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WASHINGTON TIMBER DEEDS AND CONTRACTS

RALPH W. JOHNSON*

The law of Washington concerning the interests conveyed by timber deeds and contracts is foggy. Many vital questions are still totally unanswered, or have been left in confusion, by the cases in point. The principal area of doubt revolves around the question of whether standing timber, which has been sold separately from the land on which it stands, is realty or personalty. The answer is vital for many reasons. It determines whether a husband has power as manager of the community to convey community-owned timber without his wife's signature, which statute of frauds applies to a timber transaction, which recording or filing statutes apply, which laws of descent control upon the death of one of the parties to the transaction, and whether a judgment filed in the county in which the timber is located automatically constitutes a lien against it.¹

A prior article in this law review² analyzed the status of standing timber with regard to established real and personal property concepts. This paper will examine the Washington cases and statutes to demonstrate how our supreme court has actually classified standing timber in litigation.

It is not surprising to note that a wide variety of interests can be conveyed by timber deeds and contracts. However, the consequences that flow from such conveyances often are surprising. In Washington, standing timber owned by the owner of the real property upon which it is growing has always been regarded as real property.³ However, in many instances the draftsman of a timber deed or contract can only guess whether the timber, upon execution of the timber deed or contract of sale, remains realty or in some magical way suddenly becomes personal property. He may have to make an even less reliable guess to determine if and when the timber reverts to the status of realty.

A brief examination of the key Washington cases on a somewhat

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¹ Other illustrations of the significance of this classification are: if the timber is considered personalty then 1) a conditional sale of it would be covered by RCW 63.12.010 concerning the filing of conditional sales contracts; 2) RCW 65.08.040 (recording bills of sale) would apply to such a sale of timber; 3) the statute of limitations for conversion of personal property would presumably apply in adverse possession cases, instead of the statute of limitations re wrongful possession of realty.
³ Engleson v. Port Crescent Shingle Co. 74 Wash. 424, 133 Pac. 1030 (1913), France v. Deep River Logging Co. 79 Wash. 336, 140 Pac. 361 (1914).
chronological basis will show the origin and development of the Washington law in this area and by pointing out certain problems, may assist the draftsman in avoiding unnecessary litigation. The first significant case in Washington on the classification of standing timber as realty or personalty is *Brodack v. Morsbach.* In March of 1891, one John Bannse contracted to sell certain standing timber to Morsbach. The contract provided that John Bannse agreed to sell to the Morsbaches

...all the mill timber situated on the following described land for their use and benefit... [description]... And it is further agreed that there is no specified time in which said timber shall be removed.

In September 1892, Augustus Bannse executed a deed to the realty containing the timber to Brodack, the plaintiff. No deed from John Bannse to Augustus Bannse was recorded during this period. However, Brodack took the deed from Augustus Bannse with actual notice of Morsbach's interest. A dispute arose between Brodack and Morsbach concerning ownership of the timber. Brodack finally brought action to quiet title to the real property, including the timber. The supreme court affirmed judgment for the defendant Morsbach, rendered after a trial without a jury. In a per curiam opinion the court said the transaction in March 1891 between John Bannse and Morsbach was a sale, not an agreement to sell, and that upon the execution and delivery of the contract of sale:

...the timber became personal property, and the only interest the defendants had, or could claim, in the land upon which the timber stood was an implied license to enter and remove the timber. The appellants (plaintiffs) purchased the land after this contract was made, and with full knowledge thereof, and, therefore, they acquired no interest in the timber by their purchase, except the right to have the timber revert to them, in case it was not removed under the contract of sale.

From the quoted language one might have been led to believe that a "sale" of standing timber constructively severed it from the realty and caused it to become personalty. However, such a belief would have been short-lived in view of the language of *France v. Deep River Logging Co.* which was decided a few years later.

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4 38 Wash. 72, 80 Pac. 275 (1905).
5 Id. at 73, 80 Pac. at 275.
6 Id. at 74, 80 Pac. at 276.
7 This interpretation of the *Brodack* case finds support in the case of *Heybrook v. Beard* 75 Wash. 646, 135 Pac. 626 (1913).
8 79 Wash. 336, 140 Pac. 361 (1914).
In the France case, the court held that the determination in the Brodack case (that the standing timber was changed to personal property by the sale) was "wholly unnecessary to be decided in disposing of the case as the court did."10 The deed in the France case contained the following clause:

...[grant, bargain, sell and convey unto...[purchaser]...his heirs, personal representatives and assigns, all timber...and the right of entering upon said land and removing said timber....To have and to hold the said granted property and privileges...forever.11

This deed was executed in 1892, and was followed by a deed in 1902 from the first purchaser (Mooers) to the Deep River Logging Co., defendant. This latter deed contained substantially the same language. In 1907, the plaintiff bought the realty in question on a tax sale. In 1910 and 1911, the defendant, apparently believing it still owned the timber by virtue of the deed to it in 1902, cut certain of the timber. Plaintiff brought this action of trespass claiming title to the timber through the tax sale.

The court declined to decide whether timber generally would become personalty if the deed of conveyance contained a stated time for removal, but held that this timber did not become personalty, because the grantee had a right to remove the timber "forever" (which included "a hundred years hence").12 The court concluded that this right must, therefore, be a real property interest. The court said:

9 In the meantime the court decided Lehtonen v. Marysville Water & Power Co. 50 Wash. 359, 97 Pac. 292 (1908) where the grantor of certain real estate reserved the timber thereon and the right of removal for 2 years. After the 2-year period had expired, the grantor contended the timber was his and that he still had the right to remove it. However the court held otherwise, saying that upon the termination of the time reserved for cutting, the timber reverted to the owner of the land, the grantor. The court said that it was immaterial for this purpose whether the timber was classified as real or personal property; the controlling factor was the intent of the parties. In 1913 the case of Engleson v. Port Crescent Shingle Co. 74 Wash. 424, 133 Pac. 1030 (1913) was decided in which the plaintiff sued for commissions allegedly due him for the sale of certain standing timber. The timber was growing partly on the land of the defendant and partly on the lands of third parties. The court had before it the question whether the case was controlled by RCW 19.36.010(5), the statute requiring that an agreement to pay a commission on the sale of real property must be in writing. This question turned on whether the standing timber was real or personal property. In view of the language quoted above from the Brodack case, one might effectively argue that the timber owned by the defendant and located on the land of the third parties was personalty. However, the question was not raised in the opinion.


11 Id. at 338, 140 Pac. at 361.

12 Id. at 344, 140 Pac. at 363. A number of additional questions are raised by the "forever" type of timber grant. These questions will be considered in a later portion of this article.
The right to the timber was so connected with the continuing right to enter upon the land as to not be severable one from the other, except by the actual physical removal of the timber, thereby putting an end to the right of entry.13

Two additional grounds were stated in support of the ruling that the timber remained realty: (1) the intent of the parties, as evidenced by the fact that (a) 17 years passed before the grantee attempted to remove any timber, (b) the grantee apparently never considered the timber personalty for tax purposes, because he never paid taxes on it as such, and (2) a "presumption"; the court said, "viewed in its physical aspect alone, it is real property and will be presumed to be such until clearly shown to be otherwise."14

The difference in the type of grant in the France and Brodack cases is marked. One might argue that if the language in the Brodack case about timber being personalty was dicta, so also was the criticism thereof in the France case. However, the France case does hold clearly that timber sold with the right of removal "forever" remains realty, particularly when the intent of the parties, otherwise indicated, supports such a construction.15

In Cross v. Churchill16 the contract in question stated that the seller "sells and delivers" all the merchantable timber on certain described land, reserving for the seller the piles, poles and shingle bolts. The timber was to be removed within two years from the date of the contract, or within an additional period of time if certain conditions were met. The court considered this timber to be personalty and discussed the issues in the case in relation to the rules governing sales of personal property.17 It held that title never passed to the purchaser

13 Id. at 345, 140 Pac. at 364.
14 Id. at 344, 140 Pac. at 364. However, the statement immediately preceding this quotation makes unclear whether the court was speaking generally or only in relation to the tax problem.
15 It is interesting to note that in 1 TIFFANY, REAL PROPERTY 881 (2d ed. 1920) the author cites the France case in support of the statement that "it has been decided that, upon a conveyance by the landowner of growing trees apart from the land they become personalty." The author then (p.882, n. 77) indicates that a constructive severance occurs in Washington only when there is "some limitation of time within which the grantee might remove the trees." But in 1 WILLISTON, SALES § 62 (rev. ed. 1948), the author cites the France case in support of the statement "the courts of most of the American States that have considered the question have held expressly that a sale of growing or standing timber is a contract concerning an interest in land."
16 122 Wash. 374, 210 Pac. 776 (1922).
17 Although the court never stated in so many words that the timber was personal property, the language throughout the opinion leaves little doubt that it considered the timber such, e.g., the court said: "The question as to when title passes to the vendee of personal property which is to be separated from a mass depends upon the intention of the parties. This court has long ago committed itself to the doctrine that,
under the contract, because there was never a segregation of the "merchantable" timber from the piles, poles and shingle bolts. In assuming that the timber in this case was personal property, the court clearly appears to have been in error. At the time of the sale the title to the timber, and the real property upon which it stood, were in the same person and thus the timber was necessarily real property. Certainly its status could not change before it was segregated and appropriated to the contract, because prior to that time title to both timber and land remained in the seller. However, one may observe that the assumption that the timber was personal property may not have been necessary to the decision. The rules regarding segregation and appropriation have also been applied to real property. Ordinarily need not be accomplished in any particular manner as long as the act of appropriation is clear. In a case such as Cross v. Churchill it could probably be accomplished by marking the trees, e.g., by blazes, and would not mean necessarily that they must be severed from the soil.

where a certain amount of personal property from a larger mass, where all the different portions are not of equal quality or value, is contracted to be sold, title does not pass before segregation has been made, as it is impossible before that time to determine exactly what is included in the sale. Id. at 376, 210 Pac. at 777.

Furthermore, the five cases cited, and discussed as controlling, all involved personal property. No mention was made of the Brodack or France cases. In this regard it is interesting to note that much the same question concerning lack of segregation could have been raised in the Brodack case where the contract purported to sell "...all the mill timber..." Until it was cut or marked there certainly was no segregation. However, the question apparently was not raised in the case.

Although the term "merchantable" is frequently used in conveyances of standing timber, it cannot be said that the term has a precise or generally agreed meaning. Much depends upon the locality of the timber, the business of the parties, and the then existing methods of manufacture. Hughes v. Heppner Lumber Co. 203 Or. 11, 283 P.2d 142. Rehearing denied 286 P.2d 126 (1955).

France v. Deep River Logging Co. 79 Wash. 336, 140 Pac. 361 (1914). See Skate Creek Logging Co. v. Fletcher 46 Wn.2d 160, 278 P.2d 1009 (1955) where, in an opinion by Judge Mallery, the 2d department applied the rule re appropriation to a contract for the sale of certain standing timber, which was there considered to be real property. See also Carpenter v. Ferrell 99 N.C. 495, 499, 6 S.E. 785, 787 (1888).

The doctrine of subsequent appropriation is based on reason and common sense. It would seem to apply as well to the real property field as to personal property. See 2 WILLISTON, SALES § 238 (rev. ed. 1948). But cf. the Oregon case of Seguin v. Maloney-Chambers 198 Or. 272, 253 P.2d 252 (1953) where the Oregon court held that a deed which purported to convey three and one-half million feet of merchantable timber on certain described land created an undivided interest in the timber in the grantee. The court likened this deed to a conveyance of part of a large parcel of land without designating which part is conveyed. Such a conveyance usually creates an undivided interest in the whole tract. Justice Perry, the writer of the opinion, seemed to believe that if the instrument in question did not immediately convey an undivided interest it would be void for uncertainty. The Seguin case was criticized in Note, 33 Ore. L. Rev. 301 (1954) and Comment, 34 Ore. L. Rev. 256 (1955).

2 WILLISTON, SALES § 273a (rev. ed. 1948).
Other than certain dicta in two cases, in 1928 and 1932, there appear to be no further Washington cases classifying timber as realty or personalty until *Elmonte Investment Co. v. Schafer Bros. Logging Co.* There was, however, in 1929, one federal case that considered the question, the court there holding that a conveyance of standing timber to be removed within a reasonable time was a conveyance of realty.

In the *Elmonte* case, one Clemons and wife sold all the merchantable timber on certain land to the Wynooche Timber Co., which then assigned the contract to Schafer Brothers Logging Company. The contract was duly recorded. It provided that the buyers had seven years to remove the timber. Thereafter Clemons and wife mortgaged the land to the Elmonte Investment Company to secure money due on a promissory note. The mortgage did not except the timber or any interest therein. This instrument was also duly recorded. Clemons and wife then, for a valuable consideration, extended the time for Schafer Bros. Logging Co. to remove the timber. The Clemonses defaulted on their note and Elmonte Investment Company brought this action to foreclose the mortgage. Schafer Bros. Logging Co. contended its extension

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The timber buyer was granted a right to cut the timber within 5 years, and such longer time as might be needed, on payment of $10.00 each year. Held: that the grantee may extend the time for cutting only for a reasonable time. Twenty years was an unreasonable time. *Inter alia*, the court said: "... the grantor, in contracting for the sale of the timber, had granted an interest in *his land* for five years and so much longer as might be needed for the removal of the timber and a right of way for a logging railroad." (emphasis supplied)

The court in *Elmonte Investment Co. v. Schafer Bros. Logging Co.* 192 Wash. 1, 72 P.2d 311 (1937) seems to use the above quoted language in support of the proposition that standing timber that has been sold remains realty. However, neither the quotation nor the case lend much support to this argument. Certainly a grantor of standing timber with the right to cut for a period of years grants an interest in his land, even if the conveyance is construed to work a constructive severance. The grantee in any event gets an easement or license to come upon the land to cut and remove the timber. This is an interest in the land. Furthermore the timber itself was realty in the hands of the grantor, and the conveyance may be one of realty as to the grantor, whether or not the timber becomes personalty in the hands of the grantee.

23. State Finance Co. v. Hamacher 171 Wash. 15, 17 P.2d 610 (1932). The Province of British Columbia issued timber licenses to A. W. Codd and others, authorizing them to cut and carry away certain cedar poles standing on public lands. A. W. Codd contracted with Hamacher, the defendant, for the latter to cut and remove the "merchantable" poles and to pay Codd etc. 50 cents per pole. The 1929 economic crisis intervened and Hamacher breached his agreement whereupon Codd etc. assigned their interest in the contract to the plaintiff who brought this action for damages. The supreme court affirmed judgment for the plaintiff. In the course of the opinion the somewhat astonishing (and uncalled for) statement was made, "This is a contract for the sale of personal property." (*Id.* at 23, 17 P.2d at 614). As the result would have been the same whether the contract covered either real or personal property, the above statement appears clearly to be dictum, and useless.


25. Milwaukee Land Co. v. Poe 31 F.2d 733 (9th Cir. 1929). The circuit court relied on the *France* case in making this determination.
sion agreement was valid as against the mortgagee's interest on the ground, *inter alia*, that the timber was converted to personal property by the initial sale and thus the defendant could not be charged with constructive notice of any attempted mortgaging of the "possibility of reverter" by the recording of a real estate mortgage by plaintiff.

In the supreme court, Judge Millard treated the defendant's argument rather extensively, citing many authorities and arguments, and concluded as follows:

Standing trees are real estate unless they have been sold with the intention of an immediate severance from the soil.\(^{20}\)

We are committed to the rule that a conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom in the future, whether the time of removal be measured by stated or reasonable time, is the conveyance of an interest in real property.\(^{21}\)

The court then held that, as the timber was realty at all times concerned, Schafer Bros. Logging Co. was put on notice of the Elmonte Inv. Co. mortgage by the recording thereof.\(^{28}\) This case will be discussed *infra*.

One recent case, *Coleman v. Layman*,\(^{29}\) remains for consideration. Certain standing timber had been sold by plaintiff to defendant by deed. Plaintiff contended that the deed contained certain language which created a "condition" to defendant's continued ownership of the timber. Plaintiff further contended that the defendant had breached this condition, and that the title to the timber thus had reverted to the plaintiff. When the defendant thereafter cut and removed some of the timber, the plaintiff brought this action of trespass. The second department, per Olson, J. held that the language in question constituted a covenant, not a condition, and that the breach thereof by the defendant did not cause the title to the timber to revert to the seller. The court indicated that the plaintiff might have a cause of action for other relief against the defendant, *i.e.*, for breach of the covenant, but

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\(^{21}\) *Id.* at 22, 72 P.2d at 320. Implicit in this statement seems to be the conclusion that if the parties intend an immediate severance, the instrument is not a conveyance of an interest in land but in personal property.

Compare this rule with that in landlord and tenant law that rent already due, and thus payable immediately, is personalty, whereas rent to come due in the future is considered realty. *Kneeland Inv. Co. v. Aldrich* 63 Wash. 609, 116 Pac. 264 (1911).

\(^{29}\) One might ask whether the whole discussion re timber as real or personal property is dicta in this case. In its decision the court implies that if the timber becomes personal property by the conveyance the "possibility of reverter" in the grantor is also personal property. But does this necessarily follow?

\(^{29}\) *41 Wn.2d* 753, 252 P.2d 244 (1953).
did not have any standing in court in this action of trespass. The court then generalized (gratuitously) as follows:

Growing timber can be conveyed separately from the land on which it grows. Such a conveyance, with the right to enter upon the land and remove the timber in the future, either within a stated or a reasonable time, is the conveyance of an interest in realty and is properly done by deed.\textsuperscript{30}

However the court expressly declined to state the nature of the interest conveyed.

We need not, and do not, decide the exact nature of the estate vested in defendants by the deed in this case. It possibly may be said to have the characteristics of a determinable estate, with a possibility of reverter in plaintiffs, subject to a special limitation, rather than of an estate subject to a condition subsequent.\textsuperscript{31}

From the language last quoted, the court appears to assume that the purchaser in such a transaction has an "estate" of some sort. However, in view of the court's express disclaimer to decide the nature of the interest conveyed, and the fact that even the reference to the interest conveyed as an "estate" was unnecessary to the decision, there seems little reason to believe the court will feel itself bound by the technical implications of this language in future decisions.\textsuperscript{32} Similarly, one may argue that the language first quoted above (see quotation noted by footnote \textsuperscript{30}) is dictum in the case and may not bind the court in future litigation. However, this language, and thus the opinion, is of significance here in that the court appears to reaffirm the rules from the Elmonte case.

Before entering upon a more detailed study of the above cases, it may be well to consider how the problems with which we are concerned will normally arise. Certainly the form of the particular instrument will have much to do with the occurrence of these problems, as will the apparent intent of the parties. An instrument that openly purports to create a right of "profit" in standing timber will probably raise few of the questions with which we are here concerned (as hereinafter more fully discussed). However, the two types of instruments commonly in use that do give rise to a flood of questions are the ones ordinarily

\textsuperscript{30} Id. at 756, 252 P.2d at 245. Again (see note 27, supra) the court seems to imply that a conveyance of timber to be removed immediately is not a conveyance of realty but of personalty.

\textsuperscript{31} Id. at 757, 252 P.2d at 246.

\textsuperscript{32} Also, the word estate is often used today in such a way as to be virtually synonymous with "interest," "right," and "title." Black, Law Dictionary (4th ed. 1951).
known as “timber deeds” and “timber sale contracts.” In these the grantor usually purports to convey all the standing timber (often limited by diameter, or the term “merchantable”) on certain real property to the purchaser and gives the purchaser a specified time in which to remove it. At first glance this type of instrument would appear to create a defeasible fee simple estate. In any event the parties’ intent seems to be to convey “title” to the timber. Can this be done? And if it is possible to do so, would the parties eliminate much confusion and resulting litigation by using the “profit” concept instead?

If the ordinary “timber deed” or “timber sale contract” conveys an interest in real property, what is the nature of that interest? Is it a fee simple estate, or a fee estate on a special limitation or condition subsequent, or perhaps even an estate for years? A close examination of these real property concepts reveals that the interest acquired by the timber purchaser does not properly fall within any of them.

The property concept that does fit the ordinary timber transaction, without the need of stretching or warping definitions, and through which some logical treatment can be given to this area,\(^3\) is that of “profit à prendre,”\(^4\) the right to take a part of the soil or produce of the land.\(^5\)

The grantee of standing timber upon the land of another cannot properly be said to hold a fee interest in same, whether or not the deed contains language limiting the time for removal.\(^6\) Such an interest is of course an estate in land, and therefore must consist of subject matter capable of physical occupation and defense, and enduring forever.\(^7\) Obviously, standing timber, which is sold to be cut and removed,

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\(^{3}\) The application of the profit concept to timber transactions has been proposed in several recent publications: Comment, 34 Ore. L. Rev. 256 (1955), Note, 33 Ore. L. Rev. 301 (1954), “The Conveyancer” 19 Aust. L. J. 183 (1945).

\(^{4}\) The argument in support of this proposition was set forth at length in an excellent article by Eugene Luccock, entitled “Timber Deeds—A Case For The Restatement of the Law of Property” 20 WASH. L. Rev. 201 (1945). No attempt has been made herein to fully restate the matters considered in Mr. Luccock’s article. However, a brief statement of the principal points involved may be of some aid.


\(^{5}\) BLACK, LAW DICTIONARY (4th ed. 1951).

\(^{6}\) Without express language stating that the right to remove the timber shall exist in perpetuity the Washington court has many times held that the grantee shall have only a reasonable time in which to remove the timber. See: Kalnoski v. Carlisle Lbr. Co. 17 Wn.2d 662, 137 P2d 109 (1943). Hay v. Chehalis Mill Co. 172 Wash. 102, 19 P.2d 397 (1933), Nelson v. McKinney 163 Wash. 529, 1 P.2d 876 (1931). McFadden v. Allen-Nelson Mill Co. 150 Wash. 249, 272 Pac. 714 (1928). Morgan v. Veness Lbr. Co. 108 Wash. 674, 185 Pac. 607 (1919). In Hay v. Chehalis Mill Co. (supra) the court went so far as to apply the “reasonable time” rule to a deed stating the grantee was to have and to hold the timber “forever.”

\(^{7}\) RESTATEMENT, PROPERTY §§ 7, 9 (1936).
does not fit this description. There is no defined space that can be possessed or occupied by the purchaser. Thus the type of conveyance posed in the *France* case would not and could not grant a "fee simple" estate in the timber, although it would be sufficient to create a perpetual "profit" in the purchaser. The language of our supreme court in the *France* case indicates that the interest the purchaser acquired by the conveyance was a "profit," although the court never referred to it specifically as such.

Nor does the purchaser under an ordinary "timber deed" or "contract of sale" acquire an estate for years. The type of instrument that would create this specific problem would be a conveyance of standing timber in which the grantee is given a specified time (or reasonable time) in which to remove it. For the reasons stated previously, such a grantee cannot have an "estate" in the land or timber. Furthermore, implicit in the nature of an estate for years is the notion that it will be returned to the grantor (or his successors) at the end of the term. Here, the very purpose of the interest created is to permit the destruction of the subject matter. In any event it may well be argued that what does "revert," where the timber is not removed in the allotted time, is not an "estate" but merely the unremoved timber. Also, an estate for years is ordinarily defined as a possessory interest. The timber buyer does not have such an interest in the timber. Either he or the landowner must necessarily have possession (actual or constructive) of the land upon which the timber stands, and it seems that the landowner has such possession, subject only to the buyer's right to come upon the land and remove the timber.

For the same reasons a timber purchaser's interest cannot be an estate subject to a condition subsequent or special limitation.

The interest that is ordinarily conveyed appears to fall easily within the definition of the term "profit," and is thereby not an "estate" but merely one of the total bundle of rights held by the "owner" of the land. He has conveyed the right to cut and take away the timber. After such a conveyance he is under a disability concerning that par-

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39 *France v. Deep River Logging Co.* 79 Wash. 336, 343, 140 Pac. 361, 363 (1914). "This language [conveyance using the word 'forever'] points, we think, conclusively to an intention on the part of the grantor to convey a continuing, perpetual right for all time, to enter upon the land and remove the timber." This language is noteworthy in that the court does not here use the term "profit" but clearly seems to be speaking of one when talking of the "...right...to enter upon the land and remove the timber."
ticular right. If the right is not exercised in the time agreed, it once again becomes a part of the owner's total rights concerning his land, not by virtue of any "reversion," as in the case of an estate, but merely by virtue of the purchaser's failure to exercise his right within the allotted time.\footnote{1\textsuperscript{41}}

A \textit{profit à prendre} is an interest in real property,\footnote{1\textsuperscript{42}} and, of course, the conveyance of it is a conveyance of an interest in real property. Hence for an owner to assign his interest in a profit, he must necessarily comply with the statute of frauds concerning conveyances of realty.\footnote{1\textsuperscript{43}}

What effect would the adoption of the "profit" principle have upon the existing Washington case law? As noted earlier there is language in the two most recent Washington cases (Elmonte and Coleman) that would not normally presage the announcement of the profit concept in regard to timber transactions. However, this language, as was pointed out, appeared as dicta and for that reason, would not prove an insurmountable hurdle for the court to cross. The results of both cases would have been the same whether or not the court had indicated adherence to the profit concept. The case of \textit{France v. Deep River Logging Co.} would not stand in the way of Washington's use of the profit idea, because there the court, in effect, applied the concept. An examination of these cases, and the others noted previously in this article, indicates that on authority there is no compelling reason why the profit concept cannot be applied and used by our supreme court in appropriate timber sale cases in the future. Certainly there is nothing in these cases that would indicate any danger for practitioners who wish to use the profit idea in instruments drawn to convey interests in standing timber.

Before any discussion of this subject may be closed, another area of our state laws must be examined, \textit{i.e.}, the Sales Act.\footnote{1\textsuperscript{44}} The applicability

\footnote{1\textsuperscript{41}} This result appears to obtain in Washington whether the timber is classified as realty or as personally, as indicated by the language in the early case of Lehtonen v. Marysville Water & Power Co. 50 Wash. 359, 97 Pac. 292 (1908) where the court said: "Whether the reservation of the timber made it, in legal effect, personal property or otherwise, makes no difference. It is immaterial what the theoretical character becomes. The contract of reservation provides that it shall be removed within a given time. If it was the intention of the parties that the timber might be removed after that time, the limitation means nothing and was misleading. The clear, expressed intention is that the timber shall be removed within the time stated. It follows, of course, that the vendor had no right on the land to sever the timber from the land after the time limit." \textit{Id.} at 360, 97 Pac. at 293.

\footnote{1\textsuperscript{42}} J. \textsc{Thompson}, \textit{Real Property § 264} (perm. ed. 1939). \textit{Restatement, Property § 5} (1936).

\footnote{1\textsuperscript{43}} RCW 64.04.010-0.020.

\footnote{1\textsuperscript{44}} RCW 63.04.
of this statute to timber transactions apparently has been overlooked by practitioners and courts in this state for many years. None of the Washington cases decided since its adoption in 1925 has ever mentioned the Sales Act. But even a brief examination of the wording of Section 76 of that act indicates quite clearly that sales of standing timber were meant to be included thereunder. This section defines "goods" as follows:

"...all chattels personal other than things in action and money. The term 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 the contract of sale." (emphasis supplied)

Of course, one might argue that this section is only applicable to that small number of timber sales where the purchaser is under a duty to remove the timber (on the theory that this is what is meant by "under the contract of sale"). Such an argument is obviously weak. It might be argued that the drafters of the act had some other type of transaction in mind and did not intend to include sales of standing timber. This argument is also weak, particularly in view of the comments of the best known authority on the subject (and one of the principal draftsmen of the act), Professor Samuel Williston, who has indicated quite clearly that the Sales Act was intended to include sales of standing timber.

If a sale of standing timber does come under the Sales Act, then it seems clear that the timber must be classified as personalty. The various statutes and cases relating to personal property would, therefore, control transactions involving such timber. Of course, if the

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45 Three state cases and one federal case have been decided since that date in which the court might have given consideration to the application of the Sales Act. Milwaukee Land Co. v. Poe 31 F.2d 733 (9th Cir. 1929), State Finance Co. v. Hamacher 171 Wash. 15, 17 P.2d 610 (1932), Elmente Inv. Co. v. Schafer Bros. Logging Co. 192 Wash. 1, 72 P.2d 311 (1937), Coleman v. Layman 41 Wn.2d 753, 252 P.2d 244 (1953). (However, the Milwaukee case involved a transaction that took place in 1921-24, prior to the effective date of the Sales Act.)

46 RCW 63.04.010.

47 Reid v. Kier 175 Or. 192, 152 P.2d 417 (1944).

48 1 WILLISTON, SALES § 62 (rev. ed. 1948).

49 When the Uniform Sales Act was adopted in Washington (L. 1925, ch. 142) the legislature entitled it "An Act Relating to Sales of Personal Property..."

The term "goods" used in Section 76 of the Sales Act is defined in BLACK, LAW DICTIONARY (4th ed. 1951), as follows: "The term 'goods' is not so wide as 'chattels,' for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which 'chattels' does include." The definition in BOUVIER'S LAW DICTIONARY (Baldwin's ed. 1934) is virtually the same.

50 Some interesting problems might arise here with regard to the applicability of the implied warranties of the Sales Act, contained in RCW 63.04.120-170. Would there normally be an implied warranty of fitness for purpose, or of merchantability in the sale
Sales Act does apply, then all the other requirements thereof must be complied with; e.g., the goods must be ascertained, or subsequently appropriated to the contract, and the parties must intend that the property in the timber should pass immediately, or upon its later appropriation to the contract.

Two states have recently considered the question of the applicability of Section 76 of the Sales Act to timber transactions. The Oregon Supreme Court has stated that "The Uniform Sales Act relating to personal property does not apply to standing timber." The California District Court of Appeal, Third District, also recently considered the applicability of the Sales Act definition of "goods" to sales of standing timber and said, "However, the ... [Sales Act definition of goods] ... is in our opinion quite clear and explicit, and regardless of what the rule is elsewhere, we are satisfied that as to those claiming under or by reason of a contract of sale, the California rule is that where standing timber is purchased separately from the land for the purpose of severance, it must thereafter be considered as "goods" or personal property."

There is, however, one limitation on the applicability of the Sales Act that may be forcibly argued. Section 76 does not expressly limit the term "goods" to timber that is to be removed "immediately." However, Professor Williston has set forth an argument in favor of such a limitation as follows:

In England the law has gone to great length in supporting the validity of an oral contract to sell standing trees. In Marshall v. Green [1CPD 35], there was an oral sale of thirty-two trees 'to be got away as soon as possible'. After six of the trees had been cut down the seller countermanded the sale, but the buyer continued to cut, and the action was brought by the seller because of this. The court held that 'where the
thing sold is to derive no benefit from the land, and it is to be taken away immediately, the contract is not for an interest in land.' Since part of the trees had been taken away the section of the statute relating to goods was satisfied and the bargain was held to be enforceable. The same doctrine has prevailed in several of the United States, prior to the passage of the Sales Act, [citing cases] and, though 'the courts of most of the American States that have considered the question [have held] expressly that a sale of growing or standing timber is a contract concerning an interest in land,' [citing cases] the Sales Act, copying as it has, the definition of 'goods' so far as concerns this question, 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. Although the statute does not in terms require prompt severance, it is reasonable to imply this requirement, since the English Act was intended to state previously existing law, which was expressed in the quotation above from Marshall v. Green, [supra], and the words of the American statute are identical with those of the English Act.5

Obviously such an argument is of questionable applicability in Washington where our legislature made no express limitation in the Sales Act itself, and where the legislative journals do not indicate that such a limitation was intended.

However, if this limitation were to be applied in Washington, then the applicability of the Sales Act to timber transactions would cause little change in the basic rules set forth in the Elmonte case. These rules provide essentially that standing timber sold separately from the land shall remain realty unless sold with the intention of an immediate severance. This is virtually the same statement that is made in the "Williston" limitation of the Sales Act. Strangely, the authority for the rule of the Elmonte case did not come from the Sales Act, but from an early Kentucky case66 (in spite of the fact that the gist of it had been stated in two prior Washington cases,67 which were not cited). The same rule has been adopted in a number of other states without the benefit of the Sales Act.68

51 Williston Sales § 62 (rev. ed. 1948). This view is not without dissent. 6 Cornell L. Q. 426 (1921).
66 Gabbard v. Sheffield 179 Ky. 442, 200 S.W. 940, 15 A.L.R. 1 (1918). This case has been followed in later Kentucky cases. See Cheatham v. Head 203 Ky. 489, 262 S.W. 622 (1924), Patton v. Lucy 285 Ky. 694, 148 S.W.2d 1039, 7 A.L.R.2d 524 Metcalf 372, 83 Am. Dec. 481 (1863) where the court cited 1 Greenleaf, Evidence § 271 as authority and stated the rule adopted was in accord with the then weight of authority.
If the timber becomes personalty where the parties intend an immediate severance, (under either of the above arguments) there still remain a number of questions that must be considered. Must the conveyance in such a case comply with the statute of frauds concerning conveyances of real property? It would seem not. However, an argument to the contrary can be made that although the purchaser receives the timber as personal property, nevertheless the seller sold an interest in his realty, i.e., the timber was realty at the instant of the sale and did not become personalty until the sale was fully consummated, and thus the transaction comes under the real property statute of frauds.

Will the purchaser, to protect himself, be required to record such an instrument as a conveyance of realty? RCW 65.08.070 provides for the recording of conveyances of real property and provides that if such conveyances are not so recorded they are "void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs, or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded." If the conveyance of standing timber to be severed immediately is not a conveyance of real property then the recording of such a conveyance would not be notice to subsequent purchasers or mortgagees in good faith. This would seem to be a rather impracticable and harsh result. There are, however, two approaches that might bring such a transaction within this statute. First, the court might hold that there is a constructive severance only between the parties to the transaction and that as to all third persons, or at least all other persons not having actual notice of the transaction, it would be construed as being a conveyance of realty and thus within the real property recording statutes. Another approach, mentioned in the last paragraph above, would be to say that although the purchaser receives the timber as personal property, nevertheless the seller sold an interest in his realty, i.e., the timber was realty at the instant of the sale and did not become personalty until the sale was fully consummated.

Presumably once the instrument of conveyance was recorded in the real property records, the whole world would then have notice of the

constructive severance, and thus a subsequent conveyance of the timber by the grantee could be treated for notice purposes as a conveyance of personalty.

If the instrument in question uses the words "right away," is this the same as saying "immediately"? What of such phrases as "reasonable time," "as soon as possible," "as soon as reasonably able," "as soon as practicable," "without delay," "diligently," etc.? In particular, is "immediately" really something different from "reasonable time"? If so, it follows that the parties must intend that the purchaser will cut and remove the timber faster than at a "reasonable" pace; does this mean the purchaser must cut and remove at an "unreasonably fast" pace? One needs but a moment of reflection to see that such phrases pose very difficult problems in the construction of instruments.

Or what if the instrument provides that the timber shall be removed within a stated period, e.g., one year, but the tract is so large and so inaccessible that the purchaser will necessarily have to move with the utmost speed if he is to remove the timber within the allotted time? In such a case the question arises whether the intent of the parties (re "immediate severance") may not be entirely set forth in the instrument. Even if the instrument states the amount of timber involved, the court will still have too little before it from the instrument alone to ascertain whether the time for removing the timber is so short as to require the purchaser to act "immediately." The court obviously cannot take judicial notice of all the facts necessary to make this determination. May the parties bring in parol evidence to prove whether or not the stated time is short, thereby requiring removal "immediately"? Certainly a strong argument can be made that where the instrument does not completely answer this question, parol evidence should be permitted. However, permitting parol evidence on this question will not give certainty to this field of the law. Anyone desiring, for one reason or another, to know whether the timber in question is real or personal property will not be able to make that determination from the instrument but must also examine the property, etc., and then make a most difficult "value judgment" on the question.

As noted above (quotation from Elmonte case cited in notes 26 and 27), in Washington the timber remains realty where it is to be removed within a "reasonable" time. However, the opposite result was reached in Kentucky where the Court of Appeals of Kentucky said "immediate" includes a "reasonable" time. Patton v. Lucy 285 Ky. 694, 148 S.W.2d 1039, 7 A.L.R.2d 524 (1940). This would seem to include in Washington those agreements where no time is stated, where the court has construed the parties to mean a "reasonable" time. However, permitting parol evidence on this question will not give certainty to this field of the law. Anyone desiring, for one reason or another, to know whether the timber in question is real or personal property will not be able to make that determination from the instrument but must also examine the property, etc., and then make a most difficult "value judgment" on the question.

Whether or not the court permits parol evidence on the issue of “immediately,” the question will nevertheless arise: how long can “immediately” be? Even though the parties state in the instrument that the timber is to be removed immediately, if the tract is large enough, this could mean a period of many years. It is noteworthy that in Kentucky, where the term “immediate” is similarly used in connection with such timber transactions, the Kentucky court has said⁶¹ that immediate does not mean “at once”, but as soon as is reasonable under the circumstances, which includes the amount of timber, accessibility, labor conditions, etc.

If the timber is not removed immediately, what becomes of it? Does it revert to the status of realty?⁶² When does this change take place, at the end of the period of time classified as “immediately” or at some other time?

Not to be overlooked is the fact that many instruments do not create in the purchaser any interest in the timber.⁶⁶ They create only a contract right in the purchaser to log the timber included in the agreement.⁶⁴

Conclusion

The present state of the law in Washington regarding timber transactions is, to say the least, confusing. The rules set forth in the Elmonte case and affirmed in the Coleman case raise countless questions for which there are no immediate answers. Then there is the Sales Act. How does it fit into this difficult area? Or will our supreme court reject it entirely? How? Greater understanding by the bar of the myriad problems involved in the ordinary “timber deed” or “timber sale contract” may aid in establishing some degree of rationality in this field. A step in this direction will come from more general use of the “profit” concept in connection with timber transactions, wherever appropriate. Otherwise, careful draftsmanship will help to reduce the problems that might ordinarily plague the seller or buyer of standing timber.

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⁶¹ See note 58, supra.
⁶² Bell County Land & Coal Co. v. Moss 30 Ky. 6, 97 S.W. 354 (1906). Held: the timber reverts to the status of realty.
⁶³ As to the nature of a contract purchaser's interest in real estate in Washington, see cases collected and discussed in Comment, 22 Wash. L. Rev. 110 (1947).
⁶⁴ Waples v. Sergeant 120 Wash. 63, 206 Pac. 945 (1922).