

In 1890 the plaintiff gave notice of cutting and peeling hemlock, and a second notice of further cutting and peeling in second year after the contract, but no action was taken by defendant to remove and pay for the trunks, and they are lying decaying on the land.

In 1900, nothing having been done in the way of entering and cutting trees by defendant, plaintiff made sale of the timber to one Middlebrough, and then received a letter from defendant Baker forbidding the sale.

On 6th December, 1900, Baker sold and conveyed to his co-defendants all the timber covered by his deed of 1889, and in 1903 men went on to cut and remove all the timber under defendants' orders, and in consequence this action was brought.

Defendant Baker was not on the place after he bought the timber, and no entry was made on the premises for over 10 years. The question is as to lots 24 in the 13th and 24 in the 14th concessions of Medora. Plaintiff lived on lot 24 in 13th, and has cleared over 20 acres thereon from year to year since 1889; the lots adjoin, with bush on each lot, and the bush part is not enclosed; but it has been constantly used by plaintiff for pasturing his cattle on and cutting down such small wood or trees as he wanted. There is sufficient evidence of his being, not only in legal, but in actual, possession of the whole.

These seem to be all the material facts as to the surroundings of the case.

According to the common law of England "timber" was strictly applicable only to three kinds of trees, oak, ash, and elm, because of their being fit and commonly employed for building purposes; but by custom other trees, such as birch and beech, were also considered timber because serviceable and used for the same purpose. We have the same varieties of trees in this country and others, which when of proper size are used for construction, and are treated as timber. In England as a rule nothing is considered to be timber unless of twenty years' growth; though in some places they judge by the size of the trees, and those that have reached the dimensions of two feet in girth or six inches in diameter are classed as timber: *Whitty v. Dillon*, 2 F. & F. 68; *Dunn v. Bryan*, Ir. R. 7 Eq. 143; *Honeywood v. Honeywood*, L. R. 18 Eq. 306.

As defined by Robinson, C.J., in *Miller v. Clark*, 10 U. C. R. 10, "timber means the trunk of the tree or any part of it while it exists in the solid state;" tops and limbs would be thus excluded. In the present contract, the evidence shews