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# New Jersey Court of Errors and Appeals

## Notice of Appeal

(Filed, Nov. 18, 1919)

NEW JERSEY SUPREME COURT

MORRIS COUNTY

DANIEL J. KANOUSE,  
Plaintiff-Appellant,  
vs.  
JOSEPH DONATONIA,  
Defendant-Appellee.

On Appeal.

20

*To King & Vogt., Esqs., Attorneys of Defendant:*

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds—

30

1. Counsel for defendant purposely omitted filing a plea of *res adjudicata* (which is a special plea) until the jury was sworn, so that he could have the chance of making the misstatement to the Court, in the presence of the jury, that "this cause was tried before up in the District Court in Dover," which was done for the purpose of in-

40

## Notice of Appeal

fluencing the jury, and the trial court permitted said counsel to file said special plea of *res adjudicata* over the objection of counsel of plaintiff.

2. The case thereafter proceeded upon the theory that the matter was *res adjudicata* (in favor of defendant) whereas in fact the former case  
10 in the District Court at Dover was an action in trespass resulting in a judgment for six cents in favor of said Daniel J. Kanouse, and establishing the fact, in law, that said defendant, Joseph Donatonia, had had no legal right to enter the premises and cut the wood in question, and the further fact in law that when he did so he was a trespasser—and, in that respect, the matter, as to the right to enter under the alleged permit or contract,  
20 had been adjudicated in the proper legal tribunal in favor of the plaintiff Daniel J. Kanouse.

3. The Court permitted the defendant to give illegal evidence in the presence of the jury regarding an alleged permit or contract, and relating to the meaning of the common, untechnical language therein, over the objection of the plaintiff.

30 4. The Court permitted the defendant to give illegal evidence in the presence of the jury with reference to the trial had in the District Court.

5. The Court said in the presence of the jury that "if the jury found there was no malice and that the party entered the land with the claim that he had a right, the stump act did not apply" etc.,  
40 which was prejudicial to plaintiff's case, and an erroneous statement of the law.

## Notice of Appeal

6. The court charged the jury about the case that had been tried in the District Court and then said, "if you are satisfied that there was timber unlawfully cut without any authority, then you could only render, as the case now stands, a verdict for nominal damages, there being no evidence in this case as to the value of the timber which this defendant cut," which was a misstatement of the evidence, and of the law applicable thereto. 10

7. The Court charged, after referring to the receipt, "if the ties and timbers were taken within the three years, he had a right to take them within that time," which because of the former adjudication of the right to enter against the defendant's claim in the District Court, and under the evidence then in the case, and in consideration of the form of the receipt referred to (which the District Court had decided did not give Donatonia the right to enter the land in question) was erroneous. 20

8. Defendant had no permit nor paper writing sufficient in law to give him the right to enter the premises and cut standing timber, and the evidence in the case showed that it had been adjudicated in the District Court theretofore that defendant had had no right to enter the premises in question, and the Court's charge was therefore erroneous, and the Court should have charged the jury that the only question for the jury to decide was the number of trees cut and to determine the amount of damages according to the statutory price per stick or stump. 30

JAMES H. BOLITHO,  
Attorney of Appellant. 40

**Judgment Record***(Filed, Dec. 13, 1919)*

## SUPREME COURT OF NEW JERSEY

## MORRIS COUNTY

19

DANIEL KANOUSE, . vs. JOSEPH DONATONIA (OR DONA- TONIA), Defendant.	}	Plaintiff,  On Postea. Judgment.  Defendant.	Action At Law.
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20 For Defendant, King &amp; Vogt, Attorneys.

Joseph Donatonia, (or Donatonia) the defendant in this cause was summoned to answer unto Daniel (J.) Kanouse, the plaintiff therein in an action at law upon the following complaint.

(Sumomns issued March 5th, 1919.)

Plaintiff, Daniel Kanouse residing at Boonton, in the County of Morris and State of New Jersey says that:

30 1. That he prosecutes this action as owner of the land on which the timber referred to in this demand is located, complains of the said Joseph Donatonia, for that the said defendant did on divers days between the first day of January, nineteen hundred and eighteen and the first day of January, nineteen hundred and nineteen, last  
 40 past, cut, fell, worked up, carried away and destroyed nine hundred and eighteen trees and

## Judgment Record

saplings, standing and lying on land of plaintiff in this state situate in the Town of Rockaway, county of Morris, situate on the left-hand side of the road leading from Beach Glen to Meridan and bounded on the east by the said road, on the south by lands belonging to Misel, on the north and west by lands belonging to Andrew B. Cobb, without leave first had and obtained of the owner thereof for that purpose, and to which land the defendant had not any right and title, nor permission to enter or cut anything then and there being, whereby an action hath accrued to plaintiff to demand and have of defendant the sum of seven thousand three hundred and forty-four dollars, being the sum of eight dollars for each tree and sapling so cut, felled, worked up and carried away, as aforesaid, according to the form of the act, entitled "An Act to prevent the unlawful waste and destruction of timber in this State," revision 1877, page 1187, the supplements thereof and the amendments thereto.

Plaintiff demands as damages \$7,344.00 with interest thereon from January 1st, 1918.

James H. Bolitho,  
Filed March 13th, 1919. Attorney for Plaintiff.

Defendant, Joseph Donatonia, a resident of Rockaway, in the County of Morris and State of New Jersey says that:

He denies the truth of the matters contained in the complaint.

## Judgment Record

## OBJECTION IN POINT OF LAW

Defendant says that the complaint does not set forth a legal cause of action.

KING & VOGT,

10 Filed, March 8th, 1919. Attorneys of Defendant.

Plaintiff says that each and every allegation of his complaint is true.

## OBJECTION IN POINT OF LAW

20 Plaintiff says further that defendant's answer herein filed is not according to the rules and laws of pleading required in this court, that it is not an answer at all, and that plaintiff is entitled to judgment by default because no answer in proper form has been filed by the defendant within the time required by law.

JAMES H. BOLITHO,

Filed, March 22, 1919. Attorney of Plaintiff.

30 This case was tried before Williard W. Cutler Esq., and a jury at the Morris Circuit of the Supreme Court, on May 23d, 1919, and the Jury returned a general verdict against the plaintiff and in favor of the defendant of no cause of action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and Costs that the defendant recover of the plaintiff his costs which are taxed at the sum of Forty-one dollars and sixty

cents.

Judgment entered June 2d, 1919.

40

WM. S. GUMMERE,

C. J.

Testimony

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this eighth day of December A. D., nineteen hundred and nineteen.

(Seal)

ENOCH L. JOHNSON,  
Clerk.

10

**Testimony**

MORRIS COUNTY SUPREME COURT

20

DANIEL J. KANOUSE,

Plaintiff,

vs.

JOSEPH DONATONIA,

Defendant.

Action at Law.

Morristown, N. J., May 23d, 1919.

30

Before: HON. WILLARD W. CUTLER, Judge, and  
a Jury.

For the Plaintiff, James H. Bolitho, Esq.

For the Defendant, Messrs. King & Vogt.

Elmer King, Esq., of Counsel.

The jury was empanelled and accepted.

40

## Testimony

Mr. King: Before the jury is sworn, I want to file an additional plea; I want to file a plea of *res adjudicata*. I notice the old plea is a denial of the issue and I am not so sure that there ought not to be a plea of *res adjudicata* filed; also, this  
10 cause was tried once before in the District Court up in Dover.

Mr. Bolitho: I object to that.

Mr. King: May I proceed?

The Court: Yes, you may proceed.

Mr. King: This case was tried, or a case involving the same wood and timber, was tried in Dover. I do not tell the Court what the result was, but it did result in a judgment of some character. Now, it seems to me we ought to file a  
20 plea of *res adjudicata* in this case. While the suit is brought under the Timber Act alone, I am not so sure that the plea which we have filed, which is one of general issue denying, really raises all the issue.

The Court: Any objection to amending?

Mr. Bolitho: Yes, I think at this late day he should not be allowed to amend. Now, he has waited until today before he has taken advantage to make an amendment to his pleadings.

The Court: Would you be prejudiced by it?  
30 Under our Practice Act an amendment should be allowed wherever parties—wherever it is pertinent to the issue. The only question would be whether we should go on now, or whether it should be made on terms; that is the question.

Mr. Bolitho: I want the case to be tried, but I think his plea of general denial is the only plea he can make under an accusation under the Tim-  
40 ber Act.

## Testimony

The Court: I think he can put in any plea he wants under the general practice act. I should allow an amendment to the plea. You may file that plea, amend your plea in that way, and with a—I suppose a denial on your part?

Mr. Bolitho: I don't know what his answer is. 10

The Court: He says he wants to plead *res adjudicata*. The case was tried in the district court.

Mr. King: The same counsel in the district court before. There is a copy of it.

Mr. Bolitho: That doesn't make any difference whether it was the same counsel. That isn't *res adjudicata*.

The Court: Oh, no.

Mr. Bolitho: Of course, I deny that it is *res adjudicata*. 20

The Court: Then the plea may be amended in that way, and you answer and a denial on your part. Now, proceed; let the jury be sworn.

The jury sworn.

Mr. Bolitho opened the case to the jury on behalf of the plaintiff.

Mr. King opened to the jury on behalf of the Defendant. 30

The Court: I refer counsel to the case recently decided in Monmouth County in relation to the Timber Act.

Mr. Bolitho: I have here the case of Terrone vs. Harrison, 87 N. J. Law.

Mr. King: There is one later than that, sir. 40

The Court: Yes, there is one later than this.

Ernest A. Kincaid—Direct

Mr. King: It is Cook vs. Bennett Gravel Company, 90 N. J. Law, 9. The other case is 87 N. J. Law.

The Court: 90 Law, 9?

Mr. King: Yes, sir.

10 The Court: That was the Monmouth County case?

Mr. King: Yes, sir.

---

ERNEST A. KINCAID, called as a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Bolitho:

20 Q. Where do you live, Mr. Kinkaid? A. Lionsville.

Q. And where is that; in Rockaway Township? A. Yes, sir.

Q. Do you know Joseph Donatonia? A. Yes, sir.

Q. And were you employed by him in 1918? A. Yes, sir.

Q. And did you or did you not cut some timber for him on the property of Mr. Kanouse in Rockaway Township? A. Yes, sir; I cut some.

30 Q. When was it that you did the cutting, what months? A. Well, I couldn't just tell you; that is, every month.

Q. Well, tell us some of the months? A. May was the last month.

Q. And had you cut some before May? A. I had cut some, yes.

Q. Now, how long altogether did you cut? A. I couldn't tell you.

40 Q. Well, did you cut more than a week? A. Why, I cut more than a week, yes.

## Melvin Hoppler—Direct

Q. And did you cut as long as a month? A. I don't know.

Q. You have no way of telling? A. No, sir.

Q. At the time when you were cutting, who were you employed by? A. Joe Donatonia?

Q. The defendant? A. Yes, sir.

Q. And that was the land, the property that belongs to Mr. Kanouse on the road leading from Beach Glen to—

Mr. King: I object. You see the question interposes a title.

The Court: That is true.

Q. That is the property that is known as the Kanouse property lying between Beach Glen and— A. The Kanouse property.

Q. Yes.

Mr. Bolitho: Cross-examine.

Mr. King: No questions.

---

MELVIN HOPPLER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Bolitho:

Q. Where do you live, Mr. Hoppler? A. Beech Glen.

Q. And that is in Rockaway Township? A. Yes, sir.

Q. Do you know where this property is that is known as the Daniel Kanouse property? A. Yes, sir.

Q. Did you cut any timber there in 1918? A. Yes, sir.

Leopold C. Zeek—Direct

Q. Do you know what months you were working there? A. Well, it was in the spring, and I think I got through there the latter part of May.

Q. Do you remember what time in the spring you started? A. No, not exactly.

10 Q. Was it January? A. I wouldn't say; I have no record of it.

Q. For whom were you working then when you were cutting? A. Mr. Donatonia.

Q. The defendant? A. Yes, sir.

Q. And can you give us about how long you were there in weeks, about how many weeks you worked? A. No, I don't think I could.

Q. You kept no time of it? A. No.

Mr. Bolitho: Cross-examine.

20

CROSS-EXAMINATION by Mr. King:

Q. Were you sworn in Judge Lyman Smith's Court in Dover in the case of Kanouse against Donatonia? A. Yes, sir.

Mr. King: That is all.

Mr. Bolitho: That is all.

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LEOPOLD C. ZEEK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Bolitho:

Q. Do you live in Rockaway Township, Mr. Zeek? A. I do.

40 Q. How far from this land that is known as the Daniel J. Kanouse land? A. An eighth of a mile, probably less.

Daniel J. Kanouse—Direct

Q. You know where this land is, don't you? A. Yes.

Q. Did you see the defendant taking any timber off that land in 1918? A. I don't remember as I did. I seen men there work for him. That is as near as I can get after it.

Q. Did you see Mr. Hoppler or Mr. Kincaid working there? A. I did. 10

Q. Do you remember the months when you saw them? A. Well, no; it was during the spring a year ago, of 1918.

Mr. Bolitho: Cross-examine.

Mr. King: No questions.

DANIEL J. KANOUSE, the plaintiff, sworn as a witness in his own behalf, testified as follows: 20

Direct-examination by Mr. Bolitho:

Q. Where do you live, Mr. Kanouse? A. Boonton Township.

Q. And do you own any property in Rockaway Township? A. Yes, sir.

Q. And where is it located? A. Beech Glen.

Q. How is it bounded? A. Why, it is bounded by Mr. Beech on the south, I think, and George W. Stickel on the east, and Andrew Cobb on the west, and John F. Stickel of Rockaway on the north-west. 30

Q. And does the public road run near this property? A. It runs right through it.

Q. How many acres have you there? A. Seventy.

Q. Was there any timber on the property in 1918? A. Yes, sir. 40

Daniel J. Kanouse—Direct

Q. And about how many acres of timber? A. Oh, I should judge about twenty-five or thirty.

Q. Twenty-five or thirty acres? A. Yes, sir.

Q. Did anybody cut any of that timber off in 1918? A. Yes, sir.

10 Q. Who did it? A. Joe or—

Q. Joe, this defendant? A. Yes.

Q. Did you give him permission to cut it? A. No.

Q. Did you give him permission to cut it? A. No, I didn't give him no permission.

Mr. King: Now, what was that answer?

The Court: "No, I didn't give him no permission."

20 Q. Do you know how many stumps were left after he had cut on the place? A. Why—

Mr. King: Just a moment. I object to that. Even though he cut there, they have got to show that he cut each one of these stumps for which they claim damage.

The Court: Yes, you have to show the number that were cut by the defendant or his men.

Mr. King: Yes, sir.

30 Q. Do you know how many stumps were left of the trees that were cut out by the defendant and his men?

Mr. King: Just a moment. There is no evidence yet that he knows that they cut any.

Mr. Bolitho: Oh, he testified that he knew the defendant cut and the defendant's men will testify that they cut.

40 The Court: I know, but I suppose the difficulty of your question is that it might refer to trees cut by somebody else.

Daniel J. Kanouse—Direct

Mr. Bolitho: My question was very plain. I asked him if he knew how many stumps were left from the trees that were cut by the defendant and his men; that was the question.

The Court: Well, do you know?

10

The Witness: Yes.

Mr. King: Just a moment, before the number comes in, isn't the counsel for the defendant entitled to cross-examine as to his knowledge of how many stumps?

The Court: Yes.

Mr. King: The answer is yes or no?

The Court: Yes.

Mr. Bolitho: He said yes.

The Court: You may cross-examine as to his knowledge. 20

By Mr. King: Q. Mr. Kanouse, hadn't there been cutting on this land before Mr. Donatonia cut it there? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Absolutely? A. Yes, sir.

Q. There wasn't a single stump there when he went to cut? A. No, sir; no.

Q. Is that so? A. (No response.)

Mr. King: That is all.

30

The Court: Proceed.

By Mr. Bolitho: Q. Did you count the stumps of the trees that were cut by the defendant and his men? A. Yes, sir.

Q. And how many were there? A. Nine hundred and eighteen.

Q. And who was with you when the counting was done? A. Mr. Simms.

Q. Anybody else? A. Yes, and my son Dayton. 40

Q. Your son Dayton Kanouse.

Mr. Bolitho: Cross-examine.

Daniel J. Kanouse—Cross

CROSS-EXAMINATION by Mr. King:

Q. Who counted the trees? A. I counted them twice myself.

Q. You counted every tree? A. Yes, sir.

10 Q. Well, now, when you counted a tree how do you know that you didn't go back and count it again? A. Because I marked them with a white chalk.

Q. And how did you mark it? A. Put a mark on each stump as I went through and counted

Q. Yes, but how did you mark them; an "X"?

A. A white "X."

Q. On the top or side of the stump? A. On the top.

20 Q. And had you counted them later? A. I know I counted 918.

Q. Did you make a memorandum of it? A. Yes, sir.

Q. Have you the memorandum with you? A. Yes, sir.

Q. May I see it? A. (Handing paper to Mr. King).

Q. (Referring) Now, you have got hickory 340? A. Yes, sir.

30 Q. And mixed oak, ash and beech, 311; large timber 11, and tie timber 256? A. Yes, sir.

Q. Making 918? A. Yes, sir.

Q. I see you have quite some tie timber, what size tree was that? A. Well, trees would cut 15 or 18 inches across the butt.

Q. And large timber, what size was that? A. Large timber, why, that went 25 and 27 inches across the butt.

40 Q. This mixed oak, how large was that? A. Some of it 20, 21, 22 inches across.

## Daniel J. Kanouse—Cross

Q. Did you find any smaller? A. Yes, I found some 10.

Q. And your hickory, how large was that? A. Some of that was quite large; some of that is 20 inches; some wasn't only about 8 inches.

Q. What is the size or what is the dimension— 10  
not dimension—the diameter of the smallest tree or sapling you counted? A. Oh, I don't know. I didn't measure them all across the butt.

Q. Well, what is the smallest? A. Cut some there that wasn't over 5 inches.

Q. Did you count any under 5 inches? A. I don't know as I did.

Q. Well, what is your best recollection about it? A. I don't think I did.

Q. You don't think you did? A. No. 20

Q. Now, these 918 trees were all either five inches in diameter or above? A. Yes.

Q. Every one of them? A. Yes.

Q. This was your count? A. Yes, sir.

Q. How much territory did that cover, how many acres? A. Oh, 25 or 30.

Q. How many pieces of land—how many farms did you own? A. I only owned this one over in Rockaway Township.

Q. Yes, sir. In 1915 how many farms did you 30  
own? A. 1915? Why, I owned one where I lived and the one up there.

Q. The one up where? A. Beech Glen.

Q. Where is the farm that you live in? A. That is the small one. That is Powerville; about a mile from Boonton.

Q. Oh, yes. A. I live there, and my residence is there.

Q. Didn't you own the farm in Beech Glen in 40  
1915? A. Yes, sir.

## Daniel J. Kanouse—Cross

Q. How many acres was in the farm? A. Seventy.

Q. Did you live on the farm then? A. No, there wasn't no house on it; the house burned down.

10 Q. Now, you did own this wood and timber that you now complain of, this wood and timber was growing on this Beech Glen farm in 1915? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. And that is what you bring your suit for, because you claim Donatonia cut this wood and timber from the Beech Glen farm? A. Yes, he did.

Q. Is that so? You were plaintiff in a case in Dover, were you not? A. Yes, sir.

20 Q. And Donatonia was defendant? A. Yes, sir.

Q. Heard before Judge Smith? A. I believe it did, yes, sir.

Q. Mr. Bolitho appeared for you in that case? A. Yes, sir.

Q. And our firm for the defendant?

Mr. Bolitho: If your Honor please, I want to object to any further testimony on that unless they produce the record.

30 The Court: Oh, they cannot go into what was done on the record; he is asking for him to identify it.

Mr. King: Yes, sir; the record is on its way.

Q. Now, then, the only farm you had at Beech Glen was the farm owned by you in 1915 and known as the Anna Stickel farm? A. Yes, sir.

Q. And it is upon that farm that you claim the defendant cut this wood? A. Yes, sir.

40 Q. And you say he cut the wood in the spring of 1918? A. Yes, sir.

William K. Simms—Direct

Mr. King: That is all.

Mr. Bolitho: That is all.

I want to offer this memorandum in evidence that he used in cross-examining the witness, when he gets through with it.

Marked Exhibit P-1.

10

WILLIAM K. SIMMS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Bolitho:

Q. Where do you live, Mr. Simms? A. Power-ville.

Q. Do you know Daniel J. Kanouse? A. Yes, 20  
sir.

Q. And did you go with him at any time to a place at Beech Glen known as the Daniel J. Kanouse place and count some timber that had been cut? A. Yes, sir.

Q. Now, when was it? A. I haven't got the date.

Q. How long ago was it? A. It must be between three weeks and a month—

Q. And how many sticks did you count, how 30  
many stumps? A. 918.

Mr. Bolitho: Cross-examine.

Mr. King: No questions.

Q. What is your name?

The Witness: William K. Simms.

Mr. Bolitho: That is our case.

The Court: Proceed with the defense.

Mr. King: The Court has got all my law 40  
up there on the desk and I do not remember

Daniel J. Kanouse—Direct

10 it, but I think an application can very justly be made at this time for a verdict. This case held that unless they showed malice or trespass or ill-will, there could be no recovery, except one for the value of the timber taken, not under the Stump Act. There is some evidence of that class before you, so I think an application for a non-suit would not be in order at this time.

The Court: No.

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DANIEL J. KANOUSE, the plaintiff, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

20

Direct-examination by Mr. King:

Q. Mr. Kanouse, I show you a paper dated June 29, 1915, and ask you if that is your signature, D. J. Kanouse, to the paper? A. (Referring).

(No response.)

Q. You may read it. I didn't hand it to you that way to prevent your reading it. You may read it if you choose. A. (No response.)

30 Q. Is that your signature? A. That is my signature.

Mr. King: That is all.

Mr. Bolitho: That is all; no questions.

Mr. King: I want to offer this paper in evidence and read it to the jury now.

Mr. Bolitho: No objection.

The Court: You may read it.

Marked Exhibit D-1.

40

Mr. King: (To Jury) This paper, gentlemen, reads as follows: "Powerville,

## Joseph Donatonia—Direct

New Jersey, June 29, 1915. Time, three years. Received of Joseph Donatonia, eight dollars to pay for all ties and timber on my farm at Beech Glen known as Anna Stickel farm. Received payment, D. J. Kanouse."

I have read it rather hastily (handing paper D-1—to the Foreman) 10

The Court: Won't you read it again. "All the timber and"—I didn't catch the word after that.

Mr. Bolitho: Ties and timber.

The Court: That is all.

Mr. King: "All ties and timber on my farm."

The Court: That is all right. I didn't catch the word "ties." 20

JOSEPH DONATONIA, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct-examination by Mr. King:

Q. Mr. Donatonia, you are the defendant in this case? A. Yes, sir. 30

Q. Were you the defendant in a case up in Dover before Judge Smith? A. Yes, sir.

Q. In which Mr. Kanouse appeared as the plaintiff and you the defendant? A. Yes, sir.

Q. Can you identify the case as being the one in which Mr. Bolitho appeared for the plaintiff?

A. I do not know.

Q. Mr. Bolitho appeared for the plaintiff, didn't 40

## Joseph Donatonia—Direct

he? A. I haven't got that word. I don't understand what that means.

Q. You don't, eh? Well.

The Court: Whether this gentleman at the table was the lawyer?

10 Q. Was Mr. Bolitho the lawyer? A. Oh, yes, your Honor.

Q. Now, there is a paper that the jury is looking at dated July—what is the date of that, Mr. Juror?

The Foreman: June 29th.

Q. Dated June 29th, 1915? A. Yes.

Q. It is the one Mr. Kanouse says he signed? A. Yes.

20 Q. Did you receive that paper from Mr. Kanouse? A. Yes.

Q. Did you pay him the money? A. Yes.

Q. And got that receipt? A. (Nodding head) yes.

Q. Who showed you where this wood and timber was? A. He did.

Q. Mr. Kanouse? A. Yes, sir.

30 Q. When did he show you where the wood and timber was in reference to the time that you paid him the money and got the receipt? A. I bought and paid before he sold me the wood.

Q. You bought and paid before he sold you the wood? A. No, before he showed me the wood.

Q. Then did you go up and look at it? A. Yes.

Q. Did he show you where this wood was? A. Yes.

Q. Well, was the wood just one wood lot or was it separated? A. No, it was two, but I only cut on one.

40 Q. Well, were there two wood lots? A. Two pieces, yes; one each side of the road.

## Joseph Donatonia—Direct

Q. Did he show you both of the sides of the road? A. Yes, but I don't cut anything on one side.

Q. Now, now, you won't listen. I don't care where you cut. Did he show you both sides of the road? A. Yes.

Q. Did he show you the wood on both sides of the road as being the wood he had sold you? A. Yes.

Q. Now, that was dated in 1915. When did you begin cutting wood in this job? A. Well, I started to cut a little, and I was so busy in another place, I took the men away and then I put them back again some time in May.

Q. You finished sometime in May? A. Yes.

Q. What year? May of last year? A. Last year.

Q. Last year? A. Yes.

Q. Did you cut any after May? A. No.

Q. Have you been in on the premises after May? A. No.

Q. Did you cut any wood or timber on any other plot of ground than he showed you? A. No.

Q. Now, you say that the wood and timber was on both sides of the road? A. Yes.

Q. Is that right? A. Yes.

Q. But you only cut on one side of the road? A. Yes.

Q. Why didn't you cut on the other? A. Well, I didn't have time.

Q. Your right expired in three years, didn't it? A. Well, I know, but you see I cut late, so I don't want to cut there after my time.

Q. Oh, you wouldn't cut after your time? A. No.

## Joseph Donatonia—Direct

Q. That is the reason you didn't cut on the other side of the road? A. Yes.

Q. Your time expired on June 29, 1918? A. June 29, yes.

10 Q. Were you on either of these properties after June 29th, 1918? A. What?

Q. Were you on either one of these properties after June 29th, 1918? A. No.

20 Q. Now, they charge you with cutting a great number of trees, hickory, 340; mixed oak and beech, ash and beech, 311; large timber, 11; and tie timber 256, I think, or 250; and they say that you didn't cut anything under five inches. Did you cut any timber under five inches? What is your recollection? A. I cannot say because I didn't measure any.

Q. Now, I don't quite hear that. A. I don't measure them, see?

Q. Say, now, you are a woodman? A. Yes; we might cut a few under that; I don't say—sometimes you got to cut it.

Q. Sure, you might have done it, but would you say the word was practically from five inches up that you cut? A. I can't say that.

30 Q. Well, I wish you would. I want you to give me your opinion about it. I cannot testify. A. Well, I cut smaller and bigger than that; I can't tell just all the same size, you know.

Q. I didn't ask you that. Perhaps you didn't understand me. A. Maybe.

Q. I want to know whether you cut all the timber above five inches? A. Well, yes, but you see we might cut smaller too.

40 Q. Sure, you might have cut it, sure. A. Well.

Q. When you went in there to cut, were there

## Joseph Donatonia—Cross

any stumps there at the time you went in to cut?

A. Yes.

Q. Now, not how many stumps were there; perhaps you don't know that; were they frequent or otherwise? A. It was old stumps, you know, what he cut a few years ago; what he used to sell as mine timber a few years ago. 10

Q. For mine timber? A. There may be some smaller than that, but I see a good many there, old ones; everybody can see them now.

Q. Were these stumps quite frequent in the woods? A. Yes.

Mr. King: Cross-examine.

## CROSS-EXAMINATION by Mr. Bolitho:

Q. How many old ones were there? A. What? 20

Q. How many were there of the old ones? A. I don't know; I can't tell; I didn't count them.

Q. You didn't count them? A. No.

Q. When did you start cutting there? A. I don't know.

Q. Well, was it January? A. We cut some in January; we cut some in the spring, but I don't know just the time I started, because I got different jobs.

Q. Well, did you cut any in February? A. I don't know. 30

Q. How many loads did you take out of there of cord wood? A. That is hard to tell.

Q. Well, have you any idea of how many cords you took out? A. No.

Q. How many ties did you take out? A. I do not know.

Q. How much timber did you take off? A. I cannot tell because I got different jobs, you know. 40

Louis Susska—Direct

- Q. You don't know much about it, do you, Joe?  
 A. I don't know how much I took, no.
- Q. You didn't start to cut there until 1918, did you?  
 A. No, I started before.
- Q. Well, when did you start before? What year?  
 10 A. I started a year before that. I cut some then and quit and then I went and cut some more.
- Q. What kind of timber was it that you cut?  
 A. Any kind.
- Q. Well, was there oak in there?  
 A. Oak, yes.
- Q. Hickory?  
 A. Yes.
- Q. Ash?  
 A. Yes.
- Q. And a lot of mixed timber?  
 A. Yes.
- Q. Chestnut?  
 A. Very few chestnut.
- Q. You didn't cut much chestnut, did you?  
 A. There wasn't much.
- 20 Q. And you didn't cut much small stuff, did you?  
 A. No, not much.
- Mr. Bolitho: That is all.
- Mr. King: What is Louis' second name?  
 The Witness: Susska.

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LOUIS SUSSKA, called as a witness on behalf of the Defendant, being first duly sworn, testified  
 30 as follows:

- Direct-examination by Mr. King:
- Q. Louis, do you talk English?  
 A. Not much.
- Q. Do you know where this wood job of Donatonia's is over at Beech Glen?  
 A. Yes, sir.
- Q. Where do you live in reference to the wood job?  
 A. Well, I live—
- Q. Yes.  
 A. Rockaway.
- 40 Q. What?  
 A. Rockaway.

## Louis Susska—Cross

Q. Have you been up by this wood job during the last year? A. Well, I was by it every day.

Q. About every day? A. Yes.

Q. Where do you work so that you go by it? A. I work at past that place.

Q. You work past the place? A. Yes.

Q. So that you have to go by. Now, from the wood job, is there any road that goes from the wood job to the main road? A. One road go through the lot for the woods.

Q. One road goes through the woods down to the main road? A. Yes.

Q. Where you walk or ride. Have you seen anybody drawing wood out of there recently? A. Yes, sir.

Q. Who was it? A. Jack Stickel.

Q. Was he coming out of this road that comes from the wood job? A. Yes, sir; come through the lot.

Q. When did you see him? A. I don't know; about three months ago, I guess.

Q. How many times did you see him come out? A. Two or three time, I guess.

Q. What did he have? A. He have long wood.

Q. What? A. Long wood.

Q. Long wood? A. Yes.

Q. Well, on these occasions were you going to work or coming from work? A. (No response.)

Q. Were you going up to work or coming back? A. No, I come back from the work.

Mr. King: Cross-examine.

CROSS-EXAMINATION by Mr. Bolitho:

Q. Who do you work for? A. What?

Q. Who do you work for? A. I work for Tony.

## Louis Susska—Cross

Q. Tony who? A. Tony Donatonia down at Rockaway.

Q. Tony is the brother of Joe, isn't he? A. Yes.

Q. Where do you live? A. Rockaway.

10 Q. Who do you live with? A. Who live, me?

Q. Who do you live with? A. I don't know what you mean.

Q. Well, where do you live in Rockaway? A. I live near—

Q. You live with Tony don't you? A. Yes.

Q. And Tony only came there a little while ago, didn't he? A. He came there about three months, three months and a half.

Q. Did you come there with him? A. Yes, sir.

20 Q. And you came from Long Island, didn't you? A. Yes.

Q. Who showed you where Kanouse's property was? A. Because I worked here before; I been working about five years.

Q. When did you work there before? A. In the same woods where I work now.

Q. Well, did you work on Kanouse's property? A. I know about the place.

30 Q. Well, did he show you where it was? A. I seen the team he loaded in the woods.

Q. How many times did you see his team there? A. Oh, I see a lot of times.

Q. Lots of times? A. As long as he take all the stuff out.

Q. What kind of stuff does he take out? A. Well, I never see the stuff they take out.

Q. Don't you know what kind of stuff he took out? A. He take all the ties.

40 Q. And did he take cord wood? A. I don't know; I never see.

## Tony Pilati—Direct

Q. You didn't see that? A. I seen when he take the ties away.

Q. You didn't see him take anything else but ties? A. No.

Q. Were they new cut ties? A. Who, me.

Q. Were the ties new, had they just been cut? 10  
A. Well, when I see it was new.

Q. New wasn't it when you saw it? A. (No response).

Mr. Bolitho: That is all.

TONY PILATI, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

20

Direct-examination by Mr. King:

Q. Tony, did you ever work for Donatonia? A. Yes, sir.

Q. Did you help cut up in these woods? A. Yes.

Q. Which is the subject now of litigation. Since June first or June 29th, last year, have you seen anybody coming out of there hauling wood? A. No.

Q. Now, did you go in with Donatonia when he 30 first went to work on the job? A. Yes.

Q. Did you see any stumps showing that other wood had been cut through there? A. Yes, sir.

Q. Were there many of them or not? A. Quite a few.

Mr. King: Cross-examine.

## Tony Pilati—Cross

CROSS-EXAMINATION by Mr. Bolitho:

Q. How many? A. Well, I don't know how many; I didn't count them.

Q. Were they old stumps? A. Old stumps been cut off, I think some mine timber.

10 Q. You carted out the timber that Joe cut, didn't you? A. No, sir.

Q. You helped cut it? A. I helped make the ties.

Q. How many were there in there cutting? A. Who.

Q. How many men were cutting? A. Cut them up?

Q. Yes. A. There was only one team in there.

20 Q. No. How many men were cutting? A. Cutting the ties?

Q. Yes. A. I cut the ties alone.

Q. Who cut the trees down? A. I did.

Q. Was there anybody else cutting trees? A. Sometimes we have somebody, and sometime I cut them down alone.

Q. How many were in there cutting them down, altogether? A. Well, Kane, and Mel Hopper, and his boy.

30 Q. And how long were you cutting in there? A. Well, I don't know just how long.

Q. Well, was it more than a week? A. Well, maybe two or three weeks.

Q. Cutting every day? A. No, not when it rains.

Q. Well, how many days did it rain during that time? A. I didn't keep track.

Q. What? A. I didn't keep track how many rainy days we had.

40 Q. You cut every day when it wasn't raining, didn't you? A. Yes, sir.

Mr. Bolitho: That is all.

John S. Woodhull—Direct

JOHN S. WOODHULL, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. King:

Q. Mr. Woodhull, where do you live? A. Dover. 10

Q. How old are you? A. Yes, sir.

Q. How old? A. How old? Well, that is a pretty prominent question.

Q. Well, all right; I will withdraw it. You are old enough to have been in the wood business how many years? A. Oh, over forty.

Q. Over forty? A. Yes, sir.

Q. How many wood jobs have you bossed? A. A hundred perhaps, different ones, in my time. 20

Q. Now, there is a contract in evidence here—

The Foreman: Right here, Mr. King (handing paper to Mr. King).

Q.—by which Kanouse sold to Joseph Donatona “All the ties and timber on my farm.” Have you, in buying wood—do you know whether the words “ties and timber” have a known signification in the trade?

Mr. Bolitho: I object to that.

The Court: Why? 30

Mr. Bolitho: The contract would speak for itself, if your Honor please.

The Court: If it is a technical term, they may show what it means.

Mr. Bolitho: The ordinary meaning of the words applies unless they show it is a technical term, and I object to it further as there is no deed for sale of standing timber in evidence in this case. It is my conten- 40

John S. Woodhull—Direct

10 tion that the defendant could not obtain a right to enter real property and cut standing timber as the evidence shows he did in this case with a mere receipt such as they are offering in evidence now; that there must be a permit to enter and cut before they have a right to set that up in this suit.

The Court: I shall allow that question as it stands.

Mr. Bolitho: I pray an exception.

The Court: Take your exception.

A. Will you read that?

20 Q. Do the words "ties and timber" have a well-known signification in the timber trade? A. Well, I have had several contracts, and it said timber, and I cut everything.

Mr. King: Any objection to it?

Mr. Bolitho: I object to that.

Mr. King: I have a case here where a shipment of flour was to be made at once, and the Court permitted the defendant to put in proof that the words "at once" did not have the real signification, but they had a real signification in the trade.

30 The Court: I am allowing you to do that, but this gentleman is telling us what happened to him on two or three occasions.

Mr. King: That is just what I was going to refer to, that shipments had been made time and time again after the expiration of "at once," which was forthwith.

40 The Court: He says two or three occasions.

Q. How many times have you bought timber by the name of timber, just calling it timber? A.

John S. Woodhull—Direct

Well, we most generally have an agreement, and it reads "all the timber" on a certain tract.

Q. Now, how many agreements have you had with the word "timber," using the word "timber"? A. Well, most all the agreements as I look back just says "timber."

Q. There have been perhaps a hundred of them? 10  
A. Oh, yes.

Q. And what have you proceeded to do under that contract? A. Cut everything.

Mr. Bolitho: I object to that.

The Court: I will let that stand.

Q. Now, did the word "ties" have any special signification in a contract? This one which we have is "all ties and timber."

Mr. Bolitho: If your Honor please, I submit the word "ties" is defined, as the word "timber" is defined by the lexicographers, and this word "ties" used here, there is nothing to indicate there was any special or unusual use of it. 20

The Court: You may show, if you can, what the special, technical meaning to it was.

Mr. King: Yes, because he didn't buy a tie; he was buying timber to make a tie. 30

Mr. Bolitho: Our contention in this case is that this reference to ties, strictly speaking, ties, not something to be cut down, but something already down; that is the meaning, isn't it?

Q. Did you ever have a contract which used the words "ties and timber"? A. Yes, sir; I have.

Q. How many of those have you had? A. Oh, I have had jobs with the ties and timber on it and I counted it was everything that was on the job; 40 that is what I have always understood.

Mr. King: Cross-examine.

Charles J. Fox—Direct

CROSS-EXAMINATION by Mr. Bolitho:

Q. Will you please name one of those jobs that you had? A. I think I have got a contract now on the Succasunna mining property.

10 Q. Who was that made with? A. Well, I guess that Mr. Hinchman made it.

Q. Who? A. Mr. Hinchman; Lawyer Hinchman.

Q. Well, did it say anything in that contract about your right to enter the premises and cut and remove the ties? A. Remove all timber.

Q. Isn't there a clause in there giving you permission to enter and cut and remove that? There is a special clause for that, isn't there? Isn't there? A. Well, I should say yes; I should think  
20 perhaps there was.

Q. There was, wasn't there? That is all.

CHARLES J. FOX, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. King:

Q. Mr. Fox, where do you live? A. Rockaway.

30 Q. You are in the timber business? A. I am not in the timber business, no, but we have timber.

Q. How many years were you in the timber business?

Mr. Bolitho: I object. It doesn't appear he is in the timber business or has been; he says he has timber.

40 Q. How many years have you been in the timber business? A. A number of years ago.

## Edward Jenkins—Direct

Q. Up until when? A. Oh, 20 years ago.

Q. Until 20 years ago? A. Yes. I wasn't in the business entirely; but I sold timber and bought some timber.

Q. Since that time? A. No, not since that time.

Q. When is the latest transaction you had in the timber business? A. About 21 years ago. 10

Mr. King: I think, your Honor, that that is too long to offer his evidence.

The Court: I think so.

Q. I understood your evidence related to a near time. A. No.

Mr. King: That is all.

EDWARD JENKINS, called as a witness on 20 behalf of the Defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. King:

Q. Mr. Jenkins, are you the District Clerk, or the Clerk of the District Court in Dover? A. Yes, sir.

Q. You have a book with you and some other papers; what is the book? A. The docket; the entry docket. 20

Q. Docket of what? A. The Second Judicial District Court.

Q. Of Dover? A. Of Morris County. Dover, yes, sir.

Q. And who presides over your Court? A. Judge Smith.

Q. Have you been the Clerk of the Court since it was instituted? A. I have. 40

## Edward Jenkins—Direct

Q. And that is your official docket? A. Yes, sir.

Q. I notice you have some papers in the docket; what are they? A. Relative to a case wherein Daniel J. Kanouse was plaintiff and Joseph Donatonia, I think—Donatonia was the last name; I am  
10 not so sure of the first.

Q. That was the last name of the defendant? A. Yes, sir; of the defendant.

Q. Are they the original files of your Court? A. Yes, sir.

Q. Now, produce for us the original papers. A. (Handing papers to Mr. King.)

Q. Is this package, No. 224, Second Judicial District Court of Morris County, Daniel J. Kanouse vs. Joseph Donatonia, in tort, James H.  
20 Bolitho, attorney, the original file? A. It is.

Mr. King: I want to offer that in evidence before the—there is some stuff here that ought not to go in, a brief, and brief. I want to offer the state of demand. Shall I read it to you, or will you read—

The Court: Let me see it.

Mr. King (handing paper to the Court): There does not appear to be any answer here. Was there an answer filed in the  
30 case.

The Witness: All the papers in the case—

Q. Suppose you look at your docket and see if an answer was filed.

The Court: It does not require one, does it, district court?

Mr. King: Mr. Schenck says it does not require any answer in the district court.  
40

The Court: No.

Edward Jenkins—Direct

Mr. King: I didn't know that. I want to offer this complaint and the summons in this case, and then I want to offer the adjudication of the court after I have proven it.

The Court: I will hear what Mr. Bolitho 10  
has to say.

Mr. Bolitho: I object to it, if your Honor please, because it does not relate to the same subject matter that is set up in this suit, and wouldn't be *res adjudicata*. It is a suit for trespass, and this is a suit under a special statute, under the Timber Act, a special statute that a suit for trespass does not interfere with.

The Court: Where do you find any law 20  
that if you bring suit for trespass for the same cause of action you can then bring another suit under the Timber Act?

Mr. Bolitho: Because the rule of law, as I understand it, is that an action of trespass is a common law right of action. The Timber Act is a statutory act, and we have a right to proceed, and also under the common law for simple trespass. In that action we brought a suit of trespass, alleging damages by virtue of the fact that cer- 30  
tain wood was taken off, and certain timber, but in this action we are bringing a suit for a penalty provided by statute of \$8 a stump for the timber that was cut.

The Court: Is this the same timber you claim?

Mr. Bolitho: I do not know that it is the 40

Edward Jenkins—Direct

10 same timber, no; probably some of it would be the same timber, but in that action if it is *res adjudicata* on any point, it is *res adjudicata* in our favor, by virtue of the decision that this defendant trespassed, we getting a six-cent verdict, upholding our contention that he was a trespasser there. Now, it couldn't be *res adjudicata* in their favor; it is *res adjudicata* in our favor on the simple question of whether or not he was a trespasser. Now, this action is an entirely different action; it is for the cutting of the timber, and for the number of sticks of timber that were cut under the penal act, under the *quasi criminal act*.

20 The Court: What does it say about the timber?

Mr. King: This complaint here—plaintiff complains of the defendant that on certain days between the 1st day of January, 1918 and the 24th day of August, 1918, the defendant did wilfully and maliciously break and enter, and so forth, and thereupon he brings his suit.

30 The Court: That would not prevent recovery of ties, or anything of that kind, would it?

Mr. King: It would not prevent the recovery of ties and timber here excepting so far as this cord wood may be intermingled with their present case. Of course, I do not claim that it isn't exclusive; but it might be inclusive of this. I think it is admissible in this case.

40 The Court: I think so.

Daniel J. Kanouse—Direct

Mr. King: This is an official filing.

Q. Now, was there a verdict rendered in this case? A. There was.

Q. And what was that verdict? A. Six cents.

Q. Rendered when? A. February 14th.

Q. 1919? A. Yes, sir.

Mr. King: Now, I offer the witness for cross-examination. 10

CROSS-EXAMINATION by Mr. Bolitho:

Q. In whose favor was that verdict? A. In favor of the plaintiff.

Q. For six cents? A. Yes, sir.

Mr. Bolitho: That is all.

By Mr. King: Q. And may I ask you that you leave this complaint with the—if you are going back at once, that you leave it here with the Clerk of this Court until it gets back to you. Your other papers are in the package? A. Right here (indicating). 20

Mr. King: That is our case.

Mr. Bolitho: I want to re-call Mr. Kanouse.

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DANIEL J. KANOUSE, the Plaintiff, re-called as a witness on his own behalf, testified further as follows: 30

Direct-examination by Mr. Bolitho:

Q. Mr. Kanouse, do you remember when you gave that paper to Mr. Donatonia? A. (No response.)

Q. Do you remember when you gave that paper to Mr. Donatonia? A. Yes, sir. 40

Daniel J. Kanouse—Direct

Q. And what did you give that to him for?

Mr. King: I object to that. You see that is his conclusion. "What did you give it to him for?" is a conclusion.

10 The Court: Well, you may find out something about it. What he gave it to him for, that is a conclusion.

Q. Was there anything said to you by Mr. Donatonia about permission to enter your land for the purpose of cutting this timber after you had given him this receipt? Was there anything said about that? A. No.

Q. What was said after the receipt was given?

Mr. King: Now—

A. I didn't go there to show him.

20 Mr. King: I object and move to strike it out.

The Court: I didn't catch that.

Mr. King: "I didn't go there to show him."

Q. Listen to what I say, Mr. Kanouse. Did you or Mr. Donatonia say anything after this receipt was signed about his right to go on and cut the timber? Was there anything said about that?

A. Well, he didn't know where to cut.

30 Mr. King: I move to strike it out.

The Court: Was there anything said. That was the question.

Mr. King: Please either strike that out, or—

The Court: Strike that out.

Q. He says on the witness stand that you went up and showed him where to cut. Did you ever go up and show him where to cut? A. No, sir; I wasn't there.

40 Mr. Bolitho: That is all.

## Motion for Direction of Verdict

Mr. King: I move for the direction of a verdict for the—that is, Mr. Kanouse—defendant, and I move it on the ground that within the decisions which your Honor has seen, there is no malice and no ill-will, no wilful trespass, as the case puts it, against the land of the defendant. 10  
 Donatonia had a contract that is before the Court, which gave him some right in that wood and timber, and it must be borne in mind that the only piece of land that Kanouse had is the piece of land described in this receipt. What did he find? Remember, if you please, that he bought the wood and timber with the explanation, as given by Mr. Woodhull, he bought it all; it was all his; he entered, therefore, under a right. If you assume that that isn't the true construction, that ties and 20  
 timber might have some other construction, then his entry was lawful and there was no prohibition, no wilfulness in cutting, because, by the evidence of the plaintiff himself, they haven't shown that he wilfully cut any timber. Even if he did, assuming that he had a right to do it, this case in 90 Law, page 9, is authority for the position that it must be done wilfully, in other words, there must be the wilfulness that would support a criminal complaint. If that is so, where is there any 30  
 wilfulness here? The plaintiff himself says he didn't notify this man to cut any, not a thing about it. All he says is he never gave him permission to cut it. But the man entered by virtue of this paper here. That is what he says. I took that and went up and went to cutting and cut the things that were there. If he did that there was not the wilfulness mentioned in that case. 40

There is another aspect in this case; This man

## Motion for Direction of Verdict

has testified that there were 987—well, it won't make any difference—over 900 stumps, that he and Mr. Simms and someone counted and which they claim places the amount of damages they are entitled to recover. Now, it is a cardinal principle of the law that the plaintiff must not only prove  
 10 his right to recovery, but the amount of his recovery. A judgment was handed down in the District Court of Dover, which said that forty cords of wood had been cut from this land. How many stumps are represented by the forty cords of wood? If that was subject to adjudication and a six-cent verdict rendered, that ends that case.

Now, how can the jury determine how many stumps should be taken for forty cords of wood?  
 20 There isn't any evidence.

There is another aspect, and that is that there were some old stumps there where the trees had been cut for tie timber. Where is there any evidence on the part of the plaintiff that he aggregated any stumps, because his evidence is that he counted every stump that was there, and there were no old stumps? That you may say is a question for the jury. They must believe him or someone else. But this granting of a verdict isn't the subject of the question of evidence nor the weight  
 30 of evidence. And there is another aspect, and that is the aspect that there isn't anything here before you as to what wood and timber means except the evidence of the defendant. The defendant said it includes everything. If it does include everything, then there could not be any recovery for the value of the wood taken. Now, where is  
 40 there any evidence on the other side—

The Court: Isn't that a question for the jury

## Motion for Direction of Verdict

to say whether that is the meaning of those terms?

Mr. King: They have got to decide it on the evidence. The jury is permitted to say that ties and timber means anything. Now, where is there any evidence in the case that ties and timber is not inclusive of everything that was on that land? The case stands on the proof, and there is no proof contrary to the proof we have offered. Certainly a jury cannot say, "I do not agree with that fellow," because the jury is bound to take the evidence as it is, and I submit there should be a direction of a verdict. 10

Mr. Bolitho: It isn't our contention that they had any permit at all; that is a matter of their defense. We have proved an entry on the part of the defendant, and we have testified how many stumps there were there. 20

The Court: Under that Monmouth County case, the Supreme Court held, as I understand the act, that it was a question for the jury to say whether it was malicious entry, and if it wasn't malicious entry, you could not recover for the stumps; you could only recover for the value of your timber.

Mr. Bolitho: That was on the question of damages. 20

The Court: No, it was the stump act.

Mr. Bolitho: It says in the case—

The Court: That is the stump act.

Mr. Bolitho: They held it as a matter for the jury to determine.

The Court: Yes, it was for the jury, but if the jury found there was no malice and that the party entered on the land with the claim that he had a right, the stump act did not apply, and all 40

## Motion for Direction of Verdict

10 he could recover would be the question of the value of the timber cut. They set the verdict aside because there was a verdict for the amount of the trees cut at so much a stump. Now, your stand in this case, it stands here now, the defendant claims he entered there with a right. Now, if the jury says that, there cannot be any recovery, unless you show the value of your timber taken away.

Mr. Bolitho: But it is for the jury to say whether he had that right.

The Court: Certainly.

Mr. Bolitho: I have no argument on that. His motion is for the direction of a verdict.

The Court: I cannot direct a verdict.

20 Mr. Bolitho: I won't take up any more of your Honor's time.

Mr. King: May I have an exception?

The Court: Yes, you may take an exception.

Mr. King summed up to the jury on behalf of the Defendant.

Mr. Bolitho summed up to the jury on behalf of the Plaintiff.

30 Mr. King: If your Honor please, I am aware of the rule that requires you must present your requests to the Court before the summing up, but this request follows a statement made by the counsel of the plaintiff in summing up to this jury, and without that knowledge I could not make any request before that time. That would account for this delay, sir.

The Court: Do I understand the plaintiff said the defendant showed him where he could cut?

40 Mr. King: Yes, sir; and the wood and timber was all in one place.

The Court: He showed him where it was?

Mr. King: Yes.

### Charge

CUTLER, J.: Gentlemen of the Jury, this is an action founded on what is known as the Timber Act. That Timber Act allows an action to be brought to recover for timber cut without permission on the lands of the owner, and I will read you that portion of the act which is applicable to the present case. 10

“That if any person or persons whatsoever shall at any time hereafter cut, fell, work up, carry away, box, bore or destroy any tree, sapling or pole standing or lying on any land within this State to which such person or persons hath not or have not any right and title without leave first had and obtained of the owner or owners of the said land for that purpose, every such person or persons so offending shall forfeit and pay for each tree, sapling or pole so cut, felled, worked up, carried away, boxed, bored or destroyed, as aforesaid, the sum of eight dollars.” 20

Now, under that section of the statute it is immaterial what the value of the tree or sapling cut was. It is a penalty for cutting such a tree or sapling on the land of another without the consent; but before the plaintiff can recover, he must not only satisfy you of the number of trees, saplings or poles that have been cut by the defendant, but it must also appear that they were cut without the consent of the plaintiff, because if they were cut with the consent of the plaintiff, there could be no recovery of this eight dollars per stump, and it is for you to determine whether or not in this case these trees which were cut by the defendant were cut under an honest belief that he had the right to cut them. If he had that, and 40

## Charge

10 you are satisfied from the evidence that he honestly believed that he had a right to go upon this property and cut those trees, then he cannot be held responsible under this stump act, but he could be held responsible for the value of the trees which he unlawfully removed from that premises and for the damage which the plaintiff received and suffered by reason of the removal by the defendant unlawfully.

20 Now, in this case, it appears that some time during the winter a suit was brought in Dover against this defendant by the plaintiff for entering these premises and cutting and removing forty cords of wood. That case was tried and it was determined, and so, far as the forty cords of wood are concerned, it is immaterial here what the damages were; that cannot be considered by you. So far as that forty cords of wood are concerned, and as far as any other timber which might have been cut lawfully or unlawfully, there can be no verdict in this case unless there is some evidence as to its value. If you are satisfied that there was timber unlawfully cut without any authority, then you could only render, as the case now stands, a verdict for nominal damages, there being no evidence in this case as to the value of the timber which this defendant cut.

30 Now, in addition to that, there has been offered a receipt showing that for three years he had bought certain ties and timbers of this plaintiff, and it all appears by that receipt. Have you the receipt there, please?

Mr. Bolitho: (Handing paper to the Court.)

40 The Court: Which reads as follows:

## Charge

“Powerville, N. J., June 29, 1915. Time, three years. Received of Joseph Donatonia eight dollars to pay for all ties and timbers on my farm at Beech Glen known as Anna Stickel farm. Received payment.

D. J. KANOUSE.”

10

Now, if the ties and timbers were taken within the three years, he had a right to take them within that time. If they were taken after that time, he had no right, because his right ended at the expiration of three years.

Now, gentlemen, it is a case for you to determine, first, whether or not the plaintiff in this case had a certain number of trees cut; whether the defendant cut them; whether the defendant knew or believed at the time he cut them that he had the right to cut them. If he did he cannot recover eight dollars a stump; if he did not, then the plaintiff can recover eight dollars a stump for the number of trees cut by this defendant if they were not included within the trees that he bought, because if they were cut after the 29th day of June, 1918, he had no right on that property, and there cannot be any allowance for the wood, the forty cords of wood, for which the suit was heretofore brought.

20

30

Swear an officer.

Mr. Bolitho takes an exception to the parts of the charge relating to alleged contract of sale of timber, and to District Court Record and question of *res adjudicata*.

Exception allowed.

(The jury retired at 4:12 p. m.)

40

**Exhibit D-2**

Morris County, ss:

The State of New Jersey to any Constable  
in said County, or to the Sergeant-  
at-Arms of the District Court of the  
Second Judicial District of the  
County of Morris:

10

DISTRICT COURT SUMMONS

(Seal)

SUMMON, Joseph Donotona, to appear before  
the District Court of the Second Judicial District  
of the County of Morris, to be held at 14 West  
Blackwell Street (second floor), in the Town of  
Dover, on the 4th day of September, 1918, at 10  
o'clock in the forenoon to answer unto Daniel J.  
Kanouse, in an action upon Contract to the dam-  
age of the plaintiff in the sum of Five Hundred  
\*\*/100 Dollars. Hereof fail not.

20

(Seal)

WITNESS, LYMAN M. SMITH, Esq., Judge  
of said Court, at Dover, aforesaid  
the 26th day of August, in the year  
One Thousand Nine Hundred and  
Eighteen.

EDWARD JENKINS,  
Clerk.

## Exhibit D—2

District Court of the Second Judicial  
District of the County of Morris

## SUMMONS ON CONTRACT

DANIEL J. KANOUSE, 10  
vs.  
JOSEPH DONOTONA.

Demand	\$500.00
Costs	2.10
Milage	.56
Listing fee	1.50
Attorney fee	.....

Returnable Sept. 4th, 1918 20

J. H. Bolitho,  
Att'y for Plaintiff.

The said defendant Joseph Donotona not being found, I served the within summons August 29th, 1918, by leaving a copy thereof at his residence with a member of his family above the age of fourteen years informing her of its contents.

A. JUDSON COE, 30  
Sergeant-at-Arms.  
Constable

**Exhibit D-3**

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

19	DANIEL J. KANOUSE,	Plaintiff,	} State of Demand. In Tort.
	vs.		
	*JOSEPH DONOTONA,	Defendant.	

20 The Plaintiff complains of the defendant for that whereas hereto towit, on certain days between the first day of January, A. D. 1918, and the twenty-fourth day of August, A. D. 1918, the defendant did wilfully and maliciously break and enter the close of the plaintiff, on the road leading from Beach Glen to Meridan in the Township of Rockaway, in the County of Morris, and State of New Jersey, and then and there did cut down and carry away about forty cords of hickory and other cord wood of the value of \$10.00 per cord, without the permission and against the wish of the plaintiff, to the damage of the plaintiff five

30 hundred dollars, and thereupon he brings this his said suit.

DANIEL J. KANOUSE,  
Plaintiff.

**Exhibit D-4**

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DANIEL J. KANOUSE,

Plaintiff,

vs.

JOSEPH DONOTONA,

Defendant.

10

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Judgment was rendered in the above stated case on the fourteenth day of February, 1919, for the sum of six cents, in favor of plaintiff.

EDWARD JENKINS,  
Clerk.



30 MAR 1 1920

## New Jersey Court of Errors and Appeals

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DANIEL J. KANOUSE, Plaintiff-Appellant, vs. JOSEPH DONATONIA, Defendant-Appellee.	}	On Appeal
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### **BRIEF OF PLAINTIFF-APPELLANT**

#### **Facts**

The appellant is a real old man. Appellee is a clever Italian wood dealer. On June 29, 1915, appellee went to Appellant's home at Boonton, and represented to appellant that there were several ties and some sticks of timber lying on the ground in appellant's woodland at Beach Glen, in Rockaway Township, which he, Donatonia, wanted to buy, and appellant sold the said ties and timber to Appellee for \$8, giving him the receipt which is Exhibit D-1, on pages 20 and 21 of the State of the Case. Donatonia later went on the woodland of Appellant and cut all the trees on the seventy acres. In total 918 stumps were left after the cutting. Donatonia took this timber all off after he cut it. When Appellant, who lives about ten miles from the woodland, learned what Donatonia had done, he brought suit in tres-

pass in the Second Judicial District Court of the County of Morris for the purpose of ascertaining whether Donatonia was a trespasser. Appellant obtained a judgment in that Court for six cents, establishing the fact that Donatonia had trespassed. Appellant then brought the suit at bar in the Supreme Court to recover under the Timber Act \$8 per stump. The jury rendered a verdict of no cause for action. Appellant has appealed to this Court from that verdict, for the reasons set forth in the Notice of Appeal, pages 1, 2 and 3 of the State of the Case.

### Law Points

Under the case of *Slocum v. Seymour*, 36 N. J. L., 138, holding that a sale of standing timber, with the right in the vendee to sever them, is the sale of an interest in land within the statute of frauds, the doctrine laid down in the cases of *Claflin v. Carpenter*, 4 Metc., 583, *Giles v. Simonds*, 15 Gray, 441, and *Drake v. Wells*, 11 Allen, 141, does not apply to this case.

Donatonia treated the paper (whereby a few "ties" and "timber" lying upon the ground were sold to him) as a sale of seventy acres of standing timber with the right for him to enter and cut the same. By his conduct he admits that in order to do what he did do, under our law, it was necessary for him to have had a deed from Kanouse whereby such interest in land was transferred to Donatonia.

The form of Exhibit "D-1" does not comply with the form of a deed for the sale of an interest in land, and should not have been admitted in evidence.

See Secs. 20, 20a, etc., Compiled Statutes, Vol. 2, p. 1540.

In 25 *Cyc.*, 1549, it is said,

“The general rule is that sales of standing timber must be in writing, since standing timber is a part of the realty. The conveyance must be under seal in states where seals are necessary on transfers of realty,”

citing cases in notes 34, 35 and 36.

It would seem, also, that it being that a sale of standing timber in New Jersey is the sale of an interest in land, it would be necessary that the instrument by which the conveyance is made should be signed, sealed and delivered and acknowledged, so that it could be recorded.

This property in question had a substantial mortgage on it, and it was never Kanouse's intention to convey to Donatonia anything except “ties” and “timber” that were lying on the ground, the use of the words “ties” and “timber” being to convey the ordinary, common meaning of the same, and it will be noticed that he did not use the word “standing” before the word “timber.” See Webster's, the Standard, and Century dictionaries, See also 38 *Cyc.*, 305.

Before Kanouse brought his suit in the Supreme Court, under the stump law, he brought an action in trespass in the Second Judicial District Court for the purpose of testing Donatonia's right to enter Kanouse's land and cut the trees down under the alleged permit, and it was decided, after the case was fully tried, that Donatonia had no right to enter and cut the trees under the permit, that he was a trespasser, and Kanouse obtained a judgment for nominal damages, as he did not prove any other damages.

It is Kanouse's contention that that judgment

in his favor, by a court of competent jurisdiction, decided that Donatonia had no right to enter and cut the trees, that that question was *res adjudicata*, and that that question was improperly submitted to the jury in this case in the Supreme Court. The decision of the District Court could only be tested by certiorari or appeal.

Plaintiff had the right to proceed in tort for trespass in the District Court, and also the right to proceed for the penalty under the timber act in the Supreme Court. It should be remembered that Donatonia cut and took away about \$8,000 worth of trees, figuring according to the rate allowed under the stump law, and counting the stumps was about the only way to determine what he had taken.

A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. 23 *Cyc.*, 1170. See also *Res Adjudicata* in "*Words and Phrases*" and *Bouvier's Law Dictionary*. See also 23 *Cyc.*, 1167, 1169, also 23 *Cyc.*, 1113, B, and 23 *Cyc.*, 1106, See also *Wooster v. Cooper*, 59 N. J. Eq., 204,

"All defenses to plaintiff's cause of action which were set up and adjudicated are concluded by a judgment for the plaintiff, so that they cannot thereafter be urged as against further proceedings upon the same cause of action, or upon the judgment itself, or in further litigation between the same parties upon the same subject-mat-

ter," 23 *Cyc.*, 1195-1196, citing *Delaware, etc., R. R. Co. v. Breckenridge*, 58 N. J. Eq., 581, *Manley v. Mickle*, 53 N. J. Eq., 155. See also 23 *Cyc.*, 1197-1198, especially in b, where it says:

"\* \* \* or for trespass, defendant must set up all the titles or claims to the property which he holds or can make available in his behalf; failure to assert any title or claim in such action will preclude him from setting it up afterwards."

The Trial Court should not have permitted defendant to submit testimony relating to the meaning of the common, untechnical language used in Exhibit D-1. This was prejudicial to plaintiff's case, and gave a different meaning to the words used than their ordinary meaning. It enlarged upon the real meaning of the words.

The Trial Court should not have charged these words (See page 46 of State of Case, line 26):

"If you are satisfied that there was timber unlawfully cut without any authority, then you could only render, as the case now stands, a verdict for nominal damages, there being no evidence in this case as to the value of the timber which this defendant cut."

This was a misstatement of both the law and the evidence. In this action, the law fixed the value of the timber at \$8 per stump. The uncontradicted evidence of Daniel J. Kanouse, (found on pages 15 to 18, both inclusive, of the State of the Case) was that defendant cut 918 sticks, as he counted that many stumps. This is corroborated by the evidence of William K. Sims on page 19 of the State of the Case. Appel-

lant submits that this erroneous statement of the Trial Court to the jury was very harmful to plaintiff's case, and amounted, almost, to the direction of a verdict for defendant. This statement was near the end of the charge, and was not cured by anything that was afterwards said by the Court.

The Court also charged, after referring to the receipt, (page 47, State of Case):

“If the ties and timbers were taken within the three years, he had a right to take them within that time,”

which, because of the former adjudication of the right to enter against the defendant's claim in the District Court, and under the evidence then in the case, and in consideration of the form of the receipt referred to, was erroneous.

For the foregoing reasons, appellant submits that the verdict should be set aside, and the case remitted for a new trial.

Respectfully submitted,

JAMES H. BOLITHO,  
Attorney and Counsel of Appellant.

## New Jersey Court of Errors and Appeals.

DANIEL J. KANOUSE,  
Plaintiff-Appellant,

vs.

JOSEPH DONATONIA,  
Defendant-Appellee.

Action at Law on  
Appeal.

### BRIEF OF DEFENDANT-APPELLEE.

#### Facts.

Kanouse sold to Donatonia all the ties and timber on his farm, June 29, 1915, the same to be removed within three years, as appears by his written memoranda and receipt (Exhibit D-1, State of Case, p. 20, line 41; p. 21, lines 1-10). Both men went to the farm, and Kanouse pointed out to Donatonia the wood to be cut (p. 22, line 35; p. 23, line 10). The woodland lay on both sides of the road (p. 23, line 10), and contained in all twenty-five to thirty acres (p. 14, line 2). Immediately thereafter Donatonia began cutting and removing the ties and timber (p. 23, line 15), continuing until some time in May, 1918 (p. 23, line 19). No objection was ever made by Kanouse during this three-year period.

On August 26, 1918, Kanouse started suit in the District Court for the Second Judicial District of Morris County against Donatonia (Exhibit D-2,

p. 48), for cutting and carrying away forty cords of cordwood (see State of Demand, Exhibit D-3, p. 50), which suit resulted in a six cent judgment (Exhibit D-4, p. 51).

Summons in the present suit was issued March 5th, 1919 (p. 4, line 26), the plaintiff claiming the right to recover under the Stump Act for nine hundred and eighteen trees cut. Before the jury was sworn, the trial court permitted defendant to enter a plea of *res adjudicata* (p. 9, line 1), and to that plea plaintiff entered a denial (p. 9, line 23). There was testimony that when Donatonia first went to the property a number of stumps were to be seen (p. 24, line 41), and wood was also cut after Donatonia left the job in 1918 (p. 27, lines 20-30). The jury returned a general verdict in favor of defendant Donatonia of no cause of action (p. 6, line 29), and from this judgment an appeal is taken.

Flagrant misstatements of fact are made in plaintiff-appellant's brief, and in passing we feel obliged to call the Court's attention to his failure to make reference to the page in the State of the Case where same are found. We assume the Court will scrutinize with care, or possibly disregard, all statements of fact throughout plaintiff's brief to which no reference has been made to the State of the Case.

**Plaintiff-appellant in his brief has not presented his argument in the order of grounds for appeal, as set forth in the notice of appeal, or designated in particular upon which ones he relies.**

**Defendant-appellee therefore presents the following argument and authorities in reply to each reason or ground in the order set forth in the notice of appeal:**

## ARGUMENT.

### 1.

Defendant's plea of *res adjudicata* was entered before the Jury was sworn (8 and 9) and there is absolutely no evidence that there was improper delay or statements made in entering it as alleged. Plaintiff wanted the case tried (8, line 36) and entered a denial to the amended plea (9, lines 19-24).

The right to amend is a matter addressed to the Court's discretion.

Practice Act of 1903, Sec. 126.

Practice Act of 1912, Sec. 23.

Bruch vs. Carter, 32 N. J. L. 554.

To permit the filing of this plea was entirely within the Court's discretion, and it cannot be conceived that the plaintiff was prejudiced thereby. Furthermore, in the absence of an abuse of discretion or surprise, the allowance of an amendment is not a good ground of appeal.

### 2.

By reference to the summons, state of demand, and judgment of District Court, Exhibits D-2, 3, 4, pages 48, 49, 50 and 51 respectively, it conclusively appears that the only question before the District Court was defendant's right to cut and carry away forty cords of cordwood. That judgment was claimed by defendant to be *res adjudicata* as to so much of plaintiff's alleged cause of action as was represented by the stumps made by or sufficient to produce the forty cords of cordwood.

A perusal of the State of the Case does not indicate that any broader effect was sought to be given this judgment. The entire record was before the Court. Any theory either party might have had in regard to it could not enlarge or diminish its legal effect.

**3.**

It is a well-established rule of law that where words used by persons in a peculiar business or trade have a peculiar or technical trade meaning, testimony to show that by the usage of such business or trade certain words have acquired a meaning different from their common and ordinary meaning, is admissible.

The J. C. Smith & Wallace Co. *vs.* Gilbert H. Lunger, 64 N. J. L. (35 Vr.) 539.

Defendant-Appellee maintained that the words, "all ties and timber" in the receipt or memoranda (p. 21), by usage in the trade and among woodsmen, had a known, peculiar and technical trade usage, and included all wood on the land mentioned.

Defendant witness, Woodhull, testified that the words had a trade meaning, and that in the trade "all ties and timber" permitted the purchaser to cut everything (31, 32, 33).

Such testimony was legal and proper, and its admission presents no reason for appeal.

**4.**

As considered above, the record of the trial in the District Court was properly before the Court, and evidence as to it was not illegal. Edward Jenkins, Clerk of the Court, testified to and produced the record (35, 36, Exhibits D-2, 3, 4).

**5.**

The Court did not charge in the words alleged in Plaintiff-Appellant's reason for appeal. On page 45, line 41, and 46, lines 1-4, the Court did say:

"If he (Donatonia) had that (an honest belief that he had a right to cut the trees) and you

are satisfied from the evidence that he honestly believed that he had a right to go upon this property and cut those trees, then he cannot be held responsible under the 'Stump Act'."

This is a correct statement of the law as laid down in the recent case of *COOK vs. BENNETT GRAVEL CO.*, 90 N. J. L. (5 GUMMERE), p. 9.

## 6.

The statement by the Court that there was no evidence as to the value of the timber cut by defendant is absolutely correct, for there is not one scintilla of evidence to this effect in the state of the case.

In the absence of proof as to the number of stumps made by or necessary to produce the forty cords of cordwood in litigation in the District Court, the Court should not have permitted the jury to speculate as to the number of stumps for which plaintiff-appellant was entitled to recover.

Further, it had been proved by defendant and not denied that other persons had cut timber on this same tract both before and after the defendant had cut upon the property (p. 24, line 41; p. 27, lines 20-30); and plaintiff and his witness, Simms, testified the number of stumps sued for included all the stumps on the tract (14, line 19; 15, line 35; 19, lines 20-31).

As clearly appears from a reading of the entire paragraph of the charge (46, lines 14-31), the Court's charge was proper and a correct exposition of the law.

If any possible construction adverse as alleged to plaintiff under the evidence and the law could be placed upon this particular portion of the charge, the concluding paragraph of the charge (47, lines 16-30) tersely restates the law of the case, and lines 19-23 particularly correct such possible misconstruction.

## 7.

If the memoranda given by Kanouse to Donatonia (Exhibit D-1, p. 20, line 41, to 21, line 10), means anything, it means just what the Court said. Nothing in the case purported to change the time within which Donatonia was to take the ties and timber.

As said above, the case in the District Court involved cord wood only (Exhibit D-2, p. 50), which the plaintiff there contended was not included in the sale.

## 8.

The sale of timber carries with it the right to remove it, if upon vendor's land, and the note or memoranda in writing given by Kanouse to Donatonia was more than sufficient to give him the right to cut and remove the ties and timber therein referred to. A seal and acknowledgment were unnecessary.

C. S. Vol. 2, p. 2612, sec. 5.

Claphom *vs.* Barber, 65 N. J. E. (20 Dick. Ch.) 550.

The District Court suit involved nothing more than cord wood and cannot by any stretch be held to have determined Donatonia's right to ties and timber under memoranda.

Mershon *vs.* Williams, 63 N. J. L. (34 Vr.) 398.

Hoffmeier & Son *vs.* Trost, 83 N. J. L. (54 Vr.) 358.

The Court's charge was a correct statement of the law applicable to the case and was in accord with the authorities above stated.

**Conclusion.**

The jury found as a fact, under proper instructions by the Trial Court, that the defendant-appellee, by virtue of a sufficient note or memoranda in writing, cut and removed ties and timber from plaintiff-appellant's property, after sale of the same to him and as he had a legal right to do.

There was no error in the trial or charge of the court below. Neither the grounds of appeal or brief of plaintiff-appellant present any sufficient reason for the reversal of the jury's verdict.

The judgment below should be affirmed.

KING & VOGT,  
Attorneys for and of Counsel  
with Defendant-Appellee.

