatedly requested to do so. This evidence was held inadmissible, the court saying:

> "No ambiguity existed in the writing, any prior talk or understanding contradicting the terms of such writing was not admissible."

In Castelbaum v. Wolfson, 92 N. J. L. 165, the question arose whether the defendant, who had assumed a mortgage had the right to introduce in evidence a conversation previous to the written agreement wherein it was agreed that he was not to assume payment of the interest. The court refused the evidence, saying

> "No principle is more firmly imbedded in our law than that which declares thati in the absence of fraud or illegality, where a written agreement is complete on its face, oral testimony will not be permitted either to contradict it or to supply terms with respect to which the writing is silent. In such a case the writing must be accepted as full expression of the agreement of the parties."

See also

Guaranty Savings and Loan Association v. Rutan, et al., 6 Ind. Appeal 83.

Crowley v. Homan, 130 Atl. 372 (N. J. Supreme Court) 3 N. J. Misc. Reports, 968.

Hoffman v. Seidman, 127 Atl. 199 (N. J. Errors and Appeals) (No official citation).

The two contracts dated February 4, 1922 and March 4, 1924, respectively, both provided for the *payment of commission after war tax is deducted.*

There is nothing ambiguous about the words employed. That the defendant was compelled to pay a tax popularly known as "war tax" is not disputed. The fact that this so-called war tax was later declared inapplicable insofar as the taxing of automobile fire trucks was concerned, does not change the situation. The only inquiry permitted would be what is meant by war tax, that is, did it mean a tax by the United States Government, a tax by the State Government, or some other tax. This inquiry is eliminated in this case, the testimony is clear, and it is admitted that the parties meant an excise tax levied by the United States Government. With the elimination of this inquiry, there was nothing for the court to do except to determine what the contracts meant, namely, that the plaintiff was entitled to the commission afer first deducting the amount of the war tax, namely 3% of the purchase price of the automobile fire trucks. Assuming that the contract is not clear, only such evidence is admissible as will show the circumstances existing at the time the parties entered into the contract.

Evidence to show the intention of the parties, other than the intention of the parties as gathered from the language used in the contract, is inadmissible. Only such evidence as will show the circumstances existing at the time the contract was executed would be admissible. Any evidence of subsequent events with regard to a change of circumstances after the making of the contract, is inadmissible. The contract may not be interpreted in the light of subsequent happenings.

In 13 Corpus Juris page 544, it is said

> "The surrounding circumstances must be considered as of the time of the making of the contract and not in the light of subsequent events."

In Davin v. Syracuse, 126 N. Y. Supp. 1002, the court said,

> "An agreement must be construed in the light of surrounding circumstances at the time it was made and not in the light of subsequent events."

In Silverthorn v. Silverthorn (Penna) 120 Atl. 656, the court said:

> "A familiar rule of construction is that a contract will be construed in the light of the subject matter and conditions existing at the time of its excution, and that it comprehends only those things in respect to which it appears the parties proposed to contract, and its provisions will not be extended to cover others apparently not thought of or intended to be included."

In the case of Griscom v. Evans, 40 N. J. L. 402, the court said:

> "Where in a deed, will or written contract, general words of indefinite signification are used, and there is nothing on the face of the instrument to qualify them, or limit and apply them to a particular subject matter, evidence of extrinsic circumstances—matters of fact as distinguished from mere declarations of intention—is admissible for the purpose of ascertaining in what sense such indefinite language was used. The effect of such evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it."

THE PARTIES ARE BOUND TO THEIR CONTRACTS IN SPITE OF A MISTAKE OF LAW.

In 2 Pomeroy Equity, (3 Ed) 842, it is said:

> "The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief."

In Berks & Dauphin Turnpike Road v. American Telegraph and Telephone Co., 87 Atlantic 580, the plaintiff was incorporated under act of 1805 to construct and maintain a toll road; defendant was incorporated in 1874 under statutes relating to telegraph and telephone companies. In 1890 these two companies entered into a written agreement by which plaintiff granted for 99 years for an agreed annual rental a right to defendant company to lay telegraph lines over and along its turnpike road. This is an action brought to recover payments, in which action defense is that the agreement was without consideration and void, in that plaintiff had no power or authority to make the grant, and that the contract was entered into under a mutual mistake as to the rights of the parties, in that defendant had a right to construct and maintain its lines upon the turnpike without securing consent of the plaintiff. The court held that the defendant had a right to be consulted and to impose terms and conditions, and if the two companies saw fit to enter into a written agreement under their respective seals, stipulating terms and conditions, there is nothing in the law which forbids the enforcement of the contract, in the absence of any fraud and deception, if the defendant company with its eyes open saw fit to agree to pay a certain continuing consideration for the privilege it sought, then no matter what the privilege may be termed, so long as its fruits are enjoyed, the

consideration agreed upon must be paid.

In the case of Wintermute v. Snyder, 3 N. J. Eq. 489, the court said:

> "Agreements made and acts done under a mistake of law are generally held valid and obligatory, if not objectionable by reason of fraud, misrepresentation or some other matter, which will afford a foundation for equitable interference. The rule is very clearly and decidedly given by the Supreme Court in Hunt v. Rousmanier, 1 Peters 15, that a mistake of law is not ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision." The court further says "I have come to this conclusion with some reluctance, especially as this part of the case was not spoken to by the counsel; if I had seen my way clear to afford relief in a case of so much hardship, I should have given it."

The parties to the contracts under consideration here had only one thing in mind as gathered from the language employed by them, viz., to deduct the amount of excise tax paid by the defendant to the Government of the United States before paying the plaintiff a commission on the apparatus sold. Whether that tax would be repealed or declared inapplicable to defendant's apparatus was not in their minds. The fact is that such an excise tax was being exacted from the defendant. If evidence could be admitted that the contract not only meant what it said but in addition meant something more, the rule that oral evidence cannot be admitted to change the terms of a written contract would be shattered. If

such be permitted it might just as well be allowed to the defendant to give testimony that the amount of the commission provided to be paid was to be reduced in the event that the tax was not valid. Such testimony would not be any the less inadmissible than testimony that if the tax was invalid the commission on the tax was to be paid to the plaintiff. Had the parties so intended the contract would have so provided. No claim is made by the plaintiff that such was the case. This was claimed only as to the first contract. If the contracts did not contain the entire agreement between the parties the remedy is not at law but in equity.

Taking up the charge of the court it is apparent that the court took into consideration testimony that was improper and tended to alter the terms of a written contract. The court said (S.C. p. 54 l. 22),

> "There appears to be no question of disputed fact involved in the case; it is purely a question of law for the disposition of the court; and being of the opinion that it was clearly the intent of the parties in this case to deduct from the compensation agreed to be paid by the defendant the amount of the so-called war tax in the event that it was legally assessable and actually collected by government * * * *"

From the above quotation it appears that the Court erred in finding that the parties intended a tax that was legally assessable and actually collected by the government. In order to find this intention the court had to go outside of the language used in the contract. It is an assumption that the parties would make a contract under a mistake of law but must necessarily have meant something they did not say. To begin with this assumption the court has had to make the contract and has not interpreted the language used. It must be remembered the tax

was being collected and the parties must have assumed it was valid. Consequently the fact that it was later declared invalid insofar as fire apparatus was concerned, makes it clear the contract was entered into under a mistake of law.

Again (S. C. p. 55 l. 3) the court said:

> "It is apparently clear enough, the parties do not deny, that if the federal government was not to collect a tax that therefore the compensation due the plaintiff was not to be diminished; but in the event that the federal government did levy a tax and sustain it as a valid assessment and collect the amount thereof, even though it was afterwards refunded by the government when found to be illegal, as appears to have been the case, it seems clear to me as a matter of law that it was never the intention of the parties to have anything deducted, or if deducted, that the plaintiff would impliedly, at least, be entitled to any benefit that might accrue to him in the event of the government refunding the tax. Now that is the situation here."

The reasoning upon which the court based its judgment is in part founded on the statement that the parties did not deny that if no tax was collected the plaintiff's compensation was not to be diminished. This was, of course, an erroneous conception of the case as the fact is that far from being admitted this is the very bone of contention between the parties.

Again the court says that if any deduction was made for tax, the plaintiff would be impliedly entitled to any benefit that might accrue to him in the government refunding the tax. It is respectfully submitted the court erred in finding any implied agreement for a refund in the face of the express agreement.

The court throughout his charge was inserting terms in the contract to the effect that it was the intention of the parties that the plaintiff would be entitled to his proportionate share in the event of a refund by the government. In order to arrive at this conclusion the court must have considered matters which would alter the terms of the written contract. The testimony was considered by the court in one way whereas any number of inferences could reasonably be drawn from the same testimony. For example, the court found the proportionate share to which plaintiff was entitled was based on the gross amount of the refund. If it is true the parties contemplated this refund at the time of entering into the contracts it would be just as reasonable to find that they intended the net amount refunded which was less than half of the amount collected. It is just as reasonable to suppose that the parties contemplated the refund and nevertheless entered into the contracts with that in view and provided for it by fixing a compensation that was reasonable and satisfactory either by adjusting the amount of the commission to be paid or the price of the equipment sold. It is because oral testimony gives rise to doubt and speculation that it is inadmissible to vary written contracts and should not have been considered here.

The language being clear and unambiguous should have been interpreted according to the simple meaning of the words involved. The fact that the parties entered into the contract under a mistake of law should not be permitted to sway the court.

It is therefore respectfully submitted the trial court erred in directing a verdict for the plaintiff and in refusing to direct a verdict for the defendant.

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