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New Jersey Court of Errors and Appeals

NOTICE OF APPEAL.

10

(Filed March 26, 1928)

WARREN COUNTY CIRCUIT COURT

GEORGE W. SARSON,

Plaintiff,

vs.

WILLIAM MUELLER,

Defendant.

Action at Law.

20

To Smith and Smith, Esq's, Attorneys of Defendant:

Please take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in above case, upon the following grounds: 30

1. The trial court sustained the objection of the defendant to the plaintiff's giving testimony to sustain his action against the defendant to recover the value of the standing timber on the forty-three-acre tract of land as specified in the complaint.

40

Amended Complaint

2. The trial court denied to the plaintiff the right to maintain his action against the defendant for the value of the standing timber on the forty-three-acre tract of land as set out in the complaint.

10 3. The trial court directed a verdict of no cause of action against the plaintiff and in favor of the defendant when thereunto moved by counsel of the defendant, whereas said court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

J. M. ROSEBERRY & SON,
Attorneys for Plaintiff.

20

AMENDED COMPLAINT.

(Filed Sept. 20, 1926)

WARREN COUNTY CIRCUIT COURT**JUDGMENT RECORD**

30	GEORGE W. SARSON, vs. WILLIAM MUELLER, 	Plaintiff, Defendant.	} Action at Law.
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J. M. Roseberry & Son, Esqs., attorneys.

40 William Mueller, the defendant in this cause, was summoned to answer unto George W. Sarson,

Amended Complaint

the plaintiff therein, in an action at law upon the following complaint:

(Summons issued February 8, 1926.)

AMENDED COMPLAINT.

10

Plaintiff, George W. Sarson, residing in the Borough of Washington, County of Warren, New Jersey, says:

1. That on February 6th, 1922, the plaintiff purchased for a valuable consideration of the defendant, William Mueller, in writing, the timber on a certain wood lot of the defendant in the Township of Franklin, in the County of Warren and State of New Jersey, containing forty-three acres of land, adjoining other lands of the defendant and along the road leading from Broadway to Montana in said County of Warren and State of New Jersey. Except trees not seven inches in circumference at the butt and five inches in circumference at the top and to have the above timber removed in two years from date. 20

2. The plaintiff entered upon said forty-three acres of land and cut a portion of the trees thereon of the size stated in paragraph one and made therefrom mining props and ties which were shipped to and used in mining coal at Scranton, Pennsylvania. In 1922 and 1923 a strike occurred among the coal miners in said mines, whereby the demand for said mining props and ties was suspended and the sale thereof by plaintiff indefinitely postponed and there was no market for mining ties and props elsewhere for which said 40

Amended Complaint

timber was purchased, and, thereupon, in the summer of 1923, the plaintiff saw defendant and stated to him the above facts and that it would be doubtful if he could find a market within the two years' time limit for the sale of his mining
 10 props and ties to be made from said trees on said forty-three-acre tract and asked defendant if he would not give him an additional year after the expiration of the two years, to cut and remove said timber from said forty-three acres of land, and, thereupon, defendant gave to plaintiff one year's additional time after the expiration of said two years to cut and remove said timber off of said forty-three-acre tract, sold by defendant to
 20 plaintiff as set out in paragraph one. The plaintiff relied upon said extension of one year additional time by defendant to cut and remove said timber from said forty-three-acre tract.

3. On or about the first day of February, 1924, the said defendant gave to plaintiff two months, after the expiration of the two years stated in paragraph one, to cut and remove the timber from the nineteen-acre tract and the timber that was
 30 down on the twenty-six-acre tract, but to cut nothing more down on the larger tract. Plaintiff avers that said two tracts are the forty-three-acre tract mentioned in paragraph one. This extension of the two years' limit of time to cut and remove the timber as aforesaid on said forty-three-acre tract as stated in paragraph one was relied upon by plaintiff, not waiving, however, his right to the extension of one year.

40 4. On February 8th, 1924, the said defendant served upon plaintiff a written notice stating that

Amended Complaint

as the two years had expired in which plaintiff was to cut and remove the timber from his two wood lots, being the forty-three acres mentioned in paragraph one, that plaintiff should keep off the said premises, and not cut thereon or remove
 10 therefrom any more timber.

5. On the 16th day of February, 1924, the plaintiff served upon defendant a written demand for the present cut timber and merchantable timber and wood upon said two wood lots mentioned in defendant's notice to plaintiff, set out in paragraph four, being the forty-three-acre tract mentioned in paragraph one, and also the privilege to cut and remove from said two wood lots all
 20 standing trees and timber over seven inches in circumference at the butt and over five inches in circumference at the top, the property of the plaintiff. The defendant refused to comply with the demand of the plaintiff.

6. Defendant failed to give plaintiff a reasonable time to cut and remove the timber on said forty-three-acre tract of land after rescinding the extension of one year, as set forth in paragraph two by his notice as set forth in paragraph four. 30

7. Defendant failed to give plaintiff a reasonable time to cut and remove the timber from the nineteen-acre tract and the timber that was down on the twenty-six-acre tract after rescinding the extension of the time limit as stated in paragraph three, by his notice as stated in paragraph four.

8. By reason of the breach of said agreement of sale of said timber by defendant to plaintiff, as set forth in paragraph one, and the time limit 40

Amended Complaint

therein extended for cutting and removing the same, as stated in paragraphs two and three, the said plaintiff has suffered great damage in the loss of two carloads of mine props and ties, sold by defendant to plaintiff on said forty-three-acre tract, on said 8th day of February, 1924, of the value of three hundred dollars, and of thirty acres of standing timber on said forty-three acre tract of the sizes sold by the defendant to plaintiff, as set out in paragraph one, of the value of three thousand dollars, being then and there wholly lost to the plaintiff by breach of the contract of sale of said timber by defendant to plaintiff, as set forth in paragraph one.

20 9. Plaintiff demands as damages the value of said mining props, ties and timber being the sum of five thousand dollars with interest from February 8th, 1924.

J. M. ROSEBERRY & SON,
Attorneys for Plaintiff.

ANSWER.

(Filed Oct. 28, 1926)

WARREN COUNTY CIRCUIT COURT

GEORGE W. SARSON,

Plaintiff,

vs.

WILLIAM MUELLER,

Defendant.

10

The defendant, William Mueller, says that:

20

FIRST DEFENSE TO COMPLAINT.

1. It is admitted that the plaintiff and defendant entered into an agreement in writing with reference to certain timber on the wood lot named in the complaint.

2. Paragraph 2 of the complaint is denied.

3. Paragraph 3 of the complaint is denied.

4. Paragraph 4 of the complaint is denied and this defendant says that on February 8, 1924, he served notice on the plaintiff forbidding him to trespass on the land and forbidding him to cut timber without permission.

30

5. Paragraphs 5, 6, 7 and 8 of the complaint are denied.

40

Answer

SECOND DEFENSE TO COMPLAINT.

By way of further defense, defendant says that the extension of time alleged to have been made by the defendant with the plaintiff, was not in
 10 writing and was a part of a contract relating to the sale of an interest in lands and by reason thereof, came within the provisions of an act of the Legislature entitled "An Act for the Prevention of Frauds and Perjuries," and by reason thereof, cannot be made the basis of the action set forth in the complaint.

THIRD DEFENSE TO COMPLAINT.

20 By way of further defense, this defendant says that the alleged extensions of time set forth in paragraphs 2 and 3 of the complaint were mere unilateral agreements without consideration and by reason thereof could not be made the basis of the action as set forth in the amended complaint.

SMITH & SMITH,
 Attorneys of Defendant.

REPLY TO ANSWER TO AMENDED COMPLAINT.

(Filed Nov. 10, 1926)

WARREN COUNTY CIRCUIT COURT

GEORGE W. SARSON,

Plaintiff,

vs.

WILLIAM MUELLER,

Defendant.

10

1. Plaintiff denies the second defense in answer to amended complaint.

20

2. Plaintiff denies the third defense in answer to amended complaint.

J. M. ROSEBERRY & SON,
 Attorneys for Plaintiff.

JUDGMENT.

WARREN COUNTY CIRCUIT COURT

10 GEORGE W. SARSON,
 Plaintiff,
 vs.
 WILLIAM MUELLER,
 Defendant.

} Action at Law.

This action was tried before Judge A. Dayton Oliphant, with a jury, at the Warren Circuit Court on March 5 & 6, 1928, the cause having been
 20 heard, on motion made by the defendant for the direction of a verdict. The motion was granted and the jury, by direction of the court, returned their verdict of no cause of action, whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs which are taxed at \$94.51.

Dated, March 6, 1928.

Judgment entered March 6, 1928.

30 A. DAYTON OLIPHANT,
 Judge.

I, Ramsey Reese, Clerk of the Circuit Court of the County of Warren, State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office and of the notice of appeal.

40 In Testimony Whereof I have set my
 (Seal) hand and seal of said Court at Belvidere, this 26th day of March, A. D. 1928.

RAMSEY REESE,
 Clerk.

TESTIMONY.

WARREN COUNTY CIRCUIT COURT

No. 1, DECEMBER TERM, 1927

GEORGE W. SARSON,
 Plaintiff,
 vs.
 WILLIAM MUELLER,
 Defendant.

} Action at Law. 10

Transcript of shorthand notes of testimony, etc., taken in the above-entitled cause on the trial
 20 thereof before Hon. A. Dayton Oliphant, Circuit Court Judge, and a jury, at the Court House, Belvidere, New Jersey, on Monday, March 5, 1928.

Appearances:

Joseph M. Roseberry, for the Plaintiff.

Sylvester C. Smith, Jr., for the Defendant.

(Jury empaneled and sworn.) 30

Mr. Roseberry: May it please your Honor, and ladies and gentlemen of the jury, this action is brought for timber that was cut in 1923 on land of the defendant, and for standing timber. The cut timber was valued at two hundred dollars, and the standing timber that was uncut, at twenty-three or twenty-four hundred dollars.

Mr. Sarson, the plaintiff in this case, purchased
 40 of Peter Walters two tracts of land containing

Testimony

forty-three acres, or about that, and he gave in exchange—he made arrangements with the defendant that those two tracts should be conveyed by Mr. Walters over to the defendant, and then a contract was made between the defendant, Mr. 10 Mueller, and the plaintiff, George W. Sarson, on February 6th, 1923, by which, for a consideration of six hundred and seventy-five dollars on the wood lot, “this day bought of Peter A. Walters in Franklin Township, containing forty-three acres, more or less, adjoining other lands of the defendant,” the plaintiff was to cut all the trees not less than seven inches in circumference at the butt, and not to cut or remove any timber less 20 than five inches in circumference at the top, and to have the timber removed in two years from date. The date was February 6th, 1922.

There was a strike in the coal mines at Scranton and it was difficult to sell mine props and mine ties. The timber then on this tract was largely for the purpose of making mine props and mine ties.

In 1923, toward the close of 1923, as the time 30 was to expire on February 6th, 1924, Mr. Sarson saw Mr. Mueller and asked him for an extension of time. He told him that it was difficult to sell mine props and mine ties on account of this strike, and he asked him if he would not give him an extension of a year, and Mr. Mueller told him that he would, and Mr. Mueller wanted some poplar that was in front of his place, or some poplars on the place, and wanted Mr. Sarson to pay the 40 taxes for the year that was to follow the ex-

Testimony

piration of these two years, and that was agreed to.

Later, a short time, three or four weeks, or two or three weeks, before the expiration of the two years, Mr. Sarson heard that Mr. Mueller had 10 said that he was not going to give that extension of a year and that he would have to get off of the place in February. So he went to see him, and it was on the Sabbath, and he had a conversation with him which will be detailed to you, and it was then said by Mr. Mueller that he would make no trouble, according to Mr. Mueller's story, he said he would give him two months further time after the expiration of the two years, to 20 take off the two tracts of land. One was a twenty-five acre tract and the other an eighteen- or nineteen-acre tract.

Two or three days after that, or at least a short time after that, probably two or three days before the expiration of the time, about February 4th, he got word from Squire Pierson of Washington, N. J., who telephoned to the plaintiff, Sarson, that Mr. Mueller was there and that he would give him two months to take off the tim- 30 ber on the nineteen-acre tract and he could take off the down timber on the twenty-five-acre tract, but not to cut any standing timber on the twenty-five-acre tract. Then when the time expired, on February 8th, as the time expired on February 6th, 1924, Mr. Mueller served upon the plaintiff a notice to the following purport: “Broadway, N. J., February 8th, 1924. Mr. George W. Sarson, Washington, N. J. Dear Sir: As the 40 two years have expired in which you was to cut

Testimony

and remove the timber from my two wood lots, this is to give you notice to keep off the said premises, and not to cut or remove any more timber without my permission. Yours truly, William Mueller."

10 Following that, Mr. Sarson gave Mr. Mueller notice on February 11th, 1924, stating that he had received his notice not to cut or remove any more timber from the two wood lots, and demanded the right to take into possession "all the present cut timber and merchantable timber and wood upon your said two wood lots mentioned in your notice to me my property and also the right to cut and remove from said two wood lots all
20 standing trees and timber over seven inches in circumference at the butt and over five inches in circumference at the top, also my property."

That was dated February 11th, 1924, and was served upon Mr. Mueller on February 15th, 1924.

Mr. Mueller failed to give Mr. Sarson permission to take the cut timber and did not give him permission to take either the cut timber or standing timber, and therefore this suit was brought
30 to recover the amount of the ties and props and other timber which was cut and also for the standing timber. The value of the cut timber was in the neighborhood of \$200, and the standing timber \$2300 or \$2400.

Mr. Smith: If the Court please, at this time I would like to make a motion, based upon the opening, with reference particularly to proof of the value of the standing timber, which, as I understand it, was eliminated under the decision of
40

Testimony

the Court of Errors and Appeals in this case when it was tried before, this same case.

The Court: The Court of Errors and Appeals seems to hold that the only question for the jury is the value of the cut timber.

Mr. Roseberry: I want to be heard on that, 10 your Honor, before you pass upon the motion. Was your Honor reading the last opinion of the Court of Errors and Appeals?

The Court: I am reading the opinion by Mr. Justice Lloyd.

Mr. Roseberry: Mr. Justice Lloyd in that opinion says that the question in the first case was whether an action of trover and conversion could be maintained for standing timber. They 20 held in that case that standing timber, being part of the realty and not personalty, the case could not be maintained and for that reason reversed that suit.

Then the case was tried a second time and there—

The Court: Judge Lawrence directed a verdict for the defendant.

Mr. Roseberry: Judge Lawrence directed a verdict for the defendant. That was taken up 30 and then they delivered an opinion upon the part of the case that related to the personal property and they said that under the case of Wyckoff vs. Bodine, there could not be any question but what we were entitled to recover for the personal property whether there was an extension of time given or not, and they did not say anything about the real estate at all because they deemed that sufficient to reverse the case and to remand it to this 40 Court for a trial *de novo*.

Testimony

Now, there is nothing whatever said anywhere that excludes the timber on the property.

The Court: Now, does not the Court say in treating with the direction of verdict by the Trial Court, "We think this was a misconception of our
10 earlier decision and that the case should have gone to the jury as to the cut timber"?

Mr. Roseberry: Well, that does not exclude the other.

The Court: It is pretty definite language, to my mind.

(After argument.)

Mr. Smith: In this case I submit that first, the
20 offer of proof of any damage claimed for the standing timber is objected to, on the opening by the plaintiff. Further, I would like to move, on the face of the opening, for a direction on the ground that this contract was required to be in writing and that fact having been established, that any offer of oral testimony—and it is admitted by Judge Roseberry that it is to be oral testimony—of an extension of time would have to be the basis of the action upon which he relies, because
30 no breach was made by Mr. Mueller, according to the opening, on the original contract.

The Court: Is he not entitled to a reasonable time to remove the cut timber?

Mr. Smith: Not under the terms of the agreement as we construe it.

The Court: I will deny your motion as far as the cut timber is concerned and I will sustain your objection as to the standing timber.

Mr. Smith: I pray an exception to the motion
40 being denied.

George W. Sarson—Direct

The Court: Both sides may have exceptions.

Mr. Roseberry: I pray an exception to that part of your Honor's decision which relates to the standing timber.

The Court: Yes.

10

(Mr. Smith opened for the defendant.)

GEORGE W. SARSON, the plaintiff, sworn.

Direct-examination by Mr. Roseberry:

Q. Mr. Sarson, where do you reside? A.
Washington.

Q. What is your business? A. I am retired now. I have been doing a timber business forty
20 years.

Q. When did you retire from the timber business? A. I am not exactly retired, but I am not doing anything. I am operating yet but I am not working, myself.

Q. Do you remember a transaction that occurred between you and Mr. Mueller on February 6th, 1921? A. 1922.

Q. What led up to that contract, Mr. Sarson? A. I bought a wood lot of Mr. Walters, that ad-
30 joined Mr. Mueller, and we made arrangements that I should take the timber, and he the land—

Mr. Smith: If the Court please, I object. This is a written contract, and must speak for itself.

Mr. Roseberry: This went to the consideration, your Honor.

The Court: Objection sustained.

40

George W. Sarson—Direct

Q. Did you have any arrangement with Mr. Mueller about taking off the timber on the forty-three acre tract of land? A. Yes, sir.

Q. Was it in writing? A. Yes, sir.

Q. I will show you a writing with the name
10 "William Mueller" on it. Is that the writing?
A. That is my writing.

Q. I ask you if that is the writing that Mr. Mueller made? A. I did not see him sign that.

Q. Is that his signature?

Mr. Smith: If the Court please, we will admit that is William Mueller's signature.

The Court: Very well.

Mr. Roseberry: Then I will offer this
20 in evidence.

Mr. Smith: No objection.

The Court: It may be marked.

(Paper referred to and offered in evidence is marked Exhibit P-1.)

(Mr. Roseberry reads Exhibit P-1 to the jury.)

Q. Where is that wood lot of forty-three acres?

A. In Franklin Township, between Broadway and
30 Montanna.

Q. Was it one entire lot or more than one? A. Two tracts.

Q. They were conveyed by Peter S. Walters to the defendant, Mr. Mueller? A. Yes, sir.

Mr. Roseberry: We now offer in evidence a deed from Peter S. Walters and wife to William Mueller, bearing date February 6th, 1922, and recorded in Volume
40 224 of the Register of Deeds of the Warren County Clerk's office, on page 596.

George W. Sarson—Direct

Mr. Smith: We have no objection to that.

Mr. Roseberry: The record is not here but we ask that this be marked.

(Paper referred to is marked Exhibit
P-2.) 10

Q. How many lots do you say comprised these forty-three acres? A. Two.

Q. How many acres in each? A. Twenty-four in one and nineteen in the other.

Q. After you had purchased this timber, what did you do with relation to cutting it? A. I commenced cutting at once, but the coal mines went on strike and I had no sale for it and I quit cutting
20 then for that year.

Q. Did you see Mr. Mueller about any extension of time? A. Yes, sir.

Q. When was that? A. In the spring of 1923.

Q. What was your conversation with reference to taking this timber off of this tract of land? A. I had made a contract with a Mr. Cooper to take it off, in 1923, but he took one car load and then fell down, and I went to see Mr. Mueller and told him the situation, that the mines by shutting down
30 had put me back a year, and I asked him whether he—

Mr. Smith: I object to that and move to strike it out, that the mine was out of work a year.

The Court: I do not see how it is material at this time.

Mr. Smith: I do not see how it binds us, that the mines were on strike.

Mr. Roseberry: Well, it shows the
40 reason that he told Mr. Mueller.

George W. Sarson—Direct

Mr. Smith: I do not understand that he told it to him.

Q. What did you say to Mr. Mueller? A. I told Mr. Mueller that the strike was on and it had put me back a year.

Mr. Smith: All right.

A. And I asked him whether he would give me another year's extension. I told him Mr. Baylor, another neighbor of his, had given me an extension of a year but Mr. Baylor would not take any pay and he was an old man, eighty-three years old, and I wanted to get that off as soon as I could, and I asked Mr. Mueller whether he would give me another year, and he said he would, and I asked Mr. Mueller what he wanted and he said, "Nothing." He said my son-in-law and I had done him a favor and he called it even; but I told Mr. Mueller I would pay the taxes for 1923 and also give him half a dozen poplar trees on the lot for his building operations. Now, Mr. Mueller did not say whether he would accept the trees or not, but I see they are gone.

Then I met him on the road, going to Phillipsburg, and we talked the matter over and I told him we would go back to the house and sign a paper, and he said he was going to Phillipsburg and I said if he had no objection I would ride along with him, and I rode with him and after we got started, apparently he had been drinking—

The Court: Strike it out.

A. We went to Phillipsburg. I thought we would go to Mr. Smith's office and get this paper

George W. Sarson—Direct

drawn up but when we went into Phillipsburg he did not stop there—

Q. Well, did you see him afterward? A. After that day?

Q. You went to Phillipsburg with him? A. Yes, sir.

Q. Did you come back with him? A. No. I told him—instead of stopping at the Square, he went right up South Main Street.

Q. Well, you did not see him again that day? A. No.

Q. And you went home? A. Yes, sir.

Q. Was that tax to be paid for the year 1922 or 1923?

Mr. Smith: Objected to, as leading. 20

The Court: It is fairly leading.

Q. When was that tax? For what year was that tax to be paid?

Mr. Smith: I object to that as leading.

The Court: Objection sustained.

Mr. Roseberry: I pray an exception.

The Court: There has been nothing about any tax in evidence.

Mr. Roseberry: Mr. Sarson said that he told him that he would pay the tax for one year.

The Court: The objection is sustained. You may state your question.

Q. There was nothing said about the tax then, was there, or was there not? A. Yes.

Q. Well, what was said? A. I told him I would pay the tax for the year 1923.

Q. What did he say? A. He did not say any—

George W. Sarson—Direct

thing. I told him when he got his tax notice to bring it around.

Q. That was after he gave you the extension of one year? A. At the same time.

Q. Did you, or did you not rely upon that extension of one year? A. Yes, sir.

Q. You saw Mr. Mueller afterward, did you not? A. Yes, sir. The latter part of January, 1924.

Q. What was the occasion of your seeing him at that time? A. I had heard that Mr. Mueller was not going to give me the year, and I went down—he works every day, and I went down one Sunday afternoon just to ask whether he intended to give me the year or not, and he said no, and we talked a while, and he wanted to give me one tract, nineteen acres, and he keep the twenty-four, and I said we would not do that. Then he said he would give me two months to take it off the whole tract.

Q. Where did that occur? A. In his house.

Q. Who was there? A. All his family, I guess.

Q. Then you left, did you? A. Yes, sir.

Q. When was the next time you heard from Mr. Mueller? A. A few nights after that I heard—Mr. Pierson telephoned me.

Q. What did he tell you?

Mr. Smith: I object to that.

Mr. Roseberry: We will connect it up by Mr. Sarson's testimony.

The Court: I will receive it subject to being made competent.

Mr. Smith: I will reserve my right to object later on.

The Court: Certainly.

George W. Sarson—Direct

A. I had a telephone call one night or two or three nights after that. Mr. Pierson phoned me saying that Mr. Mueller was there and he would not give me two months to take off all but I could have two months to take off one tract, the nineteen acre tract, and he would keep one tract.

Q. Did he say anything about the twenty-four acre tract, the down timber on it? A. He said I could have the down timber on the twenty-four acre tract.

Q. Did he say anything about getting the standing timber on the twenty-four acre tract? A. No, sir. That is all he said.

Q. When you had that interview at the house, what did you do with reference to taking off this timber? A. Well, there was only a week or two left then before the two years expired, and I got off all I could before it expired.

Q. How many men and teams did you hire? A. We had about a dozen men and four teams.

Mr. Roseberry: Do you admit the notice by Mr. Mueller to Mr. Sarson, not to cut?

Mr. Smith: Yes, we admit that.

Mr. Roseberry: I offer it in evidence. (Notice referred to is marked Exhibit P-3.)

(Mr. Roseberry reads Exhibit P-3 to the jury.)

Q. Who served that notice on you? A. Mrs. Mueller.

Q. Where? A. Along the road, by her house.

Q. On the wood tract? A. No, sir; on the public road.

George W. Sarson—Direct

Q. Where your wood tract was? A. Yes, sir.

Mr. Smith: I object to that as leading.

The Court: Well, it is in now. I will let it stand.

10 Q. Did you say anything to Mr. Mueller after you got that notice about removing any of the timber from the road, and if so, what did you say to him? A. The night I got the notice I met Mr. Mueller at Squire Pierson's office and I asked whether he would give me permission to remove some logs from the public road; I was afraid somebody might run into them and I would have damages to pay; and he said yes, and I asked him
20 then whether he wanted me to quit and he said he did, so I did.

Q. Was there ever afterwards permission given you to take off either the cut or standing timber on this forty-three acre tract? A. No, sir.

Mr. Roseberry: Here is a demand on Mr. Mueller. Mr. Thatcher is the subscribing witness, and I imagine you will not object to that.

30 Mr. Smith: I do not object to that. The original of that was served.

Mr. Roseberry: We offer the notice served on Mr. Mueller in evidence.

(Notice referred to and offered in evidence was marked Exhibit P-4.)

(Mr. Roseberry reads Exhibit P-4 to the jury.)

40 Q. Was there any permission given you by Mr. Mueller after that notice was served, to take off any of the cut or standing timber? A. No, sir.

George W. Sarson—Direct

Q. How much cut timber was on these premises? When notice was given you to quit on February 8th, 1924, how much cut timber was there on this forty-three acre tract? A. Mr. Cooper, who had the contract to take that timber off, got one carload in the spring of 1923 and I
10 had cut another strip of timber in 1922. Mr. Cooper had taken his all away.

Q. How about yours? A. I only got one load off of mine.

Q. How much was left on there? A. Well, all.

Q. What do you mean by "all"? A. I see by my account I paid out \$44.55 for cutting timber—and I got one load of that.

Q. How much did you pay for cutting the timber?
20 ber?

Mr. Smith: I object to that question unless it relates to the particular cut timber that was left on the premises at the termination of the two years or whenever he alleges the breach to be made.

The Court: It will have to be connected.

Q. How much was left there, Mr. Sarson, after the 8th of February, 1924, of cut timber? A.
30 All that I paid for, the \$44—

The Court: No.

Q. How much did you leave there, how many props and how many ties? A. Well, I think nearly two acres, perhaps one hundred and fifty or two hundred dollars.

The Court: Strike it out.

Q. How many props did you have there, Mr. Sarson? A. I do not know how many; I never
40 counted them.

George W. Sarson—Direct

Q. As near as you can tell—mine props?

Mr. Smith: If the Court please, not as near as he can tell. This proof must be specific.

10 The Court: Yes, he cannot speculate. He can give us his best recollection.

The Witness: There were ties on that lot that I got.

Q. Well, what about the tie timber? A. How much was it worth?

Q. How many ties did you have there, as near as you can tell? A. I have no account of them.

Q. As near as you can tell?

20 Mr. Smith: If the Court please, I object to that question as improper.

The Court: Yes, he says he does not know; that he had no account of them.

Q. How much was the timber worth that was left there?

Mr. Smith: I object to that unless he specifies how much it is.

The Court: Objection sustained.

30 Q. Can't you tell how many mine ties and props were left there on February eighth? A. No, sir.

Q. As near as you can tell how much was left there? A. I said from one hundred and fifty to two hundred dollars.

Mr. Smith: I object.

The Court: Strike it out.

40 Q. I asked you how many mine props or ties? A. They were all mine ties, there.

George W. Sarson—Direct

Q. What was the length of the mine ties? A. Five feet.

Q. What was the length of the props? A. There were no props cut on that strip.

Q. I mean, on the forty-three acre tract, that was left there on the forty-three acre tract? A. 10 There were two cars left there, what we cut on February 1st, 1924. We cut on the north side of the lot and this I got was on the south side—

Q. Listen to what I ask you. I ask you how much cut timber was left on the forty-three acre tract, that is, the two tracts, on the 8th of February, 1924? A. We left two carloads on the north of the tract, where we cut on the first of February, and the other was cut the year before 20 that.

The Court: That was taken off, was it not?

The Witness: No. We cut five loads the first of February, 1924, and took three carloads and left two car loads on the lot.

Q. How much was in a car load? What size was this timber? A. We cut on that—

Q. What was the size of the timber you left there? A. Six inches thick and ten inches thick, 30 about a carload of each.

Q. What was the price of the ten-inch diameter? A. Eight cents a foot, lineal measure.

Mr. Smith: I would like to have that limited as to particulars, when and where.

Mr. Roseberry: At that time.

Mr. Smith: And particularly at that place.

The Court: I presume it all cannot be 40 asked in one question.

George W. Sarson—Direct

Q. What was the price for the eight-inch timber a lineal foot? A. Six—

10 Mr. Smith: I object to that unless it is limited as of February 8th, 1924; and then unless he also fixes it as to the value of the timber at the place where it lay on the premises of the defendant.

The Court: It will be confined to that.
(Last question read.)

The Witness: Six cents a foot.

Q. And of the six-inch? A. Three cents a foot; and eight cents for ten-inch.

Q. Where did you deliver this timber on board
20 the car? A. Broadway.

Q. How far was Broadway from where this timber was? A. A mile and a half.

Q. Was it down hill? A. Down hill.

Mr. Smith: I object to that unless that is specified as to this particular timber.

The Court: What it cost to cut this particular timber, these two carloads that were left on the tract on February 8th, 1924.

30 A. The contract with Mr. Cooper was that he was to have fifty-five per cent of what I got, and this cost about the same as what I cut.

Q. Then it was worth to you then on the lot forty-five cents a foot? A. Forty-five per cent of what I got.

Q. How much was a carload worth? A. It would average about two hundred dollars.

Q. When was the last car you sold before that?
40 A. I think a month later. They hadn't got it quite all cut. We loaded two cars on the four-

George W. Sarson—Direct

teenth of February, and the other car was not loaded until later on. What we took out into the road we did not get to the station right away.

Q. Did you load two carloads of this same kind of timber and ship it on the fourteenth of February? A. Two cars that day.

10

Q. What did they bring you?

Mr. Smith: I object to what they brought there. My understanding is that he is now asking the question as to the price at Broadway, away from this woodlot, ready for shipment, and unless that is in some way related to it I think it is absolutely immaterial at this time.

The Court: Would it not be material, 20
Mr. Smith, if you had the price at Broadway and then it was shown what the cost of hauling the two cars was?

Mr. Smith: I understand the fifty-five per cent includes the hauling down there to the cars.

Mr. Roseberry: Yes.

Mr. Smith: I think we ought to have it confined to what it was worth before it was moved off the premises to the public road
30 down there. If you can estimate that I have no objection.

The Court: If he says that he got forty-five per cent of the value of what was paid for it, is that not the price?

Mr. Smith: No, I think not, because that would be his profit after it was moved or taken down there. In other words, he has not brought the goods to the market, and 40

George W. Sarson—Direct

we are limited to right at that particular point, and I insist it must be limited there.

The Court: There is no question but that the value is the value of the timber on the property in question.

10 (Previous testimony read as follows:
"Q. Did you load two carloads of this same kind of timber and ship it on the fourteenth of February? A. Two cars that day.

Q. What did they bring you?")

The Court: I will allow the question.

Mr. Smith: I pray an exception.

The Court: You may have an exception.

20 A. One car brought \$235.48; the other car brought \$174.78.

Q. What was the cost of hauling it from the wood lot and putting it on the car at Broadway?

A. Fifty-five per cent—

Q. That is for cutting and—yes, I know.

Mr. Smith: If the Court please, I object to counsel saying "I know."

Mr. Roseberry: I suppose you want to examine him—

30 The Court: I think we would all get along much faster if counsel would address the Court instead of addressing each other. We will recess until one-thirty.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

40

George W. Sarson—Direct

(Previous question read as follows:

"What was the cost of hauling it from the wood lot and putting it on the car at Broadway?")

The Witness: That was everything except the cutting. The cutting would be about \$25 to a carload.

Q. Did you estimate that in your forty-five per cent profit, the fact that you had cut the timber?

A. No, the two carloads would be that—

Q. No. Answer the question. Did you estimate the fact that you had cut this timber, in your profit of forty-five per cent, where you cut the timber and not the other man? A. No, sir. 20

Q. You said that where they cut the timber and hauled it and loaded it on the car would cost about fifty-five per cent? A. Yes, sir.

Q. And that you would have a profit of about forty-five per cent? A. Yes, sir.

Q. If you cut the timber would your profit be more or less?

Mr. Smith: If the Court please, he has not answered that other question. Is it 30 withdrawn?

(Previous question read, as follows "Did you estimate the fact that you had cut this timber in your profit of forty-five per cent, where you cut the timber and not the other man?")

The Witness: The two carloads—

The Court: No. Answer the question. Did you estimate that in your price of 40 forty-five per cent?

George W. Sarson—Direct

The Witness: Well, the cutting, perhaps, would be about ten per cent.

Q. Additional? A. No.

Q. Where you estimated the fifty-five per cent, what was that for? A. That was for everything, delivered on the cars; cutting, hauling and loading.

Q. In that you get forty-five per cent, you said? A. Forty-five per cent net.

Q. Where you cut the timber, but that was not estimated in the forty-five per cent for cutting, hauling and loading, what difference would it make? A. Twenty-five dollars on a carload.

Q. Then, beside your forty-five per cent you would be entitled to twenty-five dollars for cutting it—in your estimate? A. I do not understand you.

Q. You made forty-five per cent when it was cut and hauled and loaded on the cars? A. Yes.

Q. Now, if you cut it then all that had to be done would be to haul it and load it on the car? A. Yes, sir.

Q. In your forty-five per cent did you or not estimate the fact that you had cut it and not the other man? A. If the other man cut it I would get forty-five per cent, and if he did not cut it it would be about twenty-five dollars a car less.

Q. That is more than the forty-five per cent? A. I would give him more than the forty-five per cent.

Q. Do you know whether any poplar trees had been cut on your lot? A. I gave Mr. Mueller half a dozen poplar trees.

40

George W. Sarson—Direct

Q. Do you know whether they were cut or not? A. They are gone.

Q. How about the tax? A. I was to pay the tax. He never sent me any bill.

Q. Tax for what year? A. 1923; the assessment of 1923, that would be assessed in October and we would get our bills in April and pay them in May.

Q. That would be payable in 1924? A. 1924.

Q. Did you hear him testify in relation to his coming to your house for that tax? A. Yes, sir; he said he came there with a tax bill but I was not home and he never left it.

Q. How close did this timber tract come up to this house and lot? A. It joined it, close.

Q. How far from the house is it? A. The line would be twenty-five feet from the house.

Q. It runs alongside of the house? A. Yes, sir.

Q. Did you ever see any of your props or ties on his wood pile? A. Yes, sir.

Mr. Smith: I object to that as immaterial and irrelevant at this time.

The Court: I do not see how it is material.

Mr. Roseberry: It is material in this way—I will ask another question.

Mr. Smith: His answer was taken, I think. I got the objection in as soon as I could. I move to strike out the answer.

The Court: Yes. Objection sustained and the answer will be stricken out.

Q. Did you see any of your timber gone, on this wood lot of yours, any ties or props? A. I saw ties on his wood pile, the same kind as mine.

10

20

30

40

George W. Sarson—Direct

Mr. Smith: I move to strike that out as not responsive.

The Court: Strike it out.

Mr. Roseberry: I insist, your Honor, that that is responsive.

10 The Court: No. He said he saw some ties on there the same as his.

Q. Did they look like yours?

Mr. Smith: Objected to.

The Court: Objection sustained.

Q. Do you know whether Mr. Mueller had around there any props or ties that were like
20 yours?

Mr. Smith: Objected to as incompetent, irrelevant and immaterial.

Mr. Roseberry: Your Honor, I have a perfect right to show that Mr. Mueller got our ties, but I cannot show it all in one breath. It may be I have to show it by asking several questions.

(Last question read.)

The Witness: I never saw any like mine.

30 The Court: Please do not answer questions when an objection is made until the Court has ruled on it. You may answer that question.

Mr. Smith: I pray an exception.

The Court: You may have an exception.

Q. What did you say? A. I said I never saw any around his place like mine.

Q. But those that you saw in the pile—did you
40 see any roads or anything going through that wood lot to your wood pile?

George W. Sarson—Direct

Mr. Smith: I object to that on the ground there is no evidence he saw any on his pile. I object to the question in its present form on that ground.

The Court: Objection sustained.

Q. Did you see where roads had been made
10 running from his wood pile up into your timber lot, which indicated drawing of the timber from your lot to that wood pile?

Mr. Smith: I object to that on the ground it calls for a conclusion.

The Court: Objection sustained.

Mr. Roseberry: I pray an exception.

The Court: You may have an exception. 20

Q. Did you see anything that indicated that this—

The Court: No. All this witness can state is what he saw, if he can state it at all, and the jury can draw the inference from what he saw. He cannot draw his own inference.

Mr. Roseberry: Yes, but I have a perfect right to show that he saw timber on
30 this wood pile.

The Court: Yes, but he cannot say that what he saw indicated so and so. He can tell us what he saw and the jury can say whether it indicated certain things or not.

Mr. Roseberry: I thought that was the question I asked.

The Court: You asked if he saw certain things that indicated certain things. That
40 question is objectionable.

George W. Sarson—Direct

Mr. Roseberry: I will put it in a different way.

Q. Did you see any roads made from your wood lot to this wood pile?

10 Mr. Smith: If the Court please, I object to that. There may be roads anywhere through there that may have been made at any time.

The Court: I do not see the materiality of it, Mr. Smith although I will allow that question at the present.

Mr. Smith: I will pray an exception.

The Court: Yes.

20 (Last question read.)

A. Yes, sir.

Q. And what did you see on the wood pile?

Mr. Smith: I object to that as incompetent, irrelevant and immaterial. I do not see how what he saw there has anything to do with it. He has testified that he did not see anything.

30 Mr. Roseberry: Your Honor, we have a right to ask what he saw.

The Court: He said he saw some wood there that looked like his.

Mr. Smith: He further said he did not see anything in there; that Mr. Mueller did not have anything like his around his place.

Mr. Roseberry: He did say that Mr. Mueller did not have any ties or mine props on his place, but what he saw in there

40 looked like his ties and props.

George W. Sarson—Cross

The Court: When were these observations made that you are talking about, Mr. Sarson?

The Witness: I saw those ties on his wood pile that Sunday afternoon when I went to see him. 10

The Court: When was that?

The Witness: About the latter part of January, 1924.

The Court: I will allow the question.

Mr. Smith: I pray an exception.

The Court: Yes.

(Last question read.)

A. Ties.

20

Mr. Roseberry: Cross-examine.

CROSS-EXAMINATION by Mr. Smith:

Q. You do not know whose they were, do you?

A. No, not of my own knowledge.

Q. Just when did you have this first conversation with Mr. Mueller with reference to the year's extension? A. We loaded Cooper's car on the thirtieth day of March. It would be a month after that, about. 30

Q. What year? A. 1923.

Q. You had then had one full year? A. Yes, sir.

Q. During the year 1922 did you remove any timber at all? A. No. The strike was on then.

Q. You did not cut any timber then, did you?

A. No. Mr. Cooper cut one carload.

Q. And that was in 1923? A. Yes, sir.

Q. Mr. Cooper had a contract for fifty-five per 40

George W. Sarson—Cross

cent for cutting and hauling down there? A. And for loading.

Q. That including loading it on the car? A. Yes.

Q. Wasn't there a dispute between you and Mr. 10 Cooper? Didn't he give up this contract? A. Yes, sir.

Q. And didn't he give it up because he claimed you had agreed to pay more than you were paying him? A. Well, he was to have fifty-five per cent when he finished his job and I only paid him fifty per cent and gave him a bonus of five per cent. That car he loaded he got fifty per cent for and then he quit.

20 Q. Wasn't there a dispute as to furnishing the wire and other materials and the paying some other costs in connection with the loading? A. That was the excuse. He said he had to buy the wire and that cost about a dollar and a half a car.

Q. And didn't he claim there were some other costs you had agreed to pay, and wasn't that why he threw up the job? A. He did not say so. He said he quit because I would not pay for the wire.

30 Q. Did you make any effort to get anyone else to remove the ties at that time? A. We were busy cutting off another lot at the time—

Q. No. Did you make any effort? A. No.

Q. You had some other men working for you, didn't you? A. Yes, sir.

Q. And were they under contract? A. In that lot?

Q. No; on any other lot? A. Well, that summer— 40 one man was cutting off the lot on this contract—

George W. Sarson—Cross

Q. When did Mr. Cooper cut those ties? A. In the spring of 1923.

Q. And had he been cutting some before that, March, 1922? A. It must have been, because we loaded them the thirtieth day of March.

Q. How many cars did he cut then? A. One. 10

Q. And that carload was hauled down and loaded? A. Yes. Then he had fifteen hundred feet of six inch that he did not have a carload of and we loaded it in with my car.

Q. He cut some additional and that was moved off the wood lot and put on a car that you were loading from another place? A. No; the same place.

Q. Where did you store them? A. On the rail- 20 road.

Q. There is quite a large place for storing ties and timber at Broadway station, isn't there? A. Yes, sir.

Q. And you usually have quite a lot of ties and mine props and timber of the class you were getting out of this tract there, didn't you? A. There was no others there at Broadway except his, at that time.

Q. Don't you frequently have a lot stored? A. 30 Yes, but not that time, though. We were not cutting there. We were loading at Washington and Stewartsville then.

Q. Did you have any stored at the other place? A. We never stored very long. When we had a carload we loaded it.

Q. The timber was such that you had no trouble shipping it? A. There was never any trouble 40 selling it.

George W. Sarson—Cross

Q. What kind of a lot was this where the timber that was cut lay when you went back up there?

A. It was a side hill lot.

Q. Is it very steep? A. Pretty steep, yes, sir.

Q. Does it require quite some labor to get it
10 down from where your timber was on that wood lot, down to the public road, or not? A. Which timber?

Q. The timber that was there when you left there, this pile of cut timber? A. Yes.

Q. It would require a great deal of labor to have gotten it out there, wouldn't it? A. Yes, sir.

Q. Isn't that more than usual for the labor that
20 would be required to take that down to the road and to the station—isn't that more than is usual in getting out mining props and ties, by reason of its being a steep hill lot? A. No.

Q. It would be pretty costly, wouldn't it? A. It would cost a little more to haul it down and cut it.

Q. How much did you pay for cutting these two carloads? A. One man worked by the week. He was only there a week. There were three cars
30 instead of two. You gave me notice to furnish my book account for six months, and I made a mistake before dinner. It was three cars instead of two. One of those cars was loaded after that. You served notice to produce the books for that time before the two cars were loaded, that was nearly six months, and the other one after that.

Q. You say there were two cars cut? A. Yes, sir.

40 Q. That were left on the lot? A. Yes; one six and one ten.

George W. Sarson—Cross

Q. How much did you pay for cutting those two cars? Do you have that whole amount of cutting the five cars? A. One man worked all the week and I paid him the same as I did Mr. Cooper. I do not know what his cutting and
10 hauling did cost.

Q. My understanding is this, that at that time in January you cut five cars of mine props and ties? A. All mine props.

Q. You hauled off and shipped three carloads? A. Yes, sir.

Q. How much did you pay for the cutting of those five carloads? A. I cannot tell you because that man cut by contract.

Q. Who was cutting it at that time? A. John
20 Inscho.

Q. Did he do the hauling? A. He hauled his own.

Q. How many men did you have in there? A. He had three men. One to drive his team, one to cut; and he had an old mule there to take it down the hill. Our teams would not go up there.

Q. It was too steep and hard to do it? A. Yes, sir.

Q. How much did you pay Mr. Inscho for all
30 that work? Do you have your books of account? A. Yes, sir.

Q. Can you refer to it and show me how much you paid Mr. Inscho? A. I paid him ninety dollars.

Q. For all five carloads? A. No; for what he furnished.

Q. You paid him ninety dollars? A. Yes, sir.

Q. Did that include his hauling? A. That in-
40 cluded his hauling and cutting and loading.

George W. Sarson—Cross

Q. Did that include the two carloads that were left there? A. No. I cut that myself.

Q. So Mr. Inscho does not come in on the two carloads that were left there? A. No.

Q. The ninety dollars was paid to him for the
10 three carloads. Now, how much did you pay your man for cutting those two carloads? A. I cannot say that. I hired by the day.

Q. Do you have a record of what you paid? A. I always paid the men every Saturday night and I never had an account of any man, but when he came in every Saturday night I paid him.

Q. Do your books show how much you paid out? A. Yes, sir.

20 Q. When did you do the cutting of these two carloads? A. About the first of February, 1924.

Q. You said you went to work there in January? A. The last part of January. We were only there a week working.

Q. How many men did you have working, cutting these ties? A. I had three teams beside my own, and Mr. Inscho had one team. That was five teams.

Q. The teams were used in hauling? A. Yes,
30 sir.

Q. They did not haul these two carloads that were left there? A. No, sir.

Q. Who did the cutting? A. Some was done by contract and some by the day.

Q. I mean, of these two carloads? A. I could not tell you.

Q. You men did it? A. Yes. They cut the other two cars too. They cut three cars.

40 Q. But Mr. Inscho only cut one car? A. His work come to ninety dollars.

George W. Sarson—Cross

Q. We want to know how much you paid for cutting these two carloads of timber that were left there after February eight? A. Twenty-five dollars a car or fifty dollars would be about the estimate.

Q. That is what they cost? A. Yes, sir. 10

Q. About how many carloads in that tract there were you able to cut from an acre of ground? A. We cut five carloads from six acres and six-tenths.

Q. So that it is about a carload to an acre? A. About a carload to an acre; yes.

Q. So that these two carloads probably represented two acres of timber? A. Two acres of
20 timber.

By the Court:

Q. Now, Mr. Sarson, you say that the cutting would cost about twenty-five dollars a carload? A. Yes, sir.

Q. How much would the hauling cost a carload from the place where the timber was to the cars? A. Well, a carload would be a hundred and ten dollars.

Q. For the hauling? A. For the hauling, cutting and loading. 30

Q. One hundred and ten dollars for the hauling, cutting and loading? A. Yes, sir; fifty-five per cent.

Q. And two carloads average about two hundred dollars? A. About two hundred dollars.

Q. Then your profit there was about ninety dollars a carload? A. About ninety dollars a carload; yes, sir.

George W. Sarson—Cross

By Mr. Smith:

Q. The hauling and taking down to the station was the big part of getting the mine props ready for the market; isn't that true? A. Yes. It cost more.

10 Q. Do you know what size these ties were?

The Court: He said one car was six inches and the other was ten.

Q. How much did you receive for ten-inch mine props? A. We did not get any ten-inch props loaded.

Q. They were only eight inches? A. We shipped five cars there; two of six, two of eight
20 and one of ten.

Q. What did those two cars that remained on the Mueller lot—what are they? What size, six or ten? A. Sixes and tens.

Q. How much did you receive for tens loaded on the car in February, 1924? A. I did not load any ten-inch.

Q. Did you load any at any other place? A. Yes, sir.

Q. How much did you receive for them at that
30 time? A. Eight cents a foot.

Q. How much for six-inch? A. Three cents for six-inch.

Q. Eight cents for ten-inch—and how much did you receive for eight-inch mine props? A. Six cents.

By the Court:

Q. How many feet to a car? A. Well, of six-inch we generally loaded about six thousand feet,
40 or somewhere along there; and the eight-inch not so many.

George W. Sarson—Cross

Q. How about the ten-inch? A. Well, it is less yet.

Q. How many feet do you load in a car of ten-inch? A. About two hundred and fifty feet.

Q. Two hundred and fifty feet? A. Some-
where along there. 10

Mr. Smith: I do not think he means that, if the Court please.

Q. How many feet of ten-inch props? A. Oh, not two hundred and fifty. Twenty-five hundred feet.

By Mr. Smith:

Q. Now, then all of those prices were when these were loaded right on the car? A. Yes, sir. 20

Q. That is what you received? A. Yes, sir.

Q. Have you ever sold mine props right in the woods, before they were hauled? A. No.

Q. So you do not know what their value is at that point? A. No; I never sold them.

Q. Did you ever buy any mine props right in the woods? A. Not already cut. I bought a lot and cut them myself. I do not think I ever bought any cut in the woods.

Q. Now, you say that this was in 1923 after Mr. 30
Cooper quit that you requested a years extension?
A. Yes, sir.

Q. Now, I wish you would just tell me what you said that time and what Mr. Mueller said? A. I told Mr. Mueller the situation, that I was a year behind by the strike, and he said he would give me another year.

Q. Was that all that was said? A. No. We talked the matter over. I asked what he wanted 40

George W. Sarson—Cross

and he said, "Nothing." He said my son-in-law and I had done him a favor. I told him I would pay the tax that year; and there were half a dozen poplar trees he might cut for himself.

Q. Where were those poplar trees located? A. 10
In the lot, one just by the house.

Q. Do you recall testifying at the first trial of this case? A. I do.

Q. Didn't you testify there that there was no consideration then agreed on for his agreeing to extend for the year? A. Yes, that is what I said, no money consideration.

Q. You said there was no consideration of any kind, didn't you? A. There was not, at that 20 time. It was a promise of a consideration.

Q. That is, you promised to do it? A. Yes, sir.

Q. Did you ever pay that tax? A. He never gave me any bill.

Q. Did you ever offer to pay the tax? A. No. I never refused.

Q. Did you go and ask him for a bill? A. No. He was at my house to get the tax once and I was not home—so he says.

Q. Did you cut any after that? A. After those 30 two car loads?

Q. No; after you had this conversation extending the time for a year? A. We cut on until the two years were up.

Q. Who did the cutting after that? A. After the two years was up, nobody.

Q. Who did the cutting after Mr. Mueller, as you allege, had extended the time for a year? A. We cut five loads in a week. There was about

40 a dozen men there.

George W. Sarson—Cross

Q. That was about a week before the end of the two years? A. Yes, sir.

Q. Now, when you had this agreement, you understood that he had extended it for a year? A. Yes.

Q. That he had agreed to it? A. Yes, sir. 10

Q. Why did you ask him for an extension of three months? A. I did not. He offered that.

Q. Then you do not claim he ever extended it for three months? A. He said two months, and I said I would accept that if he would sign an agreement and he said he would not sign.

Q. As a matter of fact you went there on a Sunday in January, 1924? A. Yes, sir.

Q. And found Mr. Mueller at home with his 20 family? A. Yes, sir.

Q. Who else was there? Do you know? A. Nobody but his family.

Q. It happened on Sunday though? A. Yes, sir. That was the only time he was home he said. He works every day at Phillipsburg.

Q. What did you say to him then? Just what was the conversation at that time? A. I went there and told him I understood he was not going to let me have the year and he said yes, he wanted 30 to keep the twenty-four acres and wanted to give the nineteen acres and I said I would not do that, if he was not a man of his word we would have a lawsuit.

Q. You threatened a lawsuit? A. I told him if he was not a man of his word we would have a lawsuit then and there and then he offered to give two months to take it off.

Q. You had pretty hard words with him, didn't 40 you? A. Well, yes.

George W. Sarson—Cross

Q. Did you threaten to send him to State Prison if he did not give you an extension? A. No, sir. My son-in-law kept him out of State Prison.

Q. Oh, that is what you said to him. All right. At that time you did not come to any agreement, 10 did you? A. No.

Q. You did not agree to accept the three months? A. I said I would if he would sign an agreement and he said he would not sign.

Q. So there wasn't any agreement on that Sunday? A. No.

Q. There was never any agreement to extend it for three months? A. No; only two months.

Q. Didn't he tell you at that time that he had 20 not agreed to extend it for a year? A. No.

Q. Did he tell you then that you had not paid the tax as you agreed? A. No. I could not pay it. It was not due then.

Q. Did he tell you you had not paid the tax? A. There was something said.

Q. About the tax? When? A. He was to pay one hundred and fifty dollars and pay the tax; that was the agreement. That was what he says.

Q. Now, as a matter of fact on that Sunday was 30 the tax mentioned at all? A. Yes.

Q. And didn't he ask you to pay the tax and he would agree to do that? A. Yes, sir.

Q. You did not agree to pay the tax then, did you? A. Yes; I told him I would pay the tax. I told him to send the tax bill around and I would pay it.

Q. And didn't he say if you did not make any trouble he would give you two months longer?

40 A. That is what he said.

George W. Sarson—Cross

Q. You did not refuse to accept that two months extension? A. Unless he signed.

Q. Unless he signed a written agreement, isn't that true? A. There wasn't any use of taking his word any more.

Q. So you did not come to any written agree- 10 ment on that day? A. No.

Q. Now, you sent in teams right after that and put these men to work to cut that timber? A. Yes, sir.

Q. You tried to get all off that you could within the time that you had? A. Yes, sir.

Q. You had not had anybody in there from March, 1923, to cut timber, had you? A. No.

Q. You did not cut any timber at all in 1923? 20 A. No. That is the reason I wanted to get that agreement for a year.

Q. Then you went and asked him for another agreement? A. No. I just went and asked him that Sunday whether he was going to live up to the agreement he had made.

Q. After that when did you next hear about this matter? A. About three nights after that Sunday, when Squire Pierson phoned to me.

Q. Where were you at the time? A. Home. 30

Q. Was there anything said at that time? A. Only that Squire Pierson phoned up. He said Mr. Mueller was there and he said he would not give me two months for the whole amount but would give me two months for the nineteen acres.

Q. Didn't he tell you that you could go in and haul the down timber? A. Yes; he said I could have the nineteen acres and get what was cut on the twenty-four acres. 40

George W. Sarson—Cross

Q. And he was speaking for Mr. Mueller? A. He said Mr. Mueller was there.

Q. Now, then, after that, what happened? A. Well, we went and got off what we could.

Q. The two years expired on the sixth of February? A. Yes, sir.

Q. Didn't you then receive this notice that was handed to you by Mrs. Mueller? A. Yes, sir.

Q. And you then took the notice? A. Yes, sir.

Q. That night did you see Mr. Mueller? A. Yes, sir.

Q. That was at Squire Pierson's office? A. Yes, sir.

Q. Now, you testified that you asked Mr. Mueller whether you could have some scattered logs lying in the public road? A. That is right.

Q. Why did you ask Mr. Mueller for permission to remove logs that laid in a public road? A. The road was very narrow, and if anybody ran in them I would be liable.

Q. Why did you ask Mr. Mueller's permission to remove the logs? A. He served a notice on me not to take any more.

Q. It was on the public road wasn't it? A. Along the public road.

Q. Were they on Mr. Mueller's property? A. They were by the road. I do not know how far his property went. It goes to the middle of the road, I guess.

Q. Were they on his property or on the road? A. On his property, I guess.

Q. He gave you permission, did he? A. Yes, sir.

Q. He did not refuse you any at that time? A.

George W. Sarson—Cross

I asked whether he wanted me to quit the job and he said, "Yes."

Q. Quit cutting? A. Quit the job.

Q. Didn't you use the word "cutting?" A. No. I went and told—

Q. Did you use the word "cutting" at all that night when you asked for permission? A. No.

Q. Didn't he tell you that he wanted you to quit cutting that timber? A. I asked whether I could move those logs and he said I could, and then I said, "Do you want me to quit?" And he said, "Yes."

Q. But you did not use the word "cutting?" A. No.

Q. So that is the only time that you asked for permission and waited until you got an answer? A. Yes.

Q. Now, you never got an answer to this demand that you had Mr. Thatcher serve on Mr. Mueller, did you? A. No.

Q. Mr. Thatcher did not tell you that Mr. Mueller refused permission, did he? A. He did not tell me anything about it. When he came back I asked whether he served the notice and he said, "Yes."

Q. Did you ever see Mr. Mueller to find out whether he had refused permission in accordance with the demand? A. No. I depended upon the demand.

Q. And you did not care whether it was answered or not? A. Yes, I did.

Q. Did you try to get an answer to the demand? A. No.

Q. You never asked on any other occasion? A. No.

George W. Sarson—Cross

Q. The only occasion when you did ask for permission to haul the down timber you received it? A. He served notice to stop and I went down and got his permission to get the logs off the side of the road.

10 Q. That is the only time you waited to get an answer as to permission to remove the down timber or the timber that had been cut? A. Yes, sir.

Q. By "down timber" we mean timber that has been cut? A. Yes, sir.

Q. I understand that you received approximately two hundred dollars a car for this timber when it was loaded, ready to ship, is that right?

20 A. Yes; it averaged that.

Q. And that there were two carloads and that would cost approximately one hundred and ten dollars to cut, haul and load? A. Yes, sir.

Q. Now, Mr. Sarson, would that timber lying there, those two carloads, be worth anywhere nearly as much as if it was down at the station? A. Oh, no.

Q. How much would you pay for one car load of ten-inch mine props and one of eight-inch mine
30 props lying right up there in the lot in February, 1924? A. Well, it is owing to how far they were from the railroad.

Q. Right by this place, how much would you pay for them, right there? A. If it is one hundred and ten dollars it would be twenty-five dollars off. It is one hundred and ten dollars for cutting, hauling or drawing and without the cutting it would be twenty-five dollars off.

40 Q. How much would you pay for those two car-

George W. Sarson—Cross

loads, per carload, just as they laid there in February 1924, without hauling? A. I give him the market price, what he got for them, except the cutting.

Q. How much? A. One car comes to two hundred dollars and to get it to market would give
10 me one hundred and ten. Now then, the cutting would be about twenty-five dollars a car and that would be one hundred and ten and twenty-five more, which would be one hundred and thirty-five.

Q. That is, you would pay without it being hauled one hundred and thirty-five dollars? A. Yes, sir.

Q. Do I understand you would receive two hundred dollars for it? And the hauling would cost
20 one hundred and ten dollars less twenty-five dollars, which would be eighty-five dollars? A. Yes.

Q. So that your price would be one hundred and fifteen dollars per carload? A. Yes; I guess that is about right.

Q. And you would pay that in that location? A. Yes, sir.

Q. But you never bought any timber anywhere cut, right there, without cutting and hauling it yourself? A. If a man had a small lot once in a
30 while I would buy it off him.

Q. How much would you pay for that per carload? A. About what I would get out of him.

Q. How much is that? A. The market price.

Q. How much would it be? A. Three, six and eight cents.

Q. You would pay the full price then even laying in the woods? A. I would haul it.

Q. Now, how much did you get? A. Three
40 cents for the six-inch—

George W. Sarson—Cross

Q. As it lay in the woods there, how much did you get for the mine props? A. The market price.

Q. How much money? Why don't you want to answer the question? A. I may be thick headed; 10 I don't catch on probably.

Q. How much did you actually pay for mine props cut and in the woods, in money? A. Well, it would be forty-five per cent.

Q. Do you know how much you actually did pay? A. If a man had less than a carload I would buy them of him.

Q. How much did you pay for them? A. I would buy them by the lump.

20 Q. How much would it be? A. Well, for whatever we could settle on ourselves.

Q. It hasn't much value then, has it? A. It has as much as mine.

Q. Somebody had cut on those tracts before you bought them, hadn't they? A. Yes, sir.

Q. And there was some cut timber at that time, was there? A. Well, I don't think so.

Q. Did you see any? A. He would not let me go on the lot to look.

30 Q. I mean before. A. Before, yes; there was some there.

Q. Wasn't there some cut timber before you went on to cut? A. Very little.

Q. Well, there was some, wasn't there? A. Yes, sir.

Q. Somebody had cut over this tract before? A. Yes.

Mr. Smith: Yes.

Marvin A. Pierson—Direct, Cross

MARVIN A. PIERSON, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. Do you remember Mr. Mueller, the defendant, coming to your place, some time the first part of February 1924? A. Yes, sir. 10

Q. Do you remember what day it was? A. The fore part of February. I do not remember the date.

Q. Just tell us what he said to you with reference to Mr. Sarson and cutting this wood tract or hauling off the timber off the wood tract. A. He came there and said that Mr. Sarson's time had practically expired and I should call him by telephone and tell him that he could have two 20 months to cut and remove the timber from the one tract and remove the down timber from the other.

Q. Did you call up Mr. Sarson? A. I did.

Q. And did you tell him what Mr. Mueller had said? A. Yes, sir.

Q. And tell him in Mr. Mueller's presence and hearing? A. Yes, sir.

Mr. Roseberry: Cross-examine.

CROSS-EXAMINATION by Mr. Smith: 30

Q. Who else was there in the office that night, Mr. Pierson? A. There was some other member of Mr. Mueller's family; I forget just who.

Q. Now I understand that at that time Mr. Mueller gave Mr. Sarson permission to get the down timber? A. He said he would give him two months to cut the timber standing on the one lot and remove the down timber from the other, but not to cut any more timber on that lot. 40

Marvin A. Pierson—Re-direct, Re-cross

Q. He gave him permission to move the timber that was cut down? A. Yes, sir.

Mr. Smith: That is all.

10 RE-DIRECT EXAMINATION by Mr. Roseberry:

Q. The down timber he was to remove from the one lot and not to cut any more timber on that lot, I understand? A. That is right.

Q. And the other lot he was to cut the timber off and take the down timber both? A. He was to give him two months to cut and remove the timber from the one lot and remove the down timber from the other lot.

20 Q. How any acres were in this lot he was to cut and remove it from? A. I think it was nineteen.

Mr. Roseberry: That is all.

RE-CROSS EXAMINATION by Mr. Smith:

Q. What did Mr. Sarson say on the telephone about that? A. I do not remember that he gave any answer at all.

Q. He did not accept the proposition?

30 Mr. Roseberry: I object to that.

The Court: Objection sustained.

Mr. Smith: If the Court please, I think he is acting as the agent and is bound by his remarks.

The Court: He may tell any remarks that were made.

40 Q. Well, did he say anything at all that you remember? A. I don't remember a word.

Mr. Smith: That is all.

William H. Widenor—Direct

WILLIAM H. WIDENOR, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. Where do you reside? A. Anderson.

Q. How long have you been acquainted with the lumber business? A. I have worked at it—about thirty-five years I have been acquainted with it. 10

Q. How long were you in the business for yourself? A. I think about twelve years, as near as I remember.

Q. How long have you worked for others in the business? A. For myself and altogether somewhere around thirty years or over. 20

Q. Do you know the value of timber in February 1924?

Mr. Smith: I object to that, if the Court please. The word "timber" includes both standing and cut timber.

The Court: Yes. I think it should be qualified to a further extent.

Q. Were you acquainted during this period of time with the value of timber cut and uncut? A. Quite some, yes. 30

Q. You had seen them bought and sold? A. Yes.

Q. And knew the price they were getting for timber cut and uncut? A. Yes.

Mr. Roseberry: I think he is qualified now, your Honor.

Q. Do you know the value of timber that is cut, and mine props? A. Yes, sir. 40

William H. Widenor—Cross

Q. In February 1924? A. Yes, sir. I wasn't doing any of it myself, but I was still getting circulars from the mining company.

Q. Did you go upon this forty-three acre tract at any time in the year 1924, the first part of the 10 year 1924? A. Yes.

Q. What time? A. Why, from February to March—I won't say which.

Q. Who was with you? A. Mr. Sarson and another fellow; I forget his name now.

Q. Did you view the mining props that were there on this tract? A. Yes, sir.

Q. And estimate their value? A. Yes.

Q. What estimate did you put upon their value?

20 A. Why, I think it was somewhere around two hundred dollars. I most forget, but it was about two hundred dollars, I think.

Q. That was simply upon the mining props? A. Yes, sir.

Q. And not anything else? A. What was cut.

Mr. Roseberry: Cross-examine.

CROSS-EXAMINATION by Mr. Smith:

30 Q. Is that just as they lay there without hauling them down to the station? A. Yes, sir.

Q. Wasn't that a pretty hard place to haul out of, where these were cut? A. No; I did not consider it very hard.

Q. About what would it cost to cut those mine props? A. It is generally done by the piece.

Q. About how much a carload? A. Well, they would run about on an average, I suppose, about six or seven cents apiece.

40 Q. How much for cutting six-inch mining

William H. Widenor—Cross

props? A. Well, I count them the same, six and eight.

Q. How much do they pay loaded on the cars, for six-inch mine props? A. I forget what it was now.

Q. Mr. Sarson testified he got three cents for 10 six-inch props? Is that about right? A. I think so.

Q. And how much for six-inch props? A. That is what you mentioned.

Q. I mean for eight-inch, rather? A. I could not say exactly what it was now.

Q. You don't know? A. No. I knew at the time.

Q. How much did you get for eight- and ten- 20 inch at that time, loaded on the car? A. I think about eight cents, but I am not saying for certain.

Q. Do you know how much it would cost to cut six-inch mine props? A. It seems to me the last I bought I paid about four cents for them.

Q. Cut? A. I think so.

Q. And you got three cents when they were sold? A. No; that is for the whole stick. They cut them by the piece and sell them by the foot.

Q. You cut them by the piece and sell them by 30 the foot? A. Yes, sir.

Q. About how many feet in a piece? A. Well, it varies according to the length of the timber.

Q. Well, on an average? A. It costs just as much to cut a ten-foot one as it does thirty, by the piece.

Q. Do you say it would cost around forty-five dollars to prepare those mine props, per carload?

A. No; I would not think so.

William H. Widenor—Cross

Q. How much in 1924, in February? A. I do not know exactly. That would depend upon the size of the car.

Q. How much would it have cost for the carloads that you saw on Mr. Mueller's property?

10 A. I suppose twenty-five dollars or something like that, I should think, on a guess; maybe a little more or less.

Q. Did you measure the timber there? A. We measured some of it.

Q. How did you arrive at this estimate of two hundred dollars? A. We measured about one third of it probably and then we divided the difference between the longs and shorts and counted
20 them all one length and counted the number of pieces.

Q. Who do you mean by "we"? A. This fellow that was with us. I forget his name now.

Mr. Roseberry: Race.

Witness: Yes, sir.

Q. Paul Race? A. Yes, sir.

Q. And Mr. Sarson? A. Yes, sir.

Q. Who suggested the price of two hundred
30 dollars? A. That is about what it figured out, I think. I think it was about two hundred.

Mr. Smith: That is all.

Paul S. Race—Direct, Cross

PAUL S. RACE, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. You were along with Mr. Sarson and Mr. Widenor when the value of these mine props was
10 fixed? A. Yes, sir.

Q. How long have you been in the lumber business? A. I was in the lumber business for about five years.

Q. Buying and selling? A. Yes.

Q. Did you know, about this time, the value of timber that was cut? A. Yes, sir.

Q. That is, of mining props? A. Yes, sir.

Q. Had you bought and sold? A. Yes.

Q. You saw these mining props on these forty-
20 three acres? A. Yes, sir.

Q. What was your estimate of the value of those mine props? A. Two hundred dollars, approximately.

Q. That is there? A. Yes, sir.

Mr. Roseberry: Cross-examine.

CROSS-EXAMINATION by Mr. Smith:

Q. That was without hauling them or loading
30 them? A. That was the value of the props themselves.

Q. Just as they lay there? A. As they were left. That is the value of the timber there on the job.

Q. That did not include any cost of hauling? A. We did not enter into that. We estimated the value of the lumber.

Paul S. Race—Cross

By the Court:

Q. As it laid on the ground? A. We estimated the total value of the lumber.

Q. As it laid on the ground, there? A. No; as it was moved down at the cars.

10

By Mr. Smith:

Q. So that is the value of it as it was moved to the car, two hundred dollars? A. If I remember correctly; yes.

Q. How much would it cost to move it down there; how much of the total cost of two hundred dollars would it be? A. Well, that would vary with the man's equipment. I could not say.

20

Q. Could you estimate the cost—You know where this is located, with reference to the Broadway railroad station of the D., L. & W.? A. Yes, sir.

Q. Can you estimate about the percentage the cost of hauling it down to the railroad station would be? A. Well, on six-inch props I used to haul on an average of about seven hundred feet to a load.

30

Q. How many loads in a car? A. I loaded a little better than six thousand feet in a carload of six-inch.

Q. So that it took about nine loads to take six-inch props down there, and nine times seven hundred would be sixty-three hundred? A. Yes, sir.

Q. That would be hauled by wagon? A. Yes, sir.

Q. How far is that lot from the Broadway station, as near as you can tell? A. I did not measure it. I won't estimate it.

40

Q. You can estimate it. A. I would prefer

Paul S. Race—Cross

not, because I do not know the distance. I have been over it a number of times but I never hauled over it.

By the Court:

Q. Can't you tell us how much it would cost approximately to cart that lumber from where it laid to Broadway? A. Why I can give you my idea of it. 10

Q. That is what we want.

Mr. Roseberry: I object to his idea. He says he does not know the distance.

The Court: He may not know the distance but he can give the approximate cost of the moving of it. I do not know how else you will get at it in this case. He is your witness and he says that the value is two hundred dollars less the hauling. If you do not want him to testify to it I am perfectly willing that he should not testify to it. Do you want it answered, Judge Roseberry? 20

Mr. Roseberry: I object to his speculating on it.

The Court: Are you going to give us testimony as to what it cost? Here is this witness who says that the value of the ties or whatever you call them is two hundred dollars less the hauling. I am asking if he can tell us what the hauling is. If you do not want him to answer I will not let him answer. 30

Mr. Roseberry: I object to his speculating on the cost unless they estimated the cost at this time. 40

Paul S. Race—Re-direct

The Court: Then you need not answer.
Mr. Smith: That is all.

RE-DIRECT EXAMINATION by Mr. Roseberry:

10 Q. Mr. Race, you testified before, on the other case? A. Yes, sir.

Q. And you testified at that time that you went there with these three men and that the value was estimated on the ground to be two hundred dollars, did you not? A. Yes, sir.

Q. Why did you change your testimony now? A. I do not know as I am changing my testimony. The value of that timber was two hundred dollars.

20 Q. On the ground? A. It was two hundred dollars, the way we estimated the full value of the timber. We did not consider whether it was on the ground or—

Q. You went to look at these mining props on the ground, didn't you? A. Yes, sir.

Q. And you estimated a value of that timber on the ground, didn't you?

30 Mr. Smith: Objected to as improper re-direct examination. He is cross-examining his own witness.

The Court: Objection sustained.

Mr. Roseberry: I did not know that this witness was going to testify any different from what he did before and, therefore, I think that I ought to be allowed by the Court to question him on what he testified to before and why he changed it?

40 The Witness: Your Honor, it has been four years past by, and at that time I was

Joseph R. Thatcher—Direct

able to give a definite conclusive answer as to what was what, but a lot of water has passed by since that time and I am a little bit indefinite as to just what we had estimated it then. I remember the price was estimated at two hundred dollars. 10

The Court: Well, you testified to that.

Mr. Roseberry: That is all.

JOSEPH R. THATCHER, sworn for the plaintiff.

Direct-examination by Mr. Roseberry: 20

Q. Mr. Thatcher, you reside at Washington, do you? A. Yes, sir.

Q. Just look at that paper and see if that is your signature to it? A. Yes, sir.

Q. Did you serve that paper upon Mr. Mueller? A. Yes, sir.

Q. Where? A. At his home near Broadway.

Q. On what date? A. The fifteenth day of February 1924.

Q. What did he say? A. I read it to him. I 30 went up there and he was chopping wood or doing something and I read it to him and he stood there and listened and he said, "Well, read it." So I stood there a few minutes and pretty soon he says, "Who are you?" He bawled out at me, and I thought it was about time to get away, and that is all there was to it. I told him who I was; that is all.

Q. That is the notice marked Exhibit P-4, 40

Joseph R. Thatcher—Cross

served on behalf of Mr. Sarson, making a demand for the timber? A. Yes, sir.

Mr. Roseberry: That is all.

CROSS-EXAMINATION by Mr. Smith:

10 Q. You gave it to the son after you had read it, didn't you? A. Yes. I am not positive, but I think I handed it to him or he handed it to the son and said, "Read it."

Q. Do you remember the son reading it? A. He did not say a word. He did not read anything out.

Q. Do you remember testifying at the last hearing of this case, on the first trial? A. Yes, sir.

20 Q. Didn't you testify then—(indicating) This is the son Oscar, who stood there, isn't it? A. I do not know. I think there were two of them.

Q. Didn't you testify then the son started to read it? A. He was reading it, and the old gentleman said, "Who are you?" That is all he said, but he said it in a rough way and I thought I would best move on.

Q. Was there anyone with you? A. A man named Shaffer.

30 Q. Didn't you testify at the last trial "He didn't say anything. He turned and handed it back to his son. He said, read it, and left the son reading it?" A. Yes, sir, he was reading it when I left and he had it in his hand a very little time when the old gentleman spoke and said, "Who are you?" He did not say a word, other than that.

Q. And you did not wait for any other answer? A. No, sir. I was told to serve the notice which 40 was all I did.

Q. But you waited for no answer? A. No.

Mr. Smith: That is all.

Hamlin A. Gardner—Direct

HAMLIN A. GARDNER, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. Mr. Gardner, you reside at Hackettstown, do you not? A. Yes, sir. 10

Q. And are in the lumber business? A. Yes, sir.

Q. How long have you been in it? A. Forty-five years.

Q. Buying and selling timber? A. Yes, sir.

Q. Do you know the market value of timber? A. Yes, sir, rough timber.

Q. Do you know the market value of mine props? A. Yes, sir. 20

Q. Where do you sell your mine props? A. Glen Olan Coal Company.

Q. At Scranton? A. Yes, sir.

Q. What was the condition of the market during the strike at the coal mines in Scranton in 1922 and 1923?

Mr. Smith: I object to that as irrelevant and immaterial.

The Court: I do not see the materiality of it. The testimony was so far that Mr. 30 Sarson did not cut any on account of the strike.

Mr. Roseberry: Yes, and I want to support his testimony by that of Mr. Gardner, that the times were hard and there was an incentive for him to go easy on account of the hardness of the times, on account of the strike. That is the reason he gave and I want to prove by disinter- 40

Hamlin A. Gardner—Direct

ested parties that such conditions were true.

The Court: That there was a strike? Well, he may answer.

10 Mr. Smith: Well, if the Court please, I would like to press the objection on the ground that, suppose there was no market at all for it, this man contracted to buy and cut this timber, and how would that bind Mr. Mueller?

The Court: I do not think it would bind him.

Mr. Smith: I pray an exception.

(Last question read.)

20 A. There was no market at all for props at that time during the strike.

Q. Did you ever load any mine props at Broadway? A. No, sir.

Q. Do you know what it costs apiece to cut mine props? A. I generally had mine cut by the hundred.

Q. By the hundred feet? A. Yes.

Mr. Smith: "Hundred feet"?

30 The Witness: Yes, sir.

Q. In 1924, what were you getting for eight-inch and ten-inch props? A. Six and eight cents.

Q. For ten-inch? A. Eight cents for ten-inch.

Q. What were you getting for six-inch? A. Three cents.

Mr. Roseberry: That is all.

Mr. Smith: No questions.

Edward W. Snook—Direct

EDWARD W. SNOOK, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. Mr. Snook, did you ever haul any logs for Mr. Mueller? A. Yes, sir.

Q. When was that? A. Well, to my recollection, I think it was 1923. 10

Q. What were the logs? A. Well, some of them were poplars and some of them were chestnuts that had been cut for quite a while.

Q. In 1923—do you remember where you got the poplars? A. Well, the poplars were down by the house.

Q. Were they on the tract of Mr. Sarson at that time? A. Yes, sir. 20

Q. Where was the other timber? A. The chestnuts laid up along the fence near the house.

Q. Were they cut? A. Yes.

Q. Do you remember how many poplars there were? A. No; I could not say at this time. They all went in together.

Q. Do you know how many feet they made? A. Fourteen hundred feet of poplars and chestnuts together.

Q. And how much were they worth? 30

Mr. Smith: I object to what they were worth in 1923 in different kinds of wood.

Q. How much was the poplar worth?

Mr. Smith: I object.

The Court: Objection sustained.

Q. You hauled those off for Mr. Mueller to the saw mill? A. Yes, sir. 40

Edward W. Snook—Cross, Re-direct

Q. And hauled them back for Mr. Mueller? A. Hauled the lumber back after it was sawed up, yes, sir.

Q. And delivered them to him? A. Yes, sir.

Q. You knew the lot that Mr. Sarson was cutting on, did you not? A. Yes, sir.

Q. Was this timber on that lot or not? A. Yes.

Mr. Roseberry: Cross-examine.

CROSS-EXAMINATION by Mr. Smith:

Q. Do you know whose property that is where they were cut? A. The logs you have reference to, that I took away—well, I suppose it was the property that was sold to Mr. Mueller.

20 Q. Wasn't that on what he calls his house lot, where those poplars were? A. No. Those poplars were about where he put up a new building.

Q. And that is how far away from his house? A. Well, roughly guessing, I would say it was fifty to seventy-five feet.

Q. You do not know from whom he bought that property or who owned it? A. No.

Q. You do not know whether that was included in this forty-three-acre tract, or not, do you? A. 30 No; I could not say that.

Mr. Smith: That is all.

RE-DIRECT EXAMINATION by Mr. Roseberry:

Q. You know where the forty-three-acre tract ran did you not? A. Well, approximately, but I have nothing to positively show. I suppose that 40 was the tract.

Edward W. Snook—Re-direct

Q. Didn't you know that it ran up within twenty-five feet of Mr. Mueller's garage or house? A. Well, this ground—I could not say just whether that was included in the survey or not.

Q. Hadn't you seen Mr. Sarson take timber 10 from that portion of it? A. Not right there.

Q. Well, right close by? A. Where he took timber I should say was eight hundred feet from there, six to eight hundred feet.

Q. Where was this chestnut that he took? A. That was up along the fence.

Q. That was on Mr. Sarson's tract, was it not? A. On this tract that I suppose went with it.

Q. How far away from the house? A. Well, I 20 would say—from the house, I could not exactly say, but I should say it lay about from twenty to twenty-five feet from the fence.

Q. From the house about how far was it? A. Well, it laid up the hill—

Q. A hundred yards? A. No, I do not think so.

Q. Fifty yards? A. I should say so; yes, sir.

The Court How is this material, Judge 30 Roseberry?

Mr. Roseberry: We want to show that he took our timber; that is all.

The Court: This action now is confined to the value of the cut timber. Now there was no timber cut, as I remember the testimony of the plaintiff, in 1923.

Mr. Roseberry: Yes; there was timber cut by the plaintiff in 1923. He stopped in February 1924. He quit on the eighth of 40 February 1924.

Discussion

The Court: Yes, but he went to see Mr. Mueller in 1923 in regard to an extension, because there was a mine strike and he did not cut any timber in that year. The timber he cut was a few weeks before the expiration of this agreement in 1924.

10

Mr. Roseberry: He said that when he made this agreement for one year he gave him the poplars. Now we have shown that he took the poplars. That is what it is for.

The Court: I was wondering about the materiality of this chestnut.

Mr. Roseberry: Well, the chestnut—

20

The Court: Well, it does not make any difference anyway.

Mr. Roseberry: That is all. We rest. These papers have been offered in evidence, have they not?

The Court: Yes.

30

Mr. Smith: If the Court please, I would like to make a motion in this case for a nonsuit on the ground they have not proven any breach of a valid contract at any time upon which an action to recover damages can be sustained. The only agreement has been a verbal agreement which altered the terms of performance of an agreement which the law required to be in writing, and that cannot be the basis of an action to recover.

(After discussion.)

40

The Court: I will deny the motion and grant an exception.

William Mueller—Direct

WILLIAM MUELLER, the defendant, sworn.

Direct-examination by Mr. Smith:

Q. Where do you live? A. Broadway, New Jersey.

Mr. Smith: I have sent for Mr. Dahlke, 10 a member of the bar who I think will expedite the testimony of this witness. The witness does not speak very good English.

The Court: Yes.

Q. How old are you? A. Fifty-five.

Q. Who lives with you at Broadway? A. My family.

Q. Who are in your family? A. My five sons.

Q. And your wife? A. Yes. 20

Q. Now, do you live in a home that you own up there near these wood lots? A. Yes, sir.

Q. How long have you owned this home? A. 1908.

Q. How much land is there where your house is built? A. Three and a half acres.

Q. Now is there another tract nearby there, nearby your house in addition to that three and a half acres that is cleared? A. No; it is not all cleared. I got a piece of woods. 30

Q. That is part of the three and a half acres, this woods? A. Yes, sir.

Q. Was there any other land that was cleared there before 1922 beside that three and a half acre tract? A. No.

Q. Now, in 1922, did you sign this agreement, Exhibit P-1? A. Yes.

Q. Who wrote that agreement out? A. Mr. Sarson. 40

William Mueller—Direct

Q. This is in Mr. Sarson's handwriting? A. Yes, sir.

Q. Now where are the forty-three acres referred to in this contract, with reference to your house? A. I cannot get that.

10 (Mr. John H. Dahlke was sworn as interpreter.)

(Examination of the witness continued through the interpreter.)

(Previous question read as follows):
"Now where are the forty-three acres referred to in this contract, with reference to your house?"

20 The Witness: This land adjoins my other land.

Q. Did you have a conversation with Mr. Sarson in 1923 with reference to this contract for the removal of timber? A. No. Mr. Cooper was at my place and brought Mr. Sarson along.

Q. Did you have a conversation at that time? A. Yes.

Q. What was said at that time? A. The whole conversation related to the tops of trees. Mr. 30 Cooper wanted the tops. I insisted that the tops were mine; and for that reason Mr. Cooper wanted to make an arrangement with me to take them.

Q. Did you have a conversation at any time with Mr. Sarson with reference to extending the time for getting off this timber one year? A. No.

Q. When did he first ask you or say anything to you about extending the time? A. I think it 40 must have been in January, 1924 but the date I do not remember.

William Mueller—Direct

Q. How long before the two-year time period had expired? A. Four or five weeks.

Q. Where were you at the time? A. I went to Phillipsburg with friends.

Q. Where did you have this conversation with Mr. Sarson? A. We overtook Mr. Sarson on the 10 way to Phillipsburg and picked him up.

Q. What was said at that time? A. I told Mr. Sarson that I was not in a humor to talk business at that time.

Q. What was said at that time? Did he come to see you later? A. Yes.

Q. When? A. On a Sunday.

Q. In what month or what year? A. In January, 1924. 20

Q. As I understand, you have said that this was on Sunday. Where did he come to see you? A. In my house.

Q. Now just tell us what Mr. Sarson said to you then. A. He said to me that someone had told him that I would not sign over the contract to him.

Q. Just tell us all that took place and all that was said. A. And Mr. Sarson threatened me and said if I did not sign he would make me sign. 30

Q. Did he have any paper at the time? A. No.

Q. What do you mean by "signing over a contract"? A. I mean that paper that I signed the first time.

Q. What did he want you to do? A. To sign over the contract to him.

Q. Did Mr. Sarson ask you for a year's extension at that time? 40

William Mueller—Direct

Mr. Roseberry: Objected to as leading.

The Court: Yes; I think that is leading.

Mr. Smith: If the Court please, I think it is very proper in rebuttal of these two questions he testified to before.

10 The Court: Yes, but I do not think it is strictly rebuttal.

Q. Just tell us in detail what Mr. Sarson said.

A. He said that if I did not sign over he would make me sign over. Thereupon I granted him two months. Mr. Sarson said "That won't do."

Q. Was anything else said at that time? A. Mr. Sarson offered to pay one year's taxes. He did not offer me anything more, not my expenses.

20 Q. Was anything else said? If so, just tell us. A. Thereupon Mr. Sarson left the house and said "It will give a lawsuit."

Q. Did you in 1923 agree with Mr. Sarson to extend the time for cutting and removing this timber described in this agreement for a period of one year in consideration of or upon his giving poplar trees and permitting you to cut and remove some five poplar trees?

30 Mr. Roseberry: I object to that as leading.

Mr. Smith: If the Court please I have a right to answer that statement there.

The Court: Objection overruled.

Mr. Roseberry: Exception.
(Last question read.)

A. There was no such conversation between Mr. Sarson and me.

40 Q. After this Sunday when you saw Mr. Sar-

William Mueller—Direct

son what did you do? A. I went to Mr. Pierson to ascertain my standing.

Q. Did Mr. Pierson call up, under your instructions, Mr. Sarson on the telephone? A. Yes, sir.

Q. Did you hear Mr. Pierson's talk over the telephone? A. Yes. 10

Q. Could you understand what he said? A. No; I did not understand.

Q. Do you understand English very well? A. No.

Q. How long have you been here in this country? A. Since 1901.

Q. You were German by birth? A. Yes.

Q. What did you direct Mr. Pierson to say to Mr. Sarson? 20

Mr. Roseberry: I object to that, your Honor.

The Court: On what ground?

Mr. Roseberry: On the ground Mr. Pierson was acting as his agent and he told Mr. Pierson in English what to say and Mr. Pierson said it. Now he cannot contradict the man who was acting as his agent in a matter of that kind.

Mr. Smith: I am not sure it is contradiction, if the Court please, but I do feel that since Mr. Roseberry has presented Mr. Pierson as his witness for this purpose that we have a right to present the principal in the matter to see if that was done. I think we have a right to show exactly what was said. 30

The Court: I will sustain the objection.

Mr. Smith: I pray an exception. 40

The Court: Yes.

William Mueller—Direct

Q. After you went to Mr. Pierson's office that night, what did you do next? A. I think two nights later I signed a note.

Q. I show you this notice here and ask you if this paper marked Exhibit P-3 is the notice that
10 you signed? A. Yes.

Q. To whom was this given? A. I gave it to my wife.

Q. When did you next see Mr. Sarson after that? A. In Squire Pierson's office.

Q. How long after this notice was served? A. The same day.

Q. Who was there at Mr. Pierson's office beside yourself? A. I and my son and Mr. Sarson.

20 Q. Was Mr. Pierson in the office? A. Yes.

Q. Your son was there? A. Yes.

Q. Which son was there? A. (Indicating) This one.

Q. Oscar? A. Yes.

Q. You have more than one son, have you?

The Court: "Five" he said.

Q. What did Mr. Sarson say and what took place that night? A. He asked me for one day
30 and I said, "Yes".

Q. He asked you for one day—state whether or not he said what he wanted to do. A. He wanted to haul wood out of the woods.

Q. What kind of wood? A. I could not say that as I did not see it.

Q. State whether or not Mr. Sarson referred to down timber? A. That I don't know.

Q. What did you say to him? A. I said,
40 "Yes; you can haul," and with that Mr. Sarson

William Mueller—Direct

went out and then again stuck his head in the door and said, "That is all."

Q. Did Mr. Sarson say to you that night, "Do you want me to quit?" A. No. Nothing was said of that kind.

Q. Did you ever refuse him permission to haul
10 the cut timber from the woodlot of forty-three acres?

The Court: Do you mean prior to the notice, Mr. Smith?

Mr. Smith: Well, I might as well say that I do not construe this notice as a refusal. I asked at any time whether he ever refused him.

The Court: Very well. 20

Mr. Roseberry: I object to that because it is a leading question.

The Court: Objection overruled.

Mr. Roseberry: I pray an exception your Honor.

The Court: You may have an exception.

A. I have never forbidden him anything.

Q. Do you know whether there are mine props on the woodlot of forty-three acres that were left
30 there after the two years had expired, by Mr. Sarson? A. Yes.

Q. Have you taken or used any of those mine props that were cut and left there by Mr. Sarson? A. Nothing whatever, not a particle.

Q. Have you in any way touched them or done anything with reference to those mine props that were cut and that remained on the woodlot? A. No; I did not even look at them.

Q. Did any member of your family at your
40 direction touch them? A. Not that I know of.

William Mueller—Cross

Q. Do you claim ownership in those cut mine props?

Mr. Roseberry: Objected to.

The Court: Objection sustained.

10 Mr. Smith: If the Court please, I pray an exception on the ground that I think he has a right to assert whether he does claim now or did at any time. The only way to prove it is by his own actions in the matter.

The Court: Objection sustained.

Q. Did you cut any poplar trees on the forty-three-acre wood lot? A. Yes. I cut one tree, and to this Mr. Sarson gave his consent.

20 Q. When was that? A. I cannot say to a certainty the year or the month, but it was when I built my garage.

Q. When was that, with reference to the making of this contract? A. That was when Mr. Sarson came there and said to me that he had no use for that poplar tree.

Mr. Smith: That is all. Cross-examine.

CROSS-EXAMINATION by Mr. Roseberry:

30 Q. You testified on the trial before in these words, "I paid Mr. Sarson one hundred and fifty dollars for the land, and to pay the taxes." That is on this forty-three acres—did you not? A. Yes; that is so.

Q. Now, didn't Mr. Sarson get in your automobile at your house when you went to Phillipsburg or Easton? A. Yes. He went along. I sat in the front and Mr. Sarson in behind.

40 Q. You went to Phillipsburg. Do you know

William Mueller—Cross

how Mr. Sarson got home? A. No, I don't know that.

Q. Did Mr. Sarson say anything to you about an extension of one year or about extending the time at all? A. No. He did not say that, and I said to him that I was not in any humor to talk 10 business to him.

Q. What business did he want to talk with you, Mr. Mueller? A. I don't know, but I think it was concerning the wood.

Q. What about the wood? What about the wood that Mr. Sarson wanted to talk about? A. I don't know that.

Q. Did he say anything to you about there being a strike in the coal mines at Scranton? A. 20 No.

Q. What did you talk about when you went to Phillipsburg? A. I did not speak to him.

Q. How did he happen to get into your automobile to go to Phillipsburg? A. We met him on the way to Phillipsburg and he spoke and I asked him to get into the second car.

Q. Didn't you say a while ago that he got in at the house? A. No.

Q. Was Mr. Sarson walking to Easton? A. 30 No. I met him at the canal bridge, near my house.

Q. That was off of the main road that runs to Easton? A. Yes, it was. It was on the road that goes from the main way to my house.

Q. You knew at that time that Mr. Sarson was about seventy-eight years of age, didn't you? A. Yes. It could be so. I don't know that.

The Court: Seventy-eight in 1923?

Mr. Roseberry: He is eighty-one now. 40

William Mueller—Cross

He could not be much of a walker at that age.

Q. Did Mr. Sarson tell you at that time what he was going to Phillipsburg for? A. No.

10 Q. On the former trial you were asked this question: "Q. When did you give two months extension if he would make no trouble for you?" And your answer was, "Yes in January, in my house, and a little later in Mr. Pierson's office." Did you say that? A. Yes. I told Mr. Pierson that I was willing to give him two months if he would make me no trouble.

20 Q. Now when he came to your house Mr. Sarson said that he heard you would not give him any extension of time, would not give him a year's extension of time, did he not? A. Yes; Mr. Sarson said that.

Q. And Mr. Sarson was angry about it, was he not? A. I cannot say that. I do not have such knowledge of personality.

Q. You said on the former trial you went to see Mr. Sarson something about the taxes, did you not? A. Yes.

30 Q. Why did you go to see him about the taxes when you agreed to pay the taxes when you bought the property and paid a hundred and fifty dollars for it? A. I did not have any taxes to pay then. That was a year later.

40 Q. Well, I ask you, a year later, why you went to him and asked him to pay the taxes on the property when you had agreed to pay the taxes when you bought the property of him and paid him one hundred and fifty dollars for it? A. I had received the tax bill and I had laid out the

William Mueller—Cross

money for it and I went to Mr. Sarson to pay it.

Q. After he had agreed to pay the taxes when he bought the place? A. I do not understand that.

Q. When he bought the place he agreed to pay the taxes. Now why did he go to Mr. Sarson and 10 ask him to pay the taxes for this particular year? A. I did not promise Mr. Sarson to pay the taxes. He offered to me to pay half the tax.

Q. Did you go there for half of the taxes? A. Yes. I went but I received nothing from him.

Q. Now where did he go to?

The Interpreter: Meaning Mr. Sarson?

Mr. Roseberry: No. Where did he go to when he went to Mr. Sarson's? 20

A. To his house.

Q. Was the tax talked about when Mr. Sarson was at your house, when your wife and son were there and you talked about the two months' extension? A. Yes; the tax was spoken about.

Q. Was that the tax that you went to see Mr. Sarson about? A. Yes.

Q. After you went to see Mr. Sarson—was that before you saw Mr. Pierson or afterward? A. I 30 think that was much earlier. It was in 1923 as I received the first tax bill.

Q. And it was after that that you also spoke about the taxes at your house? A. Yes. Mr. Sarson and I talked about it.

Q. And it was before that you went to Mr. Sarson to have him pay the tax?

The Interpreter: The witness says he does not understand the question. 40

William Mueller—Cross

Q. Before Mr. Sarson came to your house you had gone to Mr. Sarson's house and asked him to pay half the taxes? A. Yes. In 1923 I went to Mr. Sarson's.

10 Q. Did you say that you did not understand what Mr. Pierson was saying over the telephone to Mr. Sarson, that you had said? A. Yes. I did not understand that.

Q. Didn't you say in your former testimony "Q. When did you give the two months' extension if he would make no trouble for you? A. Yes, in January, in my house, and a little later in Mr. Pierson's office." Now, do you say, in the face of that, that you did not understand what Mr. 20 Pierson said?

Mr. Smith: If the Court please, I object to that question in the present form.

(Last question read.)

Mr. Smith: I object to that question in its present form, because it really asks two questions.

The Court: Yes. You may reframe the question, Judge Roseberry.

30 Mr. Roseberry: May it please your Honor, counsel on the other side is mistaken about my two questions. It is only one question. I said—

The Court: Just reframe the question and we will go on from there.

Q. You said on the former trial, to a question asked you, "Yes, in January, in my house, and a little later in Mr. Pierson's office"—that you 40 would give him two months' extension of time.

William Mueller—Cross

Now, if you did not understand what Mr. Pierson said why did you testify to that on the former trial?

Mr. Smith: If the Court please I object to that as argumentative. I do not think that is proper. He can argue that to the 10 jury.

The Court: The question is allowed.

A. Yes; I said to Mr. Sarson in my house and in Mr. Pierson's office that I would be willing to give the two months' extension.

Q. After the interview—

Mr. Smith: Just a minute please. I understood him to say that he said that he 20 would make no trouble.

The Interpreter: He may have added that.

Mr. Roseberry: I object to Mr. Smith putting additions to the answers of the witness.

The Court: It will not go in.

Mr. Smith: All right.

Q. After this interview at your house with Mr. Sarson when Mr. Sarson was angry, about the 30 year's extension, did Mr. Sarson put on any additional men and teams to take off the timber? A. I don't know that.

Q. This tract of land was directly in front of your house, was it not? A. When I drove away in the morning at seven o'clock and return at night at seven o'clock I cannot see what is going on there.

Q. Didn't your wife or boy tell you that they 40

William Mueller—Re-direct

were cutting with a large number of men there, and five teams?

Mr. Smith: I object to that as immaterial.

10 Mr. Roseberry: I think it is all right to show Mr. Sarson started to take it off as rapidly as he could.

The Court: You may answer the question.

Mr. Smith: I object to it as hearsay, and I pray an exception.

The Court: Yes.

A. It may be so but I do not recall.

20 Q. Did Mr. Sarson ever make any trouble for you? A. I have never had anything to do with Mr. Sarson before.

Mr. Roseberry: That is all.

RE-DIRECT EXAMINATION by Mr. Smith:

Q. Did Mr. Sarson make any trouble for you since that conversation?

30 Mr. Roseberry: I object to that, because that is a leading question. He is his witness and he has not that latitude on direct-examination.

The Court: I do not see how it is material whether he ever made any trouble before or after.

Mr. Smith: If the Court please, if this was an additional ground, as the witness has testified—

40 The Court: Do you mean to say that would be any consideration?

William Mueller—Re-direct

Mr. Smith: No, but if the proposition under which this was granted was that he was to make no trouble—

Mr. Roseberry: He stopped him before that ever occurred. He gave notice to quit and keep off his premises. 10

The Court: He may answer the question.

Mr. Roseberry: I pray an exception.

The Court: Yes.

(Last question read.)

A. He had threatened me in my house and brought me before the Court.

Q. In this suit? A. Yes.

Q. Now where was this contract signed, Exhibit P-1, where was that signed? 20

Mr. Roseberry: I object to that because it is not part of the re-direct examination.

Mr. Smith: I would like to ask permission to ask it.

The Court: You may ask it.

A. This contract was made in Phillipsburg, at Mr. Van Billiard's office. I said to Mr. Sarson at the time when—

30 The Court: No. You have answered the question.

Q. I show you a piece of paper signed "William Mueller" and endorsed on the back "George W. Sarson" and ask you whether this piece of paper was signed at the same time?

Mr. Roseberry: I object to that. What is that piece of paper? 40

Discussion

The Court: What is the purpose of this, Mr. Smith?

10 Mr. Smith: Mr. Roseberry seems to have gone out of the way to bring out that this man paid—he said “Didn’t you say at the last trial that you paid one hundred and fifty dollars?” He has opened up this matter. We have a right, if the Court please, to explain to this jury any new matter that he brings out. I could not object to that and I want to explain how the hundred and fifty dollars was paid.

The Court: What difference does it make?

20 Mr. Smith: I do not want the jury to have the idea the man at a former trial did say something else.

Mr. Roseberry: I object.

The Court: Objection sustained.

Mr. Smith: I pray an exception.

The Court: You may have an exception.

Mr. Smith: That is all.

30 (Adjourned until Tuesday, March sixth, 1928, at 10 o’clock in the forenoon.)

Oscar Mueller—Direct

Belvidere, N. J., March 6th, 1928.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.) 10

OSCAR MUELLER, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. Mr. Mueller, how old are you? A. I will be twenty-three in October.

Q. Where do you live? A. Broadway.

Q. What is your business? A. I work at the Edison Portland Cement Company. 20

Q. And you have been living with your parents at Broadway? A. Yes, sir.

Q. You really live on the road leading to Montanna, back from Broadway? A. Yes.

Q. You recall the day when Mr. Sarson went to Phillipsburg with your father in the automobile? A. I do not recall that. I do not think I saw him that day.

Q. Were you living there in 1922 when this contract was first made? A. I was. 30

Q. Do you know when the first timber was cut by Mr. Sarson? A. Well, the first I know of is what Mr. Cooper cut.

Q. When did he cut timber? A. In 1923 I believe.

Q. What part of 1923? A. I do not know just what part of 1923 it was.

Q. Was it the early part, in the winter? Never mind. Was all the timber he cut hauled away 40 from the tract? A. I cannot say that.

Oscar Mueller—Direct

Q. Did you go on the woodlots at that time? A. I have been through, yes.

Q. Do you recall the day when Mr. Sarson came to your father's house in 1924? A. I do.

Q. What day of the week was it? A. On Sunday.
10 day.

Q. Who all was there at that time? A. My father and mother and one or two of my brothers.

Q. Do you recall which brothers they were? A. I won't say which brothers they were.

Q. What time of the day was it that he came? A. In the afternoon.

Q. Tell us what happened and what was said at that time. A. Mr. Sarson came to the house
20 and he wanted my father to give him an extension of time and wanted him to sign a contract and they were talking about paying the taxes and Mr. Sarson asked for a year extension and my father said he would give him two months' extension provided he paid the taxes and made no trouble.

Q. What else did he say, if anything? A. Mr. Sarson gave no answer to that, but when he left the house he said there would be a lawsuit.

30 Q. Was there anything said about signing? A. He said—Mr. Sarson said, "I had a case like this before with a man, and if you don't sign I will make you sign."

Q. Did Mr. Sarson agree to pay any taxes? A. He agreed to pay the taxes if my dad would give him a year's extension.

Q. What was said by your father to that? A. My dad was not willing to give him a year's extension.
40 sion.

Oscar Mueller—Direct

Q. Did you go to Mr. Pierson's office with your father? A. I did.

Q. When. A. Why, a few days before the contract expired.

Q. The contract expired on the sixth of February, 1924. What time did you go to Mr. Pierson's
10 office, what time of the day? A. At night, after supper.

Q. Is this office in Washington, New Jersey? A. Yes, sir.

Q. Who went with you at that time? A. My father and mother.

Q. Did anybody call on the telephone? A. I think Mr. Pierson did.

Q. At whose request did he telephone? A. At
20 my father's.

Q. What happened after that? A. What do you mean, the same evening?

Q. Yes, after the time expired, what happened? A. We had Mr. Pierson write a notice to hand to Mr. Sarson.

Q. How long after the time expired? A. I think a day after the time expired.

Q. Were you with your father at the time that that notice was prepared? A. Not with my
30 father.

Q. With your mother? A. With my mother.

Q. What was done with that notice? A. It was taken home.

Q. Do you know what happened after that? A. My father signed it and my mother gave it to Mr. Sarson.

Q. Were you at Mr. Pierson's after the notice was served? A. I was.

Oscar Mueller—Direct

Q. What night was it? A. The night after the notice had been served.

Q. What time were you there? A. About around seven o'clock.

Q. Who came there? A. Mr. Sarson.

10 Q. Did you hear the conversation that took place between Mr. Sarson and your father? A. Yes.

Q. What was said? A. We were waiting for Mr. Sarson to come in and he asked my father if he could haul for a day and my father said he could and that was all.

Q. Did Mr. Sarson ask for permission to haul logs out of the public road? A. No.

20 Q. Did he use any words like that at all? A. No.

Q. Did he mention the public road? A. Not at that time.

Q. Did he at any other time? A. No.

Q. Did he say to your father "Do you want me to quit"? A. I did not hear that.

Q. Were you there all the time? A. I was.

Q. Did you hear all that was said? A. I did.

Q. Did your father hesitate before he permitted him or told him he could haul for a day? 30 A. No.

Q. He permitted him to do it right away? A. Yes, sir.

Q. When did you next hear from Mr. Sarson? A. Why, he served that paper, by Mr. Thatcher, on us.

Q. Where were you at the time? A. At home or with my father.

40 Q. Do you remember what day it was? A. I do not remember that.

Oscar Mueller—Direct

Q. Just tell us what happened. A. At that time Mr. Thatcher came up and asked if that was my father or if it was William Mueller and he said "Yes," and he read the notice over to him and handed it to my father and my father handed it to me and I was reading it over but I said nothing 10 to him and Mr. Thatcher went away.

Q. Did your father ask Mr. Thatcher anything? A. I do not think so.

Q. Do you recall his saying, "Who are you?" A. I do not recall that.

Q. Does your father read English? A. I do not think so.

Q. Did you ever see him read English? A. No.

Q. Did you read it to him, that notice? A. I 20 read it to him and I was going to translate it to him in German.

Q. Did you translate it to him? A. I did after Mr. Thatcher had left.

Q. Did you see Mr. Sarson at your father's home after that? A. I did not.

Q. Do you know where those two carloads of cut timber are, on the woodlot? A. I do.

Q. How far are they away from the house? A. It may be a mile, or between three-quarters of a 30 mile and a mile.

Q. It is some distance away? A. Yes, sir.

Q. Have you or any of your family taken any or touched any of the cut timber that was there?

A. No, sir; nobody.

Q. Did you ever take any? A. No.

Q. Have you seen that pile of cut timber since February, 1924? A. Yes, sir.

Q. What is its appearance? A. Well, it lays 40

Oscar Mueller—Cross

there just the same as if it had been cut, practically the same as if it had been cut a couple of years ago.

Q. What about weeds or brush around it? A. The weeds and brush has grown up between it.

10 Q. It still lays there? A. It still remains there.

Q. Did you ever do anything to keep Mr. Sarson from taking off that cut timber?

Mr. Roseberry: I object to that.

The Court: Yes. Objection sustained.

Mr. Smith: I pray an exception.

Q. Do you recall when the poplar trees were
20 cut, that have been referred to here? A. I cannot recall that.

Q. Did you help cut it? A. No.

Q. Where is that, with reference to the house? A. Why, it is between—it would have been between the house and where the garage stands now.

Q. How many poplar trees were cut? A. I do not know that. Only the one that my father says he cut off.

30 Q. You did not cut it yourself? A. No.

Mr. Smith: Cross-examine.

CROSS-EXAMINATION by Mr. Roseberry:

Q. When Mr. Sarson came to your place on that Sunday was he angry? A. Well, after they had talked a while—he was not exactly angry.

Q. Didn't he say he heard your father would not let him have a year's extension? A. Not to
40 my knowledge.

Oscar Mueller—Cross

Q. Were you there all the time? A. I was.

Q. Then he had no agreement there in writing for an extension of time, did he? A. I did not see any.

Q. Nor any writing of any kind—did you? A. No. 10

Q. Then do you testify—or did you testify before that he said he would give him an extension of two months provided he paid the taxes and made no trouble? A. I did.

Q. Did you testify to the question "Then your father gave him an extension of two months, did he not?" Answer: "He gave him an extension of two months to take the timber he had cut off the twenty-six acres provided he made no
20 trouble." Did you testify to that before? A. I must have.

Q. "And then your father gave him an extension of two months did he not?" Answer: "He gave him an extension of two months to take the timber he had cut off the twenty-six acres, provided he made no trouble." "A. He granted him an extension of time." Now, did you testify anything about taxes at that time? A. I think I did. 30

Q. Is it contained there in your answers, in your previous answers that I have just quoted?

Mr. Smith: If the Court please, I object to that because it is obvious that it is not contained in the previous answers.

The Court: He may answer it if he can. (Last question read.)

A. I did. 40

Oscar Mueller—Cross

Q. In the answer I have just read to you?

The Court: I suppose it is obvious.

Q. I will ask you further: "And your father said he had given him an extension of two 10 months?" Answer: "Two months to get the timber off the twenty-six acres." Did you answer that way before? A. I must have.

Q. And you said, "Yes." "I must have if it is in there. As near as I can remember." Did you? A. I must have.

Q. You were at Mr. Pierson's office with your father? A. I was.

Q. When Mr. Pierson telephoned to Mr. Sarson that he could have two months in which to 20 take off the timber cut and down on the nineteen acre tract, and all down timber on the twenty-four acre tract but not all cut or standing timber on that tract—were you there then? A. I was at Mr. Pierson's office.

Q. And you heard that? A. You will have to read that question over again.

Q. I asked you if you were at Mr. Pierson's office when Mr. Pierson telephoned to Mr. Sarson? A. I was at Mr. Pierson's office, but I do 30 not remember—

Q. And your father was there, too? A. I think he was.

Q. Well, don't you know he was? Why, you told your counsel that he was there, so he must have been there then. Did you hear Mr. Pierson tell Mr. Sarson that he could take both the cut timber and the down timber on the nineteen-acre tract—over the telephone? A. I cannot recall 40 that.

Oscar Mueller—Cross

Q. But that he could not cut the standing timber on the twenty-four acre tract but could take the down timber—do you recall that? A. Well, there was something said about taking the down timber on the twenty-six acre tract.

Q. "I asked you if you were there when Mr. 10 Pierson was instructed by your father to telephone to Mr. Sarson that he could have two months to take off the eighteen acres." Your answer was 'Yes, sir; but he didn't give him any answer to that.' 'Did you say that?' 'A. I must have.' 'Q. Question: But you heard Mr. Pierson telephone to Mr. Sarson, didn't you?' 'Answer: 'Yes, sir.' Question: 'That he could have two months further time to take off the eighteen 20 acres?' Answer: 'Yes, sir.' Did you so testify in the other case? A. I must have.'" Is that correct? A. It must be.

Q. Now, you say that Mr. Sarson—what did you say about Mr. Sarson having a day to take off timber? A. He asked for a day to haul.

Q. You are right along that road, aren't you? A. Yes, sir.

Q. And you saw where he hauled from, did you not? A. I did not. 30

Q. You go over that road every day, don't you? A. That is on past our home.

Q. But you go down to Broadway? A. Yes, sir.

Q. You saw these logs laying along side of the road, didn't you? A. No.

Q. You never saw them laying alongside of the road? A. No, sir.

Q. You say that you do not remember Mr. Sar- 40

Oscar Mueller—Cross

son asking to take those logs out of the road?
A. I do not remember that.

Q. Your land extends alongside of the road?
A. No.

Q. Well, your land lays on opposite sides of
10 the road? A. It does not extend right on the road.

Q. Well, you were present there at that interview on that Sunday afternoon, and then you say that you were down with your father at Mr. Pierson's office when he telephoned to Mr. Sarson?
A. Yes.

Q. And you were there when your father was not there but your mother and you were there,
20 when you got this notice written which you served on Mr. Sarson? A. Yes, sir.

Q. You have been all along very much interested in this case, have you not? A. Why, certainly.

Q. And you have been trying to help your father through this case, have you not? A. I have. It is to my interest.

Q. Did you hear Mr. Gunderman on the other trial say that he saw you taking timber down with
30 some kind of a harness on, dragging it down to the woodpile?

Mr. Smith: Objected to as absolutely improper.

The Court: Objection sustained.

Q. Didn't you haul some timber off of this tract down to your woodpile? A. I did not.

Q. After this controversy at the house on the
40 Sunday afternoon, had Mr. Sarson before that

Oscar Mueller—Cross

been cutting very much timber? A. Well, I cannot say that.

Q. Then after that he started in with a number of men and teams, did he not? A. Yes.

Q. Then he started in with a number of men and teams after this interview on this Sabbath day? 10
A. Yes, sir.

Q. And you heard your father tell him that he could have two months to take off this timber if he did not make trouble? Didn't he say that?
A. Yes.

Q. Well, he would not make any trouble. Now, Mr. Sarson, when you went down to Mr. Pierson's and told him that he could only take off one tract and not the other, had not made any trouble, had
20 he? A. He had at the house that Sunday before.

Q. When he left the house that Sunday you say that your father said he could have two months further time to take off the timber on both tracts if he made no trouble? A. Well, he threatened with a—

Q. Now, wait. He left the house, didn't he?
A. Yes, sir.

Q. And went away? A. Yes, sir. 30

Q. Tell us what kind of trouble he made between that time and the time of your and your father's appearance at Mr. Pierson's office. A. He never gave any trouble, I think.

Q. Never mind. Tell us what trouble he gave, if any. A. He made no trouble.

Q. Then after this Sunday you went, without any trouble on Mr. Sarson's part—you went to Mr. Pierson and had him telephone to Mr. Sar- 40

Oscar Mueller—Cross

son that he could have two months further time to take off the nineteen-acre tract of the growing and down timber and take off the down timber on the twenty-six acre tract but not to cut any trees on the twenty-six acre tract—how did your father
10 come to change this statement that he made on the Sabbath day from what he said then to what he said in Mr. Pierson's office?

Mr. Smith: I object to that.

The Court: He may testify if he knows.

A. Well, my father did not want a lawsuit with Mr. Sarson.

Q. So that in the office he told him if he made
20 no trouble he would give him permission to take off the whole tract, standing and down timber. Now, to prevent a lawsuit he went to Mr. Pierson's office and told him he could have the nineteen acre tract but not the twenty-six acre tract. Is that in prevention of a lawsuit?

Mr. Smith: I object to that as argumentative.

The Court: I do not see how it is material, anyway. I will allow it.
30

A. Mr. Sarson never gave any answer to what my father had offered him.

Q. Then why did you change from taking off the two tracts to one tract—why did your father change it, if Mr. Sarson had not done anything?

A. He had threatened with a lawsuit.

Q. Oh, that was all? Why did you change it?

A. We didn't want any trouble with Mr. Sarson.

40 We wanted to see that he came out on his contract with the goods he had got.

Oscar Mueller—Cross

Q. Then the next day or two after that you and your mother went down and got a written notice drawn up by Mr. Pierson? A. We did.

Q. Did you go there by direction of your father? A. I won't hardly say I did. I won't say
10 whether I did or did not.

Q. But you had this notice drawn and took it home and got your father to sign it. Did that express the idea in your mind that you did not want Mr. Sarson to lose anything?

Mr. Smith: I object to that.

The Court: Objection sustained.

Q. Didn't you go there for your father? A. When, that night?
20

Q. When you and your mother went there and got this notice drawn up by Mr. Pierson? A. Did I go there for my father?

Q. Didn't your father know you were going there for that purpose? A. He did.

Q. And you went there for him? A. I went with my mother.

Q. For him? A. I guess I went for him. I won't say I went exactly for him.

Q. Who did you go for then? A. I went with
30 my mother. She is not so good in English and I went there to translate things and tell Mr. Pierson.

Q. You knew your father told her to go there then? A. No, I did not.

Q. What did you suppose you were going there for?

Mr. Smith: I object to that.

The Court: He may answer.
40

Oscar Mueller—Cross

A. Well, I took my mother up in the car and I went with my mother in the office.

Q. Who did the talking to Mr. Pierson? A. My mother and I.

10 Q. And he drew this notice by the direction of you and your mother? A. No.

Q. By whose direction did he draw it then? A. He wrote up the paper and he read it over and my mother said she thought that would be all right.

Q. Didn't you or your mother tell him to do it? A. Not exactly.

Q. Then you took it to your father? A. Yes.

Q. And you read it over to him? A. Yes, sir.

20 Q. And then you told your father to sign it, didn't you? A. I said he had to sign it.

Q. And then because you told him he had to sign it he signed it? A. No, not because I said he had to. He signed it so that it would be legal.

Q. He signed the notice, didn't he? A. Yes, sir.

Q. And you told him he had to sign it? A. So my mother could serve it on Mr. Sarson.

30 Q. And when you testified on the first trial, "Did you know how much lumber there was left there on February 8th, 1924, after Mr. Sarson finished hauling?" A. I did not.

Q. And you answered, "No, sir; I could not tell you." Is that correct? A. Yes, sir.

Q. You did not know, did you? A. No.

Q. Now, on the first trial did you not testify: "Did you hear Mr. Pierson telephone to Mr. Sarson? A. Yes, sir." "Q. And then he could have 40 two months further time to take off the eighteen

Oscar Mueller—Re-direct

acres. A. Yes, sir." You testified to that, didn't you? A. I must have.

Mr. Roseberry: That is all.

RE-DIRECT-EXAMINATION by Mr. Smith: 10

Q. Mr. Mueller, on the first trial, did you testify in answer to a question by the Court "Q. Do you know anything about the two months' extension they talk about? A. I do." Did you so testify at the last trial? A. I must have.

Q. "Q. Were you present then? A. I was, on a Sunday afternoon." Did you so testify? A. I must have.

Q. "Q. Tell us about it. A. He came and wanted the extension of time for a year, and my 20 dad said he had agreed to pay the taxes on the premises and he had not paid no taxes yet. My dad said, 'Well, if you will pay the taxes.' Then he agreed to pay the taxes for a year if my dad would grant him permission for a year, but he didn't say anything about a two months' extension. On a two months' extension he didn't want to pay the taxes." Did you so testify? A. I must have.

30

Mr. Roseberry: I object to that.

The Court: I will let it stand.

Mr. Smith: That is all.

40

Mrs. Gertrude Mueller—Direct

MRS. GERTRUDE MUELLER, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. Mrs. Mueller you are the wife of William
10 Mueller, the defendant in this case? A. Yes, sir.

Q. And you live with him near Montanna? A.
Yes, sir.

Q. Were you present on a Sunday when Mr.
Sarson came to your house, in 1924? A. Yes, sir.

Q. About how long was that before the two
years were up? A. It must have been around
that time.

Q. Were you present at that time when a con-
20 versation took place? A. Yes, sir.

Q. Were you present all the time? A. No, I
do not think so.

Q. Did you hear any part of the conversation?
A. I heard him speak about it.

Q. Just tell us what you heard. A. Well, I
heard about that Mr. Sarson was going to have
the two months. He was talking about that but
I did not pay much attention to them.

Q. Just tell us as nearly as you can what your
30 husband said and what Mr. Sarson said. A. It
is four years; I cannot remember much.

Q. State whether or not anything was said
about taxes. A. My husband said on account of
the tax—Mr. Sarson promised to pay the tax on
account of two years he had the wood contract—
but I could not recall that. It is hard to tell.

Q. Just tell us what you remember. Was Os-
car there at that time? A. Yes, sir.

40 Q. Did you hear Mr. Sarson say anything as he

Mrs. Gertrude Mueller—Cross

left the house? A. Well, I do not remember, at
that time. I was in the kitchen. But I remember
Mr. Mueller come out in the kitchen and my boy
opened the door for Mr. Sarson.

Mr. Smith: Cross-examine.

10

CROSS-EXAMINATION by Mr. Roseberry:

Q. On the former trial you were asked that
question by me—your answer was, “I was in the
house, but I went in and out of the kitchen, you
know. I did not exactly get all that was said
then.” “A. That’s right.” Is that correct?
A. Yes, sir.

Q. Then this question was read to you: “Q.
Didn’t he tell you—that is, your husband— 20
“Didn’t he tell you he telephoned Mr. Sarson he
could have two months more? A. He said some-
thing about that. I don’t remember the words
he said any more, because it is two years.” Did
you answer that? A. I must have.

Q. You and your son went to Mr. Pierson’s to
get this notice drawn, didn’t you?

Mr. Smith: If the Court please, that is
not cross-examination.

30

The Court: Objection sustained.

Q. You are the person that served it on Mr.
Sarson?

Mr. Smith: I object to that.

The Court: Objection sustained.

Q. That is all you know about this case, of
what took place there in the house there that Sun-
day? A. That is all.

40

Marvin A. Pierson—Direct

Q. Is that correct? A. That is all I know.

Q. And that you did not hear, by going in and out from the kitchen, did you? So you do not know much about it, do you? A. Well, what was said there, that I remember.

10 Mr. Roseberry: That is all.

MARVIN A. PIERSON, re-called for the defendant.

Direct-examination by Mr. Smith:

20 Q. Mr. Pierson, were you present in February on the night that Mr. Sarson came to your place, and Mr. Mueller was there? A. Yes, sir.

Q. Who was with Mr. Mueller that night? A. I think the son was there.

Q. Do you recall Mr. Sarson coming in? A. Yes, sir.

Q. Did you hear part of the conversation between Mr. Sarson and Mr. Mueller? A. All of it.

30 Q. What did Mr. Sarson say? A. Mr. Sarson came to the door of the office. I do not think he stepped inside. He just stepped to the door and asked if he could go down with his teams and cart timber for one day.

Q. What was said by Mr. Mueller? A. "Yes."

Q. Was anything else said that you heard? A. Nothing.

Mr. Smith: Cross-examine.

40

Marvin A. Pierson—Cross

CROSS-EXAMINATION by Mr. Roseberry:

Q. Didn't he say that there was some timber along the side of the road that he wanted to take out? A. There was no road mentioned.

Q. No road mentioned at all? A. Not to my knowledge. 10

Q. Didn't you swear to that before? A. I think not.

Q. You were sworn before, weren't you? A. Yes, sir.

The Court: What time was this?

The Witness: I think it was the day after the notice was written, which I think was the seventh of February, as near as I can remember. 20

Q. Then you did not hear Mr. Sarson say—you were talking over the phone when this occurred, weren't you? A. No, sir.

Q. Weren't you talking to somebody over the phone or to somebody there in the office? A. At that time?

Q. Yes. A. Not that I remember of.

Q. Didn't you testify to that on the former trial? A. I think not. 30

Q. You are sure you did not, are you? A. I cannot remember a thing of the kind.

Q. Who all were in the office that night? A. Mr. Mueller and the son. I do not remember whether anyone else was there or not.

Q. "Q. If you were attending to other business he might have said it, might he not? A. The business was very short." A. If I said it it is true, whatever I said there. It was very short. 40

Clarence Warne—Direct

Q. That is in connection with asking to take the logs out of the road that night? A. I did not hear anything about a road.

Q. It is in connection with Mr. Sarson asking to take the logs out of the road.

10 The Court: He said he did not hear it. The witness says he heard no such conversation. Therefore, the question could not be in relation to any question by Mr. Sarson in regard to the road.

Mr. Roseberry: I was asking if he was not attending to other business at the time.

The Court: He says this business was very short.

20 Q. Why did you say to the question "If you were attending to other business he might have said it, might he not?" "The business was very short." Why did you say the business was very short?

Mr. Smith: Objected to as improper.

The Court: Objection sustained.

Mr. Roseberry: That is all.

30

CLARENCE WARNE, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. Where do you live, Mr. Warne? A. Broadway.

40 Q. What business are you engaged in? Timber business.

Clarence Warne—Direct

Q. In the timber business, what do you do? A. I manage it and buy and sell.

Q. Do you buy and sell standing and cut timber? A. Yes, sir.

Q. What is the principal of timber that you sell? A. Mining props and railroad ties. 10

Q. How long have you been engaged in that business? A. 1911 or 1912.

Q. Were you engaged in that business in February, 1924? A. Yes, sir.

Q. Are you familiar with the wood lot where Mr. Mueller lived and owned and which Mr. Sarson bought? A. Yes, sir.

Q. Had you ever cut any timber on that lot? A. No, sir. I hauled some out. 20

Q. When was that? A. I think that was in 1920, 1921 and 1922.

Q. Was that before Mr. Sarson bought the timber? A. Yes, sir.

Q. Do you know whether there is any cut timber on that tract at the present time? A. There is a little.

Q. Where is that situated with reference to Mr. Mueller's house? A. Toward Montanna.

Q. About how far? A. I do not know exactly. 30 A good stretch, three quarters of a mile.

Q. Have you recently examined that timber? A. I measured it up; yes, sir.

Q. Just tell us its present condition, where it is located on the lot.

Mr. Roseberry: I object to that because it is too remote.

Mr. Smith: The purpose is to show where it is located and if there is any of it taken. 40

Clarence Warne—Direct

The Court: There is no testimony by the plaintiff that anything was taken.

Q. Were you able to measure it? A. Yes, sir.

Q. Will you tell us how much cut timber there
10 is.

Mr. Roseberry: I object to that. I think this is very improper. It is five or six years after it occurred. This is 1923 and 1924 that this timber was left there, and now it is March 1928, and it will be five years practically, or four years. In the first place it is too remote. I object to it because it is too remote and it does not allow for timber that might have been taken away by somebody else. If he testified it was the timber that was there at that time it might be proper.
20

The Court: Objection sustained. I will sustain the objection and allow an exception.

Q. Had you ever seen the cut timber previous to that time? A. Yes.

Q. When? A. Every month, and several
30 times through the month.

Q. How near to January or February, 1924, did you see this timber? A. Every month I think I have. I had a wood job, cutting right up above it and I went through the Sarson lot, both lots.

Q. Will you state whether the cut timber on the Mueller lot had been moved or disturbed since February, 1924, when Mr. Sarson left? A. It lays there just the same that he cut it.

40 Q. Did you measure the timber in that cut timber? A. Yes, sir.

Clarence Warne—Direct

Q. When did you do so? A. March 3, 1928.

Q. At that time were you able to get an accurate measurement as to how much timber, how many feet of timber, lay there after February 6th, 1928? A. It all laid there, still.

Mr. Roseberry: I object to that. The
10 testimony is too remote and immaterial.

The Court: Objection overruled.

Q. Now, how much cut timber laid there for examination? A. I put it down on a piece of paper. 309 feet of ten-inch props; 1294 feet of eight-inch props; 3145 feet of six-inch props.

Q. Do you know the market price of mine props in February, 1924? A. I do.
20

Q. Do you know that for the various sizes? A. Yes, sir.

Q. Are those prices loaded on the car at Broadway? A. Yes, sir.

Q. What was the price in February, 1924? A. Three cents for six-inch, six cents for eight-inch and eight cents for ten-inch.

Q. How far is it from where this cut timber is to the railroad station at Broadway? A. Fully two miles.
30

Q. How is the road from the station up to where this is located? A. A pretty fair road. It is up hill.

Q. Where is the cut timber with reference to the road? A. On the side of the mountain.

Q. Would it require much labor in getting it loaded? A. Absolutely. It has got to be gone to to be loaded.

Q. Can you state whether or not in its present
40

Clarence Warne—Direct

location this cut timber would be more or less expensive than ordinarily? A. It is according to the lot you buy. If you bought a lot in the same condition it would be the same.

Q. What kind of a lot is this? A. It is a very
10 bad lot to get it off of.

Q. With reference to the distance for hauling, would it require much or little labor to haul it to the station and load it? A. After you get it to the station it would be the same as any other. The labor on that is practically all the same after you get it out of the woods.

Q. Is the labor getting it on the wagon? A. You have to first cut it. You have to cut it and
20 snake it out and then load it.

Q. How much would it cost to haul and load that timber, the timber that is there, to load it on the wagon and haul it to the Broadway station then to load it on the car at the station so it could be sold for the price you have mentioned? You may state it, per carload, if you want to. A. Well, the labor has got to come out.

Q. Including the labor. A. To cart and cut and load it on the car—

30 Q. What would you estimate it would cost per carload? A. Well, I protect myself as near as I can.

Q. What would the contract price be? A. We generally get sixty or sixty-five per cent of the timber, whatever we have to get.

Q. Do you know the value of that timber in the quantity that you have there as it laid on this wood lot, cut, in February, 1924?

40

Clarence Warne—Cross

Mr. Roseberry: I object to that because the testimony is—he does not know how it was there in 1924.

The Court: He may answer this question.

Mr. Roseberry: I pray an exception. 10

The Court: Yes.

A. Absolutely, I know.

Q. How do you know the value of it? A. I am selling it every day.

Q. Did you observe the quality and the condition of the timber in 1924? A. Absolutely.

Q. What was the value of that timber as it lay there on the woodlot without hauling and load-
20 ing?

Mr. Roseberry: Objected to on the ground he is not qualified to testify as to the value of the timber on that day, from his observation the other day.

The Court: Objection overruled.

Mr. Roseberry: I pray an exception.

The Court: You may have an exception. (Last question read.)

A. Forty per cent. 30

Q. Of the market value? A. Of the market value.

Mr. Smith: Cross-examine.

CROSS-EXAMINATION by Mr. Roseberry:

Q. How long have you been in the timber business? A. Since 1911 or 1912.

Q. And Mr. Sarson during that time has been in the timber business? A. Before I was. 40

Clarence Warne—Cross

Q. You live at Broadway and he lives at Washington? A. Yes, sir.

Q. Many miles apart? A. Four miles.

Q. You were living in the same neighborhood? A. Yes, sir.

10 Q. You were angry at him, weren't you? A. Well, I have a postal card in my pocket that I beat him one time in a lawsuit on something similar to this.

Q. Didn't you in the former case answer this, "One time him and I had trouble when he tried to cheat me out of some labor. I have a postal card in my pocket to use today?" So in your anger at him you brought a postal card here to use
20 against him, did you not? A. I have always thought an awful lot of that postal card.

Q. And you are very angry at Mr. Sarson? A. No.

Q. Why did you bring the postal card then? A. I have done business with him since.

Q. Didn't you take his lumber and didn't he sue you and get judgment against you? A. No, sir. I have a receipt in my pocket.

Q. Didn't he get a judgment against you? A.
30 No, sir, he never did.

Q. When was that lawsuit? A. 1914, I think it is.

Q. Didn't he have a suit against you in 1927? A. He had and he didn't.

Q. Didn't he sue you in 1927 and got a judgment against you? A. No, sir; he did not. I have a receipt to show.

Q. Didn't he get a judgment against you before Squire Sharp? A. The Squire threw the
40 judgment on to the two of us; he had to.

Clarence Warne—Cross

Q. Well, didn't Squire Sharp give judgment in favor of Mr. Sarson and against you? A. Well, the Squire came in with a judgment against two of us.

The Court: No. Did he or did he not?

The Witness: Well, I would call it a half
judgment, because it was interested in the
two of us. 10

Q. Well, he got judgment against you then? A. Yes, sir.

Q. And you are what they call "Powerful mad" at him? A. No, not exactly.

Q. And you have qualified yourself to come here and testify just as hard as you could against Mr. Sarson? A. I got my subpoena Friday
20 night.

Q. That judgment still remains don't it? A. Well it won't some of these days.

Q. Well, it still stands against you? A. It won't some of these days.

Q. Now, you testified that the road from Broadway up to this lot was steep and hard to get up? A. The mountain is very steep.

Q. Is it from Broadway up into the lot? A. 30 You have to go up the mountain.

Q. They haul this timber down from the lot down to Broadway—it is all down hill? A. No. There is a little hill from Broadway over to the station.

Q. It is easy hauling, is it not? A. Ordinary hauling.

Q. And you said that you were nosing around there in 1924? A. I do not know as I said I was
"nosing." 40

Clarence Warne—Cross

Q. Were you around on these other few days since that? A. Yes, sir.

Q. Did you go through it with your teams? A. I go up the road with the teams.

10 Q. Are you sure you did not load a part of this lumber and cart it away? Are you sure you did not take part of Mr. Sarson's lumber in your anger at him? A. I do not think I did.

Q. You are not sure about it, are you? A. Absolutely.

Q. But you kept wide of this lumber did you? A. I knew there was trouble over it.

Q. Did you go there and measure it in 1924? A. No, sir.

20 Q. Is that all on one pile? A. It was scattered around.

Q. It was scattered all over the lot, wasn't it? A. Oh, no.

Q. It was left where it was cut? A. Yes, sir.

Q. Was it kept in one pile? A. No. One tree is cut and another is cut.

Q. They lay on the ground? A. Some of them lays on the ground with one end and up on a rock with the other end.

30 Q. It was laying around? A. It was dotted.

Q. And good for nothing but mine props? A. It is good for nothing today.

Q. Who was with you when you took this measurement? A. Mr. Wolf.

Q. A friend of yours? A. Yes, sir.

Q. Did he have any trouble with Mr. Sarson? A. Not that I know of.

Q. Did you get him? A. Mr. Mueller got him.

40 Q. You went with Mr. Mueller, did you? A.

Clarence Warne—Cross

We made arrangements to go through this timber.

Q. You went with Mr. Mueller and got Mr. Wolf? A. No.

Q. Who went with you? A. Mr. Mueller.

Q. And you went up to measure it, did you?

A. Mr. Mueller came down and got me. 10

Q. Now, you were asked on the former trial, "Did you get any of his props and mining ties?" And your answer was, "I don't think so." A. I told you the same thing a while ago.

Q. Mr. Sarson sued you for taking his timber, when he got that judgment against you before Squire Sharp, did he not? A. He sued lots of people.

Q. I asked you if he did not sue you for taking his timber? A. Well, he had— 20

The Court: Answer the question. You know what the suit was about. You can answer the question yes or no.

The Witness: If you will give me a chance to explain it. He served a paper on me.

Q. You were sued by Mr. Sarson for taking his timber unknown to him, were you not? A. He 30 served a summons on me.

Q. He sued you and got judgment for taking his timber? A. A half judgment.

Q. Well, for taking his timber? A. The Squire held me responsible—

Q. Didn't he sue you for taking his timber, you and someone else? A. He had another man working for him. I bought the timber of him and paid him for it. 40

Clarence Warne—Cross

Q. Didn't he sue you and the other man jointly for taking his timber? A. Yes, sir.

Q. Unknown to him? A. I did not know he owned the timber. I bought the timber of the other man and I paid the other man and got a receipt.

By Mr. Smith:

Q. And the other man's name was— A. Yes, sir.

Q. And he was employed by Mr. Sarson? A. Yes, sir.

Q. And Mr. sold you the timber? A. Yes, sir.

Q. And you bought it? A. Yes, sir.

Q. You did not know whose it was at the time? A. No, sir.

By Mr. Roseberry:

Q. Where was it that you got this timber? A. Over on the Bloomsbury mountain.

Q. Where is the railroad station? A. Washington, Broadway, New Village, Stewartsville, Phillipsburg.

Q. Didn't you circulate around in the neighborhood that you had taken that timber from Allentown? A. No, sir.

Q. Didn't you steal it from Mr. Sarson? A. No, sir.

Q. Did you tell Mr. Sarson that you had bought this of A. Absolutely.

Mr. Smith: If the Court please, I think that is improper.

The Court: Yes. It has been answered.

Q. Didn't you get this timber from the railroad station? A. No, sir.

George W. Wolf—Direct

GEORGE W. WOLF, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. Where do you live, Mr. Wolf? A. Uniontown.

Q. How old are you? A. Forty years old.

Q. What is your business? A. Lumber business.

Q. How long have you been engaged in the lumber business? A. Since I was twelve years old.

Q. You do most of your cutting in and around Scotts Mountain? A. Yes; all over.

Q. You are engaged in the timber business? A. Yes, sir.

The Court: He said he was, for twenty-eight years.

Mr. Roseberry: I would like to ask him a few questions.

The Court: All right.

By Mr. Roseberry:

Q. Has your business been buying and selling lumber? A. Yes, sir.

Q. For how many years? A. For the last ten years, myself.

Q. You have been buying and selling mine props? A. Not much mine props.

Q. Or mining ties? A. Lumber and poles.

Q. You do not know much about mining props then, do you? A. I know quite a bit about it.

Q. Your business has been more ties and logs, has it not? A. Yes, sir.

Q. And bridge timber? A. No, not exactly.

George W. Wolf—Direct

Q. Where do you sell your props? A. Glen Olan Coal Company.

Q. Where? A. Scranton, and all over.

By Mr. Smith:

10 Q. Do you know the market price of mining props, loaded on the car, in February, 1924? A. Well, not then.

Q. Do you recall what the price was in February, 1924?

Mr. Roseberry: He answered it.

The Court: He says he does not know.

20 Q. Have you, since you have been subpoenaed in this case, made investigation to find out the price of mining props in 1924?

Mr. Roseberry: I object to that.

A. Yes, sir.

The Court: He can testify whether or not he made any investigation.

Q. Were you selling mining props in 1924? A. I did not sell any but I can tell you the price just the same.

30 Q. How did you find out the price? A. I always get a list of them.

Q. Circulars? A. Yes, sir.

Q. From whom? A. From the agents.

Q. Is that the price for mining props? A. I haven't got it here but I know it just the same.

Q. By referring to that? A. Yes, sir.

Q. Have you visited this wood lot of Mr. Mueller? A. Yes, sir.

40 Q. When did you go there? A. Saturday, the third.

George W. Wolf—Direct

Q. With whom? A. The boys came after me and I went out with the boys.

Q. Was Mr. Warne along? A. Yes, sir.

Q. Did you measure the cut timber on this tract? A. Yes, sir.

Q. How did you measure it? A. With a steel 10 line.

Q. How much cut timber did you find?

Mr. Roseberry: I object to that. It is too remote.

The Court: Yes, but it is testified the same amount that was there was there in 1924. It is competent for this man to corroborate if he can, the testimony of Mr. 20 Warne as to the amount there present.

Mr. Roseberry: I object to it because it is not asking for the time that these things happened.

The Court: Objection overruled.

Mr. Roseberry: I pray an exception.

The Court: You may have an exception.

A. 309 feet of ten-inch props.

Q. Yes. A. 1,294 feet of eight-inch; 3,145 feet 30 of six-inch props.

Q. Where were those located on this woodlot?

A. Around the mountain, on the right-hand side of the road as you go up from Mr. Mueller's house.

Q. How is the land there, is it level? A. No, it is a hill and rocks.

Q. What would have to be done in order to get those to the market? A. It is a lot of work to get them out. 40

George W. Wolf—Direct

Mr. Roseberry: I object. He is not shown to have been over the road or examined it for that purpose.

10 Q. Well, did you examine this cut timber on the lot there to ascertain how much work would be necessary in order to take those to the car and load them? A. Well, the worst job would be to drag them out and get them down to the road. The hauling would not be so much.

Q. Did you look it over for that purpose? A. Well, I did not look it over for that purpose, but still I know what it would be.

Q. On what do you base your judgment?

20 Mr. Roseberry: Then I ask to strike it out.

Q. On what do you base your judgment as to what would have to be done to take those props to the market. A. Well, to get them to the market—

Mr. Roseberry: I object to that question.

Mr. Smith: I will withdraw the question.

Q. Are you able from your experience to tell us what would be required to load those mining
30 props and take them to the car?

Mr. Roseberry: I object to that.

The Court: The question is allowed.

(Last question read.)

A. Fifty dollars.

The Court: Strike it out.

40 Q. Are you able from your experience as a lumber man to tell us what would be necessary to

George W. Wolf—Direct

be done to take those mine props that you saw there out and load them on the car?

Mr. Roseberry: I object to that because that requires the opinion of this man's ability to do it. 10

The Court: I am not going to let him answer it except yes or no. Then he will have to tell us what that experience is based upon.

Q. Are you able to tell us what would be necessary to be done, what you would have to do on this wood lot to take those ties down and load them? A. Well, first, you have to get them out of the woods and then load them on a wagon and
20 then cart them to Broadway.

Q. How do you know that? A. Well, that must be done.

Q. How do you know that? A. From experience I know that.

Q. Where these were located on this wood lot as compared with other wood lots, would this be difficult to snake out these mine props that you measured?

Mr. Roseberry: I object to that because
30 it calls for this man's opinion on a matter with reference to other wood lots.

The Court: Have you ever hauled lumber or props out of localities the same as this?

The Witness: Yes, sir.

Q. Do you know the value of these mine props in good condition, having been cut in January of
40

George W. Wolf—Direct

1924, or the first of February, 1924, as of the date of February 8th, 1924?

10 Mr. Roseberry: I object to that. That assumes that they were all the props that were there on the eighth or sixth of February, 1924. This witness does not know whether they were all the props that were there or not.

The Court: He can testify if he knows the value of the props that he saw there recently, as of the date of February, 1924, if he knows.

20 Mr. Roseberry: Then I object because he said he did not haul any props at that time, and all he knew was from circulars.

The Court: I think that is so.

Mr. Smith: My question was whether he knows the value of that timber that was cut there, as of that date, as it lay there without being hauled or snaked out, how much it was worth.

The Court: He may answer yes, or no.

30 Q. Do you know, as of February 1924, the value of that cut timber? A. Well, I about know; yes.

Q. What do you mean by "about know?"

Mr. Roseberry: I object to that.

A. Well, I know—

The Court: I do not think he is qualified, Mr. Smith?

40 Mr. Smith: If the Court please, I insist that he is qualified as of that time. He has had the experience of the business and more than that—

George W. Wolf—Direct

The Court: He said that he did not deal in mine props; that he dealt in poles; that he knows the selling price of mine props from circulars—from circulars which he had read.

10 Q. Did you sell any mine props in 1924? A. I didn't sell none, no, but I had orders just the same.

Q. Have you ever prepared mine props for the market? A. Yes, sir.

Q. Do you know the value of cut timber such as this that you measured? A. Yes, sir.

Q. When it is freshly cut? A. Yes, sir.

Mr. Roseberry: I object to it, as it has 20 already been gone over.

The Court: He may go over it again.

Q. Is there any difference between mine props and other timber, as to the value, when it is first cut? A. Yes; there is; sometimes.

Q. Was there any in 1924? A. I do not think so.

The Court: Do you know?

The Witness: I will say there wasn't any 30 difference in the price.

Q. Are they prepared for market the same way? A. You have to have it prepared for the market.

Q. What is the difference between mine props and what you call ties? A. You have to cut them, the same way with the prop.

Q. Is there any difference in size? A. Yes, sir.

Q. Do you know the value of that cut timber 40 that you mentioned, in 1924?

George W. Sarson—Direct

Mr. Roseberry: I object. He has answered that he did not. He said he did not sell any at that time and that all that he knows about it was from circulars.

10

The Court: Objection sustained.

Mr. Smith: I pray an exception.

The Court: Exception allowed.

Mr. Smith: That is all.

Mr. Roseberry: No cross-examination.

Mr. Smith: The defendant rests.

The Court: Have you any rebuttal, Judge Roseberry?

20

GEORGE W. SARSON, the plaintiff, re-called in rebuttal.

Direct-examination by Mr. Roseberry:

Q. About this—

Mr. Roseberry: I was going to ask him about his difficulty with Mr. Warne, about his taking his timber, but since Mr. Warne has shown he was—

30

Mr. Smith: Let us have the question.

The Court: I do not see how it is proper.

Mr. Roseberry: I do not know whether it is or not. That will do.

The Court: Do both sides rest?

Mr. Roseberry: We rest.

Mr. Smith: If the Court please I would like to move at this time for a direction of verdict on the ground there is no uncontroverted evidence here,

40

*Motion for the Direction of a Verdict
Exhibit P-1*

or any evidence, of a breach, on the part of Mr. Sarson, of any contract which is actionable, on which the plaintiff can rely.

(After discussion.) I submit that the state of the case is such that, taking the most favorable aspect of Mr. Sarson's testimony, there was no breach proved, and I move, therefore, for a direction of verdict. 10

The Court: In this case we start out with a binding agreement between these parties that the timber was to be cut and removed within two years.

I will grant the motion and allow an exception.

Mr. Roseberry: I ask for an exception. 20

The Court: You may have an exception, Judge Roseberry.

The jury will return a verdict of no cause for action in favor of the defendant.

(The jury returned a verdict accordingly.)

EXHIBIT P-1.

30

Received Feb. 6th 1922 of George W. Sarson six hundred and seventy five dollars for the timber now on a certain wood lot I bought this day of Peter S. Walters being a lot in Franklin township Warren County New Jersey containing forty three acres more or less adjoining other lands of mine and others and along the public road leading from Broadway to Montana. Said Sarson not to 40

Exhibit P-3

cut any trees less than seven inches in circumference at butt and not to cut nor remove any timber less than five inches in circumference at top and to have the above timber removed in two years from date.

10

WILLIAM MUELLER.

EXHIBIT P-3.

Broadway N. J. February 8th 1924

Mr. George W. Sarson
20 Washington N. J.

Dear Sir:

As the Two years have expired in which you was to cut and remove the timber from my Two wood lots, This is to give you notice to keep off the said premises, and not cut or remove any more timber, without my permission.

30

Yours truly,

WILLIAM MUELLER.

40

EXHIBIT P-4.

To William Mueller,
Broadway,
N. J.

Having received notice from you not to cut or remove any more timber from your two wood lots 10 without your permission. I hereby demand of you the right to take into my possession all the present cut timber and merchantable timber and wood upon your said two wood lots mentioned in your notice to me my property and also the right to cut and remove from said two wood lots all standing trees and timber over seven inches in circumference at the butt and over five inches in circumference at the top, also my property. 20

Dated February 11th 1924.

GEORGE W. SARSON.

Served Feby 15th 1924
at 2:50 p. m.
J. R Thatcher.

New Jersey Court of Errors and Appeals

GEORGE W. SARSON,

Plaintiff and Appellant,

vs.

WILLIAM MUELLER,

Defendant and Respondent.

On Appeal to
the Warren
Circuit Court.

BRIEF OF J. M. ROSEBERRY & SON, ATTORNEYS OF PLAINTIFF AND APPELLANT.

At the close of the opening of the case to the court and jury, the attorney of the defendant and respondent objected to proof of any damage claimed for the standing timber, also on the ground that this contract was required to be in writing and that oral testimony of an extension of time would have to be the basis of an action.

The trial court denied the motion as far as the cut timber was concerned, and sustained the objection to the standing timber. The court predicates thus upon a statement of the judge of the Court of Errors and Appeals rendering the opinion that

“We think this was a misconception of our earlier decision and that the case

should have gone to the jury as to the cut timber."

The judgment in the first case, which was based upon an action of trover and conversion, was reversed on the ground that an action of trover and conversion could not be maintained for standing timber, being a part of the realty and not personalty.

The reversal of the judgment in the second trial was upon the ground that

"The case should have gone to the jury as to the cut timber, and this quite irrespective of the extension of time which were testified to by the plaintiff."

The very same evidence was admitted in the present case as in the former case, which this court said "should have gone to the jury."

The verdict in the first trial was for \$2,000 for timber cut and uncut of the size specified in the receipt of sale on the 43-acre tract of land. This land had been purchased by the plaintiff of Mr. Walter, and a deed of conveyance was made directly, at the request of the plaintiff, to the defendant. Now the defendant, in his testimony on page 80, lines 30-35, said:

"Q. You testified on the trial before in these words, 'I paid Mr. Sarson one hundred and fifty dollars for the land, and to pay the taxes.' That is on this forty-three acres—did you not? A. Yes, that is so."

The defendant strives to get the timber on this 43-acre tract, worth \$2,000 according to the estimate made by the jury on the first trial, for the paltry sum of \$150.

FIRST GROUND OF ERROR IS IN EXCLUDING RECOVERY FOR THE STANDING TIMBER.

The plaintiff and defendant entered into a contract of sale of timber as follows:

"Received Feb. 6th, 1922, of George W. Sarson, six hundred and seventy five dollars for the timber now on a certain wood lot I bought this day of Peter S. Walters being a lot in Franklin township Warren County New Jersey containing forty three acres more or less adjoining other lands of mine and others and along the public road leading from Broadway to Montana. Said Sarson not to cut any trees less than seven inches in circumference at butt and not to cut nor remove any timber less than five inches in circumference at top and to have the above timber removed in two years from date.

WILLIAM MUELLER."

The trial court seemed to disregard the plain language of the decision in *Webb v. Irons* which was made in 1879, and since that time has been regarded as the settled law in that respect. The court in *Irons v. Webb*, 41 N. J. L. on page 206, near the bottom, said that

"It is not possible to discriminate a sale of standing timber alone without the land, from an exception of such timber in a deed conveying the land, with respect to the legal effect of a clause appended to each, requiring within a time, specified or implied, the removal of such timber. It is manifest that if the stipulation touching the removal

will not make the title conditional in the one case, it will not in the other."

The language of that great jurist, Chief Justice Beasley, in that case, is apposite to this case. He says, on page 265 (*Irons v. Webb, supra*):

"If the contention of the defendant is right, then this timber continued to be the property of the plaintiff up to the running out of the two years, and then, by its non-removal, it became forfeited and passed to the defendant; and it is entirely obvious that such a condition is not favored in law, and that it will not be raised up by implication, unless by the force of demonstrative indication. Looking at the terms of the present agreement and its subject-matter, I can see no mark, certainly no decisive mark, signifying that it was the intention of these parties that by the plaintiff's neglect to remove the timber, it should be forfeited to the defendant. Such a purpose, it is certain, is not contained in any part of the language of the instrument, for it nowhere says that, in any event, the title to the timber is to pass to the grantee. As a consequence, as it is not in the words, such a right must be derived by inference from the nature of the transaction itself. But, then, what feature of the business is to have such an effect? The only particular relied on is the circumstance that if the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not in law to

work a forfeiture of title. Such a position of property is not uncommon. Chattels are frequently placed, or left, by their owner, on the land of another without his permission, but it will scarcely be pretended that, by so doing, the title to such chattels becomes vested in the proprietor of the land. In such case, the land owner has an adequate remedy for the wrong suffered by him; he is entitled to be indemnified for all the loss he may have sustained by having had his land illegally burdened by chattels placed there without right, and in consequence of the entry to remove them; and in this way, instead of by the exorbitant method of a forfeiture of such chattels, the law applies to the case its ordinary measure of damages, and thus gives compensation."

The decision in *Irons v. Webb* has been the settled law in this state from 1879, a period of half a century. The reasoning upon which the Supreme Court grounds its decision is unanswerable in the application of legal principles.

To upset this long-established rule of law upon the point in question would provoke uncertainty and confusion and the criticism that rules of law are the ephemeral offspring of mental differentiation and not the abiding rules of action heretofore claimed.

THE SECOND GROUND OF ERROR IS IN EXCLUDING RECOVERY FOR THE STANDING TIMBER.

The opening of plaintiff's counsel alleges:

(1) The sale and purchase of the timber on the 43-acre tract of land, and its removal in two years from February 6th, 1922.

Then the strike in the coal mines of Scranton, Pa., and the difficulty of selling mine props and ties, and that the timber on this tract was largely for the purpose of making mine props and ties.

(2) In 1923, the plaintiff for the reason stated asked defendant for an extension of one year's further time to cut and remove the timber on the tract. The defendant wanted some poplar trees on the place and wanted the plaintiff to pay the tax on the one year's extension of time to cut and remove the timber. The extension of one year and the giving of the poplar trees and the payment of tax on the year's extension was agreed to.

(3) A short time before the expiration of the two years the plaintiff heard that the defendant had said that he would not give plaintiff the extension of one year and that he would have to get off the place in February, 1924. The plaintiff went to the defendant's house and asked him about the truth of the rumor. The defendant said he would not give him a year but if he would make no trouble, according to the defendant's story, he would give plaintiff two months' further time after the expiration of the two years, to take off the timber on the two tracts of land.

(4) About February 4th, 1924, Squire Pierson of Washington, N. J., telephoned the plaintiff

that the defendant was there and that he would give him two months to take off the timber on the 19-acre tract and could take off the down timber on the 25-acre tract, but not to cut any timber on the latter tract.

(5) On February 8th as the two years expired on February 6, 1924, the defendant served upon plaintiff a notice not to remove the timber from the two wood lots and

"to keep off the said premises, and not to cut or remove any more timber without my permission."

(6) On February 15th, 1924, the plaintiff served a written demand upon the defendant of

"All the present cut timber and wood upon your said two wood lots mentioned in your notice to me my property, and also the right to cut and remove from said two wood lots all standing trees and timber over seven inches in circumference at the butt and over five inches in circumference at the top, also my property."

(7) The defendant did not give plaintiff permission to take either the cut timber or standing timber.

(8) The demand was the value of the cut timber, \$200; and the standing timber \$2,300 or \$2,400.

The action in this case was brought on the original contract of sale. The extension of time is not made the basis of the action, while the extension of time of performance cannot be made the basis of an action, it is nevertheless a binding agreement.

Nissel v. Swinley, 76 N. J. L. p. 289.

LEGAL ASPECT OF THIS GROUND OF ERROR.

We find as early as 1832 in the case of *Cox v. Bennett*, 13 N. J. L. page 171, bottom, the court saying,

"The party to whom a condition or covenant is to be performed, may, by acts as well as words, enlarge the time of performance,"

and that no consideration is necessary to be proved for the enlargement of performance to make it valid. However, the consideration of the one year's extension was the poplar trees on the tract and paying the tax on the tract for the year extended.

In 1856 the Supreme Court in *Stryker v. Vanderbilt*, 25 N. J. L. page 496, by the Chief Justice, says:

"That a subsequent parol agreement, not contradicting the terms of the original contract, but merely enlarging the time of execution, is good, even on the case of a contract required by the Statute of Frauds to be in writing" (citing *Cuff v. Penn.*, 1 Maule & Sel. 21).

Chitty on Contracts, *Cummins v. Arnold*, 3 Metc. 486,

"It must be regarded as settled that the time for the performance of a contract, either by deed or by parol, may be enlarged by parol."

In *Long v. Hartwell, Admr. etc.*, 34 N. J. L. page 125, bottom, decided in 1870, the court says:

"While the statute asserts its control over the contract itself, the performance of the contract is not within its purview."

And this applies to contracts under the Statute of Frauds (p. 126).

Citing:

Cummins v. Arnold, 3 Metc. 486, and *Cuff v. Penn.* I. M. & S. 21.

The later English case of *Stowell v. Robinson*, 3 Bing. N. R. 928, and 5 Scott. and the cases following it, denied the doctrine laid down in *Cuff v. Penn* and held that the extension of the time of performance must be in writing. So that the established law in New Jersey followed the early English case of *Cuff v. Penn* and Massachusetts case of *Cummings v. Arnold*, which held that the "time for the performance of a contract, either by deed or by parol, may be enlarged by parol," and did not follow the later English case of *Stowell v. Robinson*.

The court said:

"We are aware that the principle on which *Stowell v. Robinson* was decided is supported by other English cases cited, but the principle on which the case of *Cuff v. Penn* was decided, is, in our judgment, more satisfactory and better adapted to the administration of justice in this and similar cases."

The case of *Stern v. Hall*, 9 Cush. p. 35, follows *Cummings v. Arnold*, 3 Metc. 486, and *Cuff v. Penn*, I. M. & S. 21, and cites with approval the language of *Cummings v. Arnold*, 3 Metc. 486,

"That the principle on which the case of *Cuff v. Penn* was decided, is, in our judgment, more satisfactory, and better

adapted to the administration of justice in this and similar cases."

The court further says,

"The case of *Cuff v. Penn* was substantially like the present case. That was an action of assumpsit against the defendant for not accepting a quantity of bacon according to his written contract which was within the Statute of Frauds. The defense to the action was that the bacon was not delivered within the time specified in the contract, to which the plaintiff replied and proved that the time of delivery expressed in the written contract was extended by the parties by a subsequent oral agreement and that the plaintiff tendered the bacon to the defendant in the substituted time. The court held it was competent for the plaintiff to show that the parties by a subsequent oral agreement, substituted a time for the delivery of the bacon different from that mentioned in the written contract, and that he delivered or offered to deliver it, within the substituted time, and the plaintiff had a verdict and judgment."

The court says:

"The defendant, therefore, by his own act, by orally agreeing to receive payment at another substituted time, prevented the plaintiff from making the payment within the time limited in the original contract."

Giles v. Simonds, 15 Gray 441 and 444 is a case involving the same legal points upon the same subject as this case.

The court there said, on page 444,

"The true distinction between an executory verbal license to enter on land under a contract for the sale of timber or trees growing thereon, and a similar license executed seems to be this: The former confers no vested interest or property, no money or labor is expended on the faith of it, and no right or title is lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licensor for a breach of the contract. It cannot be held to extend further, so as to confer a right to use the land of another without his consent, because it would thus confer, *ex proprio vigore*, an interest in land which cannot be created except by a writing. But such a license executed, to the extent to which it has been acted on, has operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has therefore been held that such a license, while it is executory, may be countermanded, but when executed it becomes irrevocable." (Cases cited.)

Washburn on Real Property (4th Ed.), Vol. 3, p. 347, in considering the above case, says:

"It is not, therefore, too strong to say that the doctrine of Massachusetts courts is much more in harmony with the Ameri-

can system of conveying lands than that at present held by the English courts, the form (of conveying) in that respect being immaterial."

It seems to me that the case of *Shubert v. Nixon Co.*, 83 N. J. L. p. 101, embraces the principle stated in the above Massachusetts cases. This case lays down the law that,

"At common law the sale of a theatre ticket created only a personal license to enter the theatre and enjoy the performance for which such ticket is sold, using the seat assigned, if any. Such license is revokable at the will of the proprietor of the theatre, who may lawfully require the licensee to leave the theatre without assigning any reason therefor, and in case of refusal, eject such licensee without unnecessary force; and in case of such revocation and ejection no action of tort will lie, but only an action in contract for the price of the ticket and incidental damages arising out of breach of the contract of sale of the ticket."

Wood v. Leadbitter, 13 M. & W. followed and approved.

In the New York case of *Thompson v. Poor*, 42 N. E. Rep. p. 13, 147 N. Y. 402, the court says:

"In many of the states of this country the courts have adopted the rule laid down by Lord Ellenborough in *Cuff v. Penn*, *supra*, and have held such proof admissible on the distinction between the contract, which it was said the statute requires to

be in writing, and its performance to which the statute does not apply. This is the rule in Massachusetts, New Hampshire, Maine, Ohio, and Pennsylvania and perhaps other states."

The court then goes on to say:

"Where one party to a contract before the time for performance by the other party has arrived, consents upon his request to extend the time of performance, he must be presumed to know that the other party relies upon the consent and until he gives notice of withdrawal, he has no just right to consider the latter in default, although meanwhile the contract time has elapsed. We think the principle of equitable estoppel applies in such a case."

Equitable estoppel rests upon the principle that when anyone has done an act, or made a statement which it would be fraud on his part to controvert or impair, and such act or statement has so influenced anyone that it has been acted upon, the party making it will be estopped and cut off from the power of retraction. It is intended that the acts or admissions of a party should operate against him in the nature of an estoppel when, in good conscience and honest dealing, he ought not be permitted to gainsay them.

The court in the case of *Church v. Florence Iron Works*, 45 N. J. L. p. 133, has this to say of the application of equitable estoppel:

"It is within the principle of the leading case of *Pickard v. Sears*, 6 Ad. & E.

469, and *Freeman v. Cooke*, 2 Exch. 654, that 'where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.'

In *Williams v. Flaud*, 63 Mich. 487, it was held that where a purchaser of standing timber, who had paid in full, had a right of removal for two years, which was extended for two years more by parol, it was held not to be revocable by the seller of the timber or his grantee with notice.

The court, in *Nissel v. Swinley*, 76 N. J. L. page 288, on page 289, says:

"The opinion of Chief Justice Greene in *Stryker v. Vanderbilt*, 1 Dutcher 482, is conclusive upon this Court. He there expressly approved of Lord Ellenborough's decision in *Cuff v. Penn*, 1 Man. & Sel. 21, 26."

The court, in quoting from the Massachusetts case of *Sterns v. Hall*, 9 Cush. 31, says:

"that the verbal extension of time of performance of a contract, required by the Statute of Frauds to be in writing, cannot be made the basis of an action, it is nevertheless a binding agreement."

In *Cuff v. Penn*, cited with approval in this case:

"There was an action of assumpsit against the defendant for not accepting a

quantity of bacon according to his written contract, which was within the Statute of Frauds. The defense to the action was that the bacon was not delivered within the time specified in the written contract; to which the plaintiff replied and proved, that the time of delivery, expressed in the written contract, was extended by the parties by a subsequent oral agreement, and that the plaintiff tendered the bacon to the defendant within the substituted time."

The plaintiff had a verdict and judgment.

It will be observed that the action was brought on the original contract. The extension of time was not made the basis of the action.

The court in *Nissel v. Swinley*, further said of *Stearns v. Hall*, that the case:

"finds support in what was said by this court in *Stryker v. Vanderbilt* and in *Long v. Hartwell*, 5 Vroom 116, 125. If it is correct the plaintiff may still rely upon the original contract."

In the English cases in that case cited, the postponement of the performance of a contract is a revocable forbearance, which, if revoked, a reasonable time for performance must be given.

Barba v. Gunsberg, et al., 129 Atl. Rep. 747.

EXTENSION OF TIME OF REMOVAL OF TIMBER.

There were three extensions of time, after the two years' limit in the sale had expired, one of one year, another of two months, another of two months to cut and remove the timber on the 19-acre tract and to remove the cut timber on the 25-acre tract, but to cut no standing timber on that tract.

The defendant's counsel insists that a consideration is necessary to be proved for an extension of time.

This action is brought upon the contract of sale, not upon the extension of the period of renewal. The Supreme Court, as early as 1832, in *Cox v. Bennett*, 13 N. J. L. p. 171, in considering the contention that a consideration must be shown, said, the argument is,

"that the agreement was void because no consideration was expressed in it, or otherwise proved. I can find no authority to support this position. The party to whom a condition or covenant is to be performed, may by acts as well as words, enlarge the time of performance," and cases cited.

Such has always been the law in New Jersey.

The application of the Statute of Frauds has been fully considered in the former part of this brief.

In the year's extension there was a consideration. The plaintiff testifies, on page 20, that he asked defendant for, and he gave him, a year's extension and that he gave him half a dozen poplar trees on the lot for his building operations and agreed to pay the tax for the year 1923. The

first instalment of this tax would come due April 1, 1924, and be paid by June 1, 1924. The second instalment must be paid by December 1, 1924. This tax was not due and payable when the notice to stay off the wood lot was given by defendant on February 8, 1924.

The defendant took the poplar trees (p. 20, ll. 27, etc.). Mr. Snook testifies that in 1923, he hauled poplar logs for defendant off of this wood tract (p. 69, ll. 12-20). There was 1,400 feet of poplar and chestnut all of it taken from this wood tract before the two years had expired.

THE THIRD GROUND OF ERROR IS THAT THE TRIAL COURT DIRECTED A VERDICT OF NO CAUSE OF ACTION AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT WHEREAS SAID COURT SHOULD HAVE DENIED SAID MOTION AND SHOULD HAVE SUBMITTED TO THE JURY FOR DECISION THE QUESTIONS INVOLVED IN THE ISSUES.

The trial court gave no reasons for the direction of a verdict contrary to Rule 107a.

This court in its opinion delivered by Mr. Justice Lloyd says:

"that the case should have gone to the jury as to the cut timber and this quite irrespective of the extensions of time which were testified to by the plaintiff."

Then the opinion refers to the rule laid down by the Supreme Court in *Wyckoff v. Bodine*, 65 N. J. L. 95:

"That timber cut under a similar right and left on the owner's land after the ex-

piration of the time within which it was to be removed, did not give the owner of the land the right to refuse permission to the purchaser to take it."

The evidence in the present case was the same as in the former case of the above opinion.

Again the plaintiff was in possession of the mining ties and props worth \$200 on the land when defendant forbid plaintiff removing them (Exhibit P-3, p. 128). That was on February 8, 1924. On February 15, 1924, plaintiff served upon defendant a written demand for possession of the cut and standing timber. (See Exhibit P-4, p. 129 of case.)

There is a distinction (1) where plaintiff is in possession of personal property and is deprived of that possession by defendant. Here no demand by plaintiff for possession is necessary.

(2) Where defendant came lawfully in possession, there a demand for possession is necessary before suit brought. The present case falls under the first head of plaintiff being deprived of possession. No demand is necessary.

In trover and conversion a deprivation of possession occurs when "one having the right of possession is deprived of all substantial use of the goods permanently or temporarily."

Vol. 26, Am. and Eng. Ency. of Law (1st Ed.), p. 714.

"In an action of replevin it is not indispensibly necessary to show a demand on the defendant to return the property before suit brought. The demand serves only to

establish a conversion or wrongful detention; and when that can be established without showing a demand, a demand is unnecessary. Thus a demand is not necessary where the person in whose possession they are found has no title."

Vol. 5, Amer. & Eng. Ency. of Law (1st Ed.), 528j.

"The non-compliance with the demand after a reasonable opportunity to obey it has been afforded, is tantamount to a refusal, and is presumptive evidence of conversion and throws upon defendant the burden of rebutting the presumption."

Chitty on Pleading, Vol. 1, p. 160.

"It is only when the original possession is lawful and the action depends upon the unlawful detention that a demand is required."

5 Vol. Amer. and Eng. Ency. of Law (1st Ed.), 528U.

Crown Co. v. Reilly, 88 N. J. L., p. 590.

Where no reply is made to a demand, the defendant's silence was equivalent to a refusal.

5 Vol. Amer. and Eng. Ency. of Law (1st Ed.), 528 Z. 19.

The rule laid down in *Frome v. Dennis*, 45 N. J. L. 519, the court says:

"Acts done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidences of a con-

version, because they are evidence, that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it."

The law as cited shows (1) that the plaintiff being in possession of the props and mine ties, when deprived of it by defendant, a demand was not necessary.

(2) The defendant had no title to the mine props and ties and no demand was required by law.

(3) Where the plaintiff is substantially deprived of the mine props and ties permanently or temporarily.

(4) Defendant's silence upon demand of the mine ties and props is equivalent to a refusal.

(5) A neglect to deliver them are evidence of a refusal because withholding them is evidence of a claim of right in withholding them, which is a claim of a right of dominion over them. These three suits were the strongest demand possible for both the standing and cut timber, yet defendant has not given permission to the plaintiff to remove either at any time.

PURCHASE OF THE WOOD TRACT.

The plaintiff, Sarson, on page 17, lines 30, etc., testifies:

"I bought a wood lot of Mr. Walters that adjoined Mr. Mueller (defendant), and we made arrangements that I should take the timber and he the land."

The defendant, Mueller, on page 80, lines 30, etc., testifies:

"Q. You testified on the trial before in these words, 'I paid Mr. Sarson one hundred and fifty dollars for the land, and to pay the taxes.' That is on this 43 acres—did you not? A. Yes, that is so."

From this it appears that plaintiff paid for the timber the value of which was found by a jury at the first trial to be \$2,000, and the defendant paid for the land \$150 and to pay the taxes. Plaintiff would have explained why the consideration of the sale of the timber was placed at \$675 (Exhibit P-1, p. 127, ll. 1-30, etc.) but the testimony was excluded by the court (p. 117, ll. 30, etc.). The defendant says that he did cut one poplar tree which Sarson gave him (p. 80, ll. 16 and 17).

The defendant further said that he was "to pay the taxes" (p. 80, l. 32) besides the \$150 for the land. On page 83, line 10,

"Q. Now, why did he go to Mr. Sarson and ask him to pay the taxes for this particular year? A. I did not promise Mr. Sarson to pay the taxes. He offered to me to pay half tax."

It was in 1923 he went to Mr. Sarson's house for it, but this was not due until April 1, 1924.

"Q. Before Mr. Sarson came to your house, you had gone to Mr. Sarson's house and asked him to pay half the taxes? A. In 1923, I went to Mr. Sarson's."

The plaintiff having heard a rumor that the defendant would not give him the one year's ex-

tension, so he went to the defendant's home to see him. At this interview, plaintiff threatened to sue him because he had given him a year's extension; now defendant refused to give the year's extension, but if he made no trouble, he would give him "two months to take it off the whole tract" (p. 221, ll. 14, etc.). The defendant, on page 82, admits this: Plaintiff did not give him any trouble before defendant notified him to quit altogether.

When the two years was about up, defendant went to Squire Pierson and instructed him to telephone to plaintiff as follows:

"He came there and said that Mr. Sarson's time had practically expired and I should call him by telephone and tell him that he could have two months to cut and remove the timber from the one tract and remove the down timber from the other.

Q. Did you call up Mr. Sarson? A. I did.

Q. And did you tell him what Mr. Mueller had said? A. Yes, sir.

Q. And tell him in Mr. Mueller's presence and hearing? A. Yes, sir" (p. 55, ll. 14-27).

The same testimony is given by plaintiff on page 123, lines 1-18. Plaintiff did all he could to get off the timber. He put on about "a dozen men and four teams."

Shortly after this, plaintiff received written notice to quit altogether. This was on the 8th of February, two days after the two years had expired.

LAW RELATING TO THE FUNCTIONS OF A TRIAL JUDGE AND JURY.

Thompson on Trials, Vol. 1, page 810, Sec. 1037, says:

"In all cases, after the judge has determined the preliminary question in favor of the admissibility of the evidence, the weight and probative effect of it becomes a question for the jury. This rule is most commonly expressed by the bare statement that where the evidence is conflicting, the weight of it is to be determined by the jury. Another expression of the same legal conception is that whether it is sufficient to establish the fact is a question for the jury. To illustrate: the circumstance that the evidence is all on one side does not, it has been held, authorize the court to direct the jury that it proves a fact in controversy; its sufficiency is for them. The jury have the power to refuse their credit to parol testimony and no action of the court, it has been held, should control the exercise of their admitted right to weigh its credibility."

Sec. 1038:

"The weight of evidence always involves the consideration of the credit to be given to the opposing witnesses; and it is accordingly a rule that this is a question within the exclusive province of the jury. The court cannot, on a motion for a nonsuit or a peremptory direction, invade the province of the jury by attempting to pass upon the credibility of witnesses."

Sec. 1039:

"What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury."

In *Boylan v. Meeker*, 28 N. J. L. 274, see top page 333:

"But how shall we estimate its weight? We cannot mark it as so many ounces, pounds or tons and yet we know that it may have all degrees of weight from the lightest feather to the most absolute moral certainty. All we can do is to note all the facts and circumstances carefully and weigh its absolute and relative weight by the lights of conscience and experience. This weight varies with the greater or less liability of the witnesses, in the first place, to mistake, and in the second place to perjury."

In *Encyclopedia of Evidence*, Vol. 3, 753:

"The jury are the sole and exclusive judges of the credibility of witnesses, and in considering whom they will or will not believe may take into account their experience among men. The jury should determine the credibility of witnesses, even though the opposing party has offered nothing to contradict the testimony and they are not bound to accept the statements of a witness because unimpeached and uncontradicted by the evidence given by other witnesses. He may impeach or contradict himself or state inherent improbabilities when giving his testimony, or the jury may believe he is honestly mistaken. All the

tests of credibility should be applied to learn the exact truth in the matter, and the jury may base their estimate of the amount of credit which shall attach to the testimony upon immaterial as well as material matters."

Faulkner v. Patterson R. R. Co., 63 N. J. L. 181;

Daggers v. Van Dyck, 37 N. J. Eq. 130.

JURY'S RIGHT TO DETERMINE:

1. No claim of property in the trees at any time after the expiration of the two years in the contract of sale, by the defendant.
2. The testimony shows a recognition by the defendant of title in the trees in plaintiff after the expiration of the two years.
3. The fact that the plaintiff's action in not cutting and removing the timber, worth \$73 an acre, in the two years was due to some cause.
4. Why did plaintiff, upon hearing a rumor, go two or three weeks before the expiration of the two years, to defendant's house and charge him with a purpose to break the one year's extension of time?
5. Why did they have words, and the plaintiff threaten to sue defendant?
6. Why did the defendant tell the plaintiff that he could have two months' further time to cut and take off the timber?
7. Immediately following that Sunday interview, why did plaintiff hire several men and teams

to cut and haul off the ties and props if there were no agreement between plaintiff and defendant giving the one year's extension of time? Why did not plaintiff manifest the same degree of haste before the interview as he did after it?

8. Why did the defendant, on the 7th day of February, 1924, have Mr. Pearson telephone plaintiff he could have two months to cut and remove the timber on the 19-acre tract, but not to cut or remove any from the 26-acre lot?

9. Why did the defendant's wife, after the defendant went home, take it in her own hands, as she says, and went with her son Oscar to Mr. Pearson's office and have the notice to keep off the premises of the date of February 8, 1924, drawn and told her husband that Mr. Pearson said he should sign it, which he did, and the next day, February 9, 1924, toward night, on the timber lot she served the notice on the plaintiff to keep off the premises? Progressive freezing out of plaintiff by defendant. First, defendant gave plaintiff one year's additional time, then limited to two months, then to 19-acre lot, but not the 26-acre lot, then when the two years was up, "to stop positively" (p. 55, l. 22).

The *prima facie* presumption of truth may be repelled by the testimony and demeanor of the witness.

Ency. of Ev., 3 Vol., p. 756.

All these things would enter into the consideration of the jury in determining who was to be believed, the plaintiff or defendant, in the extension of one year additional time to cut and remove the timber from the 43-acre tract.

THE VALUE OF THE MINING PROPS AND TIES.

The plaintiff testifies to the value of the mine props and ties on page 30, etc., left on the wood tract when notice was given by defendant to quit, as \$200. Mr. Widenon, a witness, testifies that he, the plaintiff, and Mr. Race, another witness, viewed these mining props and ties in February, 1924, and they estimated its value at \$200 (p. 58).

Also the testimony of Mr. Race fixed its value at \$200 (p. 61).

The defendant's witness, Warne, is not entitled to credence because he was angry at plaintiff, and plaintiff had recently obtained a judgment against him for taking his timber; as he phrased it, "stealing" it (pp. 114 and 115).

Warne and Wolf viewed the props and ties, what was left, on March 3, 1928.

Wolf did not know the value of this kind of cut timber and did not testify to its value. He and Warne measured one heap of it after four years' laying upon the ground—what was left after four years had passed. This testimony was of no value compared with the testimony of plaintiff and his two expert witnesses, who testified to its value in February, 1924, when part of it had not been carried off or deteriorated from storms and exposure to constant wet condition and decay induced by it.

We submit that the judgment of the Circuit Court should be reversed and a *venire de novo* granted.

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Attorneys.

J. M. ROSEBERRY,
Of Counsel.

New Jersey
Court of Errors and Appeals

GEORGE W. SARSON, PLAINTIFF-APPELLANT	}	ON APPEAL TO THE WARREN CIRCUIT COURT
VS.		
WILLIAM MUELLER, DEFENDANT-RESPONDENT		

BRIEF OF DEFENDANT-RESPONDENT

SYLVESTER C. SMITH, JR.
Attorney for Defendant- Respondent

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STATEMENT OF THE CASE

Inasmuch as the brief for the appellant does not set forth a statement of the case, it is included here.

The plaintiff, George W. Sarson brought suit on a written contract which was as follows:

"Received Feb. 6th, 1922 of George W. Sarson six hundred and seventy-five dollars for the timber now on a certain wood lot I bought this day of Peter S. Walters being a lot in Franklin township Warren County New Jersey containing forty-three acres more or less adjoining other lands of mine and others and along the public road leading from Broadway to Montana Said Sarson not to cut any trees less than seven inches in circumference at butt and not to cut nor remove any timber less than five inches in circumference at top and to have the above timber removed in two years from date.

WILLIAM MUELLER."

Plaintiff in the amended complaint (p. 3) alleged a breach of the contract by the defendant Mueller, after the expiration of the two year period. The plaintiff-appellant based his right to recover on two oral extensions of time to remove the timber which he alleges were granted, and alleges that the breach consisted in the serving of a written notice, Ex. P. 3, and demand and refusal of right to cut and remove the timber after the two year term.

The case was tried before Judge Lawrence in the Warren Circuit who directed a verdict for the defendant

and on appeal judgment was reversed and a venire de novo awarded. *Sarson vs. Mueller*, 5 N. J. Adv. Rep. 1429.

The case was retried at the December, 1927 term in the Warren Circuit. After all of the evidence of the plaintiff and defendant was in the defendant moved for a direction of a verdict of no cause of action on the ground that taking the most favorable aspect of the plaintiff's case, there was no evidence of a breach of contract which was actionable. After argument the court granted the motion and allowed an exception.

On the opening of the case, counsel for the plaintiff-appellant offered to prove a claim for damages for the timber still standing on the tract of land and made this a part of a cause of action. Counsel for the defendant-respondent objected to the offer of proof of the value of standing timber on the ground that under the opinion of the Court of Errors and Appeals in the same case, *Sarson vs. Mueller*, 5 N. J. Ad. Rep. 1429, the right to recover for the standing timber had been barred. The court sustained the objection to the offer of proof of the value of the standing timber as a ground of damages and exception was allowed. The first and second grounds of appeal allege error in the court's ruling on this matter.

The testimony in the case was that the plaintiff-appellant Sarson, failed to cut and remove the standing timber alleged to have been sold by the agreement in writing, within the period of two years, and claimed that the defendant, Mueller, had granted him, in the year 1923, an extension of one year in which to cut and remove the standing timber. It is admitted by plaintiff-appellant, that there was no consideration for this extension. Mueller on the other hand, denies that he ever granted extension of one year. In January of 1924, a few weeks before the end of the two year period, Sarson claimed that he again went to Mueller on a Sunday afternoon to ask whether Mueller intended to "give him the year or not and that Mueller said that he would not but that he would give him an extension of two months to

take off the whole tract" (p. 20). On p. 47, Sarson testified on cross examination:

"I went there and told him I understood that he was not going to let me have the year and he said "Yes" he wanted to keep the 24 acres and wanted to give me the 19 acres and I said I would not do so, that if he was a man of his word he would have a law suit and then and there he offered to give two months to take it off.

Q. At that time you did not come to any agreement, did you? A. No."

Later another offer was made by Mueller to Sarson, through a Justice of the Peace to extend the time for two months but Sarson never accepted any such extension. (pp. 55, 56). The two year period ended on February 6th, 1924, and on February 8th, 1924, Mueller served on Sarson a notice in writing which is as follows:

"Broadway, N. J., February 8th, 1924.

Mr. George W. Sarson,
Washington, N. J.

Dear Sir:

As the two years have expired in which you was to cut and remove the timber from my two wood lots. This is to give you notice to keep off the said premises, and not cut or remove any more timber, without my permission.

Yours truly,

WILLIAM MUELLER."

Sarson and Mr. Pierson, Justice of the Peace, and Mueller, all testify that the same night, February 8th, 1924, Sarson went to Pierson's office in Washington, New Jersey, and asked permission to remove the cut timber, (p. 24, ll. 10-21; p. 106; pp. 78-79). Sarson first testified (p. 24, ll. 10-21), that he asked for permission to remove some logs from the public road, but on cross examination (p. 50), admitted that these logs were on Mueller's property. Mueller, according to Sarson, (p. 50, l. 38), granted permission. Pierson, the Justice of the Peace, and Mueller and his son, say that Sarson simply asked if he could haul timber for one day and that Mueller said yes.

On February 15, 1924, a week later, Sarson served a written notice on Mueller by an agent by the name of Joseph R. Thatcher (Ex. P 4), demanding of the defendant, Mueller, "the right to take into possession the present cut timber and merchantable timber and also the right to cut and remove the standing timber." The defendant-respondent is a German who does not read or understand English and at the trial required an interpreter, (p. 73, 74). This demand in writing was served upon Mueller personally by Joseph R. Thatcher. Mueller handed it to his son to read and asked Mr. Thatcher who he was whereupon Mr. Thatcher went away without awaiting for a reply. (Testimony of Joseph R. Thatcher, pp. 65-66). In fact, Mueller never had an opportunity to reply.

Sarson never sought a reply after that and Mueller claims that he never refused Sarson the right to remove the cut timber (p. 79). Sarson admits he never sought an answer saying (p. 51 l 33). "I depended on the demand." The testimony is uncontroverted that Mueller never took possession or used or converted to his own use any of the mine props or cut timber or standing timber, remaining on the forty-three acre tract and that the down timber remained where it lay on February 8th, 1924, (p. 79).

ARGUMENT

I.

THE COURT PROPERLY SUSTAINED THE OBJECTION TO THE PROOF OF ANY DAMAGE CLAIMED FOR THE STANDING TIMBER.

The objection was made at the conclusion of the opening of the case. In the opening, Mr. Roseberry, counsel for the plaintiff-appellant, made a claim for damages for standing timber (p. 11, ll. 31-40). He offered to prove the value of the standing timber, (p. 14 l. 33). An objection was made to this offer of proof and the objection was based upon the ground that the decision of the Court of

Errors and Appeals had ruled out the question of the value of standing timber. In the opinion of Mr. Justice Lloyd, 5 N. J. Adv. Rep. 1429-1430, the court said:

"We think this was a misconception of our earlier decision and that the case should have gone to the jury as to the cut timber, and this quite irrespective of the extensions of time which were testified to by the plaintiff."

Reference to the whole opinion clearly indicates that any claim for damages by reason of the standing timber was eliminated by the previous decisions of this court and the trial court relied upon this opinion in sustaining the objection, (p. 16, ll 3-11).

In addition to this, it is clear that no action could be maintained under the pleadings for the value of the standing timber. This was interest in realty. The complaint was an action alleging a breach of an oral contract and the standing timber being realty the contract had to be in writing. *Seymour vs. Sloan*, 36 N. J. L., *Sarson vs. Mueller*, 130 At. 835.

There was no offer in the opening to prove a breach of the written contract, which had expired on February 6th, 1928. The pleadings alleged a breach after the expiration of the time set forth in that contract and the plaintiff relied upon an oral extension of time, without consideration, although from the opening it does not appear to be clear whether the plaintiff relied upon the alleged extension of one year or on the alleged extension for two months. In support of this, the plaintiff in error has argued lengthily in his brief setting forth a number of cases to show that an oral extension of time, even though without consideration as in the present case, is valid and that the doctrine of estoppel applies. He relies principally upon the case of *Nissel vs. Swinley*, 76 N. J. L. 288, but on p. 290, Mr. Justice Swayze points out:

"—the principle of law that a verbal agreement to extend the time for performance of a contract required by the statute of frauds to be in writing cannot be made the basis of an action."

In all cases cited, on pp. 8, 9, and 10 of appellant's brief, the doctrine of *estoppel in pais* was applied against the defendant in the case. In none of those cases was the oral extension of time relied upon as the basis of an action. The reason for this is clearly pointed out by Vice-Chancellor Backes in a recent case, *Halpern vs. Shurkin*, 98 N. J. L. 28.

"The difference in refusing oral testimony to vary a written contract, in enforcing it and admitting it in defense rests fundamentally, on the language of the statute 'that no action shall be brought. The soundness of the doctrine has been much doubted. See note to *Martin v. Pycroft*, supra. None of the cases examined at law or in equity even intimate that a verbal agreement for substituted performance of a contract within the statute of frauds, unexecuted can form a basis of a recovery."

All of the cases cited by the plaintiff-appellant in his brief are cited in that case, including the English cases.

The second defense to the amended complaint was the statute of frauds and under the plaintiff's opening, the proof of breach of an oral agreement varying the terms of this contract required to be in writing, would not entitle plaintiff to recover for the standing timber which was realty.

To say that the period of two years is simply the time of performance in the agreement of sale, is to narrow the intention of the parties to the contract. The agreement provided that the timber should be of certain sizes, and since it was growing standing timber, the plain intention of the contract was that the timber conveyed was limited to timber of that size during the term of the contract. The oral agreement, or whichever one defendant relies upon, was distinctly a variation of the terms of the original contract.

It is therefore submitted that the court's rejection of evidence of proof of value of standing timber was proper, because of the previous decision of this court, and further because the oral extension of time could not be made the

basis of an action for damages concerning the standing timber.

II.

THE DIRECTION OF A VERDICT OF NO CAUSE OF ACTION WAS NOT ERROR UNDER THE MOST FAVORABLE VIEW OF THE STATE OF THE CASE AT THE CONCLUSION OF THE EVIDENCE.

The ground relied on in the motion, p. 126, was that taking the most favorable aspect of all the evidence there was no actionable breach of contract proved. The issue was limited and narrow. The question on the pleadings was clearly: "Did the defendant, William Mueller, do any act in violation of the contractual duties which he owed to the plaintiff?"

During the two year period from February 6th, 1922, there is no allegation in the pleadings nor was there any evidence that William Mueller in any way interfered with or prevented the performance of the contract by the plaintiff-appellant, George W. Sarson, in cutting and removing the timber. The pleadings allege two facts constituting a breach, first the serving of the written notice, Ex. p. 3, and a refusal to comply with the demand of the plaintiff, Ex. P. 4. (Paragraphs 4 and 5 of the amended complaint, pp. 4-5.)

Counsel for the plaintiff-appellant relies upon the case of *Wyckoff vs. Bodine*, 65 N. J. L. 95, which was referred to in the opinion of Mr. Justice Lloyd.

In that opinion it was indicated that *Wyckoff vs. Bodine*, was an action in replevin whereas by referring to the case, it will be seen that this was an action in trover and conversion. The opinion states that the facts in that particular case were that:

"After the expiration of the time agreed upon the defendant took possession of a certain portion of the timber which plaintiff had failed to remove and converted it to his own use."

In *Wyckoff vs. Bodine*, *Supra*, the Chief Justice clearly points out that there was an actual conversion of the cut timber and that the issue to be tried was conversion or no conversion.

The present suit is an action on contract. In the present case, however, there was no evidence of conversion. There was no evidence in this case that Mueller, the defendant-respondent, had at any time, claimed any ownership in or exercised any right or dominion over the cut timber. The only possible question was the effect of the service of the notice, (Ex. p. 3).

The law in New Jersey is very clear since the case of *Irons vs. Webb*, 41 N. J. L. 203, and *Wyckoff vs. Bodine*, 65 N. J. L. 95 that the presence of the timber upon the defendant's land after the expiration of the time limit gave the defendant a right of action against the plaintiff for his interference with full enjoyment of his property and from thenceforth the plaintiff became a trespasser.

In that notice, Exhibit P. 3, Mueller does not claim any ownership in the cut or standing timber. He did not say "since you didn't get the timber cut or moved in two years, it belongs to me." He merely said, "to get the timber after the two years you need my permission to enter upon the land." The words "keep off the premises" and "without my permission" are merely an assertion of the right to prevent trespass. There is no question but that he owned the land. The further uncontroverted evidence that Mueller never touched the cut or standing timber, never asserted any claim of ownership over it, never even saw it since February, 1924, confirms the meaning of the notice, and his intention.

Further the evidence of Sarson is that he only asked for permission once, and was granted permission without hesitancy. The other demand was made without awaiting for any reply, and there is absolutely no proof of a refusal.

A careful reading of the notice, Ex, P. 3, indicates that this notice was merely a warning that after that time

Sarson would be considered a trespasser. It is not unlawful to forbid *trespass on one's land*.

"There is no wrong done by one asserting a claim which he honestly believes himself to possess." *Hale Torts*, 165. 31 *Amer. Eng. Cyc. of Law* 368.

It is not actionable for any man to assert his own right at any time in good faith. *Smith vs. Spooner*, 3 *Taunt.* 246; *Carr vs. Duckett*, 5 *Hurlst & No.* 783; *Cooley, Torts*, 2nd pp. 260-221.

In *Glencoe Sand and Gravel Co., vs. Hudson Bros. Company* 138 *Mo.* 430, 36 *L. R. A.* 804, the court held that at mere assertion of title and right to sand and gravel in its original bed was no conversion, and that conversion would not lie for sand and gravel, while in its original bed because it was a part of the realty.

Furthermore, there is plenty of evidence that Mueller granted permission to Sarson to remove the cut timber. Squire Pierson testified, (p. 55) that Mueller told Sarson that he could cut and remove the timber from the one tract and remove the down timber from the other. This took place after the serving of the notice, Ex. P. 3. On the only occasion when Mr. Sarson, asked for permission to remove the cut timber, it was granted to him, (testimony of Sarson, p. 51, l. 20). He never waited for an answer to his demand in writing for permission although he testified: "I depended upon the demand." (p. 51.)

What was the defendant's actions after the demand was made? He never used any of the cut timber. It remained in the same condition in which it lay when they stopped cutting. There is no denial of this. (Testimony of Clarence Ware, p. 110, ll 31-41). He asserted no claim of ownership whatever nor did he exercise any dominion over the timber.

Sarson had placed himself in this position by his own breach of the written contract; he, himself, had broken the contract by failing to cut and remove the timber from the tract within the two year period. Counsel for the

plaintiff-appellant claims that the jury should have had the right to determine:

1. That there was no claim of property in the trees at any time after the expiration of the two years in the contract of sale by the defendant, and yet this is admitted.

The respondent insists that the burden was upon the plaintiff-appellant, to prove a breach of the contract; and there was no evidence to show a claim of property or exercise of dominion over the timber by the defendant Mueller at any time.

Plaintiff-appellant argues that no demand for possession was necessary and alleges that the plaintiff was in possession of the personal property. If so, why did he serve the demand upon the defendant? The cut timber remained on the property of the defendant just as it had been cut and placed by the plaintiff. If the plaintiff was in possession of the personal property after the period of two years, where is the proof that the defendant deprived the plaintiff of possession thereof or in any way changed or altered that possession. The evidence is uncontroverted that Mueller did nothing to interfere with this reduction to possession. However, if after the period of two years was up, Sarson left the cut timber on Mueller's property, he thereby became a trespasser, and was a trespasser whenever he entered the property to remove the same or reduce it to possession. *Irons vs. Webb. supra Wyckoff vs. Bodine, supra.*

There was at least a quasi-possession and a lawful possession by Mueller, occasioned by Sarson's own failure to remove the timber in the time limit. In such an instance, a demand and refusal was necessary. *Temple Co. vs., Penn Mutual Life Ins., Co., 69 N. J. L. 36.* Such a demand was made, but there not only was no refusal but there was no opportunity on the part of the defendant to refuse. The agent who served the notice and made the demand left before the defendant had completed reading the notice, so that at the conclusion of the case there was no evidence of a refusal of the demand.

To constitute a conversion of these goods it was necessary to prove that the defendant had done an act which amounted to a repudiation of the plaintiff's title or to an exercise of dominion, i. e., ownership of the goods. *Frome vs. Demris, 45 N. J. L. 515.* In that case, at p. 518, citing *Spooner vs. Manchester 133 Mass. 270*, it is said:

"Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner and it is therefore not every wrongful meddling with or wrongful asportation or wrongful detention of personal property that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title or the right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it, claims the right to withhold it, which is a claim of the right of dominion over it."

In the present case the demand was for the right to reduce to possession. Certainly, the defendant, Mueller, was under no duty at his own expense to deliver the possession of this cut timber, manually by hauling it.

In a sale-of timber case, *Town vs. Hazen 51 N. H. 596*, the judgment of the court below was reversed by the New Hampshire Supreme Court on the ground that there was no such evidence in the case to hold that the conduct of the land owner amounted to wilful conversion. In that case, the only act which was proved was that the vendee refused to give permission to enter the land and remove the cut timber after the time had expired, the timber having been cut upon the land before the expiration of the time limit. This is important because the New Jersey

sale of timber case of *Irons vs. Webb*, supra, relied upon New Hampshire cases in determining the law as found by the Supreme Court.

If the act which deprived the plaintiff of his goods in this case of cut timber was authorized by him or the result of his action, or was otherwise lawful on the part of the defendant, the latter cannot be held liable without proof of an intent to convert the property to his own use. *38 Cyc. 2010*;

The mere detention of another chattels which rightfully came into one's possession is not an actionable conversion but the detention must be based on a negation of the owner's right or be accompanied with an intention to convert the property to the holders own use. *38 Cyc. 2028*.

Silence or neglect to answer will not constitute a sufficient refusal. *38 Cyc., 2039. note 17. Richards. vs. Pitts Agric. Works, 37 Hun. N. Y. 1; McLean vs. Graham, 5 U. C. Q. B. O. S. 741.*

That citation of *Richards vs. Pitts Agricultural Works, 37 Hun. 1*, in the appellant's brief is not in accordance with the decision in that case. A demand and refusal being necessary, the demand was made and nothing was said in reply.

The court held that this was not evidence of a refusal, or denial of right. The court said:

"There may be cases where an omission to reply to a demand for property with no act of delivery or indication of willingness that the owner take it, would be equivalent to a refusal and evidence of a conversion. That would be so if the party of whom demand was made had the property on his person, or under his or their immediate control, so that he could and should hand it over. But, here was a threshing machine, in defendant's building, some distance from place where the demand was made, and there is nothing to show that defendant was required to take it from the place where it was and draw it to the plaintiff at any place. The right of the plaintiff was to take it at and from the place where

it was The expression of nothing was no more a refusal than a consent that the plaintiff take the property He is not at liberty to assume from what occurred at that time, that he was not at liberty to go and remove it from there."

So in the present case, the plaintiff Sarson, cannot say that Mueller's silence or as Mueller contends, his inability to reply by reason of the agents leaving before the notice was read constituted a refusal by Mueller, or a violation of any duty which he owed Sarson.

An actionable refusal to deliver property must be, if oral, positive and unambiguous. *38 Cyc. 2039*, and cases cited.

The only duty which the defendant, Mueller could possibly have owed by reason of the contract to the plaintiff Sarson, was a duty to allow Sarson to get possession of his cut timber, but this was to consent to a trespass. Mueller never refused permission but on the contrary every time that he was requested or expressed an opinion, consented to removing the down timber. There was no question about this in the evidence. It was not disputed that Sarson by reason thereof had the right and could go on the premises and remove his "down" timber, subject to such liability as he might have incurred by the trespass which he had committed by permitting the timber to remain on the premises after time limit had expired.

Counsel for the plaintiff-appellant in his argument suggests that there were questions here to determine as to why certain things took place but they are not relative to the issue. What difference did it make why the plaintiff went to the defendant's house and charged him with the purpose of refusing a one year unilateral extension agreement? Why did they have words and the plaintiff threaten a law suit, even assuming that the extension of time was granted and could be made the basis of an actionable contract notwithstanding the fact that it was without consideration? The appellant does not point out

the evidence that indicates in what manner the defendant breached any such agreement, and question further suggests itself, "On what extension of time does Mr. Sarson, the plaintiff-appellant, reply? Does he rely upon the extension of one year or does he rely upon the extension of two months? It will be seen from the pleadings that the plaintiff attempts to rely upon both extensions of time, neither of which was for a consideration.

There were no disputed questions of fact for the jury, and the whole evidence indicates that the plaintiff appellant failed to meet the burden of proof of a violation of contractual duty by Mueller. The court therefore properly granted the direction of a verdict for defendant.

The defendant-respondent respectfully submits that the judgment of the Warren Circuit should be affirmed.

SMITH & SMITH,
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S. C. SMITH
Of Counsel.