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Presumably, to a lumberman, a manufacturer, a wage earner or an investor a stand of trees is just a given number of trees of various types, or, perhaps better, a given quantity in board feet of merchantable lumber, which can be profitably converted into money as and when proximity to market and market price permit. More broadly, to a conservationist, trees in various stages of growth are national assets capable of continuous reproduction and the source of a constant as well as an immediate supply of material for structural and other uses. These differences in approach aside, and leaving out of account the relation of forests to water supply and the value of trees in preventing soil erosion, it is obvious that timber is a consumable commodity. Yet, in contrast with coal, iron, oil and other mineral content of the soil, trees are a product and not a part of the soil; they occupy space, but their removal does not leave an emptiness for which no particular use has been discovered as is the case in mining operations; rather, when the timber is cut, the removal releases the soil for a further growth of timber, or for agriculture, or for building.

In the light of these considerations, it seems strangely out of place to attribute the quality of an estate in the timber as distinct from the estate in the soil to whatever may be the aggregate of rights exercisable wih respect to either the land or the timber by one whose sole ultimate object is to remove the timber. Admittedly, the land, meaning generally the soil and whatever is within it and growing upon it,[1] is not the estate; the latter is the collection of rights, privileges, powers and immunities which the law recognizes in persons with respect to the land and which are summed up in the appellation of "owner"; the land is the object, the dominion is property, and the estate is the degree or measure of the dominion or control.[2] Thus, whatever is growing upon the land, appears as a part of the object of the property in the land, and the rights exercisable in respect thereto a division of the totality of all the rights exercisable in respect to the land, a part of the estate in the land. In this theorizing in the law of property, the estate interest in land appears as the archetype of ownership from the point of view of the greatest possible degree of control, for there is employed in its definition the maximum of exclusive control over space, being restricted by conventional physical boundaries alone, and the maximum possible duration of that control, that is, infinity.[3] Yet, to

[1] 2 BL. COMM (Lewis ed. 1900) *17.

[2] *Cf.* RESTATEMENT, PROPERTY, § 5; 2 BL. COMM. *15, 103; Hohfeld, *Faulty Analysis in Easement and License Cases* (1917) 27 YALE L. J. 66, 68, and n. 8, p. 69.

[3] RESTATEMENT, PROPERTY, § 9 (estate); § 14 (estate in fee simple).

fit a forest or a stand of timber into this framework, disregarding the soil which sustains it, requires considerable twisting of the orthodox meanings of possession as an element in the dominion or control within described boundaries, and of potential infinite duration of that dominion or control in point of time.

It may fairly be supposed that the practice of conveying growing timber in the terminology of transferring estates in fee simple has developed for the purpose of giving to this type of thing as the object of property ownership the utmost in security and control. For no greater degree of security and control with respect to things movable or immovable exists in common law jurisprudence than where the dominion, the power of disposition, and the power to exact compensation for interference with use and disposition, belongs to one of his heirs forever.[4] However, it is only by shifts in the meaning of words that the concept of ownership in fee simple can be applied to any object capable of destruction. As evolved in the law of real property, the necessary characteristics of exclusive control and unlimited duration contained in the fee simple interest are the products of physical attributes thought of as inhering only in land, namely: a subject matter capable of physical occupation and defense, and enduring forever.[5] Obviously, when talking about a fee simple interest or a fee simple estate in something other than land, there are being substituted for these characteristics of land the analogues of which the subject matter no land may be capable; *i.e.*, the purely legal concept of exclusive control plus the duration of this control for so long a period as the subject matter itself may exist in identifiable form. This process of thought is easily recognized when a court holds that a conveyance of the "full right" to extract and carry away coal conveys an estate in fee simple in the coal.[6] In such a case as this it is impossible to conceive of the physical occupation of the coal apart from the land, for as the land surrounds the coal the occupation must be thought of as being of a particular part of the land;[7] and it is no less impossible to reconcile enjoyment of the coal with its indefinite duration.

In the case of trees not bearing fruit, use value and indefinite duration are just as much contradictory as in the case of coal or other minerals; although, in any case, growth and decay ought to be enough reason for regarding theorizing on the basis of infinite duration as highly fantastic. In all cases of tree ownership, exclusive control apart from the land is an impractical conception, and such control as may be asserted on any hypothesis of legal interest in the trees seems necessarily, at least *pro*

[4] *Cf.* Clap v. Draper, 4 Mass. 266 (1808).
[5] RESTATEMENT, PROPERTY, §§ 7, 9.
[6] Caldwell v. Fulton, 31 Pa. 475 (1858).
[7] *Cf.* Eli v. Trent, 195 Ky. 26, 241 S. W. 324 (1922). *See also*, Guy v. First Carolinas Joint Stock Land Bank, 205 N. C. 357, 171 S. E. 341 (1933); Scott v. Laws, 185 Ky. 440, 215 S. W. 81 (1919); Note 13 A. L. R. 372.

tanto, control over the soil. Nor is it as sensible to fictionize the possibility of indefinite duration in the case of trees as may be done in the case of minerals, for in the case of trees, loss by decay and destruction by the elements are too common to be ignored. Beyond these comparisons, theoretical approaches to the character of the property interest in trees must surmount a radical distinction between the possibilities of rationalization regarding this species of property and that which can be applied to the mineral content of the earth. In the case of minerals, the concept of an estate in the space which they occupy could be an adequate basis for attributing to the ownership of this type of property all the incidents attendant upon the ownership of land including the minerals.[8] On the other hand, as already suggested, when the timber is removed there is an end to any interest in the land space which can be attributed to the timber grantee; to give him more is to give him the land itself.[9] Confessedly, the points advanced here cannot be said to have been the subject of analysis by either judges or text-writers; they have been advanced largely for the purpose of disencumbering the discussion of the necessity of dealing with the complicated field of mineral rights, and to avoid the pitfalls which so frequently attend the use of analogies for theoretical purposes.[10]

The purpose of this discussion is to suggest that while common practice and persistent judicial discussion try to deal with interests in growing timber created by deed as if this species of property were susceptible to the creation of estates in fee simple in growing timber as separate from such states in the land, such conveyances do not in essence create anything more than an exclusive right to profit, a *profit a prendre,* a right to take and carry away the timber, the title to which remains in the grantor as an incident of his estate in the land until severance and removal.[11] Since a right of profit as well as an estate is an interest in land,[12] a preliminary difficulty sometimes met in the timber cases is not material to this discussion. That is the question whether the interest

[8] In Christopher v. Curtis-Attalla Lumber Co., 175 Ala. 484, 57 So. 837 (1912) it was said: "possession of growing timber, independently of any possesion of the land itself, is a legal impossibility." The special dominion in coal cases, is at best, of limited duration; *i.e.,* until the deposit is exhausted: Greek v. Wylie, 266 Pa. 18, 109 Atl. 529 (1920); McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S. W. 694 (1909).

[9] Boults v. Mitchell, 15 Pa. 371 (1850); McNair & Wade Land Co. v. Adams, 54 Fla. 550, 45 So. 492 (1907); Willetts Wood Products Co. v. Concordia L. & T. Co., 169 La. 240, 124 So. 841 (1929).

[10] *Cf.* Fox v. Pearl River Lumber Co., 80 Miss. 1, 31 So. 583 (1902); Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 S. E. 358 (1908).

[11] The essential element in the aggregate of the profit owner's rights are "the legal powers of acquiring ownership of the several parts of the servient land by exercising the legal privilege of making physical severance." Hohfeld, *Faulty Analysis in Easement and License Cases, supra,* note 2, at 68-70, 97-8; TIFFANY, REAL PROPERTY (3rd ed. 1939) § 839; RESTATEMENT, PROPERTY, SERVITUDES (Tent. Draft No. 8) § 2; Callahan v. Martin, 3 Cal.(2d) 110, 43 P.(2d) 788 (1935). *Cf.* Baker v. Kenney, 145 Ia. 638, 124 N. W. 901 (1910) (timber deed creating a right of profit).

[12] RESTATEMENT, PROPERTY, § 5.

created by a conveyance[13] of standing timber is real or personal property, within the statute of frauds, depending upon whether or not the parties can be said to contemplate an immediate cutting and removal of the timber and hence intended a "constructive" severance converting the timber from realty into personalty at the time of conveyance.[14] The application of a statute of frauds to these transactions is merely a matter of construction for the purpose of determining if the language of the local statute is broad enough to include all interests in land.

The term "real property" is rather loosely applied to every interest in land when discussing the statute of frauds. But the Restatement prefers to restrict its meaning to freehold estates,[15] and thus suggests the impropriety of applying the term to lesser interests in land; but an obvious basis for this limited use is the duration of the interest[16] and a willingness to preserve the classical distinction between real estate and personal estate or chattel interests.[17] Yet the problem of statutory construction above referred to is not affected; a specific statute either includes or it does not include all interests in land, and, may or may not distinguish between interests of different durations; so, where a statute will apply to the creation of an estate in land, whatever its duration, it may also apply to a profit, whatever its duration, for the latter, while classified as an incorporeal hereditament, may no less than an estate be created for a term of years, *i.e.*, may be a chattel real.[18]

Statutory requirements as to a writing aside, it should be apparent that no form of a conveyance, no word formula, purporting to create an estate in timber of less duration than a fee, *e.g.*, for life or for years, can effect a transfer of the property in the trees, but at the most will only serve to supply indicators of the time within which removal is to be accomplished, leaving for implication the grant of the right to remove.[19] Certainly timber, when its use consists in converting the tree into materials for manufacturing and fabrication, cannot be enjoyed for life or for years and then returned to one in remainder or reversion. To accomplish such a paradox the notion of ownership of an estate in the timber must be abandoned; for what is returned is not the estate granted but the unremoved timber.[20] This perplexity is not diminished when the conveyance is in the form of a grant of an estate

[13] An effort is made to use the word "conveyance" as meaning only an act intended to create a property interest without suggesting the precise character of the interest created. *See* RESTATEMENT, PROPERTY, § 11.

[14] *Cf.* Cheatham v. Head, 203 Ky. 489, 262 S. W. 622 (1924); Slocum v. Seymour, 36 N. J. L. 138 (1873); Seymour v. Cushway, 100 Wis. 580, 76 N. W. 769 (1898).

[15] RESTATEMENT, PROPERTY, § 8.

[16] *Id.*

[17] 2 BL. COMM. (Lewis ed. 1900) *386.

[18] Callahan v. Martin, 3 Cal. (2d) 110, 43 P. (2d) 788 (1935).

[19] *Cf.* White v. Foster, 102 Mass. 375 (1869).

[20] *Cf.* Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 738 (1910) ("the timber conveyed is capable of definite ascertainment").

in fee simple, or fee simple defeasible[21] by reason of the inclusion of a limitation, condition or restriction as to time of removal and "reversion" to the grantor in default of removal. For here, also, what "reverts" to the grantor (or his successors) is not the estate but the unremoved timber.[22]

However, paradoxes serve only to expose the absurdity of positions built upon refinement and fiction. In the situations put the real subject-matter of the transaction is control over the timber. It is this control transferred from the owner of the land by the terms of the grant which ceases, either upon exhaustion of its object[23] or the failure to exercise it within the limits expressly stated or implied.[24] But control is a variable concept; the word is not one of art, it applies indifferently to the results in combination of basic factors, and the degree of control is affected by the presence or absence of one or more of these factors. Thus, in the case of interests in land, which, of course, can embrace all the rights, privileges, powers and immunities recognizable in relation to land and things in or upon the land,[25] the greatest degree of control is embodied in the concept of an estate in land; and the element which distinguishes an estate from all other interests in land, with consequent gradations of control, is the possessory nature of the estate interest.[26] Hence, by definition, any degree of control over land, such as the right to cut and remove timber therefrom, which does not derive from a possessory interest in land, is not co-extensive with an estate in land.[27]

Arrival at this point does not exclude the use of the general concept of an estate as applied to the ownership of timber or of the estate in land as the pattern for the determination of the degree of control to be accorded to the grantee in a timber deed, provided it can be established that the conveyance creates a possessory interest in the timber distinct from the possessory interest in the soil; for the latter, on the

[21] RESTATEMENT, PROPERTY, § 16. Sometimes the interest of the timber grantee is denominated as an estate "determinable" or "defeasible." Jones v. Graham, 141 Ga. 60, 80 S. E. 7 (1913); Flagler v. Atlantic Coast Lumber Corporation, 89 S. C. 328, 71 S. E. 849 (1911).

[22] Since a reasonable time for removal is generally implied when none is stated, the latter circumstance does not seem to change the result. *See* Ozan-Graysonia Lumber Co. v. Swearingen, 168 Ark. 595, 271 S. W. 6 (1925); Earl v. Harris, 99 Ark. 112, 137 S. W. 806 (1911); Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62 (1912); McNair & Wade Land Co. v. Adams, 54 Fla. 550, 45 So. 492 (1907); Kavanaugh v. Frost-Johnson Lumber Co., 149 La. 972, 90 So. 275 (1921); Nelson v. McKinney, 163 Wash. 529, 1 P. (2d) 876 (1931).

[23] Kaul v. Weed, 203 Pa. 586, 53 Atl. 489 (1902), denying right to make a second cutting in order to profit by a newly developed market for pulp and chemical wood.

[24] So it has been held that failure to remove the timber within a reasonable time will constitute abandonment. Probst v. Young, 187 Ark. 233, 59 S. W. (2d) 17 (1933); McNair & Wade Land Co. v. Parker, 64 Fla. 371, 59 So. 959 (1912); Nelson v. McKinney, 163 Wash. 529, 1 P. (2d) 876 (1931).

[25] RESTATEMENT, PROPERTY, § 5.

[26] *Id.*, §§ 7, 9.

[27] *Ibid.* *See* illustration 4 (II) under § 7, and note exclusion of profits in the comment (b) to § 9.

hypothesis of separate estates in the timber and the soil, must continue.[28] The possibility, or perhaps feasibility, of this dual possession appears to be excluded by the wording of the Property Restatement; for the definition of possessory interests employs the conjunction of the factor of a physical relation and "an intent to exercise such control as to exclude other members of society in general from any present occupation of the land."[29] Growing timber hardly seems susceptible of occupation apart from the land, and the timber grantee is within the class of "other members of society" excluded from occupation of the land; if not, he has an estate in the land, not merely in the timber.

There is some judicial support for the view that there may be a possessory interest in growing timber independent of the possessory interest in the soil. Perhaps the most explicit authority is the fairly early Massachusetts case of *Clap vs. Draper*.[30] Here it was held that the reservation of the trees and timber in a conveyance of the "close" created such an interest in the growing timber as would support an action *quare clausum fregit* for cutting trees, *i.e.*, an action technically based on present possession.[31] On the other hand, in *Goldsboro Lumber Company v. Hines*,[32] the North Carolina Supreme Court refused injunctive protection to the vendee of timber against the construction of a tram line across the land on which the timber was growing, although it was alleged that such construction would injure growing trees which had not reached the prescribed cutting diameter. Here the court said: "Until the conditions of growth and severance have been performed, the plaintiff has no property interest in such trees as this court can protect. The loss of such trees may defeat plaintiff's contingent rights, but would not be an injury to his property." Clearly, no possessory interest in growing timber was recognized by this court.

[28] The transition from "land" to "soil" is made for the purpose of avoiding confusion in expression; land includes things growing on the earth's surface. 2 BL. COMM. (Lewis ed. 1900) *17.

[29] RESTATEMENT, PROPERTY, § 7.

[30] 4 Mass. 266 (1808).

[31] In any event, it is the invasion of the right to exclusive occupation of the soil, even temporarily, which constitutes the trespass. *Cf.* Holford v. Bailey, 13 Q. B. (13 A. & E. n. s.) 426 (1850) (trespass for taking fish, plaintiff owner of exclusive fishery); Fitzgerald v. Firbank (1897) 2 Ch. 96, *semble*. This notion has been applied to things growing in the soil since they occupy a portion of the soil and some occupation is necessary to remove them. *Cf.* 2 BL. COMM. (Jones ed. 1916) *210, and note in Lewis' Edition (1900), p. 1196 (the editor adopting Chitty's treatment of the subject of Trespass); *see* Narehood v. Wilhelm, 69 Pa. 64 (1871). Similarly, cases can be found in which ejectment has been allowed on behalf of the owner of the timber, although the same person does not own the soil. Here it is the present right to occupy the soil for the purpose of removing the timber which is thought sufficient to sustain the action; or, as the cases say, the right of entry justifies the action. *See* Narehood v. Wilhelm, *supra;* Greber v. Kleckner, 2 Pa. 289 (1845); Goodwin v. Hubbard, 47 Me. 595 (1860); Robinson v. Gee, 26 N. C. 186 (1843); Goodrich v. Hathaway, 1 Vt. 485 (1829); *Cf.* Christopher v. Curtis-Attalla Lumber Co., 175 Ala. 484, 57 So. 837 (1912); Mt. Vernon Lumber Co. v. Shepard, 180 Ala. 148, 60 So. 825 (1913); Walters v. Sheffield, 75 Fla. 505, 78 So. 539 (1918).

[32] 126 N. C. 254, 35 S. E. 458 (1900).

It has also been decided that, after a conveyance of timber, adverse possession of the soil is not adverse possession of the trees.[33] But this conclusion does not require that the timber interest have a possessory quality, since the same is true with respect to servitudes, which are not extinguished by adverse possession of the land unless that possession is also hostile to the continued existence of the servitude.[34] Conversely, possession of the land may be limited to a claim to a right to cut and remove the timber under color of title so as to establish title to such right by adverse possession (sic) operating as a severance of the right to the timber from the other incidents of the estate in the land.[35] Where the land is unoccupied, it is practical to attribute possession to the person who has the immediate right of occupancy as against all persons,[36] and to call such relation to the land constructive possession.[37] Nor is it much out of the way to extend this fiction to things growing on the land, so long as it is possible to say that actual occupancy, when it occurs, is not adverse in intent to the continued existence of a different interest in the land respecting such things. This fictionizing would be sufficient (although the necessity for it can be made apparent only by examining specific statutes of limitation) to sustain the acquisition of a right to the timber by lapse of time under color of title,[38] as in the case above referred to, while the land remains unoccupied. But such superficial reasons as there might be for extending the doctrine of constructive possession to interests in land not suceptible of actual occupation disappear when it is held that the timber grantee is bound to take notice of changes in occupancy of the land[39] or changes in the record title to the land.[40]

It has been remarked that "there is nothing in our law which forbids a land owner from dividing his estate." This, of course, is true, but the question remains: What are the limits of this division in terms of estate ownership as distinguished from the ownership of other interests in land involving lesser degrees of control? In the case from which the above remark is quoted it was held that the effect of a timber deed

[33] *See* Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 S. E. 358 (1908).

[34] TIFFANY, REAL PROPERTY, (3d ed. 1939) § 827. The reason is that use of the soil is not necessarily inconsistent with and so adverse to the continuance of the servitude. Arnold v. Stevens, 41 Mass. (Pick.) 106 (1839) (a case of a profit); *see also* Fulcher v. Diercks Lumber & Coal Co., 164 Ark. 261, 261 S. W. 645 (1924).

[35] *See* Red River Lumber Co. v. Null, 66 Cal. App. 499, 226 Pac. 812 (1924); Hendrickson v. Lyons, 121 Wash. 632, 209 Pac. 1095 (1922).

[36] *Cf.* RESTATEMENT, TORTS, § 157.

[37] RESTATEMENT, PROPERTY, §7 (comment b.).

[38] Actual notice of the claim, or constructive notice by recording the timber deed being admitted. Red River Lumber Co. v. Null, 66 Cal. App. 499, 226 Pac. 812 (1294); North Georgia Co. v. Beebe, 128 Ga. 563, 57 S. E. 873 (1907); Hogg v. Frazier, 24 K. L. Rep. 930, 70 S. W. 291 (1902); Gray v. Edgar Lumber Co., 138 La. 906, 70 So. 877 (1916).

[39] J. Neils Lumber Company v. Hines, 93 Minn. 505, 101 N. W. 959 (1904).

[40] Elmonte Investment Co. v. Shafer Bros. Logging Co., 192 Wash. 1, 72 P. (2d) 311 (1937).

was to create in the landowner, who, before conveyance, had an unqualified estate in fee simple in the land, "a contingent future estate in the timber, with an estate in reversion in the soil." The first, the court said, was independent of the existence (in the same person) of the second and could be retained by excepting it from the grant of the second, *i.e.*, a conveyance of the land by usual description excepting the timber.[41] Under this construction, two reversionary interests are deemed to be created by either (a) a conveyance of the timber or (b) a conveyance of the land excepting the timber; the one in the timber, which is contingent, since there might not be any timber to which any sort of an interest could attach; and the other in the soil (which is presumably to be deemed vested as a good reversionary interest should be), since the owner of this interest, the grantor or subsequent grantees of the land, may be deprived of the use of the soil for the time stipulated for the removal of the timber. Inasmuch as the "reversionary" interest in the timber is at best contingent, it is a "possibility of reverter"; yet, the "possibility" does not exclusively lie in the happening of an event which will terminate the grantee's ownership of the interest created (lapse of time), but just as much in the anticipated destruction of the subject matter, a circumstance which would seem to characterize this particular future interest as an innovation.[42]

The idea of any sort of a reversionary interest remaining in a grantor necessarily requires that the conveyance be of something less than the whole of the grantor's interest. The introduction of a time limit for the removal of timber when the grant is made does easily suggest that the whole of the grantor's interest in the timber is not conveyed. The freedom with which the courts insist upon removal within a reasonable time where no time is stated shows a general appreciation of the fact that the contrary is not commonly intended in these transactions.[43] This, however, does not require holding that title to growing timber separate from title to the land including the timber passes at the time of the conveyance. The division in ownership which takes place upon the conveyance is a division in the incidents or rights attendant upon ownership of an estate in fee simple in the land whereby the owner of all such incidents or rights relating to the land severs the ownership of the particular right to cut and remove the trees and grants that right away. What is thus granted and so what passes into new ownership is the right, for a limited period of time, but which the grantor could exercise without time limit, to cut and carry the timber away. All

[41] La Cook Farm Lands Company v. Northern Lumber Company, 159 Minn. 523, 200 N. W. 801 (1924).

[42] *Cf.* RESTATEMENT, PROPERTY, § 153, requiring segmentation of ownership in terms of duration to constitute a future interest.

[43] Boults v. Mitchell, 15 Pa. 371 (1850); McNair & Wade Land Company v. Parker, 64 Fla. 371, 59 So. 959 (1912); Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62 (1912).

that passes to the timber grantee is this right; he has title to this right; but, until severed, the trees remain part of the land and the estate of the grantor in the land in terms of the totality of all his rights therein is diminished only to the extent that this granted right of removal remains to be exercised. The land owner has not parted with any segment of his estate in the land;[44] he has merely parted with the right to appropriate part of the land by severance, with the consequence that upon such appropriation the physical substance of his estate will be so far diminished. The owner of the right to cut and remove the timber, the so-called timber owner, on the other hand, can translate his ownership of his right into ownership of the timber severed from the land, *i.e.*, convert an interest in land to an interest in personalty; but when his cutting operations cease, or if he fails to exercise his right within the time allowed, he loses, not the timber but the right to acquire a property therein by severance.[45]

It is submitted that reasoning from any other premise than that the timber grantee obtains only the right to remove the timber and so make it his own is unnecessarily prolix and confusing, not to say useless. While the right is still alive in someone other than the owner of the soil, it is not to be denied that the owner of such right has a property in the trees.[46] After the time for removal has expired, it is unimportant as between the parties to the conveyance and those claiming under them, whether the conveyance carried title to the growing timber or only to such as is cut and removed.[47] The point of conflict in these timber cases is where a claim to the timber derived from a conveyance by the usual land description without excepting the timber crosses a

[44] *Cf.* RESTATEMENT, PROPERTY, *supra*, note 42. It is suggested that the only proper place for recognizing a reversionary interest in timber is where one who has the right to remove the timber but is not the owner of the land grants to another the timber right other than by an assignment. *See* Texas Creosoting Co. v. Hartburg Lumber Co. (T. C. A.) 298 S. W. 645 (1927); Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala. 465, 16 So. 632, 53 A. S. R. 73, 27 L. R. A. 434 (1894); Probst v. Young, 187 Ark. 233, 59 S. W. (2d) 17 (1933); Gabbard v. Sheffield, 179 Ky. 442, 200 S. W. 940, 16 A. L. R. 1 (1918).

[45] *Cf.* Mt. Vernon Lumber Company v. Shepard, 180 Ala. 148, 60 So. 825 (1913); McNair & Wade Land Company v. Parker, 64 Fla. 371, 59 So. 959 (1912); St. Louis Cypress Company v. Thibodaux, 120 La. 834, 45 So. 742 (1908); Williams v. Cape Fear Lumber Co., 172 N. C. 299, 90 S. E. 254 (1916); Goldsboro Lumber Company v. Hines, 126 N. C. 254, 35 S. E. 458 (1900); Kaul v. Weed, 203 Pa. 586, 53 Atl. 489 (1902); Hall v. Ritter Lumber Company, 167 Va. 95, 187 S. E. 503 (1936); Blackstone Mfg. Co. v. Allen, 117 Va. 452, 85 S. E. 568 (1915); Nelson v. McKinney, 163 Wash. 529, 1 P. (2d) 876 (1931).

[46] As to the distributive character of the word "property," see I RESTATEMENT, PROPERTY, Introductory Note, Chapter 1, and Comment (e), § 5.

[47] Bunch v. Elizabeth City Lumber Company, 134 N. C. 116, 46 S. E. 24 (1903). The same may also be said where nothing more than the validity of the grant is in dispute. *Cf.* Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 738 (1910), involving the contention that a timber deed containing no time limit on removal created a perpetuity.

conveyance of the timber *eo nominee.*[48] Here the question is whether or not the right to remove the timber (which is still part of the land) has been transferred with the estate described. The usual language of a deed to real property certainly does include growing timber; yet, on the hypothesis that the timber deed operates to create an estate in the timber independent of the estate in the soil,[49] prior conveyance of the timber must operate to exclude every right to the timber from the conveyance of the soil, notwithstanding the language employed in the subsequent conveyance.

Those courts which have carried out logically the notion of separate estates in the soil and the timber may at least be commended for recognizing that the timber "estate" is the subject of transfer distinct from any transfer of the soil.[50] But the merit of consistency is lacking when it is said that the "reversionary" interest of the grantor of the timber estate is transferred by the generality of the descriptive matter alone in a subsequent conveyance of the soil.[51] Justification for thus entwining the two estates (no other term seems suitable, for the "reversionary" interest relates to the timber estate and not to the estate in the soil) is occasionally founded upon the premise that the "timber reverts to the owner of the land."[52] Yet it is obviously fallacious, if there be two estates, to identify in the same person ownership of the soil and

[48] *Cases involving taxation.* Huffman v. Henderson Co., 184 Ark. 278, 42 S. W. (2d) 221 (1931); Brown v. Hodge Hunt Lumber Co., 162 La. 635, 110 So. 886 (1927); France v. Deep River Logging Co., 79 Wash. 336, 140 Pac. 361 (1914). *Cases involving liens and executions.* La Cook Farm Lands Co. v. Northern Lumber Co., 159 Minn. 523, 200 N. W. 801 (1924); Fowle v. McLean, 168 N. C. 537, 84 S. E. 852 (1915); Havens v. Pearson, 334 Pa. 570, 6 Atl. (2d) 84 (1939). These do not present any different point of conflict from those involving voluntary conveyances.

[49] *See* La Cook Farm Lands Co. v. Northern Lumber Co., 159 Minn. 523, 200 N. W. 801 (1924); *cf.* cases denying that the owner of the timber and the owner of the soil are tenants in common. Wisconsin Alabama Lumber Co. v. Sewell, 222 Ala. 696, 134 So. 9 (1931); Shepard v. Mt. Vernon Lumber Co., 192 Ala. 322, 68 So. 880 (1915); Dexter v. Lathrop, 136 Pa. 565, 20 Atl. 545 (1890).

[50] North Georgia Co. v. Beebe, 128 Ga. 563, 57 S. E. 873 (1907); Gray v. Edgar Lumber Co., 138 La. 906, 70 So. 877 (1916); Smith v. Salmen B. & L. Co., 151 Miss. 329, 118 So. 179 (1928); DeGoosh v. Baldwin & Russ, 85 Vt. 312, 82 Atl. 182 (1912). *But cf.* Bodcaw Lumber Co. v. Clifton Heirs, 169 La. 759, 126 So. 52 (1930); Crowell & Spencer Lumber Co. v. Burns, 191 La. 733, 186 So. 85 (1939). In Louisiana trees are required to be dealt with as immovable property until severed. La. C. C. (1932), Art. 465; *also,* servitudes in gross do not seem to be permitted; *id.,* Art. 652. *See also* GEN. STAT. 1939, § 6548 (Act 1904) requiring standing timber to be dealt with as being capable of being held separate from soil.

[51] *Cf.* La Cook Farm Lands Co. v. Northern Lumber Co., note 49 *supra; see* Ozan-Graysonia Lumber Co. v. Swearingen, 168 Ark. 595, 271 S. W. 6 (1925); Earl v. Harris, 99 Ark. 112, 137 S. W. 806 (1911); W. J. Downing Lumber Co. v. Riley, 163 N. C. 254, 79 S. E. 605 (1913); Texas Creosoting Co. v. Hartburg Lumber Co., (T. C. A.) 298 S. W. 645 (1927); Elmonte Investment Co. v. Shafer Bros. Logging Co., 192 Wash. 1, 72 P. (2d) 311 (1937).

[52] Bodcaw Lumber Co. v. Clifton Heirs, 169 La. 759, 126 So. 52 (1930): "As the timber, not removed within the time specified, reverts to the owner of the land, it follows that the reversionary right to it, in the absence of a clear expression to the contrary, follows the ownership of the land."

ownership of a reversionary interest in the timber without at the same time recognizing that these two interests are owned as different and independent estates.[53] The correct view is suggested by the following quotation from a case in Minnesota[54] (without, however, recommending the decisions of that state as a model of reasoning[55]): "But the timber in question (the subject of a prior conveyance) being a part of the realty . . . necessarily and as a matter of law passed to the fee owner on the default of the holder of the timber deed to cut and remove it precisely as all other rights and interests forming part of the land pass to the holder of the fee." Since all other rights and interests "forming part of the land" which pass to the holder of the fee do so on conveyance of the fee, the court's language is a rather plain statement of the view that the prior timber deed merely transferred for a limited period of time the fee owner's right to remove the timber, and negatives the creation of a separate estate in the timber.

Possibly, responsibility for the view that the interest of the timber grantee has all the habiliments of an estate entailing an indulgence in the technical nature of estates or future interests in reversions and reverters, is to be accredited to the anachronistic holding that a timber deed can convey absolute title to growing timber, although a clause limiting the time for removal may cut off all enjoyment of this "absolute" title.[56] Practically, avoidance of such extreme literalness required the insertion of a specific declaration to the effect that, upon expiration of the time stated for removal, the "timber" should "revert" to the grantor, although it would be an easy step to imply such a result as the obvious intention of the parties to the transaction.[57] So it might be said that improper terminology and the desire to wrest the last thread of control and security for the timber grantee out of the technical language of conveyancing has had a greater influence on judicial "logic" in timber cases than careful analysis of important basic concepts in property law. Hardly is it to be believed that the parties to these transactions suppose that the timber grantee is to receive an interest in the land (for such it must be in all events if the timber is to remain upon the land) which would survive the time fixed for removal, or

[53] *See* cases cited note 49 *supra.*

[54] International Lumber Co. v. Staude, 144 Minn. 356, 175 N. W. 909 (1919).

[55] *Cf.* case cited note 41 *supra.*

[56] *See* Wisconsin Alabama Lumber Co. v. Sewell, 222 Ala. 696, 134 So. 9 (1931); Pierce v. Finerty, 76 N. H. 38, 76 Atl. 194, 29 L. R. A. (N. S.) 547 (1910); DeGoosh v. Baldwin & Russ, 85 Vt. 312, 82 Atl. 182 (1912). Of course the owner of the soil, having no title to the timber, can be held in damages for cutting it. Wisconsin Alabama Lumber Co. v. Sewell, *supra;* Green v. Bennett, 23 Mich. 464 (1871). In Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62 (1912) and Anderson v. Pallandine, 39 Cal. 256, 178 Pac. 553 (1918), the court chose to regard the time clause as a covenant with some right in the owner of the soil to enforce removal by way of mitigating damages for the breach.

[57] A. C. Tuxbury Lumber Co. v. Byrd, 131 S. C. 32, 127 S. E. 267 (1925).

which would allow a perpetual use of the land for timber cultivation when no time for removal is stated.[58] The essential objective of the transaction is the removal of the timber, and the simple view that the timber deed transfers nothing more than the fee owner's right to remove the timber coincides with the intention of the parties that the timber should be removed.[59]

[58] Sometimes judges have been sufficiently *strictissimi juris* to announce that the parties can do so if they so desire: Butterfield Lumber Co. v. Guy, 92 Miss. 361, 46 So. 78, 15 L. R. A. (N. S.) 1123, 113 Am. St. Rep. 530 (1908); Hendrickson v. Lyons, 121 Wash. 632, 209 Pac. 1095 (1922).

[59] *Cf.* Bond v. Ungerecht, 129 Tenn. 631, 161 S. W. 1116, L. R. A. 1915A 571 (1914); Allen & Nelson Mill Co. v. Vaughn, 57 Wash. 163, 106 Pac. 622 (1910).