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**ORAL CONTRACTS FOR THE SALE OF STANDING TIMBER
IN KENTUCKY**

Section 4 of the English Statute of Frauds has been enacted in similar form in most of the states of the United States.¹ This section is incorporated in KRS 371.010 providing:

“No action shall be brought to charge any person:
(6) upon any contract for the sale of real estate,
unless the promise, contract, agreement, representation,
assurance or ratification, or some memorandum or note
thereof, be in writing and signed by the party to be
charged therewith, or by his authorized agent. ”

In connection with this section the courts have been called upon to decide if a contract for the sale of standing timber for immediate severance concerns land so as to require it to be in writing to be enforceable.²

The English courts have gone to considerable length to hold that such a sale is not a sale of an interest in land.³ However, the decisions have not been uniform.⁴ In *Teal v. Auty* the sale of standing poles was deemed a sale of an interest in land.

In 1875 the English Court most clearly stated its position in *Marshall v. Green*.⁵ The defendant in that case orally purchased twenty-two standing trees. “The trees to be got away as soon as possible.” After the defendant had entered upon the land and cut six trees, the plaintiff countermanded the sale. The countermand was ignored by the defendant, and he entered and cut the remaining trees. In denying the plaintiff recovery for trespass, the court held that the sale was of chattels only and need not be evidenced by writing.

In the United States most of the states that have considered the question have expressly held that a sale of standing trees is a sale of

¹ CLARK, CONTRACTS sec. 39 (4th ed. 1931)

² *McKenzie v. Shows*, 35 Miss. 700, 12 So. 336 (1893), *Lillie v. Dunbar*, 43 Wis. 569, 22 N.W. 467 (1885)

³ 2 WILLISTON, CONTRACTS sec. 516 (1926).

⁴ *Teal v. Auty*, 2 Br. & B. 99, 129 Eng. Rep. 895 (1820).
Contra: Smith v Surman, 9 B. & C. 561, 109 Eng. Rep. 209 (1829)

⁵ 2 Br. & B. 99, 129 Eng. Rep. 895 (1820)

⁶ 1 C.P.D. 35 (1875).

⁷ *Id.* at 36.

an interest in land.⁸ Connecticut, Kentucky, Maine, Maryland, and Massachusetts have held that the sale is of chattels only.⁹

The Kentucky Court of Appeals has held that a sale of standing trees in contemplation of immediate severance is not one concerning land.¹⁰ To arrive at this conclusion, the court has adopted a legal fiction that since the parties do not intend to embrace the land,¹¹ the trees are constructively severed by the contract and they pass as chattels.¹² As a foundation for this rule the court has used the equitable maxim that that which was intended to be done will be considered as having been done.¹³

In explaining the meaning of immediate severance the court in *Byassee v. Reese*¹⁴ said:

"The phrase 'in contemplation of immediate separation from the soil,' is used to distinguish a sale of standing trees, or growing crops, which passes no interest in land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it."¹⁵

According to the opinion in *Cheatham v. Head*,¹⁶ "immediate," as used in the above phrase, does not mean that the severance must take place at once. The severance need take place only as soon as reasonably can be done under the circumstances considering the amount of timber, its accessibility, and labor conditions.¹⁷

Although it is unnecessary that a definite time be stated within which the severance must take place,¹⁸ unless the trees are sold in contemplation of immediate severance, their character is not changed from realty to personalty.¹⁹ If the trees are sold in con-

⁸ *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913), *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S.E. 218 (1889), *Hostetter v. Auman*, 119 Ind. 7, 20 N.E. 506 (1889), *Hirth v. Graham*, 50 Ohio St. 57, 33 N.E. 90 (1893), as set out in 1 WILLISTON, SALES sec. 62 (Rev. Ed. 1948) at page 159 footnote 14.

⁹ *Bostwick v. Leach*, 3 Day (Conn.) 476 (1809), *Can v. McGuire*, 52 Ky. (13 B. Mon.) 340 (1852), *Whittington v. Hall*, 116 Md. 467, 82 Atl. 163 (1911), *Clafin v. Carpenter*, 45 Mass. (4 Metc.) 580 (1842). See *Erskine v. Plummer*, 7 Greenl. Rep. (Me.) 447, 451 (1842).

¹⁰ *Prater v. Campbell*, 110 Ky. 23, 60 S.W. 918 (1901).

¹¹ *Can v. McGuire*, 52 Ky. (13 B. Mon.) 273 (1852).

¹² *Byassee v. Reese*, 61 Ky. (4 Metc.) 334, 336 (1863).

¹³ *Gabbard v. Sheffield*, 179 Ky. 442, 450, 200 S.W. 940, 944 (1918).

¹⁴ 61 Ky. (4 Metc.) 334 (1863).

¹⁵ *Ibid.*

¹⁶ 203 Ky. 489, 262 S.W. 622 (1924).

¹⁷ *Id.* at 494, 262 S.W. 622, 624 (1924).

¹⁸ *Byassee v. Reese*, 61 Ky. (4 Metc.) 334 (1863).

¹⁹ *Gabbard v. Sheffield*, 179 Ky. 442, 450, 200 S.W. 622, 624 (1918).

templation of immediate severance, and they are not removed within a reasonable time or within the time fixed in the contract for their removal, they cease to be chattels and are restored to the status of real estate.²⁰

In order to invest the purchaser with title, it is necessary that the trees be designated so they can be identified as those sold.²¹ Thus, where the sale is of timber generally or a part of the timber on a specified tract, title will not pass unless the trees are suitably marked.²² In *Moss v. Meshew*²³ the court held that a sale of enough trees to make 40,000 staves did not pass title in the absence of marking, and did not give the purchaser the right to enter and cut the timber without the consent of the seller. Thus interpreting the sale of standing trees for immediate severance as a sale of personalty, the Kentucky Court of Appeals until 1900 held that an oral contract was valid.²⁴

In 1900 the Legislature of Kentucky enacted what is now KRS 371.100 which provides:

"No contract for the sale of standing trees or standing timber shall be enforceable by action unless the contract or some memorandum thereof is in writing, signed by the person to be charged or by his duly authorized agent."

Accordingly, in 1911, the court held in *Sears v. Ohler*²⁵ that under the statute a parol contract for the sale of standing timber was unenforceable and no action could be maintained by either party to recover damages for its breach. The defendant in that case had already entered upon the land and removed part of the timber, and the court held that although no action would lie on the contract, the plaintiff could recover in assumpsit for the timber which the defendant had already received under the contract.

Ky. Stat. sec. 1409-14, also enacted in 1900, stated:

"Wherever any timber shall be branded by the seller, or another with his consent, with the brand of the purchaser or other person or corporation, then the title to said timber shall at once pass to the person or corporation whose brand is thus placed upon it, but this shall not affect the rights of the contracting parties with respect to the payment of the purchase money therefor."

Interpreting this statute in *Burriss v. Stepp*,²⁶ the court held that the branding did not take the place of the requirement of the writ-

²⁰ *Ibid.*

²¹ *Minor v. Barlow*, 9 Ky Ops. 86 (1876).

²² *Ibid.*

²³ 71 Ky. (8 Bush) 187 (1871).

²⁴ *Prater v. Campbell*, 110 Ky. 23, 60 S.W. 918 (1901)

²⁵ 144 Ky. 473, 139 S.W. 759 (1911).

²⁶ 162 Ky. 269, 172 S.W. 526 (1915).

ing. Since KRS 371.100 did not require that the writing have the attributes of a recorded instrument, the two sections taken together meant that whenever the particular timber contracted for was branded by the seller or some other person with his consent then the sale had the same effect and force as to creditors and innocent purchasers as a recorded sale of land.

To conform to the opinion in the above case, Ky. Stat. 1409-14 was revised. The revised statute reads as follows:

“Branding of timber, effect as to third persons (1)
When a valid sale of standing timber has been made in KRS 371.100 and the timber has been branded by the seller, or another with his consent, with the brand of the purchaser, the sale shall have the same effect as to creditors and innocent purchasers as a recorded sale of land.”

The Uniform Sales Act was enacted by the Kentucky Legislature in 1928. Section 76 of this act which appears as KRS 361.760 provides:

“In this chapter, unless the context or subject matter otherwise requires: ‘Goods’ include all chattels personal other than things in action and money. The term includes implements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.”

While section 4 of the Uniform Sales Act, being KRS 361.040, states:

“(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.”

Thus by reason of KRS 361.760 a sale of standing trees is a sale of personalty. If KRS 371.100 provides that a sale of standing timber is a sale of realty, the two statutes would be inconsistent, and perhaps KRS 361.760 acted as a repeal of KRS 371.100. If KRS 371.100 was repealed, an oral contract for the sale of standing timber would be valid unless it fell within KRS 361.040. The statutes are not inconsistent upon their face as KRS 371.100 does not expressly provide that a sale of standing trees is a sale of realty, but merely requires that the contract be in writing to be enforceable. However, since the construction of the statute requiring contracts for the sale of real estate to be in writing and the statute requiring contracts for the sale of standing timber to be in writing are so similar in construc-

tion, it would seem possible that the court could infer that it was the intent of the legislature when it passes KRS 371.100 to declare a sale of standing timber to be a sale of realty. The court has not chosen to so interpret the statute, hence, the statutes are not inconsistent by express language or judicial interpretation.

Since the passage of the Uniform Sales Act only one case, *Patton v. Lucy*,²⁷ involving an oral sale of trees has been considered by the Kentucky Court of Appeals. In that case the plaintiff sought an injunction to restrain the defendant from cutting timber on his, the plaintiff's land. Prior to the plaintiff's purchase of the land, the defendant had orally purchased the timber from Church. When the plaintiff bought the land, he had notice of the contract between Church and the defendant. In denying the plaintiff an injunction the court said:

"The purpose of the statute (KRS 371.100) is apparently intended to fix the rights of the parties 'to be charged' and to fix the rights of the contracting parties."²⁸

KRS 361.760 was not mentioned.

It is submitted that KRS 361.760 did not repeal KRS 371.100, and at the present time an oral contract for standing trees is unenforceable as between the parties. However, where the parties to the contract wish to adhere to the contract, an intervening third party cannot assert its invalidity.

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²⁷ 285 Ky. 694, 148 S.W. 2d 1039 (1940)

²⁸ *Id.* at 697, 148 S.W. 2d at 1040.