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Contracts--Removal of Timber--Failure Seasonably to Exercise Option

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impose liability upon the employer, as was present in the *Wilson* case. On this basis the exclusion of the handling of gasoline as an intrinsically dangerous undertaking in the instant case seems justified in view of the fact that no other applicable exception to the independent contractor rule existed.

C. B. F.

CONTRACTS — REMOVAL OF TIMBER — FAILURE SEASONABLY TO EXERCISE OPTION.—*P* was the assignee of a contract of sale of the standing timber on *D*'s land. The contract provided that *P* was to have five years in which to cut and remove the timber with the right to extend such time, from year to year, not exceeding an additional five years upon payment to *D* of the sum of $75.00 per year for each annual extension. *P* did not remove the timber within the time allotted and tendered payment for one of the additional years two and one-half months after the beginning of the period. *D* refused payment, contending that title to the timber had reverted to him. *Held,* that a defeasible fee was created in the timber with an option to extend the period for removal, and the belated payment was properly refused. *Sun Lumber Co. v. Thompson Land & Coal Co.*, 76 S.E. 2d 105 (W. Va. 1953) (3-2 decision). The dissent maintains that *P* had vested property rights in the timber, and that equity will not permit forfeiture of a valuable property right without intervening.

A provision regarding payment for extension privileges in a timber contract is not a covenant but a condition, because it is optional with the purchaser whether or not the extension privilege will be exercised. *Hall v. Ritter Lumber Co.*, 167 Va. 95, 187 S.E. 503 (1936). Under this type of contract the absolute title to the timber never passes out of the seller until the purchaser cuts and removes the timber within the period allowed by the contract. There is no forfeiture of the title to the timber remaining uncut or unremoved after the time limit because there is nothing to forfeit. *Lange & Crist Box & Lumber Co. v. Haught,* 132 W. Va. 530, 52 S.E.2d 695 (1949). The condition spoken of in the *Hall* case is a condition precedent and until it is performed *P* has no property interest in the timber. *Curtis v. Peebles,* 160 Va. 735, 169 S.E. 548 (1933). So when the dissent speaks of *P*'s "property

rights of value" and "valuable property rights", it is submitted that use of those words is inaccurate because no such interest exists.

The dissent states the further proposition of law that in a contract where time is not made of the essence in the exercising of an option thereunder, the person having the right to exercise the option has a reasonable time in which to do so. *Watson v. Stout Lumber Co.*, 175 Ark. 240, 298 S.W. 1010 (1927). In *Blackstone Mfg. Co. v. Allen*, 117 Va. 452, 85 S.E. 568 (1915), however, under a timber contract with a specified time set for removal of the timber with an option to extend this period by payment of yearly interest on the purchase price, it was held that the grantee must notify the grantor in advance that he intends to exercise the option, and that then he must tender the payment in advance of the period for which it is intended. This seems to be the decided weight of authority. *Hall v. Ritter Lumber Co.*, 167 Va. 95, 187 S.E. 503 (1936); *Eureka Lumber Co. v. Whitley*, 163 N.C. 47, 79 S.E. 268 (1913); *Anderson v. Miami Lumber Co.*, 59 Ore. 149, 116 Pac. 1056 (1911).

But it is not necessary to cite the *Blackstone Mfg Co.* case to support the majority opinion. From the terms of the contract and the acts of the parties themselves it is quite evident that time was of the essence of the contract even though not so expressly stated. In the contract itself there was a definite time limit set for removal of the timber, and in case of nonremoval of the timber within the time allotted, reversion to the grantor was spelled out. *P*, by making payment for the sixth year in advance, showed he understood that all the payments were to be in advance. *D*, by refusing the late payment, evidenced his understanding that the payments were to be in advance. All these factors taken together give a clear basis for the interpretation that time was of the essence of the contract even though not so expressly stated. Therefore, even under the *Watson* case, cited by the dissent to support its arguments, support is found for the majority opinion.

These timber contracts with a time limit specified for removal are very similar to the "unless" type of lease in the law of oil and gas. Under this type of lease the lessee does not promise to do anything. But unless he starts or completes a well within a stipulated period or pays delay rental, the lease is automatically terminated. Here, there is a condition precedent which must be performed before the lessee has a vested interest in the mineral.

Todd v. Manufacturers Light & Heat Co., 90 W. Va. 40, 110 S.E. 446 (1922).

C. W. G.

INCOME TAXATION—CLIFFORD TRUSTS—UNRESTRICTED CONTROL RETAINED BY SETTLOR-TRUSTEE.—The settlor created trusts for his nephews and sister for the period of his life or that of the cestui. If the settlor predeceased the cestui, the trust estate would become the property of the latter; otherwise, it would revert to the settlor. The cestuis, although not members of the settlor's immediate family, not dependent upon him for support, and residing at points distant from the settlor's domicile, were his closest relatives. The settlor named himself trustee with complete control and management of the trust estate, including the right to sell the property at any price he might determine and reinvest the proceeds in any property he might think desirable, the right to borrow money and mortgage any or all of the trust estate as security, and even the right to repay any sum so borrowed from the trust estate. Furthermore, he retained the right to withhold the income from the beneficiaries and add it to the trust estate. A deficiency having been assessed against and paid by the settlor's executor for the trust income, the executor sued unsuccessfully in the district court to recover the sum so paid. *Held*, affirmed. The settlor retained so much of the bundle of rights that makes up ownership of the trust property that he continued to be the owner of the property, and the income from the trust property was taxable to him. *Wheeling Dollar Savings & Trust Co. v. Yoke*, 204 F.2d 410 (4th Cir. 1953).

INT. REV. CODE § 22 (a), the general definition of "gross income" includes all "gains, profits, and income derived . . . from professions, . . . or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, . . . or gains or profits and income derived from any source whatever." The famous case of *Helvering v. Clifford*, 309 U.S. 331 (1940), held that a settlor, who created a five-year trust, with himself as trustee and his wife as cestui, retaining substantial power and control over the trust res, and absolute discretion as to the distribution of income during the five-year term, although, upon termination of the trust, all