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SPECIFIC PERFORMANCE OF CONTRACTS FOR SALE OF NON- UNIQUE STANDING TIMBER FOR IMMEDIATE SEVERANCE

It is the purpose of this note to determine the common law rule as to specific enforcement of contracts for the sale of non-unique standing timber to be severed immediately, and the effect of the Uniform Sales Act and other pertinent statutes thereupon. For the purpose of brevity, the writer will not use the phrase "non-unique standing timber for immediate severance" in every instance, but will merely use the word "timber" to suffice for the entire phrase.

At common law much controversy arose as to whether the timber, under the contract of sale, was realty or personalty since this was the primary problem to be decided before specific performance could be decreed. The necessity for such a decision came from the firmly established rule of equity that land is considered to be unique and contracts for the sale of land are specifically enforced because damages at law are inadequate. However personalty, unless proven otherwise, is not unique, and specific performance is denied since there is an adequate remedy at law.¹ Therefore, if the timber was an interest in land, specific performance could be decreed; but if the timber was personalty, specific performance would not be granted.

As one court has said, "The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction." - The majority rule at common law seemed to be that a sale of standing timber was a sale of an interest in land.² In reaching this result, the courts reasoned that the legal character of timber is realty since it is not subject to levy and sale as chattel property upon execution, it descends with the land to the heir, and it passes to the vendee with the soil. The minority based their holding that such timber was personalty upon the reasoning that since severance was a condition of the sale, it was clearly the intent of the parties that the timber be considered as personalty.³ Other cases, distinguishing between contracts calling for immediate severance and those allowing the timber to stand for a longer period of time, held that only if immediate severance was contemplated, was the sale one of chattels

¹ 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) sec. 1402.

² Hirth v. Graham, 50 Ohio St. 57, 33 N.E. 90, 91 (1893).

³ Hirth v. Graham, 50 Ohio St. 57, 33 N.E. 90, 91 (1893) *also see* Note (1908) 13 L.R.A. (N.S.) 278 for collected authorities.

⁴ Banton v. Shorey, 77 Me. 48, 51-52 (1885); Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 367 (1897), *see* White v. Foster, 102 Mass. 375, 378 (1869).

since, if the timber remained, it received growth and support from the soil.⁶

However, in 1906, the Commissioners on Uniform State Laws approved the Uniform Sales Act which has subsequently been adopted by many jurisdictions. This Act contained two sections directly in point on the subject. The first is Section 76 which appears in Kentucky as *Kentucky Revised Statutes* 361.760 and which provides that the term "goods" includes "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Seemingly this should have put an end to the common law controversy as to whether such a sale was one of realty or personalty in those jurisdictions adopting the act, as the only logical interpretation of this provision is that standing timber which is to be severed under a contract of sale is personalty. Williston reaches this same conclusion, pointing out that the American Sales Act is based on the English Sale of Goods Act, which was a codification of the English common law; and that this provision "copying as it has, the definition of 'Goods' from the English statute, has adopted the English rule that any growing object attached to the soil is to be treated as goods, if by the terms of the contract it is to be immediately severed."⁸

Yet among the few cases construing this section in its relation to the sale of timber, varying results are reached. Wisconsin, some ten years after it had adopted the Uniform Sales Act, held that a contract for the sale of standing timber relates to an interest in land, the act not being discussed by the court.⁷ However, in a recent case in Oregon,⁸ the plaintiff argued that the timber in the suit must be regarded as personal property under the Uniform Sales Act which had been adopted in that state. After a review of the cases, the court decided that "standing timber is deemed to be goods when and only when it is agreed to be severed before sale or under the contract of sale" but as the contract in the suit did not contain any agreement as to severance, the act did not apply. These two cases and certain cases cited therein are the only decisions this writer has found construing this section of the Sales Act as it applies to timber.

The second section of the Uniform Sales Act concerning this subject is Section 68, or *Kentucky Revised Statutes* 361.680. It provides that:

"Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its

Dils v Hatcher, 24 Ky L. Rep. 826, 69 S.W. 1092 (1902)
Byassee v. Reese, 61 Ky. (4 Met.) 334 (1863) *Cain v. McGuire*, 52 Ky. (13 B. Mon.) 274 (1852).

⁶1 WILLISTON, SALES (2d ed. 1924) sec. 62.

⁷*Schaap v. Wolf*, 173 Wis. 351, 181 N.W. 214 (1921).

⁸*Reid v. Kier*, 175 Ore. 192, 152 P. 2d 417 (1944).

judgment or decree direct that the contract shall be performed specifically " "

This section could put an end to the common law controversy as to whether the contract for the sale of timber should be specifically enforced, for it allows those minority jurisdictions which heretofore considered the timber as personalty and therefore did not grant specific performance to allow such a remedy in the Chancellor's discretion. It may be argued, on one hand, that the adoption of this section of the Uniform Sales Act enlarged the jurisdiction of courts of equity to permit specific performance of contracts for the sale of personalty, since such a remedy is possible in the Chancellor's discretion.⁹ On the other hand, it is possible to say that although the section *does* give the Chancellor an *opportunity* to decree specific performance in his discretion, he does not have to do so unless such is his desire, and consequently a Chancellor will ordinarily not do so in those jurisdictions which denied specific performance of contracts concerning personalty before the adoption of the Uniform Sales Act—Illinois has followed this line of reasoning.¹⁰ It would appear that the first view is by far the more preferable one. Williston is in accord with this conclusion, for in discussing Section 68 he has said, "This section will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed."¹¹ No case has been found by this writer which applies this section to a contract for the sale of timber but it is submitted that it is and should be construed to be an enlargement of the jurisdiction of the courts of equity.

The remaining statute to be discussed in this note is not a section of the Uniform Sales Act but is *Kentucky Revised Statute 371.100* which provides that:

"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."

In fact, the relation of this statute to the subject of this note is of minor importance and the reason for its discussion is to clear away any confusion which might exist when the two are considered together. The statute seemingly relates to realty as it is suggestive of the Statute of Frauds in that the contract must be in writing, but it is to be noted that while one section of the Statute of Frauds relates to realty,¹² it is also true that another section applies to personalty.¹³ Thus no logical connotation of realty alone should necessarily result

⁹ *Hughbanks v. Browning*, 9 Ohio App. 114 (1917).

¹⁰ *G. C. Outten Grain Co. v. Grace*, 239 Ill. App. 284 (1925).

¹¹ 2 WILLISTON, SALES (2d ed. 1924) 1508.

¹² Ky. R. S. (1946) 371.010 (6)

¹³ Ky. R. S. (1946) 361.040.

from a consideration of this Kentucky statute. Its effect is simply to provide that contracts for the sale of standing timber must be in writing. There is nothing in the statute in conflict with the section in the Sales Act which provides that such contracts concern personalty. To harmonize the two, contracts for the sale of standing timber for immediate severance in Kentucky concern personalty *but* they must be in writing.

It is submitted that in those jurisdictions which have adopted the Uniform Sales Act, a contract for the sale of non-unique standing timber for immediate severance is a contract for the sale of personalty and that specific performance may be granted by a court of equity in its discretion. The statute changes the common law majority rule which regarded such timber as realty and a decree of specific performance now rests upon the discretion of the Chancellor in each case.

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