UNION SAW MILL COMPANY *v.* AGERTON.

Opinion delivered March 3, 1930.

1. LOGS AND LOGGING—TIME FOR REMOVAL OF TIMBER.—Where, in a deed, the seller reserves to himself the timber on the land, with the right of ingress and egress to his employees to cut and remove the timber, and no time is fixed therefor, the inference is that the timber shall be removed within a reasonable time.
2. LOGS AND LOGGING—REMOVAL OF TIMBER—REASONABLE TIME.—Where the seller of land reserved a right to remove timber within a reasonable time, and had a spur track near the land in 1906, but did not remove the timber until 1928, over another spur track which it claimed was the only practicable route, what was a reasonable time *held* a question of fact for the jury.
3. LOGS AND LOGGING—REMOVAL OF TIMBER—REASONABLE TIME.—Where the seller of land had a right to remove timber within a reasonable time, and had spur tracks available in 1906 but did not remove the timber until 1928, evidence *held* to warrant a finding that the removal in 1928 was not within a reasonable time.
4. DAMAGES—AWARD NOT EXCESSIVE WHEN.—An award of $649.25 with interest *held* not excessive damages for cutting and taking away the timber on 80 acres of land.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT OF FACTS.

G. G. Agerton sued the Union Sawmill Company to recover damages for cutting timber on his land. The Union Sawmill Company defended the suit on the ground that it owned the timber.

The Union Sawmill Company, a domestic corporation, originally owned 80 acres of land on which the timber was cut. On the 20th day of December, 1906, it conveyed said land by warranty deed to Henry F. Murray, and in the deed reserved to itself all the timber on the land with the right of ingress and egress for its employees, teams, and locomotives, for the purpose of cutting and removing the timber from said land. Murray mortgaged the land to the Arkansas Fertilizer Company; and, upon the foreclosure of the mortgage, said company became the purchaser of the land under a deed from the commissioner in chancery dated September 11, 1915.

The Arkansas Fertilizer Company conveyed the land by warranty deed to G. G. Agerton on the 6th day of December, 1917. Agerton has been the owner of the land ever since that time.

According to the evidence for the plaintiff, the Union Sawmill Company entered on said land in the latter part of 1927 and cut down 129,849 feet of timber, the reasonable stumpage value of which was $3.50 per thousand. The Union Sawmill Company first sent Sam Tubberville on the land to cut down the timber, and Agerton forbade him cutting it. The company then sent a crew of its employees on the land to cut down the timber, and hired Tubberville to haul it away from the land. Tubberville hauled the timber from the land about three miles to a spur which had been put in there by the Union Sawmill Company in the latter part of 1927. The Union Sawmill Company had a spur near the land in 1906, and cut timber from other tracts of land near the land in question at that time. The end of the spur was about two miles from the land in question. The spur was kept there by the company for about two years. One witness testified that the market value of the timber in that community was $8.00 per thousand. Evidence was adduced by the plaintiff tending to show that it would have been just as practical to have cut and hauled the timber to the spur which the Union Sawmill Company had built near the land in 1906, and kept there for the ensuing two years, as it was to have hauled it to the spur which it established near the land in the latter part of 1927, or the first part of 1928.

According to the evidence for the defendant, it would not have been practical and convenient for it to have cut and removed the timber from the land until it established the spur near it during the latter part of 1927. It owned a large body of land in that territory as well as timber claims which it was required to remove within a certain stipulated time or within a reasonable time. The company made a survey of all its lands and timber holdings

in that locality and adopted a plan for cutting and removing the timber which it deemed would be practical for it in the conduct of its business, which was manufacturing timber into lumber and shipping the lumber. It also showed that there was a ridge which separated the land in question from the spur which it had established near the land in 1906, and that this ridge would have made it very expensive to have cut and hauled the timber to the spur which it had established at that time. The spur to which the timber was hauled in 1928 did not have a ridge between it and the land. Other evidence was adduced by the defendant tending to show that it cut and removed the timber within a reasonable time.

The jury returned a verdict for the plaintiff in the sum of $649.25, with interest at six per cent. from January 26, 1928; and from the judgment rendered this appeal has been prosecuted.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

J. V. Spencer and *Marsh, McKay & Marlin,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the judgment should be reversed because the evidence is not legally sufficient to support the verdict. In making this contention, counsel for the defendant insist that the timber was cut and removed within a reasonable time by the defendant. The record shows that the defendant was the original owner of the land and conveyed it by warranty deed to Henry F. Murray on the 20th day of December, 1906. In the deed, the defendant reserved to itself the timber on the land, with the right of ingress and egress to its employees and teams to cut and remove the timber. The deed shows that the parties intended that the timber should be severed from the land, and no time was fixed therefor. In such cases the inference is that the timber shall be removed within a reasonable time. *Earl* v. *Harris,* 99 Ark. 112, 137 S. W. 806; *Burbridge* v. *Arkansas Lumber Co.,* 118 Ark. 94, 204 S. W. 304; *Young* v. *Cowan,* 134 Ark. 539, 178 S. W. 304;

Ozan-Graysonia Lumber Co. v. *Swearingen,* 168 Ark. 595, 271 S. W. 6; and *Orr* v. *Southern Lumber Co.,* 170 Ark. 361, 279 S. W. 1013.

Subsequently, the plaintiff became the owner of the land and sued the defendant in trespass for cutting the timber from the land in the first part of 1928. The defendant admitted cutting the timber and hauling it from the land, but justified its action on the ground that the timber had been excepted from the grant when it conveyed the land; and, under the authorities above cited, it had a reasonable time within which to remove the timber. It also claimed that the time was not unreasonable when its plan of conducting its business was considered. What is a reasonable time depends upon circumstances, such as the quantity of timber, the character of it, facilities for marketing it, and all other facts and circumstances showing the conditions surrounding the parties at the time of the execution of the contract. In cases of dispute, this becomes a question of fact for the determination of the court or of the jury trying the case. This has become the settled rule of this court and has been applied in numerous cases according to the facts of each particular case. No two state of facts are precisely the same; and in cases where the jury is the trier of the facts, its verdict must be final on appeal if there is any substantial evidence to support it.

Tested by this rule, it cannot be said that there is no substantial evidence to base a verdict in favor of the plaintiff. The jury might have legally inferred from the evidence adduced by the plaintiff that it was convenient and practical for the defendant to have cut and removed the timber from the land when it established a spur track near it in the latter part of 1906, and kept it there for the ensuing two years. The record shows that the defendant kept a crew of men to cut and remove the timber from its lands, and that it took them but a few days to cut the timber in question. It employed private carriers to haul the timber from the land to its spur track, and the jury

might have found that it could have done this equally as well when it established its first spur track near the land, as it could have done to have waited until the first of the year 1928 to do so. As we have already seen, the deed itself shows that severance of the timber from the soil was contemplated, and it became the duty of the defendant to cut and remove the timber within a reasonable time. Under all the facts and circumstances surrounding the transaction, we think the jury might legally infer that the defendant failed to cut and remove the timber within a reasonable time and had therefore forfeited its right thereto. The evidence for the plaintiff also justified the amount of damages found by the jury.

We find no reversible error in the record, and the judgment will therefore be affirmed.