

STATE LINE LUMBER COMPANY v. SHULTS.

Opinion delivered July 13, 1931.

1. TRESPASS—INSTRUCTION.—In an action for damages for timber cut by defendant from plaintiff's land, an instruction to find for plaintiff if defendant knew that plaintiff claimed the land and the true boundaries were not known by defendant, and defendant caused the timber to be cut from plaintiff's land without having the boundaries surveyed, *held* error.
2. TRESPASS—DOUBLE DAMAGES.—Crawford & Moses' Dig., § 7004, provides double damages for cutting timber only where the trespasser had no probable cause to believe and did not believe the land on which he committed the trespass was his own, or that he had entered into a contract to purchase it.
3. TRESPASS—EVIDENCE.—In an action for cutting timber, evidence concerning an agreement signed only by plaintiff fixing a different boundary line between defendant's grantor and plaintiff from the line plaintiff alleged to be the true boundary *held* improperly admitted.
4. LOGS AND LOGGING—CONTRACT FOR SALE OF TIMBER.—An agreement concerning the boundary line between plaintiff and defendant's grantor could not invalidate a sale of timber already made to defendant nor reduce the quantity of land included in the grant.

Appeal from Miller Circuit Court; *Dexter Bush*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee recovered judgment against appellant for double damages for timber alleged to have been knowingly and wilfully cut by appellant from lands belonging to appellee.

The complaint alleged that appellee was the owner of a quarter section of land in Miller County which had been cut in two by an avulsion of Red River in 1905, leaving most of the acreage on the north, or Little River County side of the river. That a survey of this land was made by Ayers in 1923 and the boundary line between the Shults and Temple lands established then and agreed to and acquiesced in by them. That in the fall of 1929 appellant began cutting timber on this land, and, after notice, refused to stop, although it was advised that double damages would be claimed otherwise for the amount of the timber so cut.

Appellant denied the allegations of the complaint; that the lines of the Ayers survey were disfigured; and that it knowingly cut and converted any of the timber of plaintiff to its own use; alleged that it bought the timber cut from William Temple; had no notice of any claim of appellee; and that the timber it cut was the identical timber shown and sold to it by Temple; that in so cutting it had acted in good faith, and denied the value of the timber alleged to have been so cut.

It appears from the record that appellant purchased timber on the Temple lands in "Hays Bend" of Red River a few years before and cut some timber therefrom. That the time for cutting the timber ran out, and a new contract was procured. That before the first cutting Temple's agent showed its agent the lines of the land and the timber owned by him; also a small piece of land owned by Shults over near the old river bank, upon which there was some little timber; and that no complaint was made of any timber wrongfully cut at that time.

That under the new contract, an agent of Temple showed appellant the boundaries of the land upon which the timber was sold, and also a small tract of timber on the Shults land on the same side of the river. The Ayers survey was made for the parties, of which Temple also had a copy, and only showed Shults' land contained a fraction over 25 acres. A while after appellant began cutting the timber, he was notified by appellee's agent, his son, that he was getting over on appellee's land, and that they would expect him to pay double damages for all timber removed therefrom. After conferring with appellee, he continued to cut the timber, claiming to be the owner of it; the amount cut after notice being shown in the testimony. The county surveyor of Miller County made a survey of the lands after the timber was cut and said he discovered all the lines of the Ayers survey; and Shults' son admitted he was mistaken in thinking one line of the Ayers survey of his land ran to the north of a large old cottonwood stump, which was on the old high bank of the river and near the little tract of timber that Temple's agents told appellant appellee owned. In making this survey, after the timber was cut, appellee and appellant's grantor agreed on one of the lines to be located by the county surveyor which divided some of the accretions to the lands. This was not the same line as was in the Ayers survey and was made without the consent of appellant, who objected to the introduction of testimony relative thereto on the trial. The survey, as shown by the county surveyor, which did not show the Ayers line on account of the agreement between appellant's grantor and appellee, showed 40 acres of land in appellee's tract, which only contained a fraction more than 25 acres, as shown by the Ayers survey.

The amount and value of the timber cut before and after the notice given by appellee to appellant that it was trespassing on his lands and cutting his timber was shown.

The court instructed the jury giving over appellant's objection, general and special, instruction No. 1,

and refusing to give all of appellant's instructions, and the jury returned a verdict in appellee's favor for double damages, and from the judgment comes this appeal.

James D. Head, for appellant.

Henry Moore, Jr., for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the court erred in giving appellee's requested instruction No. 1, which it claims is virtually a direction to the jury to find against appellant. Instruction No. 1 reads in part as follows:

"The testimony further shows that the defendant knew that the plaintiff claimed to have certain land adjoining the Temple land, and that the true boundaries between the Temple land and the plaintiff's land were not ascertained and known by the defendant; the jury is further instructed that, if you find from a preponderance of the evidence that the defendant caused the plaintiff's timber on his land to be cut for the purpose of making same into lumber, without having the metes and bounds of the land on which it had purchased timber surveyed, marked and plainly established, you will find for the plaintiff.

"The jury is instructed to find the amount of timber cut by defendant or the amount of timber received or purchased by defendant cut from plaintiff's land, and to find the value of such timber so cut; and the jury shall return a verdict in favor of the plaintiff and against the defendant for double the value of said timber."

The cause of action for double damages is based upon the statute, § 7004, Crawford & Moses' Digest. This instruction not only tells the jury that the evidence shows that the appellant knew that plaintiff claimed to have certain lands adjoining the Temple lands; that the true boundaries between the Temple lands and appellee's lands were not ascertained and known by the defendant, but further that, if the jury found from the preponderance of the evidence that the defendant caused the plaintiff's timber on his land to be cut for making it into lumber, "without having the metes and bounds of the land

on which it had purchased timber surveyed, marked and plainly established, you will find for the plaintiff." This was an instruction on the weight of the testimony, telling the jury it showed that the true boundaries of the Temple land upon which the appellant had the right to cut timber were not ascertained and known by the defendant, and that, if the defendant cut the timber without first having a survey of the lands on which he bought, the timber made and the boundaries located, they should find for the plaintiff. Appellee alleged that a survey showing the boundaries between the Temple and Shults lands was made by Ayers, an engineer, in 1923, and was agreed to and acquiesced in by both owners; and the testimony shows that this line was pointed out by Temple's agent upon the sale of the timber to appellant company; and was also located by the county surveyor in making the survey after the timber was cut from the lands. It is undisputed in fact, notwithstanding which the court told the jury that appellant knew that plaintiff claimed to have certain lands adjoining the Temple lands on which the timber was purchased, and that the true boundaries of the land were not ascertained and known by defendant; and that, if the timber was cut without a survey first made to locate the boundary line, when the undisputed testimony shows that no such survey was made, they should find for the plaintiff.

The statute provides double damages for cutting timber from lands only where the trespasser had no probable cause to believe, and did not believe, the land on which he committed the trespass was his own, or that he had entered into a contract to purchase it. *Rosengrant v. Matthews*, 55 Ark. 441, 18 S. W. 541.

In *Sawyer & Austin Lumber Co. v. State*, 75 Ark. 311, 87 S. W. 431, the court, in construing the statute providing punishment for cutting timber from lands requiring a survey to be first made, "unless the same has been surveyed and the boundaries ascertained and known," said: "The owner must, before cutting timber for the purposes named, cause an official survey to be made by

the county surveyor, whose certificate thereof is *prima facie* correct (Kirby's Digest, §§ 1142, 1146; *Jeffries v. Hargis*, 50 Ark. 65, 6 S. W. 328; *Hobbs v. Clark*, 53 Ark. 411, 14 S. W. 652), unless a correct survey has already been made, and the true boundaries thereof ascertained and known."

This instruction was given in the face of appellee's allegation in his complaint that a correct survey of the lands establishing the boundaries thereof had been made by Ayers and agreed to by himself and Temple the owners thereof. The instruction was virtually peremptory and certainly erroneous.

The court also erred in not giving appellant's requested instructions Nos. 1, 2, 3 and 6. In instruction No. 6, the jury was told that, if they found from the preponderance of the testimony that the timber was cut wilfully and intentionally after notice that it was the property of appellee, the jury might find appellant liable for double damages for such timber, although it could only recover actual damages, the market value of the timber at the time it was cut, in accordance with requested instructions Nos. 1, 2 and 3.

The court erred also in the admission of testimony showing that appellant's grantor and appellee had, after the timber was cut and removed, agreed upon a boundary line between appellee's land and the land upon which appellant cut the timber, which was different from the old boundary line established by Ayers, and which appellee alleged to be the true boundary in his suit for damages, and which the undisputed testimony shows was pointed out to appellant as such when the timber was purchased. This memorandum or agreement had not been signed by Temple, appellant's grantor, but only by appellee, and certainly it could have no effect to invalidate the sale of the timber already made to appellant, nor to reduce the quantity or area of the land included in his grant conveying it. *Richardson v. Taylor*, 45 Ark. 472; *Hughes Bros. v. Redus*, 90 Ark. 149, 118 S. W. 414; *Cox*

Wholesale Grocery Co. v. National Bank, 107 Ark. 601, 156 S. W. 187; *Collin County Grain Co. v. Andrews*, 110 Ark. 597, 162 S. W. 1098; *Wilkinson v. James*, 164 Ark. 475, 262 S. W. 319. This agreement showing the line contrary to the boundary as established by Ayers' survey, alleged to have been agreed upon as the correct boundary, under which the area of appellee's land on that side of the river was a fraction more than 25 acres, could not have been helpful to the jury in ascertaining the true boundary line between the appellant's timber lands and appellees land, and was certainly prejudicial.

It follows that the judgment must be reversed for the errors designated, and the cause remanded for a new trial. It is so ordered.
