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Specific Performance of a Contract to Sell Standing Timber for Immediate Severance

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SPECIFIC PERFORMANCE OF A CONTRACT TO SELL STANDING TIMBER FOR IMMEDIATE SEVERANCE

The rule in regard to specific enforcement of a contract to sell standing timber, where immediate severance is contemplated by the parties, can hardly be said to be well settled. Both in this country and in England the proposition has been greatly controverted, and there is unquestionably a great conflict of authority.

The majority rule seems to be that such a sale is one of an interest in land. In the case of *Hirth* v. *Graham*[1] the plaintiff sued for damages for a breach of a contract for the sale of timber and the defendant set up the statute of frauds. The court held, after an extensive review of the authorities, that such a sale came within the statute, as being the sale of an interest in land, saying, ". . . growing timber is regarded as an integral part of the land upon which it stands, it is not subject to the levy and sale upon execution as chattel property, it descends to the heir with the land, and passes to the vendee with the soil. . . . No case is found in which it is suggested that sales with a view to their (trees) immediate removal would not be within the statute. . . . The question whether such a sale is a sale of an interest in or concerning land should depend *not upon the intention of the parties, but upon the legal character of the subject of the contract, which in the case of growing timber is that of realty.*"[2] The weight of authority supports this view.[3] It will be seen that under this view the time of severance does not seem to be material.[4] Logically following such a construction, the courts are inclined to give specific performance of such contracts.[5] But in a number of jurisdictions, even though such a sale is conceded to transfer an interest in land, specific performance will not be granted where the remedy at law appears to be adequate and complete.[6]

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[1] 50 Ohio St. 57, 33 N. E. 90.

[2] Italics the writer's.

[3] *Green* v. *Armstrong*, 1 Denio 550; *Bowers* v. *Bowers*, 95 Pa. 477; *Kingsley* v. *Holbrook*, 45 N. H. 313, 86 Am. Dec. 183.

[4] See note to *Purner* v. *Piercy*, 17 Am. Rep. 595, for a review of the earlier authorities.

[5] *St. Regis Paper Co.* v. *Santa Clara Lumber Co.*, 173 N. Y. 149; *Stuart* v. *Pennis*, 91 Va. 688, 22 S. E. 509.

[6] *Marthinson* v. *King*, 150 Fed. 48, 82 C. C. A. 360.

There is, however, a strong minority view, holding unqualifiedly that if an immediate severance of the timber is contemplated, the sale passes an interest in personalty. In the vanguard of the jurisdictions adhering to such a rule is Kentucky.[7] The chief basis for the rule is stated by the court in the Gabbard case at page 450 of the Kentucky Reports: "The rule by which standing timber which is sold in contemplation of immediate severance, is converted from realty into personalty, is founded upon the equitable doctrine that that which was intended to be done will be considered as having been done." This rule is undoubtedly the law in a number of jurisdictions.[8] Consequently, because of this view, courts of equity are reluctant to intervene and give specific performance.[9]

This minority doctrine prevailed in several states prior to the enactment of the Sales Act. Where the Sales Act has been adopted there certainly should be no doubt as to the status of such contracts. Section 76, which is an exact copy of Section 62 of the English Sale of Goods Act of 1893, provides that the term "goods" includes "emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale." Unquestionably there is no ambiguity couched in this phrase, and it is hard to see how any court deciding a case involving a sale of timber for immediate severance could go astray in its interpretation.

But in the case of *Schach v. Wolf*,[10] the court disregarded this provision of the Sales Act in deciding that such a sale of timber was a sale of an interest in land. The court seemed to prefer to follow a long line of former Wisconsin decisions rather than the Act. This decision has been severely criticized for thus disregarding the statute in a note in the Cornell Law Quarterly[11] The writer there said: "So construed (referring to the correct interpretation) the section would embrace practically all contracts of this kind, for it is very rare that a sale of trees is

[7] *Gabbard* v. *Sheffield*, 179 Ky. 442, 200 S. W. 942; *Cheatham* v. *Heda*, 203 Ky. 489, 263 S. W. 622.

69 Atl. 818; In re Benjamin, 140 Fed. 320.

[8] *Douglas* v. *Sumway*, 13 Gray 498; *Strause* v. *Berger*, 222 Pa. 367,

[9] *Paddock* v. *Davenport*, 107 N. C. 710, 12 S. E. 464; *Borner* v. *Canaday*, 79 Miss. 222, 30 So. 638.

[10] 173 Wis. 351, 181 N. W. 214.

[11] 6 Cornell Law Quarterly 426.

made where severance within a fairly short time is not intended. This definition of goods was inserted undoubtedly in the act for the express purpose of doing away with the diversity of opinion existing in the different states on this point at common law." There are a number of English decisions construing this section of the Sales Act cited.[12] These authorities are agreed in holding that such a sale is strictly one of personalty. In this country there seems to be little or no authority construing this provision of the act, but the leading text writers have followed with approval the English courts in their interpretation.[13]

But what of specific performance under this minority view? If timber be considered as personal property, then damages are usually held to be an adequate relief.[14] But this is not the case where timber has a special value to the purchaser, or is unique and cannot be obtained readily elsewhere. In *Strause* v. *Berger*[15] the court, after specifically holding the timber to be personalty, granted specific performance because "the timber had a special value to the plaintiff for the use for which he bought it, because of its quality, and because of the difficulty of procuring such timber in the locality in which his business was conducted." This decision closely follows the reasoning in *Voil* v. *Osburn*,[16] another Pennsylvania case.

In conclusion it is submitted that although the weight of authority holds a sale of standing timber for immediate severance to be the sale of an interest in land, nevertheless, a strong minority, including Kentucky, adhere to the contrary rule. It would seem that this minority rule represents the sounder view upon the question. In such a sale the intention of the parties is clearly that the timber be classed as personalty. The majority of the courts still cling, however, to the view that this should not govern, but that the inherent nature of the subject matter should be the criterion. Such courts, after laying down this ironclad assertion, seem to be fully content with it, reasoning that since timber is attached to the soil, is not subject to levy and sale as

[12] *Jones* v. *Tankerville*, 2 Ch. 440 (1909); *Morgan* v. *Russell & Son*, 1 K. B. 357 (1909); *Fredkin* v. *Gline*, 18 Manitoba, 249, s. c. 8 Western Law Rep. (Can.) 587.

[13] Burdick on Sales (3rd ed.) pp. 29-30; Tiffany on Sales, p. 76; Williston on Sales (2nd ed.) sec. 62.

[14] *Paddock* v. *Davenport*, supra.

[15] Supra.

[16] 174 Pa. 580, 34 Atl. 315.

chattel property, descends to the heirs with the land, and passes to the vendee with the soil, it is bound to be regarded as realty in all cases.

Even before the enactment of the Sales Act this position was questionable, but since the passage of that act, there can be little doubt that it is untenable. Under the more equitable minority view, equity's jurisdiction is really not interfered with. The right to give specific performance where the remedy at law is inadequate is still retained in all its vigor. This is, from a practical viewpoint, the true criterion. The trend of the law seems to be toward the minority rule.

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