

price, so far as appeared, was a fair price. On the 6th July, 1912, the defendant purchased from the executors of Clemesha, who had died, the mortgage made by Hallowell, and it was assigned to the defendant. On the 12th July, 1912, Hallowell borrowed \$1,500 from the defendant, and made a mortgage upon the land to the defendant for that sum. Later on, one Walker agreed to lend Hallowell \$2,500 upon the land. The defendant was to be paid out of the new loan, and the defendant was to execute a discharge of the \$1,500 and to assign the Clemesha mortgage to Walker. It was also agreed between Walker and the defendant that the defendant could have until the 9th January, 1917, to remove the remainder of the timber and trees. About the 12th January, 1916, the defendant began to cut and remove timber; but was stopped by an interim injunction obtained by the plaintiff in this action and continued until the trial.

The plaintiffs' judgment was recovered against Hallowell on the 23rd November, 1915, for \$880.55 and costs, upon a claim or debt which originated after all the transactions in respect of timber and trees and after the mortgage and loan transactions referred to.

The learned Judge said that the plaintiffs could not succeed. There was a bona fide sale of the timber, evidenced by writing; the price was a fair one; and the whole purchase-money was paid and applied in reduction of the mortgage upon Hallowell's land.

There was part performance of the contract, as the defendant proceeded to take possession, and cut and removed one-half of the timber.

To attempt to retain the defendant's property for those who were not creditors at the time of his purchase was unjust, and the plaintiffs ought not to be assisted by injunction.

By the agreement between Walker and the defendant, by which the defendant agreed to make no claim to the remainder of the timber after the 9th January, 1917, the defendant waived no right to the trees.

In *Brown v. Sage* (1865), 11 Gr. 239, the sale of timber was not made until after the writ of execution was placed in the sheriff's hands.

Judgment for the defendant dissolving the injunction, dismissing the action, and declaring that the defendant is entitled, as against the plaintiffs, to remove the remainder of the timber, with costs, including the costs of the interim injunction and motion to continue, to be paid by the plaintiffs.

The defendant should also recover \$10 for damage sustained by reason of the interim injunction, upon the plaintiffs' undertaking.