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New Jersey
Court of Errors and Appeals

Notice of Appeal.

(*Filed Feb. 28, 1927.*)

WARREN COUNTY CIRCUIT COURT

GEORGE W. SARSON, Plaintiff, vs. WILLIAM MUELLER, Defendant.	Action at Law.

To Smith & Smith, 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 this cause.

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

Amended Complaint.

(*Filed Sept. 20, 1926.*)

WARREN COUNTY CIRCUIT COURT

JUDGMENT RECORD

GEORGE W. SARSON, Plaintiff,
vs.
WILLIAM MUELLER, Defendant.
} Action at Law.

J. M. Roseberry & Son, Esqs., attorneys.

William Mueller, the defendant in this cause, was summoned to answer unto George W. Sarson, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued February 8, 1926.)

AMENDED COMPLAINT.

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.

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 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 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 plaintiff, as set out in paragraph one. The plain-

tiff 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, 1926, 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 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 43 acre tract as stated in paragraph one was relied upon by plaintiff, not waiving, however, his right to the extension of one year.

4. On February 8th, 1924, the said defendant served upon plaintiff a written notice stating that as the two years had expired in which plaintiff was to cut and remove the timber from his two wood lots, being the 43 acres mentioned in paragraph one, that plaintiff should keep off the said premises, and not cut thereon or remove 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 4, being the forty-three acre tract mentioned in paragraph one, and also the privilege 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, 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 2 by his notice as set forth in paragraph four.

7. Defendant failed to give plaintiff a reasonable time to cut and remove the timber from the nineteen scre 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 3, by his notice as stated in paragraph 4.

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 therein extended for cutting and removing the same as stated in paragraph 2 and 3 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.

Answer

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 8*yh*, 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.

The defendant, William Mueller, says that:

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.

Answer

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.

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

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 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.

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.

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

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

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

Judgment.

WARREN COUNTY CIRCUIT COURT

GEORGE W. SARSON,
Plaintiff,

vs.

WILLIAM MUELLER,
Defendant.

This action was tried before Judge Rulif V. Lawrence, with a jury, at the Warren Circuit Court on February 2, 1927, the cause having been 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 $48.10.

Dated, Feb. 10, 1927.

Judgment entered Feb. 10, 1927.

RULIF V. LAWRENCE,
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.

(Seal) In testimony whereof I have set my hand and the seal of said Court at Belvidere, this 28th day of Feb., A. D. 1927.

RAMSEY REESE,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

GEORGE W. SARSON,
Plaintiff-Appellant,

vs.

WILLIAM MUELLER,
Defendant-Respondent.

} Action at Law.

The appellant states the following grounds of appeal.

1. The court erred in holding that the written agreement, signed by defendant, was on condition that the timber growing on 43 acres of land of the size indicated therein, should be removed within a period of two years from the date.

2. The court erred in holding that the agreement was not a conveyance of the timber but was in the nature of a timber lease involving a sort of license to the buyer to go and remove the specified timber during a definite period.

3. The court erred in holding that in the extension of time, that there is an asservation of agreement on the part of the plaintiff consented to by the defendant, and denied by the latter. Obviously, the plaintiff has not sustained the burden of proof that he carries; because the credibility of the testimony of the plaintiff and of the defendant is a fact to be considered by the jury from all the proofs and circumstances in determining the preponderance of the testimony, and it was not for the court to assume that the testimony of plaintiff and of the defendant were of equal weight considering all the proofs and circumstances in the case.

4. The court erred in holding of the action is to be maintained as a breach of the contract originally made, then the plaintiff encountered difficulty in the court's mind in having failed to prove by a fair preponderance of proof the meeting of the minds on that subject, because this fair preponderance of proof involves credibility and the facts and circumstances involved in the transaction. And is a question of facts solely for the determination of the jury.

5. The court erred in questioning whether the plaintiff did anything under the extension of time to remove the timber.

6. The court erred in questioning whether the defendant did anything to breach that condition—that agreement if it was actually made, because the notice of February 8, 1924, and of February 11, 1924, clearly shows that there was such a breach.

7. The court erred in holding that the notice of February 8, 1924, was given because of the doubtful situation which had arisen in their minds as to what the plaintiff intended to do, and that this of itself seemed to the court would be evidence indicating that the minds of the plaintiff and the defendant had not met upon the extension agreement; because it is illegal, if so considered, as a declaration in writing by the defendant, in favor of defendant. And therefore not competent. It is rather a declaration showing just the opposite to the court's view. And was a fact to be determined or an inference to be drawn by the jury.

8. The Court erred in holding that the plaintiff did not do anything under his extension of time, on the ground that the testimony shows otherwise.

9. The court erred in determining as a fact proved that the plaintiff did not do anything under his alleged extension of time, and that a day or two before the notice by the defendant was served, the plaintiff simply decided that they didn't intend to allow him to go on, and he took it that whatever they said was sufficient denial

of his right to go on the premises, and he did nothing after that, because the court's conclusion of facts and inferences is wrong, also such conclusion is a matter of fact for the jury to determine.

10. The court erred in saying that the Court of Errors and Appeals has already said that the notice served by Mr. Mueller upon the plaintiff was no evidence of conversion. We submit that the Court of Errors and Appeals did not say so. All the Court of Errors and Appeals said was that the standing timber was real estate and that an action of trover and conversion would not lie for any interest in real estate. The Court of Errors and Appeals did not determine its bearing upon the timber then made up into mining props and mining ties to the value of $300 and then laying upon the timber tract, which was personal property.

11. There was error in the finding by the court that the burden of proof fails, doesn't indicate how much was taken of the cut timber by the defendant, the value of it or really where it came from, on the ground that it was a function of the jury to determine these facts from the testimony given, the inferences to be drawn from proven facts and the credibility of the witnesses.

12. The court erred in his opinion that the motion for the direction of no cause of action should be granted because the present action being based apparently upon the alleged repudiation of the

alleged agreement to extend the time. On the ground that the action is for a breach of the original agreement, the performance of which was extended to the taking the timber off of the 43 acre tract for a year after the expiration of the two years in the agreement. Later extended for two months to the 19 acre tract and the cut timber on the whole tract of 43 acres.

13. The court erred in holding that the extension of time to remove the timber was without consideration, on the ground that a party to whom a condition or covenant is to be performed, may, by acts as well as words, enlarge the term of performance. And such an agreement to enlarge is not void, because no consideration is expressed in it or otherwise proved.

14. The court erred in his view that the plaintiff had failed to make out his case in accordance with the recognized rule of law involving burden of proof, on the ground that this view involved the determination of the effect of testimony, the inferences to be drawn and deductions to be made from the testimony and the credibility of the witnesses.

In trials by jury it is the province of the judge to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law, by which it is to be weighed. whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury.

15. The court in directing the jury to bring in a verdict of no cause of action by the plaintiff erred in that he determined the sufficiency of the evidence in the case, which function belonged exclusively to the jury.

16. The court in directing the jury to bring in a verdict of no cause of action, erred in that the court failed to take into consideration the three hundred dollars worth of mining props and ties of the plaintiff being upon the 43 acre tract of land at the time defendant gave notice on the 8th day of February, 1924, to plaintiff not to cut or remove any more timber from said premises without his permission. The plaintiff, on the 11th day of February, 1924, served a written notice upon defendant as follows: "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 be my property." Which notice was in writing signed by plaintiff and served on the defendant personally February 11, 1924. The defendant gave no permission to plaintiff to remove his said mining props and ties. The plaintiff was entitled to recover the value of said three hundred dollars worth of mining ties and props, as the quantity and value of the mining ties and props were not denied by the defendant.

17. The trial judge refused to charge the following requests of the plaintiff to charge:

1. Under the agreement of sale the trees belong to Sarson, the plaintiff.

2. Whenever the owner of land conveys a part of it, the grantee takes the part conveyed with all the benefits and which appear at the time of sale to belong to it, and the grantor retains the adjoining property subject to the burdens and easements which the grant conveys.

The grantee takes the land conveyed and the grantor holds the land retained, with the right to whatever is necessary to the enjoyment of their respective premises, for the purpose for which they are then or are intended to be used, whether such intended use is mentioned in the deed or not.

3. The time for the performance of a contract either by deed or parol, may be enlarged by parol.

4. Where one, by his word 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.

5. If it is a voluntary and revokable forebearance by one party at the request of the other. If he invokes his consent then he must "allow a reasonable time for performance."

6. Equitable estoppel rest 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.

18. The trial court erred, because the trial judge, upon the trial of said cause, directed a verdict in favor of the defendant and against the plaintiff, over the objection of the said plaintiff, whereas the said trial judge should have submitted the case to the jury for its verdict.

Dated, March 7th, 1927.

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

Testimony.

WARREN COUNTY CIRCUIT COURT

DECEMBER TERM, 1926.

GEORGE W. SARSON, Plaintiff,

versus

WILLIAM MUELLER, Defendant.

Transcript of shorthand notes of testimony, etc., taken in the above entitled cause on the trial thereof before Hon. Rulif V. Lawrence, Circuit Court Judge, and a Jury, at the Court House, Belvidere, New Jersey, Wednesday and Thursday, February 2nd and 3rd, 1927.

Appearances:

J. M. Roseberry (J. M. Roseberry and Son), for the plaintiff.

Sylvester C. Smith, Jr. (Smith & Smith), for the defendant.

(Jury called and sworn.)

(Mr. Roseberry opened for the plaintiff.)

(Mr. Smith opened for the defendant.)

Mr. Smith: I want to make a motion for direction of a verdict on the pleading and the opening, on the ground that the opening and pleading do

not set forth any valid extension of time for a consideration upon which—

The Court: Of course, there is nothing in the opening to show the nature of that alleged extension at all. I think, in the circumstances, I will allow plaintiff to put in his case, without prejudice to you to make a motion for a non-suit, so that your present motion will be denied.

Mr. Smith: I pray an exception.

GEORGE W. SARSON, plaintiff, sworn.

Direct-examination by Mr. Roseberry:

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

Q. How long have you lived there? A. Fourteen years.

Q. What is your occupation, and what has been your occupation? A. I have been doing timber business for forty years.

Q. You remember a transaction that occurred between you and Mr. Mueller in 1921, about February 6, or about that time? A. Yes, sir.

Q. Just tell us what led up to this contract. A. I bought this property, two wood lots, of Mr. Walters. Mr. Mueller wanted the lot to build a house on it. I made arrangements with Mr. Mueller to pay me for the lots and I kept the timber.

Q. Yes, and in consequence Mr. Mueller took a conveyance from Mr. Peter S. Walters and wife on 6th February, 1922? A. Yes, sir.

Q. And this 43 acres was composed of two tracts, one containing about 25 acres, less an

acre or two, leaving about 23 acres, and another tract containing about 19 acres. These were the two tracts that were conveyed, were they not, by Peter S. Walters to the defendant, Mr. Mueller? A. Yes, sir.

Q. This timber stood on these two tracts? A. Yes.

Q. On that day in February did Mr. Mueller sign that paper, and is that his signature on that paper? A. Yes, sir.

Q. He signed it in your presence? Whose writing is that? A. That's my writing.

Q. Is that his signature? A. That's his signature.

The Court: Show it to your adversary, Judge.

Mr. Roseberry: We now offer it in evidence.

By the Court:

Q. Did Mr. Mueller sign that in your presence? A. I don't think I was present. I don't think so.

Q. The body of it is your handwriting? A. Yes, sir.

Q. How do you know he signed it? A. I am satisfied that's his signature.

Q. You didn't see him sign? A. I don't think I saw him sign it.

The Court: What's the attitude of counsel? Do you admit signing it?

Mr. Smith: We admit signing it. No objection.

(Received and marked P-1).

Mr. Roseberry: I now offer in evidence a deed from Peter S. Walters and wife to William Mueller, bearing date 6 February, 1922, the same date that's on this contract here between Mr. Sarson and Mr. Mueller, of these two tracts of land recorded in Volume 224 of the register of deeds, Warren County Clerk's office, page 596.

Mr. Smith: No objection.

The Court: The record will be received as Exhibit P-2.

By Mr. Roseberry:

Q. Did you go on, after this contract was made, did you go on the property, Mr. Sarson?

The Court: So that the jury will get that, won't you read that agreement to the jury that has been offered?

Mr. Roseberry: The contract on this sale is as follows:

"Received February 6, 1922, of George W. Sarson, $675 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 43 acres more or less, adjoining other lots 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 the butt, and not to cut or remove any timber less than five inches in circumference at the top, and to have the above timber removed in two years from date.

WILLIAM MUELLER"

Q. What did you do about this timber after you made this contract with Mr. Mueller? A. Started to cut it off.

Q. Did you have any trouble in selling it?

Mr. Smith: I object to that.

The Court: He may tell what he did.

Mr. Smith: No objection to what he did, but I object to that question.

By the Court:

Q. Did you cut it in two years? A. No, sir.

Q. Why? A. First year I commenced to cut. First year I cut two acres, and then the strike came on, and next year a man signed a contract to take it off, and he took off one carload, fell down. I could not take it all, so I saw Mr. Mueller, and told him the situation, and he said he would be glad to give me another year.

By Mr. Roseberry:

Q. You saw Mr. Mueller, did you? A. In the spring of 1923.

Q. Yes, and what took place between you and Mr. Mueller? A. I told him the situation. First year the strike came on. Second year signed a contract with a man and he fell down, and I told him it was impossible to get it off, and I asked him to give me another year, and he said he would be glad to do it.

Q. Where did that occur, Mr. Sarson? A. Near his house.

Q. In the house, or outside? A. Outside.

Q. Anybody else present there? A. No.

Q. Just you two. Did you rely on that?

Mr. Smith: I object to that.

Mr. Roseberry: Withdraw it.

Q. What did you do in reference to his making that statement to you? After he made that statement, what did you do? After he made the statement that he would give you a year? A. I waited a year, then I waited until the next year to get it taken off.

Q. Then what occurred? A. Then a few days before the two years was up I went there to see him. I had heard he was not going to give me a year's extension. I went down to see him and I asked him.

Q. Where did you see him? A. Outside his house. I asked him and he studied a while.

Q. Who else was there? A. His whole family, I think. I asked him and he said no, he would not give me a year, but he would give me two months.

Q. Then what occurred? A. I told him if there were any trouble or anything we would have a lawsuit, and he said to me you are an American. I am an American, I said, and didn't have to have my friends keep me out of State's prison, to keep me out of State's prison.

Q. In regard to the two months, then what occurred? What occurred after? A. We went to work to get all we could off and we got men and teams to get it off. He made the requirement to get it off in two months, and—

Q. Did you get any other notice from him after that? How long before the expiration of the two years did he give you this extension of two months? A. I think perhaps two or three weeks.

Q. Then you hired men and teams to take it off? A. Yes.

Q. When the two years was about up, or was up, did you get any notice from Mr. Mueller? A. Yes, sir.

Q. How did he give you that notice? A. Mrs. Mueller gave me the notice.

Q. Who gave you the notice? A. Mrs. Mueller.

Q. Did you hear—look at that notice and see if it's the notice she gave to you? A. Yes, sir.

Q. Whose name is that? A. William Mueller.

Mr. Roseberry: I will read it to—

Mr. Smith: We will consent to it going in.

The Court: It may be marked.

(Received and marked P-3).

Mr. Roseberry: "Broadway, N. J.,

February, 8, 1922.

Mr. George W. Sarson, Washington, N. J.

Dear Sir:

As the two years have expired in which you were 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 to cut or remove any more timber without permission.

Yours very truly,

WILLIAM MUELLER."

Q. When did you next hear from Mr. Mueller? A. Two or three nights after that, I saw Mr. Mueller. No, the same night I saw Mr. Mueller at Mr. Pearson's office in Washington.

Q. In Mr. Pearson's office what took place? A. I asked Mr. Mueller whether I could have some scattered logs lying in the public road. I asked whether I could gather them and take them out of the way. I was afraid something would happen to them and I would have damage to pay. He said yes, I could get them, and I went next day and got them.

Q. Did he give you any permission to get any other timber?

Mr. Smith: Objected to, as leading.

The Court: Sustained.

The Witness: I asked whether he wanted me to quit then, and he said yes.

Q. Did you have a notice served upon you? A. Yes, sir.

By the Court:

Q. Who is Mr. Pearson? A. Justice of the Peace.

By Mr. Roseberry:

Q. Is that your signature to the notice you caused to be served upon Mr. Mueller? A. Yes, sir.

Q. How much timber was removed from the tract? What did you use that timber for on those two tracts? A. Mining supports, coal mines.

The Court: What they call mine props.

Q. And ties? A. Yes.

Q. The dead chestnut at that time you could use, could you? A. Yes.

Q. Can they be used now? A. No.

Q. What mining props and ties were left there on the premises cut and made up when Mr. Mueller stopped you from taking them off?

Mr. Smith: I object to that last statement there. When Mr. Mueller stopped you from taking them off, that's a conclusion.

By Mr. Roseberry:

Q. When Mr. Mueller served the notice upon you?

By the Court:

Q. What mining props and ties were on the premises at the time Mr. Mueller served notice on you? A. $200 worth.

Q. How do you value them?

By Mr. Roseberry:

Q. Can you give the items that make up the $200? A. No, I counted them up at that time.

By the Court:

Q. Approximately, how many were there? A. Between 400 and 500, I think.

Q. Of what value? A. $200. I might just say that there was another tract of two acres—

By Mr. Roseberry:

Q. You say about 200. Can you give the number of feet? A. I did mark it down. I counted them up, but I forget now.

Q. Do you remember those of the six-inch size? A. I think nearly 300. It's so long since I—

Q. Did you keep a memorandum of it? A. No, I don't think I did. I might have had.

Q. What would they average in length, these mining ties? A. Cut different lengths.

Q. The average of them? A. Average about 14 or 15 feet. They were cut from 10 to 25 feet.

Q. They were cut from timber over seven inches in circumference at the butt and five inches circumference at the top? A. Yes.

Q. You say that was about $200 worth? Now, the timber that was standing there, did you examine that? A. Yes, sir.

Q. Before we come to that, can you say anything about some timber that was removed from your place by Mr. Mueller?

Mr. Smith: I object to that form of question.

The Court: You have not put it in proper form. It's assuming something not in evidence yet.

By Mr. Roseberry:

Q. Do you know if Mr. Mueller moved any timber from these two tracts?

Mr. Smith: I would interpose this objection. He must testify of his own knowledge what he actually saw, and nothing else.

The Court: He must testify of his own knowledge what he saw.

By Mr. Roseberry:

Q. Do you know anything about Mr. Mueller moving any timber?

Mr. Smith: I object to that.

The Court: That's not in proper form, either. He has got to know what took—

By Mr. Roseberry:

Q. Was any timber removed from the neighborhood where Mr. Mueller's house was? A. Yes, sir.

Q. About how much? A. It's all gone now.

Q. At that time? A. Two acres.

By the Court:

Q. Who moved it? Do you personally know?

By Mr. Roseberry:

Q. What was the value of that timber that was removed?

Mr. Smith: Objected to, unless he shows anything—

By Mr. Roseberry:

Q. Could you see indications of where it went? A. Yes.

Q. Now tell us—

Mr. Smith: If the Court please, I object to this line of testimony.

The Court: I understand Judge Roseberry is in a position to prove, has obtained evidence, some other evidence, to show the timber was removed. I will allow the question of the timber, and assume this man's qualifications as to value.

By Mr. Roseberry:

Q. What was the value of the timber on the two-acre tract?

Mr. Smith: I want to interpose an objection for the purpose of the record. There is nothing in evidence here showing that the defendant or anyone else removed any timber which was not legally his. There is no reference to a two-acre tract in this deed of 43 acres. They must identify the land.

The Court: I agree with you about that, in the identification of the land.

By the Court:

Q. You spoke of two acres. What two acres were they? A. Two acres, in the spring of 1922, when I first bought it, I intended to cut the whole lot off these two acres, next to Mr. Mueller's house.

Q. Part of the 43-acre tract? A. Yes.

Q. And within your written contract? A. Yes.

Q. You say the timber was removed? A. Yes, sir.

Q. You know that yourself? A. Yes.

Q. How do you know who removed it? You didn't see it done? A. Yes.

Q. Do you know the value? A. Yes.

Q. How do you know? A. I know the value of the timber, nearly $200.

Q. How?

Mr. Smith: I move that be stricken out.

By the Court:

Q. Yes. How did you obtain that value? A. Measured off the strip of land to get the value of that timber, and measured off a certain amount and calculated the number of acres in that.

By Mr. Roseberry:

Q. The same character of timber? A. The same character of timber.

Q. As in this particular— A. All the same.

Q. You calculated that the average would be about 72 to the acre?

Mr. Smith: I object to that.

The Court: Objection overruled. He may answer.

Mr. Smith: Pray exception.

By the Court:

Q. You have been in the timber business how long? A. Twenty years.

Q. You are familiar with the values of timber? A. Yes.

Q. When was this cut? A. 1922.

Q. Were you familiar with the values at that time? A. 1922, yes.

Q. You estimated the value, based on the market value for what purpose? A. Mine props.

By Mr. Roseberry:

Q. Did you see by the condition of the ground where this timber had been taken to? A. I saw roads leading from the lot to Mr. Mueller's wood pile.

Q. Had Mr. Mueller been building, or had he not? A. He had been building; yes, sir.

Q. In this vicinity, or not? A. Yes, sir; I think on this lot.

Q. On his lot. About the standing timber, Mr. Sarson, how about that?

Mr. Smith: I object to that question. It is not in proper form.

Mr. Roseberry: I asked him about the standing timber in the wood lot.

The Court: What is the objection?

Mr. Smith: I object to the formation of the question. What does it mean to the Court and jury, how about the standing timber?

Mr. Roseberry: That's very general.

The Court: He can answer.

Mr. Smith: My objection is to the form of the question. I pray exception.

By Mr. Roseberry:

Q. How about the standing timber? What did you do about that? A. Oh, that was left. Approximately $2,660.

Mr. Smith: I object and ask that it be stricken out.

The Court: Not responsive at all. Go about it in the regular way, how many acres of standing timber, size and so on; in other words, timber within the purview of this contract. So many inches at the butt and so many inches at the top.

By Mr. Roseberry:

Q. How many acres have you cut off and removed, Mr. Sarson? A. Eight acres. I didn't

remove actually two acres. I left these two acres I cut but did not remove.

Q. You did altogether cut 8 acres? A. Yes.

Q. Made the difference in standing timber between 8 acres and 43 acres? A. Yes.

Q. That's 35 acres? A. Yes, sir.

Q. Did you examine that timber thoroughly? A. Yes, sir; I examined it when I bought it of Mr. Walters. I didn't buy it of Mr. Walters I made an exchange with him.

Q. With Mr. Walters? A. Yes.

Mr. Smith: We object to that. This whole line, I can't get it at all. I don't want to be facetious. We are basing this suit, I assume on the complaint, on the sale between Mr. Mueller and this man of standing timber, and these remarks that are made about exchange, or something else with Mr. Walters have nothing to do with it.

By Mr. Roseberry:

Q. You didn't actually—

The Court: Ask whether he measured the 43—

Mr. Roseberry: He said yes, at the time of the transaction between Walters and Mueller, and he said I exchanged—

Mr. Smith: I think it is absolutely immaterial and incompetent.

The Court: It's obvious what he means. He can go on and complete the answer.

By Mr. Roseberry:

Q. You made a contract with Mr. Mueller, didn't you? A. I made a contract with Mr. Mueller.

By the Court:

Q. When did he make an examination of the timber? A. When I bought that timber of Mr. Walters.

Q. You made the examination before you entered into the contract with Mueller? A. Yes, sir.

The Court: I think that's admissible.

By Mr. Roseberry:

Q. This conveyance followed; how soon after your examination of this timber was this conveyance made with him and Mr. Walters, and the contract between you and Mr. Mueller consummated? A. Two weeks, about two weeks.

Q. After thorough examination of this timber. You got this notice from Mr. Mueller to stop going on his land and removing any, what was the value of that timber at that time, standing timber? A. $2,660 approximately.

Q. How did you get at that? A. When this timber was cut, I measured off some, and counted up that timber and calculated the whole lot that was not cut.

Q. So what was cut and uncut was the same marketable value, the same size? A. The same thickness and standing on the ground.

Q. The same kind of timber? A. Yes, sir.

The Court: Was there a reservation in the deed from Walters to Mueller of the standing timber?

Mr. Roseberry: No, sir.

The Court: No reservation?

Mr. Roseberry: No reservation whatever, absolute deed for a consideration of one dollar.

The Court: Then the standing timber, of course, went with the land to Mueller?

Mr. Roseberry: To Mueller, yes, sir.

The Court: And the only evidence of Sarson's right to it is that written under the contract?

Mr. Roseberry: Under this contract.

By Mr. Roseberry:

Q. There was two wood lots, it seems, according to the deed, in these 43 acres. When he said he would not allow the year's term which you said he promised you, he said you could have two months' time to take it off, did you get word from somebody that he rescinded that?

The Court: He has already testified that. As a result of something he heard, he went back to Mr. Mueller and asked him whether he was to have a year, and Mr. Mueller said no, but he would give him two months. That's what he said.

The Witness: Yes.

By Mr. Roseberry:

Q. But he said one year? A. Yes.

Q. Then you say he repudiated that and allowed you two months? A. Yes.

Q. Just before he gave you this written notice, did you receive any information by telephone from Squire Pearson? A. Yes, sir.

Q. What did Squire Pearson tell you?

The Court: You can't do that.

By Mr. Roseberry:

Q. As a result of what Squire Pearson said, what did you do? I believe that it's testified that you went down and saw him and asked for permission—I will prove by Squire Pearson what was said at that time. These two tracts, the 19-acre tract, had there been much cut of that? A. One carload.

Q. One carload? A. Yes.

Q. What was the value of that? A. The carload?

Q. No, of this 18 or 19 acres? A. About the same. I think it was a little better of the two.

Q. In your judgment, what was the value of it? Can you give it in figures? A. The whole of the standing timber was $2,660.

Q. Is this 19 acres, almost 20 acres, is that the 20/43d parts of the $2,660, or can you give it? Can you give me the amount of the value of that 20 acres of timber, what they call 19 acres in the contract? A. 20 times 72 equals 1,440.

The Court: What has that to do with it, Judge? I understand your claim—I don't understand why you injected that. In your opening you claimed damage $200 for cut timber, and $2,660 for standing timber. That's all you claim, isn't it?

Mr. Roseberry: Yes.

The Court: You claim $1,440 in addition to that?

Mr. Roseberry: The situation is this. He gave him first an extension of one year, then after when the year was pretty near up he—

The Court: Yes.

Mr. Roseberry: Then he said he could have two months to take it off.

The Court: Do I understand that the year had expired?

Mr. Roseberry: The year had not expired quite then.

The Court: Had not begun?

Mr. Roseberry: No.

The Court: The year had not begun, and he told him he would not give him a year, but he would give him two months, but after that he got word from Squire Pearson—

Mr. Roseberry: Then he got Squire Pearson to telphone, as we will prove, telephone Mr. Sarson that he could not take off the down timber on the whole 43 acres, but only on the 19 acre tract. That's the reason I asked it, in view of that.

The Court: Well, all right; I think he has given the answer. He gives the answer as $1,440.

By Mr. Roseberry:

Q. Did you have anybody else estimate the value of this standing timber? A. Yes.

Q. Who were they? A. Mr. Widener and Mr. Race.

Q. When was that done? A. About the first April, 1924.

Q. Chestnut at that date free from disease, was it in good marketable condition, or not? A. Yes, sir.

Q. Now you say it isn't? A. No.

CROSS-EXAMINATION by Mr. Smith:

Q. How long have you been buying standing timber? A. About 40 years.

Q. You usually pay for standing timber what it is worth? A. Yes, sir.

Q. You don't give any more than it's worth? A. Sometimes, can't always tell.

Q. You judge that? A. Yes.

Q. In order to cut this timber and make this timber merchantable required a lot of labor, didn't it? A. Yes, sir.

Q. Was that a large part of the cost of getting this ready for the market? A. I made a contract with Mr. Cooper.

Mr. Smith: I object to that, and move it be stricken out.

The Court: Yes, strike it out.

Q. Was the labor a large part of the cost of getting— A. 55 per cent.

Q. What railroad did you take it to? A. D. L. and W.

Q. What station? A. Broadway.

Q. Did you ever store any of it there when you took it down to the station waiting for cars? A. Until we get orders.

Q. I asked you whether you ever stored these mine props at the station waiting for cars? A. Have to wait until we get a carload. Could not ship half cars.

Q. Did you store it there? Sometimes you had a large quantity of mine props stored at Broadway station? A. Not much more than a carload, never. We shipped as often as we get a carload.

Q. This contract made February, 1922? A. Yes.

Q. How soon after it was made did you first go on the land and start cutting timber? A. A short time after.

Q. Who did that work for you? A. My men did it.

Q. What were their names? A. That man that cuts for me, Force, Jacob Force.

Q. How soon after February, in 1922, did you go on and start cutting this timber? A. Who? Force? Soon after I bought it.

Q. How soon? A. Couple of weeks, perhaps.

Q. He kept on? A. He kept on until I stopped him.

Q. How many men did you have there? A. I think two.

Q. Two men. They cut it and prepared these mine props? A. Yes, sir.

Q. That's the only thing this timber was good for? A. Good for railroad ties, telephone poles.

Q. That's all. Telephone poles and railroad ties. Did they cut there for a long time these two men? A. Not very long.

Q. How long? A. When the miners called a strike I stopped them.

Q. How long did they go there? A. About two or three weeks, may be more, I was not there.

Q. Didn't you have anything to do with that? A. Yes, but I didn't work in there.

Q. Did you pay them? A. I paid them.

Q. Don't you know from paying them how long they worked there? A. They cut by the piece on a contract.

Q. You contracted with them to cut by the piece? A. Yes.

Q. How much were they to get a piece? A. 6-inch props 5 cents. 8-inch 8 cents. 10-inch 10 cents. Mine ties 5 cents. Railroad ties 25 cents.

Q. Twenty-five cents for each railroad tie? A. Each railroad tie.

Q. How many feet? A. Eight.

Q. That was mine props? A. Railroad ties 8½ feet, mines ties 5 feet. 5 cents a piece for mining ties 5 feet long.

Q. All mining ties? A. All the same 5 feet long mining ties, railroad ties 8½ feet.

Q. The strike started in April, 1922, didn't it? A. I think so.

Q. Continued until when? A. All that summer.

Q. Then when did you send the men in again? A. The next contract with Mr. Cooper I made New Years's, 1923.

Q. You contracted with Mr. Cooper. You didn't start in cutting any timber in the fall of 1923? A. No.

Q. 1922 rather? A. No.

Q. You kept away from it, leaving it lie idle all that time? A. You could not go on it in the winter time.

Q. Don't they cut mine props in winter time? Don't they do that generally, cut and saw timber in winter time? A. Where its level.

Q. Very poor land isn't it? A. Not very good land. Very side hilly.

Q. You did cut that wood for approximately two weeks after you signed the contract. That was in winter time wasn't it? A. Yes.

Q. Didn't keep you from starting in at that time? A. Could not haul any of it after that time. Times you could not get up and down the hill. Too icy.

Q. You didn't cut any more in 1922 than those few weeks? A. No.

Q. You came along and made an agreement with Mr. Cooper? A. Yes.

Q. Who's Mr. Cooper? A. Lives at Washington.

Q. What does he do? A. He labors, works around.

Q. You made a contract with him for the removal of the timber? A. Yes, sir.

Q. Did he cut any timber? A. One carload.

Q. Was he to be paid by the piece for cutting? A. I gave him 55 per cent of what I got.

Q. 55 per cent of what you got for the mine props? A. What I got, the price of the car.

Q. What was the price of the car? A. That was eight inch.

Q. That was what? A. Eight inch he cut. Came to $210.

Q. 210 for what? A. A car. That car he shipped came to $210.

Q. That's how much you got for it? A. I got that and he got 55 per cent of it. The contract was he was to have 55 per cent. He only got 50 per cent until he finished the job, then I was to give him the other 5 per cent. He didn't finish the job and only got 50 per cent.

Q. If he had finished the job he would have had—

By the Court:

Q. That was when he completed the job, a bonus? A. Yes.

By Mr. Smith:

Q. Only one carload. When did he cut that? A. Spring, 1923.

Q. Was that loaded and sent on March 31, 1923? A. I really don't know.

Q. When did you see Mr. Mueller the first time about this? A. The first time, a few days before I bought the lot.

Q. I mean after this contract was signed? A. With Mr. Cooper.

Q. With Mr. Cooper?

The Court: He asked when.

By Mr. Smith:

Q. I mean when did you see Mr. Mueller after the contract was signed? A. The contract with Mr. Cooper?

Q. The contract with Mr. Mueller for the sale of the land? A. When I saw him again?

Q. Yes. A. I don't really know, perhaps a month, maybe. I don't know whether I went down at all. I showed him where to cut the timber. I don't think I was ever back there again.

Q. When did you meet him and talk to him about an extension of time? A. Spring, 1923, after Mr. Cooper—

Q. Do you remember the date? You say he promised to extend the time one year? A. Said he was glad to do it.

Q. Did you pay him anything for doing that? A. No.

Q. No consideration at all for that? A. No.
Q. None whatever? A. Depended on his word.

By Mr. Roseberry:
Q. When was that, 1922, or 1923? A. 1923.

By Mr. Smith:
Q. This agreement, you say, for two months. You had a conversation at Mr. Mueller's house? A. Yes.
Q. Was that after you had heard from Mr. Pearson? Who sent word to you? A. Before I heard from Mr. Pearson.
Q. Who was present? A. At Mr. Mueller's house? His whole family, I think, one Sunday afternoon. He worked every day. I went down one Sunday afternoon to talk the matter over.
Q. On a Sunday afternoon? So that this two months' extension was made on Sunday afternoon? A. On Sunday afternoon.
Q. What did you say to him first? A. I told you that, what was said.
Q. I will ask you to repeat it? A. I went down there, and asked him about this time. I heard he was not going to give me a year. I asked him. No, he would not give me a year, but would give me two months. Then we had some hard words about it.
Q. You had some hard words about it? A. Yes.
Q. At that time didn't he ask you about paying the taxes? A. Yes.
Q. Didn't he say he would give you two months if you would pay the taxes? A. Told me to pay the taxes for 1923.

Q. Didn't he say that he would do that, he would give you two months if you would pay the taxes? A. 1923?
Q. Yes. Did you pay the taxes? A. I could not pay them then, until 1924.
Q. Did you agree to pay the taxes? A. Yes, when they came due.
Q. That was made on Sunday. Was there any consideration for that two months' period? A. Nothing more than that.
Q. When you left, you had disagreed, hadn't you? A. No.
Q. Didn't you say to him you would have a law suit about this? A. Yes, I told him if his word was no good we would have a lawsuit.
Q. So you didn't accept the offer of two months, you depended upon the offer of a year? A. I depended on the offer of two months, and went to work to get it off.
Q. So you gave up the offer of a year? A. He said he would not give it to me.
Q. You never gave him any consideration, never paid him any consideration for that? A. He didn't ask me for any. He said he would be glad to do it.
Q. Didn't you testify at the last trial that since February, 1924, to your knowledge, no trees had been cut by Mr. Mueller on— A. Yes, sir.
Q. You testified to that? A. Yes, sir.
Q. Is that true? A. Yes, sir.
Q. So that you have no knowledge that Mr. Mueller or anyone for him ever cutting any trees on this tract? A. No, I have no knowledge.
Q. After February 6, 1924? A. Yes, sir.

Q. Did you remove those logs that you say were along the road? A. Yes, sir.

Q. Any of them off the road at all? A. They might have been on the edge of the road. I didn't go down, the men went down.

Q. So you don't know whether they were all removed? A. No. I told the men to go down and remove them from the road.

Q. He granted permission for that? A. Yes, but he said I should quit then.

Q. Didn't he say then what was cut you should have? A. No.

Q. He did not say that? A. No. I asked him if I should quit and he said yes.

Q. Said yes. When did you receive word from him after that? A. No word from him, but the notice that Mrs. Mueller served on me.

Q. Didn't she serve that before you had seen him? A. She served the notice on me, it says, February 8th.

Q. Yes? A. I saw him that night.

Q. Yes? A. Afterwards, in Mr. Pearson's office.

Q. Did you see Mr. Mueller after that about this matter? A. No.

Q. Did you send any other word to him outside of the notice sent by Mr. Thatcher? A. No.

Q. Did he every indicate to you in any other way outside of this notice that he would not permit, that he would now let you, or your men, go on and take the cut timber? A. Told me to quit, and never told me I could get it.

Q. You never asked him again? A. No. I never talked to him since.

Q. You say that standing timber was worth $72 an acre? A. Yes, sir, approximately.

Q. Without being cut? A. Yes, sir.

Q. Worth that when you bought it? A. Yes, sir.

Q. Had it grown any during that time? A. No.

Q. Why not? A. It would not be very long. It was dead when I bought it, the chestnut.

By the Court:

Q. Reached its growth at the time you bought? A. Blight on the timber. No chestnut very long in New Jersey. None in Warren County.

By Mr. Smith:

Q. Was there no birch, or other trees? A. Some.

Q. That was growing? A. Yes.

Q. But the chestnut was blighted and dead? A. Chestnut was dead.

Q. And in two years it was not worth as much as it was? A. It depreciated you know after it was dead. It had been dead about ten years.

Q. It had been dead about ten years? A. Yes.

Q. Was it all the same? A. Chestnut was all the same as to size.

Q. Just all the same size? A. Averaged the same.

Q. No variation? A. Variation, not much, one size. Trees don't grow that way.

Q. Was it as thick all over, as plentiful, in every acre of that tract? I mean of the same size? A. They ran uniform.

The Court: Depends whether a tree is crowded in its growth, what its environment or surroundings may be.

By Mr. Smith:

Q. Was any part of this very hard to get at, very inaccessible, any part of these 43 acres? A. No. It all sloped towards the public road. Always get it down hill, but can't always get it up.

Q. Even in winter you could get it down the hill easily? A. No, dangerous in winter. Side of a hill and dangerous in the winter time.

Q. Was any of it more inaccessible than others? A. It might have been.

Q. Don't you know? A. It would not make any difference where it was. I would get it off just as cheap one place as any other.

Q. Make no difference at all? A. No.

Q. Where did Mr. Mueller have his house? A. Adjoining this lot.

Q. That land he owned prior to this purchase from Mr. Walters? A. He owned the lot adjoining this land.

Q. On that he had erected at the time he bought this 43-acre tract from Mr. Walters, a house, had he not? A. Yes, sir.

Q. He was living there at the time this transaction was consummated? A. Yes.

Q. There was quite a lot of ground around the house, wasn't there? A. Adjoining the house.

Q. There had been some timber right immediately adjoining his house on the land he had bought prior to this land he bought from Mr. Walters? A. I never saw any.

Q. Would you say there was, or there was not? A. There was not.

Q. There was not? A. No. I went around the land when I bought it, and it ran down to his line.

Q. Did he build a garage? A. He built a garage.

Q. Where did he build the garage? A. Next to the lot he bought of me, or on his own land.

Q. How near to these two acres? A. Near it.

Q. How near it? A. The two acres adjoined his land.

Q. What was done with the tops of these trees? A. I don't know.

Q. Who were to get these? A. I was to have them of a certain size.

Q. Who were to get the tops? A. Nothing said about that.

By the Court:

Q. Just left on the land? A. Yes.

By Mr. Smith:

Q. Might be used for fire wood? A. Lumber, wood.

Q. Do you know whether Mr. Mueller took some tops for fire wood? A. No, I don't know anything about that.

Q. You don't know anything about that? A. No.

By the Court:

Q. Did you do anything under what you call the two months' extension? A. Yes.

Q. What did you do? A. Cut as often as we could.

Q. Men went in there and cut, did they? A. Yes, I got what help I could get.

Q. Did any of the timber come off during that two months? At the end of two months you stopped? A. Yes, he served notice on me.

Q. As a matter of fact, however, you never did anything under the two months because you had written notice February 8th? A. I quit when the two years was up, and then we had the notice served, notice that we were to quit.

Q. Two days after the two years expired he served this written notice on you, and before the two years expired you claim you had this year's extension? A. Yes, sir.

Q. At first? A. Yes.

Q. Which he afterwards reduced to two months? A. Yes.

Q. After that conversation on February 8th you were served with this written notice? A. Yes.

Q. Which notified you not to go on the land without his permission? A. Yes.

Q. Did you go back and ask for permission after you received the notice? A. No.

Q. Never went back after that? A. No.

Q. Never had any further conversation with him? A. Never spoke to him since.

Q. You complied with the written notice? A. Yes.

Q. According to the notice you were not to go on the land without his permission? A. Yes.

Q. You never asked for permission? A. Up to Squire Pearson's office I asked him whether he wanted me to quit, and he said yes.

Q. Was that before the written notice was served? A. At night, two or three hours after he served the notice on me.

Q. You had a talk with him in Squire Pearson's office? A. I went to ask him if I could send the

teams down and get the logs out of the road and he said I could. I asked him if he wanted me to quit, and he said yes. That was all he said.

Mr. Roseberry: There's where he asked for permission to take it off, after February 11th.

By Mr. Smith:

Q. In January you got a number of teams to start getting it off? A. Before the two years was up.

Q. January, 1924? A. Yes.

Q. How many men did you have working in there then? A. About a dozen, I guess.

Q. A dozen? A. Yes.

Q. That was when you had no agreement at all for an extension? A. That was before the two years was up.

Q. That was before the two years were up? A. I arranged to get it off in two months then. I had all the men I could get.

Q. That's the only conversation with reference to that, that took place on a Sunday, is that right? A. That's right.

Q. No consideration for that? A. I could not pay the taxes until the next year?

Q. No consideration at all? A. No.

The Court: They admit no consideration.

Mr. Roseberry: We admit no consideration.

Mr. Smith: That's all.

By Mr. Roseberry:

Q. When they told you you could have two months, oh, yes, you could have two months, did

you get notice from Squire Pearson about the two months' time?

Mr. Smith: I object to that.

The Court: You will have to prove that by Squire Pearson.

By Mr. Roseberry:

Q. I only wanted to get the time it occurred. What time was it you had the conversation with Squire Pearson over the telephone? A. It was about—

Q. Was it before or after this meeting at the house? A. After.

Mr. Roseberry: That's all.

JOSEPH R. THATCHER, sworn for the plaintiff:

Direct-examination by Mr. Roseberry:

Q. Where do you live? A. Washington.

Q. Look at that notice, and tell us whether you served that notice upon Mr. Mueller, and when and where? A. At his house on February 16, 1924, 2:50 p. m.

Q. You served that notice on Mr. Mueller and gave him a copy of it? A. Yes, sir.

Q. Told him the contents? A. I read it to him.

Q. What did he say? A. He didn't say anything. He turned and handed it back to his son. He said, read it, and I left the son reading it.

Mr. Roseberry: We offer this in evidence.

Mr. Smith: No objection.

The Court: It may be marked. (Marked P-4.)

CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Thatcher, Mr. Mueller didn't say a word about it, did he? A. Only, I forgot one thing. He said, who are you.

Q. And did you tell him? A. I told him.

Q. Then he passed it over to his son to read? A. The son was reading it to him as I left.

Q. You never waited for an answer? A. No. He didn't say a word. All he said was, who are you?

Q. That was before it was read to him? A. I read it to him.

Q. Yes, you read it in English, didn't you? A. Yes.

Q. Mr. Thatcher, you noticed he spoke with an accent? A. Very plain.

Q. Very plain. Didn't you know he was German? A. I did.

Q. You did. Didn't his son start translating it to him in German? A. No, he read it off the same as I did. I walked off. I didn't stay until the finish. I had done my duty. That was my duty and he passed it over to the young man, and he was still reading it.

Q. You waited for no answer? A. No.

Mr. Smith: That's all.

By Mr. Roseberry:

Q. Didn't give you an answer, did he? A. No, he didn't say anything.

MARVIN A. PEARSON, sworn for the plaintiff:

Direct-examination by Mr. Roseberry:

Q. You live in Washington, Mr. Pearson? A. Yes.

Q. You remember Mr. Mueller coming to your place? A. Yes.

Q. Do you remember when that was? A. It was along the forepart of February, 1924.

Q. February 6, 1924, and you remember telephoning to Mr. Sarson? A. Yes.

Q. At whose request did you telephone? A. Some of the Mueller family. I don't know just who it was.

Q. What did you telephone?

Mr. Smith: I object to that.

By Mr. Smith:

Q. Was Mr. Mueller there at the time in the office? A. I am not sure whether Mr. Mueller was or not, I could not say. Mrs. Mueller and her son, but I am not sure whether Mr. Mueller was or not.

Q. That's this young man here (indicating)? A. Yes.

By Mr. Roseberry:

Q. Did you write a notice for him? A. Yes.

Q. Is this the notice you wrote for him at that time, which Mr. Mueller signed? A. Yes, sir.

Q. That's the signature of Mr. Mueller?

By the Court:

Q. Where did he sign that, Mr. Pearson? A. Next morning.

By Mr. Roseberry:

Q. Did you tell him what you telephoned to Mr. Sarson? A. Yes, the night before, the telephone message was, one evening, and the notice was written the next day.

Q. What did you telephone to Mr. Sarson?

Mr. Smith: I object to that unless the conversation was in the presence of the defendant.

The Court: You will have to show that Mrs. Mueller or the son were acting with the authority of the father there.

A. He was not there at the time, but came next morning to sign this paper.

Q. Did you say anything to Mr. Mueller about telephoning to Mr. Sarson?

Mr. Smith: I object to that if it was after the message went. Not competent.

The Court: Overrule the objection.

Mr. Smith: Pray an exception.

By Mr. Roseberry:

Q. Did you say anything to Mr. Mueller about telephoning Mr. Sarson? A. I am not sure about that.

Q. Did he say anything to you? A. I don't know anything about that. I remember part of the family was there, and asked me to telephone. Whether Mr. Mueller was there or not, I can't remember. It was two years ago.

Q. Did you testify before "Do you remember Mr. Mueller coming to your place" and you answered "Yes, sir" on the other case? A. I don't remember, two years ago.

Q. Do you remember this question: "Do you remember telephoning for Mr. Mueller" and you said, "Yes, sir"? A. If that's the case, he was there. I could not remember at the present time.

Q. "Why did you telephone the plaintiff" and you answered it? A. Why did I telephone the plaintiff?

Q. That's the question that was asked you, and I telephoned him Mr. Mueller was in the office, and he said he would give him two months to remove the timber from the 19 acre tract; and— A. That's correct.

Q. And cut the timber down on the 26 acre tract, but to cut nothing more down on the larger tract. That was the words you used exactly. You said Mr. Mueller was there at the time when you sent that message, in your testimony before? A. If I said so at that time, that's the truth. But two years ago I could not remember at this time who was there.

Q. When was that? A. I think about the first of February, 1924.

Q. Forepart of February. A. If that's what I said then, its true.

Q. "Question: What did Mr. Mueller say to you then at that time, about that extension of time? A. Nothing further than that." So Mr. Mueller was there? A. Yes, sir; must have been there according to that evidence. After two years it's hard to remember who was there.

Q. What you testified to then was correct? A. Yes, sir, positively.

CROSS-EXAMINATION by Mr. Smith:

Q. The very next day you drew this notice, didn't you? A. Yes, sir.

Q. That's the very next day, isn't it? A. Yes, sir.

By the Court:

Q. How did you come to do that? A. At the request of Mr. Mueller and the others of the family.

Q. You telephoned at their request the night before to Sarson didn't you? A. Then he changed his mind the next morning and wanted him to stop immediately.

Q. What did he say when he came into the office? A. Came in and wanted to serve notice on Mr. Sarson not to enter upon the premises any more, to stop positively.

Q. Mr. Pearson, that was on the 7th February, 1924, when you had this conversation with Mr. Mueller, wasn't it? A. To the best of my knowledge, yes.

Q. You don't know whether Mr. Sarson had seen Mr. Mueller at that time or not? A. No.

By Mr. Smith:

Q. You recall when Mr. Mueller came, Mr. Sarson came to your office that night this notice was served? A. Yes, sir.

Q. You saw Mr. Mueller there that night? A. Yes.

Q. Did you hear any conversation with reference to the removal of some logs between Mr. Sarson and— A. Mr. Sarson came to the door and stuck his head in and wanted to know if he could

go down there with a team and remove certain things. What it was I don't remember.

Q. What did Mr. Mueller say? A. He said he could.

Q. Did you hear after that anything said by Mr. Sarson asking whether he should quit, and did Mr. Mueller say as to that, he should quit? A. If I remember right, Mr. Sarson said he would quit after taking these things away.

Q. State whether or not Mr. Mueller said that night that he should quit? Did you hear him say that? A. I don't remember that.

Mr. Smith: That's all.

PAUL RACE, sworn for the plaintiff.

Direct-examination by Mr. Roseberry:

Q. Where do you now reside? A. (No response.)

Q. For how long? A. Five years.

Q. In April, 1924, were you called to consider the value of the timber, cut and uncut, on this land, that Mr. Sarson bought? A. Yes.

Q. Was there any difference between the timber in this April and the former February 8, 1924?

Mr. Smith: If the Court please, he has not qualified him.

The Court: He is not qualified, yes. Would you like to have the chance to examine him?

By Mr. Smith:

Q. Where do you live? A. Cornish.

Q. What is your business? A. At the present time I am with W. A. Cottrell, coal and lumber.

Q. Have you been a farmer? A. One time in my life I was a farmer.

Q. What experience have you had in buying standing timber for cutting? A. Experience for about five years.

Q. You have bought and sold it? A. Absolutely, for myself.

Q. How many tracts have you bought and sold? A. That would be impossible to tell you offhand.

By the Court:

Q. Four or five? A. Ten or twelve.

By Mr. Smith:

Q. You bought partly for them and partly for yourself? A. Yes, sir.

Mr. Smith: That's all.

By Mr. Roseberry:

Q. Was there any difference in the quality of this timber between the eighth day of February, 1924, and in April when you looked at it and examined it? A. No difference in the commerciability.

Q. Did you examine the cut timber? A. I did.

Q. Mining props and ties? A. I did.

Q. What did you estimate the value of the cut timber props and ties? A. After checking up on the list there, looking over the stuff lying around, I estimated the value of the cut timber, both mine props and mine ties at $200 and the standing timber at $2,300.

Q. You went all over the lot, did you? A. I did.

CROSS-EXAMINATION by Mr. Smith:

Q. You say you have had experience? A. I have.

Q. You buy land as well as standing timber? A. Never land.

Q. Never land. Whom did you last buy timber from? A. Whom did I last buy timber from? Boyd Major, it was the Major Estate, really.

Q. Where was that? A. Located back of Cornish, it would be impossible to describe the exact location.

Q. Somewhere near where this timber is located? A. No.

Q. Did you pay for that on an acreage basis? A. I did.

Q. How much an acre did you pay for that? A. $15 an acre.

Q. $15 an acre. When else did you buy standing timber? A. I bought standing timber, approximately around that time, I bought 11 acres of Emil Lanning.

Q. Where was that located? A. Approximately the same place, one five acre lot.

Q. Is that about the same kind of timber as on this Sarson tract? A. No, the timber was probably the same, but the land itself was an altogether different proposition.

Q. The timber was the same? A. The timber was the same.

Q. You only bought the timber? A. I only bought the timber.

Q. Did you pay for that on an acreage basis? A. I did.

Q. How much an acre did you pay for that? A. I tell you, take a pencil and paper and figure it out for yourself.

Q. How many acres were there? A. I paid $125.

Q. That was for all standing timber of a certain size, was it? A. Seven inches butt, five inches top, I should say.

Q. What else did you buy in and around 1924, when else did you buy standing timber? A. 1924, three years ago. You are trying to test my memory.

Q. I don't want to test your memory. As nearly as you can recall, name some of the other tracts you purchased standing timber. A. There was another tract, which I did not purchase outright. That was not in 1924. Those two were all that I purchased in 1924, I think.

Q. They were? A. I think so.

Q. It was about the same class of timber as in this tract? A. I should say that the timber on this other tract was probably better.

Q. On which tract? A. On Mr. Sarson's tract.

Q. How much better? A. You are asking—

Q. Was it better than on the Major tract? A. I never compared them.

Q. You cut the timber off the Major tract? A. I certainly did.

Q. You went to the Sarson tract, and you know the kind of timber there? A. I did.

Q. Was it as good as the Major tract? A. At that time I could not tell you absolutely the com-

parative difference between them, but that's impossible at the present time unless I got busy and looked up the records.

Q. Why can't you tell. I mean by that, I want to be perfectly fair with you. You testified this other timber had a certain value. Was the standing timber on the Major tract worth just as much as the standing timber on the Sarson tract? A. Not quite as much, I should say.

Q. How much difference would you estimate, in your judgment? A. Not fair to attempt to state at this late day. This is over two years, and I have nothing but records left to judge from, and naturally I—

Q. How can you testify then at this time, three years later, as to the value of the Sarson tract? A. Because at that time I went over it thoroughly, and at that time I was in the timber business, and naturally I made my data what I really understood, and now you are asking for a comparison with something altogether different that I never went into before, and two years I have gone out of business.

Q. You knew the timber on the Major tract? A. I did.

Q. You knew what that timber was? A. I did.

Q. You paid for that on the basis of $15 an acre? A. I did.

Q. How do you arrive at the value of $2,300? A. By the current price of mine props at that time, the current price of mine ties, and estimating the standing timber, and we checked up, approximately, the down timber.

Q. Then when you say $2,300 is that based up-

on the value of that timber after it is put in mine props? A. That is based upon the value of the timber, I believe, before. I would have to look that up to find out.

Q. You are testifying here as an expert. Don't you know whether it was before, or not? A. If you will give me time I will figure it.

Q. I wish you would take the time and figure it up. Do you know the number of acres in the lot? A. I do.

Q. How many acres were there? A. 43 acres all told, on that particular strip. That would be the value to me of the standing timber there on the job.

Q. How do you arrive at it? A. I know if I remember right I figured up about what they would run per acre, about how many carloads per acre, and I arrived at it the same way a man will look at a horse and appraise its value. That's the way a horse jockey will look at a horse and appraise its value.

Q. Do you mean to say this is only a rough guess on your part? A. No, not at all.

The Court: He has given you how he figured it.

Q. What is the highest price you ever paid for standing timber per acre? A. The highest price I ever paid for standing timber was a deal I made—

Q. What was the highest price you paid for standing timber per acre? A. The highest price I ever paid was about $18 per acre.

Q. Out of this 43 acres, how many acres had

been cut off, do you know? A. I appraised the standing timber on 19 acres on one side of the road. The rest of the timber that had been cut off did not interest me one way or the other. I was there as an appraiser to put a value on that particular strip. I was not there as a friend or an enemy to either side, so, naturally, I would not tell you that I made any other value.

Q. You didn't go there for the purpose of specially testifying in this suit? A. I went there to testify as to the value of the timber there.

Q. And you were requested to go there by Mr. Sarson? A. Mr. Sarson requested me to go there.

Q. Had you done some work for Mr. Sarson? A. I had, at a former period.

Q. You mean to say $2,300 is your value of the standing timber on the 19 acres alone? A. I do.

Q. That would mean that the standing timber on the Sarson tract was worth then as it stood there at the time you appraised it, more than $100 an acre? A. Yes, sir.

Q. That was your opinion as to the value of that standing timber? A. It was, in my opinion, yes.

Q. Your opinion then, is it was worth more for the timber than anything else. Worth more than the land itself? A. I don't quite understand.

Q. In your opinion the timber was worth more than the land itself? A. The timber was worth more there than the land itself.

Q. What, in your opinion, could that standing

timber have been sold to a man like yourself, engaged in cutting wood, standing timber? How much an acre would you have been willing to pay for the 19 acres? A. I would not have been willing to have bought it. It was too far away from home.

Q. Would that affect its value? A. It would affect its value to me.

The Court: It would make a difference, of course, if it was close enough to the station, etc.

Q. Assuming that you were willing to buy, how much would you have been willing to pay per acre for that 19-acre tract? A. You are getting into something I would have to stop and figure up for a while. That positively never entered my mind.

Q. You didn't base your judgment upon what that could be sold for at that time? A. Not on its value to me, on its value to me if I were situated as Mr. Sarson was. It was Mr. Sarson's proposition. He was taking it off, not me.

Q. What would it have been worth to anyone else who wanted to buy it for timber? Say I want to buy the standing timber on those 19 acres. What would have been a fair price, in your opinion, per acre to pay for it? A. I would not like to say about that until I had studied it over for a good deal.

Q. Can't you study it over now? A. If you want me to take the time.

Q. Yes, I want you to take the time. A. You want the 19 acres, not the 43?

Q. On the 19 acres. I want to know the price per acre. A. The price per acre I would be willing to pay for that, or someone else would be willing to pay for that, if they were buying it for their own proposition?

Q. As of February, 1924. A. Too many details there. I would not dare go into that. Too much cartage. I would have to cart to Broadway.

Q. But I am not asking you that. I am asking you this: do you mean to state you are unable to testify here as to the price per acre that anyone, that that standing timber should bring? A. I am competent enough to tell that, but I would have to look over the whole thing again. I was asked to appraise the value of that timber standing on that job. That is what I did.

Q. Could you tell us how much per acre that timber could be sold to any other person at that particular time? A. It would all depend on what the other person would be willing to pay for it.

Q. What could be realized on it?

By the Court:

Q. What was its market value? A. I have that figured out here. That's putting it in another way. I figure it would figure around $7,600, approximately. Very close to that.

Q. You say this standing timber is worth $7,600? A. Worth around there somewhere.

Q. That is its market value standing there? A. That would be its market value.

By Mr. Smith:

Q. Of the timber before any work was done?

A. Not before any work was done. You are asking for the market value now.

Q. I don't think the court intended that. What was the market value of the timber just standing there? A. $2,300.

Q. How much an acre would any other person be willing to pay for it? A. I don't know. I can't figure out another person's mind.

Q. In your opinion, Mr. Mueller, the owner could have sold at that time, in February, providing there was no other agreement, he would have been able to have realized and sold that standing timber to a person for $2,300, just as it stood there? A. Some people, yes.

Q. What do you mean by some people? A. It depends on how a fellow's financed. He could not sell it to me, because I didn't have that money to put in it.

Q. To whom could he have sold it for that money? A. I don't know.

Q. You don't know. Do you believe he could have sold it to anyone for that, who was an experienced man in buying timber land? A. If he was fully enough financed, yes.

Q. You had to be financed in Wall Street, or have backing at the bank in order to do that? A. No, at the time I was only financed for about $100, but he would have to be a little more fully financed than that.

Q. You think then they would have paid $2,300 for that standing timber, as it stood there in February? A. If they wanted the timber at that time, yes.

Q. That, in your opinion, was what that timber

was worth, and it could have been sold to any person at that time? A. Not necessary to any person. The timber was worth $2,300.

Q. That was the value as it stood there, its market value. That's what you mean, isn't it? A. Market value, $2,300.

Q. The highest you ever paid was $18 an acre? A. The highest I ever paid was $18 an acre.

By Mr. Roseberry:

Q. This tract Mr. Sarson had, a public road ran through it, did it not? A. Right through it.

Q. Easy access to the public road? A. Yes.

Q. That led right down to Broadway, one and a half miles away, where he loaded it on cars? A. I don't know where he loaded it on cars, but a good public road went right through that place.

Q. This lot you spoke of, this Major lot, what was the road to that lot? What was the kind of road— A. The road was half a mile from the wood lot on the rockiest road I have ever seen in seven counties.

Q. That's the reason the timber didn't bring any more than it did, because of the transportation? A. The only reason why I bought that, perhaps, was a few poles on there I had to have to finish out an order, 35 poles.

Q. How about the Lanning lot? A. If anything, worse yet, only a granite quarry back there.

Q. You say that the whole tract, counting the cost of taking it off and all, would be $7,200 on the 43-acre tract? A. Counting the cost of everything, taking it off this tract you are speaking about, $7,200.

Q. The timber would be worth that, that's its

market value. That's finally delivered? A. Finally delivered, yes; cut and delivered.

Q. This $2,300, did that only embrace the 19-acre tract? A. That only embraced the 19-acre tract.

Q. Did you appraise the other part? A. I took a look at it, but I don't think that was brought in. I know it was not brought in in this $2,300.

Mr. Roseberry: That's all.

By Mr. Smith:

Q. Do you know this 19-acre tract, as to its condition? A. At Broadway, this tract under discussion?

Q. Yes. A. I did at the time.

Q. What is the land there, sloping? A. Sloping.

Q. Rocky? A. Not so awful rocky, but extremely sloping.

Q. Very steep, isn't it? A. Quite steep.

Q. Very hard to work, isn't it? A. At certain times of the year, yes.

Q. You could not take a horse there in lots of places? A. Not in winter time, when it was slippery.

Q. You would have to work that down? A. Work it in summer time. Horses can go anywhere in summer time, or even in winter time, so long as there's no snow or ice on the ground.

Q. How did it lay, right next to the road, the 19 acres? A. A good deal of it ran along the road.

Q. Was there anything between the road and the wood lot? A. Not at that time. There was a kind of an old, I believe, at the upper end there

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was an attempt at a fence, that may have been 200 years ago, may have been a fence.

Q. Was there a brook running through? A. That's on the other side of the road there was a brook.

Q. Not on the side of the 19 acres? A. No.

Q. Sure of that, now? A. Yes.

Q. Have you been there lately? A. No.

Q. That's your best recollection? A. At that time, yes.

Q. You may be mistaken in that? A. No.

Q. You are not? A. No.

Mr. Smith: That's all.

WILLIAM H. WIDENER, sworn for the plaintiff:

Direct-examination by Mr. Roseberry:

Q. Where do you reside? A. Anderson.

Q. How long have you been engaged in the lumber business, timber business? A. I don't exactly know. Somewheres about 12 years as near as I can tell, for myself. Worked at it all my life for other people.

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

Q. Worked in the timber business all your life and 12 years for yourself? A. Since when I was 17. I think about 12 years.

Q. You have bought lots, and cut them off, and sold the timber? A. Yes.

Q. Mine props and ties? A. Yes.

Q. You have worked for various people. When was it you did this for yourself? A. Up until about five years ago, I guess. I haven't done nothing since.

Q. You visited this lot, did you not, of Mr. Sarson's? A. Yes.

Q. About April, 1924? A. As near as I can tell, about that time.

Q. You went over this 43 acres, did you? A. Yes.

Q. And made appraisement of its value? A. Yes.

Q. All the mine props and ties that lay on this tract of 43 acres, what did you estimate the market value of them? A. I think about $200, as near as I remember.

Q. And did you examine the standing trees? A. Yes, we went through a good part of it; didn't go quite through it all.

Q. The trees were over seven inches in circumference at the butt and five inches in circumference at the top? A. Yes.

Q. What did you estimate the value of the trees that you examined? A. About $60 an acre.

Q. $60? A. Yes.

Q. That was for 43 acres? A. For what was left standing, I think about 38 acres, as near as I can remember.

Q. Standing on the 43 acre tract, you think about 38 acres? A. As near as I can—

Q. $60 an acre. Did you examine it quite thoroughly? A. The most of it, yes.

Q. What kind of land is it to get timber off on to the public road? A. Pretty hard when it

freezes hard, but in the summer I would consider it all right.

Q. Difficult to get off when frozen and icy? A. It would not be very good, but I have worked at some when frozen.

Q. Is that so? It's a side hill tract? A. Yes.

Q. Public road runs through it, does it not? A. Yes.

Q. Do you know where that goes to? A. Broadway. Right up into Broadway.

Q. Do you know whether Mr. Sarson loaded his timber at Broadway? A. I believe he said that's where he loaded it.

Q. Do you know how far that was from this wood lot? A. Nothing more than just the distance it looked to be. I don't know the exact measurement.

Q. Was the road down hill? A. Yes.

Q. Could take very heavy loads? A. Yes.

Q. When coming back, no load at all? A. Yes.

Q. Made it very advantageous as a wood lot? A. Yes, very good about that.

CROSS-EXAMINATION by Mr. Smith:

Q. How long has it been since you bought standing timber? A. I think about 8 or 9 or 10 years since I bought any.

Q. 10 years? A. I think so.

Q. What was the highest price you ever paid for standing timber, just the timber? A. I think about $52 an acre.

Q. $52 an acre? A. I think.

Q. Where was that? A. That was over back of Stephensburg.

Q. What kind of timber was that? A. Mostly chestnut.

Q. Was that chestnut alive and growing at that time? A. Some of it was, and some of it was dying and dead at the time.

Q. That was just when the blight first came? A. When it first struck around there.

Q. This standing timber, the trees were dead weren't they? A. Some of the chestnut.

Q. Mostly chestnut on the wood lot weren't they? A. Mostly.

Q. Some birch and some oak, but not very many? A. Yes, on the rocky part, the knolls.

Q. This tract had been cut off before hadn't it? A. Some years before. Second growth timber.

Q. Was all of this wood lot accessible? You could readily get the timber down to the road? A. Yes, you could get it all off. Some of it easier than others.

Q. Wasn't this very steep, a slope? A. Yes.

Q. Wasn't most of it that way? A. Most of it sloping, but some slopes more than others.

Q. Pretty rocky, too? A. Some places; some places ain't.

Q. Was the timber on the track back of Stephensburg you paid $52 an acre for, was this the same timber as on the Sarson tract? A. It was a good bit better?

Q. Better timber than on the Sarson tract? A. Yes.

Q. Was it as handy to the road and the railroad station as this? A. That was the trouble of it. A good many hills to pull up.

Q. What other prices have you paid for standing timber? A. Paid all prices.

Q. Per acre? A. Anywhere from $7 right on up.

Q. What is generally paid, the average price per acre? A. I don't know. The majority I think would be about $40.

Q. $40 an acre? A. Sometimes a lot with nothing but mine ties on it is very cheap.

Q. Would you have paid $40 an acre for that in February, 1924, the standing timber that was there? A. I think it was worth $60 at that time. If I had wanted it at that time I would have paid that for it, but I would have tried to get it for less.

Q. Do you think it could have been sold to people for that much. Do you think anyone would have paid that much for it? A. I would say so, especially if they got two or three people who wanted the lot. That makes quite a difference.

Q. Do you remember where the 19-acre tract was? A. Yes.

Q. Where did that lie? A. That was the right-hand side of the road as you went up.

Q. As you went up, on the right side? A. On the right-hand side as you went up, I believe it was called the 19 acres.

Q. Aren't you mistaken about that. Isn't that the 26 acre tract on the right-hand side? A. I don't think so. I would not say for sure.

Q. Is there a brook on the left-hand side of the road? A. That lies between the road and one wood lot.

Q. Lies below the road a little. Slopes down into a little hollow, around the tract? A. Yes.

Q. You would have to get over that brook and hollow in order to get to the road? A. Yes.

By Mr. Roseberry:

Q. Where this brook was, did the road go right through the brook? A. Yes.

Q. Over a bridge? A. No bridge, unless there's one down further.

Q. Did you say, or did Mr. Smith say, you went down in the hollow and over the brook? A. Down in the hollow, but that public road don't go across there.

Q. Down through the hollow was the public road? A. Public road does not go across this brook.

Q. How big a brook was it? A. Small brook.

Q. Cross right over it without any bridge? A. I would not say it needed any bridge.

Q. It was not any impediment in taking the wood by teams off of these tracts to the public road? A. Nothing to amount to anything, no. May be some places you could not cross it on account of the rocks in there, but in easy distance you could cross it.

GEORGE GUNDERMAN, sworn for the plaintiff:

Direct-examination by Mr. Roseberry:

Q. Where do you live, Mr. Gunderman? A. Washington.

Q. How is your hearing; can you hear me distinctly? A. No, sir.

Q. Did you at any time work for Mr. Mueller on his house? A. Yes, sir.

Q. When was that, Mr. Gunderman? A. I think 1924.

Q. And how long did you work there? A. 6 or 8 weeks.

Q. Did you see anybody taking timber off Mr. Sarson's lot, props and ties? A. I don't know whose lot it was. I saw the boy they call Oscar taking some off, off the lot by the house.

Q. The boy they called Oscar. Is he that young man there (indicating)? A. Yes, sir.

Q. Did you see him take it off at different times?

By the Court:

Q. When did you see him taking it off? A. After he come home from work.

Q. How long was he at work there? A. I don't know.

Q. You don't know how long he was doing it? A. Three or four times all I saw him.

Q. Three or four times when, in the afternoon? A. Yes.

By Mr. Roseberry:

Q. Was three or four times a week, or— A. I saw him three or four times pull some stuff down off the mountain back of his house.

Q. What was it, mining props? What kind of timber was it? A. I can't tell you what it was.

Q. How did he bring it down? A. With a rope.

Q. Pulled it down? A. Yes.

Q. That was outside of the fence around this building, was it not? A. No fence there.

Q. How far was it away from the house? A. I could not tell how far. A short distance.

Q. Was the timber cut all round there where this timber was he took off? A. Not all of it, some of it.

CROSS-EXAMINATION by Mr. Smith:

Q. This was just fire wood wasn't it? A. I suppose so. That's what they were using it for?

Q. Small stuff? A. Big stuff, too.

Q. Limbs of trees? A. It was not limbs of trees.

Q. How close to the house? Was it near to the house? A. Up above the house.

Q. When did you work in 1924 for Mr.— A. I could not say what month it was.

Q. Was it after February? A. I should not say so.

Q. You don't know when it was? A. I had a fire, and my books all burned up. I could not tell you exactly what time it was. I had it all down.

Q. When did Oscar go to work in the morning? A. When did he go to work? When I got off the trolley I generaly met him down to the store at Broadway.

Q. What time did he quit work in the afternoon? A. Five o'clock.

Q. What time did he get back? A. He would be back long before I quit.

Q. What time would he get back? A. I say he would be back before I quit. I don't know exactly what time.

Q. Do you know where Mr. Mueller worked, Oscar worked, at that time? A. I imagine he worked at the cement works.

Q. Edison Cement Company. Have you ever worked there? A. About 17 years.

Q. What time do the men work. What are their hours when they work there? A. No hours. He had to do the work he was doing.

Q. Do you know what work he was doing? A. He was in packing cement.

Q. Didn't have any regular hours? A. No, no regular hours. Whenever they got done they are done, one o'clock, two o'clock, three o'clock, whenever time they got the shipment up they are done.

Q. Who did you talk to about this matter? A. Who did I talk to about it? I never talked to anybody about it.

Q. Never told anybody about it? A. I don't understand what you mean.

By the Court:

Q. You told Mr. Sarson you saw this boy, didn't you? A. No, sir, he asked me if I saw him, and I told him, yes.

By Mr. Smith:

Q. When did he ask you? A. Probably a year or so.

The Court: You rest?

Mr. Roseberry: Yes, sir, we rest.

The Court: I will hear you gentlemen in the Judge's room, on the motion Mr. Smith desires to make. There will be a recess while I am hearing the motion.

Mr. Smith: If the Court please, I move for a nonsuit at this time on the ground that the plaintiff at this stage of the case,

having rested, has not made out a cause of action, and has not sustained the burden of proof under the amended complaint. As the evidence stands now, the agreement in writing contained the provision where he was to have the above timber removed in two years from date. It is the contention of the plaintiff that this time was extended, and under the amended complaint the plaintiff alleges, first, one extension of a year, and then an extension of two months. The defense contends that this agreement must be the sole cause of action, the agreement in writing, and there is no proof of a breach of the agreement at the present stage of the case. First, notwithstanding this last evidence, because the time has not been fixed as to this date when it took place, when the timber was removed, assuming that it were true, by the boy Oscar; nor is it proved that Oscar, the son, was acting for his father, the defendant in the case. It cannot be presumed that he was acting under his direction, or as his agent. There is nothing to show that he was doing this because his father told him to do so; nor is the evidence sufficient to show that this timber was taken from the tract, from the testimony of the witness, Mr. Gunderman. It was near the house, he said. Now, we contend that there is no proof, and its admitted by Mr. Sarson, of an extension for one year. This being a unilateral agreement, it cannot be made the basis of cause

of action on the ground that we cannot alter, vary, or contradict a written contract; and on the further ground that it is trying to bring into an agreement for the sale of an interest in real estate, and realty, real property, an oral agreement. We have been through this pretty well and in our opinion seem to have covered the matter very clearly with reference to the year's extension. With reference to the two months' extension, of course, it now appears from the evidence this was made on a Sunday, which makes it void so far as any transaction that related to the two months' agreement that occurred on that day. There was an attempt to show that subsequently Mr. Pearson, the Justice of the Peace, was authorized by Mr. Mueller to grant this extension, but it now appears at this stage of the evidence, and Mr. Pearson's testimony, that that conversation on the telephone took place on the seventh day of February, the day after the time had expired, and when the next day, the very next day, Mr. Mueller changed his mind and served notice upon him not to cut, or go on without his permission. There is no consideration for the two months extension. There was never any meeting of the minds in this thing. We submit that if the plaintiff recovers, he must rely in his recovery upon this extension, and under the cases which were cited prior, and under particularly Missel versus Swinley, 76 N. J. Law,

290, and every case which we have referred to, Stryker versus Vanderbilt, 25 Law, 496, Long versus Hatwell, 34 Law, 116, this is a proper defense by estoppel in pay, but it is not the basis of an action. It breaks down the rule. If there's a cause of action there must be a breach of this agreement, the original agreement, and they have shown no evidence, no proof, that the original agreement was ever broken, no interference with going on and reducing the timber. If Mr. Sarson didn't get his timber off, it was through his neglect and his delay. He had paid for the timber and the right to get it off, but he had also agreed to get it off within two years, and relieve the land of the burden of the standing timber. The plaintiff attempts to overcome this under the ruling Missel versus Swinley on the ground that he relied upon this, that he relied upon this extension. That is not borne out, as I say, evidenced by these facts. The strike happened in 1922. He waited then until it was settled, according to his testimony, he waited, and then he made a new agreement on New Year's Day, and his own contractor fell down at that time, due to his own agent's fault, or his own neglect. He didn't remove or reduce this timber to possession. Then he goes and he starts with a great number of teams early in January to reduce this to possession.

The Court: January, 1924.

Mr. Smith (continuing): Just before the time expired he starts in with eight men, and for three or four weeks cut off as much timber as he possibly could.

Mr. Roseberry replied.

The Court: I think I will reserve decision on it. Put defendant on his defense without prejudice to your making a motion to direct under the circumstances. I don't get the time here as to when this boy, Oscar, is alleged to have gone on there and taken some timber, or whether he went on this tract at all. It does not appear where it was, or what it was he took, or when. I will allow you to open your case for that purpose, and then I shall direct that the case go to the defendant, and without prejudice to your motion to direct.

Mr. Smith: If the Court please, I would like to state that I feel, unless they can prove agency on the part of the boy, Oscar—

The hearing in the court was hereupon resumed.

The Court: I have allowed plaintiff to open his case for further testimony.

GEORGE W. SARSON, plaintiff, re-called:

By Mr. Roseberry:

Q. In reference to the testimony that you testified had been removed from the land by Mr. Mueller, when was that?

Mr. Smith: I object to that. That's not competent. He had no knowledge, and he testified he had no knowledge of it.

By the Court:

Q. You have no personal knowledge as to when that was removed, have you? A. All I know about it that two or three weeks before it had expired I saw lots of timber lying on the wood pile. The same kind of timber as on the land.

Q. What was it? A. Mine props and mine timber.

Q. You say you saw it on the wood pile of the defendant? A. Yes, sir.

The Court: That's before, he said, the two years had expired. That's all he knows about it.

By Mr. Roseberry:

Q. Was there much of it taken off? What sort of timber was on the wood pile, mine props? A. Railroad ties and mine props.

Q. Did you know of Mr. Mueller having any mine ties and props around in his neighborhood, or not? Any mine ties and props? A. I don't know.

Q. Did he have on these two acres where his house was? A. No, mine laid there on the two acres. That was my timber on the two acres.

Q. All the timber was yours there? A. Yes.

Q. These mine props and ties were all yours there on his wood pile? A. Yes.

By Mr. Smith:

Q. Did you speak to Mr. Mueller about that at the time? A. About what?

Q. Did you speak to Mr. Mueller about that, seeing that timber there? A. No, sir.

Q. You don't know whose timber it was? A. No, but it was the same kind of timber on my lot.

Q. You don't know whose it was? A. No.

Q. You don't know how it came to be there? A. No.

Mr. Smith: That's all.

By Mr. Roseberry:

Q. But you say your timber had been taken off? A. Yes, I saw it had been taken off.

Q. What had been taken off was the same character and kind that you saw—

Mr. Smith: I think the defendant had better testify, rather than Counsel—

The Court: Don't lead.

By the Court:

Q. How do you know it was your timber on the wood pile? A. The same kind as in my lot.

Q. How do you know it was taken off your lot? Did you see it yourself? A. I could see from the road the timber was gone, going back and forward by the road, I could see part of the timber was gone.

By Mr. Roseberry:

Q. You saw that on the wood pile?

Mr. Smith: I object. He said he saw some that resembled it. He didn't say it was the same at all.

By Mr. Smith:

Q. How far is the wood pile from the house? A. Fifty yards perhaps.

Mr. Smith: That's all.

GEORGE GUNDERMAN, re-called:

By Mr. Roseberry:

Q. When was it that you worked for Mr. Mueller at the house? A. I think in 1924.

Q. What time? A. I could not say what time it was.

Q. Beginning of the year? A. I could not say.

Q. You can't tell what time it was in 1924. When did you begin to work for him? When did you do your first work for him? A. I could not tell you just what time it was.

By the Court:

Q. You say you saw the boy, Oscar, remove timber while you worked for Mr. Sarson, is that right? A. Yes.

Q. When did you see him? A. When I was working for him, for Mr. Mueller.

Q. When was that? A. I could not just exactly tell you.

Q. Was it after you worked for Sarson? A. I could not say that.

Q. Can you fix the time at all? A. No.

Mr. Roseberry: He did not work for Mr. Sarson, your Honor. He worked for Mr. Mueller.

By the Court:

Q. Yes, that's it. You can't fix the time when you worked for him? A. No, but I had it down.

Q. You can't say whether it was a year ago, or two years ago? A. 1924.

The Court: During 1924; all right.

By Mr. Roseberry:

Q. You said this was up on the wood pile. Where was that used then? Where was this? A. I could not tell you what they done with it. It was for firewood, I suppose.

Q. Cut up into firewood?

Mr. Smith: Move the last answer be stricken out.

By Mr. Roseberry:

Q. What was done with the ties on the wood pile? A. I don't know what became of them.

Q. Were they cut, or were they not cut? A. I don't know.

Mr. Smith: I object to that.

The Court: He says he doesn't know.

By Mr. Roseberry:

Q. Did anybody do any work on this wood pile?

Mr. Smith: I object.

A. I don't know.

The Court: He said, no, he didn't see anything done.

By Mr. Roseberry:

Q. Did you see anything done to the mine props and ties by Oscar, or his father, on the wood pile? A. I saw them cutting wood.

Mr. Roseberry: Yes, that's what I want to know.

By the Court:

Q. Were they cutting these same ties?

By Mr. Roseberry:

Q. Were they cutting these ties? A. I didn't see them cutting ties.

Q. Props? A. I didn't see them cutting props.

Q. Who was cutting there? A. I didn't see anybody there, but I seen them fetching it down. I didn't see anybody cutting.

Q. Didn't see them cutting up any ties? A. No, sir. I didn't pay no attention to them. I was not doing that work.

Q. Did you see where this wood was used that was on the wood pile? A. I seen them put wood in the stove, but I don't know whether it was the same wood.

Q. Was that the house where Mr. Mueller lived? A. Yes.

Q. In his house? A. Yes.

By Mr. Smith:

Q. You were doing some work inside Mr. Mueller's house at the time? A. What time?

Q. Carpenter work, when you worked for Mr. Mueller? A. I did, inside and out.

Q. Wasn't it the latter part of December, or the latter part of 1924? A. I could not say.

Q. Wasn't it previous— perhaps we can help you fix the time. Wasn't it in September to November, in the fall of the year 1924, when you did this work? A. I could not really tell you, no, sir.

Q. You don't know? A. No.

Q. Haven't the slightest idea? A. I don't want to express it. I don't know.

Q. Was anybody else working in the wood lot

I asked him how much he would offer, or what he would offer. I paid Mr. Sarson $150 for the land, and to pay the taxes.

Q. When was this? A. In January, 1924.

Q. Did you pay Mr. Sarson any money? A. I paid Mr. Sarson $150.

By the Court:

Q. That was before this paper was signed? A. I paid $25 in Van Blisard's office in Phillipsburg.

Q. That was before this paper was signed? A. Yes.

By Mr. Smith:

Q. I want to know when you had a conversation with him after the paper was signed? A. Not at all.

By the Court:

Q. Did he cut all of this timber before the two years were up? A. No.

Q. Did he come and see you before the term expired, before February 6, 1926? A. This was in January, 1924.

Q. We are talking about after the contract was signed, before February 6th. The written contract expired February 6, 1926, didn't it? A. The contract ran out the 6th February, 1924.

Mr. Smith: 1924.

The Court: Dated 1922?

Mr. Smith: Yes.

By Mr. Smith:

Q. Did Mr. Sarson come and talk to you in 1922 about an extension of time? A. In Van Blisard's office his contract was made.

Q. Mr. Sarson has testified he saw you, and—

Mr. Roseberry: Objected to as a leading question.

The Court: Let him finish it first. I can't tell.

By Mr. Smith:

Q. Mr. Sarson testified he saw you in 1922 or 1923, and that you agreed to extend the time for taking off this timber one year? A. Mr. Sarson came to me with Mr. Cooper and said they wanted to cut wood. He did not speak to me that he wanted an extension of time. At that time Mr. Sarson had a whole year's time, and did not need to ask me.

Q. Did he come to you in January, 1924, at the house on a Sunday afternoon and talk to you again? A. That was the first time he came to me and spoke about the renewal of the contract.

Q. What was said at that time?

By the Court:

Q. What did he say, and what did you say? A. I cannot actually say.

The Court: Give your best recollection.

A. I gathered that Mr. Sarson wanted me to sign over the contract.

Q. What was said? A. I declined this because he did not want to pay me for my expenditures.

Q. What else, if anything, was said? A. As Mr. Sarson saw that I did not want to sign over, then he threatened me.

Q. What did he say? A. He had already some-

thing similar before, and if I did not sign he would make me do so.

Q. Did you agree to any extension of time? A. No.

Q. I show you Exhibit P-2 and ask you whether that notice was signed by you? A. Yes.

Q. Did you direct your wife to serve that notice on Mr. Sarson? A. Yes.

Q. Did you see Mr. Sarson after that notice was served? A. Yes, Squire Pearson's office in Washington.

Q. When? A. I believe it was the 6th or 7th of February.

Q. Was it the same day that the notice was served? A. I think so.

Q. What did Mr. Sarson say to you that time? A. He wanted for me one day to haul wood, and had teams outside, and they were waiting, and I said yes, he could have one day. Mr. Sarson went out and directed his teams to proceed, and again came back, stuck his head in the door, and said that is all.

Q. I show you Exhibit P-3 and ask you whether that notice was served upon you? A. I think so, but I am not quite sure.

Q. You know Mr. Thatcher, the man who brought it? A. Yes.

Q. After you got that notice, did you ever refuse permission to Mr. Sarson to go on your property to cut the timber? A. I never saw Mr. Sarson.

Q. Did you or not after you had received that notice refuse permission for him to go and remove the cut timber, or the standing timber? A. I did not see Mr. Sarson, and did not speak to him.

Q. Did you, by mail, or any other way, ever deny Mr. Sarson—

Mr. Roseberry: Objected to as very improper, and a leading question.

The Court: Reframe your question.

By Mr. Smith:

Q. Did you in any way, verbally, or written? A. No, I have not seen him, and have not forbid him.

Q. Where is the standing timber that was there on the 6th February? A. That stands there yet.

Q. Have you cut or taken any of that standing timber? A. No.

Q. Have you taken any of the cut timber that was there on the land on February 6, 1924? A. Not so much as a bit.

Q. Is that still there? A. So far as I know.

Q. Did you, before February 6, 1924, any time within the two years, yourself, or did anybody under your orders, take or remove any of the timber, cut timber, mine props or ties, from the 43 acre tract? A. I have taken nothing, no cut, or uncut.

Q. When did Mr. Gunderman work for you? A. October and November, 1924.

Q. Did any member of your family, with your knowledge and consent, take any timber from the tract? A. No.

Q. You say you are a silk weaver? A. Yes.

CROSS-EXAMINATION by Mr. Roseberry:

Q. What time was he at your house? What time of the year was Mr. Sarson at your house? A. In 1923 he was there with Mr. Cooper, and in 1924 he was there in January.

Q. 1924? A. 1924.

Q. Who all was there at that time? A. My whole family was there.

Q. Oscar lives with you and your wife? A. Yes.

Q. Oscar lived with you in 1921, 2, 3 and 4 did he not, and 5? A. Yes.

Q. On your examination before, this question was asked you: "You told him" that is, Mr. Sarson, "when he was at the house that he could have two months to take off the 18 acre tract." Your answer was "Yes, I said he might, with the caution that he should make no trouble." Did you so testify? A. For that Mr. Sarson threatened me, and I had never before been to court.

By the Court:

Q. Did you so testify at the former trial? A. Only part of the answer. For that reason I was willing to give him two months if he would make no trouble for me.

By Mr. Roseberry:

Q. He claimed, Mr. Sarson claimed, that you had given him an extension of one year's additional time, and if you were not willing to stand by it, he would law you, wouldn't he? A. Mr. Sarson has never spoken to me about one year, but he said to my son as he went out, that will mean a law suit.

Q. Did you tell Mr. Sarson he could have two months further time before he went out of the house, on the 19 acre tract? A. No, I only said that in Mr. Pearson's office.

Q. Did you not say to Mr. Sarson at your house, when he was there, and your son and your wife was there that "Yes, I said to him, with the caution that he should make no trouble." The question was: "You told him when he was at the house that he could have two months to take off the 18 acre tract" and your answer was "Yes, I said that to him, with the condition that he should make no trouble." That you said, didn't you? A. Yes. I said this somewhat conditionally, that there should be no trouble about it.

(Resumption after luncheon.)

By Mr. Roseberry:

Q. Was it in January that Mr. Sarson came, in January 1924, that Mr. Sarson came to your house about this extension of time? A. Yes.

Q. About what time in January? A. On a Sunday in the middle of January.

Q. Did you tell Mr. Pearson, or did you swear before that you told Mr. Pearson to tell Mr. Sarson he could have two months to take off the one lot of 18 or 20 acres. Did you tell Mr. Pearson to tell Mr. Sarson that he could have two months to take off the one lot of 18 or 20 acres, that is, did you swear to that? A. I substantially said something like that, but I expressly stipulated that there should be no trouble made by Mr. Sarson.

Q. I didn't ask that. What I asked was this: If you didn't tell Mr. Pearson to telephone Mr.

Sarson that he could have two months further time to take off the 18 or 20 acre lot. That's what I asked you. Did you tell Mr. Pearson to tell Mr. Sarson that? A. Substantially, I told him that, but expressly said that I would do that if Mr. Sarson would not make any trouble.

Mr. Roseberry to Mr. Dahlke (Interpreting): Ask him if he told Mr. Pearson that.

Mr. Smith: If the Court please, he has answered.

The Court: He said yes.

By Mr. Roseberry:

Q. Did you tell Mr. Pearson? If he testified before that he told Mr. Pearson that, to tell Mr. Sarson? A. I think so.

Q. Ask him, did you testify to this, "Then two days after you saw Mr. Pearson you gave Mr. Sarson that notice, not to cut, or take any more timber off the place?" and your answer was "Yes"? A. Not that I know—

Q. I asked him if he didn't say that?

Mr. Roseberry to Mr. Dahlke: Did you read that to him (indicating the former transcript)?

Mr. Dahlke: Yes.

Mr. Roseberry: The whole thing?

By the Court:

Q. Did you so testify at the former trial? A. On the 6th February in Mr. Pearson's office was the last that I saw Mr. Sarson.

By Mr. Roseberry:

Q. That isn't the question at all. Answer the question, whether he didn't testify to that. Let him answer yes or no. Did he say so or not? A. I cannot, to the best of my recollection, say what was said.

By the Court:

Q. Why did you give the notice on February 8th? A. I do not know why.

Q. You had given him two months' extension hadn't you? A. No.

Q. When did you give two months' extension if he would make no trouble for you? A. Yes, in January, in my house, and a little later in Mr. Pearson's office.

Q. Having done that, why did you give written notice on February 8th following? A. Because I received no reply from Mr. Sarson and I did not know whether he would accept it or not.

Q. At the time you talked with Mr. Sarson, and told him that you would give him two months' extension, if he made no trouble, didn't he say all right? A. Mr. Sarson said to me, "That won't do it."

By Mr. Roseberry:

Q. You did not see Mr. Sarson from the day that you were in Mr. Pearson's office on the 6th of February to the time you gave written notice to quit?

Mr. Smith: He can answer that yes or no.

A. I have not seen Mr. Sarson and I gave him no notice.

Q. Who served that notice on Mr. Sarson, the notice to quit?

Mr. Smith: Notice to quit, I object to that.

Mr. Roseberry: Let's refer to the exhibit.

By Mr. Roseberry:

Q. Who served this notice, Exhibit P-2, that notice on Mr. Sarson? A. My wife.

Q. By your direction? A. I did not tell her so, but I consented thereto.

Q. That's your signature to it, isn't it? A. Yes.

Q. Between the time you were at Mr. Pearson's and the time that was served on him, you did not see Mr. Sarson, did you? A. No.

OSCAR MUELLER, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. How old are you? A. Twenty-one.

Q. Where do you live? A. Broadway.

Q. With whom do you live at the present time? A. With my parents.

Q. Were you living with your father and mother in Broadway in 1924? A. I was.

Q. You know Mr. Sarson, the plaintiff in this case? A. I do.

Q. Were you present one Sunday when he visited your father? A. I was.

Q. At your place. Do you remember what that was? A. It was around the middle or end of January, 1924.

Q. Who all was present when Mr. Sarson had a talk with your father? A. My dad, my mother and myself.

Q. What did Mr. Sarson say when he came? A. He asked for, he says he could not get the timber off. He asked for an extension of time and my dad asked him if he was willing to pay the taxes, which he had agreed to do, and he said he would if my father would give him an extension, and they were talking, and he says after, he said if he would extend the time for a year he would be willing to pay that tax, and my father said he would not do it. Well, he says, "I had a case like that before, and made a man sign. I will make you sign." Before he left the house, he said it would turn out to be a lawsuit.

Q. To your father he said as he left the house, it would be a lawsuit? A. As he left the house, he said it would be a lawsuit.

Q. How long was he there? A. That afternoon?

Q. Yes. A. I imagine, I would not judge the time. It was not very long.

Q. Just what kind of land is this 19-acre tract? A. Nineteen-acre tract, side hill, steep side hill, quite stony.

Q. Which side of the road from Broadway does it lie? A. Left-hand side going towards Montana from Broadway.

Q. Left-hand side? A. Left-hand side.

Q. Anything between the road and the timber? A. A brook.

Q. Where is the brook with regard to the level of the road? A. Lies below the road level.

Q. Where is the home where your father and mother and yourself live, with reference to the 43-acre tract? A. It ain't on the 43-acre tract.

Q. How far away is it from the 43-acre tract? A. Twenty to twenty-five feet, I guess, in a line.

Q. How long have you lived there with your father and mother in your home? A. Since they owned the place in 1908.

Q. Did you, in 1924, 1923 or 1922, or at any time, ever take any lumber that was cut, timber that was cut into mine props and ties, from the 43-acre tract? A. Never.

Q. Did anyone else, under your direction or by orders from your father and mother, ever do it? A. Not that I know of.

Q. What has happened to the standing timber since February, 1924, on the tract of 43 acres, and including both of the tracts? A. Still stands there.

Q. Have you or any other member of your family cut any of that standing timber? A. No, sir.

Q. What has happened to the ties and mine props that were cut and on the premises at that time? A. They still remain there.

Q. Have any of them been taken away? A. There were some taken away before 1922.

Q. Were there any poles, I mean timber that Mr. Sarson had cut there? A. There was timber taken away in 1923 and in 1924.

Q. By whom? A. By Mr. Cooper and Mr. Sarson had other men there I don't know.

Q. What I mean is this, after Mr. Sarson stopped cutting timber, there were some mine props and ties on the tract. Do you know that? A. Yes.

Q. What has happened to those mine props and ties since that time? A. Still laying there, and decayed.

Q. Have you ever taken any of them? A. No, sir.

By the Court:

Q. Do you know what Mr. Gunderman refers to when he testifies he saw you take the timber? A. Yes, sir.

Q. What was it you were taking? A. I was not taking anything.

Q. Didn't you take anything? A. I don't think I was home in time to take any the way he testified.

Q. You don't know whether you did or not? A. I didn't take none.

By Mr. Smith:

Q. When did you get home from work, from the Edison plant? A. On day rate 25 minutes of six, and piece work from the spring of the year to the beginning of September, anywhere from four to half-past six or half-past seven, sometimes eight o'clock.

Q. Do you remember when he worked at the house in 1924? A. I do. It was in the end of September and October and may have been part of November.

Q. Did you take any timber, bring any timber from the 43-acre tract? A. No, sir.

By the Court:

Q. How did you replenish your wood pile there? A. You will have to explain that word.

Q. What made up your wood pile? A. It laid there.

Q. Where? A. What was used for wood came out of our property from before.

Q. Nothing to do with this tract? A. Nothing to do with this tract.

By Mr. Smith:

Q. In the place where you have lived for years, where your house was? A. Yes.

Q. Were there any trees or timber on that tract? A. On the tract we owned at first there was. Just about all cut off.

Q. Were you present when Mr. Thatcher brought this notice? A. I was.

Q. Was anything said by your father at that time after the notice had been read to him? A. I don't think so.

Q. Did he talk to Mr. Thatcher? A. I don't think so.

Mr. Roseberry: I don't understand that Mr. Thatcher said he said anything, except as he was going to father and asked the boy to read it.

Mr. Smith: That's my understanding, but I want it on the record, if the court please.

By the Court:

Q. Do you know anything about the two months' extension they talk about? A. I do.

Q. Were you present then? A. I was, on a Sunday afternoon.

Q. Tell us about it. A. He came and wanted the extension of time for a year, and my 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.

Q. What did your father say? A. Father said he would give him two months, provided he made no trouble.

Q. What did Sarson say? A. Sarson didn't give him no answer on that.

By Mr. Smith:

Q. What did he say? What did Mr. Sarson say; anything? A. Mr. Sarson said, "I had a case like this before and I made a fellow sign, and I will make you sign."

Q. What else, if anything, did he say? A. As he left the house, he said it would be a lawsuit.

CROSS-EXAMINATION by Mr. Roseberry:

Q. Did he have any paper there? A. No. At least, I didn't see any.

Q. Did you testify before, this question was asked, "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 from the tract, providing he made no trouble." Did you say that? Question: "And then your father gave him an extention of two months, did he not?" Answer: "He gave him an extension of two months to take the timber he had cut off the 26 acres, pro-

vided he made no trouble." A. He granted him an extension of time.

Q. Did you answer that way in the former case?

By the Court:

Q. Did you testify to that in the trial before? A. I did if it's that way in there.

By Mr. Roseberry:

Q. Question: "And your father said he had given him an extension of two months?" Answer: "Two months to get the timber off the 26 acres." Did you say that? Did you testify to that formerly on the other case? Your answer was, "Two months to get the timber off the 26 acres." Did you answer that way before? A. Did I answer that way before?

Q. Yes. A. I must have if it's in there. As near as I can remember.

Mr. Roseberry: Well, it's here.

Q. Then this question was asked you. Question. "I asked you if you were there when Mr. Pearson was instructed by your father to telephone to Mr. Sarson that he could have two months to take off the 18 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. Pearson telephone to Mr. Sarson, didn't you?" Answer: "Yes, sir." Question: "That he could have two months' further time to take off the 18 acres?" Answer: "Yes, sir." Did you so testify in the other case? A. I must have.

Q. Question: "After that, this written notice was given, wasn't it, that he was not to come on there at all?" Answer: "I don't know if it was that one or not, but there was a written notice given." Did you answer that way? A. I must have.

By the Court:

Q. Why was that written notice given? A. Why, was that written notice given? He had not made no reply on the agreement about two months and my dad didn't know exactly whether he was going to accept it or not, and he had threatened to make trouble.

The Court: I see.

By Mr. Roseberry:

Q. Didn't he tell you at the time he was at your house, didn't he tell your fatner he had given him an extension of one year, and if he didn't abide by it, he would have a lawsuit on his hands? A. No, sir.

Q. He didn't say that? A. No, sir.

Q. What did he threaten to law about if the time was about to expire? A. No, sir.

Q. What was Mr. Sarson going to law about? What did he say he was going to law about? A. Said he would make him sign a contract, or sign something.

Q. He had no paper there? A. He had no paper there.

Q. He had no contract there? A. I didn't see any.

Q. There was a controversy about this one-year extension, was there not? A. Never heard of a one-year's extension except from him.

Q. Didn't you hear up there that day, didn't you hear about a one-year's extension at that time, on this Sunday? Did you or did you not? What was said about a one-year's extension? A. He wanted a year's extension and he would pay the taxes for that year's extension, but he didn't say whether he would pay the taxes for a two-months' extension, or not.

Q. He threatened to sue if he didn't sign up that one year's extension, didn't he? Mr. Sarson threatened to sue; he threatened to sue your father? A. He didn't say anything like that.

Q. Didn't he say he would have a lawsuit? A. He said he would have a lawsuit.

Q. What did that mean, but that he would sue him, didn't it?

The Court: I answer, yes.

By Mr. Roseberry:

Q. So that one-year's extension of time was talked of there; it was talked of there? A. It was, if he paid the taxes.

Q. It was talked of there, wasn't it? A. Yes.

Q. And your father said he would give him an extension of two months in case he didn't make no trouble, didn't he? A. Yes.

Mr. Roseberry: That's all.

By Mr. Smith:

Q. What was said about taxes? A. Mr. Smith had agreed to pay the taxes when my dad bought the place and when it came—

Q. Just what was said about taxes that day? A. My dad wanted him to pay the taxes, and he

was willing to pay the taxes for a year's extension if my dad would grant it for that year.

By the Court:

Q. What did your father say to that? A. He said he would give him two months' extension.

Q. You say instead of a year?

By Mr. Smith:

Q. What did Mr. Sarson say? A. He didn't give no answer to that.

Q. What did he say, if anything? A. He said, "I had a case like this before. If you don't sign, I will make you sign."

By Mr. Roseberry:

Q. He had no paper there?

The Court: He said he didn't.

By Mr. Roseberry:

Q. No agreement? A. No.

Q. Or anything to sign? A. No.

Q. Yet he said, "If you don't sign, I will make you sign." What's he going to sign?

Mr. Smith: Objected to as argumentative.

Mr. Roseberry: He could have had an agreement with him.

Q. You didn't see it, did you? A. No.

Q. You didn't hear him asked to sign any agreement that appeared there? A. He didn't show no agreement.

Mr. Roseberry: That's all.

GERTRUDE MUELLER, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. You are the wife of Mr. Mueller, the defendant in this case? A. Yes, sir.

Q. Were you present in January, 1924, when Mr. Sarson came to the house? A. Yes, sir.

Q. Who else was present? A. My boys.

Q. Was your son Oscar there? A. My son Oscar was there, yes.

Q. Was Mr. Mueller there? A. Yes.

Q. What time was it, in the daytime? A. Afternoon, around three o'clock Sunday afternoon, around three o'clock.

Q. Did you hear the conversation between Mr. Sarson and Mr. Mueller? A. I heard some of it, but not all of it, because I went in and out of the room, and I didn't pay so extra much attention to it, but I heard some of it.

Q. What was the conversation you heard between Mr. Sarson and Mr. Mueller? A. They was talking about taxes. Mr. Sarson wanted some time, you know, to take the timber off, said the time had expired, and they was talking about taxes. My man says he wanted the taxes paid. He had all the expense, and he might give him two months, but there was nothing said any further.

Q. What did Mr. Sarson say after that, that you heard? A. Mr. Sarson didn't say anything.

Q. You didn't hear anything else? A. I didn't hear anything else. After that I left it to my son, because he understands English better than me and my man.

Q. Has any wood been cut, any of the standing timber that was remaining on this 43-acre tract, been cut since that time? A. Not since 1924.

Q. Has any of it been cut since Mr. Sarson quit cutting? A. I don't think so.

Q. Have any of the mine props or ties that were cut by Mr. Sarson and left on the 43 acre tract been taken by you or anybody that you know of? A. That I don't know if they are there yet, but they was not taken by us.

By the Court:

Q. Any of them put on your wood pile and used for firewood? A. No, sir.

Q. Where do you get firewood from? A. My own property where we bought in 1908.

Q. I understand you cleared that off to get a lot for the house. A. We didn't clear that. That is our own, we got it in 1908, or 9, must be 8.

Q. You bought that from another party? A. We bought that from Mr. Van Sickle, in Broadway, three and a half acres, mostly all wood.

CROSS-EXAMINATION by Mr. Roseberry:

Q. Was there any timber on that Van Sickle tract in 1924? A. We don't have nothing to do with the Van Sickle tract.

By the Court:

Q. He asked whether there was any wood there. A. That's our old lot. Yes, that is right. Yes, there was wood there. Wood today there yet, lots of it.

By Mr. Roseberry:

Q. Before, the question that Mr. Smith asked at the former trial, 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.

Q. The question was asked whether you heard any of the conversation. Answer: "Well, I heard some, but didn't pay no exact attention to it, because it was my man and my boy that had the doings with it." A. I just answered that here, too.

Q. You served the notice, you served the notice on Mr. Sarson? A. I did.

Q. To quit? A. I did.

Q. Where did you serve that?

The Court: You keep calling that a notice to quit. I read the notice that he was not to return without permission.

Q. You served the notice that he was not to return without permission? A. That's right.

Q. Where did you serve it? A. On the road, when he came down from the wood lot.

Q. He came down from the wood lot? A. That was around five o'clock.

Q. Did your husband give it to you to serve? A. No, he did not give it to me to serve, I did that out of my own—

Q. You did it yourself? A. I did it myself. My interest is my man's interest.

By the Court:

Q. You caused that notice to be served? A. I took the notice and served it.

Q. Why did you do that? A. So that we know where we stood with Mr. Sarson. Two years was run. I can't tell so plain in English.

Q. Two years were up? A. Yes, and I served the notice.

Q. Hadn't you an agreement to extend for two months, or a year? A. We didn't know if Mr. Sarson was going to take it. He never answered on that.

The Court: I see.

By Mr. Roseberry:

Q. But you wrote to Mr. Sarson? A. To who?

Q. To Mr. Sarson. You said he never answered the letter? A. I never said anything about a letter.

Q. You didn't know whether he was going to take one year's extension, or two months extension? A. Mr. Sarson never answered on that two months, and nothing was said about a year.

Q. He spoke about the two months extension at your house, didn't he? A. He did.

Q. You went with him to Mr. Pearson and heard him tell him there he could have two months to take off the timber? A. I did not. I was not in Mr. Pearson's that night.

Q. Weren't you at Mr. Pearson's when he telephoned to Mr. Sarson? A. No, sir.

Q. Who was there? A. My son, Oscar, son, William, my husband, and Mr. Griffinwell. He's in Philadalphia now.

Q. And your husband? A. Yes, he was there.

Q. Did your husband tell you about his telephoning Mr. Sarson? A. He said he didn't get no answer from Mr. Sarson.

Q. Didn't he tell you he telephoned Mr. Sarson he could have two months more? A. He said something about that. I don't remember the words he said any more, because its two years.

Q. He came home, then he came home, and the next day he went back to Mr. Pearson's? A. He said he didn't get no answer, and I got mad, and I took it in my own hands.

Q. He came back, after telephoning to Mr. Pearson, he came back after having Mr. Pearson telephone Mr. Sarson, and then next day he went back again to Mr. Pearson, did he not? A. Who went back to Mr. Pearson?

Q. Your husband? A. Went back again?

Q. Next day? A. My husband. No, he didn't go back to Mr. Pearson.

Q. Who did? A. Me and my son, Oscar, went to Mr. Pearson's.

Q. Then you had the notice written? A. I asked Mr. Pearson if we could have a notice written.

Q. Yes. A. And he wrote it.

Q. You and your son, Oscar, went there? A. Yes, sir.

Q. He was not along with you, was he? A. No, sir.

Q. You got it written, and then you took that notice home, didn't you? A. Yes.

Q. And you told your husband to sign it? A. He had signed it. He signed the notice.

Q. You told him to sign it? A. Isn't his interest my interest?

Q. You told him to sign it? A. I told him what Mr. Pearson said, he would have to sign it.

Q. And he signed it? A. He did sign it, sure.

Q. Then you went out and served it? A. Not that day.

Q. Next night? A. Next night.

Q. You went out and served it the next night? A. Yes.

Q. You told him to keep off the premises; did you read it to him? A. Mr. Sarson took the notice.

Q. Did you read it to him? A. He took the notice.

By the Court:

Q. Did you read it? A. I told you I give him the notice.

By Mr. Roseberry:

Q. Did you tell him what the notice was? A. Yes, I didn't tell him because he had the paper and he read it over himself.

Q. Did you tell him what the notice—

Mr. Smith: She has answered that, if the Court please.

By Mr. Roseberry:

Q. Did you tell him what was in the notice?

By the Court:

Q. What did you say to Mr. Sarson? A. I don't remember.

By Mr. Roseberry:

Q. Didn't you tell him he must keep off the place, that the notice was to keep off the place? A. I could not remember that. It's two years now.

Q. What did you give him notice for? A. That

Q. Where you confine your business to, in the County of Warren, as far as your transactions have gone? A. I sell all over.

Q. You buy and sell, but I am—

By the Court:

Q. What tracts have you bought in Warren County, Mr. Warne, since 1912? A. Since 1912?

Q. Since 1922? A. Probably 40 or 50.

Q. Where? A. Three are around this place I am speaking about.

Q. When? A. One 1924, cutting now.

Q. That was after this time, what others? A. Bought Ed. Morson's lot, adjoins this, the upper side of that.

Q. When? A. About 1915.

Q. What others? A. Nick Bourne's lot, right across the road.

Q. What time was that? A. 1920.

Q. What other lots? A. I bought several on Scotch Mountain, Montana.

By Mr. Smith:

Q. Do you know the value of the standing timber on this 43 acre tract after Mr. Sarson stopped cutting in February, 1914? A. I do.

Q. What was the value per acre, in your judgment, based upon your experience in buying and selling standing timber? A. I would not give over $7 an acre.

Q. On what do you base your judgment? A. The timber was gone through with and taken out by three different wood men before Mr. Sarson bought it.

Q. Do you know that of your own knowledge? A. Yes.

Q. Who are the men who took out the timber? A. This man I had reference to, I forget his name now, Lambert, William Lambert, and Wolf, and the man that Mr. Mueller bought it off of.

Q. Mr. Peter Walters? A. Yes, timber man for years.

Q. Very old man, isn't he? A. Yes, sir.

Q. What was the condition of the standing timber at that time? A. At what time?

Q. February, 1924? A. It was very small stuff that was left, partly oak, and chestnut, maple, birch, and such like, mine prop timber.

Q. What was the chestnut? A. The chestnut was dead.

Q. Is mine prop timber less or greater value than other timber? A. Less than anything else.

Q. Do you buy timber for mining props? A. Yes, sir; loaded a car this week.

Q. Have you been on this tract recently? A. Yes, sir; I go through every day nearly.

Q. You know whether the ties and mine props that were on there when Mr. Sarson left are still there? A. Yes, and some that were cut before he bought it are still there.

Q. They are on the tract? A. On the tract.

CROSS-EXAMINATION by Mr. Roseberry:

Q. Have you had any conversations with Mr. Mueller? A. No, sir.

Q. Or with Mrs. Mueller or young Mr. Mueller? A. No.

Q. About taking off this timber? A. No, sir.

Q. Are you sure you haven't made any arrangements? A. Absolutely.

Q. You say you see it frequently. The public road runs through there, don't it? A. Yes, sir.

Q. When you go out to attend to your business you go out that public road? A. Go in that public road to the job.

Q. That's where you see it. See both sides of it? A. Yes.

Q. 43 acres? A. Yes.

Q. Lies back a very considerable distance on each side? A. Goes right by.

Q. Answer the question. It runs back a considerable distance each side? A. You can see the job each side.

Q. I didn't ask about the job. I asked if it didn't run back a considerable distance on each side? A. Up and down hill, you mean?

Q. No, runs back from the roadway, from the road, you know what I mean? A. Runs up and down hill.

Q. Back from the road. You know what I mean.

The Court: He says he doesn't know what you mean.

By Mr. Roseberry:

Q. What did you think I meant? A. You can see that road—

Q. I didn't ask you for that. What did you think I meant? A. I don't know what your question is. I don't know what you mean.

Q. This road runs through the timber? A. Very near.

Q. The timber runs away from the road? A. Runs up and down the road. Runs up and down the road and up the hill.

Q. I suppose it runs up and down and up the hill, but how far does it run back on each side? A. I didn't measure it.

Q. That is all you know about it? Answer my question, that's all you know about it? A. I go through it every day.

Q. With horses or walking? A. No, sir; afoot.

Q. You go through it off the road? A. Yes, and these woods where I am cutting this timber is right beyond it.

Q. You have got good road. You go there on foot, travel back and forth to your work? A. Sometimes, sometimes we go up the road and sometimes through the woods.

Q. That's all you see of the timber tract? A. I can see the whole thing of it.

Q. You can see the whole thing of it from that road? A. When you walk up and down the road.

Q. That's all you did, wasn't it? A. No, I went through.

Q. When did you go through it? A. Every once in a while, my job is close to it.

Q. What for? A. Nearest way to my job.

Q. What job have you got? A. The job I told you about, right adjoining it. It was part of the Cole Estate.

Q. Where's that road go into on the Cole Estate? A. It goes up with Edge—into the job.

Q. It does not go through this tract? A. The same road goes through this tract.

Q. Passes by this tract? A. The same road goes through this tract.

Q. That road where you go to and from your work does not go through this tract? A. There's

a wood road comes down through my job that goes through this tract.

Q. You have been quite a rival of Mr. Sarson's down there in the lumber business?

The Court: Have you been a rival?

A. 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.

Q. You are mad at him on account of that letter? A. Not exactly.

Q. He beat you, didn't he? A. He did not, no, sir; this postal card beat me.

Q. You came here with that postal card on purpose? A. No, sir.

Mr. Smith: Objected to as immaterial.

Mr. Roseberry: I want to show enmity between these two men.

The Court: Haven't you shown it already?

By Mr. Roseberry:

Q. This Lambert you speak of, who was Lambert? A. Dad Lambert's son.

Q. When was he on this lot? A. He cut this lot off.

Q. How long ago? A. 1920, 1921.

Q. He cut this land off till there was no timber there? A. He took out the poles and such like.

Q. When did Wolf cut it off, in 1922? A. He cut the tract off on the other side of the road.

Q. He cut off after Lambert had cut off, and Walters came along and he took some off? A. Walters took out some.

Q. Where were you at this time? A. I took out some.

Q. You were there, too? A. Yes, I buy wherever I can.

Q. Did you get any of his props and mining ties? A. I don't think so.

Q. You don't think so? You don't know, do you? A. Absolutely do, I have got lots of them.

Q. Where have you been keeping that little card all these years? A. In my writing desk.

Mr. Smith: Objected to.

The Court: Objection sustained.

EDGAR SNOOK, sworn for the defendant.

Direct-examination by Mr. Smith:

Q. Where do you live? A. Broadway.

Q. How close do you live to where Mr. Mueller lives and this 43 acre tract is located? A. I should judge between half mile and three-quarters.

Q. Do you know where this 43 acre tract is? A. Yes, sir.

Q. How do you go to your home? A. At the present time?

Q. How did you go to your home in 1922, '23 and '24? A. For about twelve years I passed right by these two tracts.

Q. What is your business? A. Building.

Q. Have you had any business in buying and selling timber at all? A. I cannot say that I had; no, sir.

Q. What is the condition of the land where this 19 acre tract, along the right-hand side of the road, is located?

Mr. Roseberry: Objected to, until he explains what he means by condition of land, side hill, or what?

Mr. Smith: I will withdraw the question.

Q. What is the condition of the land with reference to its topography, being level, or rocky, or something like that? A. I should judge from casual observation of this 19 acre tract I would imagine the grade was anywheres in the neighborhood of sixty per cent.

Q. Very steep slope? A. Very steep slope.

Q. How about the ground, is it rocky? A. I don't know whether that ground in that tract is rocky or not.

Q. You know the trees, you observed the trees that were there? A. Yes.

Q. What was their condition in the 19 acre tract?

Mr. Roseberry: Objected to, unless he went round and made an investigation and examined them.

The Court: That may be developed. He may answer that question.

By Mr. Smith:

Q. What was the condition of the trees there, the standing timber, in 1924, February? A. There was the chestnut, practically all dead with the blight.

Q. Do you know of anyone else cutting the timber on this tract prior to 1922? A. Yes.

Q. Who was that? A. There was one party by the name of Dalrymple. Another man by the name of W—— Y—— on the 19 acre tract.

Q. On the 26-acre tract, do you know of any one taking any timber out of there? A. William Lambert.

Q. William Lambert. Did you see him? A. Yes.

Q. Have you been over this 43 acre tract? A. Yes.

Q. Did you go over it in 1924? A. Yes.

Q. What is the condition of the land on the 26 acre tract? A. By Mr. Mueller's house, very rocky, don't think anybody could take a horse up over it.

Q. How far does that condition extend? A. That goes way to the top of the hill.

Q. How is it for level and grade? A. Quite a grade, only in places it is practically level. All right where Mr. Sarson was cutting off timber the last time.

Q. Have you had any business in buying land with standing timber on it in that particular section? A. I bought a farm up there.

Q. Was there any timber on it? A. Yes, sir.

Q. Have you had any other experience in buying? A. No.

Q. Were you living there in 1924? A. I was, up until the 8th of September.

Q. Of 1924? A. 1924.

Q. Up to that time did any one cut any timber, to your knowledge, after February 8th, on the 43 acres? A. Not to my knowledge.

Q. Could you have seen if any timber had been cut? A. Yes, sir.

Q. Do you know where these mine props and ties that Mr. Sarson cut and left on the tract were located on that tract? A. They were left where he was cutting.

Q. You observed that pile right after? A. Yes.

Q. Have you observed it since that time? A. Since?

Q. Since 8th February, or 6th February, 1924? A. No, I have not. I have not been up that way very much.

Q. Did you observe it up to the time you left in September, 1924? A. Yes, sir.

Q. Can you state whether or not any one had taken any of this mine ties or props? A. Not to my knowledge; no, sir.

CROSS-EXAMINATION by Mr. Roseberry:

Q. Did you look? A. You generally notice those things as you go by.

Q. Kind of noticed the old lady when you went along there? A. Well, she's a pretty good natured, willing, old soul.

Q. Didn't you say before on your examination, "I very often stopped there, and Mrs. Mueller generally placed the transactions with me as a general thing," didn't you?

Mr. Smith: I object to the question, if he testified before. Object to the question further that it is improper cross-examination.

By Mr. Roseberry:

Q. Didn't you testify to that before?

The Court: For the purpose of showing interest.

A. I believe I did.

Q. What were you selling? A. What was I selling at that time?

Q. Yes. A. Who to?

The Court: Anybody.

Q. Mrs. Mueller? A. Well, I sold them considerable lumber that I had sawed off trees on my own farm. I had been doing that for probably twelve years.

Q. Didn't you sell her any groceries? A. No, sir; not in the grocery business.

Q. Simply sold her wood and timber, Mrs. Mueller? A. Yes.

Q. Tell us how much you sold her. A. Altogether?

Q. You said you were very often there? A. I would have to go over my books.

Q. You can't tell them, generally speaking? So that, in the wood business, you very often stopped there? A. That's so.

Q. No other kind of business? A. They very often stopped in and consulted me with regard to the repair of their house and rebuilding it.

Q. Did you see Mr. Gunderman there? A. Mr. Gunderman; no, sir.

Q. Never saw him there? Not there at that time, were you? A. No, sir.

Q. You said you went through these woods?

Did you say you went through these woods before the 8th February, 1924? A. Yes.

Q. Have you gone through them since? A. No, sir.

Q. Did you go through them before?

The Court: He said so just now.

Q. How did you happen to go through there in February, 1924? A. Been through there every since I have lived there, more or less.

Q. You said you had not been there since 1924? A. I was not, yes.

Q. That's the less, isn't it? Where's the more?

The Court: He's talking about your expression, more or less.

Q. Did you go before that time through the woods to get to Mr. Mueller's? A. We don't reach the woods until we pass Mr. Mueller's.

Q. You said on your former examination generally Mr. Mueller was not home? A. I don't think I said he was not home. I think he said—

Q. See if you remember this: Question: "Was Mr. Mueller present at any of these times?" Answer: "I do not think he was." Did you say that? A. I did. I say it yet.

Q. Didn't you testify before that Mrs. Mueller told you Mr. Sarson had asked two months' further time?

Mr. Smith: Objected to, as improper.
The Court: Mere hearsay.

Q. Was not your husband present when she told you that? A. No, sir.

Mr. Roseberry: That's all.

HERMAN COOPER, sworn for the defendant:

Direct-examination by Mr. Smith:

Q. Where do you live? A. Washington.

Q. What is your business? A. At that time, 1922, was timber business.

Q. 1922 and 23? A. Yes.

Q. Cutting standing timber? A. Yes.

Q. Did you ever buy and sell standing timber? A. I never until I went up on this job for Mr. Sarson at the first start, but I have worked on it for 18 years.

Q. Did you work on this job of removing the timber for Mr. Sarson, on the 43 acre tract? A. One carload of 8-inch props and fifteen hundred feet of 6-inch props.

Q. You worked on them? A. Yes.

Q. Do you know what kind of timber was on there at that time? A. Yes.

Q. What was the timber? A. Timber run from round about 9, 8 and 6-inch props, just ordinary dead chestnut timber, some oak, birch, everything mixed together.

Q. From your examination could you state whether the timber had been taken out prior to your going there?

Mr. Roseberry: Objected to, unless he knows.

A. No, only what you could tell by the tops that laid there, except on one two-acres right up by the house. In 1920 and 21 Mr. Lambert, I cut in there for Mr. Lambert. I helped cut about two acres of timber.

Q. Was that part of this 43 acres? A. That was part of this 43 acres.

Q. You know the different kinds of timber, standing timber? A. Yes, sir.

Q. Can you tell whether the timber on these 43 acres was of great value or little value?

Mr. Roseberry: Objected to. He has not shown he's qualified as an expert.

The Court: Let him qualify.

By Mr. Smith:

Q. How long have you been in the timber business? A. Cut wood in woods for 18 years.

Q. 18 years? A. Yes, sir.

Q. From your experience there, do you know the value of different kinds of woods? A. I know all the prices of different kinds of timber, yes, sir.

By the Court:

Q. Buy and sell yourself? A. No, I don't buy and sell myself.

Q. How do you know that? A. I have specifications and prices from the coal mines.

Q. For this purpose? A. Yes, sir.

Mr. Smith: From that are you able to determine the value of the timber that stood—

Mr. Roseberry: I don't think that is proper, asking for a conclusion from this witness.

By Mr. Smith:

Q. From that experience in cutting, and from your experience and knowledge, and so forth, are

you able to determine the value per acre of the timber standing on this 43 acre tract, as it stood there? A. I don't know as I can.

Mr. Roseberry: I object to that.

The Court: He's answered.

Mr. Smith: Do you know the value of the standing timber on that tract, on that 43 acre tract?

Mr. Roseberry: I object to that also.

The Court: I don't think he's hardly qualified. He is not engaged in the business of buying and selling, as are these other lumber men, and whatever knowledge he may have is derived from having seen some schedule of prices from somewhere.

By Mr. Smith:

Q. Can you tell whether this was good lumber, or poor lumber? A. I have seen a whole lot better.

Q. Could this be used for any other purpose than mine props and ties?

Mr. Roseberry: Objected to.

The Court: He may answer if he knows.

A. It could have been made up in railroad ties, and small trolley ties, used for saw mill some of it, saw mill timber.

Q. Do you know from your experience in cutting which is considered better timber, saw mill timber or timber for mine props? A. Pretty hard thing for me to answer, because I never handled saw mill timber.

Q. Did you have a contract with Mr. Sarson in 1923? A. I did.

Q. What was that contract?

Mr. Roseberry: I would like to ask what is the purpose of proving that contract.

The Court: What do you want to show?

Mr. Smith: We want to show the situation, and his part in the performance, and go on and take this timber Mr. Sarson has testified relatively.

The Court: Mr. Sarson, he was held up on a contract, the men fell down on him.

By Mr. Roseberry:

Q. Did he say that?

The Court: If he connects it, all right.

By Mr. Smith:

Q. What was your contract? A. My contract was I was to take off the timber and get 55 per cent.

By the Court:

Q. Did you do it? A. Took off one carload.

Q. What was— A. After I loaded the carload, he didn't want to furnish the wire, wanted me to go and furnish the wire.

Q. You didn't do any more? A. No, might as well starve to death.

By Mr. Smith:

Q. Would it cost more than 55 per cent?

The Court: You don't have to go into that. He gave you the reason for stopping.

CROSS-EXAMINATION by Mr. Roseberry:

Q. Did you have a written contract with Mr. Sarson? A. No, I have one paper drawed up. Mr. Sarson kept that, but I never got no copy of it.

Q. Did that say anything about this wire? A. To my knowledge I don't think it did.

Q. Let's get the idea. I want to know about this wire. You were to cut this timber and load it on the cars, were you not? A. Yes.

Q. And ship it to Scranton? A. Yes, sir.

Q. And this wire went across the parts of the car to hold the mining props and timber on? A. It did.

Q. You thought Mr. Sarson had to do that? A. I would naturally think so, when he got about all the money out of the timber, he would naturally buy the wire to go around it.

Q. He got a powerful lot of money out of the timber? A. Mr. Sarson did.

Q. That was the contract between you? You say you cut it, and put it on the cars to ship to Scranton, then you want him to provide the wire, and because he would not put the wire on you quit? A. Yes, sir.

Mr. Roseberry: That's all.

The Court: Both sides rest.

Mr. Smith: I would like to make a motion. I move for the direction of a verdict on the ground, renewing my motion for a nonsuit, but changing it into direction of a verdict, on the ground that

the plaintiff has not proved a cause of action. The evidence shows that he has relied upon a unilateral extension of time, without consideration, with reference to the sale of and removal of standing timber, which is an interest in realty, and which, of course, under the statute must be in writing, and under the pleadings and under the evidence I submit that the plaintiff cannot, under the proof, establish any right to recover. In connection with that the case of Missel versus Swinley 76 N. J. Law, 288, at the end, page 290, points out that in Massachusetts and also in New Jersey a verbal agreement to extend the time of performance of a contract is required by the statute of frauds to be in writing, and cannot be made the basis of an action. It is only a matter of defense, and that was held in the case of Long versus Hatwell, 34 N. J. Law, 116, ruling, page 125. I submit on that ground they cannot recover. There is no proof fixing the time when any timber, even assuming that it might be true, was taken from the tract of 43 acres and placed upon the wood pile. Mr. Sarson's witness said then that he could not place the time, he could not fix the time, and while it may be fixed in November, when he was working there, or October, he could not say where it came from. There is no proof that the defendant, Mueller, himself authorized any such action, even assuming it was true, or that it was done with his knowledge and consent. Gunderman did not see it, so I submit at the present state of the case there is no proof that either Mr. Mueller, or any of his family, ever took any of the timber from the 43 acre tract,

timber which Mr. Sarson, the plaintiff, claims. That I think disposes of that phase of the situation.

With reference to a breach of the original contract, the duty of Mr. Sarson was, under the agreement, and it was written by him and under the evidence and must be considered strictly against him, was to have the above timber removed in two years from date. He failed to do so. Thereby he placed himself in this position, that he could not go back on legally unless he was a trespasser, with a grant, or extension of the time in writing. In proof to that the only connection, the only proof they have brought is a notice which says to keep off the said premises, and not cut or remove any more timber without my permission. No assertion of ownership by Mr. Sarson, or Mr. Mueller, only an assertion of right to prevent trespass, which I submit he can legally do. It has so been held in cases at common law, and it is not actionable for any man to assert in good faith his own right, and certainly, if under the case, as Chief Justice Beasley points out in Irons versus Webb, if the timber is permitted to remain on the premises after the time of removal had expired, it became unlawful for the vendee for the purpose of taking it away to enter upon the premises, and action for trespass would be taken against him.

On these grounds I move for direction of a verdict in favor of the defendant.

Mr. Roseberry replied.

Direction of verdict.

Charge.

(Lawrence, J.)

The Court: The situation presented here is not without doubt and difficulty, and I incline to the view that the appellate Court, or Courts, should be called upon to pass upon such situation, and solve the problem from the legal standpoint.

It appears in the case that on February 6, 1922, a written agreement was signed by the defendant, whereby he acknowledged receipt of a definite sum of money for the timber growing on 43 acres of land, which he had previously purchased from Mr. Walters, which timber was to be cut by the plaintiff, providing it measured the size indicated therein, and on the condition that it be removed within a period of two years from the date. The authorities in this State seem to be uncertain in the rulings in respect of the construction of such an agreement, largely, I think, because in the particular cases in which the question has been raised, it depended upon the character of the agreement somewhat. In the case of Webb against Irons, for example, there was a deed of conveyance in which the grantor reserved the growing timber on question on the land, with the obvious result that title never passed to the grantee at all. This is the first case of which I am aware in which the Court is called upon to construe a written agreement not arising to the dignity or solemnity of a deed of conveyance, and therefore I think it cannot be called a conveyance of the timber itself—rather, I should say, in the nature of what in some of the States is called a timber lease, involving a sort of license to the

buyer to go on and remove the specified timber during a definite period. The plaintiff here seems to have gone upon that theory, because, apparently, he recognized that the limitation of two years was of significance, and thereupon, before the expiration of the period, namely, February 6, 1924, he began what appeared to be negotiations with the defendant for an extention of time. I am quite in doubt whether, assuming he did obtain an extension of time, it is to be considered as a part of the agreement, or whether it was a mere continuation for some period, either two months, or one year, of a license to enter the premises. If it be upon the theory that this is a renewal of license, then, of course, the plaintiff carries the burden of proving under the greater weight of the evidence that the minds of the defendant and himself met on a definite renewal of the term. The plaintiff positively claims that there was an agreement for a year's extension—one year's extension. The defendant says: "Yes, it was discussed, but I imposed the condition that the plaintiff should pay the taxes," and do something else which I do not now recall, and that the plaintiff did not agree to that condition. Then, later on, on a Sunday, there was some further talk between the parties, and then, in order to avoid trouble, as the defendant says, he told the plaintiff that he could have two months to take off the timber on the nineteen acre tract, provided he made no trouble; whereupon, according to the defendant, the plaintiff said that would not be sufficient time for him to perform the work necessary. The result apparently is that there

is an asseveration of agreement on the part of the plaintiff consented to by the defendant, and denied by the latter. Obviously, the plaintiff has not sustained the burden of proof that he carries. I, therefore, incline to the view that the plaintiff has not sustained that burden of proof with respect to the alleged agreement, but, more especially, am I in doubt as to the legal problem to be solved, and for that reason I am inclined to grant this motion, to the end that it may go to the proper forum for review. If the plaintiff's action is based upon the alleged breach of the agreement to extend, then I am clear that this action cannot be maintained as a matter of law. If, on the other hand, it is to be maintained as a breach of the contract originally made, then the plaintiff encounters difficulty in the Court's mind in having failed to prove by a fair preponderance of proof the meeting of the minds on that subject, and in the second place, whether he did anything thereunder; also whether the defendant himself did anything to breach that condition—that agreement—if it was actually made.

It appears on February 8, 1924, the defendant signed a notice addressed to the plaintiff warning him not to enter on the premises by reason of the expiration of the term of the original agreement, without his permission. While it appears that the written notice was really prepared at the instance of defendant's wife, I incline to the view that he adopted it by signing it after a conference with her and other members of the family. They say that notice was given because of the doubtful situation which had arisen in their minds

as to what the plaintiff intended to do. That of itself, it would seem to me, would be evidence indicating that the minds of the plaintiff and the defendant had not met upon the alleged extension agreement, but when one comes to read that notice, as the Court of Errors said in the case of Sarson versus Mueller, in 130 Atlantic, 835, that of itself does not evidence a conversion, and, therefore, what have we left in the case? The plaintiff did not undertake to do anything under his alleged extension of time. He says that after he saw them on the Sunday night, or a day or two before this notice was served, he simply decided that they didn't intend to allow him to go on, and he took it that whatever they said was a sufficient denial of his right to go on the premises, and he did nothing after that, especially when he received the notice dated February 8. He just quit then, and brought his action to recover his alleged damages for conversion of timber that had been cut and for the breach of contract. The Court of Errors and Appeals has already said that that notice served by Mr. Mueller upon the plaintiff was no evidence of a conversion. It is suggested, however, that there is some evidence which would warrant the case being submitted to the Jury involving the alleged removal of some of the timber, the cut timber, from the premises in question, to those of Mr. Mueller, but that evidence in no way connects Mr. Mueller with it. It is testified by a witness produced by the plaintiff that he saw some timber being removed by a son of Mr. Mueller, and put upon a wood-pile, but that's denied by the son, and the testimony is in

equipoise on that subject. There again the burden of proof fails, doesn't indicate how much was taken, the value of it, or really where it came from; Mr. Gunderman, witness for the plaintiff, stating it was taken from lots nearby there, but whether it was a part of the 43-acre tract or not he was not in a position to say.

In all the circumstances, especially in view of the legal situation involved, I am of the opinion that this motion for a direction of no cause of action should be granted, first, because I am not at all convinced that this alleged extension of time, if it was made at all, was an addendum upon the original agreement, so that action might be brought for breach of the original agreement, the present action being based, apparently, upon the alleged repudiation of the alleged agreement to extend the time, and obviously that was without consideration, it would seem, under the circumstances. In the second place, I incline to the view that the plaintiff has failed to make out his case in accordance with the recognized rule of law involving burden of proof, and in the circumstances the motion will be granted, and you may have an exception.

Mr. Roseberry: I want to take exception to the finding of the Court, and also taken exception to not charging as requested.

Request to charge above referred to was as follows:

1. Under the agreement of sale the trees belonged to Sarson.

2. Whenever the owner of land conveys a part of it, the grantee takes the part conveyed with all the benefits and burdens and which appear at the time of the sale to belong to it, and the grantor retains the adjoining property subject to the burdens and easements which the grant conveys. The grantee takes the land conveyed and the grantor holds the land retained, with the right to whatever is necessary to the enjoyment of their respective premises, for the purpose for which they are then or are intended to be used, whether such intended use is mentioned in the deed or not.

3. The time for the performance of a contract either by deed or parol, may be enlarged by parol.

4. Where one by his word 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.

5. If it is a voluntary and revokable forbearance by one party at the request of the other, if he revokes his consent then he must "allow a reasonable time for performance."

6. Equitable Estoppel rest upon the principle that when any one 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 not influenced any one that it has been acted upon, the party making it will be estopped, and cut off from the power of retraction. It is in-

tended 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 to be permitted to gainsay them.

Exhibit P-1.

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.

Exhibit P-3.

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.

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 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.

Dated February 11th 1924.

GEORGE W. SARSON.

Served Feby 15" 1924
at 2:50 p. m.
J. R. Thatcher.

MAY.1.1927

New Jersey
Court of Errors and Appeals

George W. Sarson,
Plaintiff and Appellant,

vs.

William Mueller,
Defendant and Respondent.

On Appeal to Warren Circuit Court.

BRIEF OF J. M. ROSEBERRY & SON.

J. M. Roseberry & Son, Attorneys of Plaintiff and Appellant, George W. Sarson.

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."

New Jersey State Library

The suit is brought for the value of two car loads of mine props and ties, sold by defendant to plaintiff on the forty-three acre tract, of the value of two 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 stated in the above contract of sale, of the value of three thousand dollars, and of two hundred dollars worth of mining props and ties taken by the defendant "by breach of the contract of sale of said timber by defendant to plaintiff, as set forth in paragraph one" of the complaint, being the above contract of sale.

The plaintiff was making and selling mining props and ties to the coal mines at Scranton, Pa., and it was with that purpose in view that he purchased the timber on the 43-acre tract of the defendant.

Shortly after the making of this agreement of sale the coal mines at Scranton closed down because of the strike of the miners and remained closed for about two years. The plaintiff found that this strike continuing, it would be difficult for him to get the timber cut and removed in two years from February 6, 1922, so he went to the defendant and said to him,

> "I have difficulty in selling these mine ties and props on account of the strike at the coal mines in Scranton, Pa.; won't you give me an additional year?"

The defendant told the plaintiff that he was very glad to give him another year to take off the timber. This was agreed to. This extension of one year's additional time was given in the

spring of 1923; no one was present at this interview except the plaintiff and defendant. In consequence, the plaintiff waited until the next year to remove the timber. Two or three weeks before the two years mentioned in the contract of sale was up, the plaintiff heard a rumor that the defendant had said he would not give him the one year's extension. The plaintiff went to defendant's home and asked him about it. Defendant's answer was, "he would not give me a year, but he would give me two months." The plaintiff then "went to work to get all we could off and we got men and teams to get it off."

On the 7th day of February, 1924, that was one day after the two years in the contract of sale had expired, the defendant went to the office of Marvin A. Pierson in Washington, N. J., and had him telephone the plaintiff that he could remove the timber on the 19-acre tract and the cut timber on the 26-acre tract, but to cut no more timber on the latter tract. The 43-acre tract was composed of these two lots, even although together they would make two acres more.

Pierson further testified that on the next day, being February 8, 1924, the defendant "came in and wanted to serve notice on Mr. Sarson (plaintiff) not to enter upon the premises any more, to stop positively."

Mr. Pierson then drew the following notice, which was signed by the defendant and served on the 9th day of February, 1924, on the plaintiff:

"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."

On the 15th day of February, 1924, the plaintiff had the following notice served on the defendant:

"To William Mueller,
Broadway,
N. J.

Having received notice from you not to cut or remove any more timber from your two wood lots 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.

Dated February 11th 1924.

GEORGE W. SARSON.
Served Feby 15" 1924
at 2:50 p. m.
J. R. Thatcher."

The defendant gave no reply to the demand of the plaintiff, which left defendant's notice to the plaintiff not to cut or remove any more timber from said two wood lots in full prohibition. Hence this suit. The court directed the jury to return a verdict of no cause of action, which they did, and judgment was entered, from which this appeal is taken.

Former Trial.

In a former action this court held that the standing timber was real property and that an action of trover and conversion could not be maintained for real estate. Then this suit was brought for breach of contract.

Grounds of Appeal.

The first ground is that the court erred in holding that the written agreement of sale of the timber on the 43-acre tract by defendant, of the sizes indicated, was on condition that it should be removed within a period of two years from date. The language of the court is as follows:

"CHARGE.

(Lawrence, J.)

The Court: The situation presented here is not without doubt and difficulty, and I incline to the view that the appellate court, or courts, should be called upon to pass upon such situation, and solve the problem from the legal standpoint.

It appears in the case that on February 6, 1922, a written agreement was signed by the defendant, whereby he acknowledged receipt of a definite sum of money for the timber growing on 43 acres of land, which he had previously purchased from Mr. Walters, which timber was to be cut by the plaintiff, providing it measured the size indicated therein, and on the condition that it be removed within a period of two years from the date. The authorities in this state seem to be uncertain in the rulings in respect of the construction of such an agreement, largely, I think, because in the particular cases in which the question has been raised, it depended upon the character of the agreement somewhat. In the case of Webb against Irons, for example, there was a deed of conveyance in which the grantor reserved the growing timber in question on the land, with the obvious result that title never passed to the grantee at all. This is the first case of which I am aware in which the court is called upon to construe a written agreement not arising to the dignity or solemnity of a deed of conveyance, and therefore I think it cannot be called a conveyance of the timber itself—rather, I should say, in the nature of what in some states is called a timber lease, involving a sort of license to the buyer to go on and remove the specified timber during a definite period."

He speaks of *Webb* v. *Irons,* 41 N. J. L., page 203, etc., as a reservation of the timber and therefore the title never passed, which differentiated it from a conveyance of the title to the trees in this case. In this view the trial court seemed to disregard the plain language of that decision 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,* said, on page 206, near the bottom, 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 defendant recognized that the property in the trees was in the plaintiff. On page 95 of case, lines 11-30, he testified:

"By the Court:

Q. Why did you give the notice of February 8th? A. I do not know why.

Q. You had given him two months' extension, hadn't you? A. No.

Q. When did you give two months' extension if he would make no trouble for you? A. Yes, in January, in my house, and a little later in Mr. Pearson's office.

Q. Having done that, why did you give written notice on February 8th following? A. Because I received no reply from Mr. Sarson and I did not know whether he would accept or not.

Q. At the time you talked with Mr. Sarson and told him you would give him two months' extension if he made no trouble, didn't he say all right? A. Mr. Sarson said to me, 'That won't do it.'"

The defendant did not claim title to the trees, nor that the expiration of the two years gave

him title. On the contrary, it clearly shows that he recognized the title in the plaintiff. The defendant's notice of February 8th, 1924, does not indicate a claim to title to the trees by the expiration of the two years, because it says,

> "This is to give you notice to keep off the said premises, and not cut or remove any more timber without my permission."

On page 90 of case, at bottom of page, the defendant's counsel asked him:

> "Q. Did you or not, after you had received that notice, refuse permission for him to go and remove the cut timber or standing timber? A. I did not see Mr. Sarson and did not speak to him (top page 91).
>
> Q. Did you in any way, verbally or written? A. No, I have not seen him and have not forbid him."

By these questions and answers it shows that the defendant and his counsel did not claim that the two years' limitation was a condition by which the title passed over to the defendant.

What is said above will also apply to the second ground of appeal. A timber lease is something I never heard of, and to say that the contract of sale is a timber lease is something without substance or warrant to construe it as a "sort of license."

Third Ground of Error.

The court erred in holding that in the extension of time, that there

> "is an asseveration of agreement on the part of the plaintiff, consented to by the defendant, and denied by the latter. Obviously the plaintiff has not sustained the burden of proof that he carries"

because the credibility of the testimony of the plaintiff and of the defendant is a fact to be considered by the jury from all the proofs and circumstances in determining the preponderance of the testimony and not for the court to assume that the testimony of the plaintiff and of the defendant were of equal weight considering all the proofs and circumstances in the case.

The Testimony Bearing on This Point.

The plaintiff, on page 22 of case, near bottom, says:

> "Q. You saw Mr. Mueller (defendant)? A. In the spring of 1923.
>
> Q. Yes, and what took place between you and Mr. Mueller? A. I told him the situation. First year the strike came on. Second year signed a contract with a man and he fell down, and I told him it was impossible to get it off, and I asked him to give me another year, and he said he would be glad to do it."

This occurred near defendant's house and they were alone. On page 23 of case, line 10:

> "Q. After he made the statement he would give you a year, what did you do? A. I waited a year; then I waited until the next year to get it taken off.
>
> Q. Then what occurred? A. Then a few days before the two years was up I went there to see him. I had heard he was not going to give me the year's extension; I went there to see him and I asked him * * * (l. 22) and he said no, he would not give me a year but he would give me two months * * * (l. 32). We went to work to get all we could off and we got men and teams to get it off. He made the requirement to get it off in two months."

On page 43 (top) the defendant's attorney asked plaintiff:

> "Q. Didn't he say that he would do that, he would give you two months if you would pay the taxes? A. 1923.
>
> Q. Did you agree to pay the taxes? A. Yes, when they came due (l. 21).
>
> Q. So you didn't accept the offer of two months, you depended on the offer of a year? A. I depended on the offer of two months and went to work to get it off.
>
> Q. So you gave up the offer of a year? A. He said he would not give it to me."

Top of page 45 of case, the witness says that the timber, when he bought it, was chestnut and dead, and could not grow.

On cross-examination of the defendant, top of page 93:

> "Q. Did you tell Mr. Sarson he could have two months further time before he went out of the house, on the 19-acre tract? A. No, I only said that in Mr. Pierson's office.
>
> Q. Did you not say to Mr. Sarson at your house, when he was there, and your son and your wife were there, that, 'Yes, I said to him with the caution that he should make no trouble.' The question was, 'You told him when he was at the house that he could have two months to take off the 18-acre tract,' and your answer was, 'Yes, I said that to him with the condition he should make no trouble'? A. Yes, I said this somewhat conditionally, that there should be no trouble about it."

Oscar Mueller, son of the defendant, testifies, on page 104, middle:

> "Q. So that one year's extension of time was talked of there? A. It was if he paid the taxes.
>
> Q. It was talked of there, wasn't it? A. Yes.
>
> Q. And your father said he would give him an extension of two months in case he didn't make no trouble, didn't he? A. Yes."

The tax question was a myth (P. L. 1918, p. 871 as amended by P. L. 1919, p. 118). By that law the defendant did not have to pay any taxes on the plaintiff's timber.

This witness spoke about signing an agreement, on page 105 of case. Yet, he says, the plaintiff had no paper there, no agreement or anything to sign. The fact is, the plaintiff protested against the defendant's withdrawal of the one year's extension, after he had relied upon it to the time within two or three weeks of the expiration of the two years' time in the contract of sale.

On February 7, 1924, the defendant went to Marvin A. Pierson's office in Washington, N. J., and had him telephone the plaintiff (p. 54 of case) that Mr. Mueller was in the office and that he would give him two months to remove the timber on the 19-acre tract, but not to cut the timber down on the 26-acre tract. On middle of page 55 he came in the office next day and said he had changed his mind, "and wanted to serve notice on Mr. Sarson not to enter upon the premises any more, to stop positively." Mr. Pearson then drew the notice on the 8th of February, 1924, which forbid the plaintiff entering upon the premises any more, and was served by Mrs. Mueller on the plaintiff. When Mr. Mueller came home from Mr. Pearson's office that day, he told his wife (p. 110) and she says, "I got mad and I took it in my own hands," she and her son Oscar went to Mr. Pearson's office and had him write the notice, and then told her husband to sign it. He signed it and then the next night, the 9th February, 1924, she served the notice on the plaintiff, which is marked Exhibit P-3, page 139. This was evidently served on the timber tract two days after the expiration of the two years. The contract of sale bears date Feb. 6, 1922. This service was on Feb. 9, 1924. It was this night of the 9th February, 1924, that the

plaintiff asked permission of the defendant at Mr. Pearson's office to remove the timber laid along the public road. Then followed the notice by the plaintiff served upon the defendant February 15, 1924, demanding the possession of the standing timber, cut timber, mining ties, props and wood on the 43-acre tract.

Law Relating to the Functions of a Trial Judge and Jury.

Thompson on Trials, Vol. I, p. 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 p. 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).

"Step by step man mounts up to crime.
The perfect villain is the work of time."

And as Kipling says, the female is deadlier than the male.

What Mr. Pearson testified to on page 54 of case was this:

> "I telephoned him (plaintiff) Mr. Mueller was in the office and he said he would give him two months to remove the timber from the 19 acre tract; and—
>
> A. That's correct.
>
> Q. And the cut timber down on the 26 acre tract, but to cut nothing more down on the larger tract. A. If I said so at that time that is the truth."

That required no answer from the plaintiff.

The reason, defendant's wife stated, she flared up and took things in her own hands was because plaintiff did not reply.

A reply from plaintiff was not demanded nor was the statement of such a character as required any answer.

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.

Fourth Ground of Error.

The discussion of the third ground of error may be applied to the 4th ground. The Trial Judge charged as follows:

> "I, therefore, incline to the view that the plaintiff has not sustained that burden of proof with respect to the alleged agreement, but, more especially, am I in doubt as to the legal problem to be solved, and for that reason I am inclined to grant this motion, to the end that it may go to the proper forum for review. If the plaintiff's action is based upon the alleged breach of the agreement to extend, then I am clear that this action cannot be maintained as an matter of law. If, on the other hand, it is to be maintained as a breach of the contract originally made, then the plaintiff encounters difficulty in the Court's mind in having failed to prove by a fair preponderance of proof the meeting of the minds on that subject, and in the second place, whether he did anything thereunder; also whether the defendant himself did anything to breach that condition—that agreement—if it was actually made."

Fifth Ground of Error.

Is based on the latter part of the charge set out under fourth ground.

On page 47 of case, bottom:

> "Q. Did you do anything under what you call the two months' extension? A. Yes.
>
> Q. What did you do? A. Cut as often as we could.
>
> Q. Men went in there and cut, did they? A. I got what help I could get."

Top of page 48, line 10:

> "Q. Two days after the two years expired he served the written notice on you, and before the two years expired you claim you had this year's extension? A. Yes, sir.
>
> Q. At first? A. Yes.
>
> Q. What he afterwards reduced to two months? A. Yes."

The plaintiff says at Pearson's office after the notice was served he asked him if he wanted him to quit. He said yes.

At page 49 plaintiff says he had about a dozen men cutting on the lot.

> "A. I arranged to get it off in two months' time; I had all the men I could get."

The notice to quit was served on Feb. 9th, 1927 (p. 111, top).

What the suit is based upon is stated under the next ground.

Sixth Ground of Appeal.

The trial court said:

> "Also whether the defendant himself did anything to breach the condition—that agreement if it was actually made."

The statute requires a memorandum of the bargain to be in writing that it may be made certain, but it does not undertake to regulate its performance.

Cuff v. Penn. I. M. & S., 26.
Cummins v. Arnold, 44 Mass. 486, see 491.
Stryker v. Vanderbilt, 25 N. J. L. 482, 496.
King v. Hartwell, adm. of Carpenter, 125, 126.

The plaintiff declares on a breach of a written contract with the terms of a substituted performance.

The defendant breached the contract when he refused to allow its performance under the extended time.

Seventh Ground.

The judge charged:

> "It appears on February 8, 1924, the defendant signed a notice addressed to the plaintiff warning him not to enter on the premises by reason of the expiration of the term of the original agreement, without his permission. While it appears that the

> written notice was really prepared at the instance of defendant's wife, I incline to the view that he adopted it by signing it after a conference with her and other members of the family. They say that notice was given because of the doubtful situation which had arisen in their minds as to what the plaintiff intended to do. That of itself, it would seem to me, would be evidence indicating that the minds of the plaintiff and defendant had not met on the extended agreement."

The matters contained in this assignment is distinctively a matter for the jury and not the trial judge for the reasons stated under the third ground.

Eighth Ground.

We have shown above that the notice to quit was served on the 9th February, two days after the expiration of the two years. It was served in the wood lot upon plaintiff, who was cutting and hauling away the timber up to that time. This will also apply to ninth ground.

The Court charged that

> "The plaintiff did not undertake to do anything under his alleged extension of time. He says that after he saw them on the Sunday night, or a day or two before this notice was served, he simply decided that they didn't intend to allow him to go on, and he took it that whatever they said was a sufficient denial of his right to go

on the premises, and he did nothing after that, especially when he received the notice dated February 8. He just quit then, and brought his action to recover his alleged damages for conversion of timber that had been cut and for the breach of contract."

Tenth Ground.

The court said:

> "But when one comes to read that notice, as the Court of Errors said in the case of *Sarson versus Mueller,* in 130 Atlantic, 835, that of itself does not evidence a conversion and, therefore, what have we left in the case?"

We submit that the Court of Errors and Appeals did not say that the notice served by Mr. Mueller upon the plaintiff was no evidence of conversion. What it did say was that standing timber was real estate and that an action of trover and conversion could not be maintained for real estate. The Court of Errors and Appeals did not determine its bearing upon the timber made up into mining props and ties to the value of $200 then lying on the timber tract, which was personal property.

Eleventh Ground.

The trial judge said,

> "It is suggested, however, that there is some evidence which would warrant the case being submitted to the jury involving the alleged removal of some of the timber, the cut timber, from the premises in question to those of Mr. Mueller, but that evidence in no way connects Mr. Mueller with it. It is testified by a witness produced by the plaintiff that he saw some timber being removed by a son, and the testimony is in equipoise on that subject. There again the burden of proof fails, doesn't indicate how much was taken, the value of it, or really where it came from, Mr. Gunderman, witness for the plaintiff, stating it was taken from lots nearby there, but whether it was part of the 43-acre tract or not he was not in position to say."

This ground of error is

> "in the finding by the court that the burden of proof fails, doesn't indicate how much was taken of the cut timber by the defendant, the value of it, or really where it came from, on the ground that it was a function of the jury to determine these facts from the testimony given, the inferences to be drawn from proven facts, and the credibility of the witnesses."

The Evidence.

In the middle of page 29 the plaintiff testifies:

"By the Court:

Q. You spoke of two acres, what two acres were they? A. Two acres, in the spring of 1922, when I first bought it, I intended to cut the whole lot off these two acres, next to Mr. Mueller's house.

Q. Part of the 43-acre tract? A. Yes.

Q. And within your written contract? A. Yes.

Q. You say the timber was removed? A. Yes, sir.

Q. Do you know that yourself? A. Yes.

Q. Do you know the value? A. Yes.

Q. How do you know? A. I know the value of the timber nearly $200."

At the top of page 30 of case the witness tells how he calculated the value, and says that these two acres were of the same character as the rest of the 43-acre tract and that its value was $72 to the acre.

At the top of page 32,

"I left these two acres I cut but did not remove."

Near bottom of page 30 the plaintiff says that he was familiar with the value of that timber in 1922. He estimated its value as mine props. He had been in the timber business twenty years and had been buying (p. 37, top) standing timber for 40 years.

"Q. Did you see by the condition of the ground where this timber had been taken to? A. I saw roads leading from the lot to Mr. Mueller's wood pile.

Q. Had Mr. Mueller been building or had he not? A. He had been building; yes, sir.

Q. In this vicinity or not? A. Yes, sir; I think on this lot."

By the court (p. 81):

"Q. You have no personal knowledge as to when that was removed, have you? A. All I know about it, two or three weeks before it had expired I saw lots of timber lying on the wood pile. The same kind of timber as on the land.

Q. What was it? A. Mine props and mine timber, railroad ties and mine props.

Q. These mine props and ties were all yours there on his wood pile? A. Yes."

Mr. Gunderman, who worked for defendant six or eight weeks (p. 74):

"Q. Did you see anybody taking timber off Mr. Sarson's lot, props and ties? A. I don't know whose lot it was. I saw the boy they call Oscar taking some off of the lot by the house."

Oscar was the son of defendant, and this witness saw him three or four times, after he came from work in the afternoons, he saw him "pull some stuff down off the mountain back of his house."

"Q. How did he bring it down? A. With a rope.

Q. Pulled it down? A. Yes."

On page 75 he says,

> "It was not limbs of trees. It was up above the house."

On page 85,

> "Q. Who was cutting there? A. I didn't see anybody there, but I seen them fetching it down."

While the defendant and his son Oscar deny they took these two acres of mining props and ties of the plaintiff, yet a mere bare denial was not sufficient. These two acres of timber cut into mining props and ties lay before them. They could see the two acres constantly, but they have not told us what became of the mining props and ties and railroad ties.

Oscar testifies at top of page 98, that the home where the defendant lived was "twenty to twenty-five feet, I guess, in a line" from plaintiff's timber.

At the bottom of page 98:

> "Q. After Mr. Sarson stopped cutting timber, there were some mine props and ties on the tract. Do you know that? A. Yes."

The plaintiff, on page 26, line 20, says:

> "By the Court:
>
> Q. What mining props and ties were on this premises at the time Mr. Mueller served notice on you? A. $200 worth.
>
> Q. Approximately how many were there? A. Between 400 and 500, I think."

In regard to the taking of the two acres of mining ties and props, it was

> "a function of the jury to determine these facts from the testimony given, the inferences to be drawn from proven facts and the credibility of the witnesses."

The trial court seemed not to have taken into consideration the $200 worth of mining props and ties left upon this 43-acre tract when the defendant gave the plaintiff notice to stay off his premises.

This was on the 9th day of February, 1924.

On the 15th day of February, 1924, the plaintiff made personal demand of the defendant as follows:

> "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."

The defendant did not allow plaintiff to take off of the 43-acre tract the mining props and ties of the value of $200.

In *Giles* v. *Simonds,* 81 Mass. 441, the court says, on page 443:

> "In like manner and for similar reasons a license to enter on land for the purpose of removing trees or timber thereupon, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. The right of property in chattels draws after it the right of possession,

> the license to enter on land to obtain possession of them is subsidiary to this right of property, which cannot be enjoyed if the license be withdrawn or terminated."

Wyckoff v. Bodine, 65 N. J. L. 95.

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 conversion, 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 notice served upon plaintiff by defendant February 8th, 1924, says:

> "This is to give you notice to keep off the said premises, and not to cut or remove any more timber without my permission."

In the case of *Erskine* v. *Savage* (Maine), 51 Atl. Rep. 242, bottom of page 243, the court says:

> "The defendant was the owner of the land on which the wood was. He not only forbade the plaintiff entering upon the land but also his removing the wood therefrom. It is apparent that the defendant assumed that he owned the wood."

The defendant not only forbid plaintiff's entering upon the premises, but forbid him to cut or remove any more timber. Without my permission means nothing. Permission was asked on February 16, 1924, but the defendant did not give permission to plaintiff to cut or remove the timber. That was the exercise of dominion over it.

Twelfth Ground.

The trial court said:

> "If the plaintiff's action is based upon the alleged breach to extend, then I am clear that this action cannot be maintained as a matter of law."

The complaint is for a breach of the original agreement, the performance of which was extended to the taking the timber off of the 43-acre tract for a year after the expiration of the two years in the agreement. Later extended to two months to the 19-acre tract and the cut timber on the whole of the 43 acres. The complaint clearly shows this to be so.

Thirteenth Ground.

On page 136 the trial court said:

> "The present action being based, apparently, upon the alleged repudiation of the alleged agreement to extend the time, and obviously that was without consideration it would seem, under the circumstances."

Here again we must say, if the trial court could discern the gravamen of the complaint, that the breach is of the original contract of sale, the performance of which was extended as stated in the twelfth ground.

So early as 1832, the court, in *Cox* v. *Bennett*, 13 N. J. L. 165, on page 171 says:

> "Two positions which were mentioned by plaintiff's counsel on the argument, require to be noticed. First, that the agreement was void because no consideration was expressed in 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."

Fourteenth Ground.

The trial court said:

> "In the second place, I incline to the view that the plaintiff has failed to make out his case in accordance with the recognized rule of law involving burden of proof, and in the circumstances the motion will be granted, and you may have an exception."

In trials by jury it is the province of the judge to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law, by which it is to be weighed. Whether there is any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury.

Greenleaf on Evidence, Vol. I, p. 60, 13th Ed.
Thompson on Trials, Vol. I, p. 810, Sec. 1037 & 1039.

Boylan v. Meeker, 28 N. J. L. 274, top of page 333.
Encyclopedia of Evidence, Vol. 3, 753.

Fifteenth Ground.

The fifteenth ground is practically the same as the fourteenth, and what is said in the fourteenth ground applies to the fifteenth.

Sixteenth Ground.

The sixteenth ground of appeal is fully set forth in the last part of the statement of facts and the law in the eleventh ground of appeal. I wish to say that the $200 worth of mine props and ties were cut, made up and lying on the 43-acre tract when the plaintiff was notified not to trespass on 9th February, 1924. They were made within the two-year limit in the contract of sale. Demand was made by plaintiff upon defendant for them by written notice on the 15th day of February, 1924, which was not given by defendant.

Eighteenth Ground.

The eighteenth ground of appeal is that

> "The trial court erred because the trial judge, upon the trial of said cause, directed a verdict in favor of the defendant, and against the plaintiff, over the objection of the said plaintiff, whereas the said trial judge should have submitted the case to the jury for its verdict."

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This ground of error covers everything said by the trial court in his charge to the jury. I wish to repeat the charge as though set out verbatim, also what is said in the preceding grounds of appeal as though set out here.

What I want to discuss is the legal aspect of this suit.

Legal Aspect of This Suit.

We find as early as 1832 in the case of *Cox* v. *Bennett,* 13 N. J. L., page 17, 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.

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 *Cummins* 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 American 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 in 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 revokable 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, can-

> not 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 revokable forbearance, which if revoked, a reasonable time for performance must be given.

Barba v. Gunsberg, et al., 129 Atl. Rep. 747.

We submit that the decision of the Circuit Court should be reversed for the reasons above stated, and a new trial granted.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

GEORGE W. SARSON,
PLAINTIFF AND APPELLANT,

vs.

WILLIAM MUELLER,
DEFENDANT AND RESPONDENT.

ON APPEAL TO WARREN CIRCUIT COURT

BRIEF OF DEFENDANT-RESPONDENT.

BRIEF OF SMITH & SMITH, ATTORNEYS OF RESPONDENT, WILLIAM MUELLER.

STATEMENT OF FACTS

This suit is based upon a breach of an agreement in writing for the sale of standing timber on property of defendant, Mueller. The form of the writing was a receipt in the handwriting of the plaintiff, Sarson, **p. 20, l. 28.**

For the purpose of a clear statement of facts, it is set forth in full, **Exhibit P. 1:**

"Received Feb. 6, 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."

Sarson immediately started to cut the standing timber, **p. 38, 1, 20,** and continued for two or three weeks, when, according to plaintiff's testimony, the coal strike of 1922 commenced and the market for the timber was lost. The next year, a man signed a contract with Sarson, the plaintiff, to take it off, and he took off one carload and fell down. It appears that a difference arose betwen this man, Herman Cooper, and Mr. Sarson, as to who would furnish the wire used in loading the cars, and Cooper refused to continue cutting. **(Testimony of Cooper, pp. 128, 129).** This was in the early part of 1923.

Sarson then claims that he spoke to Mueller about these situations and asked for an extension of a year within which to remove the standing timber, and Mueller, the defendant replied, according to plaintiff, "he said he would be glad to do it." **(p. 22, 1. 33).** Cross Examination, **(p. 41, 1. 37).** It is admitted by the defendant that there was no consideration for this alleged extension of time, **(p. 49, 1. 34).**

Sarson then testifies that he "waited a year, until the next year to get it taken off. Then a few days before the two years was up I went there to see him. I had heard he was not going to give me a year's extension. I went down to see him and I asked him," **(p. 23, 1. 40).** This was on a Sunday afternoon according to plaintiff's testimony, **(p. 42, 1. 20)** when this conversation took place according to plaintiff's testimony: **(p. 23, 11. 25).**

"Q. Then what occurred? A. I told him if there were any trouble or anything we would have a lawsuit, and he said to me you are an American. I am an American, I said, and didn't have to have my friends keep me out of State's prison.

Q. In regard to the two months, then what occurred? What occurred after? A. We went to work to get all we could off and we got men and teams to get it off. He made the requirement to get it off in two months, and—"

On Cross Examination: **(p. 42, 1. 18 to p. 43, 1. 20):**

Q. Who was present? A. At Mr. Mueller's house? His whole family, I think, one Sunday afternoon. He

worked every day. I went down one Sunday afternoon to talk the matter over.

Q. On a Sunday afternoon? So that this two months' extension was made on Sunday afternoon? A. On Sunday afternoon.

Q. What did you say to him first? I told you that, what was said.

Q. I will ask you to repeat it? A. I went down there, and asked him about this time. I heard he was not going to give me a year. I asked him. No, he would not give me a year, but would give me two months.

Then we had some hard words about it.

Q. You had some hard words about it? A. Yes.

Q. At that time didn't he ask you about paying the taxes? A. Yes.

Q. Didn't he say he would give you two months if you would pay the taxes? A. Told me to pay the taxes for 1923.

Q. Didn't he say that he would do that, he would give you two months if you would pay the taxes? A. 1923?

Q. Yes. Did you pay the taxes? A. I could not pay them then, until 1924.

Q. Did you agree to pay the taxes? A. Yes, when they came due.

Q. That was made on Sunday. Was there any consideration for that two months' period? A. Nothing more than that.

Q. When you left, you had disagreed, hadn't you? A. No.

Q. Didn't you say to him you would have a law suit about this? A. Yes. I told him if his word was no good we would have a lawsuit."

It is admitted by counsel for the defendant that there was no consideration for any alleged promise to extend the time for a period of two months.

William Mueller denied he had agreed to any extension of a year and said none was requested, **(p. 89 1. 16):**

"He did not speak to me that he wanted an exten-

sion of time. At that time Mr. Sarson had a whole year's time, and did not need to ask me."

He alleges that the first request for an extension was made in January, 1924, and his testimony clearly shows there was no meeting of the minds, **(p. 89 l. 21 to p. 90, l. 8):**

Q. Did he come to you in January, 1924, at the house on a Sunday afternoon and talk to you again? A. That was the first time he came to me and spoke about the renewal of the contract.

Q. What was said at that time?

By The Court:

Q. What did he say, and what did you say?

A. I cannot actually say.

The Court: Give your best recollection.

A.:I gathered that Mr. Sarson wanted me to sign over the contract.

Q. What was said? A. I declined this because he did not want to pay me for my expenditures.

Q. What else, if anything, was said? A. As Mr. Sarson saw that I did not want to sign over, then he threatened me.

Q. What did he say? A. He had already something similar before, and if I did not sign he would make me do so.

Q. Did you agree to any extension of time? A. No.

On cross examination he testified that he had agreed to an extension of two months conditionally, "that there should be no trouble about it". This was repeated a number of times, (p. 93):

"I substantially said something like that. But I expressly stipulated that there should be no trouble made by Mr. Sarson".

In answer to a question by the Court, as to why he gave a notice on February 8th, the defendant gave as his reason that he had not received a reply from Mr. Sarson and did not know whether he would accept the extension of two months on the condition that was made, or not. He further testified that Mr. Sarson said, **(p. 95,**

l. 29):

"That won't do it".

On February 8th, the defendant served a written notice upon the plaintiff, which was prepared by Squire Pierson, Justice of the Peace, at the request of Mrs. Mueller, the defendant's wife. Addressed to Sarson, the notice read:

"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".

This notice was served February 8th, 1924, two days after the two year period of the original contract had expired.

At the conclusion of the plaintiff's case a motion for non suit was made and the court reserved the decision, requiring the defendant to go on with the defense, without prejudice to making a motion to direct a verdict. After the defendant had rested, a motion for a direction of a verdict in favor of the defendant was granted, **(p. 132-136).**

While there are eighteen grounds of appeal, it will be observed that substantially the only ground of appeal to which exception has been made, is that the court erred in directing a verdict in favor of the defendant.

ARGUMENT.

I.

OBJECTION IS MADE TO THE 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 16th GROUNDS OF APPEAL BECAUSE THEY DO NOT BRING UP FOR REVIEW ANY JUDICIAL ACTION BUT ARE STATEMENTS OF A PROPOSITION OF LAW OR OF FACT.

The question to be determined on review of a direction of a verdict is the propriety of the judicial action, not the soundness of the reason that prompted it.

McCrory Stores Copr. vs. Braunstein, 99 N. J. L. 166-169.

Pierson vs. N. Y. S. & W. R. R. Co., 86 N. J. L. 661.

McAndrews, Forbes Co., vs. Camden, 78 N. J. E. 244.

Error can be assigned only on some judicial action. **Burgess vs. Noteboon, 100 N. J. L. 116.**

In **Abbie vs. Erie Railroad Co. 97 N. J. L. 212, 213,** this court said:

> "A ground of appeal based on trial error like an assignment of trial error under the old practice is necessarily based on an exception to some ruling or other action of the court or refusal to act and not to any reason therefor or to the contrary. That the court granted or refused nonsuit, admitted or excluded certain specified evidence, refused a specified request to charge, gave particular instruction to the jury, all these are customarily and proper assignment of error. But to assign that a certain statute does or does not apply to a particular condition points out no action of the court which is erroneous and is fatal as a basis of review; as futile as to assign an error on the language of a judicial opinion".

It is pointed out that all of the above grounds of appeal are statements of fact or propositions of law, argumentative, and are objections to the reasons stated by the trial judge in directing a verdict for the defendant.

It is respectfully submitted that the only ground of appeal that should be considered by this court is the 15th ground of appeal, insofar as it raises the question of the propriety of the judicial action of the trial court in granting the motion for a direction of a verdict.

II.

THE DIRECTION OF A VERDICT IN FAVOR OF THE DEFENDANT WAS PROPER AT THE CONCLUSION OF THE EVIDENCE IN THE CASE AND THERE IS NO LEGAL ERROR.

Counsel for the plaintiff attempts to set up a number of errors in the reasoning of the trial judge for granting the motion of the defendant for a direction of a verdict. The law is well settled in New Jersey that a properly directed verdict will be sustained, though the reasons given by the court below are incomplete or erroneous.

Beach vs. Palisade Realty, etc. Co. 86 N. J. L. 238.

Herrera vs. Manhattan Electric Supply Co. 85 N. J. L.

248.

Solomon vs. Public Service Railroad Co. 87 N. J. L. 284.

On the part of the defendant, the proposition will be argued from the point of view as to whether the motion for the direction of a verdict was properly granted for any legal reason. The defendant contends the motion was properly granted and will argue the same under the following reasons:

A. Upon all of the evidence, the plaintiff had failed to prove an actionable breach of the original contract on the part of the defendant.

B. The plaintiff had failed to prove any valid extension of time for the period of one year, which could be made the basis of an action.

C. The plaintiff had failed to prove any valid extension of time for the period of two months, which could be made the basis of an action.

D. At the conclusion of the evidence, the evidence was uncontradicted that the defendant had never laid claim to nor assumed any dominion over the timber on the wood lot alleged to have been sold.

A.

The plaintiff relied upon the breach of a written contract for the sale of standing timber. In **Sarson vs. Mueller, 135 At. 835** this court held that the agreement in the present case, was an agreement for the sale of an interest in realty and that trover and conversion would not lie for the standing timber. The agreement is in the form of a receipt written by George W. Sarson, the plaintiff, in his own handwriting and under the rules of construction, should be construed against him. The defendant was a German by birth and could not speak English well and required the service of an interpreter in the court, **p. 86, l. 19.** In none of the cases concerning the sale of standing timber has the agreement in writing been in the form of a receipt.

In **Seymour vs. Slocum, 36 N. J. L. 138,** the agreement was a deed.

In **Irons vs. Webb, 41 N. J. L. 203,** the agreement was a deed for the land, containing reservation and exception

of the standing timber.

In **Wyckoff vs. Bodine, 65 N. J. L. 95,** the conveyance was a deed. The Court of Errors and Appeals has never passed upon the question of the nature of the purchaser's estate, under a conveyance of standing timber and while the Supreme Court in **Irons vs. Webb, 41 N. J. L. 203** and in **Wyckoff vs. Bodine, 65 N. J. L. 95,** has determined questions arising under specific agreements, some reviewers and authorities have taken the opinions to be at variance with the rules of law as determined by the great majority of courts in this country.

In **Wyckoff vs. Bodine,** in a suit for trover and conversion, the court determined that a charge to the jury on the question of damages was harmful and reversed the court below, but in that case, the conveyance was by deed of conveyance and the timber converted had been cut and severed from the realty.

In **Irons vs. Webb, 41, N. J. L. 206,** the plaintiff Irons conveyed to the defendant Webb, by a deed, (17.37) seventeen and thirty seven hundredths of an acre of land. The deed contained an exception:

"Excepting and reserving the timber on the said land being conveyed, by the removal of which, the said party of the second part agrees to and with the said party of the first part, that he, the said party of the second part, will give two years from the date hereof, to the said party of the first part."

Within the two year period, all of the trees were cut by the plaintiff but a portion of the logs and wood were not removed. After the two years had expired the defendant removed said logs and wood on other premises and converted the same to his own use. Suit was brought in trover and conversion and the plaintiff founded his action on the proposition that the timber in controversy was conveyed to him in an absolute form and clear of all conditions and that the subsequent clause restricting the party in the right to enter had no effect on the title, either to limit or otherwise continue. Chief Justice Beasley points out that the effect of an exception is to eliminate what is excepted, from the grant and that no

title passed to the defendant by reason of such exception and further held that the right to take it away within a specified time was in the shape of an agreement on the part of the defendant. In order to give the defendant title would require a forfeiture which is not favored in law.

In neither of these cases does it appear that the question was raised as to the quantity of timber sold by the conveyance nor was the nature of the agreement determined.

The Supreme Court of New Jersey is among the few courts holding that a sale and conveyance of growing timber in which the purchaser is given a stated time for removal, passes an absolute title which is not defeated by failure to remove within the specified time.

The only other states so holding are Alabama and New Hampshire.

In California, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Montana, Missouri, New York, Ohio, Texas, Virginia, West Virginia, Wisconsin, Minnesota, the courts have held that only so much of the timber is sold and conveyed as the vendee removes within the period specified. In Georgia, Iowa, South Dakota, North Carolina and Florida, the Courts hold that though the agreement is in the form of a sale of standing timber, it is in effect, a mere license during the period of time to go upon the land and sever the trees from the realty and remove them from the realty.

In many contracts involving the sale of standing timber, or deeds in which timber has been reserved to the grantor there is an express provision that, unless the timber is removed within the time limit expressed in the contract or deed, it will revert to the vendor or grantee, as the case may be. In other cases, although this provision is not expressed, a fair construction of the contract shows that such was the intention of the parties. In other cases where such a provision is neither expressed or inferrable from the language used, the courts, nevertheless, hold that as a rule of law all rights of the vendee or grantor terminate upon the expiration of the time limit

expressed in the contract or deed.

It is set forth in the note, in **6 L. R. A. (N. S.) 469** that no general rule can be stated as to whether a contract in regard to standing timber will pass title to the same, as much will depend upon the intention of the parties as well as upon the terms of the contract itself.

In **Webb vs. Proctor, 89 Me. 404,** it was held that where a deed conveyed hemlock bark and trees upon a certain tract of land with the right to enter upon said lot of land at any and all times during the term of ten years to cut any trees and make necessary roads to remove said bark and trees during said term, without being liable for trespass, it was not an absolute sale of all of the bark and trees on the land but only so much as the vendee might cut and remove within the time mentioned and to the same effect were decisions in **Pease vs. Gibson, 6 Me. 81; Howard vs. Linden, 13 Me. 122; Davis vs. Emery, 61 Me. 141.**

In **J. Neils Lumber Co. vs. Hines, 93 Minn. 505, 101, N. W. 959** it was held that a contract based upon a valuable consideration for the sale of standing timber to be cut and removed within a certain period passed an absolute title to all timber which was cut and removed within that period. There are many other cases holding that the grantee in a contract of sale of standing timber which contains a time limit for the cutting of timber, loses all interest in timber not cut and removed within that limit.

Kemble vs. Dresser, 1 Met. 271.
Monroe vs. Bowen, 26 Mich. 523.
Richards vs. Tozer, 27 Mich. 83.
Prentice vs. Ross, 96 Mich. 83.
Saltonstall vs. Little, 90 Pa. 422.
Rich vs. Zielsdorf, 22 Wis. 544.
Strassen vs. Montgomery, 32 Wis. 52.
Mengle Box Co. vs. Moore, 114 Ten. 596.
Chestnut vs. Green, 27 Ky. L. Rep. 838, 86 S. W. 1122.

In **King vs. Merriman, 38 Minn. 47,** the court said:

"But call it by what name you may, a license to enter and cut, a sale, a conditional sale, or a contract to sell, coupled with a license to enter, the object and extent

of the grant was only so much timber as the grantee should cut during these two logging seasons and no more".

In **Kellam vs. McKinstry, 69 N. Y. 264,** where there was a grant of all of the bark on the hemlock trees standing upon a certain piece of land with the right of entering upon the land for a fixed time, to cut and remove the same, the Court held that after that time the grantee had no right or interest in the standing timber as such time was a condition, which if not fulfilled, would defeat the title of the vendee:

The court of Minnesota, in **King vs. Merriman, 38 Minn. 47;** points out the anomalous situation which exists in the theory of New Jersey and those States holding title to the timber to remain in the purchaser if the right to enter and remove has expired. The court says:

"It would be an anomaly in the law that one man should own standing timber on the land of another with no right of entry to cut and take it away. Such a right would certainly be a barren one. If the limitation of the right of entry is of any effect at all, it must operate as a limitation upon the grant itself".

Also in **Hollensterner vs. Missoula, 37 Mont. 278, 96 Pacific 420.** the court says, in criticising the ruling in New Hampshire and New Jersey:

"To say that the clause requiring that the timber should be cut and removed within five years is merely a covenant on the part of the grantee that he would cut and remove the timber within that time leads to a conclusion which we cannot believe the parties ever contemplated. It means that, after expiration of five years, the grantee still owns the trees and has no right to go on the land and cut and remove them, but at the same time the plaintiff might maintain an action for damages by reason of the grantee's failure to remove them within the five year period. If appellants contention is correct it may permit these trees to remain standing for an indefinite time, and thereby deprive the plaintiff of the use of his land for agricultural purposes with which the presence of the timber would

interfere. The result of this would be constantly recurring injury to plaintiff giving rise to numberless law suits for damages as well as depreciating the value of the land itself by reason of such outstanding title."

Two interesting notes may be found in **Vol. XVII, Harvard Law Review, p. 411, and Vol. XXVIII Harvard Law Review, p. 114,** where it will be found the view of our Supreme Court is the minority rule and the logical reasons of the doctrine here urged are set forth.

The uncontradicted evidence of the plaintiff in the case is that he failed to remove the lumber within the two year period set forth in the agreement. There is no evidence that the defendant, during that time, interfered with, prevented or restricted the plaintiff from cutting and removing all of the timber, but, on the other hand, the evidence clearly indicates that the plaintiff, Sarson, neglected to perform as he had agreed to perform and to remove the timber from the tract described, within the time limited. Therefore, the evidence clearly indicates that nothing was done by the defendant during the two year period to breach the contract.

But it is contended by the plaintiff that two days after the two year period had expired, the defendant, Mueller served **Ex.-P. 3 on** the plaintiff Sarson, by reason of which he broke the contract. The notice reads as follows:

"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."

In what way did this notice constitute a breach of the original contract?

Reference is made to the expiration of the time limit and notice is given to keep off the premises, "the two wood lots" and not cut or remove the timber without my permission. The notice does not claim that Mueller owns the timber. He did not say, "Since the two year period has expired, the uncut timber belongs to me."

It is contended in behalf of the defendant, that the

notice served by Mueller was merely notice to the plaintiff, Sarson, that the time having expired, Sarson would be held liable for trespass upon the land.

In **Irons vs. Webb, Supra,** Chief Justice Beasley says, **p. 205:**

"**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."

And in **Wyckoff vs. Bodine, Supra,** the court said:

"The leaving by the defendants of this timber upon the land of the defendant, after the expiration of the period provided by the contract, was an actionable wrong."

In **Town vs. Hazen, 51 N. H. 596,** it was held that if wood is cut and severed before the expiration of the time limit, the vendee may enter upon the land, after the time limit and remove the same by simply making himself liable for the actual damage done to the vendor in removing the same, but the vendor would not necessarily become liable in trover for the wood by refusing to give permission to enter the land and remove it after the time had expired. Judgment of the court below was reversed by the New Hampshire Supreme court on the ground that there was not sufficient evidence in the case to hold that the conduct of the land owner amounted to wilfull conversion.

In the present case, the defendant testified as pointed out in the brief of plaintiff, that he never refused permission to Mr. Sarson, **(p. 90),** that he had not seen him and had not forbid him; that the standing timber still stands on the lot and that he has not cut nor taken any of the standing timber or cut timber nor has any person in his behalf. There was no assertion of ownership or domination on the part of Mueller to standing timber or the timber that was cut. Sarson's testimony, **(p. 25),** indicates that on the one occasion, when he did ask permission, following the service of the notice, **(Ex. P-3),** that Mueller, the defendant, granted him permission.

The standing timber that remained on the wood lots,

as well as the mine ties and props that had been cut, were there by reason of the plaintiff's own neglect and breach of duty. No act on the part of the defendant, Mueller, was responsible for the failure to remove within the two year period.

Sarson made one demand in writing. It was served by Mr. Thatcher, a witness for the plaintiff. It was written in English. Mr. Thatcher knew the defendant was German **(p. 51)** yet he read in English, the notice to him. The defendant then handed it to a son, Oscar, who started reading it. The only thing said by the defendant, Mueller, was, "Who are you?" **(p. 51 l. 171).** Mr. Thatcher testified

> "I walked off. I did not stay until the finish. I had done my duty. That was my duty and he passed it over to the young man and he was still reading it.
>
> Q. You waited for no answer? A. No."

It is submitted that under this evidence, which is in behalf of the plaintiff, it is clear that Mueller never refused permission to Sarson or his agent Thatcher, and in no way breached the contract, whether title passed to the standing timber or not, or whether the conveyance was only so much of the standing timber as was cut and removed during the period fixed by the agreement.

Taking for the purpose of determining the motion, the evidence of the plaintiff to be true and in its most liberal aspect, there was no evidence of a breach of the original agreement on the part of the defendant.

First, it is admitted that both alleged extensions of time of removal were verbal and both were without consideration. It is insisted that a unilateral 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. This was clearly pointed out in the case of **Nissell vs. Swinley, 76 N. J. L. 288.**

In that case, the defendant relied upon the verbal extension of time and the doctrine of estoppel in pais was held to obtain. 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 of the cases cited by the plaintiff in his brief, the verbal extension of time was relied upon by the defendant. In no case was it the basis of an action. This was the case in **Stryker vs. Vanderbilt, 25 N. J. L. 482, Long vs. Hartwell, 34 N. J. L. 116, Cox vs. Bennett, 13 N. J. L. 171, Cuff vs. Penn, 1 M. & S. 21.**

In **Halpern vs. Shurkin, 98 N. J. E. 28,** the complainants in Chancery contended that oral modification of a contract relating to real estate related, not to the contract, but to its performance and did not come within the statute of frauds. They sought to make it the basis of an action for equitable relief. It was held that an executory parole agreement, substituting methods of performance is within the statute and unenforcible.

Malkan v. Hemming, 82 Conn. 293; Rucker v. Harrington, 52 Mo. App. 481; Abell v. Munson, 18 Mich. 306.

Vice Chancellor Backes points out that all of the cases relied upon (and these are the same cases cited by the plaintiff in his brief in the present case) were cases in which the rule of estoppel was invoked by the defendant. The court said:

> "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."

Defendant, by second defense to the complaint set up the defense of the statute of frauds, (p. 7.). It is therefore insisted in behalf of the defendant, that no breach of either the alleged extension of the time or removal or one year or for the alleged extension of two months can be made the basis of an action for the recovery of damages.

Furthermore, the evidence is clear as to the alleged

extension of two months that any such transaction occured on **Sunday.** The plaintiff testified, (p. 42) that a few weeks before the two years had expired, **on a Sunday,** he went to the residence of the defendant, and there obtained a verbal promise from the defendant, granting him two months additional time within which to remove the timber. Even if true, and agreed to on the part of the defendant, Mueller, the promise, having been made on **Sunday,** according to the plaintiff's own testimony, was void under the statute and the plaintiff can recover nothing thereunder. There was nothing done in pursuance of the agreement to extend for two months according to Sarson's own admission, **p 48, l. 1-10.**

Riddle vs. Keller, 61 N. J. E. 513, Gemert v. Wuestner, 53 N. J. E. 302; Reeves vs. Butcher, 31 N. J. L. 224.

There was no evidence of a breach on the part of the defendant, Mueller, of any alleged extension. An attempt was made to show that the defendant, Mueller, had appropriated or converted some of the wood timber and that this, it is argued, was sufficient to raise a question for the jury. Sarson testified that he had no knowledge that Mr. Mueller or any one for him, had ever cut any trees on this tract, **(p. 43, l. 47).**

The witness, George Gunderman, was a carpenter who worked, in 1924, for the defendant, Mueller. His only testimony was **(p 74)** that he saw Oscar Mueller, son of the defendant, taking some timber off the lot by the house. "I don't know whose lot it was. I could not tell what kind it was." **(1.33).** "It was a short distance from the house." After the motion for nonsuit, on being recalled by permission of the court, Gunderman could not fix the time except that it was during 1924. He did not see anybody cutting the wood. He did not see the defendant, Mueller, cutting any ties, **(pp. 84-85),** and Sarson, being recalled, admitted he did not know whose timber it was that lay on the wood pile of the defendant, Mueller. In such a state of the evidence, it is submitted the court was fully justified in directing a verdict and taking the question away from the jury. The testimony was entirely too vague as to time, as to quantity and

as to value. But particularly the plaintiff failed entirely to connect the defendant with any appropriation of cut timber and to establish any agency on the part of Oscar Mueller. Mueller himself denied that he ever took any timber or used any of the trees, mine props or other wood belonging to Sarson. The only other alleged breach of the extension was the service of the notice hereinbefore mentioned, and it is submitted that this, in itself, was not such a breach of a valid agreement as can be made the basis of an action.

D.

Finally, it is pointed out that this was apparently more of a willingness on the part of Sarson to go to law than to get possession of what he claimed under any agreement.

Mueller never asserted ownership of the timber. If he had done so or exercised any dominion over Sarson, his sole offense was the service of a notice against trespass and at the conclusion of the case and taking the most favorable view of the plaintiff's testimony it left no question for the jury. The plaintiff had failed to meet the burden of proof in establishing an actionable breach of the contract or alleged extension.

And in conclusion, it is urged that Mueller had the right, after the two year period had expired, to forbid trespass on his land and if this was done in good faith, he is within the principle of law, long established, without dispute.

"There is no wrong done by one asserting a claim which he honestly believes himself to possess." **Hale, Torts, 165 13 Am. & Eng. Enc. Law p. 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 p. 260, 221.**

In **Glencoe Sand & Gravel Co. vs. Hudson Bros. Company, 138 Mo. 430, 36 L. R. A. 804,** the court held that a 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."

For these reasons it is submitted that the judgment of the Warren Circuit court should be affirmed.

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