

by the defendants. None was necessary. It would have been a useless formality merely. The most that could have been said to him was, that he must keep away from the gearing when the machine was in operation or he would get hurt. But this would have given him no knowledge he did not already possess. The danger of getting caught in the gearing was perfectly obvious to him, and he therefore knowingly and voluntarily assumed it as one of the ordinary risks of his employment. The duty resting on the master to instruct or warn the servant of all latent and hidden defects or hazards incident to the employment, of which the master knows or ought to know, does not extend to dangers open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity of the servant, and cannot be invoked as to patent defects or dangers by a servant of mature capacity and knowledge. As to such defects or dangers as are obvious to the senses, he is bound to take notice, and when, as in the case of this plaintiff, he admits he knew of the danger and comprehended it, it would be as absurd as it manifestly would be unjust to permit a recovery on the ground that his employers did not warn him of that danger.

In view of these conclusions, the other exceptions taken at the trial need not be considered.

Judgment for the defendants.

SMITH, J., did not sit; DOE, C. J., did not concur: the others concurred.

Belknap, }
Dec., 1894. }

LAMPREY & a. v. EASTMAN.

A grantor of land is not liable to a purchaser of standing timber who agreed to cut the same before the date of the conveyance, and was prevented from so doing by the grantees after the expiration of the time limited.

ASSUMPSIT, for money paid for standing timber, on the ground of a partial failure of consideration, with a count in case for depriving the plaintiffs of a part of the timber by conveying the land. Facts found by the court.

December 17, 1889, the defendant, by a contract in writing not under seal, sold to the plaintiffs the pine and oak timber then standing on his farm, to be cut before April 1, 1891, for \$600, which the plaintiffs paid. Before February 27, 1891, the

greater part of the timber had been cut. On that day the defendant executed a deed of the land to Abbie H. Lindsey and Harriet L. Smith, who knew the timber was sold to the plaintiffs and that a portion of it had not been cut. The deed was not delivered to them until April 7, 1891. In March, 1891, the plaintiffs obtained from Mr. Lindsey (Abbie's husband) permission to cut the remaining timber during the next winter (1891-92). But for this permission they would have cut it all before April 1, 1891. The plaintiffs began cutting the next winter, but were stopped by the defendant's grantees, who denied Lindsey's authority to extend the time, brought trespass against them for what they had cut, and recovered a judgment for damages.

Jewett & Plummer, for the plaintiffs.

Jewell, Stone, Owen & Martin, for the defendant.

CARPENTER, J. There was no failure of consideration. The plaintiffs received all they bargained and paid for (*Davis v. Bryan*, 6 B. & C. 651), viz., the right to cut all the pine and oak timber on the farm that they chose to cut before April 1, 1891. It is immaterial that by the contract no property in the standing timber passed to the plaintiffs (*Kingsley v. Holbrook*, 45 N. H. 313, 320), and that the agreement operated only as a license revocable at the defendant's pleasure. *Howe v. Batchelder*, 49 N. H. 204; *Abbott v. Baldwin*, 61 N. H. 583, 586. It was not revoked. It afforded the plaintiffs full protection for all they did under it. It was not the defendant's but their own fault that they did not take the remaining timber within the time limited. He did nothing to prevent them. His deed to Lindsey and Smith had no effect until its delivery, April 7. He is not responsible for the result of the plaintiffs' negotiation with the husband of one of the grantees for an extension of the time.

Judgment for the defendant.

SMITH, J., did not sit: the others concurred.