FOSTER-THOMPSON LUMBER COMPANY *v.* BRIGHAM.

Opinion delivered April 23, 1928.

1. ALTERATION OF INSTRUMENTS—BURDEN OF PROOF TO EXPLAIN ALTERATION.—In a suit to enjoin defendant from cutting timber, where an alteration of the deed giving defendant the right to an extension of time for cutting timber appeared on the face of the deed, the burden of explaining the alteration was on defendant claiming under the deed.
2. ALTERATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—In a suit to enjoin defendant from cutting timber on lands, evidence *held* not to show that an alteration of the deed giving the grantee the right to an extension of time for cutting timber was inserted in the deed before its execution.
3. INJUNCTION—CUTTING TIMBER—EVIDENCE OF TENDER TO SECURE EXTENSION.—In a suit to enjoin defendant from cutting timber on land, the finding that defendant had made a tender of the amount necessary to extend the term for another year for removing the timber as provided in interlined alteration of the

deed conveying the timber, *held* against the preponderance of the testimony.

Appeal from Columbia Chancery Court; *J. Y. Stevens,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellants brought this suit, alleging they were the owners of all the merchantable timber, of the value of $1,000, on 120 acres of land in Columbia County, which they had purchased from John Atkins and Lillie Atkins, his wife, described in their deed, which was made an exhibit to the complaint, as the northwest quarter of the southeast quarter of the southwest quarter of the southeast quarter, and northeast quarter of the southwest quarter, all in section 9, township 15 south, range 20 west. That defendant was claiming this timber under a deed from Atkins and wife to Drake and Harper, under the terms of which the grantor's right and the time for cutting and removing the timber has long since expired. That appellee was insolvent; had already cut timber from said lands of the value of $100, and was threatening to cut the remainder of it, and would do so unless enjoined; and prayed a temporary restraining order, which was granted.

Appellee, Brigham, and Drake and Harper answered, denying that appellants were the owners of the timber, the insolvency of Brigham, and alleged that Drake and Harper had sold the timber on the lands to Brigham, who was to cut and pay for it as cut; that Brigham took possession and began cutting the timber, and, in pursuance of the terms of the timber deed from Atkins and wife to Drake and Harper, tendered to Atkins, prior to February 10, 1925, $50, and again on the 22d day of February, which he refused to accept, for extension of time for removal of the timber another year.

By way of cross-complaint they alleged that, under the deed from Atkins, they had a reasonable time after the expiration of the five years allowed in which to remove the timber; that Brigham had tendered Atkins

the $50 in accordance with the terms of the deed in time to secure an extension of time for a year from February 10, 1925, for removal of the timber; that Brigham had moved his mill to the timber at great expense to cut it, and had begun to cut the timber when enjoined, and had suffered great damages, special and general, setting it out, because of the wrongful issuance of the injunction, for which judgment was prayed in the sum of $1,732.50.

The testimony shows that appellants purchased the timber from Atkins and wife, who conveyed to them by deed executed February 12, 1925, and Brigham was cutting the timber when the injunction was issued. Atkins and wife had conveyed the timber on the same lands to Drake and Harper by deed executed the 10th day of February, 1920, allowing five years from that date for its removal. The words or phrase, "$50 per year for extension until cut," was interlined in the deed after it was prepared, one of the grantees testifying that it was written by him in the deed before it was signed, but this was denied by the grantor, John Atkins, who stated the deed contained no such provision when executed, and refused to accept the money attempted to be tendered for the year's extension of time for removal of the timber, and denied that any such tender had been made at or before the expiration of the five-year period allowed for removal of the timber, or attempted to be made before the conveyance of the timber to appellants on February 12, 1925, nor until more than 10 days thereafter. The deed with the inserted clause in italics reads, "It is agreed that, unless said timber shall have been removed within a period of five *$50 per year for extension until cut* years from the date hereof," etc.

The chancellor held that the tender of the $50 for extension of the time for removal of the timber had been made in time, dissolved the injunction, and awarded

damages to appellee for its wrongful issuance, and from the decree this appeal is prosecuted.

McKay & Smith, for appellant.

Wade Kitchens, for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the decree should be reversed, not being supported by the evidence, and this contention must be sustained.

The undisputed testimony shows the clause, "$50 per year for extension until cut," was not in the draft of the timber deed to Drake and Harper, under which Brigham claims, when prepared for execution, and one of the grantees testified he wrote it in at the direction of the grantor, Atkins, before it was signed by him. Atkins denied, however, that there was any such agreement, and that the deed when executed by him contained said clause. It was a material change in the terms of the instrument, and, the alteration appearing on the face of it, the burden of explaining such alteration was on the party claiming under the instrument. This burden could not be discharged by the testimony alone of one of the members of the partnership grantee, that the alteration was interlined by him at the suggestion of the grantor before signature, when the grantor denied not only that any such agreement was made but also stated that the instrument did not contain the interlined clause when it was executed by him. Neither the scrivener who prepared the deed for execution nor the officer who took the acknowledgment thereto testified in the case. The grantor, immediately upon the expiration of the time allowed for removal of the timber in the original deed, made a new conveyance of it to the appellant company, such action being consistent with his statement that the alteration in the deed was unauthorized by him, and the preponderance of the testimony did not support the claim of a tender having been made of the amount necessary to extend the term for another year for removal of the timber, as provided in the interlined alteration.

The chancellor's findings to the contrary are clearly against the preponderance of the testimony, and the decree will be reversed, and the cause remanded with directions to make permanent the temporary injunction granted. It is so ordered.