

PROBST *v.* YOUNG.

4-2982

Opinion delivered April 17, 1933.

1. LOGS AND LOGGING—RELEASE OF TIMBER RIGHTS.—A mortgagee's release of timber rights to the mortgagor and the mortgagor's quitclaim deed of all his rights, title and interest in land to the

- grantee conveyed all his timber rights without limitation as to the time of removal.
2. LOGS AND LOGGING—TIME TO REMOVE TIMBER.—A deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for removal has expired.
 3. LOGS AND LOGGING—TIME TO REMOVE TIMBER.—Where a mortgagor, obtaining a release of timber rights from the mortgagee, conveyed the standing timber to another with a right to remove within 5 years, and then conveyed all his rights in the land to defendant, defendant's delay of 15 years in removing the timber after expiration of five years *held* to terminate the right to remove the timber as to parties claiming under the foreclosed mortgage.

Appeal from Marion Chancery Court; *Sam Williams*, Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was instituted by appellants against the appellee in the Marion Chancery Court to quiet and confirm their title to certain lands. It was alleged, and the testimony showed, that appellants acquired title to all of the lands in controversy by mesne conveyances from the United States Government, and appellants' immediate predecessor in title was on D. H. N. Dodd or Neal Dodd. On August 7, 1908, and at a time when the said D. H. N. Dodd owned the lands, he made, executed, acknowledged and delivered to Helen P. Wilber a mortgage to secure the payment of a certain note due two years after date; this note was not paid, and on October 25, 1912, he gave as additional security a mortgage on certain other lands, reserving to himself certain timber rights; on October 26, 1912, Helen P. Wilber, mortgagee, executed and acknowledged a power of attorney, in which Chas. M. Green, of Harrison, was appointed "attorney in fact to collect any money due, release or assign mortgages and satisfy same of record and to do and perform all such other matters as may be necessary and expedient for the purpose of carrying out the objects above mentioned, and I hereby ratify and confirm all that my said agent may do in said premises." On October 31, 1912, Chas. M. Green, as attorney in fact for Helen P. Wilber, executed a release of all the timbers on the mortgaged lands for the purpose of permitting the said Neal Dodd

to sell and convey the same; on November 2, 1912, Neal Dodd sold and conveyed all pine timber upon said lands to the H. W. Redus Lumber Company, in which deed a term of five years was allowed to the grantee to cut and remove the same; on February 27, 1915, the said D. H. N. Dodd executed and delivered to appellee, Gus Young, a quitclaim deed to all of his right, title and interest in and to said lands; on July 26, 1915, Helen P. Wilber, mortgagee, brought suit in foreclosure against all of said lands, and in due course the same was condemned, the sale was effected and duly approved. Appellee, Gus Young, was not a party to this foreclosure suit. Helen P. Wilber, mortgagee, became the purchaser of said lands at said commissioner's sale, and on the 21st day of June, 1922, appellants purchased the same and received a deed therefor, and since said time have paid all taxes accruing thereon. The lands are uninclosed and unoccupied.

It was stipulated by counsel in the trial court "that all of said lands had been assessed on the real estate tax books to Florence Probst and George C. Probst and to Helen P. Wilber, their grantor, for the year 1917, and that they have paid the taxes assessed against said lands for each of said years thereafter to the present time.

The trial court construed the Green release of October 31, 1912, the deed of date February 27, 1915, from Dodd to appellee, Young, and the timber deed from Dodd to Redus Lumber Company of November 2, 1912, as a severance of the timber rights, and further held that Gus Young, appellee, only had a reasonable time in which to remove the timber from said lands from and after November 2, 1917; the court further held that a reasonable time had not expired on the date the decree was rendered, and for that reason appellee, Young, should be given one year from the date of the decree in which to remove the timbers from said lands.

From the decree giving appellee one year additional time to remove said timber, this appeal is prosecuted.

W. F. Reeves, for appellant.

JOHNSON, C. J., (after stating the facts). We think the trial court erred in giving appellee, Gus Young, one year additional time in which to cut and remove the tim-

bers from the lands in controversy. The release of the timber rights from the Wilber mortgage made on October 31, 1912, and the timber deed from Dodd to the Redus Lumber Company of date November 2, 1912, and the quitclaim deed executed by Dodd to the appellee, Young, in 1915, when construed together, had the same effect as if Dodd had reserved in himself the timber rights in the first instance and had executed a separate timber deed thereto.

This court has held: "The exception of timber (in a deed) is the same in effect as a reservation, and the effect would have been the same if there had been an absolute conveyance of the land to appellee without any exception or reservation, and then a reconveyance of the timber." *Ozan-Graysonia Lumber Company v. Swearingen*, 168 Ark. 595, 271 S. W. 6.

The Green release of October 31, 1912, and the quitclaim deed from Dodd to Young of February 27, 1915, had the effect of a conveyance of all the timber rights of Dodd in and to the lands described in said deed with no limitation on the time of removal of such timber.

This court has frequently held that a deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber has expired. *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Earl v. Harris*, 99 Ark. 112, 137 S. W. 806.

When the conveyances in the instant case are read in the light of "a reasonable time to remove," the then pertinent question for determination is whether or not that time had expired prior to the filing of this suit. The Redus Lumber Company deed expired on November 2, 1917, therefore it became the duty of the appellee to make immediate arrangements for the removal of the timbers from said lands within a reasonable time thereafter. Appellee permitted almost fifteen years to elapse prior to the bringing of this suit, and made no preparation for the removal of the timbers from said lands. There was no testimony presented in this record as to the accessibility or inaccessibility of the timber to market, neither did appellee attempt to show that he had used any diligence

whatever in cutting or removing the timber. We think that a delay of fifteen years, under the circumstances in this case, is unreasonable.

This court held in *Dunn v. Forrester*, 181 Ark. 696, 27 S. W. (2d) 1005, "The grantee waited over twenty 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." This language has application to the facts in this case. The actual severance of the timber rights from the fee simple title occurred on November 2, 1912, almost twenty years before the decree was entered in this case. The Redus Lumber Company did not remove the timber within the five years given it, and, when the time for removal given to the Redus Lumber Company is added to the time which appellee Young has permitted to expire, the two periods aggregate approximately twenty years. This length of time is unreasonable under the facts and circumstances in this case. No additional time should have been given appellee in which to cut and remove the timbers from this land, but, on the contrary, the chancellor should have quieted and confirmed appellants' title and canceled the outstanding quitclaim deed held by appellee, Young.

For the error indicated, the decree of the Marion Chancery Court is reversed, and the cause remanded with directions that a decree be entered in conformity with law and not inconsistent with this opinion.