

DUNN v. FORRESTER.

Opinion delivered May 5, 1930.

1. LOGS AND LOGGING—REMOVAL OF STANDING TIMBER.—In a sale of standing timber, when no time is fixed in the contract within which the purchaser is to remove the timber, the purchaser shall have a reasonable time, considering the circumstances, within which to remove the timber.
2. CONTRACTS—TIME OF PERFORMANCE.—A contract, fixing no time for performance, should be performed within a reasonable time.
3. LOGS AND LOGGING—REMOVAL OF TIMBER.—REASONABLE TIME.—Purchasers of standing timber to be cut and removed within two years after completion of a railroad which was never constructed held not entitled to cut and remove it over 20 years after execution of the contract.

Appeal from Scott Chancery Court; *John E. Chambers*, Chancellor; reversed.

STATEMENT OF FACTS.

Caroline E. Dunn and A. O. Ray and Rosa M. Ray, his wife, brought separate suits in equity against C. E. Forrester to enjoin him from removing the pine timber on the land described in the complaint. The basis of each suit was that Forrester and his grantor had forfeited all right or title to the timber by not cutting and removing it from the land within a reasonable time.

The suits were defended on the ground that the time limit in the timber deeds had not expired. The two cases were consolidated for trial because the issues of law and fact were the same.

It was agreed that Caroline E. Dunn and A. O. Ray are the owners of the land on which the timber is standing. The record also shows that timber deeds were executed on the 7th day of January, 1907, to R. A. Castleberry and his assigns conveying all the merchantable pine trees and timber on the lands in question. Said

trees and timber to be scaled on the mill yard, or, if shipped before sawing, to be scaled on the railroad before loading, within two years after the completion of a railroad down Mill Creek. At the time of the execution of the timber deeds, the contracting parties believed and expected that a railroad would within a few years be constructed near the lands in question. One of the timber deeds recited a consideration of fifty dollars, which was paid, and one dollar for every thousand feet of merchantable timber cut from the land. The other timber deed recited a consideration of one hundred dollars paid, and the payment of one dollar for every thousand feet of merchantable timber cut from the land. Each deed recited that payments for the merchantable timber cut should be made on the 15th day of each month. The timber deeds or contracts were transferred by R. A. Castleberry to C. E. Forrester in 1918.

The railroad was never constructed, and Waldron the nearest shipping point for timber was 25 miles distant from the lands. It was not practical to cut and haul the timber over the dirt road between the land and Waldron, and this could not be done at a profit. An improved highway was constructed in 1924 by the State, and the logs could be hauled over it from the lands to Waldron after the year 1924. The owners of the land never made any demand that the timber be cut and removed from the land.

Forrester owns a sawmill between the lands and Waldron, about 10 miles from the lands. According to the testimony of C. E. Forrester, he commenced to cut and remove the timber as soon as the State Highway Department made the road between the land and Waldron passable for log trucks. This was not done until after 1926, and the Department is still working on the road.

The present suits were instituted on the 18th day of May, 1928.

Other facts will be stated or referred to in the opinion. The case was heard and determined in the chan-

cery court on the 21st day of November, 1929. The chancellor found the issues in favor of C. E. Forrester, and was of the opinion that he was entitled to two years from the date of the decree within which to cut and remove the pine timber from said lands. It was therefore decreed that the complaint in each case should be dismissed for want of equity, and the consolidated case is here on appeal.

Duke Frederick, for appellant.

W. A. Bates, Sam T. Poe, Tom Poe and McDonald Poe, for appellee.

HART, C. J., (after stating the facts). The rights of the parties under the timber deeds depends upon the construction to be placed upon that clause which provides for the trees and timber "to be cut and paid for within two years after the completion of a railroad down Mill Creek."

The timber deeds were executed on the 7th day of January, 1907. It is well settled in this State that in a sale of standing timber, when there is no time fixed in the contract within which the purchaser is to remove the timber, the purchaser shall have a reasonable time, considering all the facts and circumstances surrounding the transaction, within which to remove the timber. *Liston v. Chapman & Dewey Land Co.*, 77 Ark. 116, 91 S. W. 27; *Hall v. Wellman Lumber Co.*, 78 Ark. 408, 94 S. W. 43; *Garden City Stave & Heading Co. v. Sims*, 84 Ark. 603, 106 S. W. 959; *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Smith v. Dierks Lumber & Coal Co.*, 130 Ark. 9, 196 S. W. 481; *Young v. Cowan*, 134 Ark. 539, 204 S. W. 304; *Fulcher v. Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S. W. 645; and *Ozan-Graysonia Lumber Co. v. Swearingen*, 168 Ark. 595, 271 S. W. 6.

This is in application of the fundamental principle that where a time is not specified for the performance of a contract, it should be performed within a reasonable time. In the present case, the expression in the timber deeds or contracts that the trees and timber were

to be cut and paid for within two years after the completion of a railroad down Mill Creek near which the land was situated indicates that the contracting parties did not intend that the right to cut and remove the timber should continue in perpetuity, but rather that it was to come to an end sometime in the future. What that time was cannot be declared to be other than would be a reasonable time for the removal of the timber according to the circumstances of the case. The parties thought a railroad would be constructed in the near future which would afford a suitable means of marketing the timber after it was cut. Only two years were given for cutting and removing the timber after the cutting began, and payments were to be made monthly. The railroad had already obtained a number of right-of-way deeds in that locality. This fact not only indicated the direction of the railroad, but pointed to the fact that construction work would begin in the near future.

All these facts and circumstances negative an intention on the part of the grantors to convey to the grantee a perpetual right to enter upon the land and cut and remove the trees growing thereon, but clearly manifests an intention to limit the right to cut and remove the trees to two years after a railroad is completed down Mill Creek, provided that should be done within a reasonable time. The grantee waited over 20 years before beginning to cut and remove the timber. Such a length of time was unreasonable. It does not make any difference that it would not have been profitable to have begun operations-sooner. While no hard and fast rule should be laid down, and each case must depend upon its own particular facts, we are of the opinion that 20 years were too long to wait in the present case. The record shows that one tract comprised 80 acres, and the other 159.49 acres. The parties lived on their respective tracts of land, and a part of them was cleared. It is unreasonable to presume that the parties intended that the clearing and putting in cultivation the lands should be delayed

for such a length of time. To hold otherwise would enable the grantee to cut and remove the timber when his convenience or market conditions required it, without regard to the interest and convenience of the owner of the land, or any injury that might result to him by reason of delay in cutting and removing the trees.

We are of the opinion that the grantee waited too long in the present case, and the title to the timber was thereby forfeited. Therefore, the chancery court erred in giving the grantee further time within which to cut and remove the timber; and the decree will be reversed and the cause remanded with directions to the chancery court to grant the prayer of the complaint in each case, and for such further proceedings as may be necessary according to the principles of equity. It is so ordered.
