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The Transfer of Title to Timber in West Virginia

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Trees are a natural product of the soil, and, from a purely logical standpoint, it seems odd to think of the ownership of the two as being distinct and separate. The holder of a fee simple estate owns not only the surface, but theoretically from the center of the earth to the sky, and thus inclusive of the minerals beneath and the timber on top of the land. Along with the vast increase in the commercial value of timber, the necessity to provide means for separating the ownership of the timber from that of the land has arisen. That this can be done has long been recognized by the courts of this country; standing timber may be conveyed separately from the land by deed or by grant. When the owner of a tract of land purports to sell the timber thereon before it is actually severed from the soil, various legal problems present themselves.

1 The theory of ownership of the airspace above the land has been somewhat revised and restricted due to the advent of air travel. See Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).

A vast majority of these problems can be classified under two headings—(a) the legal requisites to transferring title to the timber in fee to one other than the owner of the land, and (b) the extent of the title actually vested in the grantee. Although solutions to these problems vary widely according to the jurisdiction in which they arise, the purpose of this article is not to attempt to support any one view as being preferable, but rather to present a summary of the West Virginia cases dealing with these questions and an analysis of the answers that our court has given to them.

The law governing transactions by which one person divests himself of rights in property and another acquires them has developed along two distinct lines, depending upon whether the subject matter is real or personal property. For an intelligent perusal of the law governing the transfer of standing timber, we must first determine into which classification it falls. "The vegetable products of the earth have been classified as fructus naturales and fructus industriales. In the former class are included everything which grows spontaneously, or without annual cultivation, such as trees or grass. In the second class are included crops which are the subject of yearly planting and cultivation. By a rule arbitrary, but not inconvenient, fructus industriales are treated in every case as goods, whether matured or not at the time when by the terms of the bargain they are to be sold." From the foregoing citation, it would seem clear that trees fall under the classification of fructus naturales, and that a conveyance of timber should be dealt with on the same basis as any other interest in land. In order to comply with the Statute of Frauds, a sale of timber in West Virginia must be in writing. An oral contract for the sale of trees, although unenforceable, operates as a license to the purported purchaser to enter upon the land and cut the trees. Such license may be revoked; but, until revocation, it constitutes a valid defense to an action of trespass by the owner of the land, and creates a power in the licensee to sever the trees and to vest title to the fallen timber in himself.

Having found that in order to transfer title to standing timber there must be a writing sufficient to comply with the Statute of

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3 1 Williston, Sales §61 (3d ed. 1948).
5 Gibson v. Stalnaker, 87 W. Va. 710, 108 S. E. 243 (1921). "Growing trees are a part of the soil, and a sale of them, to be valid under the Statute of Frauds, must be in writing."
6 Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521 (1901).
Frauds, the next inquiry is the form this instrument must take: must the transfer be by deed, or is a mere written contract of sale sufficient? A contract of sale is not an absolute sale and conveyance of the timber in place, but amounts to nothing more than an option to the vendee to purchase, remove and pay for the timber within a reasonable time. A lease of land with lumbering rights, however, vests title to so much of the timber in place in the lessee as may be removed by him within the time of the lease; and an assignment of such lease by deed transfers this title to the assignee. Standing timber does not become the property of the purchaser in a contract of sale until severance; neither does such contract vest an equitable right to the timber in the purchaser which would entitle him either to an injunction restraining the seller from interfering with his cutting operations after the time limit in the contract has expired, or to an order extending the time. The seller of standing timber under a contract calling for its removal within a specified time cannot maintain an action for the purchase price after the expiration of this time. But if the timber is conveyed by deed, title passes to the vendee; and the vendor may maintain an action for the purchase price. When the timber is transferred by deed, the vendee receives a title sufficient to form the basis of an action of ejectment. A grantee under an unrecorded deed has better title to standing timber than a purchaser with notice from the heir of the deceased grantor. On the strength of the holdings of the foregoing cases, the following conclusions may be drawn as to the status of the law in West Virginia. In order to accomplish a present transfer of title to timber before it is actually severed from the realty, the transfer must be by deed; contrary to some

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7 Electric Metallurgical Co. v. Montgomery, 70 W. Va. 754, 74 S. E. 994 (1912). In denying the right of a vendee in a contract of sale to an injunction restraining an assignee of a deed with lumbering rights from cutting timber the court held that the assignee had title to the standing timber as against the vendee in a prior contract of sale.


11 Jones v. Gibson, 118 W. Va. 66, 188 S. E. 773 (1936). The contest in this case was between a grantee of the timber rights in an unacknowledged deed and a purchaser with notice of the land "and all timber thereon" from an heir of the deceased grantor. The court recognized that all of the grantee's rights would be destroyed by a sale of the land to a bona fide purchaser, but held that the deed served to vest equitable title to the land in the grantee which was valid as against a subsequent purchaser with notice.
jurisdictions, West Virginia does not recognize the doctrine of implied severance of timber that in effect subjects it to the ordinary law of sales concerning the passage of title to chattels. However, there are no absolute formal requirements to constitute a deed. A deed no longer requires a seal. Whether or not an instrument is a deed depends mainly upon the intent of the parties. It is submitted that, whenever it clearly appears that the parties intended to make a present transfer of title to the timber, the court will construe the instrument as a deed, although it is not drawn in the form that such instruments usually follow.

When timber is conveyed by deed, the grantee acquires a present title. The ownership of the land is in one person; that of the timber is in another. At first glance, nothing may seem incongruous about this situation. Yet in order to remove the timber, the owner thereof must enter upon the land. This places a burden on the land, and it is highly improbable that the parties intended such burden to continue indefinitely. Thus, the next question that logically presents itself is the nature and extent of the title which the deed vests in the grantee. Most timber deeds fall into one of two main groups, depending upon the presence or absence of a time limit within which the timber is to be removed. A separate consideration of these groups, in order to determine the extent of the title conveyed under each, is necessary.

A grantee in a deed which conveys timber and which contains a clause requiring the removal of the timber within a certain time, takes at most a defeasible title; and, after the expiration of the time limit, he has no title at all to the timber still standing. This is true whether the timber was the subject of a grant or reservation. A grant of timber by deed containing a clause that, at the expiration of ten years, the timber remaining on the premises shall revert to the grantor, does vest a present estate in the timber con-

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12 Some courts hold that a sale of timber which by the terms of the contract calls for immediate severance or severance within a reasonable time, operates as an implied severance of the timber which then becomes personal property. See, e.g., Cheatham v. Head, 203 Ky. 489, 263 S. W. 622 (1924).
14 Electro Metallurgical Co. v. Montgomery, 70 W. Va. 754, 74 S. E. 994 (1912), and citations therein.
15 Adkins v. Huff, 58 W. Va. 645, 52 S. E. 773 (1906). A conveyed land to H, reserving the timber in himself. By the deed, A was to have 34 months to remove the timber. The court held that the reservation was sufficient to give A a present title to the timber, but that his failure to remove it within the 34 months operated to divest title out of him and to vest it in the grantee of the land. A's bill for an injunction restraining interference with his cutting after expiration of the time limit was denied.
veyed, conditioned upon removal within the ten years. Such an estate cannot be transferred orally to a third party. Thus it would seem that, in West Virginia, the true construction of a timber deed containing a clause for removal within a certain time is that it is operative to pass present title to the timber to the grantee, subject to a conditional limitation that such timber as remains standing on the premises at the end of the specified time shall revert to the grantor. This is both a logical and desirable result. To hold that the owner of the land retained title until the timber was severed would be to deny any greater effect to a deed than a contract of sale: it would vest no estate in the owner of the timber capable of being transferred to a third party prior to actual severance, which would almost invariably be contrary to the ordinary intention of the parties to such a deed, and an undue burden on commercial transactions.

As pointed out in Williams v. McCarty, there is an irreconcilable conflict of authority as to what estate is created where timber is transferred by deed without any time for removal being specified. Some courts hold that such deed gives only a license to remove the timber for a reasonable time. Others hold that the deed vests in the grantee an absolute title to the trees. Still others hold that the title vested in the grantee is a defeasible fee, and that unless the timber is removed within a reasonable time, his title is defeated by an implied condition that it must be removed within such reasonable time. The syllabus in Keystone Co. v. Brooks states that, "In case of a deed conveying legal title to timber, though the deed contemplates removal of timber, there being no limit of time for removal and no cause of forfeiture for failure to remove, title to the timber is not lost to the purchaser for such failure." The language of the syllabus is somewhat modified by a statement in the opinion: "Though where there is no such time

\[\text{References:}\]
16 Brown v. Gray, 68 W. Va. 555, 70 S. E. 276 (1911). The grantee in such a deed made an oral contract to sell various items, including his interest in timber derived from this deed. In a suit for breach of contract against the purchaser, the seller claimed that his interest was a chattel real-personality and a valid subject matter for an oral contract of sale. The court rejected this contention, holding that his interest was a present estate, and sustained the purchaser's plea of the Statute of Frauds.
17 Williams v. McCarty, 82 W. Va. 158, 95 S. E. 638 (1918).
18 Goodson v. Stewart, 154 Ala. 660, 46 So. 229 (1908).
19 Earl v. Harris, 99 Ark. 112, 137 S. W. 806 (1911); Shippen Bros. Lumber Co. v. Gates, 136 Ga. 37, 70 S. E. 672 (1911).
20 65 W. Va. 512, 64 S. E. 614 (1909).
limit or condition, there is no forfeiture of title to timber, yet I apprehend that the right to keep the timber standing does not endure forever, and thus encumber the land and prevent its cultivation, but must be removed in a reasonable time.”

By implication, at least, this case would place West Virginia in line with those cases that hold that a deed without a time limit vests an absolute title in the grantee. Where, in addition to a grant of all the timber on a certain tract of land without specifying any time for removal, the same deed conveys to the grantee an undivided interest in this tract, he takes at least a defeasible title to the timber, conditioned by its removal within a reasonable time; but such reasonable time does not begin to run until the land is partitioned. Where timber is granted without specifying a time for removal, a reasonable time is implied; but the grantor may have estopped himself, by his conduct, from asserting that a reasonable time for removal has passed.

A grant of timber in perpetuity may be made; but the intent to convey such right must clearly appear from the instrument; and the mere addition of an ordinary habendum clause to a deed is not a sufficient indication of such intent. But notwithstanding that a grant or reservation of timber carries with it an implied condition that it will be removed within a reasonable time, the exercise of this condition constitutes a forfeiture which a court of equity will not enforce if to do so would be inequitable. On the basis of the preceding cases, it is submitted that the law in West Virginia is as follows. A grant of a fee simple estate in timber in perpetuity is valid; but in order for the court to find that such estate was created, the parties’ intention to do so must be clearly expressed. In spite of the language in Keystone Co. v. Brooks, which would seem to align West Virginia with those jurisdictions

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22 Stump v. Moore, 104 W. Va. 513, 140 S. E. 480 (1927). This estoppel may result from acquiescence in the delay, requesting the grantee to remove the timber, or instructing him not to cut any of the timber until he is able to cut it all. Obviously, questions of degree are involved.
23 Joyce v. Gibson, 106 W. Va. 221, 145 S. E. 279 (1928). The grantee accepted the rule that a deed without a time limit carries with it an implied condition that the timber must be removed within a reasonable time, but contended that he held title in perpetuity by virtue of the habendum clause. The court rejected this contention.
24 Carder v. Matthey, 127 W. Va. 1, 32 S. E.2d 240 (1944). In a strong dissenting opinion, Judge Kenna argues that there can be no forfeiture where the condition arises by implication. He also contends that even if there was a forfeiture here, the facts were not such as to call for relief in a court of equity.
25 Supra note 21.
that hold that a conveyance without a time limit vests an indefeasible title in the grantee, the later cases, without expressly overruling the earlier one, have committed this state to the view that such a grant carries with it an implied condition of removal within a reasonable time. That our court has chosen this view is commendable: we have escaped the unfortunate situation which would have naturally resulted had it continued in the direction indicated by Keystone Co. v. Brooks, i.e., a situation where one party owns the timber but will be liable for trespass if he enters on the land to remove it, and the owner of the land will be guilty of a conversion if he severs the timber. Where an undivided interest in the land and title to the timber are vested in the same grantee, he holds an indefeasible title to the timber until the land is partitioned, the title then becoming subject to the implied condition that the timber on the other portions of the surface will be removed within a reasonable time. The exercise of this condition does invoke a forfeiture, and thus courts of equity will look on it with disfavor. Whether or not the court will allow the forfeiture will depend upon the facts of each particular case. It seems that repeated demands for removal will prevent an action or suit to enforce the condition, and that equity will award the owner of the timber a reasonable time to remove it after he receives notice that the grantor is now claiming that the time for removal has expired. It is to be hoped that, in the interests of the free alienability of land, the court in the future will be less willing to find that the landowner is barred from exercising this implied condition. It is submitted that very few circumstances, short of actual acquiescence in the delay by the owner of the land, should be held to prevent the owner from enforcing the condition and once more uniting title to the land and the timber in one individual.

The problems presented so far have been concerned mainly with standing timber. No consideration of the transfer of title would be complete, however, without a few words about severed timber. It is clear that, at some time, severed timber is converted into personal property. This change in the legal light in which it is regarded does not depend upon any change in the physical characteristics of the timber, but takes place immediately upon

28 Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151 (1892).
severance from the realty. If the person severing the timber has title prior to this act, the question of whether title to the severed timber passes does not arise. But if the standing timber is sold under a contract of sale, the buyer has only an option to purchase; and thus the question of whether title to the timber passes as it is severed becomes important. Since the timber is now personal property due to severance, title should pass according to the intention of the parties. It would seem that in the absence of a contrary indication of intent, title passes at the time of the severance. As to whether the expiration of a time limit expressed in the instrument defeats the purchaser's title to the severed timber, there are two classes of cases. In an executory contract giving a right to enter upon the land and remove the timber within a certain time and to be paid for as removed, title passes only when the timber is removed and paid for; after the expiration of the time of removal, no right remains in the purchaser—the question here being not one of destruction of title to the timber, but rather of the right to remove the same. Where there is either an ordinary contract of sale or a deed of conveyance of the timber in place, and the purchaser has cut the timber within the time limit expressed, his title to the severed timber is not divested by an expiration of the time limit; and he has a reasonable time thereafter within which to remove the timber, and a right to enter upon the land to do so. In other words, within legal contemplation, severance is removal in so far as a clause in a deed calling for removal within a specified time is concerned.

It is hoped that the preceding pages will prove interesting if not informative. No attempt was made to exhaust all the West Virginia cases on this subject, nor to present all the problems involved. The endeavor was, rather, to pick out the most important and typical cases, and to present the result reached by our court. Since timber does play an important role in the economic life of this state, and since there are many conflicts among the various jurisdictions concerning the legal problems connected with timber

29 Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937 (1912) (holding that timber becomes personal property when severed and thus subject to sale by a guardian).
30 Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432 (1905) (title held to pass at the time of the severance even though the price was yet to be determined by measurement).
31 See Knight v. Smith, 84 W. Va. 714, 100 S. E. 504 (1919).
32 Knight v. Smith, supra note 31.
transactions, it is to be expected that there will be a substantial amount of litigation in this field in the future.

J. H. M., Jr.

CASE COMMENTS

Administrative Law—Res Judicata—Determination of the Jurisdictional Fact.—P was injured while employed by D. He applied for and received workmen's compensation. Later he sued under the F.E.L.A. for his injuries. D claimed that P was engaged in intrastate commerce and therefore was not covered by the F.E.L.A. and sought to assert the award of compensation as res judicata on this issue. Held, on appeal, that the award of compensation was not res judicata on the issue of the character of P's employment. Pritt v. West Virginia Northern R. R., 51 S. E.2d 105 (W.Va. 1948).

Intrastate employment is necessary to give a compensation commissioner jurisdiction to make a valid award. Hoffman v. N. Y., N. H. & Hartford R. R., 74 F.2d 227 (2d Cir. 1934), cert. denied 294 U. S. 715 (1935). Contra: Dennison v. Payne, 293 Fed. 333 (2d Cir. 1923). Where the character of employment is determined by the commissioner and approved by a court the award is not collaterally attackable for lack of jurisdiction, and the determination is res judicata. Chicago, R. I. & R. Ry. v. Schendel, 270 U. S. 611 (1926). Where the character of employment is neither raised nor decided the award is collaterally attackable for lack of jurisdiction, and is not res judicata. Hoffman v. N. Y., N. H. & Hartford R. R., supra. Where the issue of the character of employment is raised but not passed on the award is not res judicata being collaterally attackable on the basis of lack of jurisdiction. Bretsky v. Lehigh Valley R. R., 156 F.2d 594 (2d Cir. 1946). If the character of employment is raised and determined by the commissioner the award is res judicata and not subject to collateral attack for lack of jurisdiction. Williams v. Southern P. Co., 54 Cal. App. 571, 202 Pac. 356 (1921), cert. denied 258 U. S. 622 (1921); see Dennison v. Payne, supra (jurisdiction erroneously determined). When a commissioner makes an award he silently decides that he has jurisdiction; and the award is res judicata not being subject to collateral attack for lack of jurisdiction. Landreth v. Wabash R. R., 153 F.2d 98 (7th Cir. 1946), cert. denied 328 U. S. 855 (1946).